

a question of right was raised and determined in that suit, and that such a question is not one cognizable by a Court of Small Causes. We think however, on a perusal of the plaint itself and on the understanding between the parties as represented by the statements on record as to the point at issue, that no question of right was determined, and that though such a question was raised, yet it was simply raised incidentally in order to the determination of the question of damages. The plaintiff did not sue to have his right established to a particular share in the land from which malikana was derived. He simply asserted that share, and then claimed to recover the money due in reference to that share. And the case seems to us to be clearly of the nature contemplated by the decision of the Full Bench, on which the pleader for the special respondent relied (1). The suit was in fact a suit to recover a certain sum of money, and a question of right was simply raised as a question incidental to the question of the recovery of the money. We think therefore that the provisions of section 27, Act XXXIII of 1861, bar a special appeal in this case, and we therefore dismiss this appeal with costs.

1869.

LASMANI  
DEBIA  
MAHOMMED  
HAFIZULLA

*Before Mr. Justice Bayley and Mr. Justice Hobhouse.*

ISWAR CHANDRA CHUCKERBUTTY (ONE OF THE DEFENDANTS)  
v. BISTU CHANDRA CHUCKERBUTTY (PLAINTIFF.)\*

1869  
June 8

*Sale—Suit for Possession—Grounds of Decree—Act VIII. of 1865, B. C.  
s. 16—Incumbrance.*

At a sale held under Act VIII. of 1865, B. C., the defendant purchased a shikmi tenure, and obtained possession thereof. Subsequently he ousted the plaintiff from certain lands, and hence the suit by the plaintiff for recovery of possession thereof, on the ground that property in dispute was a lakhiraj tenure created by the Raja of Tippera, and that the plaintiff was owner thereof, partly by purchase and partly by inheritance. The lower Appellate Court found as a fact that the late shikmidar and not the Raja had granted the lands in dispute as bramatar, but not in favor of the person through whom the plaintiff claimed. It however passed a decree in favor of the plaintiff, as he had been unlawfully dispossessed.

*Held*, that the plaintiff having failed to prove the case as set up by him and upon which he claimed, cannot be entitled to a decree upon grounds other than those stated in the plaint.

*Held*, that under section 16, Act VIII of 1865, the incumbrances created by the former holder was voidable by the auction purchaser, and that the plaintiff should show that the former holder could create such right.

*Baboo Nalit Chandra Sen for appellants.*

*Baboo Kalikrishna Sen for respondent.*

\* Special Appeal, No. 330 of 1869, from a decree of the Subordinate Judge of Tippera, dated the 13th November 1868, reversing a decree of the Moonsiff of that district, dated the 6th June 1868.

(1) Case referred to High Court from Small Cause Court of Kishnaghur; Aug. 26th, 1863.

1869

ISWAR CHAN-  
DRA CHUC-  
KERBUTTY  
v.  
BISU CHAN-  
DRA CHUC-  
KERBUTTY.

**HOBHOUSE, J.**—In this case the plaintiff sued to recover certain lands on the following allegation. He said that the lands were lakhiraj bramatar lands within the defendant's shikmi talook; that they had been created as such lakhiraj by the Raja of Tippera, the zemindar of the talook, in favour of one Pranballab, and that he, plaintiff, partly by inheritance and partly by purchase, had become the possessor of the said lands. The plaintiff then went on to say that, on two certain dates which he specified, the defendant, who was the auction-purchaser, under Act VIII. of 1865, B. C., of the under-tenure in which the lands were situated, had ousted him of the lands by causing a certain bamboo to be put up, and a certain demarcation to be made by the peon who went to give the defendant possession of his purchased property.

The defendant denied that the tenure in question was a lakhiraj tenure of any kind, and on the issue as to whether or not the disputed land was the plaintiff's lakhiraj property, as alleged by him, the first Court found against the plaintiff, and dismissed his suit.

The lower Appellate Court found the following facts. First of all, the Court found that the tenure in question was not proved to be a lakhiraj tenure created in the manner set up by the plaintiff; and, secondly, the Court found that the talookdar, one Gopinath, whose rights the defendant had purchased at auction, had granted a lakhiraj of the disputed bramatar lands of the talook not to Pranballab, as set up by the plaintiff, but to one Kasinath and, thirdly, the Court found that Kasinath had been for a very long time in possession of the disputed lands by virtue of his "lakhiraj."

Having found these facts, the lower Appellate Court gave the plaintiff a decree not upon his title, but on the ground that he had been unlawfully dispossessed by the defendant, and that he was therefore unquestionably entitled to get possession until ousted by due course of law.

Now, upon the plaintiff's own averments in his plaint, it is quite clear that there was no unlawful dispossession. The defendant was an auction-purchaser of the shikmi tenure, and in furtherance of his purchase he had possession given to him by an officer of the proper Court in the usual manner, and it was not any forcible ouster which was the plaintiff's cause of action, but that cause of action was the possession given by an officer of the Court in the manner I have above described. It is clear therefore that, on the grounds on which the lower Appellate Court has based its judgment, that judgment cannot stand. But the special appellant further contends that upon the finding of fact of the lower Appellate Court the plaintiff's suit absolutely fails; and we think that this contention is good in law. The plaintiff claimed to be put in possession of the lands in question as a bramatar tenure, created by the Raja of Tippera, the proprietor of the talook, in favor of one Pranballab. The lower Appellate Court has found as a fact that the tenure was not so created, and this being so it is evident that the plaintiff's case as set up by himself, the case on which he claimed the lands, and on which alone he claimed them, altogether

fails. We think therefore that, on this ground alone, the plaintiff's suit is liable to be dismissed. But there is another ground on which it is equally liable to be dismissed. The lower Appellate Court has found as a fact that whatever title the plaintiff had, he derived from one Gopinath, the shikmi talookdar. If this incumbrance created by Gopinath is a legal incumbrance as against the special appellant, then if the defendant had not had any other ground to fall back upon, it is possible that the plaintiff's suit might still have been decreed; but the law, section 16, Act VIII. of 1865, B. C., distinctly provides that "the purchaser of an under-tenure sold under this Act, shall acquire it free of incumbrances which may have accrued thereon by any act of any holder of the said under-tenure, his representatives or assignees, unless the right of making such incumbrances shall have been expressly vested in the holder by the written engagement under which his under-tenure was created, or by the subsequent written authority of the person who created it, his representatives or assignees."

1869

ISWAR CHAN-  
DEA CHUC-  
KERUTTY  
v.  
BISU CHAN-  
DEA CHUC-  
KERUTTY.

Now here, as we understand it, the defendant is an auction-purchaser under this particular Act. The lakhiraj incumbrance is found to have been created by the previous holder of the under-tenure, and it is not shown to us that that holder was in anywise authorized under the law quoted to create such an incumbrance.

This being so, we think that on the other ground also the plaintiff's suit was liable to dismissal, *viz.*, that he was an incumbrancer placed there by a person who had no authority to place him there, and whose acts at once became voidable when the defendant purchased the under-tenure.

In this view of the case we think that the judgment of the lower Appellate Court must be reversed, and the judgment of the first Court restored and affirmed. This special appeal is accordingly decreed with all costs of this Court and of the lower Appellate Court.

*Before Mr. Justice Loch and Mr. Justice E. Jackson.*

UMES CHANDRA ROY AND OTHERS (PLAINTIFS) v. SHASTIDHAR  
MOOKERJEE AND OTHERS (DEFENDANTS)\*

*Rent—Mesne Profits.*

1869

June 11

When a decree-holder obtains possession of an estate in execution, he is not at liberty to sue the ryots for rents falling due before the date of his taking possession. His proper course is to sue the late wrongful possessor for mesne profits including the rents.

THE plaintiff after obtaining a foreclosure decree obtained possession of an estate. The last instalment of rent for the year 1273 (February 1867) fell due the same month. Sometime afterwards the plaintiff sued the ryots for

\*Special Appeal, Nos. 3279 to 3282 of 1868, from the decrees of the Judge of Rajshahye, dated the 15th December, 1868, affirming the decrees of the Deputy Collector of Kumarkhali, dated the 18th June 1868.