

Before Mr. Justice Cunningham and Mr. Justice Broughton.

MADHUB DOSS AND OTHERS (DEFENDANTS) *v.* JOGENDRO NATH
ROY (PLAINTIFF).*

1881
Jan. 31.

*Beng. Act VIII of 1869, ss. 38, 40—Order that Tenures have lapsed—
Procedure to enforce Attendance of Witnesses in Proceedings for Measure-
ment of Lands.*

The Collector, in proceedings for measurement of lands under s. 38 of Beng. Act VIII of 1869, cannot be said to have made a “due enquiry,” and therefore should not make an order under that section that the tenures have lapsed, until he has made use of all the powers given him by s. 40 in order to procure the attendance of witnesses.

ON the application of the plaintiff in proceedings taken under s. 38 of Beng. Act VIII of 1869, an Amin was appointed to measure the lands on an estate of which the plaintiff was the proprietor; the Amin went to the spot on the 15th of March and remained until the 1st June, but none of the defendants, the ryots on the estate, except two, Bechu and Namdah, would attend, notwithstanding notices were served on them, both by the Amin and by the Collector. As they did not attend, the Collector made an order under s. 38 of the above Act, that the tenures, otherwise than those of the two defendants who attended, had lapsed.

From this order the defendants appealed.

Baboo *Kally Mohun Doss* and Baboo *Bungshee Dhur Sen* for the appellants.

Baboo *Mohesh Chunder Chowdhry*, Baboo *Mohiny Mohun Roy*, and Baboo *Rashbehary Ghose* for the respondent.

The judgment of the Court (CUNNINGHAM and BROUGHTON, J.J.) was delivered by

CUNNINGHAM, J.—The first objection in this case is, that

* Appeal from order No. 277 of 1880, against the order of Baboo B. P. Roy, Subordinate Judge of Burdwan, dated the 6th July 1880.

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the Court below ought not to have granted the application of the respondent without better evidence of the inability of the applicant to measure the lands, and without ascertaining who are the persons liable to pay rent.

It appears that the respondent, who is the proprietor of the land in question, filed a verified petition, in which he stated that he had endeavoured to measure the land, and had been unable to do so; and that thereupon the Court below made the order under s. 38 of Beng. Act VIII of 1869, now appealed against. We think that that was a rightful proceeding, and that there is no ground for setting aside the order on that account.

But with regard to the procedure adopted by the Collector, we are not satisfied that there was a "due enquiry" sufficient to comply with the requirements of s. 38.

That section is a highly penal one, and we are bound to construe it with the utmost strictness. It appears that, by s. 40, the Collector, in conducting an enquiry of this kind, is empowered to make use of all the powers conferred on a Civil Court by the Code of Civil Procedure in procuring the attendance of witnesses and otherwise taking evidence.

Now, it does not appear that the Collector in this case did put that section in force, or make use of all the powers which the Code gives a Civil Court to procure the attendance of witnesses. The consequence is, that if we upheld the present decision, we should be enforcing a very severe penalty against the witnesses, whom the Collector might, if he had chosen to exercise the powers vested in him by law, have brought before the Court, and thus avoided the penalty coming into force.

Under these circumstances, we think that the order appealed against should be set aside, and the Collector directed to institute another enquiry, using all the powers that the law gives him to bring the witnesses before him. If he is still unable to ascertain and record who the persons in occupation of the land are, and to measure the land, he will then be at liberty to make the lapsing order under s. 38.

Appeal allowed.