APPELLATE CIVIL.

Before Wort and Varma, JJ.

1937.

August, 25.

KABIR RAM

v.

GIRO MAHTO.*

Chota Nagpur Tenancy Act, 1908 (*Beng. Act VI of* 1908), *sections* 46 *and* 139—" *trespasser* ", *meaning of, within section* 139(4*A*)—*suit to eject under-raiyat—lease before* 1908—*section* 46, *whether applicable—suit, whether one under the Act—section* 139(4).

Section 139 of the Chota Nagpur Tenancy Act, 1908, provides—

" The following suits and applications shall be cognizable by the Deputy Commissioner and shall be instituted and tried or heard under the provisions of this Act, and shall not be cognizable in any other court, except as otherwise provided in this Act, namely:—

* * * * * *

(4) all suits and applications under this Act to eject any tenant of agricultural land or to cancel any lease of agricultural land;

(4*A*) all suits for ejectment of a trespasser where the plaintiff claims an alternative relief that the defendant be declared liable to pay for the land in his possession a fair rent;"

Plaintiffs brought a suit for the possession of a holding treating the defendants as under-raiyats, who were inducted on the land by virtue of a lease made in 1901. The defendants continued in possession even after the expiry of the lease, the plaintiffs having accepted rent during this period. The plaintiffs then gave notice to quit and on the failure of defendants to give up possession of the holding the suit in ejectment was brought.

Held, (*i*) that the defendants were not trespassers within the meaning of section 139(4*A*) of the Act; the class of persons contemplated by the section are those who have gone upon the land with no sort of right and were trespassers ab initio;

* Appeal from Appellate Decree no. 882 of 1934, from a decision of H. Whittaker, Esq., I.C.S., Judicial Commissioner of Chota Nagpur, dated the 28th of July, 1934, affirming a decision of Babu Ramchandra Misra, Munsif of Giridih, dated the 26th of April, 1934.

(*ii*) that although the cause of action accrued to the plaintiffs after 1908, it was not in respect of a matter which was provided for by the Act, section 46; that being so, the action was not under the Act and was not therefore hit by section 139(*4*).

Appeal by the plaintiffs.

The facts of the case material to this report are set out in the judgment of Wort, J.

B. C. De and *S. C. Mazumdar*, for the appellants.

Bindeshwari Prasad, for the respondents.

WORT, J.—This is an appeal from the decision of the Judicial Commissioner of Chota Nagpur arising out of an action in which the plaintiffs claimed possession of a holding treating the defendants to be under-raiyats within the meaning of section 4 of the Chota Nagpur Tenancy Act (VI of 1908). I mention the definition in section 4, although it is one of the contentions of Mr. De, appearing on behalf of the appellants, that the Act of 1908 does not apply to the circumstances of this case.

There are two substantial points for determination. The first is whether the defendants, as they pleaded, were occupancy raiyats; and, secondly, whether the Civil Court had jurisdiction. The latter question was not raised in the Courts below but it is raised here. A decision of Das and Adami, JJ. [*Madhab Poddar* v. *Lall Singh*(1)] is relied upon for contending that the Civil Court had no jurisdiction. A further decision of this Court in *Musammat Jageshwar Kuer* v. *Tilakdhari Singh*(2) to the same effect is also relied upon. In this latter case the plaintiff sought to eject a non-occupancy raiyat and the learned Chief Justice in the course of his judgment said as follows: "The suit as framed was one to eject trespassers, but on the facts found the defendants were not trespassers but non-occupancy raiyats,

(1) (1926) I. L. R. 6 Pat. 69.
(2) (1923) 5 Pat. L. T. 422.

1937.

KABIR RAM v. GIRO MAHTO.

WORT, J.

As no suit to eject non-occupancy raiyats could be tried in the Civil Court the question of the plaintiffs' rights against them could not be determined in the present suit "; and he held accordingly.

Now the sections to be considered in this regard are section 46 and section 139 of the Chota Nagpur Tenancy Act. I should have mentioned also section 68 with section 139, which by clause (*4*) provides

> " all suits and applications under this Act to eject any tenant of agricultural land or to cancel any lease of agricultural land "

and by (*4A*)—

> " all suits for ejectment of a trespasser where the plaintiff claims as alternative relief that the defendant be declared liable to pay for the land in his possession a fair rent ".

These are two classes of cases which under the Act are excluded from the jurisdiction of the Civil Court. Then we come back to section 68 of the Act which provides—

> " No tenant shall be ejected from his tenancy or any portion thereof except in execution of a decree, or in execution of an order of the Deputy Commissioner passed under this Act."

Then comes section 46 and it is sought by the respondents to bring this case under clause (*4*) of that section which runs as follows :—

> " At any time within three years after the expiration of the period for which a raiyat has, under this section, transferred his right in his holding or any portion thereof, the Deputy Commissioner may, in his discretion, on the application of the raiyat, put the raiyat into possession of such holding or portion in the prescribed manner."

The question, therefore, to be determined is whether within the meaning of section 139 of the Chota Nagpur Tenancy Act, clauses (*4*) and (*4A*), it is a suit or application " under the Act ". There has been an argument addressed to us by the appellants which rather surprises me having regard to the provisions of section 139 (*4A*). It is contended that the defendants are mere trespassers. If the defendants are to be considered trespassers simpliciter then the plaintiffs

can bring an action for the ejectment of the trespassers coming within clause (*4A*) of section 139 of the Act. But I am confident that the legislature never intended this part of the Act to be construed in that way. If a plaintiff is entitled to eject a person, whether he has been a tenant or not, the mere fact that he is entitled to eject him and have a decree to that effect signifies that the defendant is a trespasser. Therefore in that sense all persons against whom such a claim arises are trespassers and will prima facie come under clause (*4A*) of section 139. But I am equally confident that what the legislature intended to provide for was the class of case in which the person whom it was sought to eject has gone upon the land with no sort of right and was a trespasser ab initio.

Then we come back to section 46. Mr. De contends that he does not come within the mischief of section 46, because at the time when he made the transfer in 1901 neither the present Act (VI of 1908) nor the Chota Nagpur Landlord and Tenant Procedure Act (I of 1879) had come into force. The Amending Act came into force in 1903 by the new section which was added to the original Act being 10B which by clause (*4*) provides:

"At any time after the expiration of the period for which a raiyat has, under this section, transferred his right in his holding or any portion thereof, the Deputy Commissioner may, in his discretion, on the application of the raiyat, put the raiyat into possession of such holding or portion."

Mr. De argues, and in my judgment correctly argues, that he does not come within that amendment: in other words, although the cause of action which he is now asserting arose after 1908 it was not a cause of action in respect of a matter which was provided for either by the Act of 1908 or that of 1903, and he is therefore not met with clause (*4*) of section 139 of the present Act in the suit, nor is he making a suit or application under the Chota Nagpur Tenancy Act. I should have stated that, as the basis of the argument with which I am dealing, Mr. De contended

1937.

KABIR RAM v. GIRO MAHTO.

WORT, J.

that the cause of action arose on the 4th of June, 1904, when the lease or kabuliyat to the defendants expired. That argument in my judgment is untenable. It is true that the moment after the lease had expired the plaintiffs could have ejected the defendants, but when they accepted rent that cause of action disappeared, and the present cause of action is one which is based upon the alleged notice to quit to the defendants.

Now, the other question is whether the defendants have occupancy rights. One of the last arguments addressed to us was an assertion of those rights by reason of occupation for a period of twelve years. That argument cannot be supported. The plaintiffs themselves are occupancy raiyats and the defendants cannot acquire occupancy rights, which properly belonged to their landlords, the plaintiffs, during the period for which they have recognized the landlords' title by payment of rent. That in my judgment is a sufficient answer to that point. But it is now contended that the judgment of the learned Judge in the Court below was correct because the Judge there said that the entry in the record-of-rights was correct and that although the settlement officer stated those rights to have arisen under the kabuliyat there might have been some other evidence. The matter will be clear by making one or two statements. First of all, the presumption of correctness attaches to the entry and to nothing else. The statement in that entry is rebuttable. In this case it was quite clearly held by the trial judge, and in that respect I am of the opinion that he was right, that no such rights arose under the kabuliyat. The suggestion that there might have been evidence other than the kabuliyat itself is precluded by the statement in the entry that the occupancy rights arose under the kabuliyat. When once, therefore, the kabuliyat is produced and the rights are shown not to come into existence by reason of that kabuliyat, it seems to me quite clear that the entry is rebutted. In my opinion whichever way one looks

at this case it is quite clear that the defendants had no occupancy rights. It is suggested that they were not possessed of full occupancy rights (to use the expression of the argument) but something short of them. If that is so, there is a clear authority of this Court that such rights of an original tenant are not heritable and it will be necessary for the defendant, who is the son of the original tenant, to acquire them by custom or otherwise: in other words, the son could not take advantage of such rights as his father possessed. There is no evidence of custom here as the learned Judge of the trial court pointed out and, therefore, on that footing also the defendants have failed to establish their rights. The learned Judge in the Court below is in error when he states that the onus was on the plaintiffs.

As to notice to quit, the trial Judge came to the conclusion that there was no notice or at least, if there was any, it was not proved. The appellate court is uncertain as to that matter and has not decided it. In my judgment reasonable notice is necessary and, therefore, there should be a decision on that question. The matter will, therefore, go back to the learned Judicial Commissioner to determine the question whether a notice to quit has been served on the defendants. If he finds that such a notice has been served, the plaintiffs will be entitled to judgment.

With these observations I would remand the case for the determination of that question and the costs of this case will abide the result of hearing in the court below.

VARMA, J.—I agree.

Appeal allowed.

Case remanded.

S. A. K.