1959

April 24

BHINKA AND OTHERS

v.

CHARAN SINGH

(S. K. DAS, A. K. SARKAR and K. SUBBA RAO, JJ.)

Agricultural Tenancy—Jurisdiction of Revenue Court—Suit for ejectment of person in occupation without title—Provisional order of Magistrate regarding possession, if a proper defence—U. P. Tenancy Act, 1939 (U. P. 17 of 1939), s. 180—Code of Criminal Procedure (V of 1898), s. 145.

These appeals arose out of suits for ejectment instituted in the Revenue Court by the respondent Zamindar against the appellants under s. 180 of the U. P. Tenancy Act, 1939 (U. P. 17 of 1939). His case was that the lands in suit were his *sir* lands and the appellants trespassed on the same on the basis of a wrong order of the Criminal Court. The case of the appellants was that they were admitted as hereditary tenants by the respondents. There was a previous proceeding under s. 145 of the Code of Criminal Procedure between the parties and the Magistrate found possession with the appellants and directed that they should remain in possession till evicted by due process of law. The Revenue Court which tried the suits found that the lands were *sir* lands of the respondent and the appellants were not hereditary tenants and did not take possession with the consent of the respondent. The Additional Commissioner on appeal and the Board of Revenue on second appeal, agreed with these findings of the Revenue Court and dismissed the appeals. The Board negatived the plea of the appellants that the suits were not triable by the Revenue Court. Section 180 of the U. P. Tenancy Act, 1939, provides that a person taking or retaining possession of land without the consent of the person entitled to admit him into occupation and otherwise than in accordance with the provisions of law for the time being in force will be liable to ejectment thereunder. In view of the finding of the courts below that the appellants had not taken possession with the consent of the respondent, the question was whether they did so by virtue of s. 145 of the Code of Criminal Procedure.

Held, that the provisions of s. 145 of the Code of Criminal Procedure authorised the Magistrate only to declare the actual possession of a party on a specified date and not to give possession or permit any party to take possession. He had no power under that section to decide questions of title or right to possession which a civil court alone could decide.

The words "taking" and "retaining" were used by s. 180 of the Act in an independent and exclusive sense. The former referred to taking of possession illegally and the latter to taking of possession legally but subsequent retaining of it illegally. Consequently, the appellants whose possession had been found

to be illegal from the very inception, could not be said to retain possession legally so as to be outside the scope of the section.

It was also clear that possession in accordance with law, such as was contemplated by s. 180 of the Act, meant possession with lawful title. The provisional Order of the Magistrate with regard to possession, irrespective of lawful rights of the parties, could not, therefore, enable the appellants to resist the suit under s. 180 of the Act.

Dinomoni Chowdhrani v. *Barojo Mohini Chowdhrani*, (1901) L.R. 29 I.A. 24, referred to.

CIVIL APPELLATE JURISDICTION: Civil Appeals Nos. 78 to 83 of 1959.

Appeals by special leave from the judgment and orders dated July 28, 1954, of the U. P. Board of Revenue in Second Appeals Nos. 430-435 of 1953-54, arising out of the judgment and orders dated April 28, 1954, of the Court of the Additional Commissioner, Meerut Division, Meerut, in Appeals Nos. 455-460 of 1954 against the judgment and orders dated March 16, 1954, of the Addl. District Magistrate, Meerut, in Cases Nos. 389-394 of 1950.

B. C. Misra, for the appellants.

S. N. Andley, *J. B. Dadachanji* and *Rameshwar Nath*, for the respondent.

1959. April 24. The Judgment of the Court was delivered by

Subba Rao J.

SUBBA RAO, J.—These six appeals by special leave were filed against the judgment of the Board of Revenue dated July 28, 1954.

The respondent was a Zamindar of Gadhi, Baghu and Santokpore Villages in Uttar Pradesh. He claimed that the plaint-schedule lands were his *Sir*. The appellants set up a dispute claiming that they were admitted by the respondent as hereditary tenants and that they were in possession of the said lands. As the dispute was likely to cause breach of the peace, the Sub-Divisional Magistrate, Baghpat, took proceedings under s. 145, Code of Criminal Procedure, and attached the disputed lands on October 8, 1948, and directed them to be placed in possession of a superdgidar pending disposal of those proceedings. After

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making the necessary enquiry, by an order dated March 20, 1950, he found that the appellants were in possession of the said lands and declared that they were entitled to be in possession thereof until evicted therefrom in due course of law.

On June 30, 1950, the respondent filed six suits in the Revenue Court (Additional Collector, Meerut) against the appellants under s. 180 of the U. P. Tenancy Act (U. P. 17 of 1939), hereinafter called the Act, for evicting them from the said lands and for damages. He alleged therein that the disputed lands were his *Sir* lands and that the appellants trespassed on the same on the basis of a wrong order of the Criminal Court. The appellants pleaded, *inter alia*, that they had been admitted as hereditary tenants by the respondent after receiving from them a sum of Rs. 40,000 towards premium. The suits were consolidated, but were stayed on August 14, 1951, under r. 4 of the Rules made under the U. P. Ordinance No. III of 1951. On September 22, 1952, on an application made by the respondent, the Revenue Court ordered under r. 5 for restarting the trial of the suits. After the said order, the Revenue Court transferred the suits to the Civil Court for retrial, but the first Additional Munsif, Ghaziabad, to whom the suits were transferred, held that the said suits were triable only by the Revenue Court and retransferred the same to that Court. The Additional Collector, Meerut, held, on evidence, that the said lands were *Sir* and *Khud kasht* of the respondent and that the appellants were not admitted thereto as hereditary tenants. The appellants preferred six appeals against the decrees of the Additional Collector in the six suits to the Court of the Commissioner at Meerut. The Additional Commissioner, who heard the appeals, held that one of the appeals filed by the legal representatives of Jahana, the plaintiff in the suit which gave rise to that appeal, had not been properly presented on the ground that Shri Brahmanand Sharma, Vakil, did not file in the suit any vakalat given to him by the legal representatives of the deceased and therefore the appeal had abated, and that as all the suits were consolidated with the

consent of the parties, the decision in the suit became final and operated as *res judicata* in the other appeals. On the merits, he agreed with the trial Court in holding that the lands in dispute were *Sir* and that the appellants were not hereditary tenants. Thereafter, the appellants preferred six second appeals against the said order of the Additional Commissioner to the Board of Revenue at Allahabad. The Board of Revenue accepted the findings of the two Courts, and also it negatived the plea raised by the appellants for the first time to the effect that the suits were not maintainable in the Revenue Court. In the result, the appeals were dismissed. The present appeals were filed against the order of the Board of Revenue.

The learned Counsel for the appellants raised before us the following contentions: (1) The appeal by the legal representatives of Jahana against the order of the Additional Collector, Meerut, was properly presented to the Court of the Commissioner; (2) assuming that the said appeal had abated, the decision of the Additional Collector in the suit giving rise to the said appeal would not operate as *res judicata* in the connected appeals; (3) the Revenue Court had no jurisdiction to try the suits; (4) as the suits had been stayed under r. 4 of the Rules made under the U. P. Zamindari Abolition and Land Reforms Act, 1950, hereinafter called the Rules, they had abated under r. 5 of the said Rules; (5) the finding on issue one, namely, that the appellants were not hereditary tenants, was vitiated by errors of law; and (6) the finding on issue two, namely, "to what damages, if any, was the plaintiff entitled", was contrary to law inasmuch as the Additional Collector gave damages though neither the witnesses deposed to it nor the Advocate advanced any argument thereon.

The first two contentions need not detain us. As we are rejecting the contentions of the learned Counsel for the appellants on all the other points, the correctness of the decision of the Revenue Board on the said two points would not affect the result of the appeals. We do not, therefore, propose to express our opinion thereon.

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We shall take the fifth contention next. That contention raises the question whether the appellants were hereditary tenants of the disputed lands. The three Courts have concurrently held on a consideration of oral and documentary evidence that they were not hereditary tenants. The learned Counsel for the appellants made an attempt to reopen the said finding by contending that it was vitiated by the following errors of law : (i) Though the appellants filed a certified copy of the *khatauni* of 1355 fasli, the Courts did not draw the presumption, which they were bound to do, to the effect that the said certified copy was a genuine document and that the person who purported to have signed it had held the official character which he claimed to hold in the said document; (ii) as the Magistrate made an order in favour of the appellants under s. 145 of the Code of Criminal Procedure, the Courts should have thrown the burden of proof on the respondent; (iii) the material evidence adduced on the side of the appellants was ignored; (iv) the Courts applied different standards of proof to the appellants and the respondent in regard to the certified copies of *khatauni* and *khasra* prepared by the same *patwari*, Ahmed Ali; and (v) the Courts also ignored the rights accrued to the appellants and ss. 10, 16 and 20 of the U. P. Tenancy Act. For convenience of reference and to distinguish the alleged errors of law from the main contentions, we shall refer to the former as points.

The first point, in the manner presented before us, does not appear to have been raised in any of the three Courts. Section 79 of the Evidence Act reads :

"The Court shall presume to be genuine every document purporting to be a certificate,.....which is by law declared to be admissible as evidence of any particular fact, and which purports to be duly certified by any officer of the Central Government or of a State Government,.....

Provided that such document is substantially in the form and purports to be executed in the manner directed by law in that behalf.

The Court shall also presume that any officer by whom any such document purports to be signed or

certified, held, when he signed it, the official character which he claims in such paper ".

Under this section a Court is bound to draw the presumption that a certified copy of a document is genuine and also that the officer signed it in the official character which he claimed in the said document. But such a presumption is permissible only if the certified copy is substantially in the form and purported to be executed in the manner provided by law in that behalf. Section 4 of the Evidence Act indicates the limits of such a presumption. The relevant part of that section reads :

"Whenever it is directed by this Act that the Court shall presume a fact, it shall regard such fact as proved, unless and until it is disproved ".

To put it differently, if a certified copy was executed substantially in the form and in the manner provided by law, the Court raises a rebuttable presumption in regard to its genuineness. The *khatauni* of 1355 fasli with which we are concerned, gives the relevant details and purports to have been signed by Ahmed Ali, the *patwari* of the village. It cannot be disputed that the *patwari* was an officer appointed by the State Government and that he was authorized to issue certified copies of the record of rights. The U. P. Land Records Manual gives the rules prescribing the form and the manner in which a certified copy of the record of rights should be issued. Paragraph 26 of the Manual confers upon him the power to give to the applicants certified copies from his record; and under cl. (d) of the said paragraph he should enter in his diary a note of such extracts. He should also note the amount of fee realised by him in the diary as well as on the extract. In this case neither the diary was produced to prove that the procedure prescribed was followed nor the extract to disclose that the officer made any note of payment. It cannot, therefore, be said that the certified copy was issued by the *patwari* in substantial compliance with the provisions of law governing such issue. If so, it follows that the Court is not bound to draw the presumption in regard to its genuineness.

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That apart, a Court is bound to draw only a rebuttable presumption in regard to its genuineness. In this case the three Courts rejected the document on the ground that it was not genuine on the basis of not only the internal evidence furnished by the document but also on other evidence. They have given convincing reasons for doing so, and even if there was any rebuttable presumption, it was rebutted in the present case.

Nor is there any merit in the second point either. The order of the Magistrate under s. 145 of the Code of Criminal Procedure may, at best, throw the burden of proof on the plaintiff; but in the present case the question of burden of proof is not material, for the findings of the three Courts were arrived at on a consideration of the entire evidence. Though the learned Counsel says that material evidence has been ignored by the Courts, he has not been able to point out what evidence has been excluded. The Courts have considered the entire evidence placed before them and the findings were based on an appreciation of the said evidence. We are also unable to appreciate the contention that different standards of proof have been applied by the Courts in respect of the different parties. This argument is based upon the fact that the Additional Commissioner, while rejecting the certified copy of the *khatauni* of 1355 fasli filed by the appellant, relied upon the certified copy of *khasra* dated June 28, 1948, filed by the respondent, though both of them were issued by the same patwari, Ahmed Ali. We do not see any incongruity in the action of the Additional Commissioner. He rejected the former as, for other reasons, he held that it was not genuine, and he relied upon the latter as he accepted its genuineness. The last of the points has not been made in any of the Courts below and indeed it does not arise on the finding that the appellants are not tenants. Sections 10, 16 and 20 of the U. P. Tenancy Act presuppose that the person claiming rights thereunder is a tenant, and, on the finding that the appellants are not tenants, there is no scope for invoking the said provisions. Presumably for that very reason,

no question on the basis of those sections was raised in the Courts below. The concurrent finding of the three Courts to the effect that the appellants are not hereditary tenants is essentially one of fact and is not vitiated by any error of law. Following the usual practice of this Court, we must accept the finding.

The sixth contention, in our view, is not open to the appellants at this stage. The Additional Collector gave damages though he noticed the fact that no witness deposed in regard to damages and though the respondent's Counsel did not argue on that point. Notwithstanding the said fact, he gave damages on the basis of the annual rent of the holdings. The correctness of this finding was not canvassed either in the first appellate Court or in the second appellate Court; nor does the statement of case filed in this Court disclose any grievance on that score. In the circumstances, we do not feel justified to allow the appellants to raise that plea in this Court.

We may now advert to the main and substantial contention of the appellants, namely, that the suits are not maintainable in a Revenue Court. This question turns upon the interpretation of s. 180 of the Act. Before reading the section, it would be convenient and useful to notice briefly the scheme of the Act relevant to the question raised. The Act, as the preamble shows, was passed to consolidate and amend the laws relating to agricultural tenancies (proprietary cultivation). It regulates the relationship between the landlords and the tenants in respect of the agricultural holdings. It confers exclusive jurisdiction on Revenue Courts in respect of rights *inter se* between the landlord and the tenant. It also reconciles the conflicting jurisdictions of Revenue and Civil Courts. Briefly stated, all disputes between a landlord and his tenant in respect of tenancy are exclusively made triable by Revenue Courts and all disputes in respect of proprietary rights are left to the decision of Civil Courts. Incidentally, if a question exclusively falling within the jurisdiction of a Revenue Court arises in a suit in a Civil Court, that suit is stayed and the relevant issue is submitted for decision of the Revenue

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Court. So too, if a question of proprietary right arises in a proceeding before a Revenue Court, that issue is submitted for the decision of a Civil Court. Jurisdiction is expressly conferred on Revenue Courts to entertain, among others, suits for ejectment under certain circumstances on specified grounds. Section 180 of the Act is one of the fasciculus of sections dealing with ejectment. Sections 155 to 179 provide for suits for ejectment against tenants on specified grounds. Then comes s. 180, the material part of which reads:

"(1). A person taking or retaining possession of a plot of land without the consent of the person entitled to admit him to occupy such plot and otherwise than in accordance with the provisions of the law for the time being in force, shall be liable to ejectment under this section on the suit of the person so entitled, and also to pay damages which may extend to four times the annual rental value calculated in accordance with the sanctioned rates applicable to hereditary tenants.

.....

.....

Explanation II.—A tenant entitled to sublet a plot of land in accordance with the provisions of the law for the time being in force may maintain a suit under this section against the person taking or retaining possession of such plot otherwise than in the circumstances for which provision is made in section 183.

(2) If no suit is brought under this section, or if a decree obtained under this section is not executed, the person in possession shall become a hereditary tenant of such plot, or if such person is a co-sharer, he shall become a *khudkasht*-holder, on the expiry of the period of limitation prescribed for such suit or for the execution of such decree, as the case may be."

Section 242 says that suits of the nature specified in the fourth schedule shall be heard and determined by Revenue Courts. Schedule 4, Group B, gives succintly the description of the suits and the periods of limitation and the court-fee payable thereon. Serial No. 8 relates to a suit under s: 180 of the Act. Against that

serial number, the nature of the suit is described in the following terms:

"For the ejectment of a person occupying land without title and for damages."

The period of limitation for instituting such a suit is also prescribed thereunder.

Under s. 180 of the Act, a person entitled to admit another to a plot of land can file a suit in a Revenue Court to eject him. The latter can defend the suit only on two grounds, namely, (1) that he has taken possession or retained possession of the said plot with the consent of the former; and (2) that he took possession or retained possession in accordance with the provisions of law for the time being in force. If no suit was brought against the occupier or if the decree obtained against him was not executed, he would become a hereditary tenant after the period of limitation prescribed in the fourth Schedule to the Act. On the findings of the Courts below, the appellants did not take possession of the lands with the consent of the respondent; but it is said that they had taken possession of the lands in accordance with the provisions of the law for the time being in force. To substantiate this contention, reliance is placed firstly on the recitals in the plaints, and, secondly, on the provisions of s. 145 of the Code of Criminal Procedure. In the plaints it was stated that the Criminal Court had declared on March 20, 1950, the appellants' possession for some reason, and after the order of the said Court, they had forcibly reaped the crops raised by the respondent. The cause of action was alleged to have accrued after March 20, 1950, or near about the date of their taking possession of the said lands. The allegations in the plaints do not support the appellants. The respondent did not admit that possession was taken in execution of the order made by the Magistrate; but he averred that taking advantage of a wrong order declaring the appellants' possession, they trespassed upon his lands. If the allegations were assumed to be correct, the appellants did not take possession in accordance with the provisions of the law for the time being in force.

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Can it be said that the appellants had taken possession in accordance with the provisions of s. 145 of the Code of Criminal Procedure? The short answer is that s. 145 of the said Code does not confer on a Magistrate any power to make an order directing the delivery of possession to a person who is not in possession on the date of the preliminary order made by him under s. 145(1) of the Code. Under s. 145(1) of the Code, his jurisdiction is confined only to decide whether any and which of the parties was on the date of the preliminary order in possession of the land in dispute. The order only declares the actual possession of a party on a specified date and does not purport to give possession or authorise any party to take possession. Even in the case of any party who has been forcibly and wrongfully dispossessed within two months next before the date of the preliminary order, the Magistrate is only authorised to treat that party who is dispossessed as if he had been in possession on such date. If that be the legal position, the appellants could not have taken possession of the disputed lands by virtue of an order made under the provisions of s. 145 of the Code of Criminal Procedure. They were either in possession or not in possession of the said lands on the specified date, and, if they were not in possession on that date, their subsequent taking possession thereof could not have been under the provisions of the Code of Criminal Procedure.

If the appellants did not take possession of the disputed lands, did they retain possession of the same in accordance with the provisions of the law for the time being in force? The dichotomy between taking and retaining indicates that they are mutually exclusive and apply to two different situations. The word "taking" applies to a person taking possession of a land otherwise than in accordance with the provisions of the law, while the word "retaining" to a person taking possession in accordance with the provisions of the law but subsequently retaining the same illegally. So construed, the appellants' possession of the lands being illegal from the inception, they could not be described as persons retaining possession of the said

lands in accordance with the provisions of any law for the time being in force, so as to be outside the scope of s. 180 of the Act.

But the contention may be negatived on a broader basis. Can it be said that the possession by virtue of an order of a Magistrate under the provisions of s. 145 of the Code of Criminal Procedure is one in accordance with the provisions of the law for the time being in force? It appears to us that the words "possession in accordance with the law for the time being in force" in the context can only mean possession with title. The suit contemplated by the section is one by a landlord against a person who has no right to possession. The preceding sections, as we have already indicated, provided for evicting different categories of tenants on specified grounds. Section 180 provides for the eviction of a person who but for the eviction would become a hereditary tenant by efflux of the prescribed time. If there is any ambiguity—we find none—it is dispelled by the heading given to the section and also the description of the nature of the suit given in the Schedule. The heading reads thus:

"Ejectment of person occupying land without Title".

"Maxwell On Interpretation of Statutes", 10th Edn., gives the scope of the user of such a heading in the interpretation of a section thus, at p. 50:

"The headings prefixed to sections or sets of sections in some modern statutes are regarded as preambles to those sections. They cannot control the plain words of the statute but they may explain ambiguous words."

If there is any doubt in the interpretation of the words in the section, the heading certainly helps us to resolve that doubt. Unless the person sought to be evicted has title or right to possession, it cannot be said that his possession is in accordance with the provisions of the law for the time being in force. If so, the appellants must establish that the order of the Magistrate issued under the provisions of s. 145 of the Code of

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Criminal Procedure conferred a title or a right to possession on them.

This leads us to the consideration of the legal effect of the order made by the Magistrate under s. 145 of the Code of Criminal Procedure. Under s. 145(6) of the Code, a Magistrate is authorized to issue an order declaring a party to be entitled to possession of a land until evicted therefrom in due course of law. The Magistrate does not purport to decide a party's title or right to possession of the land but expressly reserves that question to be decided in due course of law. The foundation of his jurisdiction is on apprehension of the breach of the peace, and, with that object, he makes a temporary order irrespective of the rights of the parties, which will have to be agitated and disposed of in the manner provided by law. The life of the said order is co-terminous with the passing of a decree by a Civil Court and the moment a Civil Court makes an order of eviction, it displaces the order of the Criminal Court. The Privy Council in *Dinomoni Chowdhrani* v. *Brojo Mohini Chowdhrani* (1) tersely states the effect of orders under s. 145 of the Code of Criminal Procedure thus:

"These orders are merely police orders made to prevent breaches of the peace. They decide no question of title.....".

We, therefore, hold that a provisional order of a Magistrate in regard to possession irrespective of the rights of the parties cannot enable a person to resist the suit under s. 180 of the Act.

This leaves us with the fourth contention based upon the U. P. Zamindari Abolition and Land Reforms Rules. To appreciate this contention some relevant facts may be recapitulated. On August 14, 1951, the six suits were stayed in view of the U. P. Government Notification dated August 9, 1951, issued under Ordinance No. III of 1951. Thereafter the suits continued to remain stayed under r. 4 of the said Rules. The appellants filed an application under sub-rule (3) of r. 5 for restarting the trial of the suits, and an order directing the restarting of the suits was made by the Additional Collector, Meerut, on September 22,

(1) (1901) L.R. 29 I.A. 24, 33.

1952. The appellants preferred a revision against that order to the Board of Revenue. It was contended before the Board of Revenue that the suits had abated under cl. (v) of r. 4 of the Rules, but the Board of Revenue rejected their contention on the ground that the suits fell within the exception to r. 5. It may also be mentioned that the rules were amended on October 8, 1952, i. e., after the order directing the restarting of the proceedings. On the said facts, the first question is whether r. 5 of the amended Rules would apply to a case which was restarted under the provisions of the original Rules. The following are the relevant rules from the two sets of Rules, i. e., the original Rules and the amended Rules:

Original Rules as published in Gazette dated 30-6-1952.	As amended on 8-10-1952.
4. Stay of certain suits and proceedings.— All suits and proceedings whether of the first instance, appeal or revision of the nature as hereinafter specified in respect of the area for which a notification under section 4 has been issued pending in any court on the date of vesting, ...shall be stayed:	4. All suits and proceedings whether of the first instance, appeal or revision of the nature as hereinafter specified in respect of the area for which a notification under section 4 has been issued pending in any court for hearing on the date of vesting, ... shall be stayed:
4(v). Suits, applications and proceedings including appeals, references and revisions under section 180 of the U. P. Tenancy Act, 1939.	4(v). Suits, applications and proceedings including appeals, references and revisions under section 180 of the U. P. Tenancy Act, 1939, or of similar nature pending in a civil court, except where the plaintiff is a tenant or where the land was the *Sir, khudkhast* or grove of an intermediary and in which rights

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5(1). Disposal of suits and proceedings stayed under rule 4(a)(1).—Every suit or proceeding whether of the first instance, appeal or revision stayed under clauses (i) to (iv) of rule 4 shall be abated by the court or the authority before which it may be pending after notice to the parties and giving them an opportunity to be heard.

5(2). The abatement of any suit or proceeding under sub-rule (1) shall not debar any person from establishing his right in a court of competent jurisdiction in accordance with the law for the time being in force in respect of any matter in issue in such suit or proceeding.

5(3). Where a suit has been stayed under clause (v) of rule 4 any party to the suit may within six months from the date of vesting apply to the court concerned to restart the issue.

have not accrued to the defendant under section 16 or any other section of the U.P. Zamindari Abolition and Land Reforms Act, 1950.

5(1). Disposal of suits and proceedings stayed under rule 4 (a)(1): Every suit or proceeding, whether pending in the court of first instance, or in appeal or revision stayed under clauses (i) to (v) of rule 4, shall together with the appeals or revision, if any, be abated by the court or the authority before which it may be pending after notice to the parties and giving them an opportunity to be heard.

5(2). The abatement of any suit or proceeding under sub-rule (1) shall not debar any person from establishing his right in a court of competent jurisdiction in accordance with the law for the time being in force in respect of any matter in issue in such suit or proceeding.

From a comparative study of the aforesaid rules, it will be seen that there are two fundamental differences relevant to the present enquiry, namely, (i) while under the original Rules, all suits under s. 180 of the Act are stayed, under the corresponding rules of the amended Rules an exception is made in the case of lands which are *Sir*, *Khudkast* or grove of an intermediary in which rights have not accrued to the defendant under s. 16 or any other section of the U. P. Zamindari Abolition and Land Reforms Act, 1950; and (ii) while under the original Rules, there is a procedure for restarting a suit stayed under r. 4, there is no such procedure under the amended Rules. In the present case, the suits were restarted under the old Rules and thereafter no stay order was made under the amended Rules. The position, therefore, is that there was neither a subsisting stay under the old Rules nor any stay order made under the new Rules. If so, r. 5 of the amended Rules cannot be invoked, for under that rule only a suit stayed under r. 4 (a)(i) shall be abated thereunder. We, therefore, hold that r. 5 of the amended Rules cannot be invoked in the present case.

That apart, cl. (v) of sub-rule (2) of r. 4 of the amended Rules does not in terms apply to a land which is *Sir* unless rights have accrued to a person in possession thereof under s. 16 or any other section of the U. P. Zamindari Abolition and Land Reforms Act, 1950. On the findings arrived at by the Courts, namely, that the appellants were trespassers on the *Sir* land, it cannot be disputed that they have not acquired any rights under the aforesaid provisions. As the operation of r. 5 is conditioned by cl. (v) of sub-rule (2) of r. 4, there is no scope for invoking the former provisions unless cl. (v) of sub-rule (2) of r. 4 applies to a given case and also an order of stay has been made thereunder. In this case, as the suit lands are found to be *Sir* lands and as the appellants have not acquired any of the rights mentioned in cl. (v) of sub-rule (2) of r. 4, the said sub-rule cannot apply, and, therefore, r. 5 cannot also be invoked.

Further, this contention was raised in the revision

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petitions filed by the appellants to the Revenue Board, and the latter by its order dated September 6, 1953, held against them and that order has become final. For the said reasons, we must hold that the suits could not be abated under r. 5 of the amended Rules.

In the result, the appeals fail and are dismissed with costs.

Appeals dismissed.

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DOLGOBINDA PARICHA

v.

NIMAI CHARAN MISRA & OTHERS

(S. K. Das, A. K. Sarkar and K. Subba Rao, JJ.)

Evidence—Admissibility—Joint statement of three persons—Admissibility under s. 32(5) of the Evidence Act, when only one is dead—Opinion as to relationship—Conduct as evidence of opinion—Proof of conduct—Direct evidence—"Opinion", meaning of—Indian Evidence Act, 1872 (1 of 1872), ss. 32(5), 50, 60.

On the death of H, who as the mother of the last male owner had succeeded to the estate, the respondents claimed the estate and brought a suit for its recovery on the strength of the pedigree which they set up that they were the sons of the half-sisters of the last male owner and therefore came before the agnates. The suit was contested by some of the agnates, of whom the appellant was one, who challenged the correctness of the pedigree, and maintained that the respondents' mothers were not the half-sisters of the last male owner. The trial court agreed with the respondents' case and decreed the suit and this was confirmed by the High Court. The High Court relied on Ex. I, a petition dated November 2, 1917, which S, one of the brothers of the third plaintiff, on his own behalf and on behalf of his brothers had filed in Suit No. 31 of 1917 which was a suit instituted by some of the agnates of H's husband questioning the alienations made by H. In the petition, S alleged that the applicants were the legal claimants to the properties in the suit and prayed to be added as co-defendants to the suit. The petition contained a pedigree which supported the pedigree set up