and others committed this crime with the sanction of Prannath, and in his presence, or with the other story that they did so under the orders of Prosunno Coomar, the police jemadar alone.

When these witnesses have told such fundamentally different stories about the whole transaction, and when they are proved to be disreputable men, and the story told by them is on the face of it so full of unexplained improbabilities, we do not think it safe to act upon their unsupported testimony as to the *parts* these two men, Kalachand and Moser Sheikh, are said to have taken in the alleged outrage.

We, therefore, set aside the convictions and acquit all three prisoners, Prannath Shaha Chowdhuri, Kalachand Sircar and Moser Sheikh, and direct their release.

Conviction set aside.

T. A. P.

APPELLATE CIVIL.

Before Mr. Justice Mitter and Mr. Justice Norris.

LALLA CHEDI LAL AND OTHERS (PLAINTIFFS) *v.* RAMDHUNI GOPE AND OTHERS (DEFENDANTS.)*

1886 *February* 11.

Bengal Act VIII of 1869, *s.* 38—*Measurement of waste lands—Bengal Civil Court's Act* (*VI of* 1871), *s.* 22—*Appeal.*

An application for the measurement of a whole estate under s. 38 of Bengal Act VIII of 1869 cannot be granted where waste lands in that estate have been brought into cultivation by various ryots, and the landlord is unable to ascertain which of the ryots have appropriated such waste lands as part of their jotes.

Before a measurement can be ordered under that section, it is necessary to establish by evidence the facts set out in the petition for measurement; and to show that the lands sought to be measured are known, but that the tenants liable to pay rent in respect of such lands are unknown.

IN January 1882 Lalla Chedi Lal and others, the proprietors of mouzah Ahiari, applied to the Subordinate Judge of Mozufferpore,

* Special Appeal No. 1488 of 1884, from the decision of A. C. Brett, Esq., District Judge of Tirhoot, dated 19th May 1884, reversing the decision of J. C. Price, Esq., Collector of Dhurbhanga, dated 31st August 1883, and the Robocari of Baboo Ram Pershad Rai, the Sub-Judge, dated 22nd March 1884.

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under s. 38 of Bengal Act VIII of 1869, to have it declared that they were entitled to have the lands of their mouzah measured. The petition, amongst other matters, stated that the area of the mouzah was approximately 3,500 bighas, and the annual income therefrom Rs. 7,000, that the mouzah had not been measured for many years, and that it contained large tracts of waste land which had since been gradually cultivated by the tenants; but that unless measurement were taken it was impossible to ascertain the quantity of lands taken by each respective tenant. On the 5th January 1882 the Subordinate Judge, without taking any evidence on the petition, transmitted the papers to the Collector (under s. 38 of Bengal Act VIII), who, on the 11th February 1882, deputed an Ameen to take measurement of the mouzah. On the 10th October 1882 the Ameen completed his report. In December 1882 some of the ryots preferred a joint petition to the Collector impugning the accuracy of the Ameen's measurements. On the 21st March 1883 the Ameen forwarded his report to the Collector, the delay being accounted for by time taken up in fair copying the proceedings and in obtaining the signature of the ryots to the necessary papers. On the 22nd March 1883 the report was duly filed in Court.

On the 5th April 1883 one hundred and twenty-eight of the tenants jointly objected that the proprietors had no right to obtain measurement under s. 38, at the time stating that as soon as they had seen the report they would file their objections in a supplemental petition. On the 18th August these objections were filed, and after argument, were decided against the ryots on the 31st August 1883, on the ground that a joint petition of objection was not such as was contemplated by s. 38 of Bengal Act VIII of 1869, and that the petition of objection was out of time, the time running from the date on which the Ameen presented his papers. On the 4th January 1884 the Ameen's report was confirmed, and the papers sent back to the Subordinate Judge who, on the 22nd March 1884, directed that the report and papers should be put up with the record.

The tenants appealed separately to the District Judge, on the grounds that the order of the Sub-Judge, dated 22nd March 1884, filing the report, was bad, inasmuch as the Collector had no

power to proceed with the case on the order of the Subordinate Judge, dated 5th January 1882, directing measurement and making over the case to him, the Subordinate Judge having neglected to take any evidence on the petition of the proprietors, and that the petition of objection was within time. The respondents objected that, inasmuch as all the tenants impugned the Subordinate Judge's order, and the value of the land sought to be measured was over Rs. 5,000, the appeal would only lie to the High Court, and that the order of the Subordinate Judge could not be interfered with, the appeal being from the Collector's decision.

The District Judge decided that the appeal would lie to his Court, inasmuch as *the subject-matter in dispute* was not the lands of mouzah Ahiari, but the right to measure those lands, it being by no one alleged that the value put upon such measurement was over Rs. 5,000; that the Collector's decision was the final decree and the Subordinate Judge's order an interlocutory order, which could be impeached in the appeal from the decree of the Collector; and that being so he held that the order of the Subordinate Judge was bad, no evidence having been taken on the petition of the proprietors—*Mohammed Bahadoor Mozoomdar* v. *Raja Rajkissen Singh* (1); that the Collector's decision as to the objections being made out of time was wrong, the date from which the 15 days allowed by the Act should run being from the date when the Collector formally accepted the Ameen's proceedings, and not from the date on which the Ameen returned the papers to the Court.

The proprietors appealed to the High Court on the grounds: (1), that the Subordinate Judge had no jurisdiction to entertain the appeal; (2), that the Subordinate Judge was wrong in holding that he had jurisdiction to set aside the order of the 22nd March 1884; (3), that the objections were filed out of time; (4), that the measurement having been completed without any objection as to the right of the proprietors to measure having been taken, the lower Court was wrong in holding that it had jurisdiction to go into that point.

Mr. *C. Gregory*, (with him Baboo *Taruck Nath Palit* and Baboo *Abinash Chunder Bonnerjee*,) for the appellants, cited

(1) 10 B. L. R., 401.

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In the matter of Dooli Chand (1) and *Omed Ali* v. *Nityanund Roy* (2), on the question of jurisdiction, and *Goluck Kishore Acharjee* v. *Kesha Majhee* (3), to show that where ryots take no objection during the progress of the measurement the Court on appeal should not set aside the proceedings on objections made subsequently.

Mr. *Woodroffe*, Baboo *Hem Chunder Bannerjee* and Baboo *Anand Gopal Palit*, for the respondents, were not called upon.

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

We agree with the District Judge that the appeal in this case lay to him and not to this Court, but we would guard ourselves from being understood to say that we concur in all his reasons. It appears to us that the decision of this question depends upon s. 22 of Act VI of 1871, which says: "Appeals from the decrees and orders of Subordinate Judges and Munsiffs shall, when such appeals are allowed by law, lie to the District Judge, except where the amount or value of the subject-matter in dispute exceeds five thousand rupees, in which case the appeal shall lie to the High Court."

It is quite clear that the value of the subject-matter in dispute is the capitalized value of the excess rents, which, after the measurement applied for had been effected, the appellant before us expected that he would recover. Of this value there is no evidence on the record. That being so under the first part of s. 22 the appeal lay to the District Judge.

Upon the merits we also agree with the District Judge that the order of the Court of first instance is erroneous: The appellant before us stated in his petition: "Sixteen annas of mouzah Ahiari (main and hamlet), pergunnah Bherwara and the tolas are the right of your petitioners and their proceeds are Rs. 7,000 and approximate area 3,500 bighas."

"It is a long time ago that the said mouzah with the tolas are not measured, and in the said mouzah and tolas thousands of bighas of land were waste and pasturage for cattle, and those lands have come under cultivation, and most of the tenants,

(1) 9 B. L. R. 190; 18 W. R., 262 (268).

(2) 24 W. R., 171.

(3) 15 W. R., 23.

besides their jotes, have gradually brought those waste lands in their possession along with their former jotes; but your petitioners do not know which tenants have cultivated how much land and what kind of land is in the jote of each tenant."

That is the ground upon which this application was made for measurement under s. 38, and the ground may be put shortly thus:- The waste lands of the estate having been brought under cultivation by various ryots, and the landlord not having been able to ascertain which of the ryots have appropriated these lands as part of his jote, an application was made under s. 38 for the measurement of the whole estate. We think that such an application as this does not come under s. 38 of the old Rent Act, which runs as follows:—

"If the proprietor of an estate or tenure, or other person entitled to receive the rents of an estate or tenure, is unable to measure the lands comprised in such estate or tenure, or any part thereof, by reason that he cannot ascertain who are the persons liable to pay rent in respect of the lands, or any part of the lands comprised therein, such proprietor or other person may apply to the Court which would have had jurisdiction in case a suit had been brought for the recovery of such lands, and such Court thereupon, and on the necessary costs being deposited therein by the applicant, shall order such lands to be measured." . . . . . It is quite clear that two conditions are necessary, *viz.*, that the lands are known, but the tenants are unknown. But according to the averments in the petition the tenants are known, but the lands are unknown. Section 38, therefore, cannot apply. We also agree with the District Judge that even supposing that s. 38 does apply, still before any proceeding could be initiated under that section, it was necessary for the petitioner to establish by evidence those conditions upon the establishment of which the Court could proceed to order the measurement under s. 38 of the old Rent Act. We dismiss the appeal with costs.

T. A. P. *Appeal dismissed.*