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IN THE MATTER OF GAJRAJ SINGH.

The sums taken together are the limit of what is ultimately recoverable or secured by the deed, and are ascertainable from the deed, and are sums on which duty is capable of being fixed, and the duty is payable on this amount, and is not affected by the question whether the obligor may or may not fulfil his engagement and thereby render void his obligation of payment, or whether the amount secured may or may not be ultimately recovered.

BRODHURST, J.—The document that is the subject of this reference is, I consider, a "bond" as defined in cl. (*c*), subsection 4, s. 3 of Act I of 1879, and also a "mortgage deed" as defined in subsection 13 of the same section. The stamp duty in either case is, with reference to arts 13 and 144 of schedule I, respectively, four annas, and four annas only is, I think, the amount of stamp duty that is, with regard to the provisions of s. 7, chargeable on the instrument.

TYRRELL, J.—Without going into the question whether *rdb* or saccharine liquor comes within the definition of "agricultural produce," it seems clear that this instrument is a mortgage, and therefore I concur in the answer recorded by the learned Chief Justice.

APPELLATE CIVIL.

1887
April 12.

Before Sir John Edge, Kt., Chief Justice, Mr. Justice Brodhurst and Mr. Justice Mahmood.

CHURAMAN (PLAINTIFF) *v.* BALLI (DEFENDANT).*

Malikana—Heritable charge—Suit for arrears of malikana allowance - Small Cause Court suit—Act XI of 1865, s. 6—Bonâ fide transferee without notice—Act IV of 1882 (Transfer of Property Act), s. 3.

S sold a share in immoveable property to *M*, by a registered deed of sale which contained the following provision :—"The said vendee is at liberty either to retain possession himself or to sell it to some one else ; and he is to pay Rs. 25 of the Queen's coin to me annually (as *malikana*), which he has agreed to pay." *M* mortgaged the property to *B*, who obtained possession ; and, after the mortgage, the annual payments provided for by the deed of sale ceased. The representatives of the vendor sued *M* and *B* to recover arrears of *malikana*, the amount sued for being less than Rs. 500.

* Second Appeal No. 614 of 1886, from a decree of W. Barry, Esq., District Judge of Banda, dated the 12th January, 1886, modifying a decree of Maulvi Muhammad Hafiz Rahim, Munsif of Hamirpur, dated the 28th April, 1885.

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Held, upon a preliminary objection made with reference to s. 586 of the Civil Procedure Code, that the intention of the Legislature as expressed in s. 6 of the Mufassal Small Cause Courts Act (XI of 1865) was that suits directly and immediately involving questions of title to immoveable property should not be cognizable by the Small Cause Courts; that in the present suit such a question was directly involved; and that consequently s. 586 of the Code had no application, and a second appeal would lie. *Mohomed Karamut-oollah* v. *Abdool Majeed* (1) and *Bhawan Singh* v. *Chattar Kuar* (2) referred to. *Pestonji Bezonji* v. *Abdool Rahiman* (3). *Qutub Husain* v. *Abul Husain* (4) and *Kadaressur Mookerjea* v. *Gooroo Churn Mookerjea* (5), distinguished.

Held that the words "as *malikana*" in the deed of sale could not be rejected as surplusage; that they showed an intention that the payment of the Rs. 25 should be an annual charge upon the property and the profits arising therefrom analogous to that of a *malikana* reserved on a settlement by a Government settlement officer for a zamíndár; that the use of these words was intended to reserve and create a perpetual and heritable charge upon the property; and that the Court was not prevented from coming to this conclusion by the omission of specific words of inheritance. *Herranund Shoo* v *Ozeerun* (6), *Bhoalee Singh* v. *Neemoo Behoo* (7), *Hurmuzi Begum* v. *Hirday Narain* (8), *Mohomed Karamut-oollah* v. *Abdool Majeed* (1), *Kooldeep Narain Singh* v. *The Government* (9), *Tulshi Pershad Singh* v. *Ram Narain Singh* (10), *Gaya* v. *Ramjiawan Ram* (11), and *Gyan Singh* v. *Kooer Peetum Singh* (12), referred to.

Held also, without expressing any opinion as to whether registration of the deed of sale operated as notice to all the world, or whether notice of the terms of the deed was necessary to bind *B*, and assuming *B* to have had no such notice in fact, that if he had searched the register he would have ascertained those terms, and if he did not search the register he must have wilfully abstained from so doing, or was guilty of gross negligence in not so doing; that in either case he could not be treated as a *bonâ fide* mortgagee without notice; and that, being in receipt of the profits of the property, he was liable for the annual payment of the Rs. 25 from the date when he took possession as mortgagee. *Agra Bank* v. *Barry* (13) and *Pilcher* v. *Rawlins* (14) distinguished. *Abadi Begum* v. *Asa Ram* (15) referred to.

The definition of the word "notice" in s. 3 of the Transfer of Property Act (IV of 1882) correctly codifies the law as to notice which existed prior to the passing of the Act.

THIS was an appeal from an appellate decree of the District Judge of Banda, dated the 12th January, 1886, by which he dismissed the claim of the plaintiff Churaman as against the defendant

(1) N.-W. P. H. C. Rep., 1869. p. 205.
(2) Weekly Notes, 1882, p. 114.
(3) I. L. R., 5 Bom. 463.
(4) I. L. R., 4 All. 184.
(5) 2 Calc. L. R., 388.
(6) 9 W. R. 102.
(7) 12 W. R. 498.
(8) I. L. R., 5 Calc. 921.
(9) 14 Moo. I. A. 247.
(10) I. L. R., 12 Calc. 117.
(11) I. L. R., 8 All. 569.
(12) N.-W. P. H. C. Rep., 1869, 72.
(13) L. R., 7 H. L. 135.
(14) L. R., 7 Ch. App. 259.
(15) I. L. R., 2 All. 162.

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Balli. On the 20th December, 1867, Sheo Charan, Narain Sukh and Durga, who were possessed of certain lands, mortgaged 367 bighas 18¾ biswas to one Adhar Singh, reserving 18 bighas as "*malikana*." On the 28th March, 1870, Adhar Singh mortgaged the 367 bighas 18¾ biswas to Mahipat Singh. On the 30th March, 1870, Sheo Charan sold his interests in his one-third share in the lands to Mahipat Singh. The following is a translation of the deed of sale :—

"I, Sheo Charan, son of Nan Nidh, caste Thakur, pattidar of mauza Goedi, mahal Thao Ragnath, pargana Mahoba, in the district of Hamírpur, do declare that I, being in need of Rs. 49 of the Queen's coin, half of which is Rs. 24-8 of the said coin, to meet my private expenses and other emergencies, borrowed that sum from Mahipat Singh, son of Ajudhia Singh, Thakur of mauza Ardauli, pargana Bindki, in the district of Fatehpur; and in consideration of the said money, I have sold absolutely my share consisting of 122 bighas 13 biswas of land, assessed at Rs. 66-15-1, which is in my exclusive possession, together with ponds, tanks, ravines, streams, *pakka* and *kacha* wells, stone-mills, fruit and timber trees, and all that appertains to zamíndári rights. The said vendee is to remain in possession, to pay Government revenue, and to enjoy profits and bear losses. I and my heirs have no connection (with the property). The said vendee is at liberty either to retain possession himself or to sell it to some one else, and he is to pay Rs. 25 of the Queen's coin to me annually (as *malikana*), which he has agreed to pay. I have written these presents in the shape of a deed of absolute sale that it may be of use when needed."

This sale-deed was registered on the 30th March, 1870.

In 1873, Mahipat Singh mortgaged the property to the defendant Balli, who obtained and continued in possession.

From the 30th March, 1870, until the property was mortgaged to the defendant Balli, Mahipat Singh duly paid to Sheo Charan the annual payments of Rs. 25 provided for by the sale-deed. Since then no payments were made. Sheo Charan died on the 11th October, 1881. The plaintiffs in the present suit were the heirs and legal representatives of Sheo Charan, and they brought the suit on the 29th January, 1885, against Balli and Mahipat Singh in the Court

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of the Munsif of Hamírpur, to recover eleven years' arrears of the Rs. 25 agreed, by the sale-deed of the 30th March, 1870, to be paid annually. The Munsif of Hamírpur decreed the claim of the plaintiff against both the defendants. The District Judge of Bánda, on appeal dismissed the suit as against the defendant Balli, holding that he had become mortgagee without notice of the agreement to make the annual payment of Rs. 25; and that, under such circumstances, he was not liable. From this portion of the decree, the plaintiffs brought the present appeal to the High Court. The Judge modified the decree of the Munsif as against Mahipat Singh, holding that Mahipat Singh's liability to make the annual payments was determined by the death of Sheo Charan on the 11th October, 1881. From that portion of the decree which related to the liability of Mahipat Singh, no appeal was brought, and Mahipat Singh was not a party to the present appeal.

Babu *Sital Prasad Chatterji*, for the appellant.

The Hon. Pandit *Ajudhia Nath* and Munshi *Kashi Prasad*, for the respondent.

On behalf of the respondent, a preliminary objection was taken by Pandit *Ajudhia Nath* that the suit was a suit of the nature cognizable in a Court of Small Causes, and that as the amount sued for did not exceed Rs. 500, the second appeal would not lie. He referred to s. 6 of the Mufassal Small Cause Courts Act (XI of 1865), s. 586 of the Code of Civil Procedure, art. 132 of the second schedule of the Limitation Act, s. 100 of the Transfer of Property Act, 1882, *Pestonji Bezonji* v. *Abdool Rahiman* (1) *Qutub Husain* v. *Abul Husain* (2), *Ali Mazhar* v. *Gopi Nath* (3), *Alagirisami Naiker* v. *Innasi Udayan* (4), and *Kadaressur Mookerjea* v. *Gooroo Churn Mookerjea* (5).

Babu *Sital Prasad Chatterji*, for the appellant, in reply referred to *Bhawan Singh* v. *Chattar Kuar* (6), *Mohomed Karamut-oollah* v. *Abdool Majeed* (7) and *Gobind Chunder Roy Chowdhry* v. *Ram Chunder Chowdhry* (8).

The Court overruled the preliminary objection.

(1) I. L. R., 5 Bom., 463.
(2) I. L. R., 4 All., 134.
(3) I. L. R., 4 All., 152.
(4) I. L. R., 3 Mad., 127.
(5) 2 Calc. L. R., 388.
(6) Weekly Notes, 1882, p. 114
(7) N.-W. P. H. C. Rep., 1869, p. 205.
(8) 19 W. R., 94.

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Babu *Sital Prasad Chatterji*, for the appellant, contended that the Rs. 25 was an annual payment charged on the land, for the payment of which the respondent was liable, that registration operated as notice to all the world, and that, in any event, whether the respondent had or had not notice of the contents of the sale-deed of the 30th March, 1870, was immaterial. In support of this contention, in addition to the cases cited by him on the preliminary objection, he relied upon *Herranund Shoo* v. *Ozeerun* (1), *Bhoalee Singh* v. *Neemoo Behoo* (2), *Hurmuzi Begum* v. *Hirday Narain* (3), *Abadi Begam* v. *Asa Ram* (4), *The Collector of Thana* v. *Krishna Nath Govind* (5), *Gunga Deen* v. *Luchhmun Pershad* (6), *Lakshmandas Sarup Chand* v. *Dasrat* (7), and *Vasudev Bhat* v. *Narayan Daji Damle* (8).

The Hon. Pandit *Ajudhia Nath*, for the respondent, contended in reply that no charge upon the land was created by the sale-deed of the 30th March, 1870; that there was nothing in the surrounding circumstances to show that it was the intention of the parties that any such charge should be created; that the agreement to pay the Rs. 25 annually amounted only to an agreement on the part of Mahipat Singh that he would make the annual payments to Sheo Charan during Sheo Charan's life, and was binding on Mahipat only, and in any event that the respondent, as a mortgagee without notice, could not be liable. In addition to the cases cited in support of his preliminary objection, he referred to *Kooldeep Narain Singh* v. *The Government* (9), Lewin *On Trusts*, 6th ed., p. 701, *Pilcher* v. *Rawlins* (10), and *Agra Bank* v. *Barry* (11).

Babu *Sital Prasad Chatterji*, in reply.

EDGE, C. J., (after stating the facts as above continued):—The first question which we have to consider is whether or not the words in the sale-deed "as *malikana*" should be treated as words of surplusage. If the intention of Sheo Charan and Mahipat Singh was that the Rs. 25 should only be payable by the latter to the former

(1) 9 W. R., 102.
(2) 12 W. R., 498.
(3) I. L. R., 5 Calc., 921.
(4) I. L. R., 2 All, 162.
(5) I. L. R., 5 Bom., 322.
(6) N.-W. P. R., 1869 p. 147.
(7) I. L. R., 6 Bom., 168.
(8) I. L. R., 7 Bom., 131.
(9) 14 Moo., 247.
(10) L. R., 7 Ch. App., 259.
(11) L. R., 7 H. L., 135.

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during the life-time of the former, then it was unnecessary to insert the words "as *malikana*," as the claim in the sale-deed relating to the payment of the Rs. 25 annually would have expressed such [illegible] if these words had not been inserted. If no meaning can be inferred from which the intention of the parties can be gathered from the use of the words "as *malikana*," they no doubt might be treated as words of surplusage. If, on the other hand, the intention of the parties can be inferred from the use of these words in the sale-deed, we consider that we should, in construing the sale-deed, give effect to them, if there is in the sale-deed, or the surrounding circumstances, nothing inconsistent with such inference.

The earliest definition of the word "*malikana*" of which we are aware is that given in the answer of Gholam Hosein Khan, Appendix No. 16 to Mr. Shore's Minute of 2nd April, 1788, when he said—"*Malikana* is the inalienable right of proprietorship, but *nankar* depends upon fidelity and attachment to the State and a due discharge of the public services." (See *Landholding and the Relation of Landlord and Tenant in various countries*, by C. D. Field, p. 738, Note 1). This definition probably would not now be considered as strictly correct or sufficiently wide. In Wilson's Glossary of Judicial and Revenue Terms and of useful words occurring in official documents relating to the administration of the Government of British India, 1855, *malikana* is described as "pertaining or relating to the *malik*, or proprietor, as his right or due; applied, especially in revenue language, to an allowance assigned to a zamíndár, or to a proprietary cultivator, who, from some cause, such as failure in paying his revenue, or declining to accede to the rate at which his lands are assessed, is set aside from the management of the estate and the collection and payment of the revenue to Government, which offices are either transferred to another person, or taken under the management of the Government Collector: in such case a sum not less than 5 per cent. and not exceeding 10 per cent. on the net amount realized by the Government, was finally assigned to the dispossessed landlord.—(Ben. Reg. i, viii, xliii, 1793; vii, 1822.) It was also applied formerly to an allowance made to the head man by the other villagers, or, when authorized to collect and pay the revenue of the village, by the State."

In Fallon's new Hindustani-English Dictionary of 1879, we find the following:—

"*Malikana*, adj. Proprietary.

"*Malikana*, adv. In manner of an owner.

"*Malikana*, n. m. An allowance to zamíndárs ousted from their estates.

Malikan-i-khangi, n. m., fees levied on cultivators by a land-holder for his house-hold expenses.

"*Malikana-rasum*. Proprietary dues."

In the case of *Herranund Sheo* v. *Ozeerun* (1), Phear, J., said: "It seems to me that the right to raise *malikana* is a distinct proprietary right, and that it constitutes an interest in the land." In the case of *Bhoalee Singh* v. *Neemoo Behoo* (2) Sir Barnes Peacock, C. J., held that "*malikana* is not rent nor has it the elements of rent. It is a right to receive a portion of the profits of the estate for which the Government has made a settlement with another person, the real proprietor having neglected to come in and make a settlement." In the case of *Hurmuzi Begum* v. *Hirday Narain* (3) it was held that *malikana* was an annual recurring charge on immoveable property. In the case of *Mohomed Karamut-oolluh* v. *Abdool Majeed* (4) Sir Walter Morgan, C. J., and Mr. Justice Ross held that a *malikana* allowance is that which comes to the proprietor in respect of his ownership and as a mode of enjoying his ownership. To the same effect is the judgment in *Gobind Chunder Roy Chowdhry* v. *Ram Chundra Chowdhry* (5).

It is true that these last five cases related to *malikana* properly so called which had on a settlement been reserved by the Government settlement officer for the zamíndár or proprietor, but still they show what *malikana* is or may be. It appears to us that the words "as *malikana*" were not inserted in the sale-deed without an object, and cannot be rejected as words of surplusage, and that they clearly indicate that the payment of the Rs. 25 annually was intended by Sheo Charan and Mahipat Singh to be an annual charge upon the property and the profits arising from the property of a nature analogous to that of a *malikana* reserved on a settle-

(1) 9 W. R., 102.
(2) 12 W. R., 498.
(3) I. L. R., 8 Calc., 921.
(4) N.-W. P. H. C. Rep., 1869, p. 205.
(5) 19 W. R., 94.

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ment by a Government settlement officer for a zamíndár, and that it was intended by the use of those words to reserve or create a perpetual and heritable charge upon the property. The employment of the words "as *malikana*" appears to us to have had the same object as would have been obtained had words expressly declaring the payment to be perpetual or the right heritable been employed. We are not prevented from coming to this conclusion by the omission of specific words of inheritance. For this latter proposition the cases of *Kooldeep Narain Singh* v. *The Government* (1), *Tulshi Pershad Singh* v. *Ram Narain Singh* (2) and *Gaya* v. *Ramjiawan Ram* (3) are authorities. The case of *Gyan Singh* v. *Kooer Peetum Singh* (4) apparently is an authority against the view which we take of the construction of the sale-deed. That case, so far as the construction of the sale-deed is concerned, appears to be in point, and to support the contention of Pandit *Ajudhia Nath* on behalf of the respondent. The Judge who decided that case does not appear to have considered what was the intention of the parties in using the words "*malikana* payment" which appear in the judgment, and which we therefore presume were used in the document then under consideration. If the words "*malikana* payment" or "*malikana*" were not employed in the document in that case, that case is not in point. If those words were used in that document, the Judge in that case appears not to have considered their meaning or the object of their having been used, and we, sitting here as a Bench of three Judges, decline to follow that decision if it be in point. We may also say, if we are entitled to look at the earliest dealing with this property appearing on the record to assist us in ascertaining the intention which the parties had in using the words "as *malikana*" in the sale-deed, that we find there that Sheo Charan and the other two mortgagors when they mortgaged the property on the 20th December, 1867, reserved 18 bighas as *malikana*.

We are bound in this second appeal to accept the finding of the Judge of Banda that Balli took as mortgagee without notice, in fact, of the terms of the sale-deed, although we should most probably have been led to a different conclusion. Assuming that Balli had in fact no notice of the terms of the sale-deed, does that fact afford a defence to this claim? We are of opinion that it does not. If

(1) 14 Moo. I. A., 247.
(2) I. L. R., 12 Calc., 117.
(3) I. L. R., 8 All. 569.
(4) N.-W. P. H. C. Rep., 1869, p. 73.

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Balli had searched the register he would have ascertained the terms of the sale-deed, in which case he would have had actual notice. Any prudent intending mortgagee who did not designedly abstain from inquiring for the purpose of avoiding notice, or who was not honestly, as far as he was concerned, misled by fraudulent statements of the mortgagor, would search the register to ascertain the title to the property and the charges, if any, upon it. It is not shown that Balli made any inquiry, or that any statements were made to him which would mislead him or put him off his guard, such as were made in the case of *Agra Bank* v. *Barry* (1). If Balli, in fact, did not search the register, he must wilfully have abstained from making the search, or he was guilty of gross negligence in not making it; and in either case he cannot be treated as a *bonâ fide* mortgagee without notice. In *Pilcher* v. *Rawlins* (2), the purchaser who got the legal estate had acted with *bonâ fides*, and the prior mortgage and the re-conveyance were concealed from him by the mortgagor, with the connivance of the trustee. Obviously that was a very different case to this. The definition of the word "notice" in s. 3 of the Transfer of Property Act, 1882, in our opinion, correctly codifies the law as to notice which existed prior to the passing of that Act.

We do not consider it necessary to express any opinion as to whether or not the registration in India operated as notice to all the world, nor do we consider it necessary to decide whether or not notice was necessary in order to bind Balli. In the case of *Abadi Begum* v. *Asa Ram* (3), in which a husband had by a deed which was registered, covenanted with his wife, for himself, his heirs and successors, to pay her monthly Rs. 12 in lieu of dower out of the income of certain specified lands, and further covenanted not to alienate those lands without stipulating for the payment of the allowance, it was held that that covenant ran with the land and created a lien which, with or without notice, extended to all subsequent persons claiming to hold the lands to the extent of the amount of the profits set apart for the benefit of the wife, who was the plaintiff in that case, and was suing a sub-mortgagee of a mortgagee who had taken subsequently to the deed relied upon by the wife.

(1) L. R., 7 H. L., 135. (2) L. R., 7 Ch. App. 259.
(3) I. L. R., 2 All. 162.

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For the reasons above stated we hold that the sale-deed of the 30th March, 1870, was intended to create a perpetual and heritable charge upon the land ; that Balli, being in receipt of the profits of the lands, is liable for the annual payment of the Rs. 25 from the date when he took possession as mortgagee.

It now only remains to be considered whether this is a case in which a second appeal lies, and this depends upon the construction to be placed upon s. 6 of Act XI of 1865, the Mufassal Small Cause Courts Act of 1865. That section, so far as is material, is as follows:—"The following are the suits which shall be cognizable by Courts of Small Causes, namely, claims for money due on bond or other contract, or for rent, or for personal property, or for the value of such property, or for damages, when the debt, damage or demand does not exceed in amount or value the sum of five hundred rupees, whether on balance of account or otherwise ; provided no action shall lie in any such Court...(4) for any claim for the rent of land or other claim for which a suit may now be brought before a Revenue Officer, unless as regards arrears of rent for which such suit may be brought, the Judge of the Court of Small Causes shall have been expressly invested by the Local Government with jurisdiction over claims for such arrears." Looking at this section, the first thing which we notice is that, although the Small Cause Courts are given jurisdiction over claims within the specified amount on contract, claims for rent subject to the limitation contained in the 4th proviso, are also expressly brought within the jurisdiction of the Small Cause Courts. Claims for rent are claims which can only arise out of contract : and if it were intended by the Legislature that all claims or contracts other than those excluded by the proviso in the section, should be within the jurisdiction of the Small Cause Courts, it is difficult to see why claims for rent should have been specifically mentioned in the enabling portion of the section. Again, we notice that claims within the specified amount or value for personal property, are specifically brought within the section, whilst claims for immoveable property are not referred to in the section. Again, the effect of the 4th proviso is to limit the jurisdiction as to suits for rent to suits in which the rents sued for accrue in respect of house property, and to arrears of rent in cases provided for. The inference which we draw from an examina-

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tion of s. 6 is that it was the intention of the Legislature that suits which directly involved questions of title to immoveable property should not be cognizable by the Small Cause Courts. We do not question the correctness of those decisions in which it has been held that in those cases in which the suit is otherwise within the jurisdiction of a Small Cause Court, that jurisdiction is not ousted because it may become necessary incidentally to decide a question of title. In this case it appears to us that the question of title to immoveable property was directly involved. The respondent's case was and is that he held the lands free of any charge. The appellant's case was and is that the respondent held the lands subject to the charge of Rs. 25 annual payment. We are aware that it has been decided that a suit to recover the principal money and interest secured by a hypothecation-bond on immoveable property can be maintained in a Small Cause Court. In such cases, unless otherwise provided by the hypothecation-bond, the mortgagee would be entitled to his personal remedy against his debtor for the debt, or on the debtor's promise to pay, of which the bond would probably be evidence. Here there is no purely personal contract on the part of Balli to make the annual payments: his liability arises out of the fact that he is the person who is in possession of the property charged with the payments. He cannot take the benefit to be derived from the profits of the land without taking up at the same time on himself the liability to make the payments charged on that land. In *Mohomed Karamut-oollah* v. *Abdool Majeed* (1), Sir Walter Morgan, C. J., and Mr. Justice Ross held that a suit for *malikana* allowance concerned the proprietary right in land, and was not one for a Small Cause Court, although they said "it is true that the allowance is as to its amount fixed by contract, and that ordinarily a claim arising under a contract would be cognizable by a Small Cause Court."

In the case of *Bhawan Singh* v. *Chattar Kuar* (2), Mr. Justice Straight and Mr. Justice Brodhurst held that a suit for arrears of *malikana* affected the proprietary interest in immoveable property, and fell without the scope of the Small Cause Court. It appears to us that the same principle applies here. The view which we take is not at variance with any of the authorities cited

(1) N.-W. P. H. C. Rep., 1889, p. 205. (2) Weekly Note, 1882, p. 114.

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before us. In *Pestonji Bezonji* v. *Abdool Rahiman* (1) no question of title to immoveable property arose. There the mortgage contained a personal undertaking to repay, and the suit was for a money decree only. In *Qutub Husain* v. *Abdul Hasan* (2) the only question which could be called in any sense a question of title, was whether the defendant was the proprietor of the village in respect of which the plaintiff had been compelled to pay the Government revenue which he sought to recover in the suit. It does not even appear that the fact of such proprietorship was in issue. In *Kadaressur Mookerjea* v. *Gooroo Churn Mookerjea* (3) the sole question was, whether the plaintiff had purchased the properties for himself or *benami* for the defendants, and if as *benami* for the defendants, whether they were liable on the implied contract of indemnity.

In conclusion we hold that the respondent Balli is liable in this suit for the arrears of the annual payments of Rs. 25 claimed in the suit, and that the decree of the lower appellate Court, so far as Balli is concerned, must be accordingly reversed, and that this appeal must be allowed with costs.

BRODHURST, J. concurred.

MAHMOOD, J.—I concur.

Appeal allowed.

1887
April 13.

Before, Sir John Edge, Kt., Chief Justice, and Mr. Justice Brodhurst.

BANDI BIBI (DEFENDANT) *v.* KALKA (PLAINTIFF).*

Execution of decree—Suit for confirmation of execution sale set aside by Collector—Jurisdiction of civil Court—Civil Procedure Code, s. 312.

A suit lies in a civil Court for confirmation of a sale held in execution of a decree by the Collector under s. 320 of the Civil Procedure Code, and to set aside an order passed by the Collector cancelling the sale. *Madho Prasad* v. *Hansa Kuar* (4) referred to. *Azim-ud-din* v. *Baldeo* (5) followed.

In such a suit, where it is pleaded in defence that the property was sold for an inadequate price, it lies on the defendant to show that there has been a material irregularity in publishing or conducting the sale.

In this case the execution of a decree against the appellant, Musammat Bandi Bibi, was transferred to the Collector of Fateh-

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* Second Appeal No. 628 of 1886, from a decree of Munshi Rai Kalwant Prasad, Subordinate Judge of Cawnpore, dated the 23rd November, 1885, confirming a decree of Maulvi Ruhalla, Munsif of Cawnpore, dated the 8th April, 1885.

(1) I. L. R., 5 Bom. 463.
(2) I. L. R., 4 All. 134.
(3) 2 Calc. L. R., 388.
(4) I. L. R., 5 All. 314.
(5) I. L. R., 3 All. 554.