

**(1869) 02 CAL CK 0014**

**Calcutta High Court**

**Case No:** Special Appeal No. 1789 of 1868

Brindaban Chandra Sirkar  
Chowdhry and Another

APPELLANT

Vs

Rani Durga Sundari

RESPONDENT

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**Date of Decision:** Feb. 2, 1869

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### **Judgement**

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?

2. The lower Court held, that because Mr. Mackensie 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.

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

4. 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 lowazima 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* (Case No. 2609 of 1866, 31st May 1867), 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 parties 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.