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defendant to prove that these lands are lakhiraj ; the *onus* is upon the plaintiff, as it has been frequently stated in numerous decision of this Court ; the *onus* is on the plaintiff to prove that these lands are *mál* lands, and that they have been paying rent. At the same time, to prevent the ryots from merely setting up this plea without any evidence at all that they hold any lakhiraj lands, the Courts have been accustomed to require the defendants to show, by some *primâ facie* evidence, that they do hold lakhiraj lands.

In this case the defendant has put in kabalas and extracts fron the lakhiraj register, which are such sufficient *primâ facie* evidence as is required. We think the Judge is wrong in saying that it is not *primâ facie* evidence ; and it is evident from the reasons that the Judge gives for so holding, that he makes no distinction between *primâ facie* evidence and complete and conclusive evidence

We are obliged, therefore, to reverse the decision of the Judge in this suit, in so far as it affects the lands which the defendant claims as lakhiraj ; and as it appears from the decision of the Judge that the plaintiff has not proved that these lands are *mál*, we decree this appeal, and dismiss the plaintiff's suit as far as it refers to these lands.

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

COLVIN, COWIE, AND OTHERS (PLAINTIFF) *v.* MRS. BARBARA OWEN JULIA ELIAS AND OTHERS (DEFENDANTS.)*

Plaint—Act VIII. of 1859, s. 246 —Claim—Declaratory Decree.

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Jany. 13.

An Appellate Court is competent at any stage to allow objections to be taken to an apparent defect in the plaint.

Held, that a party against whom an order has been obtained under section 246, Act VIII. of 1859, must, if he sue for its reversal, assert sabstantially the same right as that which has been contended for in the execution.

Held, by JACKSON, J., that in a suit for declaration of title, defendants must have given a cause of action, by impugning it antecedently to plaint filed even thought their written statement be hostile.

The *Advocate-General* and Baboo *Ashutosh Dhur* for appellants.

* Special Appeal, No. 2204 of 1868, from a decree of the Judge of East Burdwan, dated the 21st May 1868, reversing a decree of the Principal Sudder Ameen of that district, dated the 19th February 1868.

Mr. *G. C. Paul* for respondent.

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The facts of the case and the arguments of counsel sufficiently appear in the judgment of the Court delivered by

JACKSON, J.—This was a suit, on the part of the Land Mortgage Bank, as described in both the lower Courts, for the establishment of a putni right, that is, as I take it, for a declaration of the plaintiffs' putni right in the property sued for, by setting aside an order admitting a claim, which was a claim preferred and disposed of by the Court under section 246 of the Code of Civil Procedure in execution of a decree obtained by the Land Mortgage Bank. It appears that the Bank had taken a mortgage of putni talook obtained by Chandra Kant Chuckerbutty from Mrs. Elias, and had recovered two decrees against the mortgagor,— one for rent, and another for the sum advanced upon the mortgage ; that, in execution of the rent-decree, the Bank had obtained an attachment of the property in dispute, which consists of a two-storied house in one of the villages comprised in the putni, with a garden in which the house is situated ; and that, in attaching the property, it was described as the lakhiraj property of the judgment-debtor. Thereupon the zemindar, Mrs. Elias, presented a petition of claim, alleging the property to be in her possession as her hereditary lakhiraj. That claim was allowed, and the present suit was brought within one year of such allowance, upon a new allegation that the house and garden were comprised within the putni granted to Chandra Kant, and upon which the Bank held a mortgage. The plaintiffs asked for a declaration of their title as mortgagees of the putni and asked for a reversal of the order passed under section 246.

The suit was tried in the Court of the Principal Sudder Ameen, who considered that the putni did comprehend the premises and garden in question, and gave the plaintiffs a decree. On appeal to the Zilla Court, the Judge considered, both upon the terms of the putni, and also upon a consideration of the conduct of the parties, and all the circumstances of the case, that the plaintiffs had not succeeded in proving that the putni

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on which they held the mortgage included the disputed house and garden; and that, consequently, the plaintiffs were not entitled to a decree declaring the same to be included in the putni. Against this decision the plaintiffs have appealed specially. They contend, first, that the Judge has wrongly construed the putni potta; and secondly, that the Judge has omitted to consider a certain letter of Mrs. Elias to the lessee, Chandra Kant, whereby there has been a defect in the investigation which has produced an error in the decision on the merits.

Mr. Paul, who appeared for the respondent has argued the negative of these propositions, and has also contended that in point of fact the plaintiffs in this case had no cause of action, and that, however the question of title may stand, the plaint, as it was framed, ought to have been dismissed.

Speaking for myself, I am inclined to think that the latter contention of Mr. Paul has considerable force; and if it were necessary for the purposes of this case, I should be inclined to hold that there was no cause of action, and the suit ought to be dismissed, although that point is now taken before us for the first time in the proceedings. It is a defect apparent in the plaint, and one which the Court of first instance ought of itself to have taken up, and which, therefore, the Appellate Court in any stage, is I think, competent to act upon. It will be observed that the suit is described doubly: first, as a suit for a declaration of title; and, secondly, as a suit to get rid of an order passed under section 246. Looking at the nature of the claim set up in the execution proceedings as compared with the title now set up by the plaintiffs, the learned Advocate General, who appeared for the special appellant, felt the difficulty of contending that this was really a suit such as is provided for in the concluding clause of section 246, namely, a suit to establish the right of the party unsuccessful under that section. It was, I think, fairly admitted that the right to be established in such a suit must be, substantially, the same right as that for which the party had contended in the execution. The learned Advocate General, therefore, desired to set aside that portion of the plaint, and to deal with the suit as simply a declaratory suit; and if the suit is so regarded, it immediately becomes of importance to

ascertain whether there was any cause of action such as entitled the plaintiffs to the declaration which they sought. It seems to me there was no such cause, because the defendant had never, by any act of his, impugned or disturbed the title which the plaintiffs are setting up in the present suit. Indeed, I may add that the defendant did not commit any act prejudicial to the plaintiff's title. All that she did was to oppose and dispute the allegation on the part of the plaintiffs that they were entitled to sell this property by reason of its being the lakhiraj property of the judgment-debtor; and it may very well be that, if the plaintiff had sought in those proceedings to sell this property as being comprised within the putni, the defendant would not have opposed that application. It has been held in a former case *Kenaram Chuckerbutty* v. *Denonath Panda* (1), with my entire concurrence, that the answer of the defendant to a suit of this nature, though it may be hostile to the plaintiff, will not give the plaintiff a cause of action, or justify the bringing of the suit; and I should hold that, to justify the institution of the suit, the hostile act of the defendants must be antecedent to the filing of the plaint, and not subsequent to it.

Although I take this view of the case, it is not necessary to decide it on that ground; and, in fact, I prefer to decide on the merits. Although, undoubtedly, the Judge has adverted to other considerations, I think there can be no doubt that he has looked at the conduct of the parties, and the whole of the evidence in the cause. We are bound to assume that he has done so, and we are specially bound to do so, when the particular evidence referred to is one which has been commented upon by the Judge of the Court below. It is not in the least likely that such evidence should have escaped the Judge's attention, nor is it to be presumed that he has failed to give proper weight to the observations of the lower Court upon that evidence. That being so, we should not be competent to set aside the verdict of the lower Appellate Court upon the facts of the case. But I may go further and say that, so far as we are at liberty to look at the evidence on the record, the Judge has come to a correct conclusion.

(1) 9 W. R., 325.

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The terms of the putni potta, I think, are not such as we ought to construe as a demise of the premises in dispute; and if the putni potta be not explicit upon this point, I certainly think that we ought not to draw any conclusion favorable to the plaintiffs upon letters and proceedings of so ambiguous a nature as those upon which they rely, especially when it is considered that the suit is not one to recover possession, but to obtain a declaration of an abstract title.

I think that, before a Court of Justice could give the plaintiffs a decree of that nature, it ought to be quite clear that the defendant had really included the premises in dispute in the case which she granted. On all these considerations, therefore, I think that the decision of the lower Appellate Court must be affirmed with costs.

HOBHOUSE, J.—I think that on the grounds taken by the special appellant in this case, we cannot admit the special appeal; because, as Mr. Justice Jackson has put it, I think that we cannot say, on the first ground taken, that the lower Appellate Court has not rightly construed the putni potta. Neither can we, on the second ground, say that the Judge has omitted to consider the letter in question, or the conduct of the parties as set forth by that letter; for, by the other proceedings on the record, we find that the Judge expressly mentions that letter, and that, in another part of his judgment, he expressly comments upon the conduct of the parties, namely, upon the conduct of the present plaintiffs in the execution proceedings for the money-decree. In this view I concur in dismissing the special appeal with costs.

I refrain from giving any opinion upon the point taken in cross-appeal by Mr. Paul, for upon that point I am not quite sure that I can agree with Mr. Justice Jackson.