

1850

JHUNNA  
D.  
RANBARUP.

property in suit, that fraction representing the share to which Zalim would have been entitled had he been alive. The right of the plaintiff to maintenance is clear; indeed, that is positively found by both the lower Courts. We do not, however, agree with the observations of the Judge, that "the income being variable according to the seasons, it is better not to affix a given sum for maintenance, but to let that be determined as the occasion may arise." For reasons of convenience and in order to prevent the recurrence of litigation between the parties, we think it far better that a reasonable fixed sum, having regard to all the circumstances of the case, should be ascertained and decreed to the plaintiff. (The Court then proceeded to make an order remanding for trial the issue whether Rs. 48 was a reasonable amount of yearly maintenance to be allowed to the plaintiff, and if not, what fixed sum would be.)

*Appeal allowed.*

1850

March 22.

*Before Mr. Justice Pearson and Mr. Justice Straight.*

GOBIND SINGH (DEPENDANT) v. KALLU AND OTHERS (PLAINTIFFS).<sup>2</sup>

*Suit for redemption of Usufructuary Mortgage—Valuation of suit—Jurisdiction—Act VI of 1871 (Bengal Civil Courts Act), s. 22.*

The plaintiffs sued for the possession of certain immoveable property, alleging that they had mortgaged such property to the defendants, and that the mortgage debt had been satisfied out of the profits of the property. The defendants set up a defence to the suit which raised the question of the proprietary right of the plaintiffs to the property. The value of the mortgagees' interests in the property was below Rs. 5,000; the value of the mortgaged property exceeded that amount. On appeal to the High Court from the original decree of the Subordinate Judge in the suit it was contended that the appeal from that decree lay to the District Court and not to the High Court. *Held* that the "subject-matter in dispute," within the meaning of s. 22 of Act VI of 1871, was the mortgage and the mortgagees' rights under it, and that, the value of this being only Rs. 2,000, the appeal should have been preferred to the District Court. Second Appeal No. 1039 of 1877 (1) dissented from.

The facts of this case are sufficiently stated for the purposes of this report in the judgment of the High Court.

First Appeal, No. 93 of 1879, from a decree of Maulvi Farid-ud-din Ahmad, Subordinate Judge of Aligarh, dated the 30th June, 1879.

(1) Unreported, decided the 18th January, 1878.

Munshi *Hanuman Prasad* and Babu *Oprokash Chandar Mubejee*, for the appellants.

Fandit *Ajudhia Nath* and Lala *Harkishen Das*, for the respondents.

1880

GOBIND  
SINGH  
v.  
KALLU.

The judgment of the Court (PEARSON, J., and STRAIGHT, J.) was delivered by

STRAIGHT, J.—This is a first appeal from a decision of the Subordinate Judge of Aligarh of the 30th June, 1879. The plaintiffs-respondents sued for possession of mauza Chiti, pargana Chandos, by redemption of a mortgage for Rs. 2,000 executed, as far back as 1835, by Jai Kishan and others, of whom they are the representatives, to Hardeo Singh, whose rights have come to the defendants by purchase. The plaintiffs alleged that the principal sum and interest secured by the instrument had been discharged out of the profits, and they prayed that the property might be restored to them. The Subordinate Judge dismissed the claim of all the plaintiffs, with the exception of three, Kallu, Gobardhan, and Parsa, in whose favour he gave a decree in part. Gobind Singh alone of all the defendants now appeals to this Court.

Upon the case being called on for hearing before us, it was urged as a preliminary objection by Pandit Ajudhia Nath on behalf of the respondents, that the appeal had been wrongly preferred to the High Court, as the subject-matter in dispute being the mortgage, and the value of the mortgagee's rights under it, which were below Rs. 5,000, it properly lay to the District Judge. The following decisions of this Court were referred to in support of this contention,—Second Appeal No. 521 of 1869; Second Appeal No. 511 of 1878; and Second Appeal from order No. 51 of 1879 (1).

On the other side the appellant urged that, as by the statement of defence filed, a question of proprietary title to property of the value of Rs. 15,000 was raised, the appeal was cognizable by this Court. In support of this view our attention was called to a decision of Turner, J. and Spankie, J. in Second Appeal No. 1039 of 1877 (2), which, if accurate, is undoubtedly applicable to the present case.

(1) Unreported. (2) Unreported, decided the 13th January, 1878.

1880

GOBIND  
SINGH  
v.  
KALLU.

The question thus raised is one of some importance, and, having regard to the precedents already enumerated, we thought it right to take time to consider judgment. The point turns upon the construction of the words "subject-matter in dispute" of s. 22, Act VI of 1871.

In the present case the plaintiffs' suit was essentially one for redemption of mortgage, the court-fee payable on which would have to be calculated according to the "principal money expressed to be secured by the instrument of mortgage,"—Art. ix, s. 7 of Court Fees' Act. It is true that the defendants by their pleas opened up a wider field for inquiry, involving the consideration of their proprietary title to the property. But we do not think that the character or nature of the subject-matter of the plaintiffs' claim was thereby altered; it continues in its original shape so far as he is concerned, nor is the complexion of it entirely changed because the defendants put forward certain grounds of defence which, if well-founded, must defeat his right to redeem. We therefore think that the subject-matter in dispute was the mortgage and the mortgagee's right under it, and that, the value of this being only Rs. 2,000, the appeal should have been preferred to the Judge. We regret that the decision should be directly at variance with the judgment of Turner and Spankie, JJ., already mentioned, but the point appears to us so clear, that we feel constrained to differ from the view enunciated by those two learned Judges.

The memorandum of appeal will be returned to the appellant for presentation in the proper Court and the appellant will pay the respondents' costs in this Court.

*Order accordingly.*

1880.  
March 23.

*Before Mr. Justice Oldfield and Mr. Justice Straight.*

HIRA LAL (DEFENDANT) v. KARIM-UN-NISA (PLAINTIFF)\*.

*Sale in execution of decree—Sale set aside—Suit by auction-purchaser to recover purchase-money—Act VIII of 1859 (Civil Procedure Code), ss. 256, 257, 258—Act X of 1877 (Civil Procedure Code) ss. 312, 315—Warranty—Caveat emptor.*

Certain immoveable property was attached and proclaimed for sale in the execution of a decree on the application of the decree-holder, H, as the property

\* Second Appeal, No. 883 of 1879, from a decree of Maulvi Sami-ullah Khan, Subordinate Judge of Aligarh, dated the 26th May, 1879, affirming a decree of Mir Anwar Hussain, Munsif of Moradabad, dated the 26th November, 1876.