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having, up to the making of the decree of the Judicial Commissioner, appeared in the suit and defended separately. In the present appeal the defendant claimed to be allowed a proportion of those costs, on the ground that the plaintiffs had got the benefit of the reversal of the decree of the Judicial Commissioner. This is not a ground for making the plaintiffs liable for any portion of those costs. The proceedings were taken by the defendant for his own benefit, and without any authority express or implied from the plaintiffs; and the fact that the result was also a benefit to the plaintiffs does not create any implied contract or give the defendant any equity to be paid a share of the costs by the plaintiffs. This claim has been disallowed by the lower Courts, and their Lordships will humbly advise Her Majesty to affirm the decree of the Judicial Commissioner and to dismiss this appeal. The appellant will pay the costs of it.

Appeal dismissed.

Solicitors for the appellant: Messrs. *Walker & Rowe.*

Solicitors for the respondents: Messrs. *T. L. Wilson & Co.*

C. B.

P.C.*
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Nov. 21
&
Dec. 9.

LUKHI NARAIN JAGADEB (PLAINTIFF) *v.* JODU NATH DEO AND OTHERS (DEFENDANTS).

[On appeal from the High Court at Calcutta.]

Second appeal—Grounds of appeal—Civil Procedure Code (Act XIV of 1882), section 584—Evidence in cases of disputed boundary—Onus of proof.

The Court of first instance accepted as correct a boundary line mapped by an Amin, dividing the estates of the opposite parties. The Lower Appellate Court, after remanding the suit for a second local investigation and report, determined to disregard the second return, which differed from the first, and affirmed the judgment. Both parties having appealed, the High Court, dissatisfied as to this disregard of the second return, decided to hear the appeal as a regular one, examined the evidence, and reversed the judgment of the Court below.

Held, that to have dealt with the appeal as a regular appeal was in excess of the Court's jurisdiction; and that it had no power to hear the appeal as a second appeal, there not having been, in the proceedings below, any error or defect, within the meaning of section 584 of the Civil Procedure Code, which contained the only grounds of second appeal.

* *Present:* LORDS WATSON, HOBHOUSE, and SHAND, and SIR R. COUCH.

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On questions of boundary, especially where the dividing line in dispute runs through waste lands which have not been the subject of definite possession, the rule as to the burden of proving the affirmative is not applicable. The litigants are in the position of counter-claimants, and both parties are bound to do what they can to aid the Court in ascertaining the true line.

APPEAL, by special leave, from a decree (7th June 1888) of the High Court reversing a decree (2nd September 1886) of the District Judge of Cuttack, who had affirmed a decree (3rd March 1885) of the Subordinate Judge of the same district.

The principal question here was whether the High Court had acted beyond its powers, in hearing an appeal from the decision of a Lower Appellate Court upon an issue of fact only, without there having been any such grounds of second appeal as are stated in section 584 of the Civil Procedure Code.

On the 29th March 1877 the appellant's vendor instituted this suit, and the appellant was substituted for him on the 8th February 1884, the claim being to recover possession of an area of about eighty acres, valued, for the purposes of suit, at Rs. 2,816. The issue was whether the land was comprised in the plaintiff's *mouza* Argal, or in the defendant's *mouza* Dimripal, the latter lying eastward of the former.

An Amin deputed by the Subordinate Judge drew on his map a line running through the land in dispute as the boundary between Argal and Dimripal. This the Court found to be correct enough for the purposes of its decision, although the Amin had only made such a survey as his compass enabled him to make, without having, as he said, instruments for scientific measurement. From the decree of the first Court the defendant appealed, and the plaintiff cross-appealed to the District Judge, who accepted the Amin's report; but only after remanding the suit for a second local investigation. The second report by the Amin differed materially from the first.

The District Judge in affirming the decree observed as follows in reference to the defendant's objections to the Amin's mode of working:—

"I do not find that anything was said whilst the Amin's work was going on. The defendant chose to assume an attitude of indifference at that time;

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yet if wrong trijunctional points were being adopted as the basis of the work, it was open to him to try to get right ones adopted. To do nothing until the work is over, and to rely merely upon what may be the effect of cross-examination of the Amin, is not the way to promote the expeditious settlement of the case, a thing which those who are in the right are usually more anxious for than those who are in the wrong. What the defendant here did, was to say nothing in any proper manner whilst the work was going on; but sixteen days after the Amin had submitted his report, he prayed that he might be summoned for examination, and that certain other witnesses might be also called to controvert his results."

The District Judge continued thus :—

"It is greatly to be regretted that such a point as what meridian was employed in the revenue survey should have been assumed instead of being ascertained. From the enquiries made by me it has been shown that the meridian used was not the magnetic but the true meridian, the difference between which has been also ascertained to be about 2 degrees, 50 minutes. This, of course, has had the effect of dislocating the boundary to some extent. Even if the Amin got his starting-point right, this would throw the line to one side. In order to form some opinion as to what the difference would be in the run of the boundary if the necessary allowance for the variation of the compass be made, the Amin was made to re-trace the boundary on his map with corrected bearings, the result being to make matters much more against the respondent, plaintiff, than they were before, as none of the disputed land with this alteration falls in Argal, and a good deal of admitted Argal land will fall in Dimripal. It is not open to me to order that this amendment be made the basis of final settlement. The appellant cannot, indeed, ask me to do this, for his view is that a wrong starting-point was taken, and this is really what I have to consider now. Can the appellant claim to have the work done over again? Or should matters be left as they are? As it is, a line has been made which will at all events tend to stop litigation, and gives a proportion of the disputed land to each party.

"On this matter I am not disposed to think that any further working at the case is likely to be anything but an unfructuous expenditure of time and a protraction of the dispute. The appellant who moves the Court has made no offer to place at the disposal of an Amin the instrument, without which, he says himself, the boundary cannot be properly re-traced. There is no theodolite at the disposal of the Court, nor have I any means of obtaining one. Valuable instruments like these are not to be had on loan. I am thus of opinion that what has been done the defendant is not entitled now to undo. This disposes of the defendant's appeal, which is dismissed with costs."

The plaintiff's cross-appeal was also dismissed. An appeal by the defendant to the High Court, and a cross-appeal by the plaintiff followed.

The order of the High Court of the 13th June 1887 was as follows:—

"We think it necessary that the appeal should be re-heard upon the whole evidence; but looking to the fact that the suit has now been for more than ten years pending since its institution, it having been already the subject of second appeal in the year 1882, we think that the proper course is to call up the case as a regular appeal, before ourselves, and go through the evidence and come to the best decision we can."

Afterwards, on the 7th June 1888, the High Court, having heard the appeal, gave the following judgment:—

"The facts, so far as they are necessary for the purpose of our judgment, appear to be these:—The Civil Court Amin was furnished with two maps, a survey map of *mouza* Argal and a survey map of *mouza* Dimripal, and with these two maps he was directed to go to the locality and trace upon a map prepared by himself a boundary line, showing in which of the two *mouzas*, Argal and Dimripal, the land in dispute falls. He proceeded to do what he was told, and prepared a map showing that about half of the disputed land fell in one *mouza* and the remainder in the other; and he has delineated his boundary line by a black wavy line upon his map. Subsequently it was found that this boundary of his was an erroneous one; and it was alleged that he had overlooked the fact that the meridian laid down in the survey maps with which he had been furnished showed the true meridian and not the magnetic meridian. An application was then made for a re-survey, and, as we gather from the facts, we find that, by consent of both parties, the District Judge wrote to the Survey Office to ascertain whether the meridian laid down in the survey maps was the true meridian, or the magnetic meridian, and what the variation between the meridians was. The survey authorities wrote back to say that the true meridian was shown in the survey maps, and that they had no means available in the office of answering as to what the variation was between the true and the magnetic meridian. Then, as appears from the order-sheet, the Judge communicated with the Executive Engineer of the district, asking him to say what, at that time, was the variation between the two meridians; and this reference, we find, was, as a matter of fact, made with the consent of both parties. The Executive Engineer replied that the difference was 2 degrees 50 minutes, and with this information the Civil Court Amin was directed to re-trace the boundary on the map he had prepared. This he has done, delineating the boundary by a wavy dotted green line upon his map. The result is, that the whole of the disputed

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land is found to be within the defendant's *mouza* Dimripal, except a very small triangular portion at the north, the area of which is found to be 2·08 acres.

"We are of opinion that this re-tracing of the Amin ought to be accepted as correct, and that all that the plaintiffs are entitled to in this suit is the small triangular piece of land delineated which is found by the Amin to be 2·08 acres in area."

The plaintiff, on the 30th August 1888, on the ground that he had not consented to abide by the reply as to the variation of the true and magnetic meridians, applied for a review of the judgment of the High Court. This was refused.

On the plaintiff's appeal, for which special leave was given by an order in Council of the 15th August, 1890.

Mr. *C. W. Arathoon* argued that the High Court acted without jurisdiction in calling up the case as a regular appeal, and in deciding, upon the evidence, the question of fact as to the dividing line. The decision of the District Judge was final as to fact. No second appeal could be preferred except on the ground specified in section 584 of the Civil Procedure Code, and there was no error, such as was there mentioned, in the disregard of the Amin's second report by the Lower Appellate Court. He referred to *Durga Chowdhrani v. Jewahir Singh Chowdhri* (1), and to *Ramratan Sukal v. Nandu* (2). The Lower Appellate Court had decided judicially to disregard the second report of the Amin, preferring his previous report. There was no evidence upon the record of any agreement as to the meridianal line.

Mr. *R. V. Doyne*, and Mr. *F. W. Cave*, for the respondent, the Maharaja Jodu Nath Deo, submitted that the High Court had jurisdiction to make the order of the 13th June 1887. They referred to the superintending power of the High Court in virtue of the enactment in 24 and 25 Vic., c. 104, section 15. That order was made in accordance with the present appellant's interests, as presented in his cross-appeal to the High Court, where the proceeding was not objected to. But, supposing the order of 13th June 1887 to have been irregular, and so far wrong, the ultimate decree dismissing the suit was, upon the whole, in

(1) I. L. R., 18 Calc., 23; L. R., 17 I. A., 122.
(2) I. L. R., 19 Calc. 249; L. R., 19 I. A., 1.

accordance with the merits; so that it might now be held, as a second appeal, to have come under the provisions of section 584 of the Civil Procedure Code. That there had been misdecision on the merits was apparent, when the dividing line was demonstrated to be wrong by the true direction towards the north having been ascertained. It had been decided that there might be error in drawing conclusions upon evidence, which would fall within the former law of special appeal, and under the present law, under section 584. Reference was made to *Surnomoyee* v. *Luchmeeput Doogur* (1), where it was affirmed that in deciding upon questions of fact if a Court did not deal rightly with presumptions, it was an error which the High Court could, in special appeal, correct; *Ramratan Sukal* v. *Nandu* (2); *Ramgopal* v. *Shumskaton* (3), as to error in drawing conclusions.

Mr. *C. W. Arathoon* was not called upon to reply.

Afterwards, on the 9th December 1893, their Lordships' judgment was delivered by

LORD WATSON.—The deceased Maharaja Pudmalabh Deo was zemindar of two *mouzas*, Argal and Dimripal, in the district of Cuttack, which were separated by a mutual boundary running from north to south, Argal being on the west and Dimripal on the east of the line. In the year 1868, his interest in *mouza* Argal was sold in execution of a decree, and was purchased by one Babu Kanhia Lal Pundit, who instituted the present suit. On the death of the Maharaja he was succeeded by his son Jadu Nath Deo, who is the respondent in this appeal; and, on the death of Kanhia Lal, his interest in *mouza* Argal and in this suit passed to one Ram Gobind Jagadeb, and on his decease was acquired by the present appellant.

The action was brought, in March 1877, before the Subordinate Judge of Cuttack, for a declaration that a strip of ground, about 80 acres in extent, lying on the eastern verge of Argal, formed part of that *mouza*. The Maharaja Pudmalabh Deo, whilst he denied, in his written statement, that any portion of

(1) 9 W. R. 338.

(2) I. L. R., 19 Calc. 249; L. R., 19 I. A., 1.

(3) I. L. R., 20 Calc. 93 at p. 99; L. R., 19 I. A., 228 at p. 232.

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the land claimed belonged to *mouza* Argal, did not assert that *mouza* Dimripal extended westwards, at any point, beyond the western boundary of the area in dispute.

After a great deal of preliminary litigation, issues were adjusted and sent to trial. The only one of them to which this appeal relates was in these terms, "Is the land in dispute part of the "plaintiff's estate *mouza* Argal ?"

The area claimed by the plaintiff consisted admittedly of waste land or jungle, and consequently no evidence of possession was adduced on either side. The plaintiff produced and founded upon the Government survey map of 1839; and a remit was made to an Amin of the Court to ascertain whether the disputed land, or any portion of it, fell within the outlines of *mouza* Argal as shown on the map. Before proceeding to carry out the remit the Amin represented to the Court that he could not do so with absolute accuracy, unless he had the transverse table upon which the map was based, and a theodolite. The Court not being in a position to furnish him with either, and neither of the parties offering to supply the want, directed the Amin to proceed with such materials as he had at his command. Acting under that direction the Amin fixed the starting point at the southern extremity of the boundary line, by taking the evidence of villagers in presence of the parties or their agents, and used his own compass in laying down the line northwards.

The Amin thereafter made his report, accompanied by a map upon which the boundary was laid down, and the evidence which he had taken for his assistance. The boundary included in *mouza* Argal about 47 acres of the area claimed by the plaintiff, and assigned the remainder to *mouza* Dimirpal. The defendant then examined the Amin as a witness, with the view of showing the inaccuracy of his report, and adduced no other evidence. The Subordinate Judge gave effect to the report, and decreed that the plaintiff do recover possession of these 47 acres as shown in the map prepared by the Amin. Their Lordships think it impossible to affirm that, as the respondent argued, there was no evidence before the Court upon which that finding,—which is a pure finding of fact,—could be rested. They assent to the observation made by the Judge that "scientific accuracy is hardly to be expected in such

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"cases, substantial justice being all that is necessary for practical "purposes." It is of frequent occurrence, especially in cases where the disputed line of division runs between waste lands which have not been the subject of definite possession, that no satisfactory evidence is obtainable. That circumstance cannot relieve the Court of the duty of settling a line, upon the evidence which is laid before it. The ordinary rule regarding the *onus* incumbent on the plaintiff has really no application to cases of that kind. The parties to the suit are in the position of counter-claimants; and it is the duty of the defendant, as much as of the plaintiff, to aid the Court in ascertaining the true boundary. Were any other rule recognised, the result might be that some boundaries would be incapable of judicial settlement.

The decree was brought under review of the District Court of Cuttack. The District Judge, with the view, apparently, of correcting any error which might have arisen from the Amin using his own compass, communicated with the survey officials of the Orissa Circle, which comprehends the land in dispute, and was informed by them that the meridianal lines on the survey maps were intended to show the true north, and that the meridianal line indicated by a magnetic compass would, in that locality, show a deviation which "might be taken to be 2° 50′ east." Having received that information, the District Judge remitted to the same Amin to lay down, upon the map prepared by him, a new boundary line giving effect to the deviation. The Amin did as he was directed, with the somewhat startling result that the new line included in *mouza* Dimripal, not only the whole of the disputed land with the exception of a small area, about two acres in extent, but, in addition, about 53 acres of land which, it had not been disputed, belonged to *mouza* Argal. Upon considering the case, in the light of the information obtained from the survey officials and of the Amin's report to him, the District Judge adhered to the boundary first laid down by the Amin, and affirmed the judgment of the Subordinate Court.

Before this Board, the respondent maintained that the Judge's disregard of the Amin's second report constituted a substantial error or defect in procedure, within the meaning of section 584 (*c*) of the Civil Procedure Code. But he was unable to point out any defect in the conduct of the case: the only error upon which he

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relied in argument was one which, if it was committed at all, was committed by the Judge, and consisted in his drawing a wrong conclusion from the evidence. The decision of the District Judge, so far as it went, involved no principle of law, and was entirely within his competency. There can be no legal presumption that the line shown on the map of 1839 was laid down according to the true north or that it necessarily represents the real boundary between the *mouzas*. Its accuracy in these particulars must depend upon what was actually done by the persons who made the survey, and transferred the line to the map of 1839, and also upon the information by which they were guided. There can be no necessary presumption of fact, either that a line dividing jungle land was laid down with scientific exactitude, or that the precise boundary was a whit better known in 1839 than at the time when the Amin made his survey for the purposes of this case.

The respondent presented an appeal to the High Court, and objections to its competency were heard before TOTTENHAM and NORRIS, JJ., who ordered the case to be taken up as a regular appeal and to be decided on the evidence. In delivering their reasons for that decision, they observed that "the District Judge's "judgment is very unsatisfactory as to the *ratio decidendi* that the "Civil Court Amin fell into error. We are not satisfied that "there was evidence before him which justified his finding." And they added:—"We think that the proper course is to call up the "case as a regular appeal before ourselves, and go through the "evidence and come to the best decision we can." It is clear that, in adopting that course, the learned Judges exceeded the statutory limits of their jurisdiction. They had no power to entertain the case except as an appeal from an appellate decree, and that only upon the grounds specified in section 584 of the Civil Procedure Code, which deprives them of the right to review findings of fact by the First Appellate Judge, unless these are tainted with one or other of the errors or defects specified in its sub-sections. Upon that point, it is sufficient to refer to the recent decisions of this Board, in *Durga Chowdhrani* v. *Jewahir Singh Chowdhri* (1) and *Ramratan Sukal* v. *Nandu* (2).

(1) I. L. R. 18 Calc., 23; L. R. 7 I. A., 122.
(2) I. L. R. 19 Calc., 249; L. R. 19 I. A., 1.

The case was accordingly heard, as a regular appeal, before NORRIS and BEVERLEY, JJ., who set aside the judgments of the Courts below, gave effect to the line of boundary laid down by the Amin on remit from the District Judge, and found that the small excepted area of two acres was the only portion of the disputed land belonging to *mouza* Argal. For that area they gave a decree in terms of the plaint.

The terms of the judgment delivered are certainly calculated to suggest that the learned Judges had applied their minds to the evidence in the case, and had come to an independent conclusion. They pass in review the whole proceedings which had taken place before the Subordinate and District Courts with a view to the elucidation of the boundary, and then go on to say:—"We are of "opinion that this retracing of the Amin ought to be accepted as "correct." It appears, however, that their decision was not really intended to proceed upon a reversal of the District Judge's findings of fact. The case again came before the same learned Judges, on an application for review; and, on that occasion, they concurred in stating that their decision was due to their having formed the opinion "that the parties agreed to accept the District "Engineer's statement, whether it was correct or not, as the "basis upon which the measurement should be made." Seeing that no allegation had been made or proof tendered of any agreement to that effect, its existence must have been matter of legal inference from the record.

When thus explained, the ground upon which the case was disposed of by the High Court was sufficient to justify an appeal under section 584. It appears to their Lordships that the District Judge must be held to have erred in law, within the meaning of that clause, if the record discloses a judicial agreement by both parties to accept as conclusive a boundary laid down upon the Amin's map deviating the original line in accordance with the information given by the Government Engineer. The respondent's Counsel had very little to say in support of such an agreement; and their Lordships have been unable to discover any trace of one in the record, or any circumstance which could bar the present appellant from objecting to the effect of the information or of the remit which followed upon it. There is no

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more room for suggesting that the appellant agreed to abide by the second remit than for the suggestion that Pudmalabh Deo agreed to accept the first.

Their Lordships will therefore humbly advise Her Majesty to reverse the judgment appealed from, and to restore the judgment of the District Judge. The respondent Jodu Nath Deo must pay the costs in the High Court and the costs of this appeal.

Appeal allowed.

Solicitors for the appellant: Messrs. *T. L. Wilson & Co.*

Solicitor for the respondent: Mr. *J. F. Watkins.*

C. B.

APPELLATE CIVIL.

Before Mr. Justice Ghose and Mr. Justice Rampini.

1894 *January* 25.

MOKUNDA BULLAV KAR (DEFENDANT) *v.* BHOGABAN CHUNDER DAS AND OTHERS (PLAINTIFFS).*

Withdrawal of suit—Civil Procedure Code (Act XIV of 1882), *s.* 373—*Applicability of s.* 373 *to suits under Act X of* 1859.

Section 373 of the Code of Civil Procedure (as to withdrawing suits with liberty to bring a fresh suit) does not apply to suits under Act X of 1859 which is a complete Code by itself.

THIS was a suit for arrears of rent for the years 1295 and 1296 brought under clause 4 of section 23 of Act X of 1859. A previous suit for arrears of rent for the years 1294, 1295, and 1296 had been brought by the plaintiffs, but that suit was withdrawn on the 30th December 1890.

The only defence material to this report was that the plaintiffs in withdrawing the previous suit did not obtain any permission to institute a fresh suit (as it was contended they should have done under section 373 of the Civil Procedure Code), and that not having

* Appeal from Appellate Decree No. 589 of 1892, against the decree of B. L. Gupta, Esq., District Judge of Cuttack, dated the 21st of January 1892, affirming the decree of T. J. Mendes, Esq., Deputy Collector of Balasore, dated the 7th of November 1891.