of 13 beegahs odd cottahs. The plaintiffs allege that the land in dispute with the remaining portion of the jote was obtained by their great-great great-grandfather by a pottah in the year 1208; that, on the death of the plaintiff's father, which took place in 1265 Pous, the plaintiffs remained in possession for two years and were then forcibly turned out by the defendants in collusion with the zemindar.

The defendants admitted that the lands are the ancestral jote lands of the plaintiffs' ancestors, but set up a relinquishment by the plaintiffs and pleaded that the zemindar, after that relinquishment, had settled these lands with them, and that they are in possession under that settlement.

The first Court found that the plaintiffs were in possession after the death of their father for two or three years; that during their minority and owing to their inability to cultivate the lands in dispute for one year the defendant, in collusion with the zemindar dispossessed them. The first Court, therefore, gave the plaintiffs a decree.

On appeal, the Judge has found that there is proof to the effect that, for a period of at least one year prior to the case of the defendant, the plaintiffs did not cultivate the lands in dispute. The Judge, therefore, without going further into the case, has applied the principle laid down in the case of Muneerooddeen, reported at page 67 of Volume VI., Weekly Reporter, and found that the plaintiffs had relinquished the lands in dispute, and that therefore the zemindar was justified in letting them to the defendant. The suit was therefore dismissed. We may observe in the first place that the first Court found to the effect that the plaintiffs neglected to cultivate a portion of the jote for one year owing to their minority, and on this finding there is no appeal made to the Judge. In the case quoted in Volume VI. in which Muneerooddeen was the plaintiff, appellant, it was found that for some years before the occupation of the land by the plaintiff the defendant in that case had run away, or in fact had ceased to occupy the land, and the Judges therefore found that, when a cultivating ryot goes away and neither cultivates nor pays rent, he must be held to have wholly relinquished the land. Now in this case the plaintiffs are the admitted holders of an ancestral jote consisting of some 13 beegahs odd cottahs;—the lands in dispute only form a portion of that jote; the plaintiffs are still residing on the land and are cultivating the remaining portion of the jote. We do not think, therefore, that the circumstances of the case Muneerooddeen apply to the present case at all, for in Muneerooddeen's case the tenant left of his own accord and did not pay rent, and had neglected to cultivate for several years. There is also, as already observed, the finding of the first Court on the evidence that the lands were left uncultivated owing to the inability of the plaintiffs to cultivate them for one year during their minorty, against which finding no appeal was preferred. We, therefore, think that the Judge was wrong in apply the principle laid down in the case of Muneerooddeen to this case, the circumstances of which are, as shown above, altogether different.

We restore the decision of the first Court and reverse the decision of the Judge with costs payable by the special respondent.

The 8th May 1872.

Present:

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

Act VIII. of 1869, B. C., s. 102—Suit for Rent below 100 Rupees—Special Appeal.

Cases Nos. 1289 and 1290 of 1871.

Special Appeals from a decision passed by the Judge of Dacca, dated the 25th July 1871, reversing a decision of the Moonsiff of Lessragunge, dated the 30th May 1871.

Hurry Mohun Mozoomdar (Plaintiff), *Appellant,*

versus

Dwarkanath Sein and another (Defendant *Respondent.*

Baboo Hem Chunder Banerjee and *Lull Chundr Sein for* Appellant.

Baboo Grish Chunder Ghose for Respondent.

Where, in a suit for rent below 100 rupees, the Judge decided the case solely on the want of proof of relationship of landlord and tenant between the parties and especially avoided coming to any decision as to right and title to the land or as to any interest in land, HELD that the case fell under s. 102 of Act VIII. of 1869, B. C., and that no special appeal lay to the High Court.

Glover, J.—A PRELIMINARY objection taken by the vakeel for the special respondent to the effect that there is no appeal to this Court from the decision of the Judge

under the provisions of section 102 of Act VIII. of 1869, Bengal Council. There is no doubt that the amount sued for was under 100 rupees, and the question is as to whether the Court below having decided the question of rent as between the landlord and tenant, decided at the same time and question relating to a title to land or to some interest in land as between parties having conflicting claims thereto, for, if they have done any of these things, an appeal would lie. An objection was made by the vakeel for the special appellant to the effect that this section would take away from the Judge the power to entertain an appeal from the decision of the Court of first instance, and that the judgment of the Moonsiff ought therefore to stand. This we think is a wrong view of the question. The words of the Act are—"Nothing in this Act contained "shall be deemed to confer any power of "appeal in any suit tried and decided by a "District Judge originally or in appeal." The words "or in appeal" seem to make it quite clear that, whatever may be the judgment of the Court of first instance, if the Judge in appeal shall decide a claim to rent as between two parties, and in that case shall not decide parenthetically any question relating to title to land or to any interest in land, that judgment would not be open to special appeal in the High Court.

On the substantial question before us, we find that the Judge did not try any such question relating to a title to land or to any interest in land; on the contrary, his judgment shows very clearly that although, to use his own works, there was a mass of document filed with the case as if it were a regular civil suit and as if he had to decide on the merits between the two contending parties, the contending parties being the plaintiff and the intervenor, who each had a *baenamah* as purchaser in execution of a decree, he decided only this point namely that there was no proof of any agreement between the plaintiff and defendant, nor any proof of payment of rent by the defendant to the plaintiff at any former time, nor any such plain relationship of landlord and tenant as would justify the Court in dispensing with positive proof. It seems to us that the Judge specially avoided coming to any decision as to right and title to the land or as to any interest in land. He decided the case solely on the want of proof of relationship of landlord and tenant between the parties.

It appears to us, therefore, that the provisions of section 102 apply to this case, and that no special appeal lies to this Court. The preliminary objection must therefore be allowed and the special appeal dismissed with costs.

The 8th May 1872.

Present:

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

Execution of Decree—Possession of undefined Share of Ijmalee Property.

Cas No. 175 of 1872.

Special Appeal from a decision passed by the Subordinate Judge of Dacca, dated the 7th July 1871, modifying a decision of the Moonsiff of Narainguge, dated the 19th December 1870.

Prosunno Coomar Dutt and others (Defendants), *Appellants,*

versus

Sreemutty Addessuree and another (Plaintiffs), *Respondents.*

Baboo Hem Chunder Banerjee for Appellants.

Baboos Doorga Mohun Dass and *Grija Sunkur Mojoomdar* for Respondents.

A decree for exclusive possession of a plot of land of which the judgment-debtors are not the sole owners is incapable of execution, when the shares of the several shareholders has not been exactly defined, and no partition has taken place.

Glover, J.—This case is closely connected with Special Appeal No. 1309 of 1871 just decided. In this suit the plaintiffs claim the exclusive possession of plot No. 1 for building purposes, the ground of their claim being that the principal defendant's father had taken possession of a portion of the *ijmalee* property with the plaintiffs' and other shareholders' consent; and in return for that consent had given them, the plaintiffs exclusive possession of this plot No. 1 for the purpose of building their house thereupon; and their cause of action they state to be the interference with the building of that house by the defendants.

The first Court gave a decree against all the defendants in plaintiff's favor, but the Subordinate Judge before whom appeals were preferred, both by the plaintiffs and defendants, while confirming the decision of the first Court as against the defendants