APPELLATE CIVIL.

Before Courtney Terrell, C.J. and Agarwala, J.

1932.

August, 10, 11.

MAHARAJA BAHADUR KESHO PRASAD SINGH

v.

RAM BARAN CHAUBEY.*

Bengal Tenancy Act, 1885 (Act VIII of 1885), section 47— "occupation", nature of—suit in ejectment on the ground of expiry of lease—defendant relying on anterior occupation—onus on defendant to prove occupation as a raiyat.

Section 47 of the Bengal Tenancy Act, 1885, provides :

"Where a raiyat has been in occupation of land and a lease is executed with a view to a continuance of his occupation, he is not to be deemed to be admitted to occupation by that lease for the purposes of this Chapter, notwithstanding that the lease may purport to admit him to occupation".

Held, that in order to avail himself of section 47, the raiyat must show that he was in occupation of the land *as a raiyat* before the *kabuliyat* and that the lease was executed with a view to continuance of that occupation, that is to say, occupation as a raiyat.

If, therefore, a raiyat, who is sued by his landlord in ejectment on the ground that his lease has come to an end, calculates his occupation from a period anterior to the commencement of the *kabuliyat*, he must establish, as a matter of fact, that his relationship with his landlord prior to that created by the *kabuliyat* was that of landlord and raiyat, the onus being upon him to establish that contention of fact.

Appeal by the plaintiff.

The facts of the case material to this report will appear from the judgment of Courtney Terrell, C.J.

S. M. Mullick (with him *Sunder Lal* and *R. N. Prasad*), for the appellant.

P. Dayal and *D. N. Verma*, for the respondent.

* Appeal from Original Decree no. 139 of 1929, from a decision of Babu Debi Prasad, Subordinate Judge of Shahabad, dated the 28th day of February, 1929.

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COURTNEY TERRELL, C.J.—This appeal arises out of a suit for ejectment brought by the Maharaja Bahadur of Dumraon against one Ram Baran Choubey. It is alleged by the plaintiff that the defendant entered into a lease with him for the occupation of certain land and that the period of the lease had expired and, therefore, that the plaintiff was entitled to possession.

The defence to the suit was that this lease which, by the way, the defendant says he had been fraudulently induced to execute, was a raiyati lease, and that even if the term of the lease had expired the plaintiff had no right to eject him for the following reason:—It is argued by the defendant that a non-occupancy raiyat cannot be ejected except for the reasons set forth in section 44 of the Bengal Tenancy Act and whereas the plaintiff claimed that the lease had expired, in fact the defendant had not been admitted to occupation by reason of the lease but had been admitted to occupation before the date of the lease and had acquired occupancy rights and, therefore, could not be ejected. The defendant also relied on section 47 of the Bengal Tenancy Act which enacts:—

"Where a raiyat has been in occupation of land and a lease is executed with a view to a continuance of his occupation, he is not to be deemed to be admitted to occupation by that lease for the purposes of this Chapter, notwithstanding that the lease may purport to admit him to occupation."

The defendant alleged that he had been in occupation prior to the date of the lease and that the lease was merely executed with a view to continuance of his occupation and, therefore, that he could not be deemed to be admitted to occupation by reason of the lease, no matter what the lease itself might say.

The point first arises as to the proper construction of section 44(*c*) and section 47 of the Bengal Tenancy Act. The effect of these two sections to my mind is this: It must be remembered first that the general object of the Act is the protection of raiyats and it may well be that a person who has been a raiyat may be inveigled by his landlord into executing a lease

imposing upon him no harder terms than he has hitherto borne but stating that the lease is to come to an end after a certain fixed period of time. The object of these two sections is to defeat this manoeuvre on the part of the landlord and, for the purpose of counting the period of occupancy, the real period of occupation as a raiyat is to be taken into account and not the period of occupation which may happen to be stated in the lease. If, therefore, a defendant who is sued by his landlord in ejectment on the ground that his lease has come to an end, is able to shew that in fact before the date of the lease he was a raiyat and in occupation of that same land in that capacity, he is entitled to count the period of his occupation from the period when in fact he came into occupation as a raiyat.

It has been argued by Mr. Parmeshwar Dayal on behalf of the defendant in this case that the meaning of the sections is not as I have just stated. He contends that provided the person sued (the defendant) can shew that under the terms of the lease he is a raiyat and provided that he can shew that prior to the lease which constituted him a raiyat he was in occupation of the land in any capacity, the period of occupation as a raiyat is to date from the beginning of his period of occupation in fact, notwithstanding that such earlier occupation before the date of the *kabuliyat* was not that of a raiyat. That that interpretation is erroneous may, I think, be illustrated by a simple example. We may suppose that *A* and *B* are two adjacent landlords, that *A* sells a portion of his land to *B* and that *B* in consideration of the price being low allows *A*, under the terms of a *kabuliyat*, notwithstanding the sale of the portion of *A's* land, to remain in cultivation as a raiyat for a fixed period of years, and that at the end of that period when *B* desired to eject *A* from the portion of the land *A* says " Not so. It is true that I have sold you this piece of land subsequently cultivating it as a raiyat for five years but whereas I was in occupation of the land long before the commencement of the *kabuliyat*—it is true

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as an owner—nevertheless I was in occupation long before the commencement of the *kabuliyat* and you cannot eject me. I am tied to you for ever and I am a raiyat for ever of this land under your landlordship." Such an illustration demonstrates the impossibility of the construction for which Mr. Parmeshwar Dayal contends. In my opinion the true construction of section 47 is this:—The defendant must shew that he was in occupation of the land as a raiyat before the *kabuliyat* and that the lease is executed with a view to continuance of that occupation, that is to say, occupation as a raiyat.

We approach the facts of this case now upon the basis of that construction of the sections. A great deal of time has been spent in discussing the precise nature of the *kabuliyat*. To my mind that is not very material for the determination of the case. It is true that if the *kabuliyat* is, as is contended by the plaintiff, one which does not create the relationship of landlord and raiyat but creates the relationship of landlord and tenure-holder then neither section 44 nor section 47 of the Bengal Tenancy Act has any application, but even if the *kabuliyat* does in fact create the relationship of landlord and raiyat, if the raiyat, whose term under the *kabuliyat* has expired, wishes to calculate his occupation from a period anterior to the commencement of the *kabuliyat* he must establish, as a matter of fact, that his relationship with his landlord prior to that created by the *kabuliyat* was that of landlord and raiyat, and the onus is upon him to establish that contention of fact.

The learned Subordinate Judge who has dismissed this suit has done so by reason of the fact that he has omitted to take into account the proper construction of the sections of the Bengal Tenancy Act and he has agreed with the view set forth in this appeal by Mr. Parmeshwar Dayal and has held, as a matter of fact, that the defendant has shewn that he was in occupation prior to the date of the *kabuliyat*. His attention has not been directed to the proper view that

that is not sufficient but that the defendant must shew that he was in occupation as a raiyat. In order to deal with the evidence on this point no simpler method can be employed than to approach the evidence of the defendant himself. According to his evidence it would appear that the land in dispute had formerly belonged to one Maulvi Ahed, and that these lands were sold in execution of a rent decree which was obtained by the Dumraon Raj some considerable time before the *kabuliyat*. The Raj got delivery of possession after the execution sale and the defendant, under some oral agreement the precise nature of which was not specified by him, came afterwards into possession of the land. He states that some of the land was in possession of raiyats and some remained in his possession. As to the raiyats he says that he realised rent from them and as to the rest he either realised the fruits of the *bagicha* land or cultivated that land which was not occupied by raiyats and he states that that state of affairs has continued. There are seven raiyats under the tenure, he says. He produced a series of counterfoil rent receipt books showing the rents which he has taken from the raiyats and the learned Subordinate Judge has accepted the genuineness of these receipts. They are Exhibits C to C-40 and what the learned Judge says is

> "These raiyats have produced rent receipts the genuineness of which I see no reason to doubt and from these receipts it is clear that Rambaran has been realising rent from the year 1326 Fasli."

Now the *kabuliyat* was not executed until the year 1327 F. and the series of receipts go back for several years. It is perfectly clear, therefore, that the position of the defendant before the date of the *kabuliyat* was that of one who held land which was in the cultivation of other persons from whom he received rent. He in his turn paid rent in respect of the entire land to the landlord, the Dumraon Raj.

A remark may be made as to the position of the actual cultivating tenants of the land. These persons appear to have been in cultivating possession for quite a long time anterior to the date of the *kabuliyat* and

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anterior to the date when the Maharaja purchased the land. After the purchase by the Maharaja, it is contended by him (the Maharaja) that they paid their rents to him although, as the learned Subordinate Judge points out, he has not been able to prove that to the Subordinate Judge's satisfaction. Nevertheless there being no intervening holder between the Maharaja and themselves, the tenants cannot occupy any position other than that of raiyats and the person who succeeded to the position of the Maharaja in the right to receive the rents cannot also be in the position of a raiyat in respect of the land for which the original raiyats still continue to pay him rent. The position, therefore, of the defendant prior to the date of the *kabuliyat* is certainly not established as that of a raiyat even if it be not conclusively established what precise position he held. I am inclined to think from the evidence that he was in fact in the position of taking rent from the tenants and cultivating the soil which was not in fact occupied by the tenants. In that capacity he is not a raiyat and may properly be described as a tenure-holder. It has, therefore, in my opinion, not been established by the defendant, as it was his duty to establish if he wished to avail himself of the defence he raised, that prior to the tenancy he held as a raiyat. In these circumstances and in view of what I consider the true construction of section 47 of the Bengal Tenancy Act, he is unable to take advantage of such occupation as he had, if any, prior to the date of the *kabuliyat*. Section 44(*c*) applies to the case, the period of tenancy has expired, in default of the defendant shewing that he had a prior occupation as a raiyat his occupation as a raiyat must be deemed, in the absence of other evidence, to have commenced from the time of his *kabuliyat* and it must be presumed, therefore, that he was inducted upon his raiyati occupation by reason of that *kabuliyat*. The plaintiff is, therefore, entitled to eject the defendant. I would allow this appeal and set aside the judgment of the learned Subordinate Judge and decree the plaintiff's suit with costs throughout. The case will

now go back to the lower court for determination of the amount of mesne profits.

AGARWALA, J.—I agree.

Appeal allowed.

FULL BENCH.

Before Courtney Terrell, C.J., Fazl Ali and Agarwala, JJ.

RAJENDRA PRASAD MISSIR

v.

KING-EMPEROR.*

Code of Criminal Procedure, 1898 (*Act V of* 1898), *section* 386(*1*)(*a*)—*attachment of undivided share of offender in moveable property belonging to joint family, whether legal.*

An undivided share of the offender in a moveable property belonging to the joint family of which the offender is one of the members cannot be attached under section 386(*1*)(*a*), Code of Criminal Procedure, 1898.

Queen Empress v. *Sita Nath Mitra*(1), followed.

The facts of the case material to this report are stated in the judgment of the court.

B. N. Mitter (with him *B. P. Jamuar*), for claimant in Criminal Revision 251 of 1932:—The undivided share of the offender in a moveable property belonging to the joint family of which he is one of the members cannot be seized under section 386(*1*)(*a*) of the Code of Criminal Procedure.

[*Chief Justice.*—Suppose it was a debt, could not the undivided share be proceeded against?]

It can be attached in execution of a Civil Court decree—*Deendyal Lall* v. *Jugdeep Narain Singh*(2). But it cannot be seized under section 386(*1*)(*a*) as a property "belonging to" the offender.

* Criminal Reference nos. 18 and 19 and Criminal Revision no. 251 of 1932. Reference made by S. Bashiruddin, Esq., Sessions Judge of Darbhanga, in his letter nos. 665 Criminal and 690 Criminal, dated respectively the 12th and 14th April, 1932 and Application for revision of the order of F. F. Madan, Esq., I.C.S., Sessions Judge of Shahabad, dated the 7th of May, 1932.

(1) (1892) I. L. R. 20 Cal. 478.

(2) (1877) I. L. R. 3 Cal. 198, P. C.