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quite independent of the right of occupancy under s. 6, Act VIII of 1869. But it appears that the lower Courts have not inquired into this matter. We, therefore, remand the case to the Court of first instance for retrial upon the following questions: (1) whether Mr. Solano at the time of his purchase in the year 1279 (1872), had any guzashtadari right, in the disputed land; (2), whether, if he had such guzashta right, it conferred upon him any right of occupancy; (3), whether that guzashta right was kept up during the years he was in possession of the estate as malik, *viz.*, between 1861 and 1878.

The parties will be allowed to adduce evidence upon all these three points, and with reference to the second issue now laid down the lower Court will allow evidence of custom to be given, if such evidence be tendered. Costs to abide the result.

Appeal allowed and case remanded.

Before Sir Richard Garth, Knight, Chief Justice, and Mr. Justice Macpherson.

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RAKHAL CHURN MUNDUL (DEFENDANT) *v.* WATSON & Co. (PLAINTIFFS.)*

Onus of proof—Obstruction to execution of decree by a claimant—Civil Procedure Code (Act VIII of 1859, s. 229)—(Acts X of 1877 and XIV of 1882,) s. 331—Settlement of julkur—Right in the soil.

In a suit under s. 229 of Act VIII of 1859 (ss. 331 of Acts X of 1877 and XIV of 1882) the onus is on the plaintiff to establish a *primâ facie* case of possession, and it is then incumbent on the claimant to answer that case and show, if possible, a better title.

There is no such broad proposition of law, as that the settlement of a julkur implies no right in the soil.

THIS was a suit under s. 229 of Act VIII of 1859.

The land in dispute was situated in Mehal Bheel Bharat Gobindpur, and was a ryoti holding formerly owned by one Umakant Mozumdar and others, and had been sold by them to Messrs. Watson & Co., who after purchase sued Raja Pramatha Nath Roy, Zemindar of Dhulari, a contiguous mehal, for recovery of

* Appeal from Appellate Decree No. 634 of 1882 against the decree of A. J. R. Bainbridge, Esq., Judge of Moorshedabad, dated the 9th December 1881, affirming the decree of Baboo Robi Chunder Gangooly, Munsiff of Azimgunge, dated the 12th January 1881.

possession of some land of which he was said to have wrongfully taken possession. In that suit Watson & Co., in 1874, obtained a decree for possession of the land sued for. In being put into possession by the Court, delivery of possession was obstructed by one Radharaman, who claimed a portion of the land as part of his patni taluq, Bheel Julkur Gobindpur. Watson & Co. complained to the Court of the resistance to their possession, stating that it was in point of fact made on behalf of the judgment-debtor. The Court held there was no substantial resistance to the delivery of possession, and directed a fresh warrant to issue for delivery of possession. Radharaman appealed from this order, and the Appellate Court, conceiving the case to be one falling under s. 229 of Act VIII of 1859, remanded it to the lower Court with directions to try it on the merits.

At the remand hearing the Court found that Radharaman was the real claimant and not the judgment-debtor, but was of opinion that he had no right or title to the disputed land, and that he had never held possession of it; and finding that the land appertained to Mehal Bheel Bharat Gobindpur and was comprised in the tenure of Messrs. Watson & Co., made a decree in their favor directing possession to be given to them in execution of their decree.

Radharaman appealed, and the Court, holding that the first Court had left the real question between the parties untried, remanded the case again for retrial on the merits. In the meantime, under the order of the Appellate Court, the Civil Court Ameen delivered to the decree-holders actual possession of the undisputed property and nominal possession of the disputed portion of it.

Subsequently to the remand Radharaman's patni taluq Bheel Julkur Gobindpur was sold in execution of a decree, and was purchased by one Radhamadhub, who again sold it to Brojolal Mundul. Brojolal Mundul died, leaving a widow Shyama Sundari Dasi and a minor son Rakhal Churn Mundul, and he was substituted as defendant at the application of his mother who was his guardian.

The Munsiff found that the land claimed by the plaintiffs as part of Mehal Bheel Bharat Gobindpur was formed more than 30

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years back by the drying up of the water, or by the silting up of the bed of the water of Bheel Julkur Gobindpur, and that possession of it was taken first by the plaintiffs' vendors and then by Raja Pramatha Nath Roy, against whom the plaintiffs obtained their decree, and also found that Radharaman had no right or title to this land, it never having been proved that he had ever been in possession, and that it had not been proved to have been part of his patni taluq Bheel Julkur Gobindpur.

The defendant appealed to the District Judge, who gave the following judgment: "Upon the local surveys and evidence it is clear that the decree under execution includes the entire block of land in dispute. That being so, the claimant has to satisfy the Court that he is entitled to ask it to abstain from delivering the land to the decree-holder. At most, the claimant can only show that he has acquired the julkur right over it when submerged. The soil is now dry, and with the water the right over it, in other words the subject of the julkur lease, vanishes. *Primâ facie* the very fact of the settlement of a julkur as such implies exemption of the sub-soil; because the soil would carry everything on it. As to the claimants' title by mere possession since the soil dried up, I concur with the Munsiff's finding against the fact. I dismiss the appeal."

The defendant appealed to the High Court.

Baboo *Guru Das Banerjee*, and Baboo *Rash Behary Ghose*, for the appellant, contended that the Judge was wrong in holding that the mere fact of the land being included in the decree under execution was sufficient to throw on the defendant the burden of proving his title to the land, and that in construing the defendant's patni potta the Court ought to have held that the defendant's title was not limited to the julkur of Bheel Gobindpur as distinguished from the bed.

Baboo *Bhowani Churn Dutt* for the respondents.

The judgment of the Court (GARTH, C.J., and MACPHERSON, J.) was delivered by

GARTH, C.J.—The suit out of which this proceeding arose was commenced some ten years ago. It was brought by the present plaintiffs against Raja Pramatha Nath Roy to recover certain

land which they had purchased from Umakant Mozumdar and others.

The plaintiffs obtained a decree for possession in 1874 and were proceeding to execute it, when they were opposed by one Radharaman Munshee, who claimed it as part of a patni taluq which he held under a potta from Raja Krishna Chund which was granted in the year 1241 (1834).

Radharaman's claim was at first rejected; but he appealed, and after two remands this case came on to be tried between the plaintiffs and Radharaman under s. 229 of the Code of 1859.

It has now been tried by the two lower Courts, and comes up to this Court on second appeal; but meanwhile, pending the proceedings, Radharaman sold his patni to one Radhamadhub who again sold it to one Brojolal Mundul, who has since died; and his widow Shyama Sundari is the present defendant.

The land in dispute is a plot of deora land, which the plaintiffs claim under a darpatni lease as part of a mehal called Bheel Bharat Gobindpur; and the Munsiff finds that it was formed many years ago by the drying up of the water, or the silting up of the bed of Bheel Julkur Gobindpur, the defendant's taluq. Bheel Bharat Gobindpur and Bheel Julkur Gobindpur are mehals held under different patnis from the same zemindar.

The Munsiff further finds that this silting up occurred more than thirty years ago, and that possession was taken of it first by the plaintiffs' vendors, and then by Raja Pramatha Nath Roy, against whom the plaintiffs brought their suit, and obtained the decree.

He also finds that there is no reliable evidence that Radharaman, the claimant, ever had possession of this land, that it has not been proved to form a part of Bheel Julkur Gobindpur.

He, therefore, gave the plaintiffs a decree.

The District Judge, as we understand, agreed with the Munsiff as to the question of possession, and confirmed his decree.

Having now heard the case argued on appeal we have no reason to believe that the conclusion at which the lower Courts have arrived is otherwise than correct.

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But it has been contended by the appellant that the Judge has made two mistakes in point of law:—

(1*st.*)—That he has thrown the onus of proof on the wrong party; and

(2*nd.*)—That he has erroneously laid it down as a rule of law that the settlement of a julkur as such implies exemption of the subsoil; or, in other words, that the grant of julkur carries with it *primâ facie* no right to the soil.

As regards the first of these points we see no sufficient ground for impugning the lower Court's judgment.

The Judge says, if we understand him rightly, that upon the question of possession he agreed with the Munsiff, and the Munsiff finds that upwards of thirty years ago the land in question silted up or became dry; *and that since that time* Radharaman had never held possession of it.

On the other hand, he finds that the persons who had possession of it during that time were first the plaintiffs' vendors, and afterwards Raja Pramatha Nath Roy, against whom the plaintiffs brought their suit in 1874, and obtained a decree.

It is argued that under s. 229 the onus of proof is thrown upon the plaintiffs, and no doubt that is so. The onus of proof was thrown upon the plaintiffs in this case. They had to prove, to the satisfaction of the Court, that they, or the judgment-debtor, whose rights they had acquired by the decree, either had or were entitled to have possession as against the claimant. They proved this to the satisfaction of both the lower Courts, and so established a *primâ facie* case; and it was then incumbent upon the claimant to answer that *primâ facie* case, and show, if he could, a better title.

It does not at all follow that because the Court considers the claim of the claimant under s. 229 to be a *bonâ fide* one, the claimant is in point of fact in possession of the property. *Bonâ fide* claims to possession are constantly made by persons who never had possession and who are not entitled to it.

Whether the claimant really had or was entitled to the possession which he claimed under s. 229 was a question to be tried in this suit; and the plaintiffs, as I consider, fulfilled *primâ facie* the onus which the law casts upon them, when they proved

that the judgment-debtor, whose rights they had acquired, held possession as against the claimant at the time when the latter made his claim.

If this were not so, s. 229 would be productive of the greatest injustice. A man who holds possession of property has a right to retain his possession, until some other person can show a better right to it. But if a man who merely claims possession under s. 229, without in fact being in possession, is to be entitled in law to possession as against the actual possessor, unless the latter proves his title, the consequences would be serious indeed. A claimant under that section, although he had no possession, would then be in a better position than the actual possessor.

The section may often operate unjustly enough against the decree-holder as it is; but the injustice would be far greater if the appellant were right in his contention.

The plaintiffs in this suit, having shown that at the time when the question arose in the execution proceedings they and their judgment-debtor, whose rights they had acquired, had held possession of the land for 30 years, and that the claimant had never been in possession, were *primâ facie* entitled to a decree; but then comes the second point, that the Judge was wrong in laying down as law, that the settlement of a julkur implies no right in the soil. We quite agree that the Judge laid this down too broadly; more especially as, in the present case, we find that in the defendants' patni potta, the julkur mehal in question is called a *mouza*.

If, having regard to the facts found by the lower Court, we considered this question to be material to the determination of the suit, we should be disposed to remand the case to the Court below, to ascertain what passed by the patni grant. That question might depend in great measure upon what was the state of the locality at the time when the grant was made.

But as the lower Courts have found that the land in dispute silted up from the julkur more than 30 years ago, and that since that time the only persons in possession of it have been the plaintiffs and the Raja, against whom they obtained their decree, *and that the claimant has never been in possession of it*, it seems to us that

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whatever the rights of the latter may have been under the patni they must long ago have become extinguished by lapse of time. (See s. 28 of the Limitation Act of 1877.)

The appeal is therefore dismissed with costs.

Appeal dismissed.

ORIGINAL CIVIL.

Before Mr. Justice Pigot.

1883 June.

MOHENDRO NAUTH DAWN v. ISHUN CHUNDER DAWN.

Inspection of documents—Practice—Affidavit of Documents—Insufficiency of affidavit—Alteration by letter of terms of notice already served—Civil Procedure Code (Act XIV of 1882), s. s. 131 and 133.

Before the Court will make an order under s. 133 of the Code of Civil Procedure the preliminary steps mentioned in s. 131 must be taken by the party applying for the order.

THE plaintiff had filed a suit against the defendant on 1st December 1882, praying for dissolution of partnership, and for an account of the sale of a right to a certain patent medicine. The defendant put in an appearance, and the plaintiff, on the 10th December, obtained the usual order for the inspection of the defendant's documents. In pursuance of this order the defendant filed a verified list of documents with the usual affidavit on the 5th January 1883. The plaintiff objected to the sufficiency of the affidavit of documents filed by the defendant, and one Poorno Chunder Dawn, an uncle of the plaintiff who was employed as a general assistant in the firm, made an affidavit stating that certain books of account had been kept by the firm, and that these were to his personal knowledge now in possession of the defendant, and had been last seen by him on the 22nd September 1882 when he had been refused further admittance to the shop by the defendant; he further stated that certain of the account books produced by the defendant imperfectly showed the sales of certain articles of the partnership, and that without the production of the books of account, which he alleged to be in the defendant's possession, and which were unproduced, the account could not be fully proceeded with; that the plaintiff's attorney had written to the defendant's attorney as to the production of these