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of 1865.

engagements, we ought to presume that it would be doing what was fair and proper. Possibly the plaintiffs' father may have had a right to enforce the marking out and separate delivery of possession to him of the ten bighás; but after this lapse of time we cannot say what arrangement was intended to obtain between the parties. It is not for plaintiffs, who have been content to receive the rent for so long a period as fifty-five years, to turn round and call upon the defendant to give evidence of what that arrangement was.

Looking at the kaúl and the circumstances of the case, it was quite competent for the Assistant Judge to hold that the plaintiff was not entitled to recover the land. There is no ground for saying that he committed any error in law in deciding as he has done. If the defendant refuses to pay rent, the plaintiff may bring his suit to recover it; but we can make no order upon that subject in the present suit, which is merely to recover possession of the land.

We, therefore, affirm the decree of the Court below with costs.

*Decree affirmed.*

*Special Appeal No. 844 of 1865.*

BA'BA'JI' bin RA'MJI' ..... *Appellant.*

KA'SIMBHA'I valad AZAMBHA'I and others... *Respondents.*

*Remand to District Court to correct a defect—Mistake of District Judge—  
Second remand.*

An Acting District Judge having made a decree, reversing the decree of the Munsif who threw out the plaintiff's claim, omitted to pass a decree himself in favour of the plaintiff, which his finding showed he intended to do: the case was remanded on special appeal by the High Court to the District Court, with an order that a decree should be passed; but the District Judge (who had meanwhile returned to his appointment) re-opened the whole case, and passed a decree directly opposed to that of his predecessor, in which he confirmed the Munsif's decree:—

*Held* that the decree of the Judge should be reversed, and the suit again remanded, in order that he might pass a decree for the plaintiff, in accordance with the view of the case expressed by the Acting Judge, with which the High Court saw no ground, upon the special appeal before it, to interfere.

THIS was a special appeal from the decision of R. F. Mactier, District Judge of Sátará, in Appeal Suit No. 443 of 1863, confirming the decree of the Munsif of Rahimatpúr, in Original Suit No. 812 of 1863.

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The suit was brought by the appellant to recover possession of some land; and the Munsif threw out the claim.

In appeal the Acting District Judge, Baron A. J. DeH. Larpent, reversed the Munsif's decree; but omitted to pass judgment himself in favour of the plaintiff, which his finding showed he intended to do.

The defendant then preferred a special appeal, No. 724 of 1864; and the High Court passed the following order on the 28th of November 1864:—

“The Court, finding that the Acting District Judge has merely reversed the decree of the Munsif giving judgment against the plaintiff, with costs on Kásim and Bábáji, but that he has passed no decree in the suit for or against either party, remands the case for the Judge to pass a decree: costs of this appeal on special appellant.”

Thereupon the Judge, R. F. Mactier, who had meanwhile rejoined the office—after noticing that the suit had been remanded by the High Court for the purpose of the Judge's passing a decree—thought it as well to go through the facts of the case which, in his opinion, was rather a curious one; and having considered it afresh on the merits, decided it contrary to the view taken by his predecessor, recording a judgment against the plaintiff and passing a decree accordingly.

The present special appeal was then preferred.

*Bháiravanáth Mangesh* for the appellant contended that, the High Court having remanded the case merely for the passing of a decree according to the decision recorded by the Acting Judge, the lower court had no power to go into the merits of the case again; and that, in entering into the merits, the Judge had overlooked the most important point

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decided by his predecessor, namely, whether or not Kásim's resignation was fraudulent.

*Dhirajlál Mathurádás* for the respondent.

Couch, C. J.—When the judgment of the Acting Judge is read, it is clear what was intended by the High Court's decree of remand. That judgment proceeds upon a question of fact : and, after a consideration of all the facts, it concludes with a decision in favour of the plaintiff.

It was not intended to interfere with that judgment ; and the former decree of the High Court contained a sufficient indication of what was to be done by the Judge upon the remand. It very plainly shows that the ground of the reversal of the Acting Judge's judgment was merely to correct a defect.

The case, then, goes back to the Judge, in whose absence the former judgment was passed. He remarks that it is a curious case, and goes into the merits, whilst he has himself assisted in making it a curious case. He has overlooked the point that Kásim, being a trustee for Bábáji, had fraudulently turned the trust to his own use ; although that was the most material point in the case, and the point upon which the decision of the Acting Judge turned.

Upon that ground we might, perhaps, reverse his decree ; but, since he was directed merely to pass a decree with the view of correcting a defect in the proceedings of the former Judge, we prefer to reverse his decree upon that ground.

*Decree reversed and suit remanded.*