

the District Magistrate in his letter of explanation with regard to this case. He has said that this Court in revision has only to determine questions of law and has no jurisdiction to determine questions of fact. He cites a case [*In the matter of the petition of Debi Churn Biswas* (1)] in support of this observation. This case, however, was decided under the old Criminal Procedure Code, Act X of 1872, the provisions of sections 294 and 297 of which were different from those of section 439 of the present Code. The powers of this Court to consider the facts of a case in revision are apparent from the terms of the section, and this has been held in numerous decisions of this Court. We may cite the passage at p. 618 of the case of *Hari Dass Sanyal v. Saritulla* (2) as explicitly dealing with this question.

For these reasons, then, we set aside the conviction of the accused under section 379 of the Penal Code. We affirm their conviction under section 143, and we reduce the sentence of imprisonment passed on them to such period as they may have already undergone.

Rule made absolute in part and conviction modified.

H. T. H.

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APPELLATE CIVIL.

Before Mr. Justice Hill and Mr. Justice Rampini.

IRSIAD ALI CHOWDERRY (OPPOSITE-PARTY) v. KANTA PERSHAD
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June 27.

Second appeal—Bengal Tenancy Act (VIII of 1885), ss. 100, 108—Special Judge, Order of—Boundary dispute—Bengal Survey Act (Bengal Act V of 1875), Part V, s. 40—Settlement Officer acting as Survey Officer.

A second appeal only lies to the High Court under section 108 of the Bengal Tenancy Act from the decision of the Special Judge in a case under section 100 of the Act. No second appeal, therefore, lies from an order of the Special Judge dismissing an appeal on the ground that no appeal lay to him in a case of a boundary dispute which had been tried and decided by

^a Appeal from Appellate Decree No. 721 of 1893 against the decree of C. P. Caspersz, Esq., Special Judge of Chittagong, dated the 19th December 1892, affirming the decree of Babu Durga Churn Ghose, Assistant Settlement Officer of Chittagong, dated the 31st of August 1892.

(1) 20 W. R. Cr., 40.

(2) I. L. R., 15 Calc., 608.

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a Settlement Officer acting as a Survey Officer under Part V of the Bengal Survey Act (Bengal Act V of 1875).

The Court declined to interfere under section 622 of the Civil Procedure Code, being of opinion that the Settlement Officer had power under section 189 (b) of the Bengal Tenancy Act, and Rule 1, chapter VI of the Government rules under the Tenancy Act to act as he had done, and that therefore in holding that no appeal lay to him the Special Judge had not refrained from exercising any jurisdiction which he ought to have exercised.

THE proceeding which gave rise to this appeal was a petition headed "Case of boundary dispute No. 5 of 1892-93," and filed in the Court of the Settlement Officer of Chittagong by Kanta Pershad Hazaree for a determination of the boundary between his estate in *mouza* Burmacharn and *mouza* Toiladip. Notice of the application was served on Irshad Ali Chowdhry, who was in possession of *taluk* Jinnat Ali Khan (which was the portion of *mouza* Toiladip contiguous to the land of Kanta Pershad Hazaree) as auction-purchaser at a sale for arrears of revenue held in March 1888.

Irshad Ali Chowdhry made a number of objections to the petition, of which the following only are material to this report, namely, that the case being one for determination of boundaries had not been brought in the proper Court; that in such a case he should not have been made a party; that the Survey Superintendent and Settlement Officers had already determined the boundaries of his (the objector's) land, and the record of rights had been effected thereon, and the Court was therefore not competent to deal with the matter again; that as the case had not been brought under section 106 of the Bengal Tenancy Act it ought not to be heard by the Court; and that the petitioner had no right to the land claimed by him.

The case came before the Assistant Settlement Officer of Chittagong, who, finding that the boundary had been already settled in a former proceeding between Arsad Ali Khan, the former proprietor of *taluk* Jinnat Ali Khan, and the petitioner Kanta Pershad Hazaree, by the Judge of Chittagong, on the 7th July 1884, and that nothing new had been made out in the present case to justify the adoption of a different boundary, decided the case in favour of the petitioner.

On a petition of appeal to the Settlement Officer the case was

referred to the Assistant Settlement Officer for report "whether it was a summary decision of an objection, or a judgment in a regular dispute case under section 106 of the Bengal Tenancy Act," on which the Assistant Settlement Officer made the following order, dated 23rd September 1892 :—

"This is not a dispute raised under section 106 of the Bengal Tenancy Act, but one for laying down the boundary between the two *mehals* named above, and which had already been determined by Courts of competent jurisdiction. It was entered in the register of boundary disputes kept under Part V. of the Bengal Survey Act, and the procedure followed in its disposal was that prescribed by that Act."

The objector Irshad Ali Chowdhry appealed to the Special Judge of Chittagong, before whom an objection was taken that no appeal lay. As to this the Judge said :—

"A preliminary objection has been made to the effect that no appeal lies to this Court, sitting as a Special Judge under Chapter X of the Bengal Tenancy Act. It is admitted and proved that appellant's appeal to the Settlement Officer, who is the Superintendent of Survey under Bengal Act V of 1875, has been duly dismissed. Section 59 (c) of the Survey Act provides for appeals from decisions in boundary disputes; and section 62 provides for a civil suit to be thereafter instituted. Clearly this Court has no jurisdiction; nor does the decision of the Assistant Settlement Officer, who mistakenly designates himself as such, purport to be under the Tenancy Act. It is specially headed 'boundary dispute.' No doubt there has been a transference of plots, but that was for the information of the Survey Department, and correction of the maps. I am referred to the Settlement Manual, page 8, Chapter II., paragraph 19. But section 108, Act VIII of 1885, allows appeals from the decisions of Revenue Officers under Chapter X of that Act, and not under the Survey Act. Appellant himself has recognized the fact by going up to the superior authorities in the Survey Department. I express no opinion upon the question whether the proceedings ought to have been regulated by the Bengal Tenancy Act. They were not so regulated, and I therefore give my judgment for respondent with costs. The appeal is dismissed. I allow no costs to the Secretary of State, as he was no party to the appeal, and the Government pleader contented himself with observing that no appeal lay."

From this decision Irshad Ali Chowdhry appealed to the High Court, mainly on the grounds that the Special Judge was wrong in holding that the case was one under Bengal Act V of 1875, and that therefore no appeal lay to him; that the application having been made in the course of proceedings

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under the Bengal Tenancy Act disputing the correctness of the boundary laid down in respect of his farming lease, and having been entertained by him as a Settlement Officer, and not as Assistant Superintendent of Survey, the Judge should have held that an appeal lay from the decision of the Settlement Officer under Chapter X of the Bengal Tenancy Act; that the Judge should have held that the first Court did not act as Assistant Superintendent of Survey, nor was he authorized to entertain the application under that Act.

Sir *Griffith Evans*, and Babu *Harendra Narain Mitter* (for Babu *Akhil Chunder Sen*) for the appellant.

Moulvie *Serajul Islam* for the respondent.

The objection was taken that no second appeal lay to the High Court.

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

This is a second appeal against an order of the Special Judge of Chittagong, who has rejected an appeal against an order of the Assistant Settlement Officer of Chittagong on the ground that no appeal lies to him. On behalf of the appellant it is contended that the order of the Assistant Settlement Officer was passed under the provisions of the Bengal Tenancy Act, that it was *ultra vires*, being a decision as to a boundary dispute between neighbouring proprietors of land, and that, therefore, it should have been set aside by the Special Judge.

A preliminary objection to the hearing of this second appeal has been urged on the ground that no appeal lies to this Court. We are of opinion that this contention must prevail. A second appeal only lies to this Court under section 108 (3) against a decision of the Special Judge in a case under section 106, and it is clear that the decision of the Special Judge in this case, which it is sought to set aside, is not a decision under section 106, because it is not a decision about the correctness of an entry in the record of rights.

Then it is said that we should regard this appeal as an application under section 622 of the Civil Procedure Code. But we are unable to do so, because we do not think that the Special Judge

has refrained from exercising any jurisdiction which he ought to have exercised. The Settlement Officer's order, which the Special Judge declined to interfere with, was, we think, passed by him under his powers as a Survey Officer with which he is vested under section 189 (b) and Rule 1, Chapter VI of the Government Rules made under the Tenancy Act. He himself says in an order, dated 23rd September 1892, which is to be found on the record that his order is one under Part V of the Bengal Survey Act (Bengal Act V of 1875), and section 40 of that Act, which is the first section of Part V, authorises him to dispose of such a boundary dispute as he has decided in this case. We, therefore, do not think that he was dealing with the case under the Tenancy Act, and accordingly the decision of the Special Judge now appealed against is right.

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Sir Griffith Evans relies on the fact that the Settlement Officer has described himself as such and not as a Survey Officer, and also on Rule 33, page 8 of the Board's Survey Manual, in which it is laid down that, under section 106, a Settlement Officer may decide disputes between two disputing landlords, unless the estates of one of them should lie without the limits of the area under settlement, which is not the case, it is said, in the present instance.

But this rule has not the force of law, and the Settlement Officer himself says his proceeding was one under Part V of the Survey Act. It is a well known rule that, when a judicial officer has powers to do certain things, it is to be presumed that, when he does these things, he was acting under these powers, though he may not expressly say so.

We, therefore, see no reason for interfering in this case. As the Special Judge points out, the appellant has still the remedy of a regular civil suit open to him.

We dismiss the appeal with costs.

Appeal dismissed.

J. V. W.