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appeals as the judgments of the District Judge. Under section 372, Act VIII of 1859, a special appeal would lie from any order passed in appeal, unless such order had been declared to be final. There is no provision either in Act XVI of 1868 or in Act VI of 1871, which declares that orders passed by a Subordinate Judge in appeal of cases mentioned in section 102, Act VIII of 1869, B. C., would be final, and the words in the section being "District Judge," a special appeal would lie to the High Court.

Baboo *Nilmadhab Sen* in reply.

The objection was over-ruled.

On the merits Baboo *Hem Chandra Banerjee*, for the appellant, contended that Nabin Chandra Adhikari was not properly made a party to the suit; the suit was for arrears of rent. The only issue which could arise was whether or not the rent was due to the plaintiff—*Jaggadanand Misser v. Hamid Rasul* (1). Since Nabin Chandra was allowed to intervene, the *onus* was upon him to make out his case—*Jaggadanand Misser v. Hamid Rasul* (1) and *Rajah Sahib Prahlad-*

(1) *Before Mr. Justice Bayley and Mr. Justice Macpherson.*

The 12th June 1868.

JAGGADANAND MISSER (PLAINTIFF.) *v.* HAMID RASUL AND OTHERS (DEFENDANTS.)*

Baboo *Nilmadhab Sein* for the appellant.

Baboo *Ramesh Chandra Mitter* for the respondents.

THE facts of the case are fully stated in the judgment of the Court, which was delivered by

MACPHERSON, J.—The plaintiff in this case sues to recover possession of certain property from Hamid Rasul, from whom he alleges that he purchased it.

Hamid Rasul appeared in the Court of first instance, but has not substantially resisted the plaintiff's claim. But Bani Khanum, his mother, has come forward and claimed the property as her own, contending that Hamid Rasul has no interest in it, and therefore could not pass any title in it.

We think it much to be regretted that Bani Khanum was made a defendant in this way. The plaintiff sought no relief as against Bani Khanum, and could not have obtained any decree which would have been binding upon her. Having been admitted as a defendant she must remain there. But the fact of her having caused herself to be introduced as a defendant must not change the *onus* of proof so far as she is concerned, and in our opinion the *onus*, as against the plaintiff,

*Special Appeal, No 2526 of 1867, from a decree of the Principal Sudder Ameen of Gya, dated the 22nd June 1867, affirming a decree of the Sudder Moonsiff of that district, dated the 8th December 1866.

Sen v. Durgaprasad Tewari (1); that if Nabin was at all to be admitted as a party, the lower Appellate Court should have tried the question of title, and not merely tried the question of possession. There is no section in Act VIII of 1869, B. C., corresponding to section 77, Act X of 1859. The only law under which a party could intervene was section 73 Act VIII of 1859. As such, the question of title should have been tried, and the intervener called upon to prove his title. The lower Appellate Court could not, on the appeal of Nabin Chandra, set aside that portion of the decree which did not affect Nabin Chandra.

Baboo *Nilmadhab Sein*, for the respondent, contended that Nabin Chandra was properly made a party defendant. The introduction of Nabin Chandra did not alter the issue in the case,—nameley, whether the relationship of landlord and tenant existed between the plaintiff and the original defendant. It has been found by the lower Appellate Court that Nabin Chandra was in possession, and that is sufficient. He could not be called upon to prove his title for a suit for arrears of rent brought against a tenant; he would not be ousted from possession—*Kunjai*

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is entirely on her, and not on the plaintiff, since the latter has proved his purchase from Hamid Rasul.

In special appeal, it is contended that the lower Court has wrongly received a certain decree of February 26, 1863, (which was subsequent to the plaintiff's purchase from Hamid Rasul) as evidence against the plaintiff.

We think this objection good, for as the plaintiff was no party to the suit, the decree was no evidence against him.

Then it is contended that the lower Court is wrong in the construction it puts on the terms of the kabalas, under which Bani Khanum purchased. In them, she is described as "mother of the minor," Hamid Rasul. We altogether differ from the Principal Sudder Ameen in thinking that this does not show that she

was purchasing not on her own behalf, but on behalf merely of her minor son, Hamid Rasul. We think that the use of this designation is the strongest possible evidence that the purchases were made by her in her capacity of mother and guardian.

We think there has been a substantial error in law in the trial of this case by the lower Appellate Court, and we remand it for re-trial with reference to the above remarks. In trying it, the Principal Sudder Ameen will bear in mind that the whole *onus* is on the intervenor, Bani Khanum, who must prove distinctly that she purchased for herself, and not in her capacity of mother and guardian of Hamid Rasul.

(1) 2 B. L. R., P. C., 128.; S. C., 12 Moore's I. A., 331.

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Sahu v. Guru Baksh Koer (1). The *onus* is on the plaintiff to prove his possession, and not upon the intervenor. Nabin

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(1) *Before Mr. Justice Glover and Mr. Justice Hobhouse.*

The 22nd April 1870.

KUNJAL SAHU AND OTHERS (PLAIN-
TIFFS) v. GURU BAKSH KOER AND
OTHERS (DEFENDANTS).*

Mr. C. Gregory and *Baboo Nilmadhab Sein* for the appellants.

Baboo Chandra Madhab Ghose for the respondents.

GLOVER, J.—The plaintiffs are the special appellants before us. The suit was for confirmation of their possession and for registration of their names in respect of 5 dams of a certain estate situated within the two districts of Monghyr and Behar, Mauza Ruhooa, Chuck Ruhooa. Their cause of action is stated to have been a disturbance of their possession by the defendants Jhati Koer and others interfering with the plaintiff's collection of rent, and the date of this disturbance of possession is alleged to be Kartik 1276 (October 1869.)

The original defendant Jhati Koer denied the execution of the deed of sale under which the plaintiffs claimed title to the land; and another party Guru Baksh, who came in and intervened, and who was made a defendant in the suit by the Court of first instance under section 73 of the Civil Procedure Code, stated that the land was his; that he was in possession of the same; and that the parties through whom the plaintiffs claimed had no right or interest whatever in the property.

The Court of first instance found that the plaintiffs' kabala, dated 11th Chaitra 1220 (23rd March 1814), was proved; that the ikrarnama had been given by the ancestors of the first set of defendants, that is, Jhati Koer and others, in 1224 (1817)

confirming the sale; that mutation of names had taken place so far as regards one portion of the property, the portion that is situated in the district of Monghyr; and that the evidence of the witnesses, including that of the *patwari* of the estate, and the documentary evidence in the shape of receipts, *kabuliats*, and *zemdari* papers, showed conclusively that ever since the date of their kabala, the plaintiffs had been in possession of the disputed land.

The Subordinate Judge, on appeal, affirmed the judgment of the first Court so far as related to the land situated within the district of Monghyr. He held that the deeds of sale and *ikrar* filed by the plaintiffs were proved; and he came to this decision on the ground that the plaintiffs had shown continuous possession ever since the date of their deed of sale. With reference, however, to that portion of the land which was situated within the Behar district, he considered that there was no sufficient proof of the plaintiffs' possession; and that, although the deed of sale was a very old document, and in some respects proved itself, yet it was necessary to test its genuineness by evidence of possession. That evidence he considered unsatisfactory, the testimony of the witnesses being conflicting and unsupported by further documentary evidence. The result, therefore, of the appeal was that the plaintiffs got a decree for confirmation of their possession as regards the Monghyr property, and that their suit was dismissed in respect of the Behar portion of the estate.

Both parties have appealed against this judgment. In the present case, we have to deal only with the appeal of the plaintiffs. Their grounds of special appeal are three: *first*, that Guru Baksh ought not to have been made a party to

* Special Appeal, No. 2386 of 1869, from a decree of the Subordinate Judge of Bhaugulpore, dated the 12th July 1869, modifying a decree of the *Moonsiff* of that district, dated the 8th March 1869.