1872.

KRISHNA'JI NA'RA'YAN v. GOVIND BHA'SKAR.

upon the title of his mortgagor, nor would he be affected by the circumstance of the mortgagor having subsequently made a fruitless attempt to recover possession on dispossession by the defendants, in the Mámlatdár's Court, and neglected to bring his suit within 3 years. The Court has found that the mortgagor has been in possession within 12 years; the action is, therefore, clearly not barred. The decree must, therefore, be reversed, and the case remanded to be tried on its merits, having regard to the above observations, respecting the mortgagee's title.

Decree reversed and case remanded.

[APPELLATE CIVIL JURISDICTION.]

August 8.

Special Appeal No. 570 *of* 1871.

MUHAMMAD YA'KUB .....*Appellant.*
MUHAMMAD ISMAIL and others .....*Respondents.*

Khoti land—Suit by Khot against cultivator—Onus of proof.

In a suit by a Kabuláyatdár Khot for rent from cultivators holding land in a Khoti village, the *onus* does not lie on the plaintiff to prove the land to be Khoti; but the holder of land in a Khoti estate must prove that he is exempted from paying rent according to the custom of the country.

SP. APP. No. 485 of 1868 followed.

THIS was a special appeal by the plaintiff from the decision of H. J. Parsons, Assistant Judge at Rutnágiri, in Appeal No. 61 of 1869, reversing the decreee of the Subordinate Judge of Dapuli.

Muhammad Yákub sued to recover rent for the year 1862-63 as a Kabuláyatdár Khot and alleged that the defendants were cultivators of some *thikáns* (fields) on a fixed rent.

For the defence, it was pleaded that the plaintiff must have first brought his suit to establish his right as a Khot, as alleged by him, before filing any action for rent.

1872.

MUHAMMAD YA'KOUB v. MUHAMMED ISMAIL.

The Subordinate Judge gave a decree in plaintiff's favour for part of his claim. But the Assistant Judge, in appeal, reversed that decree (12th September 1871) on grounds stated in the following extract from his judgment:—

"The point is, simply, first—is the land in question Khoti, so that the respondent can claim Thall or Maktá?

"The *onus*, of course, of proving that the lands are Khoti, lies on the respondent (plaintiff), (and I see Mr. Lyon held the same in Appeal 51 of 1869).

"The Lower Court threw the *onus* on the defendants to prove the lands were 'dhárá,' but I am quite sure this is wrong. Mr. Lyon held the converse for reasons in which I quite agree, and I always thought that the person claiming must prove the tenure or the relationship under which he claims. In such a Khoti case as this, the claim simply rests on custom, that is, on the privity presumed to exist between a Kabuláyatdár Khot and the holder of Khoti lands. It is, therefore, absolutely necessary that the person suing for rent should show that this relationship, from which privity may be assumed, exists.

"In the present case, there is no such evidence at all, and the plaintiff cannot succeed with his present claim for Khoti rent."

The appeal was argued before GIBBS and KEMBALL, JJ., on the 8th August 1872.

Shántárám Náráyan for the appellant:—The Lower Court erred in holding that although the appellant was Kabuláyatdár for the year in dispute, yet the *onus* lay on him to prove that any particular land in the village of which he was such Kubuláyatdár was Khoti land, and that the tenant thereof was bound to pay "Thall" or "Maktá" (rent), whereas, by the custom of the country, all the holders of land in the village were bound to recognize the Kabuláyatdár as the managing Khot, and to pay to him rents due on their respective holdings, unless they could show a title to a total or partial exemption, or to a fixed amount of rent. It is an

1872.

MUHAMMAD YA'KCUB v. MUHAMMAD ISMAIL.

acknowledged fact that the appellant is the Kabuláyatdár Khot, and that the respondents are tenants of the land. That shows the relationship subsisting between him and the cultivators.

The respondents did not appear.

PER CURIAM :—The Court is of opinion that the Assistant Judge was wrong in laying the *onus* of proving the lands to be Khoti upon the respondent (plaintiff). In Special Appeal No. 485 of 1868, it was decided that it lay with the holder of lands in a "Khoti" estate to prove that he is exempted from paying rent for them according to the custom of the country. The Assistant Judge will, therefore, re-try the case with reference to the above remarks.

Decree reversed and case remanded.

[APPELLATE CIVIL JURISDICTION.]

August 13.

Special Appeal No. 179 *of* 1872.

NA'RO GANESH DA'TA'R .....*Appellant.*
MUHAMMAD KHA'N .....*Respondent.*

Limitation—Implied contracts—Six years' limitation.

Where the defendant employed the plaintiff to repair a bungalow, but no express agreement was come to as to the payment for the repairs, *it was held* that on the performance of the repairs an implied contract to pay their fair value arose, for which the period of limitation was six years, as ruled in *Umedchand Hukamchand* v. *Sha Bulakidas Lalchand* (*a*).

THIS was a special appeal from the decision of R. F. Mactier, District Judge of Sátára, in Appeal No. 60 of 1871, reversing the decree of Krishnaráv Vithal Vinchurkar, Subordinate Judge.

Náro Ganesh sued to recover from Muhammadkhán the cost of repairs made by the plaintiff to a bungalow belonging to the defendant. Náro alleged that in the months of May, June and July 1865, Muhammadkhán employed him (Náro) to make

(*a*) 5 Bom. H. C. Rep. O. C. J. 16.