1869

SADAT ALI v. SRIMATI SADATTUNNISA

merits the lower Appellate Court found against the defendant's istemrari tenure, and gave the plaintiff a decree for possession.

In special appeal, it is urged, that under the provisions of clause 5, section 23, Act X of 1859, the Civil Court had no jurisdiction. That clause, for the purposes of this suit, declares that "all suits to eject any ryot on account of "a breach of the conditions of any contract by which a ryot may be liable to "ejectment, shall be cognizable by the Revenue Courts only."

The question therefore before us is whether this suit was a suit to eject a ryot by reason of the breach of the conditions of any lease by which that ryot was liable to ejectment. Clearly this was not the allegation of the plaintiff, nor the issue between the parties. The plaintiff did not say that under the terms of the contract between him and the ryot, the ryot was liable to ejectment, but what he said was that there was no contract between him and the ryot; that whatever contract there had been, had expired, and that therefore the ryot held on, not contrary to any conditions of a contract by which he was liable to ejectment, but as a trespasser without any contract at all; and the ryot himself on his part denied that there had ever been any contract of the nature set up by the plaintiff, or that he was a trespasser, and set up another contract in respect of which the Courts have found against him. The case therefore is clearly in our judgment one cognizable by the Civil Court, and so the special appeal is dismissed with costs.

Before Mr. Justice Kemp and Mr. Justice Glover.

BHULI SING AND OTHERS (PLAINTIFFS) v. MUSSAMUT NEHMU BHU (DEFENDANTS.*)

1869
June 14

Malikana—Reg. VIII of 1793—Recurring Cause of Action—Limitation—Act XIV of 1859, s. 18, cl. 16.

Held, (by GLOVER, J.), that malikana is rent under Reg. VIII of 1793; that cause of action for recovery of arrears of malikana is a recurring cause of action; and that failure to recover arrears for more than 12 years would not bar the right to recover for such period as have not been barred by the Statute—clause 16, section 1, Act XIV. of 1859—that is for a period of 6 years.

Held, (by KEMP, J.) that the suit was barred, as no malikana had been paid for more than 12 years.

This was a suit for recovery of malikana from the defendants. The defendants set up (*inter alia*) that the suit was barred by limitation.

The principal Sudder Ameen held that the plaintiff was entitled to recover the malikana from the defendants.

* Special Appeal, No. 701 of 1869, from a decree of the Judge of Gya, dated the 7th January 1869, reversing a decree of the Principal Sudder Ameen of that district, dated the 10th July 1869.

1869

BHULI SING v. MUSSAMAT NEMMU BHU

On appeal the Judge held, that the plaintiff had failed to prove that he had received any malikana within 12 years of suit, and therefore the claim was barred by limitation.

The defendant appealed to the High Court.

Baboos *Kalikrishna Sen* and *Nilmadhab Sen* for appellant.

Baboo *Mahes Chandra Chowdry* and *Mr. Gregory* for respondent.

GLOVER, J.—In this matter I am compelled to differ with my brother Kemp, and with the learned Judges of other Division Benches. I need not say therefore that my opinion is come to with much diffidence.

It appears to me that malikana is in the nature of rent. It represents the profit of the proprietor derived from the rents of his estate, and was so understood apparently by Government at the time of the perpetual settlement. In Regulation VIII of 1793, section 44, malikana is called "an allowance in consideration of proprietary rights," and farmers are directed (section 45) to pay it monthly according to the "kistbandi fixed for the Sudder jumma." Payment of malikana was enforced in the same manner as arrears of rent (section 46.)

Malikana therefore has all the elements of rent. It represents the profit which the proprietor would ordinarily receive from the letting of his land, if he continued in occupation thereof, and as the recipient never ceases to be proprietor, although the lands may have been let in lease to others, what he receives as malikana seems to me never to cease to be rent.

If it be rent, then as it is due only at certain time of every year, failure to pay, must, I suppose, be considered as giving a continually recurring cause of action and enable a proprietor to receive all arrears of malikana that may not be barred by the Statute: in the present case, for instance, the proprietor would be able to recover back dues for 6 years.

KEMP, J.—This is a suit to recover malikana. The Judge found that the plaintiff had not been able to prove receipt of any malikana during a period of twelve years prior to suit. The suit of the plaintiff was therefore dismissed as barred. I am of opinion that this decision is correct under the rulings of this Court in *Mussamut Ozerun* v. *Baboo Heranund Sahoo* (1), *Heranund Sahoo* v. *Mussamut Ozerun* (2), and *Badarul Hug* v. *The Court of Wards* (3). The appeal is dismissed.

(1) 7 W. R. 336. (2) 9 W. R. 102. (3) 10 W. R. 302