

Prasad v. Aj dhia Prasad (1). From the circumstances of this particular case, the difficulty is not so great as it often would be. But even here I feel that it would be quite impossible for us to make any specific order; and under these circumstances I think all that we can do is to set aside the order of the Judge positively refusing to make an order under section 243, and to remit the case to him with instructions, that the sale be stayed for two months, in order to enable the judgment-debtor to make a fresh application to him for an order under section 243. It would be for her to show what the value and condition of the other property in her possession may be; and for the Judge to consider by what means, or by what arrangement, such a disposal of different portions of her property can be made, as, if possible, to avoid the sale of the property now under attachment. There are circumstances in the case which make it especially desirable that such an arrangement should be come to. We cannot shut our eyes to the fact that the decree-holder holds a tenure subordinate to that of his judgment-debtor, and that he may not improbably desire to get her out of the way, with the view, of course, to get her tenure into his own hands. At any rate I think it necessary, that the Judge should have an opportunity of re-considering this matter, and making such order as the justice of the case may require.

MARKBY, J.—I certainly must agree that it is not easy for us to deal with appeals from orders passed under section 243. It is very difficult, it seems to me, for this Court to ascertain what the relative situation of the parties is. Under the circumstances of this case, I think the order proposed by Mr. Justice Jackson is the right one; namely, that the case should be sent back, in order that a fresh application should be made, and that in the meantime the sale should be stayed.

Before Mr. Justice Bayley and Mr. Justice Hobhouse.

RAM CHANDRA CHOWDHRY (ONE OF THE DEFENDANTS) v.
BRAJANATH SARMA AND OTHERS (PLAINTIFFS).*

Suit for Possession—Award—Limitation Act XIV. of 1859, s. 15—Oral Evidence.

In a suit for recovery of possession of certain bramatar land of which the defendant had dispossessed the plaintiffs by virtue of an award passed under section 15, Act XIV. of 1859, declaring his right by purchase, the defence set up was that the deed of purchase was a forgery, and that the suit was barred by lapse of time.

Held, that although the plaintiffs failed to prove their title deeds, yet their title was sufficiently established by oral evidence of long possession prior to their dispossession two or three years previous to suit.

Baboo Nalit Chandra Sen for appellants.

Baboo Kali Krishna Sen for respondents.

*Special Appeal, No. 452 of 1869, from a decree of the Additional Subordinate Judge of Mysore, dated the 4th December 1868, affirming a decree of the Moonsiff of that district, dated the 21st September 1867.

(1) 1 B. L. R., F. B., 7.

1869
DEBKUMARI
BIBI
v.
RAM LAL
MCKURJER.

1869
June 18.

HOBHOUSE, J.—In this case the plaintiffs sued to recover possession of certain lands by declaration of their title by purchase to those lands, and for reversal of an order passed under section 15, Act XIV. of 1859 of date the 25th June 1866.

RAMCHANDRA
CHOWDREY
v.
BRAJANATH
SARMA.

The plaintiffs alleged that, in the year 1211, by two deeds of sale bearing date that year, one Kisto Prasad had sold the lands to them as bramatar, and that they had from that time held the lands as such bramatar, until they were dispossessed by the defendants under color of the Act XIV. award above mentioned.

The defendant's pleaded the Statute of Limitation, and averred that the plaintiff's title deeds were forged.

Both the Courts below have found for the plaintiffs, and one of the defendants now appeals before us specially. His sole ground of appeal is, that when the plaintiffs sued for a declaration of right, the lower Appellate Court was wrong in law in giving the plaintiffs a decree, without coming to a decision on the question of that right, and he relies on certain decisions of this Court, in *Jussoda Dessee v. Sheikh Mahomed Fuckeer* (1), *Ramdhanj Ohuckerbutty v. Srimati Komal Tara* (2), *Eckowri Sing v. Hiralal Seal* (3). The issue material to the point disputed before us laid down by the lower Appellate Court was this:—“Does the disputed land constitute a rent-free ancestral right of the plaintiffs by purchase or not; and were they in possession thereof accordingly; and were they dispossessed, as alleged.” The plaintiffs had relied upon their title deeds of the year 1211, and the lower Appellate Court finds that these deeds are not supported by evidence; but the lower Appellate Court goes on to say (in its decision, it must be remembered on the issue above quoted) that, “when it is considered that effect has been given to those deeds, they are not doubted in the least; for it has been proved by the evidence of most of the witnesses that the plaintiffs were in enjoyment of the disputed lands for above 12 years on the allegation of purchase, and have been dispossessed since the last 2 or 3 years only;” and further on the Court goes on to say that, “even in the absence of documentary proofs, it must be admitted that plaintiffs' long possession creates a right in their favor,” and again that “a right to land may be established by trustworthy oral evidence to the same extent as by documentary proofs.”

Admitting that in a suit for declaration of right, a plaintiff is bound to establish that right before he can obtain a decree, we still think that by the finding of the lower Appellate Court, the plaintiff's right has in this case been substantially found. It is true that the lower Appellate Court says that the plaintiff has failed to establish his title deeds, but the Court goes on to quote decision of this Court, which lay it down that a title might be established as well by oral as by documentary evidence, and then the lower Appellate Court distinctly finds in so many terms that the plaintiffs' long possession anterior to

(1) W. R., 1864, 367. (2) 3 B. L. R., A. C., 99, note. (3) 2 B. L. R., P. C. 4.

their dispossession by the defendants as of a *bramatâr tenûre* 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 appellants.

Baboo Ambika Charan Banerjee for respondents.

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.