Muneekurnicka Chowdhrain (Defendant), *Appellant*,

versus

Anund Moyee Chowdhrain (Plaintiff), *Respondent*.

Baboo Romesh Chunder Mitter for Appellant.

Baboo Hem Chunder Banerjee for Respondent.

The presumption under Section 4, Act X of 1859, of holding at a uniform rate from the Permanent Settlement, need not be specifically pleaded, but (unless rebutted) arises as a matter of course on proof of uniform payment for 20 years.

Bayley, J.—AFTER fully hearing Counsel, we are clearly of opinion that there was a substantial pleading by defendant (special appellant) that his tenure was one held at a fixed rent.

In such a case, it was for the Court to see first, whether the presumption contemplated by Section 4, Act X of 1859, existed,—that is, whether it was proved by defendant that he had paid at an uniform rate for 20 years before the suit; because, if so, then the presumption would be that defendant had paid at an uniform rate from the Permanent Settlement, unless something was on the record,or discovered in the evidence adduced by either party, to rebut the presumption.

It is urged on us that the presumption available under Section 4 should be *specifically* pleaded; but we are of opinion that, according to the later and concurrent rulings of this Court, the pleading in this case is quite sufficient to raise the issue, and, indeed, it was orally pressed by the vakeel in the Lower Appellate Court.

But not only did the Lower Appellate Court not fix this important issue, but it also expressly declined to consider the point, which is an error in law on its part.

The case is, accordingly, remanded to the Lower Appellate Court that it may re-try it with reference to the above remarks.

The 4th June 1867.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Section 180, Act VIII of 1859—Local Investigation—Irregularity—Special Appeal.

Case No. 216 of 1867.

Special Appeal from a decision passed by Mr. F. J. Cockburn, Judge of Sylhet, dated the 26th November 1866, reversing a decision passed by Moulvie Syud Ahmed Buksh, Principal Sudder Ameen of that district, dated the 30th April 1866.

Ram Doss Koondoo (Plaintiff), *Appellant*,

versus

Nil Kanto Dhur and others (Defendants), *Respondents*.

Baboo Otool Chunder Mookerjee for Appellant.

Baboos Chunder Madhub Ghose and *Greesh Chunder Ghose* for Respondents.

Section 180,Act VIII of 1859 makes it imparative on a Court to employ in the first instance the regular officer of the Court to hold a local enquiry; but non-compliance with this requirement of law is not *per se* a ground of special appeal.

Glover, J.—THIS suit arises out of a boundary dispute between the Mouzahs of Kamrapattun and Rampassah, a dispute that has been going on between the proprietors for a long time. It was apparently once supposed to be definitively settled by the arbitration of one Nawab Ali who fixed the boundary line; but changes in the course of the river, which formed one of the points of departure, rendered the position of the boundary uncertain, and the dispute between the proprietors at once revived.

The Court of first instance decreed in favor of the Kamrapattun proprietors; but the Judge on appeal reversed that decision. Previous to disposing of the case, he again deputed an Ameen to the spot (selecting for this purpose one Ahmud Ali, a vakeel of his Court, and the person who had once before been employed in the local enquiry before Nawab Ali's arbitration had taken place), and on his report and evidence, in conjunction with the other evidence on the record, decided in favor of Rampassah.

Against this decision, the owner of Mouzah Kamrapattun appeals specially, urging:—

(1). That the Judge had no authority to depute any one but the regular officers of his Court to hold the local enquiry; and

(2). That his judgment proceeds on an entirely mistaken view of the facts of the case.

On the first point, we think that the Judge acted irregularly. Section 180, Act VIII of 1859 allows a Civil Court to issue a commission to the "officer of the Court appointed to execute such commission," in other words to the Civil Court Ameen, and if "there be no such officer, to any suitable person." The words of the law make it imperative on the Court to employ in the first instance the regular officer of the Court who is attached to the Court for the particular duty in question, and if he be not available, a discretion is allowed on behalf of some other suitable person. It is not denied that there was a duly qualified Civil Court Ameen attached to the Judge's Court at Sylhet, and we think that the Judge ought to have employed him.

But although we consider that the Judge's action in this matter was irregular, we do not hold it to be a sufficient ground of special appeal, inasmuch as it did not affect either the merits of the case, or the jurisdiction of the Court, and therefore by Section 350 of the Procedure Code, is no reason for modifying or reversing the Lower Appellate Court's judgment.

With regard to the second ground of special appeal we think that the Judge was wrong. He starts his judgment with a fact admitted on all hands, namely, that the boundary line laid down by the arbitrator Nawab Ali is the correct boundary and the only point for decision was, "Where was that line?"

The boundary, we observe, ran due east and west starting from the southern extremity of a bend in the river. The Judge has on the evidence fixed the whereabouts of this starting point, and has settled the boundary by drawing a straight line from it due west. It is urged by the special respondent that the decision of the Judge is a finding of fact on evidence which cannot be disturbed in special appeal. But if it can be shewn that the facts themselves are erroneous, the evidence in support of them will not make the decision a final one.

Now, in this case, the line as laid down by Nawab Ali, passed, as appears from the map and kyfeut, to the north of certain land and homestead belonging to one Suleem and through a tank situate north of Suleem's house. This is an admitted fact, as is also the fact that the line now laid down passes a considerable distance to the south of both places; and Ahmud Ali, the Commissioner, sent out by the Judge to lay down Nawab Ali's line, admits in his evidence that his line does not correspond with that formerly defined by the arbitrator.

It appears to us perfectly clear from these admitted facts that the present starting point cannot be the same as that fixed by Nawab Ali. The fact is, that the Judge has chosen the shifting land mark of a river's bank instead of places like Suleem's homestead and tank marks which admittedly exist now, in the same state and in the same relative positions as they did when the arbitrator marked them down in his boundary.

There is, moreover, we observe, an "Akra," or religious house, noted in Nawab Ali's boundary a little to the west of the tank, a place admittedly in existence and a good land mark for discovering what was the line that the arbitrator did lay down.

We think, therefore, that as the point at issue was the position of Nawab Ali's boundary, and that as Ahmud Ali in his deposition admits that in some places at least his line did not correspond with his predecessor's, the Judge was wrong in law in deciding the case wholly on the report and evidence of the Commissioner without taking into consideration the evidence noted above, evidence about which there could be no manner of doubt.

Were the case before us now in regular appeal, we should have no difficulty in laying down the boundary line between the two estates as defined by Nawab Ali.

The case is remanded to the Judge to decide clearly on all the evidence adduced, the position of the boundary fixed by the arbitrator.

Costs will follow the result. The same order is passed in Special Appeals Nos. 217 and 219, which are admittedly governed by the decision in this case.