In this view I would dismiss this appeal with costs.

1869

H BHOUSE, J-I agree that this special appeal must be dismissed. The AMANAT AL material facts are these: - The defendant applied under section 25, Act X. CHEWDHRY of 1859, to obtain assistance to eject the present plaintiff, The plaintiff, at $_{\text{Nusern All}}^{v}$ the hearing of the application, set up certain pottas, and the defendants certain kabuliats. The Collector thought that the present defendants' kabuliats were established, and on the 14th September 1866 ordered that the present plaintiff should be ejected.

The present plaintiff, therefore, sued to recover possession, to have the kabuliat set aside, and the above pottas established. The Courts below have found the pottas in favor of the plaintiff, and have given him a decree.

The defendants appeal specially, urging that, under section 2, Act VIII. of 1859, the plaintiff's suit is barred. The question, therefore, is whether the order of the Collector, of date the 14th September 1866, was an order passed in a suit, and was an order passed by a Court of jurisdiction competent to determine the present plaintiff's rights under the pottas. The Full Bench ruling, quoted by Mr. Justice Bayley, seems to me conclusively to have held that (in the words of that decision) "an order passed by the Collector upon "an application made under section 25, is not a judgment in a suit, or an " order passed in the course of 'a suit and relating to the trial thereof," but is simply a ministerial order not affecting the rights of the parties, on which an appeal lies not to a Civil Court but to a ministerial officer, the Commissioner.

This being so, it is quite clear to me that the point in this case was not res-judicata, and the special appellant, therefore, has no ground for his appeal. I concur, therefore, in dismissing with cost.

Before Mr. Justice Lock and Mr. Justice Hobbouse.

RANI DURGA SUNDARI (DEFENDANE) v. BRINDABAN CHANDRA SIRKAR CHOWDHRY AND ANOTHER (PLAINTIFFS.)*

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Right of Occupancy-Transferable Tenure.

See also 13 B. L. R. 277.

A transfer of a mere right of occupancy gives no title to the transfer against the zemindar.

Baboos Ashutosh Dhur and Debendra Chandra Ghose for a ppellant.

Baboos Mahendra Lal Shome and Tarak Nith Sen for respondent.

* Special Apreal, No. 1789 of 1868, from a decree of the Officiating Additional Judge of Jessore, dated 16th April 1868, reversing a decree of the Sudder Ameen of that district, dated the 28th September 1866.

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RANI DURGA SUNDABI V. BBINDABAN JHANDHASIB-KAR CHOWA DHRY.

HOBHOUSE, J.—In this case the plaintiff sues to recover khas possession of certain land. It was alleged that Mr. Mackenzie held these lands babundbust, i.e., without any agreement, up to the year 1271, when he died; and on the other hand, the defendant stated that he had purchased these lands from Mr. Mackenzie on the 27th June 1864, corresponding with the 15th Ashar 1271, and had; by this purchase acquired a kaimi right, which the plaintiff could not disturb by obtaining khas possession.

The issue was, was the disputed land under permanent jumma right in the possession of Mr. Mackenzie?

The lower Court held, that because Mr. Mackenzie and the present defendant had been in occupation of the land for more than 12 years, that occupation could not be disturbed; and, therefore, dismissed the plaintiffs' suit.

On appeal, the lower Appellate Court held, that Mr. Mackenzie's tenure had been what is called orbundi tenure; that the defendant holding it under the same tenure held it no otherwise than as an orbundi ryot, and so had no right of occupanty; and the plaintiff was, therefore, entitled to oust him, and the lower Appellate Court, therefore, gave plaintiffs a decree for khas possession.

Several objections are urged against this decree in special appeal, and we are bound to say that the decision of the lower Appellate Court, upon the grounds given by the Court for the decision, cannot stand, for we think that the lewazima papers of 1268 and 1269, on which the lower Appellate Court relied, were not legal evidence against the defendant; but, on other grounds, we think that the decision of the lower Appellate Court must stand as a decision correct in law, though not exactly for the reasons which the lower Appellate Court gives.

We think it has been decided conclusively in Ajodhya Prasad v. Imam Bandi (1), which is exactly in point as to the facts of this case, that a mere right of occupancy, derived from a person who had only a right of occupancy, and who on that ground only asserted a right of transfer, gives no title to the transferee against the zemindar. But the pleader, for the special appellant, contends that while Mr. Mackenzie had some right, and while the plaintiff in this case failed to prove what that right was, the defendant's occupancy cannot be disturbed. We do not concur in this proposition. The issue between the partiss was, whether the defendant's holding was a kaimi or permanent holding. It was clearly, therefore, upon the defendant to show that he had such a holding; and when he had only shown that his vendor Mr. Mackenzie had some right, that is to our mind obviously not sufficient to show that Mr. Mackenzie had the exact permanent right at issue between the parties. We think, therefore, that as no evidence was given to show that the defendant had derived the right which he set up, the lower Appellate Court was justified in dismissing his case. Under such circumstances, we dismiss this special appeal with costs

(1) Case No. 2609 of 1866; 31st May 1867.

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