

(1869) 03 CAL CK 0008

Calcutta High Court**Case No:** Regular Appeals Nos. 182, 184, 198 and 213 of 1868

Saradamayi Chowdhraïn

APPELLANT

Vs

Nabin Chandra Roy Chowdhry

RESPONDENT

Date of Decision: March 18, 1869

Judgement

Norman, J.

These are suits or proceedings u/s 230 of Act VIII of 1859. The plaintiffs in the several cases above mentioned, allege that Nabin Chandra Chowdhry, having obtained a decree against the Government for possession of certain jalkars, proceeded, in execution of that decree, to take possession of fisheries, of which they severally were in possession, describing them by boundaries. They allege that these fisheries had always belonged to them; that they were not parties to the decree obtained by Nabin Chandra, and, therefore, pray to be restored to possession. One judgment was delivered in all the cases. The Judge says, a good deal of evidence has been taken, the result of which has been to show that there are diversities of claims amongst the plaintiffs themselves, each and several claiming possession of the same portions of the fisheries, and all the claims are pretty equally supported by both oral and documentary evidence. It behaved each party complaining of dispossession under the decree to show, to the satisfaction of the Court, that the property of which he had been dispossessed was bond fide in his possession, and this could never have been done by several parties complaining of dispossession of the same property to which they laid adverse claims. He adds, I believe that when the several applicants petitioned u/s 230, they had no personal knowledge whatever of the state of the said fisheries, or that their interests in them were conflicting or adverse to any one but the decree-holder. He dismisses all the suits, leaving the several plaintiffs to their remedy by suit. We are of opinion that this decree cannot stand. The effect of the decision is to put all the several claimants out of possession, without any determination of the question, whether they were in possession or not at the date of the execution,--to leave the decree-holder in possession, and give him the immense advantage of being able to throw upon his adversaries the burden of

proof, not of previous possession, but of title.

2. The nature of the point to be decided between each claimant and the decree-holder is not in any way affected, because there are many claimants, as will be evident from a practical illustration. Suppose a person in possession of a house is dispossessed in execution of a decree against a third person to which he is no party. It is clear that his right to be restored to possession u/s 230, cannot in any way be affected, because in a similar proceeding, another person falsely alleges that he was in possession of the whole house, or truly alleges that he was in possession of a part of it. Would the Judge say that, because such a claim is made by another, a man in rightful possession may be turned into the street and left homeless, till, perhaps in twelve months' time, a suit to recover possession can be heard, and finally decided on appeal.

3. The Legislature may properly make the party alleging dispossession a plaintiff in the proceeding, thereby throwing on him the onus of proving his possession. If he fails to prove, to the satisfaction of the Court, that he was in possession, his claim must be dismissed, and he will be left to his remedy to establish, not his possession, but his title by an ordinary suit in the Civil Court. The 230th section does not appear to us to contemplate the adjudication of any question between adverse claimants. It is easy to put cases where two several parties have been in possession of the same property, of which they cannot be deprived in execution of a decree against a fourth person. In such cases each might be entitled to a decree, declaring what his possession was, and that he is entitled to be maintained in it, notwithstanding the proceedings in execution.

4. The question in each case is perfectly simple, and each case should have been tried by itself. If the claimant was in possession, though without a good title, he cannot be dispossessed in execution of a decree against a third person to which he was no party. On the other hand, if the party against whom the decree was obtained was in possession, though without a good title, it is clear that, in execution of a decree, the person, who is declared to have acquired the rights of the party actually in possession, is entitled to be placed in the same position as the party whose rights he has acquired; and no person, not in actual possession or receipt of rents, can come in u/s 230 to resist the execution of the decree. He must, like any other person out of possession, be left to enforce such right as he has in a regular suit. With all respect for an opinion which seems to have been expressed by Mr. Justice Mitter in *Ajoo Khan v. Kristo Pershad Lahoory* (8 W.R., 477), it appears to us that the question u/s 230 is not properly a question of title, though in a case of the claim of an incorporeal right, such as that of fishery, evidence of possession might be to some extent evidence of title. The Judge very rightly says that Section 230 provides only for disputes between the decree-holder and the party dispossessed under the decree. In cases, like the present, the sole questions u/s 230 are: Was the claimant really and bond fide in possession of the fisheries claimed at the time of the

execution of the decree? Was he dispossessed by the decree-holder in execution of the decree? It is suggested by the vakeels on both sides that the whole of the evidence has not been taken, and we, therefore, remand the cases to the Judge for the trial of the above-mentioned two issues. The Judge will try the issues and return to this Court his finding thereon, together with the evidence.