1929.

MAHARAJA-DHIRAJA OF DARBHANGA v. COMMISSIONER OF INCOME-TAX, BIHAR AND ORISSA.

not justified under the law in making the assessment at Patna but that he was bound under section 64 of the Act to do so at Darbhanga. Having regard to the circumstances of the case I am of opinion that the contention raised by the assessee cannot be sustained.

SAHAY, J.

I accordingly agree with my Lord the Chief Justice and would answer each of the questions raised in the manner proposed by his Lordship.

APPELLATE CIVIL.

1929.

April, 6, 8, 16.

Before Macpherson and Dhavle, JJ.

SHAIKH FAKIR MOHAMMAD

v.

MUSAMMAT SAKINA.*

Bengal Tenancy Act, 1885 (*Act VIII of* 1885), *section* 48, *scope of—tenancies not co-extensive—section whether applicable—limitation—under-raiyat holding under a raiyat at a fixed rent, whether governed by the section.*

Section 48, Bengal Tenancy Act, 1885, provides:

"The landlord of an under-raiyat holding at a money-rent shall not be entitled to recover rent exceeding the rent which he himself pays by more than the following percentage of the same, (namely):—(*a*) when the rent payable by the under-raiyat is payable under a registered lease or agreement, fifty per cent;....."

Held, that although the land held by a raiyat under a lease be not co-extensive with the land demised to an under-raiyat, the section is applicable, inter alia, (*i*) where it can be definitely shown that the holding is not held at a consolidated rent for the whole holding but that each plot or each class of land is held at a known rent of known rate of rent, and the rental is simply an aggregation of the rents of plots; (*ii*) where the portion demised to the under-tenant is assumed to be the only profit-yielding land thereof and the rent offered by the under-tenant is the rent of the entire

* Appeal from Appellate Decree no. 227 of 1928, from a decision of Babu Gajadhar Prasad, Additional Subordinate Judge of Monghyr, dated the 23rd November, 1927, affirming a decision of Babu Brajbilas Prasad, Munsif of Jamui, dated the 22nd November, 1926.

holding plus 50 per cent. thereof; or (*iii*) where, except nominally, the two tenancies are substantially co-extensive.

Natibulla Akanda v. *Badi Bepari* (1), followed.

Nim Chand Saha v. *Joy Chandra Nath* (2), discussed and distinguished.

Akram Ali v. *Anwar Ali* (3), distinguished.

Held, further, that the section is applicable to the case of a tenant under a raiyat holding at a fixed rent, the former being an under-raiyat within the meaning of the section.

Raj Kumar Datta Gupta v. *Ramani Mohan Kunda* (4) (decision of Cuming, J.) not followed.

Appeal by defendant no. 2.

The facts of the case material to this report are stated in the judgment of Macpherson, J.

S. N. Bose, for the appellant: Under section 48, Bengal Tenancy Act, the plaintiff is not entitled to realize more than the rent which she has had to pay to her landlord plus 50 per cent. of that rent. The lower appellate court has held that section 48 is inapplicable and reliance has been placed on *Nim Chand Saha* v. *Joy Chandra Nath* (2). It is not quite correct to say that section 48 does not apply where the tenancies are not co-extensive. I rely on *Natibullah Akanda* v. *Badi Bepari* (1) where the learned judges have discussed and distinguished the case of *Nim Chand Saha* v. *Joy Chandra Nath* (2). I go so far as to contend that *Nim Chand Saha's* case (2) is not correctly decided. Although in the present case the plaintiff pays a consolidated jama for the lands comprised in her deed of settlement, I am prepared to concede that the lands settled with me are the only profit-yielding part of the lands

(1) (1917) 42 Ind. Cas. 243.

(2) (1912) I. L. R. 39 Cal. 839.

(3) (1914) 24 Ind. Cas. 677.

(4) (1927) 104 Ind. Cas. 150.

1929.

SHAIKH FAKIR MUHAMMAD v. MUSAMMAT SAKINA.

covered by the plaintiff's patta and that the entire rent payable by her relates to the lands included in my kabuliyat. In this view of the matter the question of apportionment of the jama does not arise.

Furthermore, I submit that the two tenancies are, for practical purposes, co-extensive.

My second submission is that the Munsif of Jamui had no jurisdiction to try the suit, inasmuch as that part of the holding which lies within the territorial jurisdiction of Jamui has been found to be not in my possession.

Moreover, the plaintiff has not proved her title in respect of that land. I do not "hold" that land and, therefore, no part of my "holding" within the meaning of section 144, Bengal Tenancy Act, is situated within the local limits of Jamui.

Khurshaid Husnain (with him *Syed Ali Khan* and *H. R. Kazimi*), for the respondent: Section 48, Bengal Tenancy Act, has no application where the tenancies are not co-extensive. The jama for a holding is a consideration for the use and occupation of every bit of the land comprised in the holding. If only a part of the holding is sublet to an under-raiyat, the percentage contemplated by section 48 cannot be worked out as the jama cannot be apportioned. The point is concluded by the case of *Nim Chand Saha* v. *Joy Chandra Nath* (1). The authority of this case is not impaired by reason of the decision in *Natibullah Akanda* v. *Badi Bepari* (2) which was decided under circumstances very much dissimilar to those of the present case. I also rely on *Akram Ali* v. *Anwar Ali* (3). There is an additional factor in the present case which is this that the tenancies are not only not co-extensive but not identical as well. Some land covered by the plaintiff's lease has not been sublet to

(1) (1912) I. L. R. 39 Cal. 838.
(2) (1917) 42 Ind. Cas. 243.
(3) (1914) 24 Ind. Cas. 677.

the defendant whereas some land not held by the plaintiff under the lease has been included in the defendant's kabuliyat. Furthermore, the plaintiff, if a raiyat, is a raiyat at fixed rates and, therefore, the defendant is not an under-raiyat within the meaning of section 48, which is controlled by section 18. A lease is a "transfer" within the meaning of section 18. [See the decision of Cuming, J. in *Raj Kumar Datta Gupta* v. *Ramani Mohan Kunda* (1).]

[MACPHERSON, J.—All that we have got to find out is whether the defendant is an under-raiyat.]

My second submission is that on a correct interpretation of the kabuliyat I must be held to be a tenure-holder and the defendant a raiyat. In this view of the case also section 48 is inapplicable. On the question of jurisdiction I submit that the mere fact that the defendant has not been in possession of that part of the holding which lies within the territorial jurisdiction of the Munsif of Jamui will not oust the jurisdiction of that Munsif to try the suit. (Refers to Stroud's Legal Dictionary for the definition of "holding".) A tenant may be *holding* lands without at the same time *occupying* the same. (Refers to section 144, Bengal Tenancy Act.)

S. N. Bose, in reply: I rely on the decision of Cammiade, J. in *Raj Kumar Datta Gupta* v. *Ramani Mohan Kunda* (1). For the purposes of section 48 it is immaterial whether the raiyat is holding at fixed rates or not. The only question with which we are concerned is whether the defendant is an under-tenant and the plaintiff his landlord.

S. A. K. *Cur. adv. vult.*

MACPHERSON, J.—This second appeal is preferred by Fakir Muhammad who is the second of the three defendants in a suit instituted by the plaintiff-respondent in the Court of the Munsif of Jamui

(1) (1927) 104 Ind. Cas. 150.

1929.

SHAIKH FAKIR MUHAMMAD v. MUSAMMAT SAKINA.

MACPHERSON, J.

claiming rent for the years 1329 to 1332 F. with damages thereon on the basis of a kabuliyat, exhibit 1, dated the 17th May, 1921, under which the defendants jointly took settlement from the plaintiff at a rental of Rs. 272 per annum of an area of 29½ bighas approximately in village Alapur and .07 acre of land bearing khesra no. 373 of Karimpur Kamasi.

The appellant who alone contested the suit raised various defences claiming that he himself was the owner of the land having taken it by exhibit B (the deed of settlement with the plaintiff, dated the 1st July, 1920) at a jama of Rs. 44-4-0 through the husband of the plaintiff who fraudulently got her name entered in the deed, impugning the validity of the kabuliyat and contending that in any case under section 48 of the Bengal Tenancy Act the plaintiff is precluded from recovering rent at more than Rs. 66-6-0 per annum, that he (appellant) was not in possession of all the lands specified in the kabuliyat and that the Munsif of Jamui had no jurisdiction to try the suit.

The only one of the defences which the learned Munsif did not negative was that which related to the area of which the appellant was in possession. He held on the report of a commissioner that the contesting defendant was in possession of only 27½ bighas in Alapur. He decreed the suit for a rental which bears the same proportion to Rs. 272 per annum as 27½ bighas bears to the area demised in exhibit B.

An appeal by the contesting defendant was dismissed by the Subordinate Judge.

In second appeal the only questions raised by Mr. S. N. Bose are two which were negatived by the lower appellate Court in a sentence: (1) that under section 48 of the Bengal Tenancy Act the highest sum which can be decreed is Rs. 66-6-0 per annum; and (2) that the Munsif of Jamui had no jurisdiction to try the suit and the objection to jurisdiction was taken at the earliest possible opportunity.

As to the first point, the lower appellate Court has disposed of it by a reference to the decision in *Nim Chand Saha* v. *Joy Chandra Nath* (1) on the ground that the land demised by the kabuliyat is not co-extensive with the land held by the plaintiff under the patta exhibit B where the demise includes besides the same area in Alapur, four dhurs of land *daman-e-koh*, that is, at the base of the hills in plot 212 of mauza Sheikhpura which was not settled with the defendants by exhibit 1. It may be noted in passing that it has been found as a fact that the four dhurs in Sheikhpura and the four dhurs in Kamasi do as a matter of fact exist and that the registration of exhibits B and 1 respectively was valid. Mr. S. N. Bose has criticised the decision in *Nim Chand Saha* v. *Joy Chandra Nath* (1) and not without force. It certainly is subject to many qualifications, for instance, where it can be definitely shown that the holding is not held at a consolidated rent for the whole holding but that each plot or each class of land is held at a known rent or known rate of rents and the rental is simply an aggregation of the rents of plots (a case more common before 1885 than after that date and especially after the publication of a record-of rights) and especially in the circumstances found in cases such as *Natibulla Akanda* v. *Badi Bepari* (2) with which I respectfully concur. As in that case, Mr. Bose does not here raise the question whether on a strict application of section 48 a lesser rent might not be arrived at than 150 per cent. of the rent set out in exhibit B; he is content to assume that the area covered by exhibit 1 is "the only profit-yielding part of the holding covered by exhibit B to take the whole of the annual rent payable by the raiyat". As regards the decision in *Akram Ali* v. *Anwar Ali* (3) it is pointed out that the portion sublet was "a very small fraction of the holding" and the Judges stated "on the materials on record it is impossible

(1) (1912) I. L. R. 39 Cal. 839. (2) (1917) 42 Ind. Cas. 243.
(3) (1914) 24 Ind. Cas. 677.

1929.

SHAIKH FAKIR MUHAMMAD v. MUSAMMAT SAKINA.

MACPHERSON, J.

to distribute the rent payable by the plaintiffs on the land in suit" implying that the course adopted in *Natibulla Akanda* v. *Badi Bepari* (1) would not have been of advantage to the under-raiyat who was the appellant before the Court.

On behalf of the landlord-respondent Mr. Khurshaid Husnain supports the decree of the lower appellate Court in reliance on the decision in *Nim Chand Saha* v. *Joy Chandra Nath* (2), on the basis that the demise in exhibit B is *A* plus *X* and in exhibit 1 is *A* plus *Y*, so that the tenancies cannot be co-extensive. But though *X* and *Y* exist and are part of the consideration in each case, each is entered for a purpose unrelated to the substantial contract between the parties and each is infinitesimal in value and its effect upon the financial arrangement was and was intended to be nil. Except nominally the tenancy in exhibit 1 is co-extensive with exhibit B, and, if appellant is an under-raiyat, section 48 is not inapplicable and the maximum annual rent which plaintiff can recover from appellant is Rs. 66-6-0.

Mr. Khurshaid Husnain, however, advances the further contentions that section 48 does not apply (*1*) as the plaintiff is not a raiyat but a tenure-holder and, therefore, appellant is a raiyat and not an under-raiyat, and (*2*) as plaintiff, if a raiyat, is a raiyat at fixed rates.

The second argument is supported by reference to the judgment of Cuming, J. in *Raj Kumar Datta Gupta* v. *Ramani Mohan Kunda* (3), and it is urged that section 48 of the Bengal Tenancy Act is controlled by section 18 so that if a raiyat at a fixed rent leases his holding, the lessee will not be an under-raiyat within the purview of section 48. In the case cited Cammiade, J. took the opposite view. To my mind the argument has nothing to commend it. If the plaintiff is a raiyat, and the appellant holds under

(1) (1917) 42 Ind. Cas. 243. (2) (1912) I. L. R. 39 Cal. 839.
(3) (1927) 104 Ind. Cas. 150.

plaintiff the whole or a part of the holding of the plaintiff settled with appellant for the purpose of cultivating it, then under the definition appellant is an under-raiyat, plaintiff is the landlord of appellant the under-raiyat, and section 48 applies, the point whether plaintiff holds at a fixed rent or at a variable rent being entirely immaterial, unless conceivably in exceptional circumstances which do not exist here.

The first plea is, however, well-founded and must prevail. We have before us an official translation made of exhibit B from which it is manifest that a raiyati settlement is not made therein. The lands in Alapur were bakasht of the executants. There was a premium of Rs. 2,890-6-0, and the annual payment of Rs. 44-4-0 is termed haqajiri inclusive of cesses

"so that there may be no difficulty in paying the Government demand."

The tenancy is called permanent mukarrari and the transferee is never alluded to as raiyat but as mukarraridar. There is no statutory presumption from the area that the plaintiff is a raiyat, and there is no indication in exhibit B that the person acquiring the right to hold the land has done so for the purpose of cultivating it himself or by members of his family or by hired servants or with the aid of partners. On the contrary the indications are all against any acquisition for such a purpose as the transferee is a pardanashin lady living in a different village who promptly let out the whole area for seven years. In my opinion the plaintiff's plea must be sustained, however little she may eventually relish the consequences of her success. The plaintiff is not a raiyat but a tenure-holder and the appellant is a raiyat and not an under-raiyat. Section 48, therefore, does not apply and the first contention in appeal fails.

Being content with the decision that he is not an under-raiyat for the purposes of section 48, Mr. S. N. Bose does not propose to press the appeal further.

1929.

SHAIKH FAKIR MUHAMMAD v. MUSAMMAT SAKINA.

MACPHERSON, J.

The lower appellate Court rejected the second plea on the ground that a portion of the land covered by the kabuliyat was within the jurisdiction of the Munsif. There is also nothing to show that the plaintiff, though in the absence of the kebala, which absence was explained, she had not satisfactorily proved her title to the land situated in the Jamui Munsifi, had not a bona fide claim to the land and also was not in possession. Appellant did not take actual possession because it was not worth while. It has not been shown that his lack of possession of part of the tenancy demised is due to laches on plaintiff's part. The plea, if pressed, would have failed.

In my opinion this appeal fails and I would dismiss it with costs.

DHAVLE, J.—I agree.

Appeal dismissed.

S.A.K.

APPELLATE CIVIL.

1929.

April, 26.

Before Terrel, C. J. and James, J.

SYED JAHAR ALI

v.

MUSAMMAT MUSHARATAN NISSABIBI.*

Provincial Insolvency Act, 1920 (*Act V of* 1920)—*adjudication, conditional order of—insolvent directed to pay certain sum out of salary as a condition precedent—Code of Civil Procedure*, 1908 (*Act V of* 1908), *section* 60 (*1*).

A conditional order of adjudication whereby an insolvent is directed to pay a sum of Rs. 6 a month out of his salary as a condition precedent to his being adjudicated an insolvent, is illegal by reason of the provisions of section 60 (1), Code of Civil Procedure, 1908.

The fact of the case material to this report is stated in the judgment of James, J.

* *Circuit Court, Cuttack.* Miscellaneous Appeal no. 20 of 1928, from an order of H. R. Meredith, Esq., I.C.S., District Judge of Cuttack, dated the 7th May, 1928.