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CHOUHRY  
NAZIRUL  
HAQ  
†  
ABDUL  
WAHAB.  
DAS, J.

In my opinion the argument is wholly unsustainable. It is true that a surveyor has no authority to decide any question of title between the parties; but as has been pointed out, he has authority to see what are the boundaries and bearings and also, I may add, as to who is in actual possession of the land. It is unnecessary to go through the cases which have been decided with reference to the question which has been argued before us. I may, however, usefully refer to *Koomodinee Debia v. Poorno Chunder Mookherjee* (1). *Shusee Mookhee Dossce v. Bissessuree Debee* (2). *Ram Narain Doss v. Mohesh Chunder Banarjee* (3); *Prosonno Chunder Roy v. The Land Mortgage Bank of India Limited*, (4) and *Satcoveri Ghose Mondal v. Secretary of State for India in Council* (5).

I must dismiss these appeals with costs.

BUCKNILL, J.—I agree.

*Appeals dismissed.*

## APPELLATE CIVIL.

*Before Das and Bucknill, J.J.*

SYED ALI ZAMIN

v.

NAWAB SYED MUHAMMAD AKBAR ALI.\*

*Land Registration Act, 1876 (Bengal Act VII of 1876), sections 42, 52 and 55—Distinction between "succeeding" and "assuming charge"—when Collector decides question of possession no reference to be made to Civil Court—Revision—refusal to exercise discretionary power.*

In deciding, under section 52 of the Land Registration Act, 1876, whether the applicant is entitled to be registered or not, a distinction must be drawn between a case where the applicant

\* Civil Revision No. 140 of 1921, against an order of Babu Abinash Chandra Nag, Subordinate Judge of Gaya, dated the 15th May, 1921.

(1) (1868) 10 W. R. 300.

(2) (1868) 10 W. R. 327.

(3) (1873) 19 W. R. 202.

(4) (1876) 25 W. R. 461.

(5) (1895) I. L. R. 22 Cal. 252.

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under section 42 claims to have assumed charge of an estate or revenue-free property as joint proprietor or manager, and a case where the applicant under that section claims to have succeeded to the proprietary right in such an estate or property, whether by purchase, inheritance, gift or otherwise. In the former case the Collector has only to be satisfied that the possession exists, but in the latter case he has no right to direct the name of the applicant to be registered unless he is satisfied (i) that the succession or transfer has taken place and (ii) that the applicant has acquired possession in accordance with such succession or transfer.

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The jurisdiction conferred on the Collector under section 55 either to determine summarily the question of the right to possession or to refer the matter in dispute to the Civil Court only arises where it is not proved to the satisfaction of the Collector that any person is in possession of the interest in dispute.

In this case the Collector, after deciding the question of possession in favour of one of the parties, referred the matter to the Civil Court, and the Civil Court, under section 59, delivered possession to that party. The High Court, therefore, declined to interfere in revision.

The facts of the case material to this report were as follows:—

Nawab Lutfali Khan verbally made a *waqf* with respect to two villages in the district of Patna and an 8-annas share of village Budhaul in the district of Gaya, for the maintenance of an *Imambara* and other religious institutions in the town of Patna. He himself acted as *mutwalli* until April 1898 when he died without having appointed a successor. His eldest son Badshah Nawab took charge of the *waqf* properties and, with the consent of the heirs of Nawab Lutfali, he acted as *mutwalli*. On the death of Badshah Nawab on the 15th March, 1919, the present dispute arose as to who should be *mutwalli*.

Syed Ali Zamin, the son-in-law of Nawab Ibrahim, the second son of Lutfali, based his claim to the *mutwalliship* on the ground that he had been nominated by Badshah Nawab by an *ekrarnamah* dated the 22nd June, 1917. Nawab Syed Akbar Ali, the third son

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of Nawab Lutfali, claimed that he had been elected *mutwalli* by his brother, Nawab Ibrahim, and his two sisters.

Syed Ali Zamin applied to the Land Registration Deputy Collector for registration of his name in respect of the Patna property. The rival claimant objected but Syed Ali Zamin's name was recorded as *mutwalli* in respect of those properties. An appeal to the Collector of Patna was dismissed on the 22nd February, 1920.

Each party applied in July, 1920, to the Land Registration Deputy Collector at Gaya, in respect to the 8-annas share in the village of Budhaul for registration of his name. The Deputy Collector decided that neither party's name could be registered. He rejected Syed Ali Zamin's claim on the ground that, although his name ought to be registered, he was not in possession of the property. He rejected Nawab Syed Akbar Ali's claim on the ground that, although he was in possession, he had no title to the properties. He therefore referred the parties to the Civil Court. Both parties appealed to the Collector who upheld the decision of the Deputy Collector. On the 19th May, 1921, the Civil Court decided the dispute in favour of Nawab Syed Akbar Ali.

Syed Ali Zamin petitioned the High Court.

*Hasan Imam* (with him *Susil Madhab Mullick* and *Panchanan Banerji*), for the petitioner.

*Sultan Ahmed*, for the opposite party.

DAS, J.—This application is directed against the order of the Subordinate Judge of Gaya in a reference made by the Land Registration Deputy Collector under section 55 of the Land Registration Act. Mr. *Hasan Imam*, on behalf of the applicant, contended before us that the learned Subordinate Judge had no jurisdiction to deal with the matter inasmuch as the reference was invalid under the law. He also contended that,

assuming the reference was a valid reference, the order must still be set aside inasmuch as the learned Subordinate Judge acted in the matter illegally or with material irregularity.

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The contest is between the petitioner Syed Ali Zamin and Nawab Syed Akbar Ali commonly known as Chotey Nawab. Each of these persons claim to be the *mutwalli* of the endowment of Nawab Lutfali Khan. The learned Deputy Collector who tried the question between the parties in the first instance came to the conclusion that Ali Zamin had title but had no possession and that Nawab Akbar Ali had possession but no title. He accordingly referred the matter to the Civil Court under section 55 of the Act. The learned Subordinate Judge agreed with the learned Deputy Collector that Akbar Ali Khan was in possession of the properties in dispute. He, however, differed from the Deputy Collector on the question of title. He came to the conclusion that Akbar Ali had a good title to the properties. He accordingly certified to the Collector his determination as to the right of possession under section 63 of the Act.

In my opinion the reference was not a valid one. In order to determine this point it is necessary to refer to the relevant sections of the Land Registration Act. Section 42 of the Act provides that

“Every person succeeding, after the commencement of this Act, to any proprietary right in any estate or revenue-free property, whether by purchase, inheritance, gift or otherwise and every joint proprietor of an estate or revenue-free property assuming charge after such commencement of such estate or property, or of any interest therein, respectively, on behalf of the other proprietors thereof; and every person assuming charge after such commencement of any estate or revenue-free property, or of any interest thereof, respectively, as manager, shall, within six months from the date of such succession or assumption of charge, make application to the Collector for registration of his name and of the character and extent of his interest as such proprietor or manager”.

It will be noticed that this section makes a clear distinction between the case of “succession” whether by purchase, inheritance, gift or otherwise and the case

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of "assumption of charge" whether as joint proprietor or as manager. The distinction is an important one, as we shall presently see in connection with section 52.

That section provides for the enquiry to be held by the Collector, and runs as follows :—

"On the day fixed in the notice issued under section 48, or as soon thereafter as possible, the Collector shall consider any objections which may be advanced, and make such further inquiry as appears necessary to ascertain the truth of the alleged possession of, succession to, or transfer of, the estate, revenue-free property, or interest therein, in respect of which registration is applied for; and if it appears to the Collector that the possession exists, or that the succession or transfer has taken place, and that the applicant has acquired possession in accordance with such succession or transfer, but not otherwise, the Collector shall order the name of the applicant to be registered in the proper registers as proprietor or manager of the said estate, revenue-free property or interest therein; provided that any person to whom any proprietary right in an estate has been mortgaged may be registered as mortgagee, whether he be in actual possession or otherwise".

It seems to me that reading section 52 with section 42, the Collector has the power to order the name of the applicant to be registered where, in the case of assumption of the charge, he is satisfied that the possession exists; but that in the case of succession or transfer he has no right to direct the name of the applicant to be registered unless he is satisfied, *first*, that the succession or transfer has taken place and, *secondly*, that the applicant has acquired possession in accordance with such succession or transfer. In other words, where the applicant claims to have assumed charge of the estate of property either as joint proprietor or as manager it is sufficient for him to establish that his possession exists; but where he claims to have succeeded to any proprietary right whether by purchase, inheritance, gift or otherwise, it is necessary for him to establish not only that the succession or transfer has taken place but that he has acquired possession in accordance with such succession or transfer. In the present case there were two applicants in the land registration department each claiming to have assumed charge of the estate or property as manager of the endowment. There was no question of succession whether by purchase, inheritance, gift or otherwise to be tried by the land registration

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department. It seems to me, therefore, that the only question which the land registration Deputy Collector had to determine was, did possession exist in favour of either of the applicants? He came to the conclusion that it did exist in favour of the opposite party. In my opinion he ought to have ordered the name of the opposite party to be registered as manager of the endowment.

The learned Deputy Collector, however, referred the matter to the Civil Court under section 55 of the Land Registration Act. That section gives the right to the Collector to determine summarily the right to possession of the property, or, if he be of opinion that the dispute can more properly be determined by a Civil Court, to refer the matter in dispute to the Civil Court, provided it is not proved to his satisfaction that any person is in possession of the interest in dispute. In other words, the jurisdiction either to determine summarily the question of the right to possession or to refer the matter in dispute to the Civil Court only arises where it is not proved to the satisfaction of the Collector that any person is in possession of the interest in dispute. In the present case the learned Deputy Collector was satisfied that the opposite party was in possession of the interest in dispute. In my opinion, therefore, there was no jurisdiction in the Land Registration Deputy Collector to refer the matter to the Civil Court under section 55 of the Act.

I have now to consider whether we ought to set aside the order of the learned Subordinate Judge in view of the decision that the reference was not a valid one. I have come to the conclusion that we ought not to interfere with the order passed by the learned Subordinate Judge. We are asked to exercise our revisional powers and as is well-settled the exercise of revisional powers is always discretionary. The ordinary rule is that where an aggrieved party has another remedy available, this Court is unwilling to interfere and in this

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case we are all the more loth to interfere since the learned Subordinate Judge has passed an order which the learned Deputy Collector should have passed in the first instance. In these circumstances we think that no useful purpose will be served by revising the order passed by the learned Subordinate Judge. I would refuse this application, but in the circumstances, would make no order as to costs.

BUCKNILL, J.—I have no doubt that the Land Registration Deputy Collector ought not to have referred this matter to the Civil Court. He had really no jurisdiction so to do for he had come to a clear decision as to the possession by one of the parties. Under such circumstances the reference to the Subordinate Judge, merely because the Deputy Collector thought that the possession and the title were not identical, was outside his proper jurisdiction. The Subordinate Judge, should, and, if it had been clearly pointed out to him, no doubt, would, have seen this *impasse*: but he accepted instead of refusing the reference: and his order, based as it is on an invalid reference, is obviously incapable of theoretical support. The Subordinate Judge, however, although he accepted, wrongly, the incubus of the reference, came, by a quite irregular mode of dealing with the matter, to the conclusion that, whilst the Land Registration Deputy Collector was right so far as possession was concerned, he was wrong in his view as to the title: and, so, on quite improper premises, and on a reference which he ought to have rejected as outside his jurisdiction, he has made an order the effect of which is no doubt correct. The upshot is that the right thing has been done in quite a wrong way.

The question then arises what this Court ought to do under such circumstances. If this Court decided to quash the order and send the matter back for reconsideration, the only result would be to cause further and possibly considerable expense: whereas, if the

order is allowed to stand, the position will remain the same as would be effected by a reconsideration. I think, therefore, that although I do not quite like to allow an order which I feel is without jurisdiction to stand, the sensible course is not to interfere, and I therefore agree with my learned brother.

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*'Application refused.* BUCKNILL, J.

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**REVISIONAL CRIMINAL.**


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*Before Adami and Ross, J.J.*

CHULAI MAHTO

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v.

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 Nov. 13.

SURENDRA NATH CHATTERJI.\*

*Code of Criminal Procedure, 1898 (Act V of 1898), sections 145 and 148—lands alleged by one party to be identifiable and by the other party to be unidentifiable—possession found to be with latter—first party estopped from alleging land to be unidentifiable—kabuliyats executed by one party in favour of another party but not acted upon—latter not estopped from denying first party's possession—pleader-commissioner deputed to survey disputed lands and report—whether report admissible.*

A mere survey of the lands in dispute after enquiry from all the parties as to what land is in dispute does not amount to a "local enquiry" within the meaning of section 148 of the Code of Criminal Procedure, 1898. Therefore there is nothing in the section to prevent the court from deputing a pleader-commissioner to make such survey and to report, but the report cannot be taken into evidence in a proceeding under section 145 without calling the pleader-commissioner, and even then it is admissible only for the purpose of proving that he surveyed the lands pointed out to him by the parties as being the lands in dispute, and of shewing which those lands were.

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\* Criminal Revision No. 383 of 1921, against an order of Babu Girish Chandra Dutt, Deputy Magistrate of Bhagalpur, dated the 20th July, 1921.