

their dispossession by the defendants as of a *bramatar tenure* has been established by the evidence of witnesses.

We think that none of the precedents cited by the pleader for the special appellants show that this is a bad finding in law; and we are of opinion that in this there was a sufficient finding upon the evidence to start the plaintiff's case, and to throw the burthen of rebutting that case by setting up a better title upon the defendants, and the lower Appellate Court has found as a fact that the defendants have not relieved themselves of that burthen.

The special appeal is dismissed with costs.

Before Mr. Justice L. S. Jackson and Mr. Justice Markby.

NABIN CHANDRA MITTER (ONE OF THE DEFENDANTS) v. MAHES
CHANDRA MITTER AND OTHERS (PLAINTIFFS)*

1869
RAM CHANDEA
CHOWDHEE
v.
BRAJANATH
SARMA.

1869
June 21.

Judgment—Facts inconsistent with Statement in Plaintiff.

The plaintiff alleged in his plaint that the defendant had erected a hut or *challa* upon a ground to which he, the plaintiff, was separately entitled.

The lower Appellate Court found that the land in dispute was the joint property of both parties, and that the defendant was not at liberty to erect the hut without the express permission of the plaintiff, and ordered the demolition of the *challa*.

Held, that the plaintiff was not entitled to a judgment upon a ground which was inconsistent with case set out in his plaint.

Baboo Krishna Sakha Mookerjee for appellant.

Baboo Ambika Charan Banerjee for respondent.

JACKSON, J.—I think the decision of the lower Appellate Court in this case must be set aside. The plaintiff alleged that the defendant had erected a *challa* upon a piece of ground to which the plaintiff was separately entitled; and he prayed that this *challa* might be pulled down by order of Court.

The Sudder Ameen found the plaintiff's allegation to be true, and ordered the demolition of the *challa*.

On appeal, the second Subordinate Judge found that the land did not belong to the plaintiff, and, nevertheless, holding that the defendant was not at liberty to erect any building upon the land which was common property without the consent of his co-sharers, confirmed the order of the Court below.

It is contended in special appeal, on the part of the defendant, that the plaintiff was not entitled to a judgment of the Court upon a ground which was quite inconsistent with the case he made.

I think this was so. The plaintiff alleged the defendant to have done him wrong by erecting this *challa* upon ground which belonged to plaintiff exclusively, and on failure of that allegation his suit ought to have been dismissed.

*Special Appeal, No. 3295 of 1863, from a decree of the second Subordinate Judge of Hooghly, dated the 31st August 1868, affirming a decree of the Sudder Ameen of that district, dated the 31st December 1867.

1869
 NABIN CHAN- and it appears to me that even if his allegation had been that the defendant
 DRA MITTAR had erected the *challa* upon common land, without the express permission of
 him, the plaintiff, he would not have been entitled to the decree he sought
 for.

MAHES CHAN- The respondent has argued that this was not a ground taken in the written
 DRA MITTAR grounds of appeal. We thought however that it was a fair and reasonable
 ground to take; and if the fact of its not being contained in the petition of
 appeal had been brought to our notice, we certainly should have allowed it
 to be taken. I think this objection therefore has no weight whatever.

We are also asked to remand the case in order that it may be tried whether
 the *challa*, of which the plaintiff complains, interferes with the joint enjoy-
 ment of the premises by the members of the family. No allegation of this
 sort was made in the plaint, and I do not consider that the plaintiff is enti-
 tled to any enquiry of the sort, even if the result of such enquiry could entitle
 the plaintiff a decree. I think therefore that the appeal must be allowed and
 the judgment reversed with costs.

MARKBY, J.—I am of the same opinion. Even if the allegation had been
 made in the plaint that the act complained of was an injury to the common
 enjoyment of the property, still, I have some doubt whether we could have
 remanded the case for an enquiry on that point, because I have difficulty in
 seeing how far, and under what circumstances if at all, a Court can, at the
 instance of one member of the family, interfere in the mode of dealing with
 the family property by one of the members of an undivided family. But it is
 unnecessary to express any final opinion upon that point, because the allega-
 tion not being contained in the plaint there could be no enquiry upon it.

Before Mr Justice Kemp and Mr Justice Glover.

MUSSAMAT KHEDU AND OTHERS (DECREE-HOLDERS,) v. KALU SAHU
 (JUDGMENT-DEBTOR)*

1869
 June 22.

*Suit for realization of Money under a Decree—Interest of Kistibandi—
 Limitation.*

When an agreement is entered into to pay off money due under a decree
 by monthly instalments, each monthly instalment becomes a separate cause of
 action, and limitation applies to each instalment separately.

Messrs. R. E. Twiddle and C. Gregory for appellant.

Baboo Nilmadhab Sen for respondent.

THE facts of the case sufficiently appear in the judgment of

GLOVER, J.—The appellant in this case got a decree against one Ka'u
 Sahu on the 31st of May 1859, and took out execution in October 1860, and

* Miscellaneous Special Appeal, No. 70 of 1869, from a decree of the
 Judge of Gya, dated 20th November 1868, affirming a decree of the Principal
 Sudder Ameen of that district, dated the 18th July 1867.