which her rights had been so usurped, is not **now** a question before us. A competent Court seems to have • held that she was so entitled, and the inference is that the plaintiff's loss is the consequence of his own blunders only. At the worst, the money **must** be assumed to be in the hands of the Court which appointed the receiver, and that Court will know to whom it ought to be paid.

The appeal is decreed, and the judgment of the Lower Appellate Court is reversed with costs.

The 2nd September 1865.

* *Present:*

J h e Hon'ble C. Steer and J. B. **Phear,** *Puisne "Judges,*

Registration—Priority.

Case No. 1510 of 1865.

Special Appeal from a decision passed by Moulvie Itrut Hossein, Principal Sudder Ameen of Sarun, dated the 16th March 1865, modifying a decision passed by the Sudder Ameen of that District, dated the nth January 186$.

Syud Furzund Ally and others (Plaintiffs), *Appellants,*

versus

Syud Abdool Ruhim and others (Defendants), *Respondents.*

Mr. C. Gregory and *Baboo Kissen Succa Mookerjee* for Appellants.

Mr. R. E. Twidale and *Baboos Dwarkanath Milter* and *Sreenath Doss* for Respondents.

Act XIX. of 1843 does not give a registered kubala **priority over a prior unregistered mortgage under which enjoyment has actually taken** place.

THE plaintiff sues to recover land, as purchaser, from one Abdool Ruhim, under a deed of sale made on the 4th September 1863.

The defendant is in possession, as he alleges, under a deed purporting to be a conditional sale by way of mortgage made by the same Abdool Ruhim on the 1st August 1862 ; and the defendant further fortifies his position by the production of a bond, purporting to be made on 26th August 1863 by Abdool Ruhim, and to pledge the same property to the defendant as security for a debt.

The Lower Appellate Court finds both the instruments put forward by the defendant to be genuine, and decrees that the plaintiff is only to obtain possession upon discharging the encumbrances created by them.

Against this decision the plaintiff appeals specially on the grounds—*first,* that the Lower Appellate Court has assigned reasons for holding the mortgage genuine and valid which are not sufficient in law; *secondly,* that, as the mortgage in question was never registered, while the kubala of the 4th September was so, Act XIX. of 1843 gives priority to the latter, and, therefore, the mortage ought not to have had effect given to it.

We are of opinion that there was ample evidence before the Lower Appellate Court upon which it could find the mortgage genuine; and we see no reason for supposing that it did not consider all the evidence bearing on the point. Therefore we consider the first objection untenable.

We are also of opinion that Act XIX. of 1843 does not apply to a case where enjoyment has actually taken place under the first deed.

Under these circumstances we dismiss the appeal with costs.

The 4th September 1865.

Present ':

The Hon'ble H. V. Bayley and E. Jackson, *Puisne Judges.*

Chowkeedaree Chakeran lands—Onus probandi.

Case No. 1885 of 1865.

Special Appeal from a decision passed by the Principal Sudder Ameen of Beerbhoom, dated the 31st March 1865, modifying a decision passed by the Moonsiff of that District, dated the 31st August 1863.

Mooktakeshee Debia Chowdhrain (Plaintiff), *Appellant,*

versus

The Collector of Moorshedabad and others (Defendants), *Respondents.*

Baboos Sreenath Doss and *Tarucknath Sein* for Appellant.

Baboo Kishen Kishore Ghose for Respondents.

Long possession of lands as chowkeedaree chakeran affords ground for the presumption that the lands were set apart as such at the Decennial Settlement.

The *onus* of proof that the lands were the private lands of the zemindar not set apart at the Decennial Settlement as chowkeedaree chakeran, is on the zemindar.

This is a suit to obtain possession of 17 beegahs 18 cottahs of land, which the plaintiff alleges to belong to his mal lands, but which are in the" possession of the chowkeedar of the village as his chakeran lands. The plaintiff further states that these lands were formerly in the possession of his hulshana, or private servant, but that in some way (he does not know how) they have come into the possession of the chowkeedar. The Government, who represent the chowkeedar, allege that the lands have always been chowkeedaree chakeran lands; and that, under the precedent of Joy Kishen Mookerjee's case determined by the Privy Council, whose decision is reported at page 26, Vol. I., Weekly Reporter, such lands canhot be taken possession of by the zemindar.

The first Court decreed' the claim, holding that the lands were not chowkeedaree chakeran lands, but were the private lands of the zemindar, which had been appropriated by him to his private servant, the hulshana.

The Principal Sudder Ameen on appeal held that, though the lands appear to have been formerly the chakeran lands of Golucknath Hulshana, still, police chowkeedars being afterwards appointed in his place, the said lands can no longer be styled as the chakeran lands of the hulshana. They are now properly the chakeran lands of the chowkeedar. But, as it appeared from an old document of the year 1226 that the extent of the lands so appropriated was then only 10 beegahs 6 cottahs, the Principal Sudder Ameen confirmed the decree of the first Court as respects 7 beegahs 12 cottahs, and reversed it as respects the 10 beegahs 6 cottahs, to recover which he dismissed the plaintiff's claim.

It is said in special appeal that, if these lands belonged to the hulshana in 1226, as the document above alluded to distinctly states that they did, it is clear that they did not belong to the chowkeedar; and, as the Government cannot prove that at the time of the Decennial Settlement the lands were appropriated to the chowkeedar, the zemindar is at liberty to resume and take possession of them.

Looking to the Privy Council precedent of Joy Kishen Mookerjee's case, we think that, even giving the document of 1226 full weight, that document does not in any way clearly prove that these lands were not then what they now admittedly are, and what they have been for a long series of years, *viz.*, the chowkeedaree chakeran lands. The *onus* of proof that the lands were the private lands of the zemindar not set apart at the Decennial Settlement for the maintenance of the chowkeedar, rests on the plaintiff, the zemindar. It is not for the Government to prove they were then ser apart as chowkeedaree lands. The presumption from the facts admitted in this Case, more especially the long possession of the lands as chowkeedaree chakeran by the chowkeedar, is that the lands were set apart at the Decennial Settlement for the chowkeedar. Has, then, the zemindar provred that these lands at the Decennial Settlement were his private lands ? He produces no evidence whatever to prove what description of lands they were at the Decennial Settlement. But he produces a document to show that, thirty years after the Decennial Settlement, they are described in a public. record as hulshana lands. It is not clear by whom this record was made; and it is doubtful how far the statements made in it bind the Government. But it is clear from the facts proved in Joy Kishen Mookerjee's case that the hulshana (or *mdl paik)* and the chowkeedar were frequently the same person, who performed both duties. The circumstance that the man who held them was described as a hulshana in 1226 is not conclusive that he performed only the duties of a hulshana, and not also those of a chowkeedar, the more so as we find that the chowkeedar has been in possession of them ever since. We think that this is the intent of the Principal Sudder Ameen's judgment, though it is not as distinctly worded as it might be, and, therefore, we think that that judgment is correct. Indeed, if the judgment was not to this effect, and it had been held by the Principal Sudder Ameen upon the strength of this document of 1226 that the lands were exclusively devoted to the zemindar's private hulshana at the Decennial Settlement, we think that such a judgment would have been open to revision on special appeal, on the ground that the document was not sufficient evidence of the fact, and that it did not follow that, because the lands were described by some one as hulshana lands in 1226, they were not also at that time chowkeedaree lands, when they are now, and have been for many long years, chowkeedaree chakeran lands.

We think we ought not to interfere with the decision of the Lower Court, and dismiss this appeal with costs.