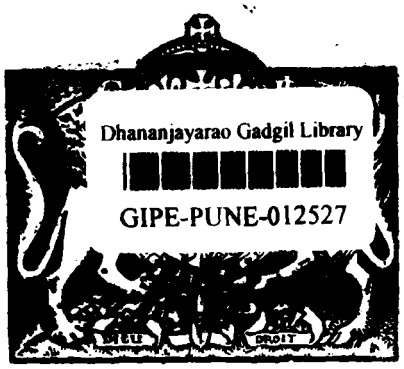

Government of Bengal

Revenue Department

Notes on the amendments of the Bengal Tenancy Act, 1885 made by the amending Acts IV of 1928 and II of 1930

by

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CORRECTION SLIP.

Page 27, line 14, *omit* the words within brackets, viz., " court-fee required 12 annas ".

Page 28, lines 34-35, *for* words " The court-fee required ..... 12 annas and " *read* " No court-fee is required (*vide* notification No. 7878 L.R., dated 22nd June 1931, under section 35 of the Court Fees Act, 1870), but ".

Page 29, line 13, *omit* the words " with one court-fee stamp of 12 annas ".

Page 30, line 29, *omit* the words " with the usual court-fee of 12 annas ".

Page 31, lines 35-36, *omit* the words " and shall bear a court-fee stamp of 12 annas."

Gratis.

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Introductory.

The Bengal Tenancy Amendment Act of 1928 marks an important stage in the history of tenancy legislation in Bengal. The unsatisfactory parts in the Act of 1885, noticed even at that time, were—

(1) absence of adequate protection for the under-raiyats;

(2) absence of provision for transfers by raiyats, although such transfers were even then very numerous; and

(3) absence of any simple procedure for realisation of arrears of rent.

It was mainly with a view to improve the law in these respects that a special representative committee was appointed in 1921. It was presided over by Sir John Kerr with Mr. F. A. Sachse, C.I.E., I.C.S., then Director of Land Records, as Secretary. There were 19 members in the committee including eminent lawyers and representatives of landlords and tenants. The report of the committee, together with a Bill to amend the Bengal Tenancy Act, was published in December 1922 to elicit public opinion. As a result, a very large volume of opinions was received by Government, and these opinions were examined in detail in the Revenue Department. The draft Bill was modified at places and the modified Bill was introduced in the Legislative Council by the then Revenue Member (late Maharaja Bahadur of Nadia) in December 1925. The Council referred the Bill to a Select Committee, but that committee made some so very drastic changes that Government were unable to adopt *in toto* the Bill as revised by it. Another special committee was accordingly appointed to further examine the Bill. It was presided over by Sir N. R. Chatterjee, *ex*-Chief Justice of the Calcutta High Court, who later on acted also as Member in charge of the Revenue Department. The Bill as revised by this committee was then introduced in the Legislative Council on 7th August 1928 by the Hon'ble Revenue Member, Sir P. C. Mitter.

2. No legislation in Bengal since the introduction of the Reforms evoked so much wide-spread interest as the Tenancy Amendment Bill of 1928. The Swarajists who had otherwise kept aloof from the Council attended in full strength and contributed very largely to the lively debates which lasted for about one full month. Altogether 1,343 amendments were tabled, and the members of the Council grouped themselves into several definite parties, *viz.*, the Swarajist party, the Praja party, the landlord's party and the European group. Several private amendments were carried in the Council and the Bill thus amended was ultimately passed by it on 4th September 1928. It received the assent of the Governor-General on 14th December 1928 and was published in the "Calcutta Gazette" on 21st February 1929. A small supplementary amending Act was passed in 1930 (Bengal Act II of 1930) mainly to rectify certain formal defects.

3. The most important change introduced by the Act of 1928 was that with regard to under-raiyats. Under the Act of 1885 the only protection provided for the under-raiyats was really that their rent could not be enhanced by more than 50 per cent. of their landlord's rent. He might acquire a right of occupancy if there was a local custom for his acquiring such right anywhere, but as the burden of proving such custom lay on the tenant, he was really left without

any protection against arbitrary eviction. To quote from the speech of Hon'ble Sir Stuart Bayley when introducing the Select Committee's report and the Bill in February 1885—

> "This class (the under-raiyats) we have left as in the intermediate Bill No. II, with only the nominal protection of a fractional limit above the head-rent beyond which the lessor cannot recover in Court. This is, to my mind, the most unsatisfactory part of the Bill, but the committee were unable to afford to under-raiyats any real protection without subverting the customs and traditions attaching to the status. So long as they were liable to arbitrary ejectment, there can be no protection against arbitrary enhancement, and the protection afforded by the Bill can in practice only refer to arrears of rent. With the right to eject, the lessor will always prefer this method of attaining his object to that of a suit in Court, so that the protection, as I said, is nominal. In fact the only practicable method of protecting them would be by giving to under-raiyats sub-occupancy rights against the lessor, of the same nature though not necessarily of the same degree, as the occupancy raiyat has against the tenure-holder above him."

But, he continued to observe—

> "no such plan would, at the present time, be favourably received, as it is contrary to existing custom and is in that sense justly condemned as revolutionary. Moreover the question is not at present of serious importance, though as population increases it is likely to become so; but I wish to say that in regard to the under-raiyat I do not think the Bill can be considered to be in any way a final settlement of the difficulty, and the next generation will probably have to reconsider his position."

This prophecy proved perfectly true: and when the Hon'ble Maharaja of Nadia introduced his Bill in 1925 he had to observe that this class of tenants, the weakest in the chain of tenantry, who from their position deserved most the care of the legislature, had been reduced to no better than mere "serfs and slaves." The statistics obtained from the cadastral operations which had been completed in most of the districts in the Province, showed that the number of this class of tenants was very considerable and was steadily increasing. In Jessore for instance their number was about 9 lakhs—quite as many as the *asli* raiyats themselves.

4. The Select Committee to which the Bill of 1925 was referred was not however disposed to give substantial right to the under-raiyats; but this view was not accepted either by the Special Committee of Sir N. R. Chatterjee or by the Legislative Council when it passed the law eventually in 1928. Under the new section 48C an under-raiyat who has held the land for 12 years or has a homestead on it cannot be ejected merely on the ground that the term of his lease has expired or that the landlord has served him with a notice to quit. Other under-raiyats also cannot be ejected unless the landlord requires the land for his own use.

5. As regards the rent of under-raiyats, the initial rent has been left to agreement (section 48), but the rules for subsequent enhancement, though much improved, are still, in the opinion of many, not quite satisfactory. Such enhancement may be made, as in the case of occupancy raiyats, either by registered contract or by suit. But there is hardly any justification to put the permissible rate of contractual enhancement as high as 4 annas per rupee of the previous rent when it is only 2 annas in the case of occupancy raiyats. The reasons which justify such periodical enhancement of rent are the same in both cases. The proportion of one-third of the average gross produce as the money rent which the Court may allow in an enhancement suit, is also high—higher than any traditional proportion fairly leviable from the cultivator of the soil. Half the value of the gross produce is generally estimated as equivalent to cost of cultivation, but it is often higher if the cost of plough, cattle and manure and the cost of maintaining the cattle and the risk of casualties amongst them be properly taken into account. A rent of one-third of gross produce to be paid in all years would leave very little margin for profit, and is almost the rack-rent. However it is the maximum and the Courts have discretion not to adopt the maximum unless it appears fair in the circumstances of any particular case.

6. The right of transfer allowed to the occupancy raiyat has not been extended to the under-raiyats, and the only means by which he can raise money in time of distress is a usufructuary mortgage of his land. Such mortgage can again be only a complete usufructuary mortgage and the maximum time within which both the principal and the interest must be paid up is 15 years. The amount which an under-raiyat can thus secure at say 10 per cent. compound interest, is about one and a quarter of the average gross produce of his land in a year.* If he carries with him the liability to pay the rent the amount may be about three and three-quarters of the average gross produce; but there is a restriction that the mortgage shall not be binding on the landlord, e.g., in the event of a rent-sale, and this increases the risk of the mortgagee and therefore affects the amount which he will be prepared to advance.

7. On the whole the amendment of 1928, though a considerable improvement on the previous law, cannot be said to be yet a final settlement of the difficulty about under-raiyats, and to quote the words of Hon'ble Sir Stuart Bayley, the next generation will probably have again to reconsider the position.

8. The next important change is with regard to the question of transfers by raiyats. The original Government Bill of 1883 contained proposals for allowing occupancy raiyats to transfer their holdings like any other immoveable property. But these were strongly opposed at the time and Government had to yield and let matters rest on custom and wait till "custom crystallised." It was pointed out at the time with full statistics, that in spite of the landlord's denial of the existence of such right, raiyats had been, in Bengal proper at any rate, freely selling their lands. The unsatisfactory

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*Taking half the gross produce as equivalent to cost of cultivation and one-third as the rent, and equating the remaining one-sixth at 10 per cent. for 15 years the present value works out to 1·28. If the under-raiyat undertakes to pay the rent the remainder for the mortgagee would be half and the present value 3·8.

position which resulted from the Act of 1885 is now a matter of history recorded in the numerous decisions of the law courts, so much so that the Hon'ble Judges of the Calcutta High Court thought it necessary to address the Government of Bengal to take up legislation to clear up the position. Sections 26B and 26C of the Act of 1928 now definitely recognise the right of the occupancy raiyat to transfer his holding, subject to the payment of a *salami* (called landlord's transfer-fee) to the landlord. The rate of this fee is fixed at 5 times the rent or one-fifth of the consideration money whichever is greater. Sir John Kerr's draft Bill and the Government Bill of 1925 provided for the realisation of this *salami* as an arrear of rent, if it was not voluntarily paid. The Select Committee, however, preferred the same method as in the case of the landlord's fee for transfers of permanent tenures, viz., that the fee should be paid to the registering officer at the time of registration of the document (or to the Court in case of sale effected by a Court) to be transmitted by the Collector to the landlord. The landlords wanted to avoid the trouble of having to realise the *salami* by their own effort, and the tenants also feared that they would be harassed by the landlord's officers if they were left to settle the payment through them. This was unfortunate, for nowhere in the new Act have there been so much complication and controversy as in the application of these provisions for realisation of *salami* through the agency of the Collector. These have been discussed in the notes under the several sections.

9. Apart from the amount, one point of material difference in the transfer-fee in the case of occupancy raiyats and the landlord's fee in the case of permanent tenure-holders, is in the basis of "consideration money" in the former instead of only the rent. This introduced a disputable element and it was rightly contended by the landlords that the consideration money might be understated in the document of transfer to evade both the proper transfer-fee and the proper stamp duty. To provide an automatic check against such understatement a right has been given to the landlord to pre-empt (or rather post-empt) the raiyat's transferree by paying him the consideration money stated in the document together with 10 per cent. on it by way of compensation (section 26F). It is true that the theory of right of pre-emption is not a new one (in fact, as was stated during the debate in the Council, it was proposed once in the old Tenancy Bill of 1883), and that it can be justified on the ground that it is not unreasonable that the landlord should have a preferential right to buy if he be willing, yet the doctrine is undoubtedly repugnant to modern ideas of rights in property. In its application in the case of transfers of occupancy holdings a good deal of complication has necessarily been introduced, and already the law courts are perplexed. One serious evil effect of this rule of pre-emption is the uncertainty in the position of the buyer till the time for possible application by the landlord was over. The Legislature has tried to keep this period of suspense as short as possible, and by section 26F (1) it has been limited to 2 months from the service of notice on the landlord, and a further one month when one of several co-sharer landlords wanted to exercise the right [section 26F (4) (a)]. There is no provision for interest or cost in case of undue delay in the application for pre-emption or disposal of the matter by the Court. It is important therefore that the notices should issue from the Collector's office promptly. It may be stated here that in a recent case the

Hon'ble High Court has held that when owing to omission by the raiyat or other reasons a co-sharer landlord did not receive the formal notice, he was entitled to a reasonable time from the date of his knowledge of the transfer (Surja Kumar Mitra *vs.* Munshi Noabali, 35 C. W. N., p. 688) to exercise his right of pre-emption.

10. In the plan of realising the transfer-fee through the agency of the Collector, there are obvious difficulties where a co-sharer landlord wants to get his share of the fee separately from him. An amendment moved by a private member and carried on the floor of the Council [section 26C (3), first proviso] provides for such payment on documentary proof of the co-sharer's title to the share before the Collector. The implications of this provision were not perhaps fully realised at the time. The Collector could not arrogate to himself the power of deciding title where there was a dispute, nor could it be expected that the raiyat should know the shares *inter se* of his landlords or what proportion* of the transfer fee each was entitled to, far less that he should be penalised if he made any mistake in this respect. Where there was no dispute amongst the co-sharer landlords there was no difficulty and they could always act jointly or take advantage of the provision in the Act for appointment of a common agent to receive payment for them all. Where there was dispute or disagreement amongst them they were bound to be in trouble wherever they went, and the amendment could not be of much help to them. From this point of view the plan in the original Bill of 1925 of leaving the *salami*, if not voluntarily paid, to be realised as an arrear of rent was, perhaps, better for the co-sharer landlord.

11. On the whole the Act of 1928, though a great improvement on the old law, cannot be said to be a final settlement of the difficulties regarding sales by raiyats and, to use again the words of Hon'ble Sir Stuart Bayley, the next generation will perhaps have to reconsider the position, viz., whether the right of pre-emption should not be taken away altogether and also whether the transfer-fee should not be fixed simply as a multiple of the rent [and not any proportion of the consideration money, *cf.* the rule of premium in the case of conversion of utbandi tenancies in section 180A (10)], to be realised by the landlord in case of default, as an arrear of rent.

12. On the subject of greater facilities for realisation of arrears of rent the Act of 1928 has introduced some very important amendments. The authorities responsible for the Act of 1885 had tried to evolve a simpler procedure, but failed.† The Hon'ble Mr. Ilbert when introducing the Bill of 1883, explained the position thus: "The reason why rent suits are apt to be long and troublesome is.....because the rights involved are obscure and uncertain, and the facts are difficult to ascertain." He then proceeded to explain that in a rent-suit as in the case of other money claims, the plaintiff "must satisfy the

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*This is not necessarily proportionate to the recorded share of each whether in the Collector's General Register D or in the record-of-rights.

†In this connection the Secretary of State for India made the following observations on the Act of 1885: "I should have been glad if it had been found possible to give the greater facilities for the realisation of rent desired by the zemindars by an abreviation and simplification of procedure in the civil court. But the opinion of the Select Committee supported by that of the Judges of the High Court, convinces me that this would have involved serious risk to failure of justice."

Court on three points: *first* that the amount which he claims is actually due; *secondly*, that he is the person entitled to the money; and *thirdly*, that the defendant is the person liable to pay the money. The defendant either appears and pleads or he does not. If he appears he usually raises one of three pleas: either that the amount claimed is excessive, or that the amount claimed has been paid in whole or part, or that the plaintiff is not the person entitled to the money claimed. Now, as to the first plea, I believe, that there is no reason for doubting that it is well-founded, that a suit for arrears is in many cases a suit for enhancement in disguise. But, if a landlord wishes to avoid being harassed either with this plea or with the plea of payment, the remedy is in his own hands. He should keep his accounts and receipts in such form and with such regularity as would justify the Court in accepting them without suspicion. As for the plea under which a landlord's title is disputed,.....no tinkering of the Civil Procedure Code will facilitate the proof of a landlord's title." "There is," he proceeded, "one mode in which that proof might be facilitated, and that is the establishment of a general register of titles." He was referring to the preparation of record-of-rights as eventually provided for in the Act of 1885. The position was further explained as below in the Statement of Objects and Reasons of the Bill of 1883:—

> "A summary form of procedure can scarcely help a plaintiff, unless his case is of the simplest description, admitting of being answered only in the simplest way, and he comes into Court armed with documentary proof of such trustworthy a character that the presumption against any defence being possible is extremely strong.....The provisions in the Bill with respect to.....framing of record-of-rights and those which relate to receipts and accounts, may reasonably be expected to remove most of the difficulties of which landlords now complain."

The real difficulty lay thus in the absence of reliable record of tenants' interests and their rents. When therefore records-of-rights had been prepared for several districts under the provisions of Chapter X of the Act of 1885, the position was further examined. By an amendment in 1907 (Act I 1907, Bengal, and Act I of 1908, East Bengal) power was taken by the Local Government to allow landlords in special cases where a record-of-rights had been prepared and was maintained, the advantage of the summary certificate procedure under the Public Demands Recovery Act for realisation of arrears of rent. Several large estates applied and obtained the concession of this new provision, but it did not become sufficiently popular. One reason for this was that the terms and conditions were not well-defined. Another reason was that the cost of maintenance of the record-of-rights was apprehended to be heavy. The amendment of 1928 now provides for the terms and conditions being defined by Government and published* for

*The terms and conditions defined by Government were first published in notification No. 4794 L.R., dated the 12th March 1929. They were revised and elaborated in a subsequent notification No. 10954 L.R., dated the 31st August 1931, slightly amended by notifications Nos. 5689 L.R., dated 25th April 1932, and 6511 L.R., dated 12th May 1932. The main conditions are maintenance of the record-of-rights with Government agency and keeping by the landlord of correct and reliable account of payments made by the tenants.

general information; so that any landlord who agreed to these terms would as a matter of course be allowed to have the benefit of the summary certificate procedure for realisation of arrears of rent. A simpler procedure of maintenance of the record-of-rights for keeping it up-to-date (i.e., with corrections for changes due to transfer, succession, etc.), so far as necessary, has also been evolved and provision has been made for the revision work being done every third year instead of annually.

13. The amendment of 1928 also provides for a simpler procedure in the civil court, of "special summons," somewhat analogous to certificate procedure before the Collector, for suits for arrears of rent, where the rent claimed is based on a finally published record-of-rights or on a registered lease [section 148(k)]. Though there will be obvious difficulty in the application of this special procedure where the record-of-rights is old and out-of-date or the registered lease is in contravention of section 29 of the Act or has subsequently been reversed in a record-of-rights, yet if the defendant does not dispute the plaintiff's basis of claim (i.e., the record-of-rights or registered lease, as the case may be) the issue of "special summons" in the first instance will be effective and simplify the proceedings a good deal.

14. Another change, or rather better definition, which evoked keen controversy during the debates in the Legislative Council was the amendment regarding the position of produce-paying tenants [section 3 (17), proviso]. This and other changes made by the Act of 1928 have been explained and discussed in the notes under the several sections.

M. N. GUPTA.

September 1932.

Notes on the Amendments of the Bengal Tenancy Act, 1885, made by the Amending Acts IV of 1928 and II of 1930.

Section 1 (3).

Calcutta Municipality.—The Bengal Tenancy Act *never* applied to that portion of the Calcutta Municipality which comprises the original town of Calcutta (Kalikata, Sutanuti and Gobindapore) bounded on the west by the river Hooghly and east (to state roughly) the Circular Road and Tolly's Nullah.* This was also the entire area of the municipality till 1888, when certain suburban areas to the south and east of the Circular Road were added. The Bengal Tenancy Act however continued to apply to this suburban area till 1907 when by Act I of 1907 the following "Explanation" was inserted in section I of the Bengal Tenancy Act, viz.—

"The words 'the town of Calcutta' mean, subject to the exclusion or inclusion of any local area by notification under section 637 of the Calcutta Municipal Act, 1899, the area described in schedule I of that Act."

As a result, the Bengal Tenancy Act ceased to apply in this area from that year. But this did not extinguish any occupancy right already acquired; for, by the operation of section 19 of the Act, raiyats who had acquired occupancy rights in any land in this area prior to 1907 continued to enjoy the full benefits of such rights. *See* also 20 C.W.N., p. 258 (Jotiram *vs.* Janaki Nath); 31 C. W. N., p. 1007 (Shibakali *vs.* Chuni Lal).

Clause (*i*) of the section refers to the main and the suburban areas of the Calcutta Municipality mentioned above. Clauses (*ii*) (*a*) refers to the further area added by the Calcutta Municipal Act of 1923. This area comprises the old municipalities of Maniktala, Cossipore-Chitpore and Garden Reach and portions of Tollygunge and Behala Municipalities. By reason of the same "Explanation" which was inserted by Act I of 1907, the Bengal Tenancy Act ceased to operate in this area from the year of its inclusion, viz., 1923; but for the same reasons as already stated the occupancy rights acquired by raiyats prior to 1923 were not affected.

Clause (*ii*) (*b*) of the section refers to areas which may *in future* be added to Calcutta Municipality by notification under section 543 of the Calcutta Municipal Act of 1923. Before such new area can be excluded from the operation of the Bengal Tenancy Act, a notification under the proviso to the section, the *previous approval of the Legislative Council* is necessary. This provision for previous approval is new and was inserted at the instance of the Select Committee [*vide* proviso (*b*) at the end of the section].

Municipalities other than Calcutta.—Clause (*iii*) of the section refers to municipalities other than Calcutta. By its own operation the Bengal Tenancy Act applies to all agricultural (and horticultural) lands, though situated within municipal areas. The main portion of clause (*iii*) is the same as in the old Act. It gives Government power to exclude by a notification in the "Calcutta Gazette" any such lands

*See Proclamation, dated 10th September 1794, by the Governor-General in Council under 33 Geo. 3, c. 32, s.159 (1793).

from the operation of the Bengal Tenancy Act though no such notification has been actually issued. The proviso to the clause was inserted by the amending Act II of 1930, and takes away this power regarding agricultural lands. It follows that a notification under this sub-clause excluding a municipality or part of a municipality from the operation of the Bengal Tenancy Act, can have effect only on non-agricultural lands, including, it is presumed, lands once agricultural but subsequently converted to homestead sites or other non-agricultural use. The net result is that agricultural land within a municipality (other than Calcutta) would always be governed by the Bengal Tenancy Act. The whole of clause (*iii*) would thus now seem to be superfluous.

NOTE.—The proviso inserted in 1930 was intended to make clear the meaning of the amendment carried in the Council in 1928. That amendment only inserted the words "lands other than agricultural" at the beginning of the clause. The mover Babu Ramesh Chandra Bagchi explained his object thus :—"to make it clear that the Bengal Tenancy Act should continue to apply to all agricultural areas in municipalities, even when they happen to be excluded from the operation of the Act under this section." His actual amendment, however, made the language clumsy and hence the amendment of 1930.

It will be noticed that the proviso to clause (*iii*) does not apply to areas which may be added to Calcutta Municipality under clause (*ii*) (*b*), and it is therefore open to Government to exclude by notification even agricultural lands in such areas from the operation of the Bengal Tenancy Act.

Clause (iv): the scheduled districts.—Those in Part III of the Scheduled Districts Act, 1874, are Jalpaiguri, Darjeeling and Chittagong Hill Tracts in Bengal; and the Sonthal Parganas, the districts in Chota Nagpur Division and the Mahal of Angul in Behar.

The Bengal Tenancy Act does not, by its own operation, apply to those districts. But sections 5 and 5A of the Scheduled Districts Act give authority to the Local Government to extend any part of this Act (by way of that any Act) to any of the scheduled districts or part thereof. The Government of Bengal have not extended the Bengal Tenancy Act to any part of the districts of Darjeeling or the Chittagong Hill Tracts. The tenancy laws in force in Darjeeling are Act X of 1859 and Act VIII (B.C.) of 1879. *See* Waste Lands Manual and also paragraphs 354-359, Survey and Settlement Manual. In the Chittagong Hill Tracts the tenancy law is regulated by the rules issued by Government under section 18 of the Chittagong Hill Tracts Regulation, I of 1900. (*See* Chittagong Hill Tracts Manual published by Government.)

The Bengal Tenancy Act was extended to the whole of the district of Jalpaiguri, except the Western Duars, by Government notification No. 966 T.—R., dated the 5th November 1898, issued under section 5 and 5A of the Scheduled Districts Act. The Act was also extended to the Western Duars by another notification, No. 964 T.—R., dated the 5th November 1898, but subject to the following important restrictions :—

(1) That the Act is not to apply to any lands granted or leased by Government to any person or company for the cultivation of tea or for reclamation under the Arable and Waste Lands Rules.

(2) That where there is anything in the Bengal Tenancy Act, which is inconsistent with any rights or obligations of a Jotedar, Chukanidar, Dar Chukanidar, Adhiar or other tenant of agricultural land as defined in Settlement proceedings

or in the leases granted by Government, such rights and obligations are enforceable notwithstanding anything in the said Act.

Section 3(1).

Agricultural year.—The old section had reference also to *Fasli* or *Amli* year which prevails mainly in Bihar, now separated from Bengal. Hence this omission by the amendment of 1928, and also the insertion of the proviso as a necessary corollary.

Section 3(3).

Complete usufructuary mortgage.—This definition was inserted by the amending Act of 1928. The term usufructuary mortgage appears in the body of the Act—

(1) with reference to occupancy raiyats—section 26G(4),

(2) with reference to under-raiyats—section 49, and

(3) with reference to aboriginal tenure-holders, raiyats and under-raiyats—section 49E.

In cases (1) and (2), a usufructuary mortgage can only be a complete usufructuary mortgage, and the maximum period is 15 years on the expiry of which the land would automatically revert to the raiyat freed from the charge. In case (3) of aboriginal tenants under Chapter VIIA of the Act, the maximum period is, however, only 7 years, and the restriction applies to all classes of aboriginal tenants whether tenure-holders, raiyats of any description or under-raiyats.

For the distinction between "Complete usufructuary mortgage" and "Usufructuary mortgage" *see* also section 58(*d*) of the Transfer of Property Act.

Section 3(4).

The Bengal Tenancy Act recognises three main kinds of interest in land, viz.—

(1) estate,

(2) holding, definition item 5, the interest of raiyat and the under-raiyat, and

(3) tenure, definition item 18, the interest of the middlemen between the raiyat and the owner of the estate.

The estate comprises mainly the interest of the zamindar who is responsible for the land revenue due to Government and which is entered in the Collector's general registers (under the Land Registration Act VII of 1876). It also includes revenue-free *lakhraj's* (as opposed to rent-free *nishkars* under a zamindar) similarly recorded and recognised as such in the Collector's general register of revenue-free estates maintained under the Land Registration Act. The last words of the definition, viz., "revenue-free lands not entered in any register" refer to the revenue-free lands which the Board of Revenue may, in exercise of its powers under section 13 of the Land Registration Act,

exempt from registration in the Collectorate. Such exemption has been made only to petty areas in Cuttack, Balasore and Puri. The words have thus no meaning in present Bengal.

Section 3(5).

Holding.—The words "undivided share" have been inserted by the amendment of 1928. This is intended to get over the difficulties in the application of the various sections about holdings of raiyats and under-raiyats which had arisen from the interpretation of the old section that a 'holding' could only be a parcel of land and not undivided share; *see* 25 Cal., p. 917, Hurry Charan *vs.* Raja Ranjit and 30 C.W.N., p. 613, Bahadur Ahmad *vs.* Hemanta Kumar Ray. Undivided share may develop from shares amongst co-sharer tenants or from shares amongst co-sharer landlords: but the essence of such a share being a "holding" is that it must be the subject of a separate tenancy, e.g., a separate lease for it, or treatment by the landlord as a separate jama in his rent-roll (compare "estate," which requires a separate entry in the Collector's revenue-roll).

The amendment brings the definition of "holding" in a line with that of "tenure" and "estate."

The important results which follow from the amendment are that when an undivided share of any land is the subject of a separate tenancy—

(1) an enhancement suit may be instituted for it under section 30 (occupancy right) or section 48D(2) (under-raiyat),

(2) the benefit of the presumption of section 50 will apply if such an undivided share is separated from the other lands of the holding or is amalgamated with another holding [section 50(3)],

(3) it may be surrendered under section 86, and

(4) the fact that the tenancy comprises undivided share of some is no bar to a rent-suit and the purchaser at a rent sale takes it according to section 159, etc., in chapter XIV.

It would also seem to follow that inasmuch as a holding may comprise an undivided share in land, a raiyat may invoke the application of section 88, 2nd proviso, for getting through Court his undivided share recognised as a separate tenancy.

Not retrospective in effect.—In Maharaja Bir Bikram *vs.* Rajjab Ali, 33 C.W.N., p. 1156 (June 1929), it has been held that as there is nothing in the amending Act of 1928 to show that this change in the definition of "holding" is to have retrospective effect, it cannot be applied to have such effect so as to disturb a decision between the parties correctly arrived at before the amending Act was passed.

Under-raiyats.—In the case of Munsab Ali *vs.* Assadullah and others under the old Act, 16 C.W.N., p. 831, it was held that except where the word "holding" was used expressly with reference to lands held by an under-raiyat it did not include the holding of an under-raiyat, because the expression in the old definition was simply "land held by a raiyat." Hence the words "or an under-raiyat" have been inserted after the word "raiyat" by the amending Act of 1928. The term

"holding" therefore now always includes the holding of an under-raiyat.

Section 3(17).

The proviso to section 3(17) was inserted by the amending Act of 1928 with a view to set at rest the controversy which had become rather acute over the question of the status of persons who cultivated land but paid, instead of a cash-rent, a portion of the crops; that is to say, whether they were "tenants" within the meaning of the Act or not. "Tenant" is a person who pays or is liable to pay rent, and "rent" under sub-section (13) (old sub-section 15) includes what is paid in "kind." Ordinarily, therefore, such a person would be a "tenant"; but circumstances in different cases varied very considerably, and it was not always clear whether the terms of the arrangement in a particular case really created an *interest* in land or were only of the nature of a labour-contract. In the Settlement Department a practice had developed that where the person himself supplied all the requirements of cultivation, viz., plough, cattle, seeds, manures, etc., he was tenant. *See* also rule 48 of the Technical Rules and Instruction of the Settlement Department, Chapter IX.

The proviso inserted now makes it clear—

Firstly, that such of the above classes of persons as pay a fixed quantity of produce irrespective of the actual outturn, e.g., *dhan-kararidars*, they are tenants,

Secondly, those who are to pay only a share (e.g., half) of whatever may be the actual outturn in the year, e.g., *bargadars*, *bhagchasis*, *adhiars*, etc., they are not "tenants" except when otherwise admitted by the landlord or held by a civil court.

The Hon'ble Revenue Member (Sir P. C. Mitter) explained the position thus:—

"If *A* is the owner of land and if he enters into transaction with *B* by which *B* will give a fixed quantity of the produce or any money, he is a tenant. On the other hand, if *B* instead of giving a fixed quantity shares in the dangers and profits with *A*, namely, if the produce of any particular year be 20 maunds and *A*, the owner, will get a certain share, and *B*, the labourer, will also get a certain share, then *B* is not a tenant. On the other hand, irrespective of the produce, irrespective of bad or good reason, if *B* has to pay a definite amount or deliver a definite quantity of the produce, then he is a tenant and *A* has to accept *B* as a tenant."

The principle was clear "but," the Hon'ble Member said "the law was not definite on the point of application on the facts of each case," and each case depended on the interpretation of the circumstances and of the documents, if any, relating to it. The amendment of 1928 aims at narrowing the field of uncertainty. In the first place it definitely eliminates those who pay a fixed quantity of crop, e.g., *dhankararidars*, etc. They will in any case be tenants, i.e., raiyats or under-raiyats as the case may be, and all the rights and privileges of raiyats or under-raiyats will apply to them. In the case of a person who pays a share of the *actual* outturn, the field of enquiry is limited to one question only, viz., whether the landlord has expressly admitted him

to be a tenant in a document executed by the landlord or executed in his favour and accepted by him. The proof in every case must therefore be a document. It may be a *patta* or a *kabuliyat*; or it may be a statement by the landlord in any other document executed by him, e.g., a plaint in a suit, or a road-cess return or partition paper, in which the person may have been expressly admitted as a tenant.

Clause (*ii*) of the proviso would seem to be redundant. But it makes clear that decisions of civil courts already arrived at before the Act of 1928 came into force, cannot be questioned on the ground that they were not consistent with clause (*i*) of the proviso, or in other words clause (*i*) is not to have retrospective effect when there has already been a final judicial decision. Two questions arise—

(1) What about decisions under sections 105 (with 105A) and 106 of the Bengal Tenancy Act by a revenue officer?

(2) What about entries in a record-of-right in respect of which there has been no case under section 105, 105A, or 106, or in the civil court within the time allowed?

The Hon'ble Revenue Member (Sir P. C. Mitter) explained the position thus:—

"I will explain to the House generally that revenue officers act in two stages. One stage is up to section 103(B), when there is a final publication. Up to that stage the proceedings of the revenue officers are summary in character; they make enquiries in the field and other enquiries, and they come to a conclusion and as a result of that conclusion an entry is made; and under section 103(B) a presumption of correctness is raised with regard to that entry. After 103(B) the judicial stage begins and under sections 105, 105(A), 106 and so on the revenue officer acts as a civil court under the procedure laid down in the Civil Procedure Code, the Evidence Act and so forth, and under section 107, the decision of the revnue officer in the subsequent judicial stages of the proceedings amounts to a decree of a civil court.

"So far as the second stage of the proceedings is concerned, the words we have in clause (ii), namely, 'He has been held by a civil court to be a tenant,' are quite wide enough, that is to say, a revenue officer acts as a civil court and section 107 applies. If my friend Khan Bahadur Maulvi Azizul Haque has any doubt on that point, and if the House permits it, we have no objection to a modification for greater safety to the effect that the decision of a revenue officer under sections 105, 105(A), 106 and 107, will be treated as a decision of a civil court—I am not using drafting language but merely stating the substance of my idea—Government will have no objection to such a change; but such a change as I have said, can only be permitted with the leave of the House. However, I would point out that perhaps such a modification is not necessary, because when a revenue court deals with civil rights it is a civil court. In the well-known Privy Council case of Nilmony Singh Deo *vs.* Tara Nath Mookerjee, M.I.A., p. 174, it has been held that a revenue court dealing with civil rights is a civil court.

"Now, I will take up the other portion, viz., when a revenue officer acts in a summary way. Under our draft Bill we are taking away no rights created by a presumption raised under section 103(B). Section 103(B) will still form part of the Act. Therefore, under section 103(B)

the presumption of correctness will still be raised. Well, that is undoubtedly a rebuttable presumption. I am sure my friend, Khan Bahadur Azizul Haque, does not want that a rebuttable presumption should be turned into a conclusive presumption. If he does not want that, then he has no grievance. On the other hand, if he means that a rebuttable presumption will be a conclusive presumption then a distinguished lawyer like himself will at once see that it will not be right."

In the above view, if there has been a decision by a revenue officer on the question of status under section 105 [with 105(A)] or 106, that decision is conclusive as a decision of a civil court under clause (*ii*). If there has been no such case the value of an entry in a record-of-rights is the same as is given to any other entry under section 103(B), viz., that it shall be presumed to be correct unless proved otherwise by evidence.

Not retrospective in effect.—In Suresh Chandra Dutta *vs.* Mahendra Chandra De, 34 C.W.N., p. 845, it has been held that as the provisions relating to the difference in the status of a *bargadar* in the new section 3(17) are of a substantial character, they are therefore not retrospective in effect (March 1930).

Section 4.

[*See* notes under section 3 (4).]

No change was made in the classification of tenants, by the amending Act of 1928. "Raiyats holding at fixed rates" thus remained as a distinct class from "occupancy raiyats." Doubts were expressed in several reported cases, though these were somewhat set at rest by the decision in Sarbeswar *vs.* Bejoy Chand, 49 Cal., p. 280 (1921), and Tarini *vs.* Srish (1928), 56 Cal., p. 173, as to whether a raiyat at fixed rate was also an occupancy raiyat and what incidents of occupancy right governed him. The position has been made clear by section 18 as amended by the Act of 1928, viz., clauses (*b*), (*c*) and (*d*) of that section. (*See* also section 166.)

Section 5.

The words "servants or labourers" were substituted in sub-section (2) for the words "hired servants" in the old Act by the amendment of 1928, at the instance of the Select Committee who thought that these words would be more suitable and would express more clearly the intention.

There was a heated debate in the Legislative Council by a section of the members who wanted to bring *bargadars* in the category of servants and labourers within the meaning of this section. It was explained that *all bargadars* were not no-tenants and eventually the amendment to include *bargadars* or *bhagchasis* was lost.

For a recent exposition of the distinction between a tenure-holder and a raiyat and also what may be the reasonable inference from extensive *bhag*-settlement, *see* the case of Ram Charan Tripathi *vs.* Mohan Mohan Laha, 35 C. W. N., p. 1143.

Section 12 (2).

"Prescribed cost of transmission" means cost of transmission as prescribed by rules made by the Local Government under this Act [section 3 (10)]. Rule 25(3) of the rules published with Government notification No. 5462 L.R., dated 26th March 1929, prescribes this cost as 10 per cent. of the landlord's fee subject to a minimum of 8 annas, fraction of an anna being treated as full anna. This fee covers the cost incurred in Registration Office, Treasury and the Collectorate (including the cost of money-order commission) in handling and keeping account of the money.

Compare section 26 D. The exceptions in the 2nd and 3rd provisos in that section which apply to occupancy holdings, do not apply to permanent tenures or to raiyati holdings at fixed rate.

Section 12 (3).

The "prescribed manner" of transmitting or paying the landlord's fee to the landlords is contained in rules 24 to 29D of the Government Rules. (*See* also the Executive Instructions.) The landlord would first receive a copy of the notice of the transfer from the Collector: and unless desired otherwise by the landlord, the Collector would send him the landlord's fee by postal money-order. Where there are co-sharers amongst the landlords, they may appoint a common agent (the words "or his common agent, if any" were inserted by the amending Act of 1928) under section 99A to whom the Collector may send the money due to all the co-sharers. Otherwise, co-sharer landlords who have not appointed a common agent, can receive payment only on application by them all to the Collector and on their joint receipt [*vide* rule 29 (1) of the Government Rules].

It should be noted that as section 26C applies only to occupancy raiyats and therefore the procedure in rules 29 (2) to (7) for separate payment to a co-sharer landlord is not applicable to transfer, etc., of tenures or raiyats holding at fixed rates [sections 12, 13, 15 and 18 (1) (*a*)].

Section 13.

Sub-section (1).—Compare section 26E (1). Sales in certificates for arrears of rent or cases in which the decree-holder or purchaser is the landlord are not exempted from landlord's fee in the case of permanent tenures and raiyati holdings at fixed rate.

Sub-section (2).—For the words "or his common agent, if any" and for the manner of transmission of the money, *see* notes under section 12 (3).

Non-payment of landlord's fee does not invalidate sale of a permanent tenure, or holding at fixed rate [*vide* Bengal Tenancy (Validation and Assessment) Act, I of 1903, section 1]. *See* also Bishnu Ch. Pal *vs.* Jogendra Kumar Bhowmic, 36 C. W. N., p. 922. The Act of 1903 was intended to remove the difficulties expressed in the case of Babar Ali *vs.* Krishna Kamini, 26 Cal., p. 603 (3 C. W. N., p. 531).

Sale is complete as soon as the sale-deed is registered. Actual receipt of landlords' fee by the landlord or of the notice is immaterial.

[Kristo Ballav Ghosh *vs.* Krishto Lal Singh, 16 Cal., p. 642. *See* also Surapati *vs.* Ramnarayan, 50 Cal., p. 680 (28 C. W. N., p. 517)].

Section 15.

For the words "or his common agent, if any" and for the manner of transmission of the money, *see* notes under section 12 (3).

The proviso was inserted by the amending Act of 1928.

Section 16.

The word "distraint" was deleted from this section by the amending Act of 1928, because all the provisions about "distraint," sections 121 to 142 of the old Act, were repealed.

Section 16A.

As doubts were expressed in some cases whether a transferee included his successor in interest, this new section was inserted by the amending Act of 1928 with the object of making it clear that the successor in interest is also included.

Section 18.

(*See* notes under section 4.)

Clauses (c) and (d).—Clauses (*c*) and (*d*) of sub-section (1) and sub-section (2) were inserted by the amending Act of 1928.

Clause (*c*) follows the decision in Sarbeswar *vs.* Bijoy Chand, 49 Cal., p. 280 (1921), M. Z. Coy. *vs.* Sadhumani, 54 Cal., p. 681, and Tarini *vs.* Suresh, 56, Cal., p. 173, and removes the doubts which had been expressed in previously reported cases as to whether a raiyat at fixed rate could also be a settled and occupancy raiyat: and if so, what were the incidents of occupancy right which applied to him. Under clause (*c*) a raiyat at fixed rate would be a settled raiyat if he complied with the requirements of section 20, that is to say, if he has held any land in the village for 12 years; and when he is a settled raiyat he would also, under section 21, have occupancy right in respect of the lands held by him. This occupancy right would be a protected interest under section 160 (*d*) and (*f*) and he would not therefore be liable to ejectment on the sale of the superior interest for arrears of rent or revenue (*see* also section 37 of the Revenue Sale Law, Act XI of 1859). *In addition* to all these rights of an occupancy raiyat, a raiyat at fixed rate has, besides his rent being fixed [*see* also new clause (*ff*) to section 160], two extra privileges as specified in section 18. These are—

(1) that the transfer-fee payable to the landlord would follow the low scale of permanent tenures, and not the scale of occupancy raiyats;

(2) of the two conditions of ejectment of occupancy raiyats, viz., (*a*) and (*b*) in section 25, only condition (*b*) applied in the case of raiyat at fixed rate.

As regards trees the rights are the same as in section 23A.

The omission of condition (*a*) of section 25 in the case of a raiyat at fixed rate (same as in the Act before 1928) gives him wider power in utilising the land than an ordinary occupancy raiyat. The only limitation is that the use to which the land is put does not impair its value to an extent as to render the stipulated rent precarious. *See* Baroda Prasad Bannerji *vs.* Bhupendra Nath Mukherji, 50 Cal., p. 694. Same principle in the old case of Girish Chandra *vs.* Srish Chandra, 9 C. W. N., p. 255. This view was consonant with the observations made by Hon'ble Mr. Reynolds during the discussion of the old Bill of 1883, explaining the reason why a clause similar to clause (*a*) of section 25 was omitted from section 18:—

"You may trust him (raiyat at fixed rate) perfectly well not to use the land in such a manner as to render it unfit for the purpose of the tenancy. His interest is very much against his doing so. He may use it for a purpose imcompatible with a purpose for which it was let to him, but I really do not see why we should interfere so long as the security for the rent is not endangered."

The Bill of 1928 (as amended by the Select Committee) has a clause in section 18 repeating clause (*a*) of section 25. The Select Committee did this under an impression that that was the general law, viz., that if any tenant uses his land in a way which, when the lease was made, was not intended, then the tenant is liable to be ejected. The applicability of this proposition as a general rule for raiyats at fixed rate is open to question (*see* the cases referred to above). The clause was strongly opposed and was eventually dropped. The following observations of Sir Abdur Rahim are interesting:—

"We have got large suburbs outside Calcutta. Lots of lands there are—agricultural lands. These are held under *mokarari* rights and have been so held for years together—from time immemorial. What right has the landlord now to come down on him and say—you shall be ejected if you improve your land for the purpose of erecting buildings? If he gets his settled rent according to contract what right has he to deprive the tenant of his privilege?"

Clause (a).—Clause (*a*) of sub-section (1) is the same as in the old Act. It has to be read with sections 12 to 17.

In the case of mere occupancy raiyats, certain kinds of bequests, gifts, or dedications are exempted from transfer-fee, and a reduced rate is laid down for exchange (*see* section 26D). These exemptions do not apply in the case of raiyats at fixed rate. But the fee to be paid by them under sections 12 to 17 are almost nominal compared with the fees in case of occupancy holdings.

Compare also section 26E (1) which applies to occupancy raiyats. Certificates for arrears of rent are not excluded by section 13 (1), and therefore the landlord's fee must be paid in case of sales in such certificates of raiyats' holdings at fixed rates. There is also no exception for cases in which the decree holder or the purchaser is the landlord himself.

Section 18C.

This section earmarks forfeited landlord's fees and transfer fees for the district boards. The proposal was opposed by the Hon'ble Finance Member (Hon'ble Mr. A. Marr) on principle. He said, "It is against

all practice for a legislature to earmark any revenue—any particular revenue—for particular purposes, and the legislatures in all countries have been very jealous that this right of theirs should be safeguarded." He explained further that if the amendment were carried all this money would appear as non-voted in future budgets [*vide* section 72 D (3) (*iii*) of the Government of India Act. *See* also the objections explained by the Hon'ble Revenue Member (Sir P. C. Mitter) at the discussion in the Legislative Council]. The Government objection was however lost.

Section 22.

The amending Act of 1928 makes a considerable change in the rule of merger of occupancy holdings. The intention is stated as below in the "objects and reasons" (notes on clauses):—

"The existing section 22 prevents any landlord from holding lands in his own estate or tenure as a raiyat. This was considered unfair in the case of co-sharer landlords. So long as under-raiyats have substantial rights there is no reason why co-sharer landlords should not hold as raiyats, holdings of which they have come into possession otherwise than by exercise of their own legal powers to realise rents in arrears. Hence the existing sub-section (2) of section 22 has been omitted and a proviso to the new sub-section (2) of section 22 takes its place. The new sub-section (2) in section 22 emphasises the change in the law in favour of co-sharer landlords." For the implications in the old sub-section (*2*), *see* the case of Gorai Molla *vs.* Panchu Haldar, 34 C. W. N., p. 51.

Under the new sub-section (2), there will be no merger when a co-sharer landlord purchases the holding of his raiyat. But this does not extend to purchases at sales for arrears of rent, *vide* proviso to the sub-section. The reasons for making the distinction were explained thus from the side of Government:—

Mr. Sachse.—"Then, we are told that there is no substantial ground for making a difference between a landlord who buys a holding at a rent-sale and one who buys it privately. To that I give an emphatic 'No.' If he purchases at a rent sale he can annul incumbrances: if he purchases privately he merely steps into the shoes of his predecessor-in-interest. If there is an under-raiyat in the land, he must respect the rights of that under-raiyat. * * * From the lawyer's point of view there are grounds for considering that there ought to be a difference in the treatment of a compulsory sale which takes place at the instance of the landlord and a private sale."

It was also pointed out by another Government member that surreptitious and *ex parte* rent-sales and far more frequent rent-suits would be induced if it were made possible for a co-sharer landlord to *compel* a rent-sale and then to acquire the occupancy raiyat's interest for himself.

Hon'ble Sir P. C. Mitter.—"* * * if a third party purchases, that third party acquired interest in all the land at the instance of all the co-sharer landlords, but this particular co-sharer who purchases and has made his co-sharers a party, purchases in an involuntary rent-sale all the original rights of the occupancy raiyat free from encumbrances, and that brings in the distinction between the purchase by the

third party and purchase by one of the plaintiffs or defendants in whom the landlord's interest is vested. In the case of purchase by a third party he acquires the original rights of the occupancy raiyat against the landlord but a co-sharer landlord who in such a case represents all the landlords has in himself all the rights of the landlord and tenant in the same person."

Sub-section (3).—The term "ijaradar" in the old Act has been deleted, and the intention has been explained by the expression "temporary tenure-holder" as opposed to "permanent tenure-holder" in sub-sections (1) and (2).

Explanation.—The words "as proprietor or permanent tenure-holder" in the old Act have been deleted, because of the new sub-section (2).

The proviso includes purchases in sales in execution of certificates under this Act, i.e., under section 158A. It would seem therefore that when the certificate, though for an arrear of rent, be not under section 158A but under the ordinary rules in the Public Demands Recovery Act (e.g., in a court of wards estate under item 8 of schedule I) and a co-sharer landlord purchases, there will be no merger of the raiyati interest.

Section 23.

The words "But shall not be entitled to cut down trees in contravention of any local custom" in the old Act were deleted by the amending Act of 1928, because full right to trees was accorded to the occupancy raiyat by the new section 23A.

Section 23A.

This section was inserted by the amending Act of 1928 in the place of the old law which left the matter to local custom, a question which was always vague, and a fruitful source of ill-feeling between the tenant and the landlord. The new section sets at rest finally the whole controversy and gives full right to the occupancy raiyat both in respect of timber as well as fruits and other produce. This right cannot be defeated by any contract whether made before or after the passing of the Act [*see* section 178 (1) (*h*)].

This right extends also to the under-raiyat (as against his immediate landlord) when he has a right of occupancy in the land (*vide* section 48G). The law is still vague as regards other classes of under-raiyats.

Section 26A.

The amending Act of 1928 was published in the "Calcutta Gazette" of 21st February 1929 on receipt of the assent of the Governor in Council on 14th December 1928, and came into operation from the date of publication. The provisions relating to transfer of occupancy holdings, however, came into operation from the beginning of the next financial year, viz., 2nd April 1929. This time was allowed to enable Government to draw up and publish the rules of procedure to be followed in the different offices, and also to let the landlords and tenants be apprised of the new rules and procedure.

Section 26B.

(See notes under sections 26A and 26C.)

Section 26B confers similar rights of transfer to occupancy raiyats as section 11 did for permanent tenure-holders. Compare the language of that section which is the same as section 26B except for the words "or a share or a portion thereof" in the latter.

This right cannot be taken away or limited by any contract whether made before or after the Act. [*See* section 178 (*1*) (*g*) and notes under it.]

The right to transfer is subject to the provisions of this Act, i.e., subject to the liability to register the sale-deed and to pay the landlord's transfer fee at the time. It is not likely, yet if by mistake, fraud or otherwise the fee be not paid at the time of registration (or by way of that to Court when a sale certificate is issued), will that invalidate the sale? The answer is doubtful, for the provisions of section 1 of Act I of 1903 which validates such transfers in case of permanent tenures and holdings at fixed rates have not been expressly extended to occupancy raiyats.

Sections 26C to 26F—General.

See notes under section 26A, and compare section 26C (*1*) [with section 12 (*1*) read with section 18 (*1*) (*a*) regarding transfer of permanent tenures and raiyati holdings at fixed rates (*mukararis*). (*See* also the "Introductory Note".)]

Section 26C and the sections which follow it regarding transfer of occupancy holdings, embody an important change introduced by the amendment of 1928. Previous to that amendment the right of an occupancy raiyat to transfer his holding depended on local custom [*vide* section 183, illustration (2) of the old Act], and the burden of proving the existence of such custom lay on the raiyat (Manmatha Nath *versus* Anath Bandhu, 23 C. W. N. p. 201), not merely a growing usage but a fully established custom (Bazlul Karim *versus* Satish Chandra, 15 C. W. N. p. 752).

In practice what happened generally was that the purchaser paid a *salami* or *najar* to the landlord and obtained his recognition as tenant. Several decisions of the High Court tended to the view that the amount of *salami* or *najar* might be a customary sum or rate, but this view was hedged round by so many conditions that it was practically impossible for a purchaser to make any real use of it. For instance, the *najar* or fee must be proved to be a definite sum or scale and not a matter of bargaining between the landlord and the tenant in individual cases (*see* Mina Kumari *versus* Ichhamoyee, 27 C. L. J. p. 587). Proof that purchaser paid *najar* and obtained recognition was not sufficient (Bhagirath *versus* Sital Chandra, 16 C. W. N. p. 955) and the Court would not go to fix what might be a reasonable fee. In one case it was held that if the customary fee had not already been paid the sale was invalid (Siba Sundari *versus* Rajmohan 8 C. W. N. p. 214).

Although a transfer was not valid if not ratified by custom, yet it was recognised that it was fully operative as against the transferor and

further that in case of transfer of part or share of a holding the landlord was not entitled to evict the purchaser or get khas possession (Full Bench case of Dayamoyee *versus* Anandamohan—18 C. W. N. p. 971), the theory being that there was no abandonment (section 87) by the transferor which might entitle the landlord to step in.

The position was thus extremely unsatisfactory both from the point of view of the landlord and the raiyat. The amendment of 1928 aims at bringing the occupancy raiyats in a line with permanent tenure-holders and raiyats at fixed rate [sections 12 (*1*) and 18 (*1*) (*a*)]. It fixes the scale of the *salami* or fee (called "transfer fee' corresponding to "landlord's fee" in case of permanent tenures and holdings at fixed rate), and also provides that (1) in case of voluntary transfers (section 26C), this fee must be paid at the sub-registry office at the time of the registration of the transfer deed, and (2) in case of involuntary sales by Court, it must be paid in the Court concerned before confirmation of sale (section 26E). The scale of the fee fixed is however much larger, viz., to state generally, 20 per cent. of the consideration money or 5 times the rent whichever is greater (section 26D) as against only 2 per cent. of the rent in the case of permanent tenures and holdings at fixed rate. In certain cases the occupancy raiyat is altogether exempted from any transfer fee, viz., in case of bequest to certain near relations, or for religious or charitable purpose (*vide* 2nd proviso to section 26B). There is no such exception in case of permanent tenures and raiyati holding at fixed rate.

The Sub-Registrar or the Court would send the transfer fee to the Collector of the district and he will send it to the landlord (or his common agent, *vide* section 99A or common manager) by postal money-order in the same manner as landlord's fee for permanent tenures and raiyati holdings at fixed rate. A special facility is, however, provided in the case of occupancy holdings, for a co-sharer landlord to take payment from the Collector of his portion of the transfer fee by production of documentary proof of his title and share [first proviso to section 26C (3)]. The immediate landlord (or a co-sharer) of any occupancy holding has also been given what has been called a right of pre-emption, i.e., a right to purchase (through Court) the holding by paying, within 2 months of notice, the raiyat's transferee the amount of the consideration money in the transfer deed *plus* 10 per cent. on it (section 26F).

"Transfer" referred to in section 26B includes bequest, but it does not include—

(*i*) partition;

(*ii*) lease (for which see section 48H) or simple mortgage;

(*iii*) usufructuary mortgage (for which see section 26G), or

(*iv*) mortgage by conditional sale, until a decree or order absolute for foreclosure is made (*vide* section 26I).

The provisions about transfer of occupancy holdings came into operation from 1st April 1929 (*vide* section 26A).

The general plan of the several sections which follow is as below:—

Sections 26C and 26D—deal with the various kinds of voluntary transfers.

Section 26E—deals with the various kinds of involuntary sales.

Section 26F—deals with the pre-emption right of the landlord.

Section 26G—deals with mortgage.

Section 26H—is special for rent-free holdings.

Section 26I—interprets "transfer" in the several sections.

Section 26J—remedy in case of deficient transfer fee.

Section 26C.

General.—This section deals with the following matters relating to various kinds of voluntary transfer:—

(*i*) when a transfer of an occupancy holding must be registered [sub-section (*1*)];

(*ii*) how the "transfer fee" should be paid by the party to the sub-registrar, and what other requirements must be fulfilled by him at the time of registration of the transfer deed [sub-section (*2*)];

(*iii*) how the landlord or a co-sharer landlord would get payment of the transfer fee [sub-section (*3*)].

(*iv*) how the transfer fee should be paid in case of bequest [sub-sections (*4*) and (*5*)].

(*v*) how arrears of rent or mortgage dues should be treated for the purpose of determining the amount of transfer fee under section 26D or pre-emption charge under section 26F [sub-section (*6*)].

(*i*) *When a transfer deed must be registered.*—Sub-section (*1*) of section 26C requires that all voluntary* transfers must be registered.

Section 26I (2), however, excludes the operation of section 26C in several kinds of voluntary transfers, viz., partition, lease or simple mortgage, usufructuary mortgage and mortgage by conditional sale. These cases will be governed by the ordinary rules in the Registration Act, subject to other provisions in this Act which are:—

(*a*) lease by a raiyat to an under-raiyat (section 48H);

(*b*) usufructuary mortgage (sections 26G and 49E).

(*ii*) *What the party should do at the time of registration of transfer deed.*—These are enumerated in sub-section (*2*), viz., besides paying the usual registration fee, he shall also file (*a*) the prescribed notice forms duly filled in for service on the landlords and (*b*) shall also pay, (1) the process fee required for the service, (2) the landlord's transfer fee and (3) the prescribed cost for transmitting the transfer fee to the landlords. The transfer fee has to be paid in cash and the other fees in court-fee-stamp.

(*a*) *Notice for service on the landlords.*—Forms of notices are available in the registry office free of charge: and it is very important that the prescribed forms are used. Two forms of notices are prescribed

*As for involuntary transfers, i.e., those forced by the Civil or Revenue Courts in execution of decrees or certificates, *see* notes under section 26E.

—one for transfer of permanent tenures and *mukorari* holdings, and the other for occupancy holdings. The form for occupancy holdings is Form No. 3 in the Government Rules under the Act, and that for permanent tenures and raiyati holdings at fixed rate—Form No. 2 in the same rules. The notice form should be filled up by the party, and except where there is a common agent or common manager, as many notice forms as there are co-sharers amongst the landlords should be used, *plus* one extra form filled up in full for keeping in the Collector's record (see rule 26 (1) and (2) of the Government Rules under the Act). Where several tenancies held under the same co-sharer landlords are transferred by one document, one set of notices giving particulars of the different tenancies on the back, would be sufficient.

The correct postal address of each co-sharer landlord should also be stated. This is necessary because under Government rule 27 (1) these notices will be served by registered post. Where there is a common agent or common manager the address of the common agent or manager is sufficient.

Where there is no common agent or common manager, it is very important that notices are given for *all* the co-sharer landlords. Any omission may lead to complications in the position of the purchaser later. For example, the landlord's right of pre-emption under section 26F lapses ordinarily after 2 months from the notice of transfer: but it has been held by the High Court in the case of Surja K. Mitra *versus* Munshi Noabali reported in 35 C. W. N. page 688, that if no notice was given to a co-sharer landlord, his right to pre-emption subsisted till a reasonable period from the date of his knowledge of the transfer. The same principle would seem to apply equally in case of notice on a wrong landlord. To ensure that no co-sharer landlord is omitted or that a wrong person is not named as landlord —the party should always refer to the latest rent receipts received from the landlords and take particular care that the notices are written up for all the landlords mentioned in the rent receipts. The Executive Instruction of Government to sub-registrars is as below:—

"It is important that the prescribed forms are used and are filled up properly in all essential particulars. The registering officer shall see in particular that the address on the back of the forms is clearly written and that the names of all co-sharer landlords, where there are co-sharers, are given in the body of the notice. Whenever possible, he should compare these names with the names given in the latest rent receipts granted by the landlords where such receipts are voluntarily produced by the party. Any case of omission or doubt should be brought to the notice of the party, and it should be explained to them that it is to their interest that these particulars should be fully and properly supplied." (*See* paragraph 5 of the Executive Instructions—II Procedure in Registration Office.)

Supplementary notice.—There is no express provision for amendment of notice or for supplementary or additional notices. But there is nothing to prevent the raiyat from amending a notice by petition to Collector or filing supplementary or additional notices to safeguard his interest.

The raiyat is not required to state the shares *inter se* of the co-sharer landlords, or how the total "transfer fee" would be divided amongst them. He cannot be expected to know these correctly: and in

fact the rent from the raiyat is not always appropriated by the co-sharers according to their general shares in the estate or tenure. It is for the co-sharer landlord when he applies for separate payment of his share, to state his share and the shares of his co-sharers [*see* notes below against the first proviso to sub-section (*3*)].

For service of notice, *see* notes under sub-section (*3*).

(*b*) (*1*) *The process fee*—for the service of the notices referred to in (*a*). "Prescribed" means prescribed by Government [section 3 (*10*)], *vide* rule 25 (*2*) of the Government Rules, thus:—

"For the service of these notices a process fee of Re. 1 shall be levied in the case of each holding or tenure; provided that where there are several holdings or tenures included in one document of transfer are held under the same landlord or same body of co-sharer landlords a single fee of Re. 1 shall be charged."

The process fee is thus Re. 1 irrespective of the number of co-sharer landlords on whom the notices may have to be served. The process fee shall be paid in court-fee stamp [*see* Government rule 25 (4)] affixed to a blank sheet of paper on which the particulars of the transfer for which it is paid should be stated briefly to avoid it being mixed up with other cases. The cost of transmission of the transfer fee [*vide* (*d*)] should be paid also in the same manner. The executive instruction of Government to sub-registrars is as below:—

"The party when presenting a deed of transfer for registration should supply—

(1) notices in the prescribed forms properly filled in, for service on the landlord; separate notices should be prepared for each tenure or holding transferred, unless they are held under the same landlord or same body of co-sharer landlords;

(2) a sheet of paper with the process fee and cost of transmission affixed in court-fee stamp, the particulars of the transfer to which they relate being stated briefly in the body;"

(*b*) (*2*) *The landlord's transfer fee*: unlike process fee and cost of transmission, this should be paid in cash and a receipt will be given by the registering officer for it.

The scale of the fee is laid down in section 26D, and the schedule on the back of the form of notice (Form 3, Government Rules) is intended to afford an automatic method of calculating the amount in cases of transfers of entire holdings as well as of portions or shares. Sub-section (*6*) requires that the consideration money or the value of the holding on the basis of which the transfer fee is calculated should include all arrear rent and subsisting mortgage dues. This is important and should be borne in mind when drawing up the deed or filling up the schedule of the notice. It will be noticed that the raiyat is not required to divide the total amount amongst the co-sharer landlords [*see* last portion of the notes under sub-section (*2*) above]: but the amount due for each holding should be shown separately. The form of notice for transfer of tenures or raiyati holdings at fixed rates is different (viz., Form No. 2), and where such tenancies as well as raiyati holdings are transferred by the same document, care should be taken that they are not mixed up in the same form of notice.

Effect of insufficient transfer fee on misdescription.—Misdescription of the nature of the tenancy in the transfer deed or in the notices does not bind the landlord [*vide* section 26I (*4*)] : but if insufficient transfer fee be paid, or if transfer fee be paid on the scale of a holding at fixed rate (*mukarari*) where the tenancy is only an occupancy holding a penalty is provided in section 26J (*viz.*, the same amount over with costs). The landlord also gets an extended time for pre-emption [*vide* sub-section (*3*) of that section].

The form of schedule with the notice requires mentioning *khatian* numbers, etc., in all areas where there has been a record-of-rights.

(*b*) (*3*) *The prescribed cost of transmission*—means such cost as may be prescribed by Government by rules under the Act [section 2 (*10*)]. It is laid down in rule 25 (3) of the Government Rules, thus :—

"The cost of transmission of transfer fee shall be levied at 10 per cent. of the fee subject to a minimum of 8 annas, fraction of an anna being treated as full anna: provided that where several holdings or tenures, included in one document of transfer, are held under the same landlord or same body of co-sharer landlords a single fee calculated at 10 per cent. of the total transfer fee, subject to a minimum of 8 annas, shall be charged."

Paragraph 7 of the Executive Instructions to sub-registrars explains the calculation further, thus :—

"For example, if the transfer fee is Rs. 4-6, the cost of transmission will be 8 annas and not 7 annas. Again if the transfer fee be Rs. 36, the cost of transmission should be Rs. 3-10 and not Rs. 3-9-7."

Where lands of several holdings are included in the same transfer deed, the above calculation should be made separately for each holding.

The cost of transmission is payable in court-fee stamp like process fee and in the same manner [*see* notes under (*b*) (*1*) above regarding process fee].

The cost of transmission is intended to cover the cost of Government on account of the agency work* which the Act imposes upon it. This cost comprises the cost in the registration office, the collectorate and over-head charges for supervision, audit, etc., and includes the money-order commissions for sending the money from the sub-registry office to the collectorate treasury and from the collectorate to the landlords concerned. As for the detailed procedure, see Government rules 28, 29, 29A to 29D, and the Executive Instructions.

Sub-section (3)—Payment of landlord's transfer fee to the landlord. The landlord's transfer fee and the notices are sent by the Sub-Registrar [in case of involuntary sales by the Court, *vide* section 26E (*4*)]

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* NOTE.—Sir John Kerr's Committee or the Bill as introduced in the Legislative Council in 1925 did not impose this agency work on Government. It was left to the landlords to realise the transfer fee in the same manner as arrear of rent. The Select Committee which followed that Bill, recommended, however, that the fee should be paid to the registering officer at the time of registration of the transfer and then transmitted by the Collector to the landlord concerned as in the case of landlord's fee for transfer of permanent tenures. This recommendation was accepted in the Act of 1928. It no doubt saves the landlord the trouble and expense of realisation and he gets the money at his door through the postal peon, but as will be explained later, it complicates the whole matter a good deal, particularly where there are co-sharer landlords.

to the Collector, and the Collector sends the money by postal money-order to the landlord (or to his common agent or common manager), so that the latter gets it at his door. Before he does this, the Collector first serves the notices on the landlord named therein (or to his common agent or manager) by registered post, acknowledgment due, or in the manner of service of a revenue process (Government rule 27). He then waits till the acknowledgment or due service is received [*see* Executive Instructions III (5) and (7)] and then sends the money by postal money-order (except in case of personal ledger account for which see notes below under that head) to the landlord or his common agent or common manager, if any. If any notice be returned by the Post Office undelivered, the Collector will affix it on the Collectorate notice board for one month, but payment will not be made in such case unless the landlord makes an application ~~(court-fee required 12 annas)~~ in writing to the Collector. Such application may require the Collector to pay direct from the Treasury or by postal money-order, and the Collector will act accordingly (Government rule 28).

This is simple enough when there is a sole landlord or where co-sharer landlords have a common agent or common manager *and* there is no mistake in his name in the notice furnished by the raiyat. But where (*a*) there is a mistake or (*b*) there are co-sharers without common agent or common manager, difficulties necessarily arise.

(*a*) *Mistake in the name of the landlord in the notices or wrong landlord being named.*—Under section 26C (*3*) [also section 26E (*4*)] the Collector can pay only to the person named in the notices furnished by the raiyat. He has no authority to pay to any person not so named. This stands to reason. The Collector's position is that of an agent who can only pay to the person named by his principal, i.e., the raiyat. If there is a mistake, he cannot take it upon himself to correct it. Such a course would necessarily involve him into an investigation as to whether the matter is one of dispute or a mere mistake, and then to a finding on these points. If there is a dispute, the Collector cannot arrogate to himself the power of enquiring into such dispute, which is the jurisdiction of the Civil Court. In any case his finding can have no legal effect.

It follows, therefore, that a landlord not named in the raiyat's notice cannot have any relief from the Collector. Such a landlord can, however, obtain a decree or order from the Civil Court and apply to the Collector for payment of the transfer fee on its strength. If the Collector has already paid the money to the person named in the raiyat's notice, the landlord can recover it from that person (*vide* proviso to section 195A). He seems to have got two other indirect ways of getting payment—(1) he may induce the raiyat to file supplementary notices or to apply to the Collector for correction of his previous notices; or (2) he may apply for pre-emption under section 26F. As already observed, there is nothing to debar a raiyat from filing supplementary notices or correcting mistakes in his first notices; and if the mistakes are *bona fide*, it is to the interest of the transferee to see that they are corrected. As for pre-emption, the right under section 26F is not limited only to the landlords named in the notices, and, following the principle held in the case of Surja Kanta Mitter *versus* Munshi Noab Ali, 35 C. W. N. page 688, a landlord not named in the notice can apply for pre-emption within a reasonable time from the date of his knowledge of the transfer.

(*b*) *Co-sharer landlords.*—If co-sharer landlords can act jointly, there are several ways of receiving payment of their transfer fee—

(1) by application to the Collector and joint receipt of all of them [*vide* Government rule 29 (1)];

(2) by the appointment of a common agent* under section 99A or a common manager;

(3) by opening personal ledger account according to rule 29B of the Government Rules. (*See* notes under heading "Personal Ledger Account," page 31.)

The necessity of joint action by all the co-sharer landlords arises from the position that the Collector cannot take it upon himself to divide the transfer fee amongst them unless such division is agreed to by them all. Moreover, the expression "landlord" in sections 26C (*3*) and 26E (*4*) has its ordinary meaning of entire body of landlords. However, to simplify the procedure in (1) above, i.e., joint application and receipt—rule 29 (6) of the Government Rules has been recently amended (*vide* Notification No. 856 T.R. of 14th October. 1932), and the landlords can take together a number of deposits of the same kind in one application and receive payment of the total amount. The procedure in (2) above, viz., of common agent or common manager is more convenient, as all notices, etc., will also be served on such agent.

If the co-sharer landlords cannot act jointly owing to disputes amongst themselves, they or any one of them can have a common manager appointed by the District Judge under section 93 (*i*) (*b*) and the transfer fees may then be paid to such common manager. It is, however, doubtful whether a common manager can be appointed under this section only for the purpose of receiving transfer fees.

A co-sharer landlord may, however, obtain separate payment of his portion of the transfer fee of occupancy raiyats† by proceeding under the first proviso to section 26C (3) [or in cases of involuntary transfers —section 26E (*4*), proviso]. The procedure is as below:—

(1) application to the Collector, mentioning the transfer fees in deposit and the share he claims and the shares of the other co-sharers with their names and postal addresses. ~~The court-fee required for the application is 12 annas, and~~ the application must be verified in the same manner as a plaint under the Civil Procedure Code [Government rule 29 (2)];

(2) the application shall be accompanied by extract from the Land Registration Registers where the landlord is the proprietor of an estate, showing the shares, and in other cases documentary proof (e.g., copies of record-of-right or other title deeds) to show the shares;

(3) it shall also be accompanied by notices (in Form 7 of the Government Rules) to be served on the other co-sharers [Government rule 29 (2)] together with a total process fee of Re. 1 only [Government rule 29 (3)]. The "other co-sharer" should include all the co-sharers named

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*See notes under section 99A. The name of the common agent must be registered in the Collectorate. The rule about common agent does not debar the landlords from appointing a special agent, *e.g.*, by mukhtearnama or vakalatnama for any particular case.

†This procedure does not apply to landlord's fees on *account of permanent tenures* or of raiyati holdings at fixed rate or fixed rent (*mukarari*), as sections 26C and 26E apply only to occupancy holdings. The procedure may, however, apply to leases *to under-*raiyats [*vide* section 48H (2)].

in the raiyat's notices, even though there may be mistake and the applicant may not admit them, and also names of other co-sharers not named in these notices [Government rule 29 (2)] with their addresses.

The Collector will first serve the notices in the manner provided in Government rule 29 (3), i.e., by registered post, acknowledgment due, on the other co-sharers inviting them to state whether they have any objection to payment to the applicant according to the share stated. If no objection is received and the Collector is satisfied about the title and share from the documents filed, the applicant may receive payment of his share from the Collector, provided always that his name is mentioned in the raiyat's notices under section 26 (*2*) (*a*).

To simplify and cheapen the procedure, Government rule 29 (6) provides that a co-sharer may join any number of deposits in one application ~~with one court-fee stamp of 12 annas~~, provided the interest and title of the landlords are uniform. To avail of this advantage all that the landlord is required to do is to keep together the notices as they are received, and then wait for 6 months or a year till a sufficient number has accumulated. He can then take them all together and apply to the Collector with one application only, according to rule 29 (6). The payment can, however, be had only from the Treasury, i.e., not by postal money-order.

Registration of shares.—Still the procedure cannot be said to be easy or simple. To comply with the requirements of sections 26C (*3*) and 26E (*4*), the co-sharer has to prove in each application for payment his title and share by production of extracts from the Land Registration Registers or other document. A new rule 29D has accordingly been recently proposed to be inserted in the Government Rules (Notification No. 9010 L.R., dated the 4th August. 1933) by which this can be avoided. According to this rule,* a co-sharer landlord would be able to register with the Collector a statement of his share in respect of any estate or tenure or part thereof, and later on when he applied for payment of his portion of any transfer fee in deposit the Collector would, unless he was apprised of any objection or dispute since, without further notice on the other co-sharers and without further production of extract from the Land Registration Registers or other document in proof of title or share, divide out the applicant's portion according to the registered share and send it to him by postal money-order, provided always that his name was mentioned in the raiyats' notice under section 26C(*2*) (*a*). A statement of share once registered, would remain in force for two years, but would be renewable thereafter in the same manner. The procedure of registration, renewal and payment would be as below:—

(1) The statement of share shall be in the form given in Form 7A of the Government Rules, and shall show the applicant's share as well as the shares of all the other co-sharers in the estate, tenure or part thereof in respect of which registration is sought. The statement must be verified as a plaint under the Civil Procedure Code and shall be accompanied by as many copies of the same as there are co-sharers together with notices (Form 7A, first page) to be served on the other co-sharers, and an application to the Collector requesting him to register

*This rule would seem to be applicable also to landlord's fees for transfers of permanent tenures and raiyati holdings at fixed rate or fixed rent, as it is not entirely dependant on section 26C (*3*) (first proviso) or the proviso to section 26E (*4*).

the statement and to divide his portion of transfer fees according to the share stated in it.

(2) The court-fee required for the application and the statement is Rs. 5, and the process fee required for the service of the notices is Re. 1 total, whatever the number of co-sharers, as in Government rule 29 (2), and it shall be paid also in court-fee stamp. The application must be supported by extract from the Land Registration Registers where the landlord is the proprietor of an estate, and in other cases copies of the record-of-rights or other document showing his share as in the case of an application for payment under section 26C (*3*), first proviso, or the proviso to section 26E (*4*). The shares of all the co-sharers in the estate, tenure or part thereof in one application or statement, must be uniform.*

(3) The Collector will then serve the notices on the other co-sharers inviting them to file objections, if any, to the shares stated in the statement of shares within a specified date. If no objection be filed and there be no dispute, the Collector will register the applicant's share.

(4) Any other co-sharer may, in response to the notices mentioned above, apply to have his share also registered; and if there be no objection or dispute about it, the Collector will register his share also without further notice to the other co-sharers and, unless the share is not supported by the documents already filed by the first applicant, without production of any further document in proof of title or share. The court-fee required for such application is Re. 1.

So far as regards registration of share. As for payment out of any particular deposit of landlord's transfer fee, there must be an application under the first proviso to section 26C (*3*) or the proviso to section 26E (*4*), ~~with the usual court-fee of 12 annas,~~ but it will not be necessary to file again any extract from the Land Registration Registers or other document in proof of title or share, or to file any further notices or process-fee. The Collector will, on receipt of such application and unless he has been apprised of any change or dispute regarding the applicant's share, forthwith divide the transfer fee and send the applicant's portion to him by postal money-order, provided always that the applicant's name is mentioned in the raiyat's notice under section 26C (*2*) (*a*). An application for payment may include any number of deposits as in Government rule 29 (6).

Payment under the above procedure can, as already stated, be made during two years from the registration of share; but the registration may be renewed for another two years (and so for every succeeding two years) by fresh application, and the procedure is the same as in the first application.

It will be observed that whichever of the above procedures be adopted by a co-sharer landlord, he must not only at one stage give *prima facie* proof of his title to the share claimed by production of

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*It might be sufficient, so far as the applicant co-sharer is concerned, that his own share (e.g., say 7 annas), was the same in the entire area covered by the statement of shares and the application, it being immaterial whether the shares *inter se* of the other co-sharers within the remainder (viz, 9 annas) varied or not. But in that case it would not be possible to extend the benefit of the rule to any other co-sharer [*vide* paragraph (4) below], without fresh statement of shares and fresh notices.

extract from the Land Registration Registers or other document as required by the provisos to sections 26C (*3*) and 26E (*4*), but he cannot get any payment from the Collector if there is any objection or dispute regarding his title or share, or if his name is not mentioned in the raiyat's notices under section 26C (*2*) (*a*).*

Personal Ledger Account.—A sole landlord or, where there are co-sharers, all the co-sharer landlords together, may apply to the Collector for personal ledger account in respect of transfer fees due to him or them in any estate, tenure or part thereof, provided that in case of co-sharer landlords their shares are uniform in the entire area covered by the application. As transfer fees are received by the Collector, he will enter them in the personal ledger, and where there are co-sharers amongst the landlords, divide the amounts according to their shares and show the amounts due to each co-sharer in separate columns of the ledger, provided always that the landlord's name is mentioned in the raiyat's notices under section 26C (*2*) (*a*). The form is given as Form 8 in the Executive Instructions. When the landlord wants payment he must apply to the Collector, and the Collector will pay him against the amount at his credit in the ledger. The procedure is laid down in rule 29B of the Government Rules, and is as below:—

(1) Application for personal ledger to be verified as a plaint under the Civil Procedure Code, to give a brief description of the estate or tenure with names of villages, and where there is a record-of-rights its *khatian* number. In case of proprietors of estates, extracts from the Land Registration Registers to be annexed. In case of co-sharers, their shares to be specified and also the shares or groups of shares according to which separate accounts in the ledger are sought.

(2) The fee for maintenance of personal ledger account is Rs. 25 per annum, except when the revenue or rent is Rs. 100 or less, in which case it is Rs. 10. When co-sharer landlords want separate accounts according to their shares or groups of shares, the above fee must be paid for each such separate account wanted. The fee has to be paid in cash at the treasury.

(3) Every application for payment shall state whether there has been any change in the landlord or his share, ~~and shall bear court-fee stamp of 12 annas~~, and shall be verified as a plaint under the Civil Procedure Code. In case of change in the landlord, the Collector must obviously be satisfied as to his right to receive the money. In case of change in share, he cannot also pay unless the co-sharers agree; and in such case notices on the co-sharers are obviously necessary, unless they voluntarily appear and signify in writing their agreement. When satisfied in these respects the Collector will order payment against the amount at the credit of the applicant in the ledger. The payment will not be made by postal money-order but will have to be taken from the treasury.

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*From this point of view the provisos are more a handicap than otherwise to the co-sharer landlord. These provisos were inserted by an amendment moved in the Legislative Council by Mr. Syed Atiqulla. The amendment was opposed from the side of Government, but the opposition was lost. In moving his amendment Mr. Atiqulla simply said that his object was to "safeguard the interest of a co-sharer landlord where there is no common agent". There was no proper discussion of the implications in the suggested procedure. It would perhaps have been simpler if the suggestion made by Mr. Nelson from the side of Government that the matter might be left to rules, were accepted.

The application for payment in case of co-sharer has to be treated as application under section 26C (*3*), first proviso, or section 26E (*4*), proviso, so far as regards transfer fees on account of occupancy holdings, only if there has been no change in the landlord or his share, no further notices on the other co-sharers or production of documents is necessary. The advantage of personal ledger account in Government rule 29B is not, however, confined to occupancy holdings only, but extends to landlord's fees on account of permanent tenures and raiyati holdings at fixed rate; and although the provisos to sections 26C (*3*) and 26E (*4*) do not apply, the procedure, is the same and, as in the procedure of registration of shares, a co-sharer landlord can thus get payment separately of his portion of such fee also.

It will be observed that the main difference between the procedure of personal ledger and the proposed procedure of registration of shares under Government rule 29D is that in the former all the co-sharers must join in the application and agree to personal ledger account for themselves also, while in the latter one co-sharer can apply and act independently. On the other hand in the case of personal ledger account, the landlord need not necessarily keep an account of the transfer fees, as this is done by the Collector for him. In applying for payment also he has not to mention the specific deposits. In the case of mere registration of shares, the landlord will have to keep an account of the transfer fees as he receives the notices under section 26C (*2*) (*a*), and when applying for payment he must state definitely the deposits against which he seeks payment.

2nd proviso to section 26C (3).—When a landlord or a co-sharer landlord purchases the holding of a raiyat under him.—When a sole landlord (or the entire body of landlords) purchases the holding of an occupancy raiyat under him, no notice or transfer fee is necessary. The reason is obvious.

Similarly when a co-sharer landlord purchases his raiyat's holding, it is not necessary for him to serve a notice on himself or to pay his portion of the transfer fee. The transfer fee to be paid at the registry office will be only what would be payable to the other co-sharers, and the notices to be filed will be only those which are required for service on these other co-sharers.

Where such a co-sharer purchaser shows a wrong share for himself or omits some other sharers and retains for himself a larger portion of the transfer fee than is properly due to him, there is no special provision for the relief of the aggrieved co-sharer. None of the remedies mentioned above are available to him. There is, however, nothing to bar his ordinary civil remedy by suing the purchaser co-sharer.

Sub-sections (4) and (5).—*Sub-section (4).—Bequest transfer fee to be paid at the time of probate or letters of administration.*—In case of bequests the transfer fee should be paid at the time of probate or letters of administration, together with notices on the landlords to be served through the Collector as in the case of transfer by registration at the registry office. The form to be used is the same as prescribed for transfer by private sale, viz., Form No. 3, only the rate of transfer fee should be calculated at 10 per cent. of the value (instead of 20 per cent.) or $2\frac{1}{2}$ times the annual rent (instead of 5 times) whichever is greater [*vide* section 26D (*e*)]. The consequences of omissions and mistakes in names, etc., would be the same as already stated above. The Court

will send the notices and the transfer fee to the Collector and the Collector will deal with the same in the same manner as when received from the registry office.

The provisions of sub-section (*6*) are important for the purpose of the calculation of the landlord's transfer fee. The stamp duty will have also to be paid on the full amount.

See also section 73, proviso. Ordinarily the transferor and the transferee are both liable for arrears of rent; but if the arrear has been mentioned in the transfer deed as payable by the transferee, the transferor ceases to be liable for it to the landlord.

Section 26D.

Section 26D is subsidiary to section 26C [*see* section 26C (*2*) (*c*)] and lays down the rates of landlord's transfer fee (or *salami*) to be paid in different kinds of voluntary transfer of occupancy holdings, thus:—

Rates of landlord's transfer fee in case of voluntary transfers.

Holding or part on produce rent.	20 per cent. of the consideration money..	To be paid at the time of registration to the Registry office.
Holding on money rent.	20 per cent. of the consideration money or 5 times the annual rent whichever is greater.	Ditto.
Part or share of a holding on money rent.	20 per cent. of the consideration money or 5 times the proportionate rent for the share or part whichever is greater.	Ditto.
Exchange ..	5 per cent. by each party of the consideration money or 1¼ times the rent whichever is greater, i.e., total 10 per cent. or 2½ times the rent.	Ditto.
Gift	20 per cent. of the value or 5 times the rent whichever is greater.	Ditto.
Bequest ..	10 per cent. of the value or 2½ times the rent whichever is greater.	To be paid to Court at the time of probate or letters of administration.

Where the transferee is a co-sharer landlord the transfer fee to be paid is less by the proportion of his share.

Consideration money and value of holding.—There is no "consideration money" in the case of "gift", "bequest" or "exchange". In these cases therefore the "transfer fee" has to be calculated on the "value of the property". Under section 26C (*6*) "consideration money" includes arrear rent and mortgage dues which the transferee has paid or agreed to pay, and these amounts are required to be shown in the transfer deed both for the purpose of transfer fee and stamp duty.

"*As set forth in the instrument of transfer.*—The expression used in clauses (*a*), (*b*), (*c*) and (*d*) is consideration money or value "as set

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NOTE.—For involuntary sales (*see* section 26E).

forth in the instrument of transfer". There is no provision for disputing this amount if it is under-stated: but the purchaser stands the risk of losing his land on the landlord paying only the under-stated amount (with 10 per cent. extra) under section 26F (pre-emption), and this apprehension would afford an automatic check against under-statement. To the landlord, the only remedy is by following the procedure of pre-emption under section 26F (*see* notes under section 26F).

Exchange.—"Exchange" really amounts to two sales, and from this point of view the fee would be half of what would be derived if there were two sales. But exchange is effected usually by one document as one transaction. However, taking the rate prescribed as a reduced rate, it was justified on the ground that exchange should be encouraged as it would facilitate consolidation of holdings. The landlord's right of pre-emption does not extend to "exchange" [*see* section 26F (*1*) (*c*)], and therefore there is no check against under-statement of the value in the document. But the same reason, viz., desirability of encouraging exchange, justifies this laxity.

2nd proviso—Gift or bequest to near relatives or for religious or charitable purposes.—The 2nd proviso exempts certain bequests or gifts to near relations or for religious or charitable purposes. This exemption does not extend to permanent tenures or raiyati holdings at fixed rate.

Section 26E.

Sub-section (1).—Just as sections 26C and 26D deal with the various kinds of voluntary transfers, section 26E deals with the various kinds of involuntary sales, which are sales in execution of a decree or certificate or foreclosure of mortgage. Two classes of involuntary sales are exempted* from transfer fee:—

(1) those in execution of a decree or certificate for arrears of rent due in respect of the holding or dues recoverable as such, and

(2) where the purchaser or the decree-holder is the sole landlord (which term includes entire body of co-sharer landlords where there are co-sharers).

The underlying idea is that as the transfer fee represents the price to purchase the landlord's sanction, it should not be payable where the sale is brought about at the instance of the landlord himself, or by a co-sharer in a proceeding in which the other co-sharers have also notice [*see* sections 148A (*7*) and 158A (*9*)].

"Decree or certificate for arrears of rent"—the first exemption.—Compare the proviso to section 22 (*2*), *ante*, where the words are "rent

*NOTE.—The language of the section is not very happy. It would perhaps have been better if those exemptions were shown in a separate proviso like the 2nd proviso to section 26D. However, in both sections 26C and 26D (which relate to voluntary transfers) and section 26E (which relates to involuntary sales) the provisions about liability to transfer fee and the procedure of paying it are mixed up. There is no separate liability clause. Section 26E excepts these two classes of cases and there is no other section or provision imposing a liability to transfer fee for them. The net result is that they are exempted from the fee, as really intended by the framers of the Act.

decree or a certificate under this Act". The same would seem to be the meaning of the above expression in section 26E, viz., decrees or certificates for arrears of rent *under the Bengal Tenancy Act**.

Cases in which no transfer fee is payable are thus:—

(*i*) sales in execution of decrees in rent suits by the entire body of landlord, i.e., the ordinary rent suits framed under section 144;

(*ii*) sales in execution of decrees in rent suits by co-sharers, framed under section 148A [for notice to other co-sharers, *see* section 148A (*7*)];

(*iii*) sales in execution of certificates under section 158A whether filed by the sole landlord or by a co-sharer† [for notice to other co-sharers, *see* section 158A (*9*)]:

(*iv*) sales in execution of ordinary certificates under the Public Demands Recovery Act whether by Government or by the Court of Wards [e.g., item (8) of schedule I of the Public Demands Recovery Act], where the Government or the Court of Wards is the sole landlord [*vide* exemption (*ii*) above].

Proviso to sub-section (1).—Compare the 2nd proviso to section 26C (*3*). The omission of any reference to sole landlord is due to the fact that under the main sub-section when a sole landlord purchases in a Court sale, whatever the nature of the sale, no transfer fee is payable. This also follows otherwise: for where the purchaser is the 16 annas landlord, there remains nothing of the transfer fee to be deposited for anybody else.

Sub-section (3).—Compare what would happen in the case of a voluntary transfer (section 26C). If the requisite fee is not paid, the Sub-Registrar will not register the document, and under section 26C (*1*) the sale would be ineffective.

Sub-section (4) (proviso).—For deficient fee, section 26J applies to Court sales also. The proviso to sub-section (*4*) repeats the proviso to section 26C (*3*). [*See* notes under section 26C (*3*).]

Section 26F.

This section embodies provisions about what has been called the right of pre-emption by the landlord against the purchaser of a holding of a raiyat under him. The right can, however, be exercised only *after* the sale by the raiyat has been completed. It is strictly therefore a right of "post-emption".

The introduction of this section in the Act of 1928 was a subject of very hot controversy. The objects intended by the section are—*firstly*, to let the landlord have an opportunity to get rid of an undesirable tenant, *provided* he paid reasonable compensation to the man who has purchased from the raiyat (10 per cent. over the purchase money [*vide* section 26F (*2*)]; and *provided* there was no delay in taking action by

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*NOTE.—It would have been clearer if the words "under this Act" were inserted after "certificate" in line 3 as in section 22.

†NOTE.—It does not seem to be necessary to induct the theory in section 158AAA and exclude certificates by co-sharer landlords when obtained under section 158A. The provision of section 158A (9) for notice to other co-sharers brings, for this purpose, the case in a line with cases under section 148A. Further, section 22 (*2*), proviso, does not exclude such cases. In any case the section as it is does not, in case under section 158A, limit its scope only to certitificates by sole landlord or entire body of landlords.

the landlord, time fixed 2 months (*vide* section 26F): and *secondly*, to provide an automatic check against under-valuation in the sale deeds with a view to avoid the proper transfer fee, and thus to stop any litigation over the question of valuation.

The proposal for provision of pre-emption appeared also in the old Bill of 1883, along with the proposal for conferring the right of transfer on the occupancy raiyats. Both fell through at that time. The latter proposal having been revived, the former also came in for consideration, and was adopted with certain modification.

The position was further explained thus on behalf of Government, during the discussion in 1928:—

"Under the present law, though practice varies, but generally stated, when a raiyat sells his holding, the landlord recognises the purchaser on payment of a *salami*, or when he does not recognise him, he treats him as a trespasser and goes to the law Court to eject him.

"Now, of the two alternative courses open to the landlord, that of *salami* which now varies with his whim and pleasure, it has been made definite, and a uniform rate of fee has been fixed. The rate of post-emption provides a substitute for the other alternative, namely, the option of ejectment suit now open to the landlord. As a substitute it is certainly a fairer and more equitable substitute. If there be an ejectment suit, the purchaser loses or at any rate risks to lose not only the land but also the whole of his purchase money, the cost of litigation and perhaps mesne profits also, not to speak of the suspense and anxiety for years, during which the litigation would be pending. Under the Bill where he cannot get the land, he gets back his money with 10 per cent. compensation in 2 or 3 months' time."

The procedure for the landlord will be as follows:—

(1) to make an application in the Civil Court within two months of the receipt of notice of transfer: the other co-sharer landlords should be made parties defendants to the proceeding [*see* section 188 (*i*)];

(2) to deposit simultaneously in the Court the amount of consideration money or value as set forth in the notice with 10 per cent. over it.

(3) to annex with the application—(*i*) notices to be served on the person to whom the raiyat has transferred [*vide* section 26F (*3*)]; and (*ii*) notices to be served on the other co-sharer landlords who would be made parties defendants: with the necessary process fee.

(4) to deposit within such time as the Court will allow [section 26F (*3*)] the further amount as the transferee may have paid as rent or to annul any incumbrance, together with interest.

(5) to obtain order of the Court allowing the application under section 26F (*5*).

(6) if necessary, to apply for and obtain possession through the Court [section 26F (*iii*)]. No special rates of court-fees for the application under (1) or (6) above or for deposits under (2) or (4) above, or for

the notices under (3) above are prescribed (*see* Chapter VIII of the Statutory Rules), and therefore the scales in the Court-Fees Act (VII of 1870) will apply.

Sub-section (1).—Exceptions.—The exceptions (*a*) to (*d*) are obvious except perhaps "exchange" in (*c*), for which see notes under section 26D.

Pre-emption to be applied for within two months of the service of notice.—The object is to keep the period of suspense as short as possible. To quote from the statement made from the Government side during the debate in the Legislative Council:—

"Another objection is that this (i.e., pre-emption) may be used as a convenient weapon to terrorise and fleece the purchaser. This is a serious objection, and if it turns out to be true, it should be the duty of Government and this Legislature to step in and take away the right altogether. Government were not unmindful of this objection, and safeguards have been provided in the Bill against such possible abuse. These are, *firstly*, that the amount set forth as consideration money in the sale deed must be taken as final and must not be open to question in Court; *secondly*, that the procedure in the Court should be a simple proceeding and not a suit; *thirdly*, the time of suspense must be as short as possible. It has been put at two months and in no circumstances should it be permitted to exceed 3 to 4 months at the most; *fourthly*, the rules of merger in section 22 should apply. It was with considerable diffidence that the right of post-emption (i.e., pre-emption) has been extended to co-sharer landlords. But judging from the number of amendments bearing on this concession, which have been put forward, it should be a serious matter for consideration if they are pressed, whether the right should not be restricted to sole landlord and entire body of landlords only. On no account should the procedure of post-emption be permitted to drag on as a regular suit. It is a matter of the utmost importance that the period of suspense should be as short as possible. Otherwise not only will all peace-loving purchasers be shut out altogether but even the speculating purchaser will be shy and the raiyat will never get a free market on anything approaching a proper value for his land; and the landlord's share as transfer fee will also be proportionately less. There is again the risk that actual cultivation of the land will be neglected during this period of suspense—a very serious contingency which should by all means be avoided. The restrictions of time and procedure by which this right of post-emption has been hedged round in the Bill, are therefore all of great importance, and none of them can be relaxed."

When no notice is received.—When a co-sharer landlord does not receive any notice under section 26C (*2*) (*a*) by reason of the raiyat omitting his name, it has been held by the High Court in the case of Surja K. Mitra *versus* Munshi Noabali, reported in 35 C. W. N. page 688, that that co-sharer would get a "reasonable time" from the date of his knowledge of the transfer within which he may apply for pre-emption under section 26F. In this case the application was within two months of knowledge and this was taken as reasonable. It will, however, be observed that an amendment somewhat on the line of the

decision by the High Court was moved in the Legislative Council from the zamindar's side, but was lost, Government opposing thus:—

"It is directly against the clear intention of the sections on pre-emption. This intention is that two months should be the maximum time within which the landlord must exercise his right. If a co-sharer landlord be permitted to come at any time after years, on this plea or that and claim pre-emption who will care to buy a raiyat's land or risk his money? Again if a fear like this be constantly hanging over his head it will mean interminable suspense with all the serious difficulties in its tail about which I have already spoken, purchasers will be shy, the raiyat will not get the full market value and the landlord will not get the full *salami* and cultivation will be held in suspense for an indefinite period. Other serious objections will also arise. *For the possible benefit of a few sleeping co-sharer landlords who do not care to keep any information about their property, serious harm would be done to many—both landlords and tenants*—and to the community as a whole. As a result the chances of this rule of pre-emption will be very seriously jeopardised. For single landlords too it will mean that the raiyat will not get the full value of their lands and they themselves will never get the full *salami*. The crux of the whole scheme is the limitation of the period to two months from the service of the notice."

The amendment which was lost on the above opposition was as below:—

"Nothing in this section shall affect the right of any co-sharer landlord whose name has been omitted owing to the neglect or default of the transferor or transferee."

While on the one hand it may be said that when a co-sharer was omitted* from notice by the raiyat himself, he (the raiyat) could not grudge if he was put at a disadvantage on that account, on the other hand the right of pre-emption is an extraordinary and a very special right and its exercise ought, it is respectfully submitted, to be allowed only within what the statute *expressly permits*. It is clear from the extracts given above, that it was not the intention of the Legislature to grant any extended time, however, unreasonable it might otherwise apear.

Exceptions to the limitation of two months.—Besides the exception made for a co-sharer who has not received notice (*vide* 35 C. W. N., page 688, referred to above), extended time is allowed also—

(1) *Under sub-section 4 (a)*—when one co-sharer applies, in which case the other co-sharers get a further one month from the date of that application;

(2) *Under section 26 J (3)*—two months from the date of payment of deficit transfer fee, where the raiyat had paid at first an insufficient fee.

*NOTE.—A pertinent question in such cases of omission would be whether the name of such co-sharer landlord was or was not mentioned in the rent receipts granted to the raiyat. If the name was not mentioned, no blame could be attached to the raiyat, nor could the raiyat be expected to introduce a name not mentioned in the dakhilas. The fault is the landlord's and if anybody suffers, it should be the landlord.

Sub-section (3).—*Acceptance of rent, does it estop pre-emption?*—This sub-section has the words "other sums he has been paid in respect of rent": and these have led to an *obiter dictum* in the case of Shaikh Dabiruddin *versus* Krishto Chandra Mukhopadhay (35 C. W. N., page 658) that acceptance by the landlord of rent from the purchaser does not estop him from applying for pre-emption. For the facts of that case the relevant section was section 170 (*4*) discussed at the earlier part of the judgment: but it is respectfully submitted that the deduction of the inference from the words above in sub-section (*3*) is strained. Such a limited meaning need not have been put to the word "paid." The payment might have been made to another co-sharer landlord, or it might have been in the name of the old raiyat. When, however, payment was made by the purchaser on his own account, and the money accepted by the landlord, equity and analogous decisions, e.g., Naba Kumari *versus* Behari Lal (I. L. R. 39 Cal., page 902), and Gadadhar *versus* M. Z. & Co. (27 C. L. J., page 385) were in favour of the tenant. Even mere demand by the landlord of rent from the purchaser would mean recognition, Manmotha Nath *versus* Promode Chandra (37 C. L. J., page 52). The object of sub-section (*3*) is to provide for the accounting of all monies that may have been spent by the purchaser on the property, and had not the words been there, it might lead to an interpretation that monies paid as rent to other co-sharers or in a manner as would not lead to an inference that he had been recognised, were not payable by the pre-emptor. The question of recognition is distinct and should be judged independently on the facts and circumstances of the individual case. For instance where the rent was sent by postal money-order and the special exception in section 54 (*4*) was applicable. (*See* notes under that section, *post*).

While the section was thus interpreted for the landlord in the case of Shaikh Dabiruddin *versus* Kristo Chandra Mukhopadhya discussed above, in the case of Surendra Narayan *versus* Nalin Behary, 35 C. W. N., p. 114 (July 1930), it has been held that when transfer-fee had been deposited under section 26D, i.e., as for an occupancy holding, the transferee was precluded from raising the question of the nature of the tenancy in a proceeding for pre-emption under section 26F which followed, i.e., he could not then raise any plea that he was a raiyat at fixed rent or a permanent tenure-holder. [*See* also notes under section 26 I (4)].

Sub-section 4 (a).—*Question.*—When a co-sharer landlord applies for pre-emption, is it necessary that he should join the other co-sharers as parties in the proceedings? Section 188 (*i*) clearly requires that this should be done. It follows therefore that the other co-sharers should have a notice, though there is no provision for such notice in the section itself.

The further one month allowed in this sub-section is, however, not from the date of the service of such notice but from the date of the application.

Sub-section 4 (b).—It will be noted that this sub-section 4 (*b*) does not extend the time beyond what is allowed in sub-section 4 (*c*).

Pre-emption by a co-sharer landlord.—See notes against "when no notice is received" and "exception to the limitation of 2 months" above.

When a co-sharer pre-empts, he gets the 16 annas interest of the holding. If another co-sharer joins with him, the two together get the holding in proportion to their interests in the superior right as compared with the interests of the two co-sharers, Khosal Chandra Das *versus* Upendra Nath Ghose and others, 35 C. W. N., p. 1058. This means that if A, B, C are 3 co-sharers, A owning 3 annas, B owning 5 annas and C owning 8 annas, then A and B will get the entire holding in proportion to 3 to 5, i.e., A getting 6 annas and B getting 10 annas.

The same case held that a co-sharer landlord purchasing his share within two months of the service of notice under section 26C was entitled to join in the pre-emption (page 1060).

Section 26C.

Usufructuary mortgage.—See notes under section 3 (19), also section 49, and compare section 49E.

The object of this section—limitation of the period to 15 years—was thus explained on behalf of Government:—

"This provision about complete usufructuary mortgages is entirely for the benefit of the *bona fide* cultivator. How often does a raiyat not give up possession of one or more plots of his land in return for a petty loan? At the end of 5 or 10 years the capital is still unpaid and the raiyat has to see his land go out of his possession for ever. * * * If this proviso is accepted, no *mahajan* can keep a raiyat out of his land for more than 15 years at the most. At the end of that period he must give it back as the whole capital and also the interest will have been paid off."

Section 26H.

Rent-free holdings.—Rent-free lands commonly called *nishkar*, including *debottars*, *pirottars*, etc., are usually tenures and are governed by sections 12 and 13. There are, however, small *nishkars* held by cultivators which are sometimes recorded in settlement records as "holdings." This section covers them and similar cases: and the same rules as in case of *nishkar* tenures, from which there is really nothing to distinguish them in substance, are made applicable, viz., sections 12 and 13 and not section 26C, etc. The amount of transfer fee is Rs. 2 in all cases: and the rule of pre-emption in section 26F does not apply. This would also follow from the history of the new rule regarding pre-emption (*see* notes under section 26F), viz., that it arises only as a corollary to the new provisions declaring holdings which were not transferable before, to be transferable. *Nishkars* are all as a rule transferable. As for *chakrans*, they will be governed by the special conditions of each grant.

Section 26I.

Sub-section (2)—*Partition.*—Compare section 26F (*1*) (*a*). Even when a co-sharer raiyat sells to another co-sharer not under the cover of a partition, he is not liable to pre-emption under section 26F.

Lease.—*See* section 48H.

Usufructuary mortgage.—Under section 26 G, such mortgage must be a *complete* usufructuary mortgage, and on the expiry of the stipulated period (not exceeding 15 years) the land reverts to the original raiyat. There is thus no final passing of the land.

Mortgage by conditional sale.—The land may pass finally to the mortgagee, *either*—

(1) on Court's order of foreclosure or decree: or

(2) amicable giving up by the mortgagor:

For (*1*)—the landlord's transfer fee will have to be paid and notices, etc., supplied at the time of the decree or order of the Court (*vide* section 26E).

For (*2*)—the mortgagee would, when finally taking over, have a fresh deed of final conveyance. The rules about landlord's transfer fee, notices, etc., would come into operation at the time of such conveyance.

Sub-section (4).—Compare section 18B for permanent tenures and raiyati holdings at fixed rate. This sub-section protects the landlord: but in Surendra Narayan *versus* Natan Behary, 35 C. W. N., p. 114 (July 1930), it has been held that where the transfer fee has been deposited under section 26D, i.e., as for an occupancy holding, the transferee was precluded from raising the question of the nature of the tenancy in a proceeding for a pre-emption under section 26F.

Section 26J.

Will the proceeding be a suit or an application?—This section provides for the payment of deficit fee with penalty in case the raiyat misdescribes his occupancy holding as a permanent tenure or raiyati holding at fixed rent and pays a lesser landlord's transfer fee than is properly due. Such misdescription ought not to arise where there has been a record-of-rights (and there has been a record-of-rights in most districts now) unless the raiyat or the landlord wants expressly to dispute the status shown in such record. *Bona fide* cases under this section will therefore be cases for determination of the status of the tenant: and would be regular suits. But see section 188 (*1*) (*i*) in which the proceeding under section 26J is referred to as an "application," and it has been held in Srinath Bose *versus* Debendra Nath Barari, 36 C. W. N., p. 847 (May 1932), that a proceeding under section 26J was an application and not suit. Jack J. observed: "For

the purposes of section 26J the landlord has only to show in a summary proceeding that the holding is a raiyati holding in order to be able to recover the balance of the transfer fee to which he is entitled under section 26C or 26E. This of course will not debar any subsequent suit by the tenant to establish that the tenure is a permanent tenure or rent-free tenure; and if he establishes that fact in a subsequent suit, he will be entitled to recover the balance of the landlord's transfer fee which has been paid under section 26J of the Act."

Question.—Will an application lie under this section where, whether due to fraud, mistake or otherwise, no transfer fee at all is paid?

No corresponding provision in case of permanent tenure.—It may be noted that there is no corresponding provision where a permanent tenure or raiyati holding at fixed rate is described as "rent-free" and only Rs. 2 is paid as landlord's fee under section 12 (*a*) instead of a larger sum which may be due on calculation on rent.

Sub-section (3).—Sub-section (*3*) gives an extended period for the exercise of the right of pre-emption by the landlord. But this is justified inasmuch as the raiyat, by reason of his misdescription, is resposible for it. This sub-section does not preclude the landlord [Narayan *versus* Kailash Chandra, 35 C. W. N. (June 1931), p. 1078.] from applying for pre-emption under section 26F at an earlier stage.

Section 30.

The words "wholly or partly" were inserted by the amendment of 1928, the reason being explained thus in the statement of objects and reasons:—

"It has been considered reasonable that the landlord should be entitled to some enhancement of rent under clause (*c*) of section 30 when he bears a portion of the cost of an improvement."

Cf. similar amendment in section 80(1).

These amendments will apparently cover also cases of improvements under the Agricultural and Sanitary Improvement Act in which the cost is borne both by the landlords and the tenants.

Undivided share of land.—Under the old law "holding" meant a parcel or parcels of land and it did not include an undivided share. Accordingly no suit was maintainable under this section for an undivided share of a piece of land even though the undivided share formed part of a separate tenancy. By the amendment of the definition of "holding" [*see* section 3 (5) new] the term now includes an undivided share of a piece of land when the share is the subject of a separate tenancy, e.g., where there is a separate settlement or lease for it. A suit under section 30 is therefore now maintainable for such an undivided share. [*See* notes under section 3(5).]

Question: Has this retrospective effect, i.e., will the new procedure apply to tenancies created prior to the amending Act of 1928? For adverse decision *see* Bir Bikram Kishore *vs.* Rajjat Ali, 33 C.W.N., p. 1156 (June 1930). But in that case, the suit had been instituted before the amending Act, and even the decisions of the lower courts had been given before that Act.

Co-sharer landlord.—*See* the new proviso [item (*ii*) to section 188] inserted by the amendment of 1928. A co-sharer landlord may institute a suit under this section, provided he makes the other co-sharers parties defendants. The case of Jatindra Nath Chaudhuri *vs.* Prasanna Kumar Banarji, 38 Cal., 270 (P.C.), is thus overruled.

Section 38.

The additions made by the amending Act of 1928 are—the words "one or more of" in (1), and the whole of (*c*). Besides these the words "holding at a money rent" which appeared in the old Act after the opening words "An occupancy raiyat" in sub-section (1), were deleted. The effect of the deletion of these words is that the section will have application also to raiyats paying rent in kind, e.g., raiyat paying a fixed quantity of produce such as a *dhankuraridar* may apply for reduction of rent on the grounds given in section 38(1) (*a*) or 38(1) (*c*).

For sub-section (1)(*c*) the "object and reasons" stated are:—

"It is reasonable that where a raiyat has had his rent settled when certain arrangements in respect of irrigation or maintenance of embankments were in force he should receive a reduction of his rent so long as the landlord fails to carry out his obligations in this respect. The Select Committee suggested that it must also appear that the soil of the holding has, as a result of such failure, deteriorated."

Explanation.—This permits a co-sharer "raiyat" to institute a suit for reduction of rent and it was accepted by the Council as being "on the same common principle on which a co-sharer landlord is entitled to claim relief against a number of tenants." The words "in a suit properly framed for the purpose" were however added, the object being explained by the Hon'ble Revenue Member (Sir P. C. Mitter) thus:—

"* * We all know that when there are four persons enjoying a common right any one of them can make the others parties to the suit, if they refuse to join as plaintiffs. So, one of several raiyats can institute a suit for reduction of rent making the other tenants as well as the landlord a party to the suit: although my lawyer friends are perhaps aware that there may be one or two rulings here and there in which the right of one tenant alone to institute a suit for reduction of rent has been questioned. So I think there is justification for this amendment."

The words "properly framed for the purpose" would apparently mean a suit in which all the other co-sharer tenants are also made

parties (*see* Rishee Kesh Law *vs.* Golam Ali, 55 Cal., p. 676, under the old Act).

Sections 40 and 40A.

Sections 40 and 40A of the old Act which provided for commutation of produce rent of an occupancy raiyat either on the application of the landlord or the raiyat, were repealed altogether by the amendment of 1928. The Select Committee thought that "in the conditions prevailing in Bengal commutation of produce rent should be abolished." The only means by which an occupancy raiyat holding on produce rent can now get his rent commuted to money rent is by amicable arrangement with his landlord. Failing which he has his relief either of selling or surrendering.

Section 44.

There is no provision for the ejectment of a non-occupancy raiyat on the ground that the term of his lease has expired, except when that term is fixed by a *registered lease*. In other words where there is an unregistered lease, or where the raiyat is holding only on verbal arrangement, the landlord cannot eject even though such unregistered lease or verbal arrangement stipulated for ejectment on the expiry of a term. This looked as if the raiyat with a registered lease was being put at a disadvantage: and as a matter of fact in the Bill of 1928 as introduced in the Council there was a clause providing for ejectment in such cases with 6 months' notice before the expiry of the stipulated period in a written (unregistered) lease, and where no written lease existed 6 months before the expiry of the agricultural year. This latter provision assumed that all non-occupancy raiyats without written lease were year to year tenants. The clause was opposed in the Council and eventually dropped—the section remaining as before. The position thus is that if a landlord wants to retain the right of ejecting a non-occupancy raiyat on the expiry of a stipulated period, he must secure such right by a *registered* lease. In this connection the view taken in the case of Jotiram Khan *vs.* Janakinath, 20 C.W.N., p. 258, is pertinent, viz., that under the Bengal Tenancy Act there is no raiyat who holds from year to year, and if the tenant is a non-occupancy raiyat who does not hold under a registered lease for a term of years, he cannot be ejected even if he holds over. The term besides being contained in a registered lease, must also be a fixed term and certain, and not mere contingent, e.g., that the raiyat would be liable to vacate when the landlord wanted the land (Nanda Kumar *vs.* Kali Kumuddi, 3 C.W.N., XLVII).

Admitted to occupation.—*See* section 47. The acquisition of occupancy right by 12 years' possession cannot be defeated by periodical leases.

Section 46.

In the case of The Port Canning and Land Improvement Co. *vs.* Narayan Chandra Paramanick, 45 Indian Cases, page 284, it was held that the term "agreement" in section 46 meant an agreement in which the landlord *proposes* that the tenant should execute, that is to say, a draft of an agreement. This has been made clear by the amendment of 1928 which changed the words "an agreement" to "a draft of an agreement."

Chapter VII—Under-raiyats.

The sections in this chapter regarding under-raiyats were introduced by the amendment of 1928. They entirely replace the old sections 48 and 49 and mark an important stage in the development of Tenancy legislation in Bengal. A historical account of the law regarding the position of under-raiyats has been given in the Introductory Note. Regulation IV of 1794* was an effort to provide a means of protection to the raiyats (rather the *khudkast* or resident raiyats) who were on the land at that time. It did not touch the under-raiyats(*a*). Act X of 1859 codified the decisions of the law courts by which the benefit of occupancy right were held applicable to raiyats inducted after the permanent settlement, provided they held the land for 12 years, but it did not touch the under-raiyats either. The Bengal Tenancy Act of 1885 made for the first time a feeble effort(*b*) to provide some protection to this class of people. Section 48 of that Act (now repealed) limited the rent to a maximum of 50 per cent. over the raiyats' rent. But as in most cases only portions of a holding were sublet, the protection intended proved unworkable and remained a dead letter. Section 49 provided that an under-raiyat could be ejected on the expiry of the term of a written lease: or where there was no written lease, on mere notice expiring by the end of the agricultural year. This really meant nothing to the under-raiyat. The section was not, however, applicable where an under-raiyat acquired a right of occupancy under certain circumstances by virtue of any local custom or usage. It was a difficult

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*NOTE.—This Regulation provided for granting of written *pattas* or leases by all landlords to their raiyats with a view to fix their rents permanently at the then existing *pargana* rates and secure their possession so long as they paid those rents.

(*a*) NOTE.—Apparently because under-raiyats were practically unknown then. Population was low and there were more lands in the country than what even the *khudkast* raiyats could cultivate. In fact cases of enticing away cultivators were frequent in those days.

(*b*) NOTE.—Hon'ble Sir Stuart Bayley when introducing the Bill in February 1885, regretted that the Select Committee were unable to afford to under-raiyats any real protection and considered that "this was the most unsatisfactory part of the Bill." In his opinion "the only practicable method of protecting them would be by giving to under-raiyats sub-occupancy rights against their lessor of the same nature, though not necessarily in the same degree, as the occupancy raiyat." His concluding observations were: "I wish to say that with regard to the under-raiyat I do not think that the Bill can be considered as in any way a final settlement of the difficulty, and the next generation will probably have to reconsider his position." This prophesy has been fulfilled by the Legislature of 1928.

matter for an under-raiyat to prove in Court; but the cadastral survey and record-of-rights (completed now in most districts) disclosed the fact that the under-raiyats, particularly those on money-rent, were rarely disturbed in their possession so long as they paid the stipulated rent. Where they had been inducted on payment of a *salami* they were viewed almost in the same light as a stable raiyat. The Settlement statistics showed also that the number of under-raiyats were quite considerable* and were steadily increasing. One main object of the amendment of 1928 was to provide for a status and a stable position for this important class of tenants who really were the cultivators of the land and belonged to the weakest section.

The first Bill introduced in the Legislative Council in 1925 saw no point for distinguishing between a raiyat and an under-raiyat in the matter of acquisition of occupancy right and in the incidents of that right when possessed by either class.† It therefore proposed that all under-raiyats should have, as against their immediate landlords, the full rights of an occupancy raiyat, including those of transfer and right to trees. The only exception made was with regard to temporary sub-leases not exceeding 9 years, granted by a raiyat or under-raiyat who was disabled by age, sex, disease, accident or temporary absence from home from cultivating his land himself or by hired servants.

The Select Committee to which the Bill was referred, however, refused to accept this proposal. They conceded that as regards those who had already acquired a right of occupancy by reason of any local custom or usage [*vide* section 183, illustration (2) of the old Act], they might continue to enjoy such right: but as regards the rest they proposed that they should be liable to ejectment at the end of the term of a written lease or on notice before expiry of the year: only exception being in the case of those who may be in possession of their holdings for 20 continuous years *and* also have a homestead in them. In these cases they would be liable to be ejected only on the same grounds as those on which an occupancy raiyat could be ejected, and the further ground of failure to pay an arrear of rent. As regards rent they retained the old rate of 50 per cent. over the raiyat's rent, but to remove the difficulty in case of leases of portions of a holding provided for proportionate calculation.

Government hesitated to accept these proposals and the Bill was held in abeyance. It was then referred to a special committee presided over by Sir Nalini Ranjan Chatterji, Kt. The Bill as revised by that committee was subsequently introduced in the Legislative Council in 1928. It retained the first portion of the Select Commitee's recommendations, but with one very important change, viz., limiting the liability to ejectment on the ground of expiration of lease or on notice, only to cases where the landlord required the land for cultivation by

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*NOTE.—For instance in Jessore, they were quite as many as the *asli* raiyats,—about 9 lakhs.

†NOTE.—In fact according to the report of Sir John Kerr's committee on which the Bill was based, it was the under-raiyat in the chain of various grades of tenants, who, on the principle of the matter, deserved more the special protection of occupancy right than even the so-called raiyat, in as much as the former was the raiyat in fact, while the latter, when he had sublet all his lands, was raiyat only by history and theory. [See also the Hon'ble Revenue Member (Maharaja of Nadia's) speech when introducing the first Bill in 1925.]

himself (i.e., not for letting out to another under-raiyat) or for building a house on it for his own use.

As regards rent quite a different doctrine was introduced. In the first place the initial rent agreed between the parties at first settlement was to be binding. As for subsequent enhancements, if made by agreement, they might be up to 4 annas* in the rupee; and if made by suit, the rent might be up to one-third of the average gross produce† of 10 years immediately preceding.

The above proposals were accepted in the main by the Legislative Council (the amendment Act of 1928), but with a very important modification in the first part regarding liability to ejectment. It reduced the requisite period of possession from 20 years to 12 years, and changed the words "*and a* homestead thereon" to "*or* a homestead thereon." This latter change made the existence of a homestead‡ in itself an independent ground for the stabler right, even when possession did not extend to so long as 12 years.

The position of under-raiyats after the amendment of 1928 is therefore now as below:—

Under-raiyats are divided into 3 classes, viz:—

(*a*) those with a right of occupancy [section 48G (1)],

(*b*) those who hold under a permanent and heritable lease,

or have been in possession of their holding for 12 continuous years,

or have a homestead in their holding, and

(*c*) the rest, i.e., under-raiyats of less than 12 years' possession without a permanent or heritable lease and without a homestead in the holding.

Occupancy under-raiyats, class (a).—As regards (*a*), they are those who had by reason of the old law, viz., occupancy right by custom, had acquired a right of occupancy when the amendment of 1928 came into operation. Their number cannot increase further: and they are thus practically the same as are recorded as such in the Settlement records. Under-raiyats of this class have, as regards their immediate landlords, all the rights and liabilities of an occupancy raiyat as laid down in chapter V, except that they cannot transfer without the

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*NOTE.—The argument that when the rate was 2 annas in the case of the occupancy raiyat [sec. 29 (*b*)], it might be annas 4 in the case of the under-raiyat,—is obviously fallacious: for, the basis of enhancement in either case is the same, viz., normal increase in the money value of the crop,—the same which the Court will take into consideration under section 30(*b*) when ordering an enhancement of rent.

†NOTE.—This is the first recognition in the statute of the theory that rent should properly bear a certain proportion to the gross yield. A similar proposition was put forward in the Tenancy Bill of 1884: the proportion proposed then was 5/16ths (compare the old Hindu rule of one-sixth and Toder Mali's rule of one-fourth). Assuming that half the gross produce represents the cost of cultivation in Bengal, including wages for the tenant's own labour, a proportion of one-third as rent, means a margin of profit of only one-sixth, viz., $\frac{1}{3}-\frac{1}{6}=1$-6th. This can hardly be considered sufficient: and a more correct maximum limit of rent would be one-fourth. In the commutation rules (now of no use) of the Settlement Department, the limit was one-fifth.

‡NOTE.—As regards the under-raiyat's right to build a house for his dwelling, *see* section 76(*f*), 77 and 178 (1)(*d*). Like the raiyat he has a right to build a dwelling house for himself and his family and this right cannot be taken away by any contract.

consent of their landlord, and sections 26A to 26J do not apply. This means that as between them and their immediate landlord—

(1) their existing rents shall be presumed to be fair and equitable (section 27) and rules about enhancement or reduction of rent in sections 29, 30 and 38 applicable to occupancy raiyats apply also to them;

(2) they cannot be ejected except on the same ground on which an occupancy raiyat can be ejected (section 25);

(3) they have the same full right to plant or cut down trees or use the land as an occupancy raiyat (sections 23 and 23A) and also make improvements (sections 76 and 77);

(4) though they cannot transfer, they can like other under-raiyats sublet their lands for any period, subject to payment of a *salami* to the superior landlord as provided in section 48H.

Besides the above, they can surrender their holding in accordance with section 86, but their landlord cannot surrender unless they also consent [*vide* section 86 (6)]: also, if their landlord (the raiyat) abandons under section 87 they can compel the superior landlord to recognise them on payment of a *salami* of 5 times the rent [section 87 (5)].

They are not protected interests except where they have built a dwelling-house on their land [section 160 (c)]: but they can prevent the sale of their landlord's interest by depositing the latter's arrear rent.

Under-raiyats of 12 years' possession, or a homestead, etc., class (b).—*As for under-raiyats of class* (*b*) above, perhaps the most numerous amongst under-raiyats, the provisions of chapter V regarding occupancy rights do not apply and there is thus no presumption of fairness about their existing rents as would arise from section 27, nor are the grounds in section 30, viz., rise in prices, landlord's improvement or trivial action, grounds for enhancement of their rents in the manner as they are for occupancy raiyats. The initial rent agreed with their landlord are, in the first instance, made binding. Subsequent enhancement can be made *either* by contract, when it is limited to 4 annas per rupee at intervals of not less than 15 years, *or* through Court by a regular enhancement suit under section 48D(1). No specific rules (like those in section 30) are laid down for the guidance of the Court in determining what would be a fair and equitable rent; but the maximum limit of rent is put down at one-third of the average gross produce of the 10 years immediately preceding [section 48 (2)]. The new rent settled by the Court cannot however be enforced if the under-raiyat does not agree. If he does not agree the Court will at once pass a decree for ejectment, section 48D (4). If he agrees the new rent will not be liable to further enhancement within the next 15 years. There is no provision for reduction of rent corresponding to section 38.

There may be a period-limit in the terms of an under-raiyats' lease or there may be no lease at all: but if he comes in class (*b*), i.e., if he has been in possession of the land for 12 continuous years, or has a homestead on it, he is entitled to hold on (practically occupancy right), and is not liable to be ejected by mere notice to quit or on the ground

that the period of his lease has expired. He is liable to be ejected only on the following grounds:—

(1) Misuse of land or breach of conditions of tenancy consistent with the Act, i.e., the same as apply to occupancy raiyats.

(2) Failure to pay an arrear of rent, only if he fails again to pay the same into Court (with costs, etc.) before execution of decree [section 48C (a)].

(3) Failure to accept fair rent settled by the Court under section 48D (1) as already stated above.

His position as regards user and improvement of land (except in the matter of planting and cutting down trees*) is the same as that of an occupancy raiyat.

An under-raiyat of class (*b*) cannot transfer his holding (section 48F), but like the occupancy under-raiyat [class (a)], he can sublet for any period, subject to payment of a *salami* according to section 48H.

An under-raiyat of class (*b*) cannot surrender according to section 86 (which does not apply in his case), but his landlord cannot surrender either unless the under-raiyat also agrees [section 86 (6)]. If his landlord "abandons," he can like the occupancy under-raiyat, compel the superior landlord to recognise him on payment of a *salami* of 5 times the rent [section 87 (5).]† He is however not a protected interest, but he can protect himself by preventing the sale of his landlords' holding by paying the latter's arrear rent into court.

Under-raiyats of less than 12 years and without homestead, class (c).—As regards the *under-raiyats of class* (*c*), they comprise those who do not hold a permanent or heritable lease, or have not been in possession for 12 years nor have a homestead in the holding. Besides the ground on which an under-raiyat of class (*b*) above can be ejected, under-raiyats of class (*c*) are liable to be ejected on the further ground of expiration of the period of lease, or where there is no lease on notice to quit at the end of the year. But this ground can be taken by the landlord only when he requires the land for his own cultivation (i.e., not for subletting again to another), and provision is made for restitution (section 48E) in case of breach of the condition. The only other respect in which an under-raiyat of this class differs from one under class (*b*) is that section 78 (5) does not apply in his case. This means that when his landlord (the raiyat) abandons, he is left without any protection and must abide by such terms as the superior landlord may demand,‡

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*NOTE.—Section 23A does not apply. There is however no clear provision in the Act as regards the under-raiyats' right regarding trees. These will therefore depend on local usage and terms of the lease.

†NOTE.—Would he have to pay this over again if he was holding under a lease in accordance with section 48H and the superior landlord had already received a *salami*? From the very reasonable observations made in the case of Sukh Chand Halder and others *vs.* Jajneswar Mandal and others, reported in 35 C.W.N.p. 974, it would seem that once the *salami* was paid according to section 48H, the superior landlord could no longer deny the sub-tenant. For, otherwise, it may justly be questioned what was the *salami* then for?

‡If the landlord prefers an enhancement suit under section 48D, the under-raiyat of class (*c*) may continue to hold like the other classes of under-raiyats if he agrees to pay the rent which is determined by the court. But why will a landlord institute an enhancement suit if he can have his own demand indirectly by ejectment suit or threat of ejectment suit under section 48C (*c*) and (*d*)?

or must vacate. In all other respects, viz., rent, user, etc., his position is similar to that of the under-raiyat of class (*b*).

Under section 178 (1) (*f*) the rights conferred on an under-raiyat by the new provisions cannot be taken away by any contract whether made before or after the Act. Where, however, the judgment of the trial court was given before the amendment of 1928 the new provisions will not have retrospective effect in the appellate court, 36 C. W. N., p. 89, Sm. Taltan Bibi *vs.* Mahadeb Mandal.

Section 48.

(*See* general note above.)

No limit is placed to the initial rent of an under-raiyat. It is subject to contract: once fixed it cannot be enhanced by more than 4 annas per rupee at intervals of 15 years. Such enhancement by contract can be made again only by a registered instrument. *See* sections 48A and 48B. Under the old law the initial rent was also subject to the rule that it must not exceed 50 per cent. the immediate landlords' rents.

Section 48B.

Compare section 29 which applies to occupancy raiyats. The points of difference are:—

(1) the enhancement may be up to 4 annas per rupee as against 2 annas in the case of raiyats;*

(2) omission of any provision corresponding to proviso (i) to section 29. The effect of this (read with section 48A) is that mere payment of an enhanced rent for 3 years is not sufficient to legalise it. The execution of a registered document is obligatory. The following is the observation of the special committee of Sir Nalini Ranjan Chatterjee: "It will be noticed there is no provision corresponding to proviso (i) to section 29 in our draft section 49. The under-raiyats are a weaker class than raiyats, and, in view of the fact that no restriction is put on initial rents, there is no hardship in insisting on all contracts involving an enhancement of rent being in writing and registered."

Section 48C.

(*See* general note at the beginning of this chapter.)

Compare section 44 which applies to non-occupancy raiyats and section 25 which applies to occupancy raiyats and also to under-

*NOTE.—It has been observed in the general note at the beginning of the chapter and also in the introductory note, that there is hardly any justification for this differentiation.

raiyats with occupancy right (section 48G). The main points of difference in liability to eviction may be exhibited thus:—

Grounds of eviction.	Ordinary under-raiyat (sec. 48C).	Under-raiyat with permanent and heritable lease, or with 12 years possession or a home-stead [prov. (i)]	Non-occupancy raiyat (sec. 44).	Occupancy raiyat and under-raiyat with occupancy right.
1. Failure to pay an arrear of rent.	Yes. Sec. 48C(a).	Yes ..	Yes. Sec. 44(a)	No.
2. Misuse of land	Yes. Sec. 48C(a)	Yes ..	Yes. Sec. 44(*b*)	Yes. Sec. 25(*a*)
3. Breach of condition of lease consistent with the Act.	Yes. Sec. 48C(b).	Yes ..	Yes. Sec. 44(*c*)	Yes. Sec. 25(*b*)
4. Expiry of term of a written lease, or one year's notice.	Yes. Secs. 48C(c)and (d), but must be required for own cultivation or own house.	No. Prov. (i)	Yes, Sec. 44(*c*) but must be registered: own cultivation or house not required.	No.
5. Not agreeing to pay rent determined by court.	Yes. Sec. 48C(e).	Yes. The proviso does not include condition (e).	Yes. Sec. 44(*d*)	No.

Clause (a).—Proviso.—But *see* section 66 (2). That section provides that a decree for ejectment for arrear of rent shall not be executed if that amount and the costs of the suit are paid into court within 30 days from the date of decree. In view of this, the proviso to section 48C (*a*) would seem to be somewhat redundant. The exclusion of under-raiyats on produce-rent in this proviso, cannot be said to bar the operation of section 66 (2) in his case. Only thing new in the proviso to section 48C (*a*) is that in case of an under-raiyat on money rent he is further liable to such damages as the Court may award in addition to interest.

No time-limit is put in the proviso to section 48C (*a*). It follows therefore that the 30 days' limit specified in section 66 (2) may be exceeded by an under-raiyat on money rent; that is to say, he may pay through court at any time before actual execution of decree.

This clause does not apply to under-raiyats with occupancy right (section 48G). It applies to all other class of under-raiyats.

Clause (b).—This is the same as section 44 (*b*) which applies to non-occupancy raiyats, and section 25 (*a*) and (*b*) which apply to occupancy raiyats and under-raiyats with occupancy right (section 48G). As for procedure and alternative of money compensation, see section 155.

Clauses (c) and (d).—Clauses (*c*) and (*d*) (regarding liability to eviction on the expiry of the term of a written lease and in other cases on one year's notice) do not apply to under-raiyats coming under proviso (i), i.e., those with a permanent and heritable lease or with 12 years' possession or having a homestead on the holding. They do not apply also to under-raiyats with a right of occupancy (section 48G). This liability applies therefore only to those temporary under-raiyats whose possession of the holding has not been for so long as 12 years,

or who has no homestead in it,* and subject to a very important condition, viz., that the land is required by the landlord for cultivation by himself or for his own dwelling house, *vide* proviso (*ii*). In this respect the position of an under-raiyat is better than that of the non-occupancy raiyat†.

Clause (c).—A written lease stipulating yearly rent must be registered according to section 17 of the Registration Act. For leases for terms of 12 years or more *see* also section 48H post.

Clause (d).—This liability does not exist in the case of non-occupancy raiyats, *see* section 44 and the notes thereunder.

Clause (e) corresponds to clause (*d*) of section 44 regarding non-occupancy raiyats, and must be read with section 48D which corresponds to section 46. This carries the rule which was adopted for non-occupancy raiyats in 1885 to under-raiyats (excepting those with occupancy right—section 48G). Whatever the original theory underlying this distinction from an enhancement-decree against an occupancy raiyat (under section 30), so far as the under-raiyat is concerned, it almost follows from section 48F, which does not permit him to transfer his holding without the consent of the landlord. He cannot surrender either under section 86. Section 48D (4) thus affords him indirectly a way out of the tangle, where he finds that the rent fixed by the court is too high for him to bear or is such that he cannot accept.

Proviso to clause (e) already discussed in the classification of under-raiyats into (*a*), (*b*) and (*c*) *ante*.

Section 48D.

[*See* notes under section 48C (*e*) *ante*.]

Section 48D read with section 48C (*e*) corresponds to section 46 regarding non-occupancy raiyats. In the case of the under-raiyat, however, rent once enhanced by the court cannot be altered for 15 years [sub-section (3)], in the case of occupancy raiyats the period is only 5 years.‡ This section has no application to under-raiyat with occupancy right in whose case sections 29, 30, etc., in chapter V would apply (section 48G).

Sub-section (2).—As for the rule of one-third gross produce, *see* general note at the beginning of the chapter.

No exception is made of the cases where the under-raiyat does not cultivate the land himself but has sublet it. This rule would therefore apply in those cases also. A sub-lease by an under-raiyat binds his own landlord, when such sub-lease has been registered in accordance with

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*NOTE.—As for right to build a house, the under-raiyat has now the same right as an asli raiyat [*vide* sections 76 (*f*) and 77].

†NOTE.—During the debate in the Council on the corresponding clauses for non-occupancy raiyats in the Bill of 1884, Hon'ble Mr. Amir Ali moved an amendment to the effect, that in these cases also the landlord must offer the tenant a new rent, and the tenant shall not be ejected if he accepted that rent or such other rent as might be fixed by the Court. The amendment was, however, lost.

‡NOTE.—One justification for this is that the position of the non-occupancy raiyat would, fter the lapse of 5 years, be otherwise much better than that of an under-raiyat; for, he would ordinarily by that time be a full-fledged occupancy raiyat.

section 48H and a landlords' fee paid for it; yet under sub-section (3) of that section, the rent of the sub-lease does not bind the superior landlord.

Section 48E.

Section 48E provides for a relief against breach of the condition in proviso (*ii*) to section 48C. *See* notes under that section [clauses (*c*) and (*d*) and the general note at the beginning of the chapter.] The relief is lost after 4 years.

Section 48F.

The object of this section is thus stated by the Committee of Sir Nalini Ranjan Chatterjee:—

"We have declared definitely that all transfers of under-raiyats' holdings without the consent of the landlord will be not voidable but void, as otherwise it is certain that the present complications which have arisen as regards raiyati holdings would in course of time arise as regards under-raiyati holdings." This section applies to all classes of under-raiyats, including those with occupancy right under section 48G.

NOTE.—As for the under-raiyats' means of raising money he may place his land under usufructuary mortgage [*vide* section 49(1)].

Section 48G.

(*See* general note at the beginning of the chapter.)

There cannot be any more under-raiyat with occupancy right than what existed at the commencement of the Act of 1928. Consequently illustration (2) to section 183 regarding acquisition of occupancy right by under-raiyats according to any local custom or usage, was also repealed by that Act.

Although the old law [section 183 illustration (2)] permitted acquisition of occupancy right (by virtue of local custom) by an under-raiyat, considerable difficulty arose in the law courts in determining what exactly such occupancy right meant. In one case it was held that it did not necessarily make the holding heritable (Iswar Sant *vs.* Tarendra, 42 C. L. J. 560: also Sudhansu Kumar *vs.* Shaik Ismail, 29 C. W. N. 733). Again it was a matter of controversy whether the principles of section 29 applied in such cases (Azizul Huq Chowdhury *vs.* Kazimuddin Sarkar, 32 C. W. N. 68, notes). Sub-sections (2), (3) and (4) of section 48 G now define which of the incidents of the occupancy right of a raiyat apply to an under-raiyat with occupancy right. The following sections are excluded:—

(1) *Sections 20 and 21.*—This means that there cannot be a "settled under-raiyat."

(2) *Section 22, regarding merger.*—This will probably mean that the rules of merger in the general law will apply, that is to say, such right will merge in the lessor's right.

(3) *Sections 26A to 26J.*—This means that the right of under-raiyat (even though he may possess occupancy right) to transfer his holding depends on the consent of the landlord (*vide* section 48F). In other

respects an under-raiyat with occupancy right has now all the rights of an occupancy raiyat, e.g.,—

(*i*) right to cut down trees and enjoying its fruits (section 23A),

(*ii*) right to pay only fair and equitable rent (sections 24, 27),

(*iii*) right of protection against ejectment except on certain grounds (section 25),

(*iv*) right to inherit the right (section 26, also section 48F),

(*v*) same rights about enhancement of rent (sections 28, 29, 30 to 37 and reduction, section 38), and

(*vi*) right to surrender (section 86).

These rights are however operative only against the immediate landlord of the under-raiyat, and the occupancy right of an under-raiyat is not a protected interest under section 160 (*d*). He may, however, like any other inferior tenant prevent the sale of his landlord's holding by depositing the latter's arrears into court (*vide* sections 171 and 172). Yet the position of an under-raiyat with occupancy right is worse under the amendment of 1928 in this respect than under the previous law; for, by the operation of section 160 (*d*), his was a protected interest. *See* Sonatan Dafadar *vs.* Daulat Gazi, judgment of Rankin C. J., 36 C. W. N., p. 400. The interest of an under-raiyat (of any description) in a holding where he has built a dwelling house is however a protected interest under section 160 (*c*).

Section 48 H.

The procedure for the payment of the landlord's fee is the same as for transfer of occupancy holdings (sections 26A to J). *See* statutory rules 24 to 29 C.

"Value of the leasehold."—This expression is not defined. It presumably means the same thing as the premium (or *salami*) paid at the time of the lease.

Sub-section (3) states what such acceptance shall not affect: but it does not state what it will affect. It will in effect make the under-raiyat's lease a protected interest against the superior landlord: for, having participated in its creation it will not be open to him to deny its existence except to the extent specifically mentioned in the sub-section. This would also seem to follow from the observations by Jack J. in the case of Sukh Chand Haldar *vs.* Jogeswar Mandal, 35 C. W. N., p. 974. In that case the question arose whether the landlord had any means of recovering the *salami* prescribed in this section if it had not been paid owing to misdescription or otherwise in the document. There was no section corresponding to section 26J, and it was held that the landlord had no means to recover the *salami*: but that the sub-lease would not be binding on him, as it would be if he had received the *salami*.* This seems also to be the correct interpretation of the intention of the Legislature; for, an amendment tabled to the effect that the provisions of Chapter V regarding "transfer fee" of occupancy

*Question.—What would be the effect if the superior landlord refused to accept the salami? Obviously, acceptance by the landlord is immaterial: all that is required is that it is paid to the Registering Officer.

raiyats should apply to landlord's fees under section 48H was not moved or accepted. The net result seems to be that if by mis-description or otherwise, no landlord's fee is paid as a fee under section 48H, while the landlord has no means of recovering it, the under-raiyat also loses the advantage of his lease being protected against the superior landlord. The whole matter ends there*.

Section 49.

Section 48F makes transfer by an under-raiyat without the landlord's consent entirely void. Regarding the provision of section 49 for usufructuary mortgage, the committee of Sir Nalini Ranjan Chatterjee observed thus:—

"An under-raiyat must occasionally raise money. If he executes a usufructuary mortgage, we propose that that mortgage should operate as a complete usufructuary mortgage, i.e., at the end of the term the land will return to the under-raiyat with all the debt cleared. The mortgage will not bind the landlord."

See also notes under section 26G.

Chapter VIIA.

Restriction on alienation of land by aboriginals.—The provisions of this chapter (sections 49A to 49-O) apply in the first instance to the *Sonthals* of the district of Birbhum and Midnapore: but the Local Government may by notification extend their application—(*i*) to the aboriginal tribes mentioned in sub-section (2) in respect of any district, and (*ii*) to any class of *raiyats* in the colonisation areas of the Sundarbans [section 49A (5)] added by the amending Act of 1928. The following notifications extend the application of this chapter to various tribes in several districts:—

Number and date of notification.	Names of tribes.	District or local areas.
5077 T.—R., dated 24th May 1919.	Bhumijes, Maghs ..	Bankura district. The portion of the Sundarbans included within the police-stations of Amtali, Galachipa and Barguna in the district of Bakarganj.
8371 L. R., dated 10th November 1919.	Oraons and Santhals ..	Rangpur district.
Ditto ..	Mundas, Oraons and Sonthals.	Dinajpur district.
4194 L. R., dated 10th April 1922.	Kora, Bhumij and Munda.	Midnapore district.
749 T.—R., dated 9th June 1923.	Garos, Hadi, Hajangs and Koches.	Police-stations Nalitabari, Haluaghat, Durgapur and Kalmakanda in the district of Mymensingh.

*The unsatisfactory part of the provision arises where landlord's fee is paid as land lord's fee under section 48 H(1), but is insufficient. This gives a scope for litigation as to what the value of the lease-hold is. Here again there would have been no trouble if the fee was fixed as only a multiple of the rent.

Number and date of notification.	Names of tribes.	District or local areas.
5069 L. R., dated 7th July 1923.	Sonthals	Rajshahi.
10148 L. R., dated 2nd November 1923.	Sonthals	Malda.
21 T.—R., dated 1st May 1924.	Koches	Police-stations Kaliakoir, Sabhar and Joydebpur in the Sadar subdivision of the district of Dacca.
436 T.—R., dated 27th August 1925.	Sonthals, Oraons and Mundas.	Bogra.
11302 L. R., dated 9th November 1925.	Oraons	Rajshahi.
1138 T.—R., dated 25th October 1926.	Garos, Hadis, Hajangs and Koches.	Police-station Purbadhala in the district of Mymensingh.
11457 L. R., dated 14th July 1927.	Sonthals	Baraset and Diamond Harbour subdivisions in 24-Parganas, district Murshidabad.
	Oraons	Baraset and Basirhat subdivisions in 24-Parganas ; district Murshidabad.
	Mundas, Bhumijes ..	Baraset and Basirhat subdivisions in 24-Parganas.
11457 L. R., dated 14th July 1927.	Bhuiyas	Baraset and Basirhat subdivisions in 24-Parganas ; district Bankura ; district Midnapore.
	Koras	Labpur and Nalhati circles in district Birbhum ; district Bankura.

As regards the colonisation areas in the Sundarbans, Government notification No. 10073L.R., of the 27th July 1929, has extended the application of chapter VIIA to the raiyats of the following areas in Bakarganj-Sundarbans :—

AREAS.

A. Thana Amtali.

North—By Buriswar river and mauzas Chhota Bogi, Pancha Koralia, Chandkhali, Chakamaia, North Teakhali, Dhankhali and Debpur.

East—By Rabnabad channel, mauza Lalua and the Bay of Bengal.

South—By mauzas Char Chapli, Khaprabhanga (part) and the Bay of Bengal.

West—By the Bay of Bengal.

B. Barguna police-station (Revenue thana Amtali).

Census village Patakata within mauza Barguna, on the east of Nali Don.

C. Patharghata police-station (Revenue thana Mathbaria).

North—By Char Duani khal.

East—By mauza Jnanpara and Bishkali river.

South—By the Bay of Bengal.

West—By Haringhata estuary and Baleswar river.

List of estates in the colonization area to which the provisions of Chapter VIIA of the Bengal Tenancy Act, 1885, applicable to aboriginal raiyats are applied by this notification.

Serial No.	Name of estate.	Tauzi No.	Revenue Survey No.
1	Karaibaria	4526	3343
2	Nishanbaria	4545	3364
3	Bara Baliatali	4580	3359
4	Chhota Baliatali	4581	3361
5	Dhulashar	4583	3356
6	Dakshin Teakhali	4600	3373
7	Nilgunj	4771	3351
8	Nithaganj	4865	3358
9	Latachapli	4958	3354
10	Bora Bogi	4959	3347
11	Dalbugunj	4973	3357
12	Char Baliatali	5092	3360
13	Sonatals	6052	3352
14	Bara Nishanbaria	6300	3513
15	Tengagiri Chak	6301	3515
16	Chhota Nishanbaria	6321	3512
17	Khaprabhanga	6450	3353
18	Kashir Char	6469	..
19	Char Nishanbaria	6506	..
20	Chhota Bogi	6623	3346
21	Char Gangamati	7068	..
22	Char Dowani Lathimara	4573	3281
23	Borguna Patakata	5008	2963

Section 49A.

As for notifications under sub-section (2), *see* the general note at the beginning of this chapter.

Sub-section (5) was inserted by the amendment of 1928 "in view of the special conditions of the raiyats in the colonisation areas in the Sundarbans"—Statement of Objects nad Reasons.

Section 49E.

For the definition of "complete usufructuary mortgage" *see* section 3 (19).

Sub-section (1).—The limit of period is 7 years in the case of aboriginals to whom the provisions of chapter VIIA may be extended by Government. In other cases the period is 15 years [*vide* sections 26G and 49 (1)].

Section 52.

Sub-section (*6*) was substituted by the Amending Act of 1928, in the place of the old sub-section which ran thus:—

"When in a suit under this section the landlord or the tenant proves that, at the time the measurement on which the claim is based was made, there existed in respect of the estate or permanent tenure or part thereof in which the tenure or holding is situated, a practice of settlement being made after the measurement of the land assessed with rent, it may be presumed that the area of the tenure or holding specified in any patta or kabuliyat, or (where there is an entry of area in counterfoil receipt corresponding to the entry in the rent-roll) in any rent-roll relating to it has been entered in such patta, kabuliyat or rent-roll after measurement."

The object of the change made by the amendment of 1928 was explained thus in the Statement of Objects and Reasons:—

"In order to meet certain doubts which have arisen, it is proposed to amplify sub-section (6) of section 52 in order to make it clear that an entry of an area in a document may be presumed to have been ascertained on measurement if it is shown that a practice of settlement after measurement was in use at or about the date on which such document was drawn up." The doubts referred to are the doubts (rather the contrary opinion) expressed in the Full Bench case of Nilmani Kar *vs.* Sati Prasad Garga, 48 Cal., p. 556, about the correctness of the view taken in previous cases (Umia Singh *vs.* Tarini Prasad, 19 C. L. J. 451; Umer Ali *vs.* Nabab Khaja Habibux, 47 Cal. 266), that the expression "measurement on which the claim is based was made" refers to measurement at the time the original settlement was made. That view was no doubt the intention of the old sub-section, though its language might not have been clear. The amendment of 1928 makes this intention clear, and the decision in the Full Bench case referred to above therefore no longer holds good. To determine whether the tenant is possessing any land in excess of what he is paying rent for, it is *ordinarily* necessary to have evidence of two measurements, e.g.,—

One to show what land he is possessing now: and

Another to show what is the land for which his rent was fixed. The latter must therefore be a measurement made at the time when the rent was last fixed, whether by a patta or kabuliyat, or an adjustment in the rent-roll *accepted* by the tenant. It is however not always possible for the landlord (specially when he is a purchaser at a court-sale or revenue-sale) to find the papers of the old measurement, and sub-section (6) provides that in such circumstances he may prove that *at the time* of the patta-kabuliyat or of the last adjustment of rent, the general practice in the estate or tenure was to allow such patta-kabulyat or adjustment of rent only after a measurement. The sub-section now makes it clear that this practice of measurement must be proved to have prevailed at the time when the patta-kabuliyat were

executed or when the rent-roll adjusting the rent was prepared. Sub-section (*ii*) also makes it necessary that where there is no patta-kabuliyat, i.e., where the acceptance by the tenant cannot be evidenced by his kabuliyat, the counterfoils of rent-receipts granted to the tenants should show the area, so that it may be assumed that the area was accepted by the tenant.

Co-sharer landlord.—A suit for additional rent for excess area under this section can now be maintained by a co-sharer landlord provided the other co-sharers are made parties defendants (*vide* section 188 as amended by the Act of 1928).

The change in the definition of holding in section 3 (5) does not however seem to affect the view hitherto taken that the word 'area' in section 52 indicates a definite parcel of land (*see* the observations in the case of Benode Kumar Roy Chowdhury *vs.* Ganga Charan, 35 C. W. N., p. 211).

Section 54.

One object of the amendment of 1928 was to provide better facilities to landlords to realise arrears of rent and to tenants to pay rents. For the latter object some improvements were made in—

(1) **Section 54.**—In the matter of payment and tender of payment of rent.

(2) **Sections 56 and 58.**—In the matter of a written receipt when any amount is paid as rent.

(3) **Section 64A.**—Penalty for refusing to receive rent.

(4) **Section 74.**—Regarding cesses in excess of the amount payable under the Cess Act.

(5) **Section 93.**—Appointment of common manager for co-sharer landlords at the instance of the tenants.

Sub-sections (1), (2) and (3) of sections 54 thus replace entirely the old sub-sections (1) and (2), and sub-section (4) is entirely new. Two main changes are made—

(*i*) the legal position regarding "tender" is now codified in the Act; and

(*ii*) one obstacle in the way of postal money-orders is removed by prescribing that acceptance of such rent would not be admission of the particulars set forth in the money-order form.

Tender.—As regards tender, it had already been recognised by the High Court in several reported cases that when a valid tender was proved, the landlord could not claim any interest or damages against the tenant (Sarat Sundari *vs.* the Collector of Mymensingh, 5 W. R., p. 69 under Act X of 1859: and after that Jagattarini *vs.* Nabagopal, 34 Cal., p. 305). So far, the amendment does not seem to take the tenant much further. But a real difficulty about "tender" arose from the view taken in the cases of Kripa Sindhu *vs.* Annada, I. L. R. 35 Cal., p. 34 F. B. (11 C. W. N., p. 983) and Behari *vs.* Nasimunnessa, 37 C. L. J., p. 223. In these cases it was held that a tender to be valid must be of the full amount due, as rent and interest. This

means accounting with the landlord or his *gomostha;* and unless the tenant himself was sufficiently literate and business-like, it was impossible when the position between the two parties was that one was refusing what the other was tendering. The words "tender of rent" in the new section 54 (2) are now wide enough to cover tender of a portion* of a rent. *See* also notes under section 64A.

Postal money-order.—Sub-section (2) (*ii*) postal money-order is permissible now wherever the Bengal Tenancy Act operates.

The prescribed form of rent-money-order (notification No. 11267-L.R., of 27th November 1914) may be had from the post office free of cost. The following are the general instructions:—

(1) Fractions of a pie should be rounded to next larger pie.

(2) Two or more tenancies should not be included in the same money-order, that is to say, there should be a separate money-order for each tenancy.

(3) The money-order cannot be addressed to a number of persons; it may be addressed to the authorised *gomostha*, agent, or common manager in case of co-sharers. The address should be at the usual *katchary* or the landlord's own residence.

Sub-sections (3) and (4).—It is true that under the old section a tenant could pay his rent by postal money-order, but there were several reasons for which he could not derive much benefit from the provision, and the procedure was not popular. Two of these reasons were—

(1) difficulty of proving the refusal of money-order: the refusal being usually an endorsement by the postal peon "refused by the addressee," and

(2) reluctance of the landlords to accept rent by money-order in the apprehension that such acceptance might be treated as admission on his part of the particulars (e.g., rent, area, status, etc.) set forth in the form.

Sub-section (3) is intended to obviate the first difficulty. The intention of the sub-section is that if a tenant produces any paper, such as a post office receipt which shows that he tried to send the money to his landlord, the Court may presume that it reached the landlord and he refused to accept it, unless the landlord denied it, in which case evidence would be taken.

Similarly sub-section (4) is intended to obviate the other difficulty. To quote from the statement of objects and reasons:—

"The amendment of section 54 is intended to remove the practical difficulties which at present discourage the tenants from paying their rents by money-order and cause the landlords to dislike this system of payment. It has been made clear that a tender made at the landlord's village office should be sufficient and that a postal receipt of money-order would be presumed by the court as tender of rent by the tenant.

* * * * * *

*NOTE.—This need not cause any hardship to the landlord: for, in practice rent is usually paid in portions throughout the year, and accounting is made, even in well-organised estates, only at the close of the year.

The main reason which makes the landlords reluctant to accept rents tendered by postal money-order, and thus discourages the tenants from making use of this method, has been removed by providing in sub-section (4) that the landlord's acceptance of such rent shall not be treated as admission or evidence as regards the particulars of the tenancy set forth in the money-order or operate as a waiver of his rights under the clauses relating to the transferability of occupancy-holdings."

Sub-section (4) is borrowed to some extent from sections 18B, 26J (4) and 48H (3).

The inclusion of section "26F" (pre-emption) in the last line of the sub-section seems due to the anxiety of the framers of the Act to popularise rent-money-orders. Otherwise it would seem to be unreasonable that when rent sent by a transferee of an occupancy holding was accepted by a landlord, that landlord would still be permitted to deny him. For exercising the exceptional power given in section 26F [*see* notes under sub-section (3) of section 26F, *ante*].

Section 56.

Compare the particulars for the "receipt" which must be given just at the time the rent is paid, and the particulars of "account" which have to be given under section 57, later on. The additional items in the account are items 7 and 9 (outstandings at the beginning and end of the year). The preparation of this statement of account may require some time, but the "receipt" under section 56, which is of the nature of a simple "cash-memo" must be delivered at the time the money is received. For penalty for failure, *see* section 58.

Sub-section 2 (b).—Amongst the particulars to be specified in the receipt or account (*see* schedule II post) one item is "name or names of the landlord or landlords." Where there are co-sharers amongst the landlords and there is a common agent appointed under section 99A, the name and address of the common agent must be entered upon the rent-receipt. This is particularly necessary for the facility of transmission of landlords' transfer fee under section 26C and of rent-deposits under section 61.

There is no corresponding provision in case of common manager under section 99. It would however follow from sub-section (3) of that section.

Where there are co-sharers amongst the landlords, and no common agent or common manager, it is desirable that the names as well as *addresses* of all the co-sharers should be mentioned on the rent-receipts, so that in the case of a transfer, the tenant may correctly enter them in the notices under section 26C (*vide* notes under section 26C). For the same reason the address of the landlord even when he is the sole landlord ought to be shown on the rent receipt. It will facilitate transmission of the transfer fee to him by postal money-order.

Section 57.

See notes under section 56. The "receipt in full discharge" in sub-section (1) of section 57 is distinct from the simple "receipt" in

section 56. No form is prescribed for this "receipt in full discharge," but it will obviously have the same particulars as the "statement of account" under sub-section (2) with "nil" for item 9, viz., amount remaining due at the end of the year.

Section 58.

The obligation to grant a receipt for any money received is an ordinary business obligation which hardly required any special provision in the codified law. However, owing to the relative position of the parties, it was considered necessary to enjoin even in the earliest legislation that every landlord or his agent "receiving rents * * * from dependant talookdars, under-farmers, raiyats or others are to give receipts for all sums received by him, *and* a receipt in full on the complete discharge of every obligation" (section 63 of Regulation VIII of 1793). *See* also section 11 of Act VIII of 1869 and section 10 of Act X of 1859.

Still, omission to grant timely receipts was not uncommon, and sub-section (3) of the original Bengal Tenancy Act of 1885 provided for a fine up to Rs. 50. This did not improve the position much, and one reason for this, it was supposed, was that no action could be taken unless there was formal complaint by the tenant. The amendments of 1907 (West Bengal) and 1908 (East Bengal) introduced the present sub-sections (3) to (8). To quote from the statement of objects and reasons (notes on clauses) :—

"The provisions of the Tenancy Act regarding the issue of proper rent-receipts by landlord are very generally disregarded* in certain parts of the province. It is considered necessary, therefore, to take some active measures to enforce them. At present, the provisions of section 58 can only be set in motion on the complaint of the tenant and are practically inoperative. It is proposed therefore to give the Collector power to take action on reports received from Revenue and Judicial officers† who will be required to bring to the Collector's notice any breaches of the law which come to their knowledge."

Judicial officers were deleted later; and although a civil court cannot take action under this section without a separate suit being instituted, in case of rent-suits it may, if the fact be proved that no receipt was granted though payment was made, award damages under section 68 (2).

Sub-sections (1), (2), (3) and (9)—"reasonable cause."—Sub-section (9) inserted by the amending Act of 1928 explains that the existence of a dispute as to the rent or area of a tenancy is not a reasonable cause for refusing to grant a receipt when money is actually

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*NOTE.—This disregard of the rule to grant a receipt forthwith any sum was received is not only an evil to the tenant, but has often proved to be more so to the landlord. It has led to misappropriation, and has often been the main cause of many agrarian disputes and dead-lock in regular rent collection.

†NOTE.—" Judicial Officers " were omitted later at the instance of the Select Committee who thought that " the provision requiring judicial officers to report cases of failure to grant receipts would be generally disregarded." This view was unfortunate : and is hardly justified. It has nullified the object of the provision to a large extent, because such matters come ordinarily more to the notice of judicial officers than to the executive.

received. As a matter of common reason, when one person receives any money from another, there cannot be any excuse for his not granting a receipt for it, unless his intention is to misappropriate. The special mention of "dispute as to the rent or area" is intended only to emphasise these two particular items because they are often put forth as excuses for not granting a receipt. For instance, where the person paying the rent is not a registered or recognised tenant, the landlord cannot accept money from him and at the same time withhold a receipt for it (*see* Narendra *vs.* Asmatulla, 1 C. W. N. 19, Notes). It will be noticed that section 56 provides for two kinds of receipt, viz.—

(1) a simple receipt—like a cash-memo for the actual amount received, without any account; and

(2) a receipt in the form of an account showing the amounts originally due, amounts paid and the balance due. This it may take some time to prepare; but there cannot be any excuse whatsoever for not granting a simple receipt as in (1) forthwith any money is received.

Sub-sections (4), (6), (7) and (8).—A proceeding under this section is a criminal prosecution (Naik Panday *vs.* Bidya Panday, 1 Patna Law Journal, page 149; Emperor *vs.* Mohant Ram Das, 9 C. W. N., p. 816); but appeal lies to the Commissioner or where the Commissioner himself is the punishing authority, to the Board of Revenue, *vide* sub-section (6); and the processes to be issued for production of documents would be according to the Civil Procedure Code and the fine would be realised by certificate procedure.

"Collector"—for the meaning of "Collector" *see* section 3 (2), the Collector of the district or any other officer authorised for the functions by the Local Government. For the purpose of this section, all Sub-divisional Officers are authorised (*vide* notification No. 1570T.R., of the 19th September 1910).

Section 59.

This section does not mean that private receipt books cannot be used. The forms of receipt and account given in schedule II only specify the several particulars [*vide* amendment of section 56(3) and 57(2) by the amending Act of 1928], which are required to be shown.

Section 60.

This section should be read with sections 78 and 79 of the Land Registration Act (VII of 1876).

See also section 72, *post.*

Section 61.

Sub-section (1).—The words "a sum not less than the amount of the money *then* due" follow the view taken in Sridhar Roy *vs.* Rameswar, 15 Cal. 166, and Sashi Bhusan *vs.* Umakanta, 19 C.W.N., p. 1143.

As for presumption of tender in case of postal money order, *see* section 54(3) inserted by the amendment of 1928.

Sub-section (2).—For common agent, *see* section 99A.

Sub-section (2)—Last portion.—For the prescribed "cost of transmission" in cases (*a*) and (*b*), *see* statutory rule 66, viz., "the fee payable for sending the amount by postal money order."

For the "fee" payable in cases (*c*) and (*d*), *see* rule 67 of the Statutory Rules.

Section 63.

This section has been entirely recast by the amendment of 1928. The main change effected was explained in the statement of objects and reasons thus:—

"Changes have been made in sections 63 and 64 in order to make it compulsory on the Courts in certain cases to send rents deposited under clauses (*a*) and (*b*) of section 61 by money order to the landlord": that is to say, in the same manner as landlords' transfer fee would be sent by the Collector. Hence the "cost of the transmission" in section 61(2) which would include money-order commission. As for indemnity of the Court, *see* section 64 (3).

Refusal to accept such money order without reasonable cause, bars claims of interest and damages and may entail counter damages (*vide* section 64A).

Section 64A.

This new section was inserted by the amending Act of 1928, the object being explained in the statement of objects and reasons thus:—

"In order to prevent landlords from harassing tenants by means of suits for rent which the latter have already tendered by money order or deposited in the civil court, it is proposed by the new section 64A to preclude the landlord from recovering in such suits damages, interest or costs, and also to make him liable for damages." *See* notes under sections 54 and 63.

The section is silent about tenders made direct to the landlord (or at his Katchary) and refused by him. Here the question of interest and damages is thus left to the Court to decide according to the circumstances in each case. *See* notes under section 54, heading "tender."

"Rent remitted by postal money-order or deposited in Court" need not be interpreted, for the purpose of the benefit of the first paragraph of section 64A, to mean the entire rent due. To do so would practically mean nullifying the benefit intended, for example, where there is a dispute regarding the amount due. Moreover, landlords do generally receive part-payments throughout the year (this is business-like and is to the advantage of both the landlord and the tenant), and there is no question of hardship. This view need not be considered as in conflict with the view taken in Rakhal Chandra *vs.* Baikuntha, 32 C.W.N., p. 1053. The utmost that it may mean is, that in the event of a rent-suit by the landlord the tenant, in order to have the benefit of the first paragraph of section 64A for any remittance or deposit

of part-rent, must pay into court the entire amount *admitted* by him to be due to the landlord.

Section 66.

See the change in the definition of "agricultural year" in section 3 (1) by the amending Act of 1928.

The time previously allowed for the payment under sub-section (2) was 15 days. It was extended to 30 days by the same amending Act.

Section 67.

See item (i) of section 178(1) which was transferred from sub-section (3) to sub-section (1) by the amendment of 1928. The effect is that interest on arrears of rent at more than 12½ per cent. per annum is not enforceable even though stipulated prior to 1885.

A stipulation in a kabuliyat that if paddy-rent be not delivered within a certain time, half as much again would be required to discharge the arrear is a stipulation by way of penalty within section 74 of the Indian Contract Act and is not interest: and consequently the landlord is entitled to recover not this penalty but only reasonable compensation assessed according to the discretion of the court, Shyam Lal Bose *vs.* Kalim Shaikh and others, 34 C.W.N., p. 905. In remanding the case their Lordships observed: "If it (i.e., the paddy-rent) is not so paid (i.e., within the stipulated time), it is quite easy to think that 5 per cent., 10 per cent. or 25 per cent. per annum should be added as compensation. The percentage here would apparently vary according to the difference in the price of paddy at the two dates.

Section 68.

The second proviso to sub-section (1) is new and was inserted by the amending Act on 1928.

Sections 69 to 71.

Dealing with appraisement or division of crop by the Collector in the case of tenancies on produce rent, on the application of the landlord or the raiyat were entirely repealed by the amending Act of 1928. These sections were very rarely resorted to in Bengal.

Section 73.

This section has been recast by the amending Act of 1928. The old section made the transferor and the transferee both liable for "arrears of rent accruing *after* the transfer unless and until notice of the transfer was given to the landlord in the prescribed manner." The deletion of those words follows from the new provisions 26A to 26J which confer the right of transfer on the occupancy raiyat. The transferor's liability thus ceases after the transfer. The condition in the proviso is however important, viz., "If the transferee has agreed to pay such arrears to the landlord and the fact has been mentioned in the instrument of transfer." If this has not been done both the transferor and

the transferee are liable for the arrears before the transfer according to the main portion of the section.

As for the words "or in part" *see* also section 88.

Section 74.

Sub-section (3).—The last words (viz., and registered, etc.), were added by the amending Act of 1928. Permanent *mokorari* leases registered after 22nd February 1929 are therefore now subject to the provisions in sub-sections (*1*) and (*2*). *See* notes under section 54.

See also the provisos added to section 179 by the amending Act of 1928.

Section 76.

By the amending Act of 1928, the words "raiyat's holding" in sub-section (1) were changed to simply "holding" and in sub-section (3) the word "raiyat" was changed to "tenant." The object is to make all these provisions about "improvements" (sections 76 to 83) applicable to under-raiyats as well as to raiyats.

Sub-section (2) (a).—The words "or for drinking" were inserted by the amendment of 1928, as also the "explanation." These now countermand the view taken in the case of Govinda *vs.* Kasimuddin, 16 C. L. J. 127 (9 C. W. N., ccxlvi—notes) under the old law, viz., that 'tank' for providing drinking water was not an improvement within the meaning of section 76.

Sub-section (2) (f).—The old section had simply "suitable dwelling house" and this led to controversy in each case as to what was or was not a suitable house for the tenant in question (*see* Hari Kishore *vs.* Baroda Kishore, 31 Cal. 1014; Narain Chandra *vs.* Maharaja Manindra Chandra Nandy, 37 I. C. 999; Surendra *vs.* Nakur, 64 I. C. 716). The amendment of 1928 is intended "to make it clear that a dwelling house 'includes a masonry building' that is to say, a brick or stone house is never an unsuitable dwelling house for a raiyat or under-raiyat."

See in this connection section 160 (*c*). As "dwelling houses" or as "permanent buildings" and as "tank" these are "protected interests" under section 160 (*c*), whether executed by a raiyat or under-raiyat. This position of the under-raiyat was questioned in the Legislative Council by an amendment moved during the debate of the Bill of 1928. In opposing that amendment, the reason was thus explained on behalf of the Government:—

"*firstly*, because it (the amendment) really means making an exception to section 160 (*c*) of the Act about which no amendment has been put, and, *secondly*, because if section 160 (*c*) gives protection to an under-raiyat who has made a masonry house we do not see any reason why that protection should be taken away. After all, the distinction between a raiyat and an under-raiyat in this respect is an artificial one, and many under-raiyats under the provision of the law which is going to be passed will have rights approaching very much the rights of an occupancy raiyat. For these reasons, as well as for the simple reason that an under-raiyat if he has been able to build a masonry house is as much entitled to protection as other tenants, we do not consider that any exception should be made."

This view taken by the Government was accepted by the Council, and the amendment to exclude the under-raiyat was thrown out.

Section 77.

(*See* notes under section 76.)

The old section 77 was confined in its application to "raiyats at fixed rate and occupancy raiyats." The amendment of 1928 by changing those words to simply "tenant," makes the provisions of this section applicable to *all classes* of raiyats and also *under-raiyats*.

Sub-section (3) is new.

Section 79.

Section 79, dealing with the rights of non-occupancy raiyats in the matter of improvements, was entirely repealed by the amending Act of 1928, for the reason that there was under that Act no longer any distinction in this respect between an occupancy raiyat and a non-occupancy raiyat.

Section 80.

For the words "wholly or partly" *see* notes under section 30.

Section 85.

Section 85 has been wholly repealed by the amending Act of 1928. The old section provided—

(1) that a sub-lease (to an under-raiyat) by a raiyat was not valid against the raiyats' landlord unless it was registered,

(2) that such sub-lease would not be registered if it exceeded a period of 9 years, and

(3) that in case it exceeded a period of 9 years, it was not valid against the raiyats' landlord.

The section was rigorously interpreted against the under-raiyat in the full bench case of Chandra Kanta *vs.* Amjad Ali (48 Cal., 783; 25 C. W. N. 4) in which it was held, to state generally, that a sub-lease exceeding 9 years was not binding even against the lessor from whom the under-raiyat took the lease. The restrictions have now been removed by the repeal of the section, and the position of the under-raiyat, whether with reference to his lessor or to the superior landlord is now what would follow from the new sections about the under-raiyats, viz., 48C, 48G, 48H and 87 (5). A sub-lease to an under-raiyat may therefore now be for any period or even permanent; only when it purports to exceed 12 years, a landlord's fee of 20 per cent. of the value of the lease-hold or 5 times the rent must be paid at the time of registration (section 48H).

Section 86.

Sub-section 6.—The references to under-raiyat were inserted by the amending Act of 1928, and are intended "to protect the under-raiyat by rendering it obligatory to have his consent before his landlord (viz., the raiyat) could surrender his holding"—(statement of objects and reasons). Consent of the under-raiyat means that the under-raiyat agrees also to give up the land along with his immediate landlord. Where therefore there are several grades of under-raiyats the consent of all is necessary. As regards the position in the case of "abandonment"—*see* new sub-section (5) to section 87.

Section 86A.

This section is new and was inserted by the amending Act of 1928. The object is to "do away with difficulties as regards demarcation and consequent litigation or breaches of the peace when lands form and reform in a river. If a tenant has definitely taken abatement of rent for diluviated lands, it is reasonable that, he should lose all rights in those lands, provided they do not accrete to any lands of which he is in occupation."—Statement of Objects and Reasons. In the latter case, i.e., accretion, he can claim it under the ordinary law of alluvion and diluvion, section 4, Regulation XI of 1925.

Section 87.

Sub-sections (1) to (4).—The proviso about abandonment which previously applied only to *raiyats* have been extended to under-raiyats of all classes by the amendment of 1928.

Sub-section (5).—New, inserted by the amendment of 1928. The protection to the under-raiyat by this sub-section is, however, much inferior to that afforded by sub-section (*4*), inasmuch he has to pay a higher rent, viz., his own rent and not the rent of his landlord the raiyat (or under-raiyat); and has also to pay a *salami*. The original Government Bill of 1925 did not make any such distinction, and this sub-section (*5*) was introduced by the Select Committee and eventually passed into the Act. As for the rent there may be justification, but as for the *salami* it is not intelligible why it should be paid over again when it has once been paid at the creation, under section 48H (*1*). (*See* notes under that section.)

Taking the two sub-sections together, the application of sub-section (*4*) would appear to be limited to leases for a term less than 12 years and without any homestead.

Section 88.

The second proviso inserted by the amendment of 1928 was adopted in the Council on a motion by Mr. Nalini Ranjan Sarkar. Its object was thus explained by the mover: "When you have given a statutory recognition to the transfer of a portion of a holding (section 26B), it is only fair and equitable that a subdivision of the tenancy as also a subdivision of the rent should be allowed. In my amendment the procedure has been laid down in such a way that while it gives relief to the tenant, it does not affect the interest of the landlord also. I have made provisions in the amendment that in the process of such subdivision of a tenancy, the holdings cannot be unreasonably small,

and the rent cannot be below a fixed sum. I have also provided for mutation fees in connection with this to be paid to the landlords to compensate them for collecting rents from a larger number of tenants."

The first proviso was in force in Western Bengal by the amending Act, I of 1907.

Section 93.

Considerable change has been introduced in this section by the amendment of 1928. This was explained thus in the Statement of Objects and Reasons:—

"At present it is necessary when action is taken under section 93 to appoint a common manager for the whole of the estate or tenure concerned, though a dispute may exist in only a small portion. Under the section as amended by this clause, it will be possible to appoint the common manager only for those portions of the estate or tenure which are affected by the dispute.

"Provision is also made for enabling the tenants to apply for the appointment of a common manager in case where, owing to the existence of a large number of small co-sharers in the estate or tenure, the tenants are put to inconvenience and harassment in the payment of their rent (*see* notes under section 54).

"Conditions (*a*) and (*b*) in the present (i.e., now old) section 93, which make the appointment of a common manager contingent on inconvenience to the public and injury to private rights, have been omitted in accordance with the view taken by the Select Committee."

Section 99A.

This section is entirely new, being inserted by the amendment Act of 1928. The function of the common agent (as opposed to common manager in section 93) is limited to receiving notices of transfer and transfer fees from the collectorate and rent deposits from the civil court. The appointment of a common agent is optional and not compulsory.

Sub-section (1).—The instrument in writing would be a power of attorney liable to stamp duty under Schedule IA, Article 48 of the Stamp Act (i.e., Rs. 7-8), and also to registration (*vide* section 18 of the Indian Registration Act).

Sub-section (2)(a).—The application to the Collector will require the usual court-fee of 12 annas under the Court Fees Act.

Sub-section (2)(b).—This is necessary for notices under section 26C (*see* notes under that section and section 56).

Section 100.

The Board of Revenue will, when necessary, make rules regarding the powers and duties of the common agents [*see* section 100 (2)]. No rule, however, has been made yet.

Section 101.

Sub-section (1).—The words "all lands" in place of "the lands" were substituted and the proviso added by the amendment of 1928. Doubts were expressed in several reported cases as to whether a survey

and record-of-rights could be made of non-agricultural lands, and in particular whether the sections about settlement of fair rent (sections 104 to 109) were applicable to tenancies of such lands. On the one hand it was contended that the Tenancy Act in no part could apply to non-agricultural tenancies; on the other it was argued that the use of the word "occupant" (not necessarily a "tenant" within the meaning of the Bengal Tenancy Act) in section 102(*a*) justified a record of "occupation" for all classes of lands (*see* amongst other cases Umrao *vs.* Syed Mahammad, 27 Cal. 205; Bipra Das *vs.* Azam, 46 Cal. 441; Sashi Kanta *vs.* Sandhyamani, 26 C.W.N. 483). Where non-agricultural lands were intermixed with agricultural lands, it was obviously inconvenient, if not impossible, to omit them in the course of a general survey and record of the country. In municipal areas where considerable area is non-agricultural, it is often desirable to take the advantage of a general district survey and have the boundaries of the holdings properly delineated and mapped. The amendments made in 1928 are intended to make the position clear. A survey and record-of-rights can now be made of *all* lands whether agricultural or non-agricultural comprised within an area notified under section 101; only the provisions about settlement of fair rent and consequent proceedings (*vide* proviso) will not apply. In fact there is no provision for settlement of fair rent by any Court for a non-agricultural tenancy and there are no rules for guidance corresponding to sections 7 and 30 of the Bengal Tenancy Act, the whole matter being regulated by contract between the parties; and even if these sections were not excluded by the proviso they would be inoperative. The record in the case of non-agricultural lands will therefore be a record of existing facts, viz., occupation, present rent, and also the terms and conditions on which the land is held (*see* proviso at the end of section 102). As section 106 is not excluded by the proviso, these entries may be disputed by a suit framed under that section and the consequent sections 108, 109 and 115C. regarding revision and appeal would be applicable.

Section 114 is not excluded by the proviso: and therefore the cost of survey and record-of-rights of non-agricultural lands may be recovered from the "landlords, tenants and occupants."

Section 102.

Clause (b).—The words "with or without a right of occupancy" with reference to under-raiyats were inserted by the amendment of 1928. Read with clause (*h*) which requires recording of "special conditions and incidents" these words would include recording of circumstances, if they exist, referred to in proviso (i) of section 48C(*e*), that is to say, whether the lease is permanent or heritable or whether the under-raiyat has been in possession of his land for 12 years or has a homestead thereon.

For under-raiyat with occupancy right, *see* section 48G.

Clause (*ee*) **and the 'proviso'** are entirely new, being inserted by the amending Act of 1928.

For **clause** (*ee*), *see* also section 193, according to which the procedure of rent-suit applies to dues on account of pasturage, forest-rights fisheries and the like (*see* also new section 158AA).

Proviso.—No special rules have yet been made for the "prescribed particulars."

Section 105.

Sub-section (5).—The amendment of 1928 has deleted the words "orally or " after "accepted." Acceptance under this section must therefore now be made in writing.

Sub-section (7).—By the amendment of 1928, this section applies to both West Bengal and East Bengal.

Section 105A.

Clause (*g*) was added by the amendment of 1928. "Rent payable at the time of the final publication" is the existing rent [so far as it is lawful under section 3 (13)] as opposed to the enhanced rent which the landlord seeks in his application under section 105 (1) to be settled as fair and equitable rent by the Revenue Officer.

Section 105B.

This section was inserted by the amending Act of 1928. This does away with the necessity of having a notification of Government under section 105 (3), as the old one No. 6954 L. R. of 21st July 1923, published in the "Calcutta Gazette" of July 26, 1923, Part I, page 1451.

Where the applicant under section 105 himself disputes at the same time the correctness of the finally published record and thus raises an issue of the nature mentioned in section 105A, he really combines a suit under section 106 with his application. In such case he shall have to pay such court-fees as he would have had to pay if he had instituted two separate cases, viz., one for settlement of fair rent under section 105 and another for disputing the record-of-rights under section 106.

Section 105C.

This new section, inserted by the amendment of 1928, overrules the view taken in Srinivas *vs.* Ram Chandra (14 C. L. J. 146) that a landlord is entitled to costs incurred by him in making applications under section 105 and in serving them upon the tenants. In the "notes on clauses of the Bill" it was explained that: "Ordinarily it was inequitable to make the tenant pay the landlord's cost in a rent settlement case besides having to pay enhanced rent." Under the new section no cost would ordinarily be awarded as a matter of course: if costs are demanded, there must be special reasons: and if the Court award costs the special reasons must be stated in the order.

Section 109.

The proviso was inserted by the amendment Act of 1928. The second portion, viz., (*b*) of the proviso follows the decisions in Nawab Bahadur of Murshidabad *vs.* Ahmed Hossain, 44 Cal. 783, and other cases. The first portion, viz., (*a*) regarding dismissals for default or withdrawal, overrules the view taken in the Full Bench case of Purna C. Narendra, 52 Cal. 894 (*see* also Raja Rishikesh Law *vs.* Satish Chandra Pal, 56 I. A., p. 179), in which it was held that when an application under section 105 was withdrawn, a subsequent suit for enhancement of rent was barred.

The amendment has no retrospective effect so as to affect proceedings pending at the date of the amendment, Gosta Behari Paramanik *vs.* Nawab Bahadur of Murshidabad, 35 C. W. N., p. 1147.

Section 109C.

The words "specially empowered in this behalf by the Local Government" after "Revenue Officer" were deleted by the amendment of 1928. A Revenue Officer need not be specially empowered now, every Revenue Officer acting under chapter X has now the requisite power.

Section 109D.

This new section 109D inserted by the amendment of 1928 "brings together the various sections in chapter X relating to notes of decisions in the finally published record-of-rights and co-ordinates the Western Bengal and the Eastern Bengal law on the subject."

Section 112.

The West Bengal law now applies also to East Bengal.

Sub-section 2 (b) is however new and was inserted by the amendment of 1928. The object is to prevent the provisions of this section being defeated by the exaction of excessive rents pending the currency of the proceedings.

Section 113.

No change has been made in this section by the amendment of 1928 with regard to under-raiyats. The period of 15 years applies therefore only with regard to those under section 48G and not to those under section 48C, proviso (*i*). For the latter, the period is 5 years. This when read with section 48D (3), which has 15 years in case of enhancement by suit, would seem to be an oversight.

Section 115C.

Same as old section 109A, renumbered and put at its proper place at the end of the chapter.

Section 116.

The amendment (from "or lands owned" to "the same") of 1928 provides for the protection of the District Boards against the tenants on road-side lands acquiring occupancy right. It is not necessary that such lands should have been acquired under the Land Acquisition Act. Similarly for lands on the sides of canals or embankments which are required for the repairs or maintenance of those works, though they may at times be set free for useful cultivation.

Sections 121 to 142.

The procedure of distraint was abolished by the amending Act of 1928, because it was rarely used and then probably only as a means of oppression. All these sections were accordingly entirely repealed.

Chapter XIII.—Judicial procedure.

The amendment of 1928 provides for certain important facilities in the procedure of rent-suits with necessary safeguards against abuse. These new facilities are mainly:—

(1) There may be one suit against a number of similar tenants [section 144 (2)]: *Cf.* the procedure in section 105.

(2) A fresh petition or affidavit for the purpose of verification of pleadings is not necessary (section 145, proviso).

(3) In case of co-sharers amongst tenants, the entire body of them would be treated as represented if those who have homestead in the village or have previously paid rent or have notified their purchase or succession, are cited (section 146A and B).

(4) No identifier is necessary for service of summons in rent-suits [section 148 (g)].

(5) A summary procedure of "special summons" is prescribed when the rent claimed is based on a record-of-rights or a registered lease and the defendants do not appear to contest [section 148 (k)].

(6) A co-sharer landlord is entitled to bring rent suit making the other co-sharers party defendants (section 148A).

The safeguards appear in the details of the several sections.

Section 144 (2).

The new procedure of one suit for a number of tenants introduced by the Act of 1928 follows the analogy of section 105. All the defendant tenants must hold in similar right and equal status. For example, there cannot be one suit against *A* and *B* when *A* is a tenure-holder and *B* is a raiyat; or where *A* is an occupancy raiyat and *B* is a raiyat at fixed rate. If such difference is disclosed in the course of hearing presumably the case would be split up.

A convenient method of drawing up a plaint in such case would be to state the particulars about different tenancies in the form of a schedule, with columns like the following:—

(1) Serial number.

(2) The names and addresses of the tenants (defendants).

(3) Description of the tenancy.

(4) Annual rent.

(5) Years and *kisti* for which the rent is due, and the amount.

(6) Interest or damages, if any, charged.

[illegible] there is a record-of-rights, the description in column 3 will [illegible]sist of reference to the numbers of settlement *khatians* and plots. [illegible]here is a registered lease under which rent is claimed references to [illegible]date, etc., may be given here.

[illegible]e will be no saving in the initial court-fee (proviso iv) but one [illegible]a will suffice and in subsequent stages one petition (e.g., [illegible]ent), where previously as many as there were ca[illegible]

were required. There would also be a saving in process fees by reason of residence in the same village (rule 65 of the Government rules).

The tenant-defendants may also all have a joint *vakalatnama* with single court-fee and also the advantage of one petition in subsequent stages instead of separate ones for separate tenancies.

Section 145, proviso.

The proviso was added by the amendment of 1928. It does away with "the necessity of a fresh petition or affidavit for the purpose of verification of pleadings."

Section 146A.

This section inserted by the amendment of 1928 was strongly opposed by the raiyat's section in the Legislative Council. One member (Khan Bahadur Azizul Huque) described the procedure as 'preposterous' inasmuch as it meant that although some of the co-tenants will not be made parties yet the suit, if decreed, would be treated as decreed against them also. A suggestion by another member (Babu Jogindra Chandra Chakravarty) that decrees in such cases should be treated as money-decrees was not pressed or accepted. It was explained on behalf of Government (Mr. Pranendra Narayan Choudhuri) that the principle of the new provisions had already been accepted by the High Court in a Full Bench case (referring to the case of Jogendra Mohan Sarkar *vs.* Brajendra Kumar Chakravarty, 53 Cal. 197), viz., that a suit for rent was maintainable against some of the heirs or successors-in-interest of a deceased tenant without bringing all the heirs or successors-in-interest on the record. The new section accepts this principle, but provides for safeguards by definitely stating the circumstances under which only it would apply [*vide* sub-section (3)].

As for cases in which one of a number of tenants is put forward by the rest as their representative *see* 17 C. W. N. 833 (Chamatkarini Dasi *vs.* Triguna Nath) and for the contrary view Krishna Das *vs.* Kalitara, 22, C. W. N. 289; Abinash *vs.* Fulchand, 50 Cal. 737. The new section 146A is expected to set at rest the controversy.

The remedies of the co-sharer tenant who has not been made party are:—

(*a*) To appear and apply to be made a party before the commencement of the hearing of the suit [section 146B (1)].

(*b*) After commencement of hearing, and in the course of the suit to pay into court the amount due and get the case dismissed [section 146B (1), prov.], the amount being then a mortgage debt on the tenure or holding under section 171.

(*c*) After order of attachment, to get the tenure or holding released by paying the money due into court under section 170.

(*d*) Where sale has already taken place, to apply for having it set aside under section 174.

Sub-section (3) (iii).—Reference to sections '26E or 26F' in the amending Act of 1928 was a mistake for section '26C or 26E,' and this was corrected by the amendment of 1930. For analogy and for effect

if a suit was instituted omitting a transferee who had given notice, *see* the Privy Council case of Jitendra Nath Ghosh *vs.* Monmohan Ghosh, 34 C. W. N., p. 821.

Section 146B.

Follows from new section 146A. *See* notes under that section.

Section 147.

The proviso was inserted by the amendment of 1928 as consequential to the amendment of section 148A regarding rent-suits by a co-sharer landlord.

Section 147A.

The law in the two parts of the proviso has been made uniform by the amendment of 1928, viz., adopting the Eastern Bengal section except sub-section (2) which adopts the old Western Bengal sub-section (4).

Section 148.

The object of the changes in this section made by the amendment of 1928 is to cheapen the procedure of rent-suits and also to co-ordinate the Eastern and Western Bengal laws. These changes may be summarised as below:—

(1) **Clauses (c) and (d).**—In areas where a record-of-rights has been prepared, it will be sufficient if only the settlement *khatian* number of the tenancy is stated; and where there have been changes since the record-of-rights, also plot numbers in order to explain the changes. No detailed boundaries, etc., are required.

(2) **Clause (g).**—Omits the identifier, a procedure which was considered expensive, inefficient and affording temptation to false affidavits. Another object is to make it possible to have these summonses served by *dafadars* through union courts.

(3) **Clause (h).**—Notice on the natural guardians of minor defendants.

(4) **Clause (i).**—Court to record reasons if it grants or refuses leave to file written statement.

(5) **Clause (k).**—A simple procedure in undefended cases where the rent claimed is based on a record-of-rights or written lease. The second proviso to sub-clause (*ii*) safeguards the tenant against the use of any statement in the landlord's plaint except that about rent, to the tenant's prejudice later on. *See* analogous section to safeguard the landlords against statements by tenant [sections 18A, 18B and 261 (4)]. "It is expected that tenants knowing that they are safe in this respect will not trouble to defend rent-suits in which the money is admittedly due." For the form of special summons *see* form No. 10 of the Government rules, and for the form of the registered postcard [sub-clause (*iii*)], see form No. 11 of the same rules.

(6) **Clause (l).**—Special rule of evidence for copies or extracts of record-of-rights certified by the court.

The provision of special summons in clause (*k*) was opposed by certain members in the Legislative Council as giving a "novel right to the landlords in rent-suits." It was explained on behalf of Government that the only novelty was that evidence would not be recorded where the defendant did not care to appear and dispute the amount due. This was the procedure in England in cases of liquidated claims, and the question was whether it was safe to extend it to India. The Civil Justice Committee which went into the matter in some details observed: "A court is not likely *in an ordinary case* to be in a better position to ascertain the truth or falsity of the claim by examining the plaintiff himself, or his witness," where the defendants in spite of notices served on him did not appear to contest; and that insistence on such evidence only encouraged false witnesses, whom it would be difficult to bring to account later. In rent-suits sufficient safeguard was, it was stated, provided by ruling out of evidence any extraneous statement other than about the amount due [*vide* 2nd proviso to sub-section (*k*) (*ii*)].

Sub-section (k) (iv).—Requires deposit of one-half of the amount recoverable under the decree. Compare section 153A which would need deposit of the amount that may be admitted by the defendant.

Section 148A.

This section was entirely recast by the amending Act of 1928. Under the previous law, a co-sharer landlord could bring against a defaulting tenant, *either* a suit framed under section 148A (old) for the share of rent due to him, that is to say, when he was unable to ascertain what rent was due for the whole tenancy or to the other co-sharer landlords; *or* a suit framed under section 158B (old). The position was unsatisfactory and the new section 148A is intended to meet the difficulties of co-sharer landlords in this respect. Briefly, a co-sharer may now *always* bring a suit for arrear of rent due to him alone, making his other co-sharers parties defendants. These co-sharers have an opportunity of coming forward as plaintiffs, but if they do not, they will be barred from getting any decree for arrears of rent due for the period in suit. As a corollary, old section 158B was repealed by the Act of 1928.

A decree passed in a suit under this section will be as effective as a rent-decree by a sole landlord or entire body of landlords, and if a sale follows section 159, etc., will apply [sub-section (6) which is taken from the old section 158B].

Section 156.

The rights under this section were extended to under-raiyats of all kinds by the amending Act of 1928.

Section 158A.

Sub-section (2) has been modified by the amending Act of 1928. The general terms and conditions under which an application under this section may be allowed were first notified in Government Notification No. 4794L.R. of the 12th March 1929 (and later revised and elaborated in Government notification No. 10954L.R., dated 31st August 1931).

The essentials required are:—

(*a*) that a copy of the record of rights should be maintained by Government agency, and

(*b*) that the accounts of the landlord concerned should be correct and reliable.

If the Collector is satisfied regarding (*b*) and the landlord is prepared to bear the cost of maintenance of settlement record, he may on application to him, obtain the special certificate power for the realization of arrears of rent of his tenants under the provisions of this section. The intention of the modification made in 1928 is to popularise this method of realizing arrear rents instead of by suits in the civil court, and at the same time to provide an automatic means of keeping the record-of-rights up to date. The maintenance of settlement record is not expensive particularly where the estate or tenure is large and compact in area. To cheapen this cost the terms and conditions provide that if the landlord so desires the maintenance work may be done once every 3 years instead of every year.

Compare the summary procedure through the civil court by "Special Summons" under new section 148 (*k*). *See* also Introductory note for these facilities for realisation of arrears of rent.

Section 158AA.

See new sub-section (*ee*) to section 102, and also section 193.

Section 158AAA.

This section is taken from a part of the old section 158B so far as it related to sales by certificate procedure. The effect of a certificate-sale ordinarily, is that merely the right, title and interest of the certificate-debtor passes [section 20 (1) of the Public Demands Recovery Act], but in the case of a certificate under this chapter of the Bengal Tenancy Act, where the certificate is on the requisition of or in favour of a sole landlord or entire body of landlords the tenancy itself passes subject only to protected interests, etc., as in the case of sale in execution of a rent-suit. This is also made clear in section (3) of the Public Demands Recovery Act. *See* notes under section 158E and 158B (old).

For the effect of sales in execution of a rent-suit, see section 159.

Section 158B (old).

The old section 158B was deleted by the amendment of 1928, because the portion of sub-section (1) of that section which related to certificate sales was transferred to new section 158AAA under Chapter XIIIA; and the rest, so far as it related to rules in suits instituted by a co-sharer landlord, it became unnecessary in view of the new section 148 (6). The proviso of the old section 158B relating to merger now appears in its proper place under section 22 (2).

As for the portion of the old section which referred to sales in rent-suits by a sole landlord or entire body of landlords, it was deleted

as unnecessary. The position was explained thus on behalf of Government:—

"When the section 158B was inserted in 1907 in the Act the question had arisen only with reference to decrees obtained by co-sharer landlords: it was really by mistake that the first portion which was in a previous draft got into the Act; it was unnecessary so far as the sole landlord or entire body of landlords. Section 159 is complete in that respect and worked satisfactorily before the amendment of 1907. It clearly explains what happens when there is a decree and a sale follows the decree, and what a purchaser would get."

Section 159.

(*See* notes under the old section 158B, now deleted.)

Sub-section (2) added by the amendment of 1928 brings the question of the title of a purchaser of a tenure or a holding in execution of a rent-decree in conformity with section 169 (*1*) (*c*). The view taken in several cases that the question would be governed by the Civil Procedure Code (18 C. W. N. 136, Bejoy Chand *vs.* Sashi Bhusan, 26 C. W. N. 511, Ramlal *vs.* Badriram) will no longer apply.

Section 160.

Clause (ff) as inserted by the amendment of 1928 did not contain the last words, viz., "which has not been changed during 20 years." These words were added by the subsequent amendment of 1930. The clause as it stood under the amending Act of 1928 made no distinction between (*i*) a mokarari raiyat holding from the time of the permanent settlement and (*ii*) a mokorari holding created by the landlord subsequently. The former, by reason of the conditions of the permanent settlement with the zamindar [*see* the principle repeated *in section* 50 (*1*)] are not liable to any enhancement of rent in any circumstance. But as regards the latter, viz., (*ii*) who may have paid a *salami* to their immediate landlord and been holding on a low or nominal rent, it was unfair that such rent should be binding on the superior landlord who was no party to the transaction. Hence the subsequent amendment in 1930. Such rent would be binding as a protected interest if it had not been changed for a period of 20 years.

Section 163.

The provision of combined attachment and proclamation [(1)] inserted by the amendment of 1928 simplifies the procedure deal.

The elaboration of the method of publication in sub-section replaces the old Government notification of 3rd March 1889 and cribes three essential methods of advertising the property for s

Section 166.

The insertion of the words "not held at fixed rates" in s (1) follows from the new clause (*c*) of section 18 (1) which clear that a raiyat at fixed rate may aslo be a settled rai occupancy rights as such.

codified in section 48D(2), viz., one-third of the gross produce. The clause, however, does not apply to those who have stipulated to pay a fixed quantity of produce (*dhankuraridars*) irrespective of actual outturn in the year, and the only way out for such a tenant, if the stipulated quantity proves beyond the capacity of the land, is to surrender under section 86 provided it is not within the term of the years of his lease.

Clauses (f) to (h) necessarily follow from the new sections referred to in them. As regards clause (*g*), it may be questioned whether a contract by which an occupancy raiyat has a greater right than that conferred by sections 26B to 26J, would be operative, e.g., where the contract gave full right to transfer without payment of any transfer fee. But a transfer deed would not be registered by the registering officer unless the transfer-fee was paid [section 26c(2)] and unless the deed was registered the transfer was not effective [section 23c(1)]. The net result would seem to be that the transfer-fee must be paid even though there was a contract to the contrary.

Clause (i) was transferred by the amendment of 1928 from sub-section (3) to sub-section (1). Interest at a rate exceeding 12½ per cent. is not thus enforceable even though the lease stipulating the interest might have been executed prior to 1885. [*See* also the second proviso (new) to section 68.]

Section 179.

The reason stated in the "notes on clauses" of the Bill of 1925 by which the proviso was added, was as follows:—

"Under the interpretation of section 179, conditions for *abwabs* [which are illegal under section 74 or section 77(3)] or for interest on arrears of rent in excess of that allowed by section 67 can be embodied in permanent *mokarari* leases. It is proposed to make such conditions in future leases of this description invalid."

The interpretation referred to was given in the case of Krishna Chandra *vs.* Sushila, 26 Cal. 611. *See* also Asanulla *vs.* Tirtha Bashi, 22 Cal. 630. As for high rate of interest, it was recoverable under the law prior to 1928, Naba Kumar *vs.* Syed Abdul, 21 C.W.N. 112. These views do not hold good now in respect of *mokarari* leases executed after the amendment of 1928.

Section 182.

Compare the old section before the amendment of 1928:

"When a raiyat holds his homestead otherwise than as part of his holding as a raiyat, the incidents of his tenancy of the homestead shall be regulated by local custom or usage, and subject to the local custom or usage, by the provisions of this Act applicable to land held by a raiyat."

The reference to "local custom or usage" has now been deleted. It was useless under the old law because custom is so difficult to prove.

Further changes made extend the provisions of the section to under-raiyats, and also to cases of homesteads held in a village contiguous

to the village in which the raiyat's or under-raiyat's land may be held. Otherwise the law remains as before.

The position has been explained thus in a recent case under the amended section: "The section makes the position of the raiyat or the under-raiyat with regard to the homestead dependant not upon his position with regard to his holding but upon the status of the landlord of the holding"—36 C.W.N., p. 789.

Section 183.

The two illustrations in the section which saved any local custom by which a raiyat could sell or an under-raiyat acquire occupancy right, were deleted by the amendment of 1928. These two illustrations came into existence in the old Act when the proposal in the original Bill of 1883 to confer the right of transfer on the raiyat and a kind of limited occupancy right on the under-raiyat was dropped at that time, it being decided to leave the matters to local customs and watch how such customs "crystallised." The amendment of 1928 has conferred the right of transfer on the occupancy raiyat with certain conditions (sections 26B to 26J) and hence the first illustration became unnecessary. As regards under-raiyats, those who had already been in possession of occupancy right prior to the amendment of 1928 would continue to have such right (*vide* section 48G); but no new under-raiyat can acquire such right any more even though there was a custom for such right prior to 1928. But section 48C gives a substantial security to the under-raiyats generally throughout the province. *See* general notes at the beginning of chapter VII.

Section 188.

The section has been elaborated by the amendment of 1928, and for the following reasons as stated in the notes on clauses:—

"In the new section 188 it is proposed to extend the same principle underlying the amendment proposed in section 148A to a number of cases at present governed by section 188 of the Act, and it is made clear which suits are to be brought and which applications are to be made by all the landlords together or by an agent authorised to act on behalf of all of them when they are co-sharer landlords, and in which cases any of the co-sharer landlords may obtain the relief sought for if he makes the other co-sharer landlords parties to the suit or proceedings."

It will be noticed that the words used are "co-sharer landlords" and not "joint landlords." The latter would ordinarily mean persons who collect their rents jointly (*ijmali*) as for instance brothers in the same family. Co-sharers would ordinarily be therefore persons who collect their shares of rent separately, each or each group having definite share in the landlords' interest. The joint or *ijmali* landlord would in such case have all to act together, for, the tenants know them not separately.

Section 188A.

The provisions of the old section 188A being completely covered by the amendments of sections 148A and 188 in 1928, that section was entirely repealed.

The old section which was inserted by the amendment of 1907 and 1908 counteracted the ruling in the case of Jogendra Nath Ghosh *vs.* Paban regarding appeals 8 C. W. N. 472, provided that suits by—

(a) sole landlord,

(b) entire body of landlords, or

(c) a co-sharer landlord

were subject to the provisions of sections 143 to 153; and also that for a decree passed in a suit framed under section 158(1) and (2) the provisions of Chapter XIV would apply. The provision in the old section so far as it related to cases by sole landlord or entire body of landlords was unnecessary and probably got into the old Act by mistake. As regards co-sharers, section 148A [particularly the latter portion of sub-section (6)] and 188 now explain the position.

Section 191.

This section combines the old sections 191 and 192 and by the insertion of the words "or in any lease or contract" after the words "nothing in this Act," makes the original intention of those sections more clear, viz., that in a temporarily settled area an agreement to hold land free of rent or at a particular rent was inoperative beyond the period of the temporary settlement and the landlord would not, on the expiry of that period, be bound by it. To quote from the Statement of Objects and Reasons in the Bill of 1883,—

"The Government has an undoubted right to raise its revenue on the occasion of a fresh settlement. Of this right no act of the landlord can deprive it; and, accordingly, if the landlord were to be bound by a grant at fixed rates made by him so as to extend beyond the term of the settlement, he might be exposed to the risk of having to pay an enhanced revenue without the possibility of recovering it from his tenant."

Hon'ble Sir Stuart Bayley explained the position further thus:—

"The history of the matter is that it is a part of the existing law which provides that a temporary settlement-holder could not contract beyond the term of his own settlement; a settlement-holder cannot therefore protect his raiyat against subsequent enhancement, in case of subsequent enhancement of the revenue."

There was a contrary provision of law in section 51 of Regulation VIII of 1793 and in the 2nd part of the proviso to section 4 (firstly) of Regulation XI of 1825, which did not permit a zamindar to enhance the rent of his tenant, although his own *jama* might be increased, unless the tenant was liable to such enhancement according to the

terms of his lease or contract with the zamindar. Consistently with the intention of sections 191 and 192, these portions of Regulation VIII of 1793 and Regulation XI of 1825 were also repealed in 1885 (*vide* schedule I of the Act of 1885).

See also the observations in the case of Baidya Nath Roy *vs.* Nandalal Guha Thakurta (1914), 18 C.W.N., pages 1208-09:—

"It is plain from the proviso to the first clause of section 4 of Regulation XI of 1825 (unrepealed portion) that in case of accretion, the proprietor himself who holds direct under the Government becomes liable to additional revenue to Government and the view cannot be maintained on any intelligible principle of equity and justice that the proprietor should be liable to additional revenue to Government, but that the subordinate holder under him should be entitled to hold the land without payment of rent to him."

However, in the case of Prafulla Nath Tagore *vs.* Tweedie (1921), 35 C.L.J., page 14, it was held that section 192 could not have retrospective effect so as to make a tenant who had obtained a *mokarari* lease from his landlord prior to 1885, liable to pay to that landlord the enhanced rent fixed by the Revenue Officer at the time of resettlement. Again in the case of Dhirendra Chandra Roy *vs.* Nawab Khawaja Habibulla, 29 C.W.N., page 507, an opinion was expressed that there was nothing definite in section 192 which empowered the Collector to determine a rent "so as to fix the under-tenant with liability to pay the amount fixed to his landlord." The language now in the new section 191 is: "nothing * * in any lease or contract made after the passing of the Bengal Tenancy Act, 1885, shall entitle any tenant to hold his tenancy free of rent or at a particular rent, unless, etc....." This fixes the liability of the under-tenant: while by inserting the word "after the passing of the Bengal Tenancy Act of 1885" recognises the view taken in the case of Prafulla Nath Tagore. It may be noted that the Bill as introduced in the Council had the words "before or after," but the word "before" was deleted by an amendment in the Council.

The position as regards leases or contracts of date prior to 1885 is thus now as explained in the Privy Council case of Priyanath Das *vs.* Ramtaran Chatterji, I.L.R. 30 Cal., page 820, under the old law prior to 1885, viz., that as between the contracting landlord and his tenant the contractual rent was binding, but if Government or a farmer of Government, came in the position of having to realise rent from the tenant (e.g., when the estate is taken under direct management under section 3 of the Regulation VII of 1822), the fair rent fixed by the Revenue Officer would have to be paid by the tenant. To quote from the observations of their lordships of the Privy Council:—

"If it had seemed good to Government to take the land into their khas possession, or to settle it on strangers to the contract with the respondent Chatterji, then the recorded rent would have been the rate of payment by the respondent."

This safeguarded the public revenue which could not be affected by private contract extending beyond the period of the settlement with the zamindar himself. *See* also the principle of the rule in section 194.

The position has been more fully explained in a recent judgment of the Calcutta High Court, dated 8th April 1930, in a case which arose out of the Revenue Officer's determining a fair rent (for the same tenure as in the above Privy Council case) under section 104 of the Bengal Tenancy Act in the course of the preparation of a record-of-rights. It was held that the contractual rent though it may be binding as between the contracting parties, did not bind the Government or affect the Government revenue or the power of the Revenue Officer to determine a fair rent of the tenure under section 104.* (Secretary of State *vs.* Tranada Sundari Debi and others Appeal No. 12 of 1928, *unreported.*)

As for leases or contracts subsequent to 1885 their force so far as regards rents, is spent up with the expiry of the term of the temporary settlement of the estate. After that or when land revenue settlement is made for the first time (e.g., on resumption) the tenant is not entitled to hold at the contract rent, but is liable to pay his landlord the rent which would be fixed as fair by the Revenue Officer. The tenant has therefore to be beware when he enters into an agreement about rent in respect of any land outside the permanently settled area.

In the case Dhirendra Chandra Roy *vs.* Nawab Khawaja Habibulla, 29 C.W.N., pages 505-508, a view was expressed that the Revenue Officer could not alter the existing rents of tenants by proceeding simply under section 192 of the Act (prior to 1928), but that he must take action under section 104, etc., under Chapter X. The argument given, it is respectfully submitted, are not very convincing. However, the words "in accordance with the provisions of this Act" in the old section 192 might be taken to mean provisions of Chapter X. The amendment of 1928 changes these words to "in accordance with the principles laid down in section 6, 7, 8, 9, 27 to 36, 38, 39, 43, 50 to 52 and 180" with the intention to make it clear that it was not necessary to have a

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*The facts of the case were briefly thus : By a lease of 1867 the zeminder settled certain lands with the predecessors of Tranada Sundari as a *makarari* tenure (*ganti*) on a fixed rent of Rs. 307 per annum. The lands were subsequently found to be outside the permanently settled estate of the zeminder, and as such they were resumed by Government and settled as a temporarily settled estate for a term of years. In the course of a re-settlement proceeding the Revenue Officer determined Rs. 2,394 as the fair rent of the tenure and also recorded that the fixed rent was not recognised by Government . On this the tenure-holder instituted a suit impleading the Secretary of State and contending that the fixed rent of Rs. 307 was binding on Government also. The issue framed was : " Is Government bound by the terms stated in the *patta* and the subsequent litigation between the settlement holder (i.e., zeminder) and the tenure-holder?" The subsequent litigation referred to was the Privy Council case mentioned above. Their Lordships observed : " The right which the *gantidar* established in the Privy Council was a right purely contractual and only enforceable against the contractors or persons who were parties or privy to the contract, that right being that, so long as the proprietary interest remained with such persons, they are under a personal bar from claiming any higher rent than the rent which was stipulated for in 1867. The Government was in no way bound by that. The amount of money at which the revenue was to be assessed was in no way affected by it." And lower down in the judgment : " As to its being *makarari* and non-enhancible, so far as the Government are concerned the answer is either that the Government is not concerned or that, so far as the Government is concerned, it is not *makarari* and non-enhancible—the Government being no party to the bargain of 1867 and the Government having since resumed the land." As for the Revenue Officer's record it was observed that the " Revenue Officer stated facts correctly when he was making out the settlement rent-roll for the purpose of re-settlement." i.e., that " so far as regards the fixity of the jama it is not recognised by Government."

notification under section 101 of the Act or to have a formal proceeding under section 104, etc. This will simplify the procedure in cases in which a record-of-rights is not under preparation and simple action can be taken on the basis of an existing record-of-rights.

The *"proviso"* was added by the amendment of 1928. This follows the general practice of the Settlement department. The principle underlying is that the profit of an intermediate tenure-holder in temporarily settled estates must come out of the profit of the landlord who creates him, and cannot affect the Government revenue. The 10 per cent. profit provided in section 7 would therefore be distributed amongst all the several grades of tenure-holders. In other words the Government revenue would be 70 or 80 per cent. of the rents paid by the raiyats, and if a settlement-holder chooses to create intermediate middle-men between himself and the raiyats, perhaps on receipt of a *salami*—his contract with such middle-men cannot have the effect of giving the latter a profit which he himself could not give out of his own profit. This has been considered necessary for the security of the Government revenue in temporary settled estates to which the conditions of permanent settlement did not apply.

Section 194.

The *proviso* was added by the amendment of 1928, for "keeping with the protections given to raiyats and under-raiyats by section 178." The *proviso* overrules the decision in Akhay Kumar *vs.* Akman Mulla, 19 C. W. N., page 1197, that section 178 (1) (*d*) was controlled by section 194. In that view all the provisions in the Act for the protection of raiyats and under-raiyats might be nullified by the application of section 194.

Section 195.

Clause (e).—The expression "occupancy raiyat" does not appear in the Patni Regulation, VIII of 1819. The term there used is *"khudkast* or resident raiyat" the same as what has been styled "settled raiyat" subsequently in the Bengal Tenancy Act of 1885. The amendment of 1928 makes it clear that all occupancy raiyats are protected in the event of the Patni taluk being sold up for arrears of rent.

Section 195A.

This section was inserted by the amending Act II of 1930. In view of the first proviso to section 26C (*3*), it was considered necessary to have, firstly, an immunity clause corresponding to section 64 (3) *ante*: and also to lay down definitely a liability clause by which a person wrongly receiving payment of landlords' transfer fee from the Collector or the Court would be liable to pay it to the person who may later, in a suit, be adjudicated to be rightly entitled to it.

Section 196 (old).

The old section 196 provided that the Act was to be subject to every subsequent Act passed by the Legislature. It was repealed in 1928 as unnecessary.

Schedule II.

Instead of prescribing forms, the amendment of 1928 prescribes only particulars of receipts and account. As record-of-rights has been prepared in most of the districts these particulars require mention of Settlement Khatian numbers.

The first part of schedule II is meant for simple cash receipt and counterfoil under section 56 (3), and the second part for statement of account under section 57 (2).

Schedule III.

The proviso to article 6 was added by the amendment of 1928. The time spent on the execution of a decree for rent on a sale which is subsequently set aside on application will now be excluded from the calculation of the period of limitation for the execution of such a decree.

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