CHANDRABATI KOERI AND ANOTHER (PLAINTIFFS) *v.* E. T. HARRINGTON (DEFENDANT).

[On appeal from the High Court at Calcutta.]

*P.C.**
1890
*December*
18 *and* 19.
1891
*February* 7.

*Right of occupancy—Act X of* 1859 (*Bengal Rent Law*), *sections* 6 *and* 7—*Bengal Rent Act* (*Bengal Act VIII of* 1869) *sections* 6 *and* 7—*Mostajiri lease—Cultivating possession.*

Under Bengal Act VIII of 1869, sections 6 and 7, as well as previously under the similar sections 6 and 7 of the Rent Act, X of 1859, a raiyat paying rent for and cultivating land continuously for a period of twelve years had a right of occupancy, whether he held under a potta or not (1).

In reference to this, it was *held* that a lessee of land continuously in cultivating possession for a period of twelve years, under several written leases or pottas, which were for specified terms of years, but in which there was no express stipulation for the landlord's re-entry on their expiration, had a right of occupancy. The mere existence of a term in a lease was not an " express stipulation" to the contrary, within the meaning of section 7, so as to exclude the right of occupancy.

The decision of the Full Bench in *Sheo Prokash Misser* v. *Ram Sahai Singh* (2) approved, and held applicable.

In a suit for the recovery of possession, with mesne profits, of land, brought by a lessor against a tenant holding over, the defence was, as to part of the land, that the tenant had a right of occupancy, his cultivating possession having lasted for more than twelve years. The right was established, but the burden of proving to which part of the land it attached was upon the tenant, and for proof as to this the suit was remanded.

APPEAL from a decree (4th June 1888) of the High Court, reversing a decree (31st March 1886) of the Second Subordinate Judge of Bhagulpore.

The appellants, who brought this suit, were the zemindars of a separated one-third share of a mouzah, named Dahia, in pergunnah Naipore, in the Bhagulpore district. The respondent, defendant in the first Court, was the owner of the estate named Bhugwanpore, belonging to a neighbouring indigo factory, and lessee of land within Dahia. The plaint (13th March 1885) alleged, as the

* *Present*—LORD HOBHOUSE, LORD MACNAGHTEN, and SIR R. COUCH.

(1) These Acts were wholly repealed by the Bengal Tenancy Act, VIII of 1885, of the Governor-General in Council, which gives the law now in force on the subjects to which they related.

(2) 8 B. L. R., 165.

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ground of suit, that on the 3rd July 1877 the plaintiffs granted a lease to the defendant of land somewhat less than their share of Dahia, comprising 89 bighas and some fractions, for a term of seven years, which lease expired on the 5th September 1884, when the defendant, though required to give up possession, refused to do so. They claimed possession of the leased land, to be marked out in accordance with maps filed by them, and mesne profits from the above date.

The defendant, by his written statement, admitted the lease and his kabuliyat; but as to 34 bighas 3 cottahs $8\frac{3}{4}$ dhoors, part of the land leased, he alleged that he had long been in possession, before the date of the lease, of 85 bigahs in the entire of Dahia, so that before 1870 he had acquired a right of occupancy; and that out of them the 34 bigahs odd had under a partition of the revenue-paying estate in which Dahia was with other villages included (a partition made by the Collector in 1874) fallen into the putti or separate one-third share of the plaintiffs; and that of this he had a right to retain possession on his previously-acquired title as a tenant with rights of occupancy. He claimed the latter rights under the 6th section of Act VIII of 1869 of the Bengal Council, or the 20th section of the Bengal Tenancy Act IV of 1882 of the Acts of the Government of India. (1)

Having fixed issues as to whether the defendant's possession of the disputed land commenced with the lease of July 1877, and whether he had a right to hold after its termination, the Subordinate Judge decided that "the defendant's possession

(1) Sections 6 and 7 were practically identical in both the Bengal Rent Act, X of 1859, of the Legislative Council of India, and the Act of the Bengal Council, VIII of 1869. Section 6 enacted as follows:—"Every raiyat who has cultivated, or held, land for a period of twelve years, has a right of occupancy in the land so cultivated, or held by him, whether it is held under a potta or not, so long as he pays the rent payable on account of the same . . . . . . . . . . . . . . . . . . . The holding of his father, or other person from whom a raiyat inherits, shall be deemed to be the holding of the raiyat within the meaning of this section." Section 7 enacted:—"Nothing contained in the last preceding section shall be held to affect the terms of any written contract for the cultivation of land entered into between a landholder and a raiyat, when it contains any express stipulation contrary thereto."

of the plaintiffs' land was all along under one or another mostajiri, or farming lease." The result was a decree for the plaintiffs.

On the defendant's appeal, the High Court (NORRIS and O'KINEALY, JJ.,) differing from the first Court, held that, though the defendant had taken a lease from the plaintiffs in 1867 for nine years of their share, during which term the butwara of Dahia had taken place, and the lands of the alleged jote had fallen to the plaintiffs in severalty, the defendant had during those butwara proceedings asserted, without contradiction from anyone, his right as jotedar, and that therefore when the defendant in July 1877 took, on the expiration of the first term, a second lease for seven years of the plaintiffs' whole share, he should, in the absence of any expressed reference to the jote in the lease, be presumed to have continued to be both lessee for a term and jotedar, *i.e.*, with a right of perpetual occupancy as to the lands of the jote, and one limited to seven years as to those outside it. And they remanded the suit for the purpose of having the boundaries of the defendant's jote, in which he claimed a right of occupancy, ascertained and laid down on a map. On this remand, an amin was deputed by the lower Court to identify the land, by reference to the butwara, the lease, and other papers, and to make a map. After hearing objections to the return made, under section 567 of the Civil Procedure Code, the High Court (NORRIS and BEVERLEY, JJ.) held that the remand order had been substantially carried out. They allowed the appeal, dismissing the suit, limiting the costs of the appeal to the first hearing, and making the defendant bear his own costs of the enquiry under the remand order.

The plaintiffs now appealed.

Mr. *R. V. Doyne*, for the appellants, argued that the respondent had, in fact, failed to show the right of occupancy by him as a raiyat, and therefore could not defend his retention of possession. He could not have derived occupancy rights from other proprietors of the mauza before the partition of 1874, as against the appellants, who were not parties to any such arrangement; and in order to make good his claim to the right of occupancy, he should have shown that he held as a cultivating raiyat under

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them. This he had not shown; and besides this defect in his case, he had, by taking the lease of 3rd July 1877, admitted the absence of such a right, and must be considered as having surrendered it, if any such right had previously existed. The lease expired in 1884, and the respondent was now retaining possession of the whole of the appellants' share of Dahia. It further appeared from the return made by the amin that no defined area was in the respondent's possession, as to which it could be maintained with probability that over such distinct portion of the appellants' share he exercised occupancy rights. The state of things contemplated by sections 6 and 7 of Act X of 1859, and of the Bengal Act VIII of 1869, did not here exist.

Mr. *T. H. Cowie, Q.C.*, and Mr. *J. H. A. Branson*, for the respondent, argued that the right of occupancy had been correctly held to be an incident of the respondent's tenure. He claimed his jote, or tenanted land, of which he had been in cultivating possession for more than twelve years. He therefore had a right of occupancy, as being a tenant who himself took the profits of the cultivation carried on by those whom he employed. The sections of the Bengal Act VIII of 1869 were applicable, and might be shown to correspond with those of the Act of the Government of India, the Bengal Tenancy Act, VIII of 1885, which did not, however, govern this case. The question was only as to the effect of the respondent having held under leases, which, however, as they did not contain anything that was inconsistent with his acquiring rights of occupancy under the enactments in force while he held cultivating possession, did not contain any such "express stipulation to the contrary" as was contemplated in section 7.

They referred to *Kaleechurn Singh* v. *Ameerooddeen* (1), *Sheo Prokash Misser* v. *Ram Sahai Singh* (2), *Soorut Soondri Dabea* v. *Jardine, Skinner & Co.* (3), *Laidley* v. *Gourgobind Sirkar* (4), and *Dhunput Singh* v. *Gooman Singh* (5).

(1) 9 W. R., 579.
(2) 8 B. L. R., 165; 17 W. R., 62.
(3) 25 W. R., 347; on app. L. R., 5 I. A., 164, 3 C. L. R. 140.
(4) I. L. R., 11 Calc., 501.
(5) W. R., Act X, 61.

Mr. *R. V. Doyne* replied.

Their Lordships' judgment was delivered by

SIR R. COUCH.—The plaintiffs in this suit and appellants in this appeal alleged in their plaint, which asked for recovery of possession and mesne profits, that they are proprietors and zemindars of a third share of mouzah Dahia, pergunnah Naipore, and that a mostajiri settlement—a lease—of the mouzah, except 3 bighas 14 cottahs of khodkasht land, dated the 3rd July 1877, was made by the plaintiffs and the husband of the first plaintiff to the defendant: that at the expiration of the lease the defendant did not give up possession of the leased share of the mouzah, and was forcibly holding possession thereof. The plaint was filed on the 13th March 1885, the defendant being stated therein to be Mr. T. Poe.

In the order sheet in the record of proceedings, it appears that on the 17th April, before the time allowed for filing the defendant's written statement expired, an order was made on the petition of the plaintiff that E. T. Harrington should be made a defendant in the place of A. T. Pugh, and the plaint be amended accordingly. A. T. Pugh is evidently a mistake for T. Poe, which is not the only inaccuracy in names in the documents in the suit. This order is not in the proceedings, and the reason for making it does not appear. It could not, however, have been made under section 368 of the Code of Civil Procedure, in consequence of the death of T. Poe, as in that case a summons would have been issued to Harrington, as his representative, to appear and defend the suit, which does not appear in the order sheet to have been done. Apparently the suit was continued against Poe under the name of Harrington. Poe is the person who is stated in the plaint to be holding possession when it was filed, and is described in the title of it as proprietor of the Bhugwanpore concern—meaning the indigo factory. This is material as to the right of occupancy which is one of the questions in the case. A right of occupancy cannot be transferred, and it is necessary that Poe should have been in continuous occupation.

In the written statement of Harrington, filed on the 11th May, the defence set up is "that since a long time the defendant, as tenant, got possession of 85 bighas of land in mouzah Dahia

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while the aforesaid mouzah was joint. Before 1278 F.—1870—" the defendant acquired the right of possession in respect of the aforesaid land. Out of the aforesaid land 34 bighas 3 cottahs 8¾ dhoors has under the butwara"—partition—"fallen into the putti"—share—" of the plaintiffs, and it has been held by the defendant as tenant after the expiration of the term of lease. The defendant being a tenant enjoying the right of occupancy is not liable to ejectment." In another written statement of Harrington, filed on the 12th May, the same defence is set up as to the 34, &c., bighas, and it is said that the remaining land is not held by the defendant. Thus there were two questions—(1) Whether the defendant had acquired a right of occupancy in the 34, &c., bighas. (2) Whether the defendant was in possession of the remaining land. The Lower Court decided both questions in the plaintiffs' favour. The High Court has reversed the decree, and ordered the suit to be dismissed. Their Lordships have to decide both questions.

As to the first, the evidence is both oral and documentary. The witness Jowhur Lal, 73 years old, an inhabitant of Dahia and a small shareholder in Hurpore Chuhar, the principal mouzah, deposed that for 34 or 35 years before the trial 34 bighas in Dahia had been in the possession of the factory under indigo cultivation; and the witness Nund Lal Roy, aged 60 years, a shareholder in Dahia, deposed that indigo was planted by the factory in 34 bighas which now "lie in the putti (or share) of the plaintiffs;" that at the time of the ijmali (the joint ownership) they were in the putti of the other two-third sharers; that the 34 bighas were granted to the saheb—meaning the factory—34 or 35 years before the trial, and since that time the factory had been in possession of the 34 bighas cultivating indigo. Other witnesses deposed to the same effect.

By a pottah bearing a native date, corresponding with the 29th May 1856, Bahal Roy and Dukha Roy, described therein as shareholding proprietors of mouzah Harpore Jower and two dependent mouzahs, leased about one-ninth share held and owned by them to Mr. A. B. Lowe, mokhtar, on behalf of Mr. Kitt Macleod, proprietor of the Bhugwanpore and Surajpore factories. The lease stated that the lessee had been in possession and occupation of the

leased property, and was to cultivate indigo or other crops and get cultivation made.



In April in the following year one Posan Roy presented a petition to the Magistrate under Act IV of 1840, regarding the possession of 29 bighas 11 cottahs 6 dhoors of khodkasht land in mouzah Dahia, the dakhili of mouzah Hurpore Chuhar. The petition stated that certain persons whose names are given, proprietors of a portion of mouzah Hurpore Chuhar and Hurpore Berhal, granted a ticca pottah (in respect of usli and dakhili) in favour of Mr. Macdonald, the proprietor of the Bhugwanpore factory, and that the servants of the factory had ploughed up the crops sown by the petitioner and had dispossessed him, and prayed that possession might be awarded to him.

The record of the Magistrate's judgment is dated the 21st April 1857, and the defendant is stated to be Mr. E. T. Poe, proprietor of the Bhugwanpore indigo factory. The case was dismissed on the ground that the plaintiff had failed to prove any one of three points:—(1) That the land was in the plaintiff's possession as a shareholder in Dahia; (2) that the land was in Dahia; (3) that the parties who granted a lease of their share to Mr. Poe had no share in Dahia. It is immaterial whether the former proprietor of the factory was called McLeod or Macdonald. Mr. Poe appears to be then the proprietor, and in a receipt for rent in 1859, which will be hereafter noticed, he is called proprietor by purchase of 16 annas (the whole) of the factories of Bhugwanpore, &c. The Subordinate Judge takes a very erroneous view of this judgment when he says of it in his judgment:—"It is conclusive proof showing that the raiyati holding now set up did not then exist." It was not proof as to any holding. It proved only that a charge of dispossession was made against Mr. Poe and was dismissed. As it does not appear that the plaintiffs or any persons through whom they claim were parties to the proceeding, the statements in the petition are not evidence either for or against the plaintiffs.

There are in the evidence six receipts for money received "from the general agent of Mr. E. T. Poe" for rent of land in indigo and jai (oat) cultivation. They are dated as follows:—30th September 1859 (two), 23rd July 1860, 5th July 1862, 3rd February 1864, and 14th March 1868. There is also in the record a

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kabuliyat executed by Mr. L. G. Crowdy, described as mokhtar of the Bhugwanpore, Surajpore, and other concerns, pergunnah Naipore, which states that he had leased a third out of the whole of mouzah Dahia at an annual rental of Rs. 525 from the beginning of 1275 to 1283F. (September 1867 to September 1876), being a period of nine years, and on receipt of a pottah from Mussummat Chandrabati Koeri, daughter of Janki Roy, deceased, and mother and guardian of Goman Singh, minor, had entered into possession of the estate leased. Then follow these words :—"For this reason, I do hereby declare that I the declarant shall by good treatment keep the resident and non-resident tenants satisfied and contented, and shall to the best of my ability cultivate or get others to cultivate the aforesaid village with indigo or with other crops." The pottah is not in the record. In 1874 the owners of Dahia took proceedings to obtain a partition of it, and on the 15th June 1874 Mr. William S. Crowdy, described as the manager and general agent of the indigo factory of Bhugwanpore, presented a petition, complaining that the butwara (partition) amin had omitted to record in his measurement of the lands of the mehal Hurpore Chuhar the indigo cultivations made by the Bhugwanpore factory in about 85 bighas of land of the mehal, which it was his duty to do. The Deputy Collector dismissed this petition on an explanation made by the amin that he had recorded the name of the malik—the owner. On an appeal to the Collector he allowed the appeal, and by an order dated the 6th August 1874, he directed the amin "to mention the plots under indigo, together with the names of the planter and the concern." This was done, and there is in the record an extract from the khusra (rough paper) of measurement of the lands of mehal Dahia prepared by the partition amins. In this 36 bighas 18 cottahs 6 dhoors of land are stated to be "in the zerat cultivation of indigo of the Bhugwanpore factory."

Of the documents in evidence, the next in date are a lease and kabuliyat thereon, dated the 3rd July 1877, the lease being, with other lands of other owners, of the third share of Dahia, which had been awarded to Chandrabati Koeri in the partition. It is the lease referred to in the plaint as the foundation of the suit. In it and in the kabuliyat there is a provision that the lessee is to

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cultivate and get others to cultivate indigo, oats, or any other grain or crop.

Both the first Court and the High Court have found, what in their Lordships' opinion is proved by the evidence, that the defendant had possession of the land in the plaintiffs' putti, which he now states to be 34 bighas 3 cottahs 8¾ dhoors, from 1856. But the First Court held that the "possession was all along under one or another mostajiri lease, and that therefore he did not acquire any right of occupancy." The High Court held that there was a right of occupancy, but the grounds of their opinion do not appear to their Lordships to be clearly stated. It appears to their Lordships that the leases were for the purpose of cultivating the land as a raiyat and were not ijaras; and that the decision of the Full Bench in *Sheo Prokash Misser* v. *Ram Sahoy Sing* (1) is applicable to this case. There it was held under Bengal Act VIII of 1869, the law in force during part of the occupation in that case, and under Act X of 1859 previously in force, that a raiyat who has held or cultivated a piece of land continuously for more than 12 years, but under several written leases or pottahs each for a specific term of years, in which there is no express stipulation for re-entry, is entitled to claim a right of occupancy in that land. Therefore, in the opinion of their Lordships, there is a good defence to the suit so far as regards the 34 bighas 3 cottahs 8¾ dhoors.

The plaint stated that the quantity of cultivated land in Dahia, except 3 bighas 14 cottahs, which were excluded from the pottah and kabuliyat, was 89 bighas 7 cottahs 7 dhoors 15 dhoorkis. The defendant in his written statement said this was not true; that, "according to the measurement which took place in 1880, only 63 bighas 9 cottahs 13 dhoors 15 dhoorkis of land was found to comprise the entire putti of the plaintiffs which was held by the defendant." As the suit was dismissed by the High Court, this question of the quantity of land included in the lease has not been determined by that Court in this suit. In a suit for rent which by consent of the parties was tried together with this suit, the first Court decided this question against the defendant, and there does not appear to have been any appeal upon it.

(1) 8 B. L. R., 165; 17 W. R., 62.

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As to the second question—possession by the defendant of the remaining land—the first Court thought there was reliable evidence that the defendant was in possession, referring to three of the plaintiff's witnesses as proving it. The defendant appears to have mainly relied upon a lease to one Mannu Chowdry, made by Muna Koeri, the mother-in-law of Chundrabati, dated the 25th November 1884. This lease alone, if really made, would not be evidence of possession by Mannu Chowdry, and only one witness, Dukha Mahton, a holder of two bighas, deposed to payment of rent to him. Neither Mannu Chowdry nor Mr. Crowdy, the manager of the factory, who must have known about the possession, was called as a witness, nor any proof given that either of them could not be called. The High Court found that the defendant was not in possession of the land; that it was in possession of the "plaintiff's mother-in-law as owner." They rest this finding mainly upon the report of a police officer, made in consequence of a petition of Muni Sing, the husband of Chundrabati, after the suit was instituted, that the defendant had sided with his old co-sharers in the village, and had given orders that whenever he should go to collect the rents a criminal case was to be brought against him. The High Court say—"In that (the report) the police officer intimates that, *in his opinion*, the case was untrue; that the mother-in-law, Mussummat Muna Koeri, had only one daughter who married Muni Singh, and on that occasion she had made a gift of the property to her daughter and her son; that Muni Singh, on coming into possession, appropriated all the money and left the mother-in-law in a state of starvation; that she in retaliation took possession of the property from the saheb (the factory), and leased it out on receipt of Rs. 600." This report is not in the record. Their Lordships are unable to understand upon what ground the High Court considered that the opinion of the police officer was evidence of Muna Koeri being in possession. A police officer has not authority to make a judicial inquiry about possession, and his opinion most probably was founded entirely upon hearsay. Seeing that Mr. Crowdy was not a witness, it appears to be possible that the allegation in the petition of Muni Singh of collusion was true, and that the lease was made to be used as a defence to the suit. The finding of the first Court on this question

of possession was in accordance with the evidence, and should not have been reversed by the High Court.

Their Lordships' attention has been called to the inquiry which took place for the purpose of ascertaining the lands in which the defendant claimed his right of occupancy. On the hearing of the appeal the High Court rightly held that the onus lay on the defendant to point out these lands, and they referred it to the District Judge to depute an amin to find out the "lands covered by the khusra of the butwara." That appears to be right in principle. The defendant was bound to identify the 34 bighas 3 cottahs 8¾ dhoors which he claims, and to show that they are in the khusra and in the putti of the plaintiffs as he alleges in his written statement. But the finding of the amin does not specify any such quantity of land. He finds that the lands now identified as the defendant's jote are 76 bighas and a fraction by one measure and 36 bighas and a fraction by another, and that the indigo plantation land in the khusra is 49 bighas and a fraction. In dismissing the suit the High Court say, "We accept the report of the amin, and we find that the District Judge has substantially carried out the remand order." Perhaps, for the purpose of dismissing the suit, the amin's findings were sufficient. But for the purpose of ascertaining the precise land claimed by the defendant the findings are abortive and useless. And as their Lordships hold that the suit should not be dismissed, and that it is necessary to ascertain the lands claimed, there must be a fresh inquiry.

The result is that the plaintiffs are entitled to a decree for possession of the land included in the lease of 1877, except the 34 bighas 3 cottahs 8¾ dhoors, in which the defendant should be declared to have a right of occupancy, and the decrees and order of the Courts below ought to be reversed and the suit remanded to the High Court to have an inquiry made as to the situation and boundaries of these last-mentioned lands, and also of the remaining lands included in the said lease, and thereupon to make a decree for possession to the plaintiffs of the remaining lands and mesne profits thereof, with costs to the parties in the Courts below in proportion to the result. Their Lordships will humbly advise Her Majesty accordingly.

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In the special circumstances of this case their Lordships are of opinion that the appellants should have the costs of this appeal.

*Appeal allowed; suit remanded.*

Solicitors for the appellant: Messrs. *T. L. Wilson & Co.*

Solicitors for the respondent: Messrs. *Sanderson, Holland & Adkin.*

C. B.

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## FULL BENCH REFERENCE.

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*Before Sir W. Comer Petheram, Knight, Chief Justice, Mr. Justice Pigot, Mr. Justice O'Kinealy, Mr. Justice Macpherson, and Mr. Justice Ghose.*

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*March* 17.

MAHOMED ABBAS MONDUL (DEFENDANT) *v.* BROJO SUNDARI DEBIA (PLAINTIFF).*

*Bengal Tenancy Act (VIII of* 1885), *ss.* 13, 195, *cl. (e)—Sale in execution of decree—Dur-putni tenures.*

Section 13 of the Bengal Tenancy Act applies to sales of *dur-putni* tenures in execution of decrees.

REFERENCE to a Full Bench made by TREVELYAN and BEVERLEY, JJ. The referring order was as follows:—

"The plaintiff is the owner of a *putni.* He brought this suit for arrears of rent against the first three defendants, who were *dur-putnidars* under him. Their defence was that their tenure had been sold in execution of a decree and had been bought by one Amirunnessa. Amirunnessa has been added as a defendant.

"The Munsiff gave a decree against Amirunnessa alone.

"On appeal this decree was set aside, and in the place of it a decree has been made against the first three defendants, who have appealed to this Court, but have not made Amirunnessa a party to the appeal. Amirunnessa's purchase was not registered in the books of the plaintiff. It has been contended before us by the pleader for the appellants that Amirunnessa alone is liable, and that the plaintiff is bound to recognise her.

* Full Bench reference in appeal from appellate decree No. 273 of 1889, against the decision of the District Judge of Rajshahye, dated 23rd February 1889, reversing the decree of the Sudder Munsiff of that district, dated the 16th November 1888.