PRIVY COUNCIL.

*P. C. 1921 March 15.

RAJA MUHAMMAD ABUL HASAN KHAN, SINCE DECEASED (1ST PLAINTIFF) *v.* LACHMI NARAIN (2ND PLAINTIFF, *pro formâ*) AND OTHERS (DEFENDANTS).

[On appeal from the court of the Judicial Commissioner of Oudh.

Birt tenure in Oudh—Under-proprietary right—Bankati birt—Dahyak—Settlement decree.

In 1802 the owner of a village in Oudh granted it by way of birt to get it cultivated, the future rent to be at the rate for bankati prevalent in the taluqa, and subject to the prevalent rebate (dasaundh or dahyak). In 1871 a settlement court decreed "upholding" the birt-holder's "possession and occupation as an under-proprietor under circular No 2 of 1861," upon the condition that the taluqdar could alter the rent in accordance with the practice before the annexation, the birt-holder being entitled to deduct a dahyak of 10 per cent., and to be paid it if he refused a patta. It was alleged that the birt-holders were out of possession between 1875 and 1879, but regained possession in 1880. They had since 1900 been paying a rent of Rs. 500 less 10 per cent. dahyak.

Held that the birt-holder was an under-proprietor, the alleged interruption of possession not affecting the rights under the deed of 1802 and the decree of 1871. Further, that the taluqdar could not capriciously enhance the rent, which must be at the rate prevalent in the taluqa; and that, in case of dispute, it was wholly within the cognizance of the Revenue Court to determine whether the proposed rent was so.

The distinction between bankati birt and bishunprit birt discussed.

Parmeshar Dat v. *Mohammad Abul Hasan Khan* (1) distinguished.

APPEAL (No. 128 of 1918) by special leave from a judgment and decree (April 27th, 1915) of the court of the Judicial Commissioner of Oudh, reversing a decree (October 18th, 1913) of the Subordinate Judge of Gonda.

The deceased appellant who was the owner of a half share in the village of Kundarwa in Oudh sued the respondents other than the first, claiming (1) a declaration that the defendants were not under-proprietors of the village, (2) a declaration that according to a settlement decree of the 30th of January, 1871, he alone was entitled to alter the amount of rent to be paid by the defendants, and (3) possession of the village and mesne profits. There was a second plaintiff, now the first respondent, joined in the suit. The defendants by their written statement pleaded that they and

Present:—Lord DUNEDIN, Lord PHILLIMORE, Mr. AMEER ALI, and Sir LAWRENCE JENKINS.

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their ancestors had been under-proprietors since Fasli 1209 (1802 A. D.) and relied on the settlement decree of 1871.

The Subordinate Judge made a decree in favour of the plaintiffs. He held that the settlement decree did not give the defendants any under-proprietary right in the village, but only a right to 10 per cent. of the rental, and that that right did not entitle them to retain possession.

Upon appeal to the court of the Judicial Commissioner it was conceded by the plaintiff that he could not in the suit claim possession or mesne profits, and the same was conceded in the present appeal.

The court of the Judicial Commissioner came to the conclusion upon the terms of the decree of 1871 that the defendants had under-proprietary rights. The learned judges said in the course of their judgment:—"It is important to notice that the decree of 1871 contains a reference to Circular 2 of 1861, and a perusal of that Circular proves to us clearly that the Extra Assistant Commissioner must have decided, and must have intended to decide, that Sheo Ratan was an under-proprietor according to the provisions of that Circular." After referring to the terms of the Circular, more especially paragraph 24, they said that there could be no doubt that the decree meant that Sheo Ratan had the status of an under-proprietor. They said further:—"It is argued that the precarious nature of the tenure which is to be implied from the grant to the taluqdar of power to alter the amount of the jama is inconsistent with any notion of under-proprietary right which connotes a fixity of tenure. But this power of the taluqdar was recognized by Mr. Wingfield as one of the incidents of birt tenure (see paragraph 22 of the Circular) and he obviously did not consider that this incident was an obstacle to it being held that the birtiya was an under-proprietor provided that the other necessary conditions were fulfilled. We are satisfied, therefore, that the settlement decree in this case conferred an under-proprietary right in Sheo Ratan." They were of opinion that the alleged interruption of possession made no difference, and concluded:—"We are unable to hold that the decree of the settlement court conferred nothing more than a right of dahyak; it conferred, in addition, an

under-proprietary right which has descended to the defendants." The appeal was accordingly allowed and the suit dismissed.

On this appeal :—

De Gruyther, K. C., and *Parikh* for the appellant :—The settlement decree of 1871 did not confer an under-proprietary right. It reserved to the taluqdar the right to offer new pattas at an enhanced rent, and conferred no "heritable and transferable right in land" as required by the definition of "under-proprietor" in section 3 of the Oudh Rent Act (XXII of 1886). All that was conferred was a right to deduct or receive the dahyak. The grant purported to be a bankati birt which is different from a bai birt. The decision in *Parmeshar Dat* v. *Mohammad Abul Hasan Khan* (1) covers this case. [Reference was also made to the Oudh Sub-settlement Act (XXVI of 1866), Schedule, rule 5 ; United Provinces Land Revenue Act (United Provinces Act, III of 1901), and Sykes' Compendium of Taluqdari Law, pages 173, 191, 289, 309].

Dube for the respondents other than No. 1 :—The effect of the settlement decree of 1871 is that these respondents are under-proprietors. The terms of Circular No. 2 of 1861 clearly show, as the lower appellate court held, that the intention of the settlement officer was to decree under-proprietary rights. These respondents have a heritable and transferable right in land. No objection is raised to an enhancement of the rent in accordance with the rate prevailing for bankati. There is no distinction between bankati birt and bai birt. On the other hand, as pointed out by Sykes, there is a distinction between bankati birt and bishunprit birt. The decision in *Parmeshar Dat's* case (1) referred to a bishunprit tenure, and the settlement decree did not contain the words "upholding possession and occupation as an under-proprietor." The decision of the Board in *Lal Sripat Singh* v. *Lal Basant Singh* (2) covers this case. [Reference was also made to *Raja Muhammad Mumtaz Ali Khan* v. *Murad Bakhsh* (3).] Alternatively, the present case comes within section 79 of the United Provinces and Oudh Revenue Act (United

(1) 14 Oudh Cases, 335. (2) (1918) 22 C. W. N., 985.
(3) (1907) 10 Oudh Cases, 318.

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Provinces Act, III of 1901), the respondents being "holder of heritable non-transferable leases under a judicial decision."

Parikh, in reply, referred to section 19 of the Oudh Rent Act, 1886.

1921, March 16.—The judgment of their Lordships was delivered by Mr. AMEER ALI.—

The suit, which has given rise to this appeal, was brought by the plaintiffs in the Court of the Subordinate Judge of Gonda, in Oudh, on the 1st of May, 1913, and relates to a village called Kundarwa, lying within the taluqa Birwa Mahnon, in the Gonda district, in which the first plaintiff owns a half share; the second plaintiff, a resident of Lucknow, appears to have purchased at a sale in execution of a decree a part of the village in dispute. Why he has been joined in the suit as plaintiff does not clearly appear. The other half of the taluqa is owned by the taluqdar of Balrampur. The defendants hold the village Kundarwa under a *birt* grant created so long ago as 1802 by one Maharaj Kumar Madho Singh, who owned the property in those days. Later the taluqa came into the possession of a lady named Rani Sarfaraz Kunwar; on her death it devolved on her daughter, Birjraj Kunwar. On Birjraj Kunwar's death, somewhere in 1879 it passed into the hands of her husband, Achcha Ram. In 1888 half of the estate was purchased by the first plaintiff's father, Raja Kazim Husain, whose title as purchaser was affirmed finally only in 1899; whilst the other half was acquired at or about the same time by the taluqdar of Balrampur.

The *Pottah* under which the birt-holders obtained the village of Kundarwa is in the following terms:—

"I have given the land of village Kundarwa to Pathak Guni Ram by way of *birt*. He is free to settle himself and others (therein) and to cultivate it himself or get it cultivated, year after year: that is to say, he is free to have it cultivated and populated. He should pay the revenue to the Sarkar at the rate prevalent in the taluqa and take the dasaundh at the rate prevalent in the taluqa I have written this; none should act against this."

For the first year, the rent is fixed at Rs. 4 rising in the course of five years to Rs. 36. And then follows the clause relating to future rent:—

"He [meaning the grantee] is to enjoy it free for five or six years. Thereafter at the rate for *bankati* prevalent in the taluqa."

The character and incidents of these *birt* grants will be referred to more particularly in the course of this judgment. It is enough to say at this stage that the Circular issued by the Chief Commissioner of Oude in 1861 shows that so late as the early part of the nineteenth century large tracts of land in the Province were lying unreclaimed and uncultivated, and the usual method for large proprietors was to let out the waste lands on favourable terms and security of tenure to tenants to bring them under cultivation. These grants were usually called *birt bankati* (as in the present case) or *bantarashi*, the names indicating the purpose for which they were made. The *birtia* or birt-holder had to cut down the forest, clear the land, build tanks and induct raiyats.

The predecessors in title of the defendants remained admittedly in unmolested possession of the village for nearly 73 years.

In 1869, in the course of what is called the first Regular Settlement in Oudh, they applied for a direct settlement with them of the revenue assessed on their village. Their application was opposed on behalf of Sarfaraz Kunwar, who then held the taluqa. The case came for final disposal before the Extra Assistant Commissioner of Gonda on the 30th of January, 1871; the birt-holder was arrayed as plaintiff and the taluqdar as defendant. The taluqdar charged the documents produced by the birt-holders to be forgeries. This was found to be untrue; and the actual decision relative to the respective rights of the parties is in the following terms:—

"Now the question whether the *bankati birt* is tantamount to the *birt* right or not remains to be dealt with. It is evident that, when the *birtdari dahyak* dues are being deducted all through, no extinction of the *birt* rights can take place on account of the decrease or increase in the amount of rental. In mortgage and sale *birt*, (1) the owners of villages generally enjoyed the power to assess rents, to make amendments in them, and to grant periodical leases in their districts; and the *dahyak* dues have been estimated at 10 per cent. only. The plaintiff has all these qualities in him.

"For the above reasons it is ordered that a decree upholding possession and occupation as an under-proprietor be passed in favour of the plaintiff under the provisions of Circular No. II of 1862 in respect of village Kundarwa No. 590, Pargana Gonda, subject to the condition that the taluqdar shall always have the power to renew the *patta* and to amend and to assess the *jama* according to the practice observed during the *Shahi* times; that

[1] For the meaning of this class of *birt* see Sykes.

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the plaintiff having deducted only 10 per cent. *dahyak* dues, shall pay the balance of the *jama* proposed to the taluqdar ; that in case of refusal to take up the lease and the village being held under direct management, the plaintiff shall be deemed entitled to *dahyak* dues at 10 per cent. from the amount of gross rental, and that, having deducted his *dahyak* dues in both the seasons, he shall have the accounts adjusted at the end of the year."

It is clear from this decree that the Extra Assistant Commissioner found that the plaintiff in that case possessed all the powers ordinarily enjoyed by birt-holders of his class; and he accordingly upheld the plaintiff's "possession and occupation as an under-proprietor," subject to the conditions set forth above.

It is alleged by the plaintiffs in the present suit that there was a discontinuance in "the possession and occupation" of the birt-holders between 1875 and 1879, when they declined to take a *pottah* on the rent assessed by the taluqdar. During this period, it is alleged, the village was let to some other people, the defendants receiving only the tenth of the rent received by the taluqdar, and that in 1880 the birt-holders again got possession under a new arrangement. These allegations are not admitted by the defendants ; they deny that they ever lost possession. No *pottah* or *kabuliat* appears to have been produced to show what the new arrangement was. Anyhow, whatever its character, it has lasted a considerable time.

In 1898 Achcha Ram, who had come into the possession of the taluqa on the death of his wife, Birjraj Kunwar, brought a suit against the defendants for ejectment and enhancement of rent. That suit failed; the Judicial Commissioner dismissed the action on the ground that both reliefs were exclusively for the Revenue Courts to determine.

In 1901 Raja Kazim Husain Khan, the father of the first plaintiff, who had by that time become the owner by purchase of a half share of the taluqa, brought a suit against the defendants in the Court of the Deputy Collector of Gonda for arrears of rent for the Fasli years 1307 and 1308 (1900 and 1901), on the allegation that they held Kundarwa on a rental of Rs. 503-14-6 and that he was entitled to receive a moiety thereof The defendants contended that the rent was payable as a whole and they could not be made separately liable for a share of the rent. They also

alleged that their rent was Rs. 500, which they had been always willing to pay less their *dahyak*, the tenth, which they were entitled to deduct, and that Rs. 3-14-6 claimed by the plaintiff was an overcharge for rates.

The Deputy Collector of Gonda, before whom the case came for trial, dealing first with the plea that the defendants were not liable to pay the rent in halves, stated his view as to the status of the defendants in the following terms:—"They are not tenants; nor are they ordinary *thekadars*; rather they hold the land as under-proprietors, or inferior proprietors." In this view he overruled the *birtia*'s objection to being made liable to pay rent in halves. On the question of the rent he held as follows:—

"The defendants admit the *jama* to be Rs. 500, and on adding to it Rs. 3-14-6 on account of rate, we get the amount of Rs. 503-14-6, as claimed by the plaintiff. But the suit has not been brought in respect of rate, nor was any issue framed as to whether the plaintiff was entitled to get the same. The defendants are not tenants nor are they responsible for profits and loss; they are in possession (on payment of *jama* minus a fixed percentage *i.e.*, 10 per cent.). Till the rate is sued for I cannot include it in the claim from my own side. I take the amount of *jama* to be Rs. 500 and thus the plaintiff's share comes to Rs. 250 per year. The defendants have stated that from the *jama* fixed, 10 per cent., that is to say Rs. 50 per year, used to be deducted as *dahyak* dues. The plaintiff is silent as regards this objection. From the copy of the order, dated the 30th of January, 1871, passed in the previous settlement it appears that a decree for *dahyak* (10 per cent.) was passed in favour of Sheo Ratan, the ancestor of the defendants, and it was settled that the proposed rent should be paid to the taluqdar after deducting therefrom the *dahyak* right, that is 10 per cent. From the copy of the judgment, dated the 29th of October, 1898, passed by the Court of the Judicial Commissioner (of Oudh) in *re* Sheo Ratan *versus* Achcha Ram, it appears that up to that time the *dahyak* right prevailed and there appears to be no reason why it should have ceased thereafter. From the proposed rent Rs. 50 per year should be deducted; and after deducting this amount Rs. 450 are due, out of which the plaintiff is entitled to get Rs. 225."

The decree of the Deputy Collector is dated the 23rd of December, 1901. The North-Western Provinces and Oudh Land Revenue Act (III of 1901) was enacted about this time, and under its provisions the revenue assessment of the Gonda District was taken in hand. In the course of the settlement proceedings relating to the Birwa Mahnon taluqa a claim was preferred for the assessment of rent in respect of the village of Kundarwa.

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Before the Settlement Officer the Balrampur Estate, as the owner of the half-share of the taluqa, was arrayed as plaintiff, whilst the birt-holders appeared as defendants. The Assistant Settlement Officer, after stating in his judgment that "the case was instituted in his Court simply to determine whether or not the *daswantdar*-holders of the village Kundarwa should be assessed with rent by him," sets out the contentions of the parties. The taluqdar's Mookhtear urged again that the defendants were holding at a rental of Rs. 503-14-6 under a lease executed by them, and that therefore the Settlement Court should not assess the rent on the village; whilst the defendants contended they had never been disturbed in their possession of the village, and that for the last 30 years they had been paying a rent of Rs. 500 less Rs. 50, their *dahyak* dues, which they were entitled to deduct. Dealing with the Kundarwa village, he held as follows:—

"When the Settlement Court allowed the *daswant*-holders to retain possession over the hamlet of Kundarwa, and they were not dispossessed by the Civil Court, the rent thereof should certainly be assessed by this Court. Now there only remains to be seen what would be the amount of rent. The revenue fixed formerly in respect of the village has been allowed to stand, therefore I allow the rent of Kundarwa to be the same as before for the following reasons."

After giving his reasons for the conclusion at which he had arrived, he went on to say that whilst there was a possibility of improvement in one of the hamlets in dispute, "there was very little chance of improvement in Kundarwa." In other words, in his opinion there was little room for enhancement in the case of Kundarwa. And accordingly he made the following order in regard to the hamlet and the village respectively:—

"For these reasons I think it advisable to let the former revenue, Rs. 50 of Pura Sanwant Ban, stand as good, and Rs. 250 of Pura Kundarwa. The (net) profit thus comes to Rs. 500, and after deducting the *dahyak* dues the rent of the hamlet Kundarwa amounts to Rs. 450: and this is the rent which I fix."

The effect of the Assistant Settlement Officer's order was simply to recognize and affirm the rent the defendants were paying. The taluqdar preferred an appeal from this order to

the Settlement Officer; and his order in respect of Kundarwa is in these terms :—

"This is one of those unfortunate decrees of the last settlement which gave and took away rights in the same breath. The respondents were decreed possession of mauza Kundarwa and intermediate rights, *i.e.* under-proprietary, but the taluqdar was given power to fix the rent, and if the under-proprietors were not prepared to pay it *they could resign possession and receive* 10 *per cent.* of assets instead. Such conflicting decrees are merely provocative of further litigation in order to define the status of the subordinate party. The appellant urges that as no rent was fixed at last settlement the Settlement Court has no *power to fix rents* now. I find that whatever else the Settlement Court at last settlement gave, it certainly conferred under-proprietary rights to land, and I am, therefore, empowered to fix rents under Section 79 of the Revenue Act."

The Settlement Officer's order was made on the 1st of December, 1902. From that date to November, 1912, the taluqdars remained quiescent. By that time the first plaintiff in this action had succeeded to his father's estate; and he, on the 19th of that month, issued to the several defendants the following notices couched in identical terms offering a three years' lease. After setting out the decree of the Extra Settlement Officer made on the 30th of January, 1871, the plaintiff says :—

"I, the sender of this notice and the possessor of the Estate of Birwa Mahnon, of which the aforesaid village forms a part, assess and fix the lease money of the aforesaid village at Rs. 580, as detailed below, from 1320 F. to 1322 F. After deducting therefrom Rs. 58, the *dahyak* (10 per cent.) dues at the rate mentioned in the settlement decree, you shall be liable to pay every year the remaining amount of Rs. 522, as detailed below, in the instalments noted below. If you accept the rental, mentioned above, you can attend the estate office of the sender of this notice and get the *patta* and the *kabuliat* completed; but if you fail to get the same completed within fifteen days from this date or refuse to take up the lease (*theka*) of the aforesaid village at the above rental, you shall cease to have the right of possession over the village and it shall be taken under direct management. If you fail to make a reply to this notice within seven days from this date, it shall be deemed that you do not agree to take up the lease of the village on the rental assessed by me."

The defendants do not seem to have given any reply to this demand—at least there is nothing on the record to show that there was a reply—and accordingly the first plaintiff, in conjunction with Lachmi Narain, brought this suit as already stated in the Court of the Subordinate Judge of Gonda on the 1st of May, 1913, for the following reliefs :—

"(*a*) That a declaration be made to the effect that the defendants 1 to 5 have no zamindari right, superior or inferior, in the entire village Kundarwa owned by the plaintiffs.

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"(b) That it may be declared that according to the old settlement decree, dated the 30th of January, 1871, the plaintiff alone is entitled to assess and alter the amount of rent to be paid by the defendants 1 to 5.

"(c) That a decree for possession of the entire village Kundarwa be given."

He also claimed mesne profits.

The defendants in their written statement denied the right of the plaintiff to eject them; they admitted that under the decree of the 30th of January, 1871, the plaintiff no. 1 was the superior proprietor of the village, and they claimed that under the same decree they were entitled to under-proprietary rights. And in paragraphs 24 and 25 they said as follows:—

"Thakurain Sarfaraz Kunwar obtained a decree for the superior proprietary right in respect of this village on the 24th of March, 1869, and in the said suit a direction had been given that the ancestor of the defendants 1 to 5, Sheo Ratan, should bring a separate suit for under-proprietary rights. Accordingly the said Sheo Ratan Pathak, having brought a claim for the pukhtadari rights, obtained a decree on the 30th of January, 1871. Now the plaintiff is the representative of Thakurain Sarfaraz Kunwar; therefore he is the superior proprietor of the said village.

"In the recent settlement Rs. 500 was determined to be the amount of rent, and after deducting Rs. 50 on account of *dahyak* dues, the defendants pay Rs. 450 annually to the superior proprietor. In view of the quality of land in this village, the amount of rent cannot exceed Rs. 500. If the Court determines that the plaintiffs and the defendant No. 6 are entitled to a rent exceeding the amount assessed during the recent settlement, *the undersigned defendants do not object to the payment of an enhanced amount of rent. The plaintiffs should seek redress in the Revenue Court.*"

The issues raised by the Subordinate Judge were wider than the prayers in the plaint: the first was whether the defendants were under-proprietors; and the second whether the relation of landlord and tenant existed between the parties.

He decided both issues against the defendants, and accordingly made a decree in favour of the plaintiffs in respect of all the reliefs asked for. He treated the defendants as trespassers and awarded to the plaintiffs possession of the village with mesne profits. On appeal the claim for ejectment and mesne profits was abandoned; the Judicial Commissioners, therefore, dealt only with the question of the defendants' status. They were of opinion that the decree of the 30th of January, 1871, conferred on the *birt*-holder "more than a mere right of *dahyak*." In their view it affirmed his right as under-proprietor, and that therefore the

decree for ejectment made by the Subordinate Judge was bad. They accordingly dismissed the plaintiffs' suit.

On the present appeal before this Board, it has been conceded that the claim for the ejectment of the defendants and for possession is not maintainable. It is admitted that such a claim arising between landlord and tenant (even assuming that the defendants' position is no more than that of an ordinary tenant) is exclusively cognizable by the Revenue Courts. The decision of the Board is thus confined to the first two prayers in the plaint, which relate to the status of the defendants and the effect of the Extra Assistant Settlement Commissioner's order made on the 30th of January, 1871.

It seems clear that the rights of the *birt*-holders must be adjudged on the basis of the document which created their interest. It is called a *pottah*; but the term *pottah*, like the word *jote* in Bengal, is a general expression and comprehends all tenures and subordinate interests, from a permanent *mokurrari* tenure to a yearly lease. It has to be observed that in Oudh, as pointed out in the Chief Commissioner's Circular already referred to, there exist various kinds of *birts*, the incidents of each of which differ from those of others. Some are acquired by purchase, and are accordingly called *bai birts*; some are given from motives of piety to Brahmins, and are designated *bishunprit birts*. Sykes, in his valuable work, at p. 178, states their character thus :—

"*Bishunprit birts* were cessions similar in almost every respect to the *bai* or purchased *birts*, save that these were given to Brahmins for the honour and glory of God (if not for that of the giver) and no consideration was taken."

Such was the nature of the grant in the case of *Parmeshar Dat* v. *Mohammad Abul Hasan Khan* (1), on which the plaintiff's counsel relies in support of his contention that the defendants have no right in the land beyond the receipt of the *dahyak*. The dispute there related to a *bishunprit birt* (see p. 339). As the Judges dealing with that case pointed out, a *bishunprit khushast* is not a grant for "valuable consideration," but a mere "grant by favour." Again, the settlement decree there appears to be quite different from the decree in the present case; it had simply confirmed the *bishunprit*-holder's

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"existing possession" coupled with the taluqdar's power to fix the rent and renew the lease. There is little or no analogy except in the common use of the word *birt* between a gratuitous grant like the *bishunprit birt* and a jungle-clearing grant where the grantee has to incur considerable outlay before he can obtain any return from the land.

There is a reference to "jungle-clearing *birts*" in pp. 176-77 of Mr. Sykes' work. And on p. 191 a fuller explanation is given, thus :—

"Chaharum and Daswant (also known in the neighbouring district of Benares as *Bunkuttee*) is an under-proprietary right obtained by clearing jungle land under a lease granted for the purpose (bunkuttee) and bringing it under cultivation, and in other cases granted to all proprietors and influential residents of the village to keep them contented and loyal. The terms Chaharum and Daswant are in use chiefly in the districts of Gonda and Bahraich, and mean respectively one-fourth, and one-tenth, thus giving a clue to the original extent of these subordinate tenures : the daswant being very similar in its nature and extent to the *dahyak* of the *birtias*.

"The use of the terms chaharum and daswant arose in this way. The terms of the lease were usually as follows :—For five years the land was rent-free ; in the sixth year the tenant paid one-sixth of the produce : in the seventh, one-fifth : in the eighth, one-fourth ; in the ninth, one-third ; and in the tenth, one-half the full rent. Henceforward the clearer was entitled to hold at that rent so long as the land was held pakka ; but if the landlord held kacha the clearer was entitled to have one-fourth or one-tenth of the produce, which, in practice, came to mean one-fourth or one-tenth of the land rent-free in under-proprietary right. This tenure, like the others, was liable to encroachment in the shape of an assessment of rent, but that would be low in any case."

The *pottah* in the present case expressly declares that the grantor has given the land of the village to the grantee to get it cultivated and populated. It was for the purpose of clearing the jungle, making the land fit for cultivation and bringing in raiyats, which carried with it the duty of sinking wells, etc. It is declared in the *pottah* that "the *birt*-holder was to enjoy it free for five or six years." A comparatively small but gradually ascending rent is fixed for the years 1210 to 1214, in proportion, it would seem, to the increasing productiveness of the soil. After 1214 he was to pay "the revenue to the *sarkar* prevalent in the taluqa, and take the *daswant* prevalent in the taluqa." The deduction was in the nature of a rebate.

By his order of the 30th of January, 1871, the Extra Assistant Commissioner declared the right of the *birt*-holder, and made a

decree "upholding" in express terms his "possession and occupation as an under-proprietor . . . under the provisions of Circular II of 1862 in respect of the village Kundarwa." The reference to the circular in the decree shows, as the Judicial Commissioners rightly observe, that "the Extra Assistant Commissioner decided and must have intended to decide" that the *birt*-holder was an under-proprietor under the provisions of that Circular. The Extra Assistant Commissioner further declared the condition on which the land was held under the *pottah*, that "the taluqdar shall always have the power to renew the *pottah* and to award and assess the *jama* according to the practice observed during the *Shahi* times"; that is, before the annexation. The *jama* is to be assessed according to the practice observed prior to 1855, as indicated in the Circular itself. There is no evidence, however, in the case what the practice was in those days. The *pottah*, however, lays down a standard for the assessment of the *jama*. The taluqdar cannot capriciously enhance the rent; the assessment must be in accordance with the rate prevalent in the taluqa. Whether it is in accordance with such rate or not, in case of a dispute, is a matter wholly within the cognizance of the Revenue Courts. Nor, from the terms of the *pottah* or the decree of 1871, does it appear that the taluqdar is vested with the power of amending and assessing the rent arbitrarily at short intervals, which would necessarily be a harassment to the inferior holder as well as the raiyat.

The facts already recited show that for a number of years the defendants have been paying a rent of Rs. 500, less their tenth. It is alleged by the plaintiff that between 1875 and 1879 there was an interruption of their possession, and the village was let on a higher rental to other people. If these *pottahs* represented real transactions it is difficult to understand why no reference was made to them in the proceedings in 1898, or 1901 before the Deputy Collector. Again, considering that the rent in the *pottah* for 1287 is stated to be Rs. 1,451, and in that of 1875 it is stated to be Rs. 1,826, it is not explained how the defendants were found in 1901 to be paying only Rs. 500. Anyhow, interruption of that character cannot affect or alter the defendants'

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rights under the *pottah* of 1802 or the decree once they got back into possession.

On the whole their Lordships concur with the Judicial Commissioners in holding that the respondents, as declared in the decree of 1871, possess an under-proprietary right in the village of Kundarwa, granted to their ancestor in 1802. The appeal will, therefore, be dismissed with costs, and their Lordships will humbly advise His Majesty accordingly.

Solicitor for appellant: *E. Dalgado.* *Appeal dismissed.*

Solicitors for respondents: *Barrow, Rogers and Neville.*

APPELLATE CIVIL.

1920
December, 16.

Before Mr. Justice Muhammad Rafiq and Mr. Justice Ryves.

RATAN SINGH (PLAINTIFF) *v.* PRAN SUKH (DEFENDANT)*.

Act (Local) No. II of 1901 *(Agra Tenancy Act), sections* 95 *and* 177*(f)—Suit for declaration of status of tenant—Plea that plaintiff was not a tenant at all—Question of jurisdiction decided—Appeal.*

In a suit, which was framed as a suit under section 95 of the Agra Tenancy Act, 1901, asking for a declaration of the plaintiff's status as an occupancy tenant, the defendant zamindar pleaded that the plaintiff was a mere trespasser, and further stated that "there was no allegation in the plaint regarding the jurisdiction of the court as was required under the law." An issue was framed—"Is the suit under section 95, Act II of 1901, maintainable and cognizable by this Court"—upon which the decision was—"Section 95 of the Tenancy Act is the only section under which such suits can be brought. The suit is maintainable under section 95 and as such is cognizable by this Court" *Held* that it could not be said that in these circumstances a question of jurisdiction had been decided within the meaning of section 177*(f)* of the Agra Tenancy Act, 1901, and the appeal lay to the Commissioner and not to the District Judge.

THE facts of this case sufficiently appear from the judgment of the Court.

Babu *Piari Lal Banerji*, for the appellant.

Munshi *Girdhari Lal Agarwala*, for the respondent.

MUHAMMAD RAFIQ and RYVES, JJ.:—The three appeals Nos. 94, 95 and 96 of 1918 are connected and arise out of three separate suits brought by the same plaintiff under section 95 of

*Second Appeal No. 94 of 1918 from a decree of D. R. Lyle, District Judge of Agra, dated the 23rd of November, 1917, reversing a decree of Muhammad Husain, Assistant Collector, First Class, of Agra, dated the 26th of March, 1917.