Before Mr. Justice Norris and Mr. Justice Gordon.

THE SECRETARY OF STATE FOR INDIA IN COUNCIL (DEFENDANT) *v.* KAJIMUDDY AND OTHERS (PLAINTIFFS).* 1895 *July* 31.

Res judicata—Bengal Tenancy Act (VIII of 1885), section 104, clauses (2), (3); sections 105, 107—Civil Procedure Code (Act XIV of 1882), section 13—Objection—Dispute.

Where a Settlement Officer of his own motion settled what appeared to him to be a fair and equitable rent in respect of the lands held by the plaintiffs and other tenants under section 104, clauses 2 and 3, of the Bengal Tenancy Act, and the plaintiffs preferred an objection under section 105, clause 1, to certain entries in the record enhancing their rents, on the ground that their rents were not liable to be enhanced, which objection was disallowed and the record finally published under section 105 (2): *Held*, the proceedings of the Settlement Officer were of an executive, rather than of a judicial, character, and did not operate either as a *res judicata* under section 13 of the Code of Civil Procedure, or as a final decree under section 107, estopping the plaintiffs from having the same matters tried by the regular Civil Court.

The words "objection" and "dispute" in sections 105 and 106 are not synonymous terms.

THE facts of this case are sufficiently stated in the judgment of the High Court.

Babu *Hem Chunder Banerji* and Babu *Ram Charan Mitter* for the appellant.

Babu *Akhil Chunder Sen* and Babu *Amarendra Nath Chatterji* for the respondents.

The judgment of the Court (NORRIS and GORDON, JJ.) was as follows:—

This is an appeal from an order of remand passed by the Subordinate Judge of Tipperah under section 562, Code of Civil Procedure. The plaintiffs are tenants of a Government estate situated in Pergunnah Singargaon in the District of Tipperah, and the defendant is the Secretary of State for India in Council. By a notification, dated the 6th November 1888 (see Part I, page 943, of the *Calcutta Gazette* of the 7th November

* Appeal from Order No. 14 of 1894, against the order passed by Babu Girindra Mohan Chakravarti, Subordinate Judge of Tipperah, dated the 29th of September 1893, reversing an order of Babu Asutosh Banerjee, Munsif of Chandpore, dated the 31st of August 1892.

1895

THE SECRETARY OF STATE *v.* KAJIMUDDY.

1888), the Local Government made an order under section 101 (1) of the Bengal Tenancy Act, directing that a survey be made and a record of rights be prepared in respect of all lands included in the estate in question, and specifying therein the particulars to be recorded as required by section 102 of the Act; and by another notification of the same date, Babu Kali Sankar Sen, Deputy Collector, was appointed Settlement Officer of that estate. After the order had been made and the record of rights prepared, the Settlement Officer, of his own motion, settled what appeared to him to be a fair and equitable rent in respect of the lands held by the plaintiffs and other tenants, under the provisions of clauses (2) and (3), section 104, of the Tenancy Act. Having completed the record, he caused a draft thereof to be locally published under section 105 (1), and thereupon the plaintiffs preferred an objection under that section to certain entries therein enhancing their rents, on the ground that their rents were not liable to be enhanced. This objection was considered and disallowed by another duly-empowered Settlement Officer, Rajany Kumar Dutt, the successor in office of Babu Kali Sankar Sen. Having disposed of the objections, the Settlement Officer finally framed and published the record (*khatian*) under section 105 (2). The plaintiffs did not appeal against the Settlement Officer's orders passed under sections 104 and 105 of the Tenancy Act, but they instituted the present suit to have the proceedings of the Settlement Officer in regard to the settlement of their rents set aside, mainly on the grounds that his proceedings are illegal and invalid; and that his decision has not the force of a decree, and is not binding on them. The principal ground of defence is that the suit is barred by the provisions of the Tenancy Act; that the decision of the Settlement Officer has the force of a decree; and that the question decided by him is *res judicata*, and cannot be reopened and tried by the Civil Court. The learned Munsif gave effect to this defence and dismissed the suit. He was of opinion that the decision of the Settlement Officer under sections 104 and 105 operated as *res judicata*, and that the only remedy open to the plaintiffs was to have appealed to the Special Judge. On appeal, the learned Subordinate Judge set aside the decree of the Munsif and remanded the suit for trial on the merits. He held that the

Settlement Officer had no jurisdiction to settle the rents of the plaintiffs under section 104, and that, even if he had, his decision in such proceedings has not the force of a decree under section 107, and that the principle of *res judicata* does not apply.

In second appeal by the defendant, it is contended before us that the learned Subordinate Judge has taken an erroneous view of the law, and that he ought to have held that the suit is barred by the provisions of the Tenancy Act.

The first question to be determined is, whether the Settlement Officer had jurisdiction under the Tenancy Act to settle rents in respect of the land held by the plaintiffs. Now it is admitted that the Settlement Officer was not invested under section 112 of the Act with powers to settle all the rents in this estate, and further that neither the plaintiffs nor the defendant applied for a settlement of rent under section 104 (2), so that in order to give the Settlement Officer jurisdiction to settle the rents *suo motu* it must have appeared to him that the plaintiffs were holding land in excess of, or less than, that for which they were paying rent [see paragraph 1, clause (2), of section 104]. The Subordinate Judge observed that this fact does not appear, either on the face of the proceedings (Exhibit A) of the Settlement Officer under section 104, or from the *khatian*, or record, as finally framed by him under section 105, and no doubt that is so. The proceedings (A) only show that the Settlement Officer enhanced the rents, on the ground that there had been a rise in the average price of rice, and further there is no entry in the *khatian* of the area of the plaintiff's holding prior to the survey. But however that may be, it is clear from the plaint itself that it is the plaintiffs' case that the Settlement Officer found by measurement that the area of their holding was in excess of that for which they had been paying rent. In paragraph 1 of the plaint the plaintiffs say the area of their holding is 9 kanis, and in paragraph 2, that the Settlement Officer "published a draft *khatian* stating, among other things, that the said quantity of land was 103 bighas 1 kattah 10 chattacks;" and, again, in paragraph 3, the plaintiffs take exception to the length of the pole of measurement used by the Settlement Officer in measuring their lands, whereby the area thereof was increased. In the face of these admissions, we do not think that it can be contended that the

1895

THE SECRETARY OF STATE v. KAJIMUDDY.

Settlement Officer had no jurisdiction to settle rents, merely because it does not appear on the face of his proceedings under section 104, that he settled the rents on the ground that the land held by the plaintiffs was in excess of that for which they were paying rent. And as regards the *khatian*, we observe that there is no column provided in it for showing the area of the land prior to the survey (see form of *khatian* given in rule 9 of the rules published by the Local Government on the 21st December 1885 under sub-section 5, section 190, of the Tenancy Act) ; so that such area could not be entered therein. We are, therefore, unable to agree with the Subordinate Judge that the Settlement Officer had no jurisdiction to settle rents under section 104 of the Act. The next question is, what is the legal effect of the Settlement Officer's proceedings under sections 104 and 105 of the Tenancy Act.

The determination of this question is not free from difficulty, but after giving it our best consideration, we are of opinion that the Subordinate Judge is right in holding that the suit is not barred by the principle of *res judicata*, or by the provisions of the Tenancy Act. We have sent for and examined the original records of the proceedings of the Settlement Officer under sections 104 and 105 for the purpose of ascertaining what was the exact character of those proceedings, and it appears to us that they were of an executive, rather than of a judicial, character. Under rule 16 of the rules promulgated by the Local Government, the Settlement Officer issued a notice (see form of notice at the end of schedule 1 of the rules), which, among other matters, contained the following : "I shall, also, at the said time and place, or at such other time to which the proceedings may be adjourned, proceed, on the application previously made of either landlord or tenant, to settle fair and equitable rents under section 104, sub-sections 2 and 3, of the said Act. Furthermore notice is given that should it then appear that any tenant is holding land in excess of, or less than, that for which he is paying rent, and should neither the landlord nor tenant apply to have a fair rent settled, I shall, in accordance with the said section of the Tenancy Act, proceed of my own motion to settle a fair and equitable rent for such tenants' holding." And, as we have already said, neither the landlord (the Government in the present case), nor tenant applied for a settle-

ment of rent. Several tenants, however, presented petitions to the Settlement Officer, in which they stated that their rents were not liable to be enhanced, and the Settlement Officer, after taking down the depositions of some of these petitioners and some other persons, decided that the rates of all the tenants of the estate were liable to be enhanced, on the ground stated in his proceeding, dated the 5th March 1890 (Exhibit A). There was thus, we think, no suit before the Settlement Officer in the proper sense of the term. The landlord was no party to the proceeding. There was no plaintiff and no defendant arrayed against each other. There was, in fact, no contest, and no issue was raised for determination between any contending parties. In these circumstances, we think it is quite impossible to hold that section 13 of the Civil Procedure Code has any manner of application to the present case, or that the decision of the Settlement Officer settling the tenant's rents under section 104 operates under section 107 as a final decree, estopping the present plaintiffs from having the same matters tried by the regular Civil Court. The same observations apply to the order of the Settlement Officer passed under section 105 on the objection of the plaintiffs. That order was not passed in a suit or in any contest between landlord and tenant. All that appears is that some local enquiry was held and the objection was disallowed.

It was argued before us that the entries in the *khatian*, to which objection was taken by the plaintiffs, are disputed entries, and that, therefore, the decision by the Settlement Officer in respect of those entries is final.—See the case of *Gokhul Sahu* v. *Jodu Nundun Roy* (1). We cannot accept this view. The words "objection" and "dispute" are not synonymous terms, and we do not think that they are used in the same sense in sections 105 and 106 of the Tenancy Act. In our opinion these entries are, properly speaking, undisputed entries, and, under section 109, are to be presumed to be correct, until the contrary is proved. A suit in the Civil Court will accordingly lie to establish the incorrectness of these entries, and we observe that section 111 of the Act contemplates the institution of such a suit after the final publication of the record.

(1) I. L. R., 17 Calc., 721.

1895

THE SECRETARY OF STATE *v.* KAJIMUDDY.

On the whole we think the decision of the Subordinate Judge is right, and we dismiss this appeal with costs. The case will go back to the first Court for trial of the remaining issues.

F. K. D. *Appeal dismissed.*

Before Mr. Justice Prinsep and Mr. Justice Ghose.

1895 *August* 6.

BENI PARSHAD AND OTHERS (DEFENDANTS NOS. 1 AND 2) *v.* PURAN CHAND (PLAINTIFFS).*

Hindu Law—Joint family—Benares School of Law—Joint family property—Ancestral property assigned to wife in lieu of maintenance, Devolution of—Collateral succession—Decree passed by mistake against father, Effect of on sons—Sale in execution of decree against father—Purchase by decree-holder—Interest passed by sale, Nature and extent of—Mother's share in joint family property, Nature and devolution of.

A Hindu governed by the Benares School of Law died, leaving a joint family, consisting of four sons, *A*, *B*, *C* and *D*, and a widow, *R*, to whom he assigned an ancestral *mouza* in lieu of her maintenance. All the sons predeceased the widow: *C* and *D* dying childless. After the widow's death, a separation took place in 1862 among all her grandsons, *viz*, *E* and *F*, sons of *A*, and *G* and *H*, sons of *B*. At the separation, *E* withheld possession, among other properties, of the *mouza* assigned to *R* on alleged transfers from *R* and the widows of *C* and *D*; *H* sued *E*, making *G* a *pro-formâ* defendant, and recovered a decree for 4 annas of the *mouza* in 1864, and *G* also recovered a similar decree for 4 annas in 1866. Some time after *H* brought an action for mesne profits and recovered a decree in 1875 against *M*, heir of *E*, and also against *G*, although there was no allegation of wrong against the latter, and no finding in the Court's judgment to that effect. In execution of this decree *H* caused the interest of *G* in the *mouza* to be sold, purchased it himself and took delivery of possession on 19th December 1878. In 1881, the wife of *G*, together with her two sons (plaintiffs 1 and 2), executed a *kabala* in respect of one anna six pies of the *mouza* to *S* (defendant 4); the wife of *G* died in 1885. The present suit was brought by the three sons of *G* to recover a four-fifth of the four annas of the said *mouza*, a three-fifth in their own right and a one-fifth in right of their mother. Among the objections raised by the defendants and pressed by them on appeal to the High Court—

1. It was urged that out of the four annas share, two annas were acquired by *G* collaterally from his uncles *C* and *D*, and therefore were not "ancestral property" of the plaintiffs: *Held*, that the *mouza* in question retained the

* Appeal from Original Decree No. 130 of 1893, against the decree of Babu Sham Chand Dhur, Subordinate Judge of Gya, dated the 31st of December 1892.