APPELLATE CIVIL

Before Mr. Justice Ziaul Hasan

BRAHMA DIN (APPELLANT) *v.* SANGAM LAL AND OTHERS (RESPONDENTS)* 1938 *December*, 7

Oudh Rent Act (*XXII of* 1886), *sections* 3(5), 108(2), *and* 132—Malikana *payable by under-proprietor to superior proprietor, if rent—Suit for recovery of* Haq-i-malikana, *if cognizable by civil courts—Limitation applicable to such suits*—Malikana, *meaning of—Jurisdiction of civil and revenue courts—Limitation Act* (*IX of* 1908), *Article* 132—*Interest if payable in a suit for recovery of* Haq-i-malikana.

The term *malikana* cannot be applied for purposes of article 132 of the Limitation Act to under-proprietary rent in Oudh. *Hurmuzi Begum* v. *Hirday Narain* (1); *Churaman* v. *Balli* (2); *Nathu* v. *Ghansham Singh* (3); *Gopi Nath Chobey* v. *Bhugwat Pershad* (4); *Jagarnath Pershad Singh* v. *Kharach Lal* (5); *Padhum Lal* v. *Tribeni Singh* (6); *Shaikh Ramzan Ali* v. *Babu Lal Singh* (7); *Raja Mohammad Mumtaz Ali Khan* v. *Wazir Khan* (8); *Ram Jiawan* v. *Jadunath* (9); and *Deputy Commissioner, Fyzabad for Ajodhia Estate* v. *Jagjiwan Bakhsh Singh* (10), referred to.

What an under-proprietor is liable to pay to the superior proprietor is rent and a suit for recovery of it must be brought in the revenue court under section 108(2) of the Oudh Rent Act and the limitation applicable is 3 years under section 132 of the Act.

Haq-malikana payable by an under-proprietor to a superior proprietor is rent as defined in the Oudh Rent Act and in a suit for recovery of it there is no reason whatever why the plaintiff should not get interest on the rent claimed by him.

Messrs. *Ram Bharosay Lal* and *Murli Manohar Lal*, for the appellant.

Mr. *Hydar Husain*, for the respondents Nos. 1 to 5.

*Second Civil Appeals Nos. 132, 133 and 138 of 1936, against the decree of Babu Gopendra Bhushan Chatterji Saheb, District Judge of Gonda, dated the 23rd January, 1936.

(1) (1880) I.L.R., 5 Cal., 921.
(2) (1887) I.L.R., 9 All., 591.
(3) (1919) I.L.R., 41 All., 259.
(4) (1884) I.L.R., 10 Cal., 697.
(5) (1905) 10 C.W.N., 151.
(6) (1934) A.I.R., Patna, 44.
(7) (1938) A.I.R., Patna, 16.
(8) (1904) 7 O.C., 108.
(9) (1915) 18 O.C., 380.
(10) (1916) 19 O.C., 49.

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ZIAUL HASAN, J.:—These connected appeals arise out of a suit for recovery of under-proprietary rent brought by Sangam Lal and others (appellants in appeal No. 138) against the defendants, appellants in appeals Nos. 132 and 133.

The defendants are admittedly under-proprietors of villages Gajadharpur, Tendwaujar and Patti Berisalpur which were at one time under the superior proprietorship of Syed Ali Hyder. In 1927 Syed Ali Hyder sold his rights to one Zaigham Ali. The present plaintiffs pre-empted that sale and obtained a decree in 1928. They also obtained possession of the property in pursuance of the pre-emption decree. The plaintiffs sued the defendants for recovery of Rs.109-3 as *haq-i-malikana* and prayed that if the defendants should not pay the amount within the time to be fixed by the court, their under-proprietary rights specified in the plaint be sold for recovery of the amount of the decree. Their allegation was that the defendants as under-proprietors in the villages in question were liable to pay 10 per cent. of the land revenue and *abwab* to the plaintiffs as under-proprietary rent or *haq-i-malikana*. The rent claimed related to the years 1334 to 1339.

The defendants raised a number of pleas in defence on which the learned trial court framed ten issues. One of the issues, namely, issue No. 6, was whether or not the suit was cognizable by the civil court. This issue was decided by the trial court, the learned Munsif of Kaisarganj, in the negative and accordingly he ordered the plaint to be returned to the plaintiffs for presentation to the proper court. The plaintiffs appealed to the District Judge against this order but the learned First Civil Judge of Bahraich who heard the appeal concurred with the finding of the trial court that the suit was cognizable by the revenue court only. The plaintiffs' appeal was accordingly dismissed. The plaintiffs filed a second appeal in this court and on the 1st December, 1933, the then learned Chief Judge

allowed the appeal and in view of the provision of sections 124-B, 124-C and 124-D of the Oudh Rent Act remanded the case to the Court of the District Judge of Gonda for re-hearing the appeal and deciding it according to law. As the suit had been decided by the trial court on the question of jurisdiction only and no evidence had been taken, the learned District Judge sent back the case to the trial court for disposal of the issues other than that of jurisdiction. The learned Munsif after recording evidence held that the plaintiffs were the transferees of the rights of Ali Hyder, that Syed Ali Hyder as superior proprietor was entitled to recover 10 per cent. of the land revenue and cesses from the under-proprietors-defendants as *haq-i-malikana,* that the defendants were paying Rs.85-5-4 as land revenue and cesses for Gajadharpur, Rs.68-10 for Tendwaujar and Rs.25-7-4 for patti Berisalpur, that the plaintiffs were entitled to interest on the rent claimed at the rate of 1 per cent. per mensem claimed by them, that the claim for the years 1334 and 1335 Fasli was barred by limitation but that the plaintiffs were entitled to *haq-i-malikana* for 1336 to 1339 Fasli. On these findings the suit of the plaintiffs was decreed for Rs.71-2-6 with proportionate costs and interest at 1 per cent. per mensem up to the date of the decree and future interest at 6 per cent. per annum.

Both parties appealed against this decree of the learned Munsif but the learned District Judge upheld that decree and dismissed both the appeals.

Appeal No. 132 of 1936 has been brought by one of the defendants, appeal No. 133 of 1936 by all the defendants and appeal No. 138 of 1936 has been brought by the plaintiffs.

I will take up appeal No. 132 first.

Only one ground has been urged in this appeal, which has been filed against the decree of the learned District Judge passed in appeal No. 64 of 1935, brought by the plaintiffs, namely, that the lower appellate court

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has erred in allowing the respondents costs of the original suit amounting to Rs.46-8. That decree provides—

"The respondents have incurred no costs in this Court of appeal. The plaintiffs' proportionate costs of the original suit amounting to Rs.46-8 are to be paid by the defendants to the plaintiffs."

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In the other appeal (No. 61 of 1935) brought by the defendants Rs.5-8 costs of the plaintiffs respondents were awarded against the defendants appellants. The learned counsel for the defendants appellant contends that as appeal No. 64 of the plaintiffs was dismissed, no costs should have been awarded to them by the decree in that appeal. I do not think there is any force in this contention. The decree of the trial court was superseded by that of the appellate court and as that decree was confirmed and it provided for payment by the defendants of the plaintiffs' proportionate costs of the suit, the order for payment of the plaintiffs' proportionate costs should naturally have found place in the appellate court's decree. Perhaps it would have been more proper if this order had been inserted in the decree prepared in the defendants' appeal but the insertion of it in the plaintiffs' appeal (No. 64) cannot be said to be illegal. Now, as the decrees of the lower appellate court stand, the plaintiffs cannot recover this amount from the defendants twice. Appeal No. 132 of 1936 has therefore been brought unnecessarily and must be dismissed.

In their appeal No. 133 of 1936, the defendants have raised two points before me. The first is that the amount found by the trial court as having been paid by the defendants on account of land revenue and cesses included also the *haq-i-malikana*. In other words their contention is that the amount shown in the khewats of the three villages (Exs. 26, 27 and 28) as that of *abwab* is really the amount not of cesses but of the *haq-i- malikana* payable by the defendants. In the lower courts the

contention also was that the defendants are liable to pay 10 per cent. of the land revenue only and not of the *abwab;* but this position has now been abandoned and all that is urged is that the use of the word *"munafa"* in Exs. 26 and 27 (pukhtedari khewats of Gajadharpur and Tendwaujar respectively) shows that the amount shown as *munafa* is really *haq-i-malikana.* No such plea was however raised by the defendants in their written statement. Moreover, the findings of the courts below of the aforesaid amounts being the amounts of land revenue and of *abwab* are pure findings of fact and cannot be questioned in this court. Further there is no good reason to suppose that the amounts shown as *"munafa"* represent the *haq-i-malikana* payable by the defendants. On the other hand there are good reasons for holding that those amounts represent the *abwab.* In the first place they occur in the column relating to *abwab.* In the second in three of the khatas mentioned in Ex.26 the word *"munafa"* is coupled with the word *"sewai"* and the omission of that word from khata No. 4 in question seems to be merely an accidental omission.

The next point urged is that the plaintiffs are not entitled to any interest on the amount claimed. This plea too has no force whatever. As the amount claimed by the plaintiffs is undoubtedly "rent" as defined in the Oudh Rent Act and as the learned counsel for the defendants himself was at pains to show in his reply to the plaintiffs' appeal, there is no reason whatever why the plaintiffs should not get interest on the rent claimed by them. This appeal too has therefore no force.

I now come to the plaintiffs' appeal No. 138 of 1936. This appeal is against the decision of the lower courts that the suit relating to the years 1334 and 1335 Fasli was barred by limitation. It is argued that the amount payable by the defendants was a charge on the property and that therefore the limitation for recovery of that amount was twelve years not three years. Reliance is placed on article 132 of the first schedule of the Indian

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Limitation Act and particularly an explanation (*a*) to that article. The article read with clause (*a*) of the explanation would read as follows:

"To enforce payment of money charged upon immovable property.	12 years	When the money sued for becomes due.

Explanation—For the purposes of this article—

(*a*) the allowance and fees respectively called *malikana* and *haqqs* . . . . shall be deemed to be money charged on immovable property."

It is argued that the money claimed by the plaintiffs comes under the *malikana* mentioned in the explanation to article 132. "*Malikana*" has not been defined in the Limitation Act or in any other act but after a careful consideration of the cases relied on by the learned counsel for the plaintiffs I have come to the conclusion that the term cannot be applied for purposes of article 132 of the Limitation Act to under-proprietary rent. The learned counsel for the plaintiffs has relied on the following cases:

Hurmuzi Begum v. *Hirday Narain* (1); *Churaman* v. *Balli* (2); *Nathu* v. *Ghansham Singh* (3); *Gopi Nath Chobey* v. *Ghugwat Pershad* (4); *Jagarnath Pershad Singh* v. *Kharach Lal* (5); *Padhum Lal* v. *Tribeni Singh* (6) *Shaikh Ramzan Ali* v. *Babu Lal Singh* (7); *Raja Mohammad Mumtaz Ali Khan* v. *Wazir Khan* (8); *Ram Jiawan* v. *Jadunath* (9); *Deputy Commissioner, Fyzabad, for Ajodhia Estate* v. *Jagjiwan Bakhsh Singh* (10).

Almost all these cases hold that a claim to *malikana* can be brought within twelve years but none of them is an authority for the view that the rent payable by an under-proprietor in Oudh comes within the term "*malikana*" occurring in the explanation to article 132 of the

(1) (1880) I.L.R., 5 Cal., 921.
(2) (1887) I.L.R., 9 All., 591.
(3) (1919) I.L.R., 41 All., 259.
(4) (1884) I.L.R., 10 Cal., 697.
(5) (1905) 10 C.W.N., 151.
(6) (1934) A.I.R., Patna, 44.
(7) (1938) A.I.R., Patna, 16.
(8) (1904) 7 O.C., 108.
(9) (1915) 18 O.C., 380.
(10) (1916) 19 O.C., 49.

Limitation Act. In the first of these cases the judgment is very short and does not show what was the nature of the money claimed in that case. In the second what was claimed as *malikana* was the amount which the vendee of certain immovable property contracted to pay annually to the vendor. In the third the facts were that in 1838 the proprietors of a certain village refused to accept the settlement offered to them under the orders of Government. They were therefore excluded from the settlement and a settlement was offered to the cultivators of the village and a *malikana* charge of $12\frac{1}{2}$ per cent. on the land revenue was fixed for the proprietors who had refused to accept the settlement and had been excluded. *Malikana* in this case was therefore more in the nature of *nankar* than of under-proprietary rent. In the fourth case also the nature of the *malikana* claimed was far from anything like the rent payable by an under-proprietor. The judgment in the fifth case does not show the nature of the *malikana* claimed. The same remark applies to the sixth case. The seventh case does not refer to *malikana* at all and all that was held was that where a mortgagor mortgages his right to recover rent from the tenant in respect of a certain holding, the mortgage though merely a right to recover rent is really a mortgage of an interest in immovable property. The last three cases of Oudh are clearly cases of *nankar* and not of under-proprietary rent. I am not therefore prepared to accept the learned counsel's contention that the under-proprietary rent payable by the defendants is *malikana* as referred to in the explanation to article 132.

On the other hand it is quite clear from the provisions of the Oudh Rent Act that the intention of the Legislature was that the *haq malikana* payable by an under-proprietor should be sued for within three years. According to section 3(5) "rent" means money or the portion of the produce of land payable on account of the use or occupation of land are on account of any right

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in land or on account of use of water for irrigation. According to section 3(8) "under-proprietor" means any person possessing heritable and transferable right of property in land for which he is liable or but for a contract or decree would be liable to pay rent. "Landlord" according to section 3(11) means any person to whom an under-proprietor or tenant is liable to pay rent. Further, section 108 which bars the jurisdiction of courts other than courts of revenue in relation to certain classes of suits provides in clause (2), "for arrears of rent". From all this it is quite clear that what an under-proprietor is liable to pay to the superior proprietor is rent and that a suit for recovery of it must be brought in the revenue court under section 108(2) of the Oudh Rent Act. Now section 132 of the Act provides—

> "A suit for the recovery of an arrear of revenue or rent ———— shall ———— be instituted within three years from the last day of the month of Jeth of the Fasli year in which the arrear fell due."

As the case is fully governed by the provisions of the Oudh Rent Act those provisions must necessarily apply to it even though it be assumed that the rent payable by an under-proprietor can be called *malikana* referred to in the explanation to article 132 of the Limitation Act.

I am therefore of opinion that the courts below rightly dismissed the plaintiffs' suit for the years 1334 and 1335 Fasli.

The result is that all the three appeals are dismissed. Parties will bear their own costs in this court.

Appeal dismissed.