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purposes of rateable distribution, but where money is received by a court in virtue of execution process it must be held that it is "assets realised in the course of the execution." It will be observed that the provisions of section 53 are not the same as the English Law in this behalf. Under the English law a creditor is entitled to the benefits of execution as against the trustee in bankruptcy only if there has been a completed execution by the creditor before the date of the receiving order and before notice of a bankruptcy petition or of an available act of bankruptcy. Under the English law an execution by attachment of debt due to the insolvent is not complete until the debt is actually received by the creditor—see *Jitmand Ramanand* v. *Ramchand Nandram* (1). The requirements of section 53 are in our opinion fully satisfied if the money is received by the court for the benefit of the decree-holder in proceedings initiated according to law for the purpose of executing the decree.

Hasan, C.J. and Allsop, J.

For these reasons we dismiss the appeal with costs.

Appeal dismissed.

APPELLATE CIVIL

1933
November, 15

Before Mr. Justice Bisheshwar Nath Srivastava

MAHABIR (DEFENDANT-APPELLANT) *v.* JAGANNATH BAKHSH SINGH, RAJA (PLAINTIFF-RESPONDENT)*

Oudh Rent Act (*XXII of* 1886), *section* 127—*Death of occupancy tenant—Landlord receiving rent from the son and heir—Landlord, whether debarred from proceeding under section* 127—*Section* 36, *Oudh Rent Act* (*XXII of* 1886) —"*Admitted to occupation of the holding*," *whether implies voluntary act of landlord—Landlord allowing deceased's heir to take possession under impression that he was*

*Second Rent Appeal No. 21 of 1932, against the order of Pandit Raghubar Dayal Shukla, District Judge of Rae Bareli, dated the 7th of April, 1932, upholding the decree of S. Masudul Hasan, Assistant Collector, Rae Bareli, dated the 8th of August, 1931.

(1) (1905) I.L.R., 29 Bom., 405.

entitled to occupation of holding, whether amounts to "Admission to occupation," within the meaning of section 36.

Where a tenant died before the Amended Oudh Rent Act 1921 came into force and the deceased's son entered into possession of the holding and the landlord permitted him to retain possession of it and to pay rent for it under the impression that he was entitled in law to be maintained in possession as the heir of his father for a period of five years under the Amended Act of 1921, the receipt of rent by the landlord in these circumstances did not evidence landlord's consent to the son's holding possession in his own right and had not the effect of creating a contract of tenancy in his favour and the landlord was not debarred from taking proceedings against him under section 127 of the Oudh Rent Act.

The words "admitted to the occupation of the holding" used in section 36, Oudh Rent Act, clearly imply a voluntary act on the part of the landlord. Where, therefore, the landlord allows the son of a deceased tenant to take possession of the holding and to retain possession of it under the impression that he was entitled in law to be maintained in possession as his deceased father's heir for a period of 5 years, the occupation of the land by the son cannot be held to be the result of any such voluntary act on the part of the landlord and so it must be held that the heir was never admitted to the occupation of the holding by the landlord within the meaning of section 36 and his claim to be a statutory tenant must be rejected. *Rani Kaniz Abid* v. *Mahabir* (1), relied on.

Messrs. *Radha Krishna* and *Ganesh Prasad*, for the appellant.

Messrs. *Ram Bharose Lal* and *Amrit Rai*, for the respondent.

SRIVASTAVA, J.:—This is a defendant's appeal against the decision dated the 7th of April, 1932, of the learned District Judge of Rae Bareli upholding the decision, dated the 8th of August, 1931, of an Assistant Collector of that district. It arises out of a suit under section 127 of the Oudh Rent Act. The facts necessary to be stated for the purpose of this appeal are as follows:

In 1319 Fasli, the plaintiff taluqdar granted a lease for seven years to one Sital. The term of the lease expired in 1326 Fasli but Sital continued to hold over

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till his death which occurred on the 26th of October, 1921. Mahabir appellant got possession of the holding from the time of the death of his father Sital. The taluqdar issued a notice of ejectment against Mahabir as heir of Sital in November, 1928, under section 48 of the Oudh Rent Act. No suit was instituted to contest this notice of ejectment but when the taluqdar applied for assistance of the court to eject Sital an objection was raised on the latter's behalf that the notice in question had not been served on him. The Revenue Court on the 25th of June, 1929, accepted the objection and refused to give assistance to eject the tenant under section 60 of the Oudh Rent Act. The plaintiff taluqdar then issued a second notice in November 1929, again treating Sital as the heir of the deceased tenant under section 48 of the Rent Act. A suit was instituted to contest this notice and it was finally decided by the Commissioner on the 10th of December, 1930. It appears from the judgment of the Commissioner that the date of the death of Sital was in dispute in the case and it was ultimately decided that Sital had died on the date mentioned above, namely, the 26th of October, 1921. It was held by the Commissioner that Mahabir was not entitled to succeed as heir of Sital under section 48 of the Oudh Rent Act because his father had died before the commencement of the amending Act of 1921 and after the term of his lease had expired. Thereupon the taluqdar instituted the present suit on the 21st of May, 1931, under section 127 of the Oudh Rent Act.

Both the courts below have held that as the amended Act came into force on the 11th of February, 1922, soon after the death of Sital, the plaintiff taluqdar acted under the impression that under the provisions of the new Act the appellant as the son and heir of Sital was entitled to retain the holding for five years and that in view of the explanation given under clause 18 of section 2 of the amended Act the landlord could eject him as an heir at any time within three years after the expiration of this period of five years. This view is borne

out by the fact that in the *khasra* of 1329 Fasli Sital is entered as a tenant and in the *khasra* for the following year 1330 Fasli the name of Mahabir is entered in place of his father with a note that Sital being dead he was entered as heir. The statement of the patwari who was examined as a witness in the case further shows that Mahabir continued to be so recorded at the settlement which took place in 1332 Fasli and in subsequent years till 1338 Fasli. I have therefore no hesitation in accepting the opinion of the courts below which is amply borne out by the evidence just mentioned. As a result of this finding the learned District Judge has held that the fact of the taluqdar receiving rent from Mahabir under the impression that he was entitled to hold as an heir did not debar the plaintiff taluqdar from taking proceedings against him under section 127 of the Oudh Rent Act.

Two contentions have been urged on behalf of the appellant. It is contended in the first place that the appellant had become a statutory tenant of the holding under the provisions of the amended Rent Act. Reliance has been placed upon the provisions of section 36 of the Oudh Rent Act in support of this contention. This section provides that a tenant in occupation at the commencement of the Oudh Rent Amendment Act of 1921 shall be entitled to retain possession of the holding for a period of ten years from the date of the last change in his rent or the last alteration in the area of the holding or where no such change or alteration has taken place, from the date on which the tenant was admitted to the occupation of the holding. There is no question of any change in the rent or area of the holding in the present case. On my questioning the learned Counsel as to the date on which, according to him, the appellant was admitted to the occupation of the holding, he said that he was so admitted when the taluqdar granted the lease to Sital in 1319 Fasli or at any rate when Sital died. It is not denied that the lease was granted to Sital alone and his son Mahabir had no interest in the lease at the

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time when it was granted. It is therefore ridiculous to suggest that the appellant, Mahabir, was admitted to the occupation of the holding when the lease was granted to his father Sital. As regards his being admitted as a tenant on the death of his father, the words "admitted to the occupation of the holding" used in section 36 clearly imply a voluntary act on the part of the landlord. In this case it has been found and the finding has been accepted by me that the landlord allowed the appellant to take possession of the holding and to retain possession of it under the impression that he was entitled in law to be maintained in possession for a period of five years. In these circumstances it is impossible to say that the occupation of the land by the appellant was the result of any such voluntary act on the part of the landlord. I must, therefore, hold that the appellant was never admitted to the occupation of the holding by the landlord within the meaning of section 36 and so his claim to be a statutory tenant must be rejected.

The second contention urged by the appellant is that the taluqdar respondent having been receiving rent from the appellant, it cannot be said that the appellant retained possession of the land without the consent of the landlord and therefore section 127 of the Oudh Rent Act does not apply to the case. It is the common case of both parties that the taluqdar had been realising rent from the appellant from the time of his father's death till 1336 Fasli. The last receipt of rent is dated the 12th of December, 1929, shortly after the issue of the second notice of ejectment. No rent has been realised since. It has often been held that if a landlord has been receiving rent from the person in occupation of land, he cannot after having received the rent proceed against the tenant under section 127 because the receipt of rent implies the landlord's consent to his occupation of the land, and is deemed to give rise to a contract of tenancy between the parties. I am of opinion that the circumstances under which the rent was accepted must be taken into account before they can be construed as an

admission of tenancy or as carrying an implication of consent. There have been a number of such cases which have been the subject of decision by the Board of Revenue. As the decision of each case is naturally influenced by its circumstances, the decisions of the Board of Revenue have not been altogether uniform. The latest of these cases in which many of the earlier cases have been discussed is *Rani Kaniz Abid* v. *Mahabir* (1). In this case it was held that when a man who is not an heir to a statutory tenant is believed by the landlord to be the heir and is therefore allowed to continue in possession of the land and to pay rent on its account such action of the landlord being based on misapprehension it has not the effect of creating a new statutory tenancy. I am of the same opinion. In my opinion it is clear that in the present case the taluqdar received rent from Mahabir under the impression that he was the heir of his father as recorded in the village papers. It is important to note that no rent was received from him after the judgment of the Commissioner in which it was held for the first time that Mahabir had no right to retain possession as an heir. The courts below were therefore right in holding that the receipt of rent under the circumstances of this case did not evidence the landlord's consent to Mahabir holding possession in his own right or in other words had not the effect of bringing into existence a contract of tenancy between him and the landlord.

In my opinion the decision of the lower courts is correct. The appeal is therefore dismissed with costs.

Appeal dismissed.

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