1869
June 4.

Before Mr. Justice Bayley and Mr. Justice Hobhouse.

UDAI TARA CHOWDRAIN (PLAINTIFF) *v.* KHAJA ABDUL GANI, (DEFENDANT.)*

Dispossession—Claim under Act VIII. of 1859, s. 230—Onus Probandi.

One shareholder being dispossessed by the other of a certain jalkar in execution of his decree, brought a suit under section 230, Act VIII. of 1859, alleging that the jalkar had been a part of their joint mehal, and that on partition thereof the jalkar was left ijmali. The decree-holder set up that the jalkar had been formed after the partition, and by diluvion of one of his own villages.

Held, that the *onus* was upon the claimant to prove his case.

Baboo *Tarini Kant Bhattacahrjee* for appellant.

Mr. C. *Gregory* for respondent.

HOBHOUSE, J.—This was a suit under the provisions of section 230 of the Code of Civil Procedure to recover possession of a certain jalkar, of which the plaintiff alleged she had been in possession as part of her share of Pergunna Attia, and had been dispossessed by the defendant. The plaintiff's contention was that she was one of the 8-anna shareholders of one part of the mehal, and that the defendant was one of the 8-anna shareholders of the other part of the mehal; that this mehal had been partitioned in 1838; that by that partition the Jalkar Mehal was left in the joint possession and enjoyment of all the shareholders of the 16 annas, and so had been held by them ever since; and that the particular fisheries of which plaintiff sought to recover possession were part of that mehal.

The defendant does not seem to have denied the partition in question, nor that the Jalkar Mehal at the time of that partition was left and had been ever since held ijmali; but he averred that the particular jalkar for which the plaintiff sued was not a part of the Jalkar Mehal created by the partition of 1838 and held ijmali; but had been created since the partition by the diluvion of one of his villages in the mehal, and had been ever since held by him as proprietor.

Both the Courts below have found that the plaintiff has failed to establish her case, and have dismissed her suit.

In special appeal it is urged that the Courts below have proceeded on a wrong theory and thrown the burthen of proof upon the wrong person, and two cases are quoted, *Govind Chunder Shaha* v. *Khaja Abdul Gunny* (1) and *Korunamayi Chowdrain* v. *Joy Sundur Chowdhry* (2). In both these cases it seems to us, there was no contention but that the jalkars in question were a part of the orginal Jalkar Mehal or had sprung out of it, or were additions to it.

*Special Appeal, No. 220 of 1869, from a decree of the Subordinate Judge of Mymensing, dated the 11th November 1868, affirming a decree of the Moonsiff of that district, dated the 27th March 1868.

(1) 6 W. R., 41. (2) W. R., 1864, 267.

However the first question that arises and was in issue between the parties was whether the two particular jalkars in dispute were a part of the Jalkar Mehal held ijmali by the plaintiff and the defendant as such part of such Mehal. In such a case the burthen of proof was clearly upon the plaintiff to start her case, by showing that the particular jalkar in question was a part of the jalkar Mehal held in ijmali by the parties; and as pointed out by Mr. Gregory, it was especially necessary in this case that the plaintiff should prove the possession which she set up, because a suit under the provisions of section 230 can only proceed on the ground that the plaintiff was *bona fide* in possession of the property which she sues to recover, while here we have a distinct finding of the lower Appellate Court to the effect that "there is an entire "want of evidence as to plaintiff's possession."

1869

UDAI TARA CHOWDRAIN v. KHAJA ABDUL GANI.

We think, therefore, that the Courts below were right in throwing the burden of proof on the plaintiff. Neither in regard to the other ground of objection taken, do we think that the lower Appellate Court erred in law in the reasons which it gave for rejecting the oral testimony of the plaintiff. The Court said that it was of a conflicting nature; that it was hearsay and open to doubt as that of persons who were either interested to speak for the plaintiff or not likely to have knowledge of the facts to which they were supposed to be speaking.

We dismiss this special appeal with costs.

Before Mr. Justice Bayley and Mr. Justice Hobhouse.

PADMA LOCHAN (DEFENDANT) *v.* SIRDAR KHAN (PLAINTIFF.)*

1868 *June* 7.

Remand—Act VIII of 1859, *s.* 148—*Fresh Evidence.*

When a case is remanded by an Appellate Court for a trial under section 148, Act VIII. of 1859, the Court of first instance has no authority to receive new evidence, nor the lower Appellate Court to decide thereupon.

Baboo *Rashbihari Ghose* for appellant.

Baboo *Ananda Chandra Ghosal* for respondent.

BAYLEY, J.—We think that this special appeal ought to be decreed with costs, and the judgment of the lower Appellate Court reversed.

Plaintiff sued for confirmation of ijardari rights, and claimed the lands as rent-paying lands, and sued also for assessment of rents. It is necessary to see whether the lands in dispute were rent-paying lands, and whether plaintiff had evidence on the record to show that he collected rents from these lands. The plaintiff's suit for rent was dismissed on the 27th of April 1867. And upon this dismissal the plaintiff instituted this present suit on the

* Special Appeal, No. 269 of 1869, from a decree of the Subordinate Judge of Tippera, dated the 12th November 1868, affirming a decree of the Sudder Moonsiff of that district, dated the 28th May 1868.