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APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Muttusami Ayyar.

SESHAMA (DEFENDANT), APPELLANT,

and

SANKARA (PLAINTIFF), RESPONDENT.*

1888.
February 6.
April 20.

Boundary Act, 1860, *ss.* 21, 25, 28—*Limitation Act*, 1877, *ss.* 6, 14—*Appeal from decision of Boundary officer—Limitation—Award by Arbitrators—Irregular procedure.*

The appeal allowed by s. 28 of the Madras Boundary Act, XXVIII of 1860, is one from a decision recorded in the presence of the parties and duly intimated to them as required by s. 25 of the said Act.

In 1883 a plaint, by way of appeal from a decision purporting to be passed under s. 25 of the Boundary Act, was presented to the Court of a District Munsif and returned on the ground that the subject-matter of the suit was beyond the jurisdiction of the said Court. The plaint was then filed in the District Court more than two months after the date when the decision of the Boundary Settlement officer was communicated to the parties :

Held, that s. 14 of the Limitation Act, 1877, applied, and that the suit was not barred by limitation.

The true construction of s. 6 of the Limitation Act, 1877, is that, save as to the *period* of limitation, the other provisions of the Act are applicable to cases governed by special and local laws of limitation.

The omission by the Collector to pass a decision in accordance with an arbitrator's award and to furnish a copy to the parties as required by s. 21 of the Boundary Act is fatal to the award.

* Appeal No. 7 of 1885.

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The power given by s. 21 being a judicial power, a Collector must exercise his independent judgment and should not refer the award for acceptance to the Board of Revenue and Government, nor should he adjudicate when, as agent to the Court of Wards, he represents one of the rival claimants.

APPEAL against the decree of D. Buick, Acting District Judge of North Arcot, in Original Suit No. 22 of 1883.

The facts necessary for the purpose of this report sufficiently appear from the judgment of the Court (Collins, C.J., and Muttusami Ayyar, J.).

Mr. *Powell* and *Parthasaradhi Ayyangar* for appellant.

Mr. *Subramanyam* for respondent.

JUDGMENT.—The appellant is the palayagar of Bangari and the respondent is the zamindar of Punganur in the District of North Arcot. Both the Bangari palayam and the zamindari of Punganur are permanently-settled estates and they are in part contiguous to each other, the former lying to the east of the latter. The property in litigation consists of certain hills and jungles which lie between them and the contest is as to the estate in which they are included or as to the true boundary line between the two estates where the hills and jungles in dispute are situated.

The boundary in dispute is that between the villages Sarakal, Gurukuvaripalli and Chiltavaripalli, a hamlet of Sarakal in the Bangari palayam, and the villages of Bonamanda and Midimalla subordinate to the village of Avalapalli in the Punganur zamindari. The latter villages are on the plateau and the former are on the plain below the plateau and the dispute is as regards the slopes of the ghats and the valleys between the spurs projecting from the table land. In the plan attached to the decree of the first Court the boundary claimed by the respondent is represented by the yellow line commencing at the spot, marked Q (Bedisakonda) on the south and extending to Virastralapenta on the north, marked A, and the boundary claimed by the appellant is denoted by a green line commencing at Kannapparai, marked W, and extending to an old temple, marked C. In July 1882 the Government invested Lieutenant-Colonel Cloete, Deputy Superintendent of Revenue Survey, with the powers of a Settlement officer under Madras Act XXVIII of 1860 for the purpose of adjudicating on the conflicting claims. The boundary line which he determined as the true line is shown on the plan by a broad blue line.

The Settlement officer recorded his decision at Trichinopoly

on the 15th November 1882 and forwarded it to Madras where the Superintendent of the Madras Revenue Survey confirmed it on the 10th March 1883. It was then communicated to the parties concerned, the communication from the Collector to the (plaintiff) respondent being dated the 24th March 1883. From that decision, the appellant preferred no appeal by way of regular suit, but the respondent brought this suit on the 8th May 1883 praying for a declaration that he was entitled to have the boundary determined and demarcated in accordance with the yellow line. His case was that the tract between the blue and yellow lines never belonged to the appellant, that it formed part of his zamindari and that it was declared to belong to him by Mr. Sewell in 1871 who then adjudicated on the claim as arbitrator under the Boundary Act. For the appellant it was contended that the tract between the green and the yellow lines never belonged to the respondent but belonged to himself and that the decision of Mr. Sewell was set aside on appeal. For the purposes of this appeal it is necessary to refer only to three questions on which the appellant and the respondent proceeded to trial, viz., (1) Whether the claim was barred by limitation; (2) Whether the claim was *res-judicata* by reason of the decision of Mr. Sewell in 1871; (3) Whether the tract in dispute belongs to the respondent.

As to the first question, the District Judge held that the suit was not barred by limitation, and in this opinion we concur. The question has to be determined in accordance with Madras Act XXVIII of 1860, and it is provided by s. 25 that "The Settlement or other officer shall proceed to investigate the claim, and after examination of the witnesses and documents, shall record his decision and the grounds for arriving at it and after duly informing the parties of the same, he shall proceed to mark out the requisite boundaries in accordance with the decision, which, subject to the revision of the authority to whom the said officer is immediately subordinate, shall be considered as the determination of all claims and disputes until it is set aside by a formal decree of a Civil Court. An appeal shall lie to the Civil Courts from this decision by regular suit, provided it be preferred within two calendar months from the passing of the same." If the decision of the Settlement officer were taken to be passed on the 15th November 1882 when he recorded it at Trichinopoly in the absence of the rival claimants and without previous intimation to them,

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the claim would be clearly barred as it was preferred after the expiration of two months, viz., on the 8th May 1883. If on the other hand, the decision of the Settlement officer were considered to be passed on the 24th March 1883 when it was communicated to the respondent, the suit would be in time. We entertain no doubt that the decision from which an appeal is allowed by s. 28 is the one recorded in the presence of the parties and duly intimated to them, for the right to prefer an appeal within two months presupposes a knowledge of the adverse decision from which the appeal is allowed. We do not consider that there is a real conflict between the decisions reported in *Thir Sing* v. *Venkataramier*(1) and *Annamalai* v. *Cloete*(2). It is not necessary to consider whether the decision of the Settlement officer is only a preliminary proceeding and becomes appealable only after it is confirmed by the revising authority. But it is sufficient to state that the question now under consideration did not arise in the first mentioned case; what was really decided by it being that, when an appeal was preferred from the decision of the Settlement officer to the revising authority and the decision was confirmed by such authority, the period began to run from the date of the original decision and not of the decision of the revising authority. In *Annamalai* v. *Cloete*, however, the question now raised for decision was discussed and the Court observed, that if there was any decision at all in the sense of the Act, it could not date earlier than the date of its communication to the parties; otherwise they might be barred of their right of appeal without any knowledge of the decision having been passed.

Another objection taken in appeal as regards limitation is that although the plaint was presented on the 5th May 1883 to the District Munsif of Palmanair, it was presented to the District Court, which was alone competent to entertain it, on the 15th November 1883, that s. 14 of the General Act of limitations is not applicable to cases governed by a special enactment and that on that ground the suit was barred by limitation. It appears that the suit was at first valued at less than Rs. 2,500 and instituted in the District Munsif's Court, but after enquiry the District Munsif came to the conclusion that the real value was over Rs. 2,500 and on the 13th November 1883 returned the

(1) I.L.R., 3 Mad., 92. (2) I.L.R., 6 Mad., 189.

plaint to be presented to a Court of competent jurisdiction and the plaint was accordingly presented to the District Court on the 15th November 1883. It is conceded that if s. 14 of Act XV of 1877, the Act in force at the date of the suit, is applicable to cases falling under the Boundary Act of 1860, the claim is not barred by limitation, but it is contended that s. 14 is not applicable to such cases. Although the decision reported in *Thir Sing* v. *Venkataramier* supports this view, that decision was passed, it must be remembered, with reference to Act IX of 1871. Section 6 of that enactment provided that "When by any law not mentioned in the schedule hereto annexed and now or hereafter to be in force in any part of British India, a period of limitation, differing from that prescribed by this Act, is specially prescribed for any suits, appeals or application, nothing herein contained shall affect such law"; but it was modified by s. 6 of Act XV of 1877 and the words "nothing herein contained shall affect or alter the period so described," were substituted for the words "nothing herein contained shall affect such law."

The true construction of s. 6 then is that save as to the period of limitation, the other provisions of the General Act of limitations are applicable to cases falling under special or local law and this view is in accordance with the decisions reported in *Behari Loll Mookerjee* v. *Mungolanath Mookerjee*(1), *Guracharya* v. *The President of the Belgaum Town Municipalities*(2) and *Reference under Forest Act V of* 1882(3). We overrule the objection and hold that the suit was properly considered not to be barred by limitation.

As to the second question, the District Judge is of opinion that the decision of Mr. Sewell was final, that it was binding on the appellant and that it was not competent to the Government to reopen it. It is admitted that on the 24th Aug. 1871, Mr. Sewell, Assistant Collector of North Arcot, professing to act as an arbitrator under Act XXVIII of 1860, investigated the present claim, *inter alia*, and formally adjudicated upon it. At that time the appellant was a minor and his estate was under the management of the Court of Wards. Certain old boundary disputes revived in villages along the border of the Chittur taluk and the zamindari of Punganur and it was considered desirable by the Collector

(1) I.L.R., 5 Cal., 110. (2) I.L.R., 8 Bom., 529. (3) I.L.R., 10 Mad., 210.

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to settle them under Act XXXIII of 1860 and to include the present dispute in the settlement. He proposed that Mr. Sewell should undertake the adjudication of these disputes and adding that the zamindar of Punganur expressed his acquiesence in the proposal, requested the Government to assign to Mr. Sewell the adjudication of the differences of which he enclosed a list including the boundary that forms the subject of the present litigation. The Board of Revenue submitted the proposal for the orders of Government who by their order, dated the 13th September 1870, authorised Mr. Sewell to act as arbitrator under Act XXVIII of 1860 for the settlement of the boundary disputes referred to in their proceedings, observing that the Collector should be careful to see that all the requirements of the Act in regard to arbitration were strictly adhered to (exhibit CC). The Collector communicated the Government order to Mr. Sewell by endorsement and he thereupon proceeded to adjudicate on the claim. He recorded his decision (exhibit V) and forwarded it to the Collector who forwarded it for the approval of the Board (exhibit R) and the Government. They approved of the decision and the Collector deposited it in the District Court (exhibit S). The award was afterwards forwarded to Mr. Rundall to be carried out and he advised the Collector of the difficulty which he experienced in so doing and called attention to several omissions in procedure which in his opinion rendered the award altogether void. A correspondence then ensued and after obtaining the opinion of their Law officers, the Government came to the conclusion either that the question in dispute must again be referred to a new arbitrator if the parties concerned will consent or that if they will not consent, a Settlement officer must be deputed to deal with it under s. 25 of the Act. The parties to this suit consented to the appointment of Major Liardet as arbitrator, and though Government appointed him he was unable to proceed with the arbitration. The respondent then declined to consent to the appointment of any one else as arbitrator and the Government appointed Colonel Cloete to proceed under s. 25 of the Boundary Act. The omissions to which Mr. Rundall called attention are (i) that no written statement nor agreement was filed in accordance with s. 22, (ii) that there was no order of reference as required by the s. 23, (iii) that Mr. Sewell disposed of disputes between villages which are not mentioned in the Government order

whereby he was appointed arbitrator, (iv) that when the award was forwarded to the Collector he did not confirm it and pass a decision as required by s. 21, (v) that such decision was not intimated to the parties and that a certified copy was not forwarded to the District Court for deposit as provided by s. 24.

Though, as observed by the District Judge, most of the omissions are mere defects of form and may not be considered to be fatal to the award on the ground that there was a substantial, if not a formal compliance with the provisions of the Act, the omission on the part of the Collector to pass a decision in accordance with the award and furnish a copy of the same to the parties is, as pointed out to the Government by the late Advocate-General, fatal to the award. That the Collector intended to approve of the award, there is no doubt, for in his letter to the Board of Revenue dated the 9th October, he expressed his approval and recommended its acceptance by Government. But he overlooked s. 21 which requires him to pass a decision according to the award and to furnish a copy thereof to the parties and provides that the decision given according to the award shall be final. The power given by this section is judicial and the Collector was in error in seeking the acceptance of the award by the Board and the Government instead of exercising his independent judgment as a Judicial officer. Again, his position was anomalous. As agent to the Court of Wards he represented one of the rival claimants, and as the person entitled to approve of the award and pass a decision according to it he was judge in one sense in his own cause. Again, he passed no decision in accordance with the award which alone could become final when duly intimated to the parties and sustain a plea of *res judicata*. We are unable to concur in the opinion of the Judge that this error of procedure is not substantial and that it was not competent to the Government to re-open the question.

On the merits, however, we consider the decision of the Judge is right. The oral evidence upon which the parties rely is sufficiently set out by the Judge and it is scarcely necessary for us to recapitulate it here. It will be observed that the oral evidence is conflicting, but considering it in the light thrown upon it by certain undisputed facts and by the probabilities of the case, the respondent's claim appears to be well-founded. The dispute between these two estates is more than 60 years old and the question of

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actual enjoyment is therefore of considerable importance. The Bangari palayam was under attachment from 1804 to 1827 and it was restored to the palayagar in 1828. During this period the palayam was under Amani management and the accounts do not show that the Government derived any revenue from the forest or hill produce of the tract in dispute, whilst the accounts of Bonamanda indicate that such produce was enjoyed by the zamindar of Punganur. Again, in 1828, a dispute arose in regard to the tract in question between the two estates. Messrs. Macdonald and Inglis, Head Assistant Collectors of North Arcot and Cuddapah, were directed to settle the dispute, and they decided in favor of the respondent in 1832. Their judgment shows that the Punganur zamindar was then in possession; that though the dispute existed even prior to 1804, no evidence was then forthcoming in support of the appellant's claim; and that on the other hand there was positive evidence that the Government was not in possession between 1804 and 1827. It was admitted in the Court below that the respondent was in possession since Mr. Sewell's settlement in 1871. As for possession during the intermediate period, it is shown on the one hand by the oral evidence for the respondent that a Punganur Tana existed at Katu Papannagunta, marked P in the plan, and that tamarind and other forest produce were let on contract by the respondent's family, whilst on the other, there is no trace of interference by the Bangari Palayagar with the possession of Punganur.

Furthermore, though the pymaish accounts of the two estates severally support the rival claims, yet the Punganur Survey Account was considered in 1832 and in 1871 to be more carefully prepared than the Bangari pymaish in regard to waste land and a comparison of O, P, II, III and IV supports the observation of the Judge that the former is more satisfactory and reliable than the latter.

Again, the position of the ruins of a fortification across the Saddikudu Pass not very far on the slope from where the ascent to the plateau begins, the situation of the fortress of Analapallidrug sheltered by jungle all around in which the Punganur Zamindar took refuge in 1785 and on previous occasions and the situation of a ruined wall across the valley in Govindulupenta, marked G, and of a gateway on Thalupula Kamma show that the tract in dispute

in which the abovementioned Punganur works lie belonged probably to Punganur even before the Mysore war.

With the foregoing evidence before us we are unable to adopt Colonel Cloete's opinion which he formed mainly with reference to the natural features and the lie of the country, the distance of the boundary line from the villages of the rival claimants and the necessity of the villages on the plain for fuel and grazing grounds. In dealing with questions of property a decision must be arrived at upon the evidence on record and we cannot approve of the mode in which Colonel Cloete rejected the evidence on both sides and decided the case on considerations such as those mentioned by him. We are of opinion that the District Judge has come to a correct conclusion as to the effect of the evidence on the record and we dismiss this appeal with costs.

APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Muttusami Ayyar.

RAMASAMI AND OTHERS (PLAINTIFFS), APPELLANTS,

and

APPAVU AND OTHERS (DEFENDANTS), RESPONDENTS.*

1887. Aug. 11, 31.

Evidence Act, ss. 13, 42—Relevancy of judgments in suits in which right asserted to collect dues for a temple.

In a suit brought by the trustees of a temple to recover from the owners of certain lands in certain villages money claimed under an alleged right as due to the temple,

Held, that judgments in other suits against other persons in which claims under the same right had been decreed in favor of the trustees of the temple were relevant under s. 13 of the Evidence Act as being evidence of instances in which the right claimed had been asserted:

Held, also that the said judgments were relevant under s. 42 of the said Act as relating to matters of a public nature.

APPEALS from the decrees of D. Irvine, District Judge of Trichinopoly, reversing the decrees of A. Kuppusami Ayyangar, District Munsif of Trichinopoly, in suits Nos. 208, 209, and 395 of 1884.

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* Second Appeals Nos. 455 to 457 of 1886.