1869.

RANGLAL SAHU v. SIALI DHAR DAS.

it be said that according to the common understanding of men, if a person occupies lakhiraj or rent-free land adjacent to another's estate, but not shewn to be dependent on it, or in any way connected with it, that the lakhiraj lands are comprised in the estate? In the present case, the lands in Towji 866 are stated to be resumed lakhiraj mehal, in which the 82 bigas of land now in question were supposed to be included. The defendants have since, by a regular suit, established their title as lakhirajdars. The result is that they are holding an estate wholly distinct from, and unconnected with, the lands held by the plaintiff under the settlement of Towji No. 866.

It appears to us that in no sense can the defendant's lands be said to be comprised within that settled estate. Reading section 9, in order to see what are the powers of the Collectors, an additional argument presents itself in support of the view we take. The Collector, if the case so requires, is to pass a decision enjoining or excusing the attendance of undertenants or ryots, not of all persons occupying land within the ambit of the estate. Under such circumstances, we reverse the decision of the lower Courts, with costs in all the Courts, and interests.

Before Mr. Justice Kemp and Mr. Justice Glover.

1869 *April* 15.

CHARLES MACDONALD (ONE OF THE DEFENDANTS), *v.* RAJARAM ROY AND OTHERS (PLAINTIFFS.)*

Jurisdiction of Civil Courts and Revenue Courts—Suit to recover Possession of Land.

In a suit in the Civil Court, to recover possession of lands, which, the plaintiff alleged, he has leased to the defendant or manager of an indigo factory, and also of other lands over which he had given a zuripeshgi lease, *Held,* that the suit was rightly brought in the Civil Court, and that the Revenue Court had no jurisdiction. *Held* also that, as the defendant had made no objection to the manner in which plaintiff had calculated damages in the Courts below, the question could not be gone into in special appeal.

Mr. R. *T. Allan* for appellant.

Baboos *Chandra Madhab Ghose* and *Ramesh Chandra Mitter* for respondents

THE facts of this case sufficiently appear in the judgment of

GLOVER, J.—The plaintiff in this suit is a co-sharer in a certain mauza in Zilla Tirhoot, and his suit is to recover possession of 72 bigas, 1 kata, 3 dhoors of land from the defendants in this wise:—The allegation of the plaintiff is that, in the year 1269, he leased his share of the estate to the defendant, the manager of an indigo factory, and along with that share likewise leased to him certain zerayat lands, which he cultivated himself within the

* Special Appeal, No. 3251 of 1868, from a decree of the Judge of Tirhoot, dated the 9th June 1868, reversing a decree of the Principal Sudder Ameen of that district, dated the 19th December 1867.

mauza as a ryot; that at the time of the expiration of the zuripeshgi lease, the defendant gave back to him possession of his share of the estate but retained the zerayat lands; and to recover these, the present suit is brought. The defendant's statement is that the lands which the plaintiff asserts had been given to him (defendant) along with the pati were never held by the plaintiff, but were the lands of one Gandowr Sing, a co-sharer in the estate from whom the defendant holds.

The first Court dismissed the plaintiffs' suit; but the Judge, on appeal found that the 72 bigas in dispute comprised the zerayat cultivation of the plaintiff apart from his share in the estate; that these lands were identical with the land which the defendant claimed to hold from Gandowr Sing; and that the plaintiff was entitled to possession.

In special appeal it is contended in the first place that, as this suit assumes the relationship of landlord and tenant between the plaintiff and defendant, the suit was not cognizable by the Civil Courts, under Act VIII. of 1859, but should have been instituted in a Revenue Court under Act X. of 1859; and, secondly, that, supposing the suit to have been rightly brought in the Civil Court, it was incumbent on the plaintiffs to show a distinct title for these particular lands, inasmuch as the defendant claims to hold for Gandowr Sing, who is not shown to be other than a shareholder in the estate, and that the defendant, holding through Gandowr Sing, would have, at least, a joint interest in the mauza, and thus a sufficient title to defeat the plaintiffs' suit. With regard to the first objection, we find that the plaintiffs never considered or said that they considered the defendant as their tenant; on the contrary their allegation was that, from the date of the expiration of the zuripeshgi lease, the zerayat lands had been forcibly withheld from them by the defendant, who, from that time, was a trespasser, and the defendant, from the very first, distinctly repudiated the relationship of tenant to the plaintiffs, alleging that he held from a third party. We think therefore, that this suit was undoubtedly cognizable by the Civil Courts, and that the Revenue Courts had no jurisdiction in the matter.

With regard to the second objection, the Judge finds as a fact on the evidence, that the 72 bigas, which the plaintiffs now claim, formed the plaintiffs' cultivation, exclusive of his share in the estate; that this was the land which the plaintiffs made over to the defendant at the time of giving the zuripeshgi lease, and that the defendant has not returned, but still holds possession of that land. It is a notorious fact that, in the Behar districts, co-sharers in estates frequently hold land in cultivation over and above their share in the estate; they cultivate these lands themselves, as ryots paying rent as such to all the co-sharers, including themselves; so that, supposing Gandowr Sing, from whom the defendant claims to hold, to be a shareholder in a property, the only interest he could possibly have in these 72 bigas (after the finding of fact come to by the Judge), would be his right to receive a proportionate share of the rent of the land.

1869
CHARLES MACDONALD v. RAJARAM ROY

On the facts as found, it is clear that the lands which the plaintiffs claim, did not form the pati or share of Gandowr Sing, and could not have been leased by Gandowr Sing to the defendant as forming that share.

A further objection was taken by the special appellant's pleader to the amount of damages; with reference to it, he relied upon a Full Bench decision of this Court, in the case of *Ranee Asmed Kooer* v. *Maharanee Indurjeet Kooer* (1). It is possible that, had this objection been pressed below, or, indeed, at any stage of the proceedings (for it does not appear to have been taken in the grounds of special appeal), the ruling referred to might have had some application, and that the most the plaintiff could have recovered, would have been the amount of a fair and reasonable rent for the land, as if the same had been let to a tenant during the period of the unlawful possession of the wrong-doer, but we find, on referring to the Judge's decision, that no objection was ever taken to the amount of damages claimed by the plaintiffs, and the plaintiffs' patwarri had given evidence as to the nature and the extent of the crops which could be grown on the land during the period for which damages are claimed.

As, therefore, the defendant chose to rest his case, entirely on the ground that he held the land from Gandowr Sing, and that the 72 bigas were not the property of the plaintiffs, and did not take any exception to the way in which the plaintiffs had calculated the damages, he alleged himself to have sustained.

We do not think that, at this late stage of the case, and specially considering that we are now in special appeal, we should be justified in re-opening the proceedings, or in applying a principle which the special appellant himself never asked to have the benefit of. The special appeal must be dismissed with costs.

Before Mr. Justice Norman and Mr. Justice E. Jackson.

1869
April 15

TETAI ABOM (ONE OF THE DEFENDANTS) *v.* GAGAI GURA CHAWA (PLAINTIFF.)*

Endorsement of Transfer—Stamp Act.

Transfer of an under-tenure, endorsed upon the back of the tenant's patta, is not admissible in evidence, unless it be stamped, as though it were a separate deed.

Baboo *Abhaya Charan Bose* for appellant.

None for respondent.

THE judgment of the Court was delivered by

NORMAN, J.—The plaintiff sues for the possession of 30 bigas of land, which he alleges that he purchased from the defendant's father, on the 4th of May.

* Special Appeal, No. 2074 of 1868 from a decree of the Deputy Commissioner of Sibsagur, dated the 8th May 1868, reversing a decree of the Moonsiff of that district, dated the 16th May 1867.

(1) Case No. 362 of 1867; April 4th, 1868.