brought an action to recover mesne-profits for the time during which he was kept out of possession.

Both the Courts below have dismissed this suit, and the Lower Appellate Court in its judgment said that the talook bearing a jumma of 24 rupees is divided into two parts, namely, 4½ annas in the possession of Tripoora Soonduree and another person, and 11½ annas which belonged to the opposite party in this case under his decree and by auction-purchase; and therefore there was nothing for the petitioner to obtain, and he failed to show that he (petitioner) had obtained possession under the order of the Moonsiff.

Now, as the judgment of the Lower Appellate Court in this case merely declares that the opposite party has a right to 11½ annas in the estate with a jumma of 24 rupees, it has said nothing contrary to what had been said by the High Court and by the Judge when they disposed of the matter in the execution-case.

There may perhaps be some mistake with regard to the possession of the remaining 4½ annas. The Judge may be in error in saying that it was in the possession of Tripoora Soonduree and the other lady, and we are told that he *is* in error on this point; but even if his judgment is erroneous, we cannot say that the Subordinate Judge has exercised a jurisdiction which is not vested in him by law. It may be a mistake which can be rectified by an application to him to review his order; but it is not certainly a matter to be brought before us, and regarding which we should be called upon to exercise our extraordinary powers under the Charter.

Then as to the other point, namely, that the Court below had refused to exercise jurisdiction, all that it did do was this; it said to the plaintiff: "You have failed to "prove your case; and failing to do so, you "cannot get a decree for mesne-profits." In this we cannot say that the Court has refused to exercise a jurisdiction which it ought to have exercised.

For the above reasons, we think that the rule must be discharged with costs, which we assess at 2 gold mohurs.

Mookerjee, J.—I agree in discharging the rule with costs. The suit being for a sum of money below 500 rupees, it is clear we have no appellate jurisdiction. The petitioner has invoked our special power under Section 15 of the Charter on the grounds stated by my learned colleague. I do not think that mere errors of law committed by a Judge on appeal in such cases give us jurisdiction under the Section quoted. I am of opinion that probably the Judge is wrong, and has confounded the old 4½ annas share of Tripoora Soonduree with the 4½ annas in the jumma of Rupees 24. If it is so, the remedy lies in an application to him, and not by one in this Court. It is only in cases where the Lower Appellate Court has exercised jurisdiction where it has none by law, or has refused to exercise jurisdiction where it clearly has, that we can interfere. This is not a case of that nature. We are, therefore, unable to interfere with his decision, even if it is wrong in law or has proceeded from a misconception of the facts of the case.

The 30th January 1871.

Present:

The Hon'ble H. V. Bayley and Dwarkanath Mitter, *Judges.*

Special appeal—Enhancement of rent—Excess lands.

Case No. 1763 of 1870 under Act X. of 1859.

Special Appeal from a decision passed by the Officiating Judge of Purneah, dated the 23rd June 1870, affirming a decision of the Assistant Collector of that District, dated the 22nd December 1869.

Shaikh Ahmed Hossein (Plaintiff), *Appellant,*

versus

Mussamut Bandee and others (Defendants), *Respondents.*

Mr. R. E. Twidale and *Baboo Chunder Madhub Ghose* for Appellant.

Baboo Grish Chunder Ghose for Respondents.

In a special appeal the general affirmation of a judgment can only refer to the points raised by the appellant, the rejection of the appeal not necessarily affirming the other findings of fact or law incidentally arrived at by the Lower Appellate Court.

In a suit for enhancement of rent on the ground that defendant holds land in excess of what he pays rents for, it is plaintiff's duty to show that the lands in question are all included within the tenure of the defendant, but that the latter has been paying rent for a quantity less than the area of those lands.

Bayley, J.—I AM of opinion that this special appeal must be dismissed, inasmuch as it is not shown that there is any error in law in the finding of the Lower Appellate Court that "the plaintiff has entirely failed "to show what specific lands are in excess "of the defendant's tenure, and what the "rates and quantity are of each kind."

It is admitted that the original tenure consisting of 23 beegahs and odd cottahs was a distinct tenure held at a fixed rent, as to which the plaintiff states he has no claim for enhancement; but the plaintiff asserts that there are 30 beegahs beyond those 23 beegahs held and occupied by the defendant, as to which he, plaintiff, is entitled to, and sues for, enhanced rent.

Now, until the actual fact of the 30 beegahs being in excess of the original tenure is proved by some specific evidence as to what and where they are, I think no such suit for enhancement as brought by the plaintiff in this case can lie.

The special appellant, however, relies on the judgment of the Lower Appellate Court on a former occasion having been generally affirmed on special appeal by this Court. I think that in a special appeal the general affirmation of a judgment below can only be on the points raised by the special appellant. By rejecting a special appeal, it does not follow that this Court necessarily affirms all the other findings of fact or of law which the Lower Appellate Court may incidentally come to.

I would dismiss this special appeal with costs.

Mitter, J.—I am of the same opinion.

The argument based on the 3rd Clause of Section 17, Act X. of 1859, has no application to this case. If the so-called excess lands are included within the mokurruree lease relied upon by the defendant, it is quite clear that the plaintiff cannot enhance the rent payable by the defendant on the ground of those excess lands. If, on the other hand, the said lands are not covered by the mokurruree pottah, it is equally clear that there is no relation of landlord and tenant between the plaintiff and the defendant in respect of those lands. Clause 3, Section 17, Act X. of 1859, pre-supposes that the original tenure itself is liable to enhancement. In this case, it is admitted that the defendant has got a tenure which is not liable to enhancement; and what the plaintiff is really seeking to do is to assess rent on lands for which no rent has been hitherto paid to him, although he is ostensibly trying to treat this suit as a suit for enhancement of rent.

It is said that this point has been finally determined by the decision of the Judge passed on remand, as well as by the decision of this Court passed on special appeal against the Judge's order. So far as the Judge's order of remand is concerned, I think that the observations of that officer relied upon by the special appellant were altogether premature, and cannot, therefore, be binding on us now that we are called upon to pass final judgment in the cause. Whether the *excess lands* were liable to enhancement or not was a question on which no opinion could be given before it was determined what those excess lands were, and how, and under what circumstances, they were taken possession of by the defendant. The law applicable to those lands could not be laid down without the necessary facts being found; and I am, therefore, of opinion that the observations in question cannot be treated as conclusive on the particular point now under our consideration.

As to the decision passed by this Court on special appeal, no judgment has been shown to us on the strength of which it can be contended that the respondent is precluded from contesting the plaintiff's claim for

enhanced rent on the ground of *excess lands*. If the plaintiff chose to come to Court on the ground that the defendant held lands in excess of what he paid rents for, it was his duty to prove that assertion by showing that the lands in question are all included within the tenure of the defendant, but that the defendant has been paying rent for a quantity less than the area of those lands. The plaintiff has, in my opinion, entirely failed to prove this assertion, and I would, therefore, dismiss this special appeal with costs.

The 31st January 1871.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Joint tenancy—Commensality.

Case No. 1690 of 1870.

Special Appeal from a decision passed by the Judge of Beerbhoom, dated the 28th April 1870, affirming a decision of the Moonsiff of Ookrah, dated the 29th November 1869.

Pearee Monee Bibee (Plaintiff), *Appellant,*

versus

Madhub Singh and another (Defendants), *Respondents.*

Baboo Rash Beharee Ghose for Appellant.

Baboo Romesh Chunder Bose for Respondents.

The word "ijmalee" expresses joint tenancy even where commensality is not implied.

Glover, J.—THE plaintiff in this case claimed certain property by purchase from one Tara Soonduree. She states that, after having purchased this property, she went to take possession, but was prevented by the defendants, and therefore was obliged to bring this suit.

The defence was that the property in dispute did not descend to Tara Soonduree as alleged by the plaintiff, but was the self-acquired property of one Narain Singh, a member of another branch of the family. The first Court found that the plaintiff's vendor had never been in possession of the property, that it was the self-acquired property of Narain Singh, and that Tara Soonduree had no right to sell it. In the second Court, the Judge refused to take into consideration the objection which had been raised before him that the family was a joint family, and that the property was joint-family property, and decided against the plaintiff on the ground that there was no documentary evidence in her favor, and that none of the six witnesses who had been examined on her behalf had deposed that the property was ever in the possession either of Tara Soonduree or of her husband Mutty Singh.

It appears to us that this decision of the Judge by no means touches the question at issue between the parties. The allegation in the plaint undoubtedly was that the family was a joint family, the word used being "ijmalee." The Judge seems to have taken the want of any allegation as to commensality as want of allegation of joint tenancy, overlooking, apparently, the fact that a Hindoo family may very well be joint in property, though not joint in mess. The points to be decided in this case, therefore, were—1st, whether this property which Tara Soonduree sold to the plaintiff was part of the ancestral joint-family property coming as such to her husband Mutty Singh, and on his decease devolving on his widow Tara Soonduree, or was it, as alleged by the defendant, the separate self-acquired property of Narain Singh, a member of another branch of the family. The first Court decided this point adversely to the plaintiff, and, no doubt, it was the duty of the Judge to decide that point also. There was no question of limitation involved in this suit, and therefore whether Mutty Singh or Tara Soonduree was or was not in possession of this property at the time of the sale had really nothing to do with the matter.

We observe, moreover, that the Judge is not quite correct when he states that