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of the evidence on the record. The lower Appellate Court will, on remand, decide the question of the amount of damages with reference to the evidence on the record.

As to the other relief granted, *viz.* the removal of the whole dam, it is equally based upon imaginary grounds. The District Judge thinks that, because it has been shown that the defendants have obstructed the drainage of the surplus rain-water of the plaintiffs' land, it must be taken for granted, unless the contrary be proved, that the construction of the dam even to the height of an inch is an invasion of the plaintiffs' right. This opinion does not appear to be based upon any materials on the record. We think that this point, namely, how far the erection of the bund is an invasion of the plaintiffs' right, must be enquired into and determined upon proper materials placed before the Court. The case will, therefore, be remanded to the lower Appellate Court to appoint a competent person as Commissioner, to hold a local investigation upon the point, *viz.* whether to secure to the plaintiffs the enjoyment of the right which they have established, it is necessary to move the whole of the *bund or* a portion of it, and, if the latter, what portion. The cost of this investigation will be borne by the plaintiffs in the first instance, but ultimately it will be part of the costs of the suit.

H. T. H. *Appeal allowed and case remanded.*

Before Mr. Justice Prinsep and Mr. Justice Pigot.

GOBIND CHUNDRA SEN (DEFENDANT) *v.* JOY CHUNDRA DASS (PLAINTIFF.)*

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Sale for arrears of Revenue—Under-tenures—Avoidance of tenure—Act XI of 1859, *s.* 37, *cl.* 4.

Leases of lands which may not have been expressly leased for the purpose of making gardens thereon, but on which gardens have subsequently been made, are, under the provisions of Act XI of 1859, s. 37, cl. 4, protected from avoidance by a revenue auction-purchaser.

THIS was a suit for the recovery of land. The plaintiff stated

*Appeal from Appellate Decree No. 1023 of 1883, against the decree of Baboo Nobin Chandra Gangooly, First Subordinate Judge of Dacca, dated the 14th of February 1883, modifying the decree of Baboo Mohendra Nath Dass, Second Munsiff of Kaligunje, dated the 17th of July 1882.

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that the zemindari, of which the land in suit formed part, was purchased by Nawab Assanulla at an auction sale for its own arrears of revenue on the 19th of February 1877; that on the 23rd of July 1878 the Nawab granted a putni lease of the zemindari to the plaintiff's uncle, Raj Coomar Gupta Roy; and that the latter, by a deed of gift, dated the 16th January 1880, granted the putni taluk to the plaintiff. The plaintiff further stated that the defendant held within the taluk a piece of *bhitta nal* land, (the boundaries of which were given), which land he had refused to give up to the plaintiff, although he had been duly served with a notice to quit on the 5th of August 1881. The plaint was filed on the 11th of January 1882.

The defence was that the land in question formed part of a permanent taluk called taluk Mokund Ram Das, which had been created long before the permanent settlement; that the portion of the taluk held by the defendant had been purchased by the defendant's mother, on whose death more than twelve years before the revenue sale, the defendant succeeded. The written statement went on to say that since the purchase by the defendant's mother, "she and I planted new orchards of trees "bearing fruits, and excavated tanks, &c., and also greatly im- "proved the old garden, &c. The plaintiff is not entitled accord- "ing to law to obtain *khas* possession of the aforesaid two kinds "of lands, that is, the lands on which gardens aforesaid are planted, "and the *diggi* and tank excavated."

The lower Appellate Court found that the taluk Mokund Ram Dass had not been proved to have been created before the permanent settlement, though admittedly in existence some years later; that the defendant was in possession as owner of a portion of taluk Mokund Ram Dass; that with regard to the plots of lands on which tanks had been excavated the plaintiff's suit must be dismissed under the provisions of Act XI of 1859, s. 37, cl. 4; but that in respect of garden land he held, for reasons which will be found set out in the judgment of the High Court, that the plaintiff was entitled to a decree. The following authorities were cited in the lower Courts: *Bhago Bibee* v. *Ram Kant Roy Chowdhry* (1), and *Ajgur Ali* v. *Asmut Ali* (2).

(1) I. L. R., 3 Calc., 293. (2) I. L. R., 8 Calc., 110.

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The defendant appealed and the plaintiff preferred a cross appeal to the High Court against the Judge's construction of Act XI of 1859, s. 37, cl. 4.

Baboo *Durga Mohun Dass*, for the appellant.

Baboo *Mohesh Chunder Chowdhry*, and Baboo *Umbica Churn Bose*, for the respondent.

The judgment of the Court (PRINSEP and PIGOT, JJ.) was as follows:—

The first point for our consideration is, whether lands on which gardens have been made are protected by Act XI of 1859, s. 37, from the effect of a sale for arrears of revenue, unless they may have been expressly leased for that purpose.

No doubt three successive Revenue Sale Laws, Regulation X of 1822, Act XII of 1841 and Act I of 1845, were to this effect, but the language of Act XI of 1859 is different, and is capable of the more liberal interpretation in favour of the tenant. This construction has been adopted by Birch and Mitter, JJ. in unreported special appeal 1796 of 1876, *Sheikh Joofail Ali* v. *Ram Kanto Rai Chowdhuri*, and three appeals decided simultaneously, and also by White and Mitter, JJ. in the case of *Brago Bibee* v. *Ram Kant Roy Chowdhry* (1).

We were at one time inclined to doubt the correctness of this opinion, but after examination of proceedings in the Legislative Council, we have come to the conclusion that the alteration in the terms of the law was deliberate, so as to protect all tenants coming within the terms specified.

The Subordinate Judge has, however, found that the lands occupied by the defendant cannot be regarded as garden, although there are many trees planted thereon, and he has come to this conclusion because the lands were described as *bhitti* and *chara bhitti* in some old documents, and he consequently finds that the principal object of the tenure being that it should be occupied by the dwelling houses of ryots, the planting of trees would not alter its character, so as to make it come within the protective clause of the Act. The Subordinate Judge does not set aside the

(1) I. L. R., 3 Calc., 293.

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finding of the Munsiff on the evidence from which, (from the number of trees planted,) it is clear that if the opinion of the Subordinate Judge be erroneous in other respects they should be regarded as garden lands. Having regard to his opinion already expressed regarding the interpretation of the law as contained in Act XI of 1859, s. 37, we think that the original character of the tenure does not affect its position in this respect. The number of betel, mangoe, jack and tamarind trees standing on those lands seems fully to justify the finding of the Munsiff, and as the Subordinate Judge has not questioned the correctness of the Munsiff's finding on the evidence, we think that we may safely restore the Munsiff's finding, instead of prolonging the litigation by a remand.

The order of the Subordinate Judge must therefore be set aside, and that of the Munsiff restored. The defendant will receive his costs in this and the lower Appellate Court.

P. O'K. *Appeal allowed.*

Before Mr. Justice Wilson and Mr. Justice Ghose.

1885. *September* 8.

KRISHTO KISHORI CHOWDHRAIN AND ANOTHER (PLAINTIFFS) *v.* RADHA ROMUN MUNSHI AND ANOTHER (DEFENDANTS.)*

Principal and Surety—Contract Act (Act IX of 1872), *ss.* 133—139—*Surety still liable though remedy against principal barred.*

Where a plaintiff sued a principal and a surety for arrears of rent, and it appeared that the principal was dead at the time the suit was instituted, and where the representative of the principal was not made a party till after the right to recover the arrears as against him was barred by limitation,

Held, that the surety was still liable, the suit as against him having been instituted within the period allowed.

Hajarimal v. *Krishnarav* (1) cited and approved.

IN this case the plaintiffs originally sued two persons, Radha Romun Munshi and Horo Chunder Talukdar. Their claim was to recover Rs. 1,977-11, as arrears of rent, road cess and Public Works cess, together with interest due upon an *ijara kabuliut* and

* Appeal from Appellate Decree No. 1633 of 1884 against the decree of F. McLaughlin, Esq., Judge of Pubna, dated the 28th of May 1884, modifying the decree of Baboo Jiban Krishna Chaterji, Subordinate Judge of that District, dated the 3rd of May 1883.

(1) I. L. R., 5 Bom., 647.