

1869

AMRA NASHYA
v.
GAGAN
SHUTAR.

are quite distinct; and on any application made and decided, as this was under section 25, no appeal lies to the Judge.

We would further observe that the admission of the appeal on the 27th May 1868, from a decision of the Collector of the 30th June 1864, on the ground that Act X. of 1859 was not then sufficiently understood, was not a proper reason; and as the delay itself was not explained, the Judge's order admitting the appeal was incorrect.

The rule is made absolute with costs.

Before Mr. Justice Bayley and Mr. Justice Hobhouse.

AMANAT ALI CHOWDHRY (ONE OF THE DEFENDANTS) v. MUSSEN ALI
(PLAINTIFF.)*

1869
Feb'y. 20.

Res-judicata—Possession—Act VIII. of 1859, s. 2—Act X. of 1859, s. 25.

The defendant had obtained an order under section 25, Act X. of 1859, to eject the plaintiff, who now sued in the Civil Court for recovery of possession.

Held, that section 2, Act VIII. of 1859 does not bar the suit.

Baboos Purna Chandra S'ome and Hem Chandra Banerjee for appellant.

Baboo Girija Sankar Mozoomdar for respondent.

THE facts are fully set out in the judgment of Justice Hobhouse.

BAYLEY, J.—In this case the ground taken before us in special appeal, is that, as this was a suit to set aside a decree of the Revenue Court, under section 25, Act X. of 1859, the suit cannot at all lie.

I am, however, of opinion that there cannot be a decree under section 25. That section only contemplates an order passed by the Revenue Court. It is true that before such an order is passed, the Collector may, for the purpose of satisfying himself as to the propriety of granting the application for ejectment made under that section, investigate the facts, receive all the evidence bearing upon them, and enter into all the forms of a judicial enquiry, but still his decision upon it is but an order, an appeal from which under section 25 lies to the Commissioner, and not to the judge. This view is borne out by the Full Bench ruling in the case of *Phillip v. Shibnath Maistr* (1).

I would add that there might be a suit for ejectment (as laid down in the Full Bench ruling) under clause 5, section 23, Act X. of 1859, and there an appeal would lie to the Judge, and the decree would have the effect of that in a regular suit for the trial of the matter.

* Special Appal, No. 1309 of 1868, from a decree of the Principal Sudder Ameen of Chittagong, dated the 11th March 1868, affirming a decree of the Sudder Moonsiff of that district, dated 20th August 1867.

(1) Case No. 7 of 1862; 1st July 1863.

In this view I would dismiss this appeal with costs.

HOBHOUSE, J.—I agree that this special appeal must be dismissed. The material facts are these:—The defendant applied under section 25, Act X. of 1859, to obtain assistance to eject the present plaintiff. The plaintiff, at 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.

1869
AMANAT AL
CHOWDHRY
v.
MUSSEN ALI

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 Hobhouse.

RANI DURGA SUNDARI (DEFENDANT) v. BRINDABAN CHANDRA
SIEKAR CHOWDHRY AND ANOTHER (PLAINTIFFS.)*

1869
Feb'y. 24.

Right of Occupancy—Transferable Tenure.

See also
13 E. L. R.
277.

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

Baboo Ashutosh Dhur and Debendra Chandra Ghose for appellant.

Baboo Mahendra Lal Shome and Tarak Nath Sen for respondent.

* Special Appeal, 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 29th September 1866.