

Then as to the ground of the plaintiffs' suit, it is not contended that they had by inheritance any claim to share in Brij Beharee Lall's estate. On the contrary, they claim their shares on the ground that the defendant had contracted with them by an ikrarnamah to give them part of the estate, in consideration of their having given up to him a share in his natural father's property; and they date their cause of action from the date on which they say that that ikrarnamah was denied by the defendant Nundun Lall's refusal to register it. They make no mention in any part of their plaint of any other right except that given to them by Nundun Lall under the agreement. Moreover, if the plaintiffs do not sue on their contract, we fail to see what was their ground of action, or what right they had to bring a suit at all; they could only succeed in obtaining an interest in the land by proving the contract—the one thing was a condition precedent to the other.

It was contended further, though the argument was not much pressed, that the plaintiffs alleged themselves to have been in joint possession with their brother of Brij Beharee Lall's property, and that the Judge ought to have determined this question of fact whether the defendant's possession from the dates of Brij Beharee Lall's and of his widow's deaths was joint or separate.

But we find that the plaint most distinctly states that the defendant No. 1 was in possession, and that the plaintiffs never held possession of the disputed property. No doubt one of the plaintiffs' vakeels, in answer to the question put to him nearly a year after the suit was instituted, stated generally that all the brothers were in possession; but this answer was in direct opposition to the terms of the plaint, and altogether inconsistent with the relief which the plaintiffs sought.

Lastly, it is urged that the Judge ought to have taken the ikrar as evidence of the contract, but this ikrar not being registered was not receivable in evidence. This point has been ruled by the Full Bench decision of this Court, dated 7th August 1868, 10 Weekly Reporter 51.

On the whole, therefore, and after considering all the arguments urged, we are of opinion that this was substantially a suit on a contract to which the limitation fixed by Clause 9, Section 1, Act XIV. of 1859

applies; that the defendant Nundun Lall was in a position to fulfil that contract on the deaths of Brij Beharee Lall and Anundo Koer respectively; and that the plaintiffs' suit, not having been brought within three years of the dates of those deaths, is barred by limitation.

The appeal is dismissed, and the Judge's order affirmed with costs.

Kemp, J.—I am of the same opinion. The plaintiffs had no title whatever in the estate claimed, which was the estate of Brij Beharee Lall, and to which the defendant Nundun Lall has succeeded as the adopted son of Brij Beharee Lall. The plaintiffs' title, if any, is under the agreement of the 1st Bhadro 1270. Nundun Lall, on the death of Brij Beharee Lall, took possession of the estate of his adopting father. From that time, Nundun Lall was in a position to perform his part of the alleged contract between him and the plaintiffs. If he did not do so, the cause of action to the plaintiffs accrued to them from the time that Nundun Lall refused to perform his part of the alleged agreement; and as more than three years had expired between the date the defendant Nundun Lall took possession of the estate of Brij Beharee Lall, and the date on which this suit is brought, it is, in my opinion, clearly barred under the provisions of Clause 9, Section 1, Act XIV. of 1859.

The 7th June 1869.

Present:

The Hon'ble H. V. Bayley and C. Hobhouse,
Judges.

Remand—Section 148, Act VIII., 1859.

Case No. 269 of 1869.

Special Appeal from a decision passed by the Subordinate Judge of Tipperah, dated the 12th November 1868, affirming a decision of the Sudder Moonsiff of that District, dated the 28th May 1868.

Puddo Lochun (Defendant), *Appellant,*
versus

Sirdar Khan (Plaintiff), *Respondent.*

Baboo Rash Beharee Ghose for Appellant.

Baboo Anund Chunder Ghosal and Kalee Kishen Sein for Respondent.

When a case is remanded to be re-tried under the terms of Section 148, Act VIII., 1859, a Court is not justified in taking, and determining on, any evidence not on the record at the time of remand.

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 *ijaradaree* rights, and claimed the lands as rent-paying lands; he 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 allegation that he had been dispossessed.

On the 10th of September 1867 he was ordered to produce his witnesses, and the 1st of November was fixed as the date of hearing. But as on that day, which was the fourth day after the re-opening of the Court, neither plaintiff nor his pleaders appeared, the case was dismissed agreeably to Section 114, Act VIII. of 1859.

An application was then made under Section 119 of the said Act for a new trial on the ground that Section 114 did not strictly apply to the present case.

The re-trial was refused, and the case was again dismissed, but the Judge, on appeal, directed a determination to be come to under the provisions of Section 148.

Then after remand for this purpose, new witnesses and new documents were produced, and the suit of the plaintiff was again dismissed.

In dissatisfaction of this decree of the first Court, an appeal was preferred to the Judge, and the Judge decreed the appeal of the plaintiff, and reversed the decision of the first Court.

The grounds taken in special appeal against the decision of the Lower Appellate Court are, *1st*, upon the plea of limitation, the Lower Appellate Court has erroneously placed the burthen of proof upon the defendants; and, *2nd*, that the Lower Appellate Court had not the authority to decide the case upon documents admitted subsequent to the completion of the record, contrary to the provisions of Section 148, Act VIII. of 1859.

The Lower Appellate Court's judgment is erroneous, and must therefore be reversed.

The case was remanded to be re-tried under the terms of Section 148, Act VIII. of 1859, which is as follows: "If either party to a suit to whom time may have been granted shall fail to produce his proofs, or to cause the attendance of his witnesses, or to perform any other act for which time may have been allowed, the Court shall proceed to a decision of the suit on the record, notwithstanding such default."

The words of the law are that the Court shall proceed to a decision of the suit on the record, and not that the Court may proceed to a decision of the suit; and consequently the Court was not justified in taking and in determining on any evidence not on the record when the case was remanded, and such evidence must, therefore, be taken as if it had no existence.

It would then ordinarily be necessary to remand the case in order that the Judge might come to a finding on any other evidence legally on record. It is pointed out to us, however, that there is no evidence, other than that taken after remand, on the record in support of plaintiff's case. We have ascertained that the fact is so, and it is, therefore, unnecessary to remand the case, and it remains only to dismiss the plaintiff's suit, and see this special appeal with costs of all Courts.

The 7th June 1869.

Present:

The Hon'ble H. V Bayley and C. Hobhouse, Judges.

Survey proceedings—Cause of action—Objection.

Case No. 2849 of 1868.

Special Appeal from a decision passed by the Judge of Dacca, dated the 30th June 1868, affirming a decision of the Moon-siff of Bhangah, dated the 14th December 1866.

Soodukhina Chowdhraïn (one of the Defendants), Appellant,

versus

Issur Chunder Mojoomdar (Plaintiff), Respondent.

Mr. G. C. Paul and Baboos Romesh Chunder Mitter and Sreenath Doss for Appellant.