APPELLATE CIVIL.

Before Mr. P. B. Charkravartti, Chief Justice and Mr. Justice S. C. Lahiri.

CIVIL.

1953.

August, 5.

INDRA NARAYAN BHATTACHARJEE

v.

PHANINDRA LAL SEN.*

Putni Regulations—Niskar right—Burden of proof—"Niskar Bhogdakhal sutre," the meaning of the entry in the Record of Rights.

In cases where the defendant claims a rent-free (Niskar) title the initial onus is on the plaintiff to prove that the land is a part of his mal assets and as soon as the plaintiff proves that fact, the burden of proof shifts on the defendant to show that they are entitled to hold the land without payment of rent.

A new putnidar is entitled to get the putni free from encumbrances created by the defaulting putnidar or putnidars and unless such encumbrances were created before the creation of the first putni.

The entry "Niskar Bhogdakhal sutre" in the Record of Rights at best means that the tenant is not actually paying rent to anybody and not that the tenant is not liable to pay rent to anybody, and as such this entry, by itself does not necessarily mean rent-free tenancy.

Appeal by the Tenant-Defendant.

Suit by the Plaintiff putnidar for assessment of rent. Plea of niskar title by the defendant.

The material facts will appear from the judgment.

Manindra Nath Ghosh and Anil Kumar Sen for the Appellant.

Satindra Nath Ray Chowdhury and Byomkesh Bose for the Respondent.

The judgment of the Court was as follows:—

* Letters Patent Appeals Nos. 13 to 23 of 1950, against the judgment Mr. Justice Thomas James Young Roxburgh, dated 21st of July 1950, in Appeals from Appellate decrees Nos. 2038 to 2046 of 1946).

Civil.

1953.

Indra Narayan Bhattacharjee v. Phanindra Lal Sen.

August, 5.

S. C. Lahiri, J.:—These eleven appeals have been filed by the tenants defendants under clause 15 of the Letters Patent against a judgment of Mr. Justice Roxburgh whereby he has dismissed eleven second appeals preferred by them, questioning the correctness of decrees for assessment of rents made by the Courts below.

The plaintiff, Rai Bahadur Phanindra Lal Sen, purchased a putni taluk named Lot Simdali at an auction sale held under the Putni Regulation on November 17, 1932. This putni taluk is included in Touzi No. 1 of the Burdwan Collectorate, held by the Maharaja of Burdwan. It is undisputed that in 1210 B.S. the Maharaja created a putni in respect of the lands of Mauza Simdali and other properties in favour of one Jagat Narayan Roy in 1212 B.S. One Bhaktaram Roy executed another kabuliat in respect of lands of Mouza Simdali and other mouzas and in 1221 B.S. one Bhairab Singh executed a third putni Kabuliat in respect of the lands of Mouza Simdali only. In 1235 B.S. the putni was sold under the putni Regulation and purchased by one Badal Bibi and in 1300 B.S. the putni was again sold and purchased by one Bakkeswar whose heirs were in possession on the date of the auction-sale at which the plaintiff purchased. The plaintiff instituted the suits out of which these appeal arise for assessment of rent, alleging that the defendants were tenants under the putni purchased by him, that the lands held by the defendants were parts of the mal assets of Touzi No. 1 of the Burdwan Collectorate, that the defendants were liable to pay rent to the plaintiff, but they were refusing to do so relying upon certain incorrect entries in the Record of Rights which recorded their tenancies as niskar. The suits were contested by the defendants on the ground that the lands of their tenancies were not mal lands, that they had been holding the lands in *lakheraj* and *niskar* rights, that the entries in the Record of Rights were correct and that since the defendants were in possession of the lands without payment of rent, they were entitled to claim a rent free title on the presumption of lost grant. The defendants further pleaded that the suits brought by the plaintiffs were barred by limitation.

The plaintiff's suits were decreed by the learned Munsif and those decrees were affirmed on appeal by the Subordinate

CIVIL.

1953.

Indra Narayan Bhattacharjee v. Phanindra Lal Sen.

S. C. *Lahiri, J.*

Judge and on second appeal by Mr. Justice Roxburgh. In six out of the eleven suits, the interest of the defendants has been recorded as niskar raiyati and in the remaining suits as niskar tenure-holders but in all the cases in the Remarks Column there is entry "Bhogdakhal sutre." The courts below have proceeded on the footing that in cases of this description the initial onus is upon the plaintiff to prove that the land is a part of his mal assets and was taken into account at the time of Decennial Settlement for the purpose of assessing revenue and as soon as that is done, the onus shifts on the defendants to prove that they are entitled to hold the land without payment of rent. It has been found in these cases that the plaintiff has succeeded in discharging the initial onus, but the defendants have failed to prove that they are entitled to hold without payment of rent. Mr. Justice Roxburgh has held that under section 11 of the Putni Regulation the plaintiff was entitled to get the putni free from encumbrances created by the defaulting putnidar or putnidars, and in order to succeed the defendants must prove either that there was a valid or an invalid revenue grant made in their favour prior to the permanent settlement or that the rent free title was created by the Maharaja of Burdwan before the creation of the first putni in 1210 B.S. According to Mr. Justice Roxburgh the entry in the Record of Rights at best proves that the defendants had niskar title under one of the putnidars which was not sufficient to defeat the plaintiff's claim. Against the decision of Mr. Justice Roxburgh the tenants defendants have filed these appeals.

Mr. Ghose appearing in support of the appeals has argued, in the first place, that Mr. Justice Roxburgh has misunderstood the effect of the entry in the Record of Rights. According to Mr. Ghose the effect of the entry is that the defendants must be taken to have proved that they were never liable to pay rent from the inception of the putni. The putni kabuliyats of 1210 B.S. 1212 B.S. and 1221 B.S. are on the record. The putni kabuliat of the year 1221 B.S. shows that the putnidar was making reservations in respect of a tank for which the zamindar had granted *sanad* and also in respect of rents which had been realised by the Zamindar up to the date of the execution of the putni kabuliat. The putnidar was further stipulating that he would not raise any objection with regard to the said grant or

realisation of rent. If rent free grants had been made by the zamindar before the creation of the putni as alleged by the appellants, it is reasonable to expect that the putnidar would have made similar reservations in respect of those grants but no such reservation is to be found in the putni kabuliat. From this fact the inference legitimately follows that rent free grants were not made by the zamindar before the creation of the putni.

Mr. Ghose next contended that the expression "niskar bhogdakhal sutre" in the Record of Rights means that the tenants had acquired rent free title by possession and enjoyment and there is a presumption of correctness of this entry which must prevail unless the contrary is proved by the plaintiff. This interpretation of the entry in the Record of Rights cannot be accepted as correct. In the case of *Kamala Ranjan Roy* v. *Ifran Sheikh* (1), to which Mr. Ghose himself drew our attention, Mitter and Akram JJ. observed as follows at page 16.

> "If a property is found to be in possession of a man who is not actually paying rent to anybody the property is to be described as niskar in the column in which rent is to be mentioned. If any documents, sanad, chhar etc. be produced the particulars of the document are to be stated there. But if no sanad, chhar or other documents of that nature be produced the remark is to be made that it is "Bhogdakhal Sutre."

This passage is based upon an interpretation of Rule No. 37 of the Technical Rules and Instructions of the Settlement Department which the Settlement authorities follow. It follows from the passage quoted above that the entry "Niskar Bhog dakhal Sutre" means that the tenant is not actually paying rent to anybody and not that the tenant is not liable to pay rent to anybody. The same view has also been taken by Sen and Chunder JJ. in the case of *Bibhuti Bhusan Kar and ors.* v. *Rai Phanindra Lal Sen Bahadur and ors.* (2), which has been referred to by Mr. Justice Roxburgh in his judgment. In this case the learned Judges held as follows:

> "A raiyati interest is assessable to rent and the word 'niskar' does not take away from this liability. It only

(1) [1018] A.I.R. Cal. 14.

(2) S. A. Nos. 1918-1930 of 1944.

CIVIL.

1953.

Indra Narayan Bhattacharjee v. Phanindra Lal Sen.

S. C. Lahiri, J.

shows that this raiyati interest had been enjoyed by the tenants without paying rent, but it does not show that the lands are not assessable to rent."

We see no reason to differ from the observations made in the two Bench decisions quoted above and, accordingly, we must hold that the word "niskar" when it appears in the Record of Rights, by itself does not necessarily mean rent free tenancy, but only means that the tenant is not in fact paying rent to anybody. Mr. Ghose relied upon the decision in the case of *Sri Monohar Das Mahanta* v. *Charu Chandra Pal* (1), for the proposition that in that case a different view was taken of the expression "Bhogdakhal Sutre." On going through that judgment, we find nothing which is contrary to the interpretation of that expression as accepted by us.

The next point urged by Mr. Ghose is that in cases of the present description the onus is upon the plaintiff to prove that the rent free grants came into existence after the creation of the putni, the presumption being that they "run back to a period antecedent to the creation of the putni." In support of this proposition reliance was placed upon the case of *Bipradas Pal Chowdhury* v. *Kamini Kumar Lahiri* (2). On going through the facts of that case, it appears to us that it is of no assistance to the appellants. That was a case where the plaintiff purchased a putni taluk at a sale held in execution of rent decree and after serving notices under section 167 of the Bengal Tenancy Act for annulment of encumbrances, sued for eviction of the defendants as trespassers. The defence *inter alia* was that no zamindar or putnidar was ever in possession within twelve years and as such the plaintiffs claim was barred by limitation. The plaintiff, however, relied upon Article 121 of the Limitation Act. The High Court in its judgment pointed out that if the plaintiff relies upon Article 121 he has to establish that "the incumbrance which he seeks to annul commenced after the creation of the Putni * * * * On the other hand, there is ample evidence that the adverse possession of the defendants and their predecessors commenced before the creation of the putni. There are traces on the record to show that there had been assertions of hostile title before the putni itself was created." In these circumstances the Privy Council affirmed the decision

(1) (1950) 54 C.W.N. 706. (2) (1921) 26 C.W.N. 465.

CIVIL.

1953.

Indra Narayan Bhattacharjee v. Phanindra Lal Sen.

S. C. Lahiri, J.

of the High Court upon the view that the proper presumption was that the adverse possession of the defendants ran back to a period antecedent to the creation of the putni. In the cases before us there is nothing to show that the tenants and their predecessors had ever asserted a rent free title before the creation of the putni. On the contrary, the putni kabuliyat of 1221 B.S., to which I have already referred, shows that no reservation was made in respect of any rent free grant by the Zamindar. We must, therefore hold that the principle laid down by the Privy Council in *Bipradas Pal Chowdhury's case* (1). has no application to the circumstances of the present case. The principle of onus applicable to cases of this description has been settled by a long line of judicial decisions beginning from *Hurryhur Mookhopadhya* v. *Madub Chunder Baboo* (2). *Jagdeo Narain Singh v. Baldeo Singh* (3) and ending with *Kamala Ranjan Roy* v. *Ifran Sheikh* (4). In all these cases it has been uniformly laid down that the intial onus is upon the plaintiff to prove that the lands formed part of his mal assets and as soon as the plaintiff proves that fact, the burden of proof shifts on the defendants to show that they are entitled to hold the land without payment of rent. It is interesting to note that even in *Bipradas Pal Chowdhury's case* (1), the Privy Council expressly follows the principle in respect of onus laid down in *Hurryhur Mookhopadhya's case* (2). Mr. Ghose made a faint attempt in his opening to contest the finding that the lands are included in the mal assets of the plaintiff, but he finally abandoned the point. We must accordingly hold that the plaintiff has discharged the initial burden that lay upon him to prove that the lands are included in his mal assets, but the defendants have failed to prove that they are entitled to hold without payment of rent.

In his opening Mr. Ghose raised a point that the suits are barred under Article 131 of the Second Schedule of the Indian Limitation Act which provides that in suits to establish a periodically recurring right, the limitation is twelve years from the time when the plaintiff is first refused the enjoyment of the right. In these cases it has been found by the Courts below

(1) (1921) 26 C.W.N. 465.
(2) (1871) 14 Moore's I.A. 152 at page 172.
(3) (1922) L.R. 49 I.A. 399.
(4) [1948[A.I.R. Cal. 14.

CIVIL.

1953.

Indra Narayan Bhattacharjee v. Phanindra Lal Sen.

S. C. Lahiri, J.

that the plaintiff purchased the putni on November 17, 1932, and made demands for rent from different defendants on different dates—the last demand being made in Kartick 1349 B.S. November, 1942. The suits were instituted on July 17, 1943, well within twelve years from the date of the plaintiff's purchase. In view of these findings, Mr. Ghose did not develop this point in the course of his argument and finally said that he abandoned the point about limitation. In these circumstances, this plea must be overruled.

As all the points urged on behalf of the appellants fail, these appeals must be dismissed with costs—the hearing-fee being assessed at one gold mohur in each case.

P. B. Chakravartti, C.J.:—I agree.

S.G.P. *Appeal dismissed with costs.*

APPELLATE CIVIL.

Before Mr. Justice R. P. Mookerjee and Mr. Justice P. N. Mookerjee.

CIVIL.

1953.

September, 10.

MOHAMMAD NASSAIR
v.
MOHAMMAD YUSUF & ORS.*

Mahammedan Law—Wakf—Essential conditions of a valid Wakf—"Religious pious or charitable" objects under clause 2(1) of the Wakf Act—Postponement of vesting in charity, permissible limit.

One of the essential conditions of a valid Wakf is that the appropriation must be at once a complete one. When the objects of the Wakf are certain and definite it will not make the Wakf an invalid one because no definite portion of the property or specific amount or portion of the income is dedicated to religious or charitable purposes of a permanent character.

* Appeal from Original Decree No. 71 of 1948, against the decree of N. Banerjee Esq., Additional Sub-Judge, 3rd Court of Zillah 24-Parganas at Alipur in Title Suit No. 6 of 1947 dated 17th of January, 1948.