tank was part of any holding. The argument most pressed upon us is that the defendant, being admittedly a rent-paying tenant, cannot, by any length of possession, acquire a title against his landlord; that his occupancy, not being protected by Statute or contract, could be determined by his landlord at pleasure, and that the plaintiff was therefore entitled to take khas possession of this tank.

In a recent decision of this Court it has been held—in the case of *Sibu Jelya* v. *Gopal Chandra Chowdhry*(1)—that the provisions

(1) *Before Sir Richard Couch, Kt., Chief Justice, and Mr. Justice Glover.*

The 26th February 1873.

SIBU JELYA (ONE OF THE DEFENDANTS) *v.* GOPAL CHANDRA CHOWDHRY AND ANOTHER (PLAINTIFFS).*

Right of Occupancy—Act X of 1859, s. 23, cl. 4—Tank—Landlord and Tenant.

Baboo *Nil Mudhub Sen* for the appellant.

Baboo *Hem Chunder Banerjee* for the respondent.

THE judgment of the Court was delivered by

COUCH, C.J.—This suit was brought for the possession of a tank which the plaintiff alleged he had been dispossessed of. His case was that he had purchased the tank at a sale in execution of a decree against Raja Gopal Singh, to whom it belonged as a rent-free tenure.

Sibu Jelya was allowed to come into the suit as a defendant in the suit, and he did not deny that the property in the tank belonged to Raja Gopal Singh, and that it had been purchased by the plaintiff; but he objected that the Raja had no khas possession; that on the 4th of Jaisti 1230 (15th April 1823) he gave a lease of the tank to this defendant's father, and that the property had since been held accordingly, and that under that lease the plaintiffs were not entitled to khas possession.

The issue framed by the Munsif was whether Sibu Jelya entered into possession of the tank as ancestral *jamai* property, or the judgment-debtor had khas possession of the same; and in his judgment, he says:—"Upon the evidence on the record and the circumstances of the case, it is evident that the defendants have held the tank under a *jamai* title from before the sale in execution and therefore the plaintiffs have no right to khas possession." He made a decree to the effect that the plaintiffs, were confirmed in possession of their right as owners of the tank, but as the allegation on which they grounded their suit was not proved, while the defendants had made out their case, the plaintiffs were ordered to pay the costs.

*Special Appeal, No. 712 of 1872, against a decree of the Judge of Zilla West Burdwan, dated the 31st January 1872, reversing a decree of the Munsif of Bishenpore, dated the 5th May 1871.

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of Act X of 1859 are not applicable to tanks which are not apportioned to any ryotti holding but held separate.

From this there was an appeal to the Judge, who, after stating what the nature of the suit was, and the Munsif's decision, and the grounds of appeal, said :—"I am of opinion that defendant's possession under the lease is not proved, and there is no improbabiliy whatever in Sibu Jelya and his father having held possession of the tank from year to year by payment of a share of the produce, namely, fish ;" and he decreed the appeal and reversed the judgment of the Munsif.

It has been objected before us that, although the title which had been set up by the defendant Sibu had not been proved, it appeared upon this judgment that there had been such a possession as gave him a right of occupancy, and therefore the plaintiffs ought not have a decree for possession.

This tank appears to be used only far the preservation and rearing of fish. It does not appear to have formed part of any grant of land, or that it can in any way be considered as appurtenant to any land held by the defendant.

The only thing occupied appears to be the tank itself; and the question is whether the provisions of Act X of 1859 which would confer a right of occupancy apply to such a tank as this.

No doubt, it may be said that a tank comes under the word land, as [illegible] covered with water. But it is [illegible] land cultivated or held; and [illegible] considering whether this tank comes within the provisions of Act X of 1859, we must do what was done in *Rani Durga Sundari Dasi* v. *Bibi Umdatannissa* (a), which was decided by myself, Bayley, and Ainslie, JJ.. on an appeal against the decision of Glover, J., the senior Judge sitting with Mitter, J. The question there was whether a suit for enhancement of rent of land covered with buildings would lie in the Revenue Courts under cl. 4, s. 23 of Act X of 1859. I was of opinion—and Bayley and Ainslie, JJ., concurred with me—that in order to see what was meant by land in Act X of 1859, we must look at all the provisions of the Act.

Following that rule in the present case, we think we cannot say that the provisions of Act X of 1859 are applicable to such a tank as this is. For instance, the provision in s. 112 of the Act, which was noticed in that case, respecting the recovery of the rent of the land by distress, is not applicable to such a tank as this. Following that rule, we are of opinion it cannot be said that a right of occupancy was gained under the Act by the parties in possession of this tank, although for more than twelve years.

It is therefore unnecessary to determine the question, whether the defendant (by which we mean the intervening defendant Sibu) not having set up this case (he having set up a title under a lease which he has failed to prove) can be allowed to resist a decree to the plaintiff for possession. We think this is different from where a plaintiff fails to prove the case which he relies upon in bringing his suit, and is not allowed to set up a different case; because here, supposing the defendant has a right of occupancy, the consequence

(a) 9 B. L. R., 101.

The Rent Law therefore not being applicable to a tenure of this nature, we have to consider whether the defendant is protected from ejectment by the common law of the country. It has frequently been held by the Courts in this country that a tenant cannot plead limitation against his landlord ; that possession for sixty years gives a tenant no title to his tenure has against his zemindar, so as to convert his tenant-right into a right of ownership. Long possession may pr otect his tenancy ; but it cannot as a matter of law be said in this country to create a title to the land so held.

We have only to consider in this case whether the arbitrary right to eject can be conforced.

This tank is proved to have been in existence so for back as 1213 B.C. (1807 A. D.), or within fourteen years of the permanent settlement. It was then sold by Krishna Mohan Hazra to Gopinath Palit, and passed from him to the former talookdar, who again sold it to the present defendant. Possession at an uniform rent is thus traced back for sixty-six years. When the patni was first created does not appear, but it must have been subsequent to the year 1807. It is well known that it was customary for zemindars to grant lands at quit-rent for the purpose of digging tanks, or for gardens, and reference is made in s. 8, Regulation XLIV of 1793, to such leases. They were excepted from

of giving the plaintiff a decree would be that the plaintiff having got possession under the decree in this suit, the defendant would have to bring another suit to get back the possession by virtue of his right of occupancy, which would be contrary to the rule that circuity of action is to be avoided. It would not be right to give the plaintiff a possession which he ought immediately to lose by another suit ; and the proper course would be finally to decide the rights of the parties in the present suit. Or this injustice would be done, that the defendant, although entitled to a right of occupancy, would be entirely deprived of it by losing possession, and not being able to assert his right in any other suit. It would be not only depriving him of a right which clearly belonged to him, but taking away from him altogether the possession of land which he had a right to keep. However, as we have said, it is not necessary to determine that question. It is in order that it may not be supposed, if this case should arise at some future time, that we assent to the proposition that the defendant could not set up this now, because he did not do so originally by way of defence, that we have made these remarks.

The appeal will be dismissed with costs.

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the prohibition then in force against the granting of leases by zemindars for a period exceeding ten years : and the ground for exemption seems to have been that such leases were not improvident diminutions of the culturable area of the estate, but were calculated to benefit the property. No one would be likely to go to the expense of digging a tank unless he secured a transferable interest therein. In the case before us it is true that no grant is produced; but when it is established that this tank was in existence so for back as 1807, was then transferred by its possessor to Gopinath Palit, and after passing from father to son in that family was transferred again by sale, the rent all along remaining the same, I think we may fairly presume that it originated in a grant and has always been treated as a transferable tenure.

That it was so treated by the plaintiff's predecessor is pointed out by the Munsif in his judgment. the purchase of the tank by one of the former talookdars gives the plaintiff no right to determine the tenancy. Rent has all along been paid for the tank. the defendant by purchase acquired only the right to hold the tank on the same terms as his vendor, *i. e.*, by payment of rent. To allow the plaintiff arbitrarily to eject the defendant from this tank would be inequitable and unjust. Both the lower Courts, though for different reasons, have concurred in dismissing the plaintiff's suit, and I think that the special appeal must be dismissed with costs.

Appeal dismissed.