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an opportunity to the petitioner to prove his case by witnesses. I hold that this was a complaint under the Code of Criminal Procedure filed under section 200. The Magistrate did not dispose of it in accordance with law. He should have examined the petitioner on oath and disposed of it in accordance with law. The petition, however, purports to be on behalf of Hamid Mian relating to his father Kari Mian's murder during the recent riot. It is initialled at the left-hand corner by Mr. Abdul Wadood, a pleader of Muzaffarpur. To the petition is attached a vakalatnama which is not properly drawn up. Except saying that it is a petition on behalf of Hamid Mian, the name of the actual petitioner is not mentioned. From what has transpired it may be taken to be a petition of Hamid Mian; but it must be properly signed with a proper vakalatnama. The accused is entitled to ask the complainant to take the responsibility of filing a valid complaint under the Code. It is open to Hamid Mian if he wants to go on with the case to file a fresh complaint or in the presence of the Magistrate to rectify the defects pointed out above. If that is done, then the Magistrate will proceed to dispose of the complaint in accordance with law as laid down in Chapter XVI of the Code of Criminal Procedure.

Order set aside.

APPELLATE CIVIL.

Before Kulwant Sahay and Macpherson, JJ.

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Feb., 22.

MITA DUSADH

v.

ANUP MAHTON.*

Bengal Tenancy Act, 1885 *(Act V of* 1885*), section* 181, *scope of—service-grant of a police character, incidents of—occupancy right, whether can accrue—incident, preservation of, in favour of grantee as well as grantor.*

* Appeal from Appellate Decree no. 1033 of 1925, from a decision of Babu Raj Narayan, Subordinate Judge of Patna, dated the 21st April, 1925, confirming a decision of Babu Ram Chandra Misra, Munsif of Patna, dated the 12th December 1926.

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A right of occupancy cannot be acquired in service-grants of a police character (e.g., of a road chaukidar in the Patna district) especially when they are of the nature of raiyati holdings, and any encumbrance on the tenancy, including a right of remaining upon it, ceases when the incumbency of the service-tenant who created it comes to an end, and is not binding on any succeeding incumbent who has not ratified it or acquiesced in it for the statutory period of limitation.

Mohesh Majhi v. *Pran Krishna Mandal* (1), *Upendra Nath Hazra* v. *Ram Nath Chowdhury* (2) and *Jafarruddin Shaha* v. *Brindabani Chaudhurani* (3), followed.

Ram Kumar Bhattacharjee v. *Ram Newaj Rajgur* (4), *Sitikanta Roy* v. *Bipra Das Charan* (5), and *Khetra Mohun Ghosh* v. *Lakhi Kanta Pal* (6), distinguished.

Section 181, Bengal Tenancy Act, 1885, provides: " Nothing in this Act shall affect any incident of a ghatwali or other service-tenure, or, in particular, shall confer a right to transfer or bequeath a service-tenure........."

Held, that section 181 preserves from the operation of the Act the incidents of ghatwali and service-tenures as much in favour of the grantee as in favour of the grantor.

Appeal by the plaintiffs.

This appeal was preferred by the plaintiffs from a decision in appeal of the Subordinate Judge of Patna who affirmed the decision of the Munsif of that station dismissing their suit for recovery of possession of certain land.

The litigation related to 11 plots extending to 23.53 acres which constituted khata no. 463 of the record-of-rights of village Kareja in the Patna district finally published in 1910. The proprietor was Kaisar-i-Hind under whom Ramlal Dusadh, Mita Dusadh and Rampat Dusadh (son of Chintaman) were shown as tenants in equal shares. All the plots were shown as " chauki " and the status as " jagir jakrohi " or jagir for guarding the roads. It was common ground that the land was a service-grant of a road-chaukidar. The khatian of the tenant showed

(1) (1905) 1 Cal. L. J. 138.
(2) (1906) I. L. R. 33 Cal. 630.
(3) (1918-19) 23 Cal. W. N. 136.
(4) (1904) I. L. R. 31 Cal. 1021.
(5) (1917-18) 22 Cal. W. N. 763.
(6) (1926) 44 Cal. L. J. 271.

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also that the lands were in possession of Anup Mahto as shikmi. The subordinate khatian (no. 2) of Anup Mahto showed that he held under "Ramlal Dusadh and others" under khata no. 463 and that the lands were "chauki." The Munsif thought that the Dusadhs were described as tenure-holders.

The plaintiffs Mita, Rampat, the sons of Jodha, the son of Ramlal, and the sons of Budhu, residents of Dariapur, sued Anup Mahto, son of Dhanukdhari Mahto, for recovery of the lands in khata no. 463 stating that they were members of a Mitakshara joint family with Mita as karta and sued as representing all the members of the family. They set out that the land was their raiyati kasht forming their jagirdari interest with occupancy right in lieu of rendering service as chaukidar and they were entered as kashtkar-tenants in the record-of-rights with defendant as darjotdar. They claimed the right to eject him in virtue of their jagirdari interest but to avoid objection they in 1328 served notice on him under the provisions of section 49(*b*) of the Bengal Tenancy Act, in reply to which the defendant falsely set up an ancestral occupancy-right in the land whereas his possession was unlawful from the beginning of 1330, and they had thus been compelled to sue for ejectment and mesne profits.

The defendant claimed an occupancy-right both because the plaintiffs were recorded in the survey khatian as tenure-holders, and also in virtue of possession from time immemorial, set out that in 1904 and on other occasions his possession as occupancy-raiyat had been found by the Court, that the area of the ancestral kasht was 28 bighas, that 3 bighas had been settled under a permanent lease of 1902 at a jama of Rs. 6 while some parti land brought under cultivation by him had been wrongly entered in khata no. 2, and contended that in any case plaintiffs could not eject him.

It was common ground that in 1902 Rampat Dusadh had made a dawami or perpetual settlement

of 3 bighas at two rupees per bigha with Dhanukdhari Mahto, that previously the family of the defendant held 28 bighas of the road-chaukidar's jagir and that the balance of the land in suit had been gradually annexed to the old holding by the defendant's family and had been in their possession at least two years before the record-of-rights was completed. The plaintiff's case as to the 3 bighas was that Rampat had no right to settle that area in 1902. The rental of Rs. 118-3-0 consisted of Rs. 112 for the 28 bighas at Rs. 4 per bigha and Rs. 6 the fixed rent of the 3 bighas settled in 1902.

The suit was obviously framed upon the particulars entered in the record-of-rights (with this exception that there was no entry as to occupancy-right in the record-of-rights) and the chief issue was whether defendant was an occupancy-raiyat in respect of the lands or an under-raiyat of the plaintiffs. The defence sought to rebut the presumption in plaintiffs' favour which attached to the entry in the record-of-rights by proving that the plaintiffs' tenancy was a tenure and that the plaintiffs were tenure-holders within the meaning of the Bengal Tenancy Act. The Munsif, who misapprehended the record-of-rights and its effect, found, mainly on the entry in the thak survey of 1843 of the chaukidar or "faujdar" of that time, an ancestor of the plaintiffs, as "malik" with one Prasad Singh as "raiyat," the fact that tenants had been continuously cultivating the land from before 1843, and the possession by the defendant of the 28 bighas since 1898, that the plaintiffs were not occupancy-raiyats but service-tenure-holders and that the defendant was not their under-raiyat but an occupancy-raiyat who could not be ejected either from the original holding or from the six bighas which he had annexed to that holding and of which he had been in possession for more than twelve years before the suit. As to the 3 bighas the Munsif held that the co-sharers had ratified the action of Rampat and they could not eject the defendant. He further held that

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section 181 of the Bengal Tenancy Act did not affect the case, being of opinion that it merely protected the interest of the superior landlord and was not a bar to acquisition of occupancy-rights as against the service-tenure-holder. He, therefore, dismissed the suit.

The appeal of the plaintiffs was also dismissed by the Subordinate Judge who held (*1*) that defendant had held since 1898 at least, (*2*) that the land had been let continuously to tenants and the Munsif had correctly held that the plaintiffs were only tenure-holders so that the defendant must be a raiyat and had a right of occupancy, and (*3*) that section 181 was inapplicable as it only operated to prevent the jagirdar himself from acquiring an occupancy-right, though possibly the right of the defendant might be disputed by the person who created the service-tenure.

P. K. Sen and *Naresh Chander Sinha*, for the appellants.

Sir Sultan Ahmad (with him *Khurshaid Husnain* and *Sambhu Barmeshwar Prasad*) for the respondent.

MACPHERSON, J. (after stating the facts set out above proceeded as follows:) In second appeal it is urged that the finding of the lower appellate court as to the status of appellants on which the main issue was decided, is vitiated by the fact that that Court follows the Munsif who misdirected himself in respect of the record-of-rights. This contention cannot be gainsaid The Munsif erroneously thought that the defendant's shikmi khatian describes the plaintiffs as tenure-holders and that the framer of the record-of-rights was, therefore, under some misconception regarding the status of the parties. Such is not the case. The absence of a khewat for the tenancy of plaintiffs indicates that it was not recorded as a tenure; it is entered as khata no. 463 in a khatian in which the status is shown as the jagir of a road-chaukidar and every plot is separately shown as "chauki" and in shikmi to defendant. Defendant's

khatian also shows each plot as "chauki" (plot 859 also as "under" this khatian) and the tenancy as subordinate to raiyati khata no. 463. This entry supports the plaintiffs' case that the tenancy is not a tenure, and it was upon the defendant to rebut it. The area of the jagir can afford no presumption in his favour, nor the purpose for which the tenancy was acquired by the Dusadh road-chaukidar who holds it "in lieu of wages for services to be rendered." The description of the faujdar of 1843 as "malik" is equivocal, since a raiyat is no less in that relation to his under-raiyat than a tenure-holder is to his raiyat. No local custom or usage in this regard is pleaded or proved by the defendant though there are forty road-chaukidars with similar jagirs attached to the same police-station. But it is contended on behalf of the respondent that as the chaukidars have been in the habit of letting out the land or most of it, it has in their hands become a tenure, and reliance is placed upon the decision in *Mohesh Jha* v. *Manbharan Mia* (1). That decision is distinguishable on the facts. In that case the tenancy extended to 325 bighas and was created by an instrument which conveyed "various rights which are not, ordinarily speaking, granted in conjunction with an occupancy holding." Here the area is far less than 100 standard bighas and the position of plaintiffs is practically the same as that of a raiyat. It would appear that the intention of the grantor was to make a raiyati grant. It may be that the definitions of "tenure-holder" and "raiyat" in the Bengal Tenancy Act are not exhaustive but the mere sub-letting of his holding by a raiyat, however persistent, would hardly transform him into a tenure-holder. In the present instance the plaintiffs have long been anxious to recover their lands and the circumstances are altogether against the interest of the service-holder being regarded as that of a middleman. The fact that the tenancy is a "tenure" under the Local Cess Act is irrelevant. It is clear that the

(1) (1907) 5 Cal. L. J. 522.

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defendant has failed to rebut the entry in the record-of-rights or to prove that the plaintiffs are tenure-holders, and accordingly under section 5(3) of the Bengal Tenancy Act he cannot himself be a raiyat.

Sir Sultan Ahmad then contends on behalf of the respondent that even if he does not possess a right of occupancy under the Bengal Tenancy Act in the plaintiffs' jagir-land, the latter are nevertheless for several reasons not entitled to eject the respondent.

It is urged in the first place that the matter is res judicata as to the whole or at least as to part of the area in suit. In Suit no. 54 of 1914 Hafiz Saiyid Mohiuddin and Indarjit Singh sued Kalicharan Mahto, the uncle of defendant and Ramlal, Rāmpat and Mita Faujdars for recovery of possession of eleven bighas of land averring that Ramlal had settled that area with them out of this chaukidari jagir after private partition between the three chaukidars. The learned Munsif mentions that the area in dispute was four bighas and Indarjit Singh had apparently taken ijara of one-third of Ramlal's interest in eleven bighas of the jagir in Kareja. Indarjit had, however, been convicted in 1904 on a charge of theft of the crops of the land, and he and his co-plaintiff asked that the suit be decided on the special oath of Kalicharan, and thereon it was held that the land in suit was not the jagir of Ramlal and that Kalicharan had a kasht and occupancy-right therein and the plaintiffs being therefore entitled to no relief whatever, the suit was dismissed with costs on 5th May, 1905. Prima facie, if the land then in controversy was not jagir, it is not included in the land now in suit. Kalicharan, now represented by defendant, did not then plead nor depose that he was an occupancy-raiyat in that land under the jāgirdars. The Munsif negatived the plea of res judicata on the ground that no question fell to be decided between the defendant Kalicharan and the other defendants who were merely impleaded pro forma, and the plea was not raised in the lower appellate court. It is obvious on the plaint,

judgment and decree in the suit that the Court did not intend to and did not determine any question between the two sets of defendants. This plea of respondent is without foundation even as regards the area then in suit.

Much reliance is placed on the plea that defendant has an occupancy-right under section 19(*1*) of the Bengal Tenancy Act, having acquired it under Act X of 1859 or previously. Prasad Singh is shown in the thak survey of 1843 as raiyat in the jagir and it is contended that defendant is his descendant. But this plea fails on the facts. The Munsif held that Prasad Singh was a Babhan and could not be the ancestor of defendant who is a Kurmi, that it was Dhanukdhari Mahto, father of defendant (defendant, when deposing, was only 24 years of age), who (of defendant's family) first came on the land, and that all that could be said as to length of possession was that Dhanukdhari was in 1898 in possession of the original holding. The Subordinate Judge held that it was not necessary to decide the point. It is, however, both necessary and very easy to determine it. The claim to descent from Prasad Singh is a very recent invention. Plaintiffs in reply adduced the testimony of the real descendants of Prasad Singh, and there is no possibility of doubt on the oral and documentary evidence on the record that the Munsif's decision is correct. Defendant and his uncle were Mahtos until quite recently and defendant even signed his written statement as Anup Mahto. Indeed Kurmis were not designated Singh in the Patna district eighty years ago or even within living memory and when once they adopt the title, they do not drop it again. There is no satisfactory proof that Kurmis held the tenancy before 1898, far less that they held it before the Bengal Tenancy Act came into operation.

It is then urged that even if Prasad Singh was not an ancestor of defendant, the fact that he was an

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occupancy-raiyat constituted in some manner a change of incident so that future sub-tenants would be occupancy-raiyats. I can find no warrant in precedent or principle for such a result, even if Prasad Singh had held under a tenure-holder. And, as is well known, even in the case of zirat land the fact that an occupancy-right has been acquired by one cultivator but has ceased to exist, does not make it any easier for a future cultivator of the land to secure a right of occupancy therein. Moreover, as has been indicated, Prasad Singh did not hold under a tenure-holder.

It was next urged that in any case the respondent is in adverse possession of the limited interest of a right of occupancy for more than twelve years before suit. The point is not clearly raised in the written statement and the issues of limitation and estoppel were not pressed in the trial Court. Moreover an unfounded claim to be an occupancy-raiyat would not by lapse of time convert him into one, however long it is persisted in—*Muhammad Mumtaz Ali Khan* v. *Mohan Singh* (1), and still less if section 181 applies a statutory bar to occupancy-right. But the facts adduced in support of the claim to adverse possession of an occupancy-right do not support the plea. Three judicial proceedings arose between the parties in 1904. A proceeding under section 145 of the Code of Criminal Procedure merely dealt with the possession at that time of the 31 bighas. In the contemporaneous criminal case brought by Kalicharan Mahto under section 379 against Indarjit Singh (who had apparently taken ijara of Ramlal's one-third share in eleven bighas in Kareja) in which Indarjit and others were convicted for appropriating the crops on the demised land, the question at issue was who had raised the crop on the disputed area, while in suit no. 54 of 1904, already referred to, the claim of defendant's uncle was not to an occupancy-right under the jagirdars. This plea clearly fails.

(1) (1923) I. L. R. 45 All. 419.

The argument in appeal has to a considerable extent circled round the question whether an occupancy-right can at all accrue in a service-tenure. Learned Counsel for the appellant gave it this turn by opening with the statement that the point for determination was whether such a right could arise in chaukidari-chakaran land. In point of fact the tenancy of the plaintiffs is not chaukidari-chakaran land as defined in the Bengal Chaukidari Act (Act V of 1876), since Mita is not a village chaukidar or appointed to keep watch in any village and since no service is to be rendered to any zamindar in respect of any land of the tenancy. The plaintiffs-appellants are entitled to succeed if an occupancy-right cannot arise in their own particular jagir, even if it can arise in service-tenures of a different character. It would not follow from the fact that a cultivator in a service-grant covering a pargana or even a village can secure occupancy-rights in his tenancy, that a cultivator in a service-grant extending, let us instance, to less than a hundred standard bighas in Patna or less than five hundred bighas of jungle and upland in Chota Nagpur can do so. And in our more modern nomenclature the term "service-tenure" really signifies "service-tenancy" and does not imply in section 181 (as the Courts below have assumed) a tenure in contradistinction to a holding: indeed to make that fact more clear section 77 of the Chota Nagpur Tenancy Act, 1908, adds the words "or holding" to the words in section 181—

"Nothing in this Act shall affect any incident of a ghatwali or other service-tenure."

In support of the contention that an occupancy-right cannot be acquired in service-grants of a police character, Mr. P. K. Sen referred to *Mohesh Majhi* v. *Pran Krishna Mandal* (1) where it was held in respect of a ghatwali tenure that the growth of occupancy or non-occupancy-rights is inconsistent with the nature of service-tenures, though a custom or local usage may

(1) (1905) 1 Cal. L. J. 138.

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grow up on any local area as to recognition of occupancy-rights, and be binding on successive ghatwals, to *Upendra Nath Hazra* v. *Ram Nath Chowdhry* (1) where Maclean, C.J., following the ruling cited said, "I think that upon principle, having regard to the nature of ghatwali lands, the acquisition of occupancy-rights in these lands is inconsistent with the incidents of such tenures; and this view gains support from section 181 of the Bengal Tenancy Act, which seems to me to be inconsistent with the view of the acquisition of such rights in ghatwali lands. This conclusion seems to be in accordance with Mr. Justice Mitra's view on the point expressed in the case cited, that any such right is not susceptible of acquisition in ghatwali lands;" to *Jafarruddin Saha* v. *Brindabani Chaudhurani* (2) where it was held that a right of occupancy cannot be acquired in a kotwali jagir which was a service-tenure under a zamindar, and to section 181 of the Bengal Tenancy Act. Though the decisions cited relate to Bengal and it is never very safe to assume that the conditions are similar in this province, no exception can be or is taken to the principle that from their nature it is an incident of service-tenancies of a police character, that occupancy-rights ordinarily do not accrue in them even when they are of the nature of tenures, save under section 183 of the Bengal Tenancy Act, and especially when as in the present instance they are of the nature of raiyati holdings. Further the view of the Courts below as to the import of section 181 of the Bengal Tenancy Act cannot be supported: that provision preserves from the operation of the Act the incident mentioned as much in favour of the grantee as in favour of the grantor of the service-tenure. Accordingly no statutory right of occupancy can accrue in a service-tenure of a police character and any encumbrance on the tenancy including a right of remaining upon it, therefore, ceases with the incumbency of the service-tenant who created it

(1) (1906) I. L. R. 33 Cal. 630. (2) (1918-19) 23 Cal. W. N. 136.

and is not binding on any succeeding incumbent who has not ratified it or acquiesced in it for the statutory period of limitation. There is one exception. A custom, usage or customary right that occupancy rights can arise in such tenancies would not be inconsistent with the provisions of the Bengal Tenancy Act and in fact a local custom or usage in that regard is found in certain ghatwali tenures in this province especially in Chota Nagpur, that is to say, in real tenures as opposed to holdings of a ghatwali character. But, as already stated, no such custom or usage is alleged or proved by the defendant. And where, as in this instance, the service-tenancy is itself of the nature of a holding, the presumption is strong against a custom or usage that occupancy-right accrues to an under-tenant thereon and certainly not less strong than in the case of an under-raiyat under a raiyat who himself possesses a statutory right of occupancy.

Sir Sultan Ahmad has sought to bring the case of the respondent within the decisions in *Ram Kumar Bhattacharjee* v. *Ram Newaj Rajgur* (1); *Sitikanta Roy* v. *Bipra Das Charan* (2) and *Khetra Mohun Ghosh* v. *Lakhi Kanta Pal* (3) where it was held that an occupancy-right could arise in a service-tenancy under Act X of 1859. The first decision relates to a tenancy from 1846 in chaukidari-chakaran land, the second to a tenancy in a ghatwali tenure and the third to a service-tenancy under a zamindar. To my mind this question merits further consideration when an appropriate occasion arises (as indeed appears to have also been subsequently contemplated by Mookerjee, J., who delivered the first of these decisions) especially as regards tenancies in jagirs of a public servant which are of the nature of raiyati holdings. But even if such an occupancy-right could arise under Act X of 1859 and could do so in Bihar no less than in Bengal to which those decisions relate, it is a complete answer in the present instance that the defendant

(1) (1904) I. L. R. 31 Cal. 1021. (2) (1917-18) 22 Cal. W. N. 763.
(3) (1926) 44 Cal. L. J. 271.

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has, as already indicated, failed to establish that he ever held a right of occupancy under Act X of 1859 or even that he was a tenant prior to the operation of the Bengal Tenancy Act.

Accordingly so far as the first tenancy of 28 bighas and the additional lands which the tenant annexed thereto as part thereof, are concerned, the defendant has no right to remain thereon without the consent or against the will of his landlords, the plaintiffs. The notice to quit has been proved and is adequate whether it is or is not regarded as a notice under section 49 of the Bengal Tenancy Act. As stated by Sir Sultan Ahmad this tenancy includes plots 849 to 857 and part of plot 859.

The case in respect of the three bighas covered by the tenancy of 1902 which consists of plot 858 and the remainder of plot 859 is, however, different. The instrument which created it purports to confer a permanent tenancy and it was good against Mita, the present road-chaukidar, who has impliedly ratified it by allowing more than twelve years from the date of his appointment to elapse without questioning it. During his term of office, the respondent cannot be ejected. The suit must fail in respect of it.

Accordingly this appeal is allowed in part. The suit is decreed in respect of plots 849 to 857 both inclusive and part, that is, so much of plot 859 as remains after the portion of it covered by the instrument of 1902 is excluded. In respect of the lands covered by that instrument which consist of plot 858 and part of 859, the decree under appeal is maintained. If the exact land demised in plot 859 cannot be ascertained, there will be allotted to the respondent and demarcated by the Court at his instance so much of the land of plot 859 adjoining plot 858 as will with plot 858 make up an area of three local bighas.

Plaintiffs are also entitled to mesne profits in respect of the land recovered from the beginning of

1330 F. to the date of delivery of possession and to interest thereon. They are also entitled to five-sixths of their costs in all the Courts with future interest. Interest will be at six per cent. per annum.

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KULWANT SAHAY, J.—I agree.

Appeal allowed in part.

CRIMINAL REFERENCE.

Before Wort and Macpherson, JJ.

WAZIR KUNJRA.

v.

KING-EMPEROR.*

1928.

March, 16.

Code of Criminal Procedure, 1898 *(Act V of* 1898), *sections* 438 *and* 439—*High Court, jurisdiction of, to interfere with acquittal on reference by Sessions Judge.*

Section 438, Code of Criminal Procedure, 1898, covers all cases of irregularity and injustice including erroneous acquittals and certainly all such acquittals as the High Court would interfere with in revision under section 439 at the instance of a private party.

The High Court may well interfere with an acquittal on a reference made by the Sessions Judge even when it would not do so on a reference by a District Magistrate.

Siban Rai v. *Bhagwat Dass* (1), referred to.

This was a reference by the Sessions Judge of Monghyr under the provisions of section 438 of the Code of Criminal Procedure. His recommendation was that Wazir Kunjra who was acquitted by the Honorary Magistrate of Begusarai of an offence under section 326 of the Indian Penal Code be convicted of that offence.

Wazir was placed on his trial along with seven others including Bashir and Anis on a charge under section 148 of the Indian Penal Code of having rioted

*Criminal Reference no. 119 of 1927, made by S. B. Dhavle, Esq., I.C.S., Sessions Judge of Monghyr, in his letter no. 2828/X-1, dated the 21st/23rd December, 1927.

(1) (1926) I. L. R. 5 Pat. 25.