1893

SURJAN RAOT v. BHIKARI RAOT.

properly and effectually be gone into, and that when any objection is raised under section 526, the Court should refer the parties to a regular suit. I doubt, in the first place, whether a separate suit would lie to enforce an award if the application to file it can be dealt with under section 526, and if it has been refused, though no doubt a suit being brought upon the original right the award may be referred to as evidence in support of that right. But however that may be (and it is perhaps unnecessary to express any opinion upon that question in this case), I do not see why, if the Legislature has provided a procedure under sections 525 and 526 to enforce an award, the parties should be driven to another suit.

Whether, if an objection is raised upon the score that there was no submission to arbitration, or that there was no award at all, the Court would have jurisdiction to deal with the matter, is a question which does not arise in this reference, and I therefore refrain from expressing any opinion upon it. I confine myself to the question as referred.

J. V. W.

Before Sir W. Comer Petheram, Kt., Chief Justice, Mr. Justice Prinsep, Mr. Justice O'Kinealy, Mr. Justice Norris, and Mr. Justice Ghose.

GOURHARI KAIBURTO (DEFENDANT) *v.* BHOLA KAIBURTO AND ANOTHER (PLAINTIFF).*

1894 *Feb.* 1.

Regulation XI of 1825, *s.* 4 (*cl.* 1)—*Accretion—Occupancy right—Jote tenure—Ryot.*

A ryot who has a right of occupancy is entitled to the benefit of section 4, (clause 1) of Regulation XI of 1825.

Gobind Monee Debia v. *Dinobundhoo Shaha* (1), *Attimoollah* v. *Saheboollah* (2), and *Bhagabat Prasad Sing* v. *Durg Bijai Sing* (3) followed.

Finlay, Muir and Company v. *Gopee Kristo Gossamee* (4) not followed.

THE plaintiff in this case sought to obtain possession of 15 *gundas* of land on the ground that it was an accretion to his

* Full Bench Reference in appeal from Appellate Decree No. 1533 of 1892, against the decree of Babu Dwarka Nath Mitter, 1st Subordinate Judge of Tipperah, dated the 23rd May 1892, reversing the decree of Babu Jagan Mohun Sarkar, Munsif of Nabinuggur, dated the 16th July 1890.

(1) 15 W. R., 87.
(2) 15 W. R., 149.
(3) 8 B. L. R., 73; 16 W. R., 95.
(4) 24 W. R., 404.

1894

GOURHARI KAIBURTO v. BHOLA KAIBURTO.

ryoti jote, which *jote* he had held for more than 12 years. The defendant claimed to be in possession by virtue of a settlement from the zemindar. It was admitted that the plaintiff had never been in actual possession of the accretion. The Munsif held that the plaintiff had no right by contiguous accretion and dismissed the suit; holding that the suit was not barred by article iii, schedule 3 of the Bengal Tenancy Act, as he had never been in possession of the accreted lands. The Subordinate Judge on appeal reversed the Munsif's decision and declared the plaintiff to be entitled to the accretion, on the ground that under section 4, clause 1 of Regulation XI of 1825, he had the same right in the accreted land as he had in his *jote* tenure.

The defendant appealed to the High Court, and on the case coming up for hearing before O'KINEALY and RAMPINI, JJ., the learned Judges referred to a Full Bench the question, whether a ryot who has a right of occupancy is entitled to the benefit of section 4, clause 1 of Regulation XI of 1825?

The following was the referring order:—

"This reference arises out of two analogous cases tried by the Subordinate Judge of Tipperah. In both these cases the Judge in the Court below held that the plaintiff had been in possession of his *jote* for more than 12 years, and therefore acquired an occupancy in it. It was admitted before him that the land in dispute had recently accreted to the plaintiff's *jote*. The Judge held that the plaintiff *jotedar* had, under section 4, clause 1 of Regulation XI of 1825, the same right in the accreted land which he had in the *jote* tenure.

"The decisions of the Court have not been uniform on this point. In the case of *Zuheerooddeen Paikar* v. *Campbell* (1) it was held that this provision of the Regulation referred only to an under-tenant, intermediate between the zemindar and the ryot, and to *khoodkast* or other ryots, who should by the terms of the engagement possess some permanent interest in the land. In the case of *Finlay, Muir and Company* v. *Gopee Kristo Gossamee* (2) it was broadly laid down that there is no right of accretion by which a ryot is entitled to claim under the law of the country. On the

(1) 4 W. R., 57. (2) 24 W. R., 404.

other hand, we find in the cases of *Gobind Monee Debia* v. *Dinobundhoo Shaha* (1), *Attimoollah* v. *Saheboollah* (2), and *Bhagabat Prasad Sing* v. *Durg Bijai Sing* (3) that a ryot has been held to be entitled to the benefit of section 4, clause 1 of Regulation XI of 1825.

"As we are unable to reconcile these decisions and have some doubt as to the correctness of the view taken in the first set of cases, we refer the case to a Full Bench."

Babu *Jogendro Nath Bose* for the appellant:—The case of *Zuheerooddeen* v. *Campbell* (4) is not applicable, as there the claimant was a tenant from year to year only.

The case of *Finlay, Muir and Company* v. *Gopee Kristo Gossamee* (5) broadly states that a ryot is not entitled to the advantage of the law, and the word "law" must be taken to mean this Regulation. I rely on this case. [PRINSEP J.:—The word *asli* in that case is a misprint for *aruli*.] In the case of *Gobind Monee Debia* v. *Dinobundhoo Shaha* (1) the question whether there was an accretion was not decided; in *Attimoollah* v. *Saheboollah* (2) there was not only a right of occupancy in the *jotedar*, but the *jote* was his hereditary *jote*. In *Bhagabat Prasad Sing* v. *Durg Bijai Sing* (3) the plaintiff was more than a tenant-at-will, as will be seen from the findings of the District Judge. So far as it deals with a tenant-at-will, it is *obiter*. The case of *Oodit Rai* v. *Ram Gobind Singh* (6) is in my favour. The facts in *Narain Doss Bepary* v. *Soobul Bepary* (7) are not given.

Babu *Madhubanund Bysak* for the respondents was not called upon.

The opinion of the Court (PETHERAM, C.J., PRINSEP, O'KINEALY, NORRIS, and GHOSE, JJ.) was delivered by

PETHERAM, C.J.—The terms of Regulation XI of 1825, section 4 (clause 1), are in our opinion clear; the plaintiff who has an occupancy right in a *jote* is entitled to hold the lands in dispute as an increment to that *jote*. We therefore agree in the view of the law

(1) 15 W. R., 87.
(2) 15 W. R., 149.
(3) 8 B. L. R., 73; 16 W. R., 95.
(4) 4 W. R., 57.
(5) 24 W. R., 401.
(6) 2 Agra. H. C., 206 (Dec. 1867).
(7) 1 W. R., 113.

1894

GOURHARI KAIBURTO v. BHOLA KAIBURTO.

expressed in the cases of *Gobind Monee Debia* v. *Dinobundhoo Shaha* (1), *Attimoollah* v. *Saheboollah* (2), and *Bhagabat Prasad Sing* v. *Durg Bijai Sing* (3). The appeal is dismissed with costs.

T. A. P.

APPELLATE CIVIL.

Before Mr. Justice Macpherson and Mr. Justice Banerjee.

1893 *June* 1.

NIL MADHUB SARKAR (DEFENDANT) v. BROJO NATH SINGHA (PLAINTIFF).*

Res judicata—Rent suit—Decree as to amount of land—Rent payable for former years—Rate of rent payable.

The plaintiff sued the defendant for rent of certain lands. The defendant contended that he was not liable for the entire rent, as part of the land was in the plaintiff's possession. The defendant failed to prove his contention, and a decree was given for the full amount claimed. Subsequently the plaintiff again sued the defendant in regard to the same property for arrears of rent for subsequent years at the rate claimed in the former suit. The defendant had the land measured, adduced evidence, and endeavoured to raise the same defence as he had in the previous suit. No allegation was made to the effect that the rent had been altered in consequence of anything that had happened since the previous decision. The Lower Courts, without considering the evidence adduced by the defendant, held that the defendant could not again raise the same contention, as the question had already been considered and determined in the previous suit, and was *res judicata* between the parties.

Held, that the previous decision did not operate as *res judicata*, and that the Lower Courts ought to have determined on the evidence adduced what the amount of rent in question was.

THE facts in this case were as follows:—

The plaintiff was the owner in *patni* and *sepatni* rights of an eight-anna share in certain property and made separate collections.

* Appeal from Appellate Decree No. 1003 of 1891, against the decree of J. Whitmore, Esq., District Judge of Birbhum, dated the 10th of April 1891, modifying the decree of Babu Debendra Nath Roy, Munsif of Dubrajpur, dated the 27th of September 1890.

(1) 15 W. R., 87. (2) 15 W. R., 149.
(3) 8 B. L. R., 73; 16 W. R., 95.