

*Special Appeal No. 480 of 1869.*1871.
Nov. 7.

PITÁMBAR DHÁRI..... *Appellant.*
 SAMBHÁJIRÁV *Respondent.*

Boundary Dispute—Revenue Survey—Bombay Act I. of 1865—Bombay Act II. of 1866—Act III. of 1846.

• “Boundary dispute,” as used in the Survey Act (Bombay Act I. of 1865), means a contention between two neighbouring land-proprietors as to where a boundary line or boundary marks has or have been fixed by the Survey officers. After the functions of the latter officers have ceased in a district, the Collector, acting under Act III. of 1846, is the proper officer to determine such a dispute, and fix the proper position of the boundary marks.

But where a landholder claims to recover from a neighbouring holder land alleged to have been usurped or encroached upon by the latter, the person aggrieved must file his plaint in court (which in the case of a claim for mere possession may be the Court of the Mámlatdár or the ordinary Civil Court), where the determination of the Collector as to the proper position of the boundary line or marks (although it of itself confers or withdraws no right of possession) affords valuable evidence in adjudicating upon the rights of the parties.

THIS was a special appeal from the decision of A. C. Watt, Acting Assistant Judge at Puñá, annulling the decree of the Munsif of Talegáin.

In his plaint the plaintiff, Pitámbar Dhári, alleged that he owned a piece of land, Survey number 12, in the village of Wágoli, *tarf* Haveli, in the district of Puñá, and that the defendant, Sambhájiráv, by disturbing the boundary stones fixed to divide his own field from that of the plaintiff, had thereby encroached upon the land of the latter, and prayed that the boundary stones might be restored to their original position, and that the land thus encroached on might be made over to his possession, with the trees standing thereon.

The defendant stated that part of the land claimed was the property of Government, and part his own; and that the boundary stones had been disturbed by the plaintiff himself.

The court of first instance awarded the claim of the plaintiff as prayed for. The court of appeal held that the suit was clearly one of the nature of a boundary dispute, and as such, under Sec. 3 of Bombay Act II. of 1866, should be dealt with under the provisions of Bombay Act I. of 1865.

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The special appeal was argued on the 5th of June 1871, before WESTROPP, C. J., and WEST, J.

Dhirajlal Mathuradas (Government Pleader), for the appellant:—The question is solely one of jurisdiction. The view of the Assistant Judge is wrong, as the case does not fall within the scope of Bombay Act I. of 1865. The powers of the Survey officers expire in a year after the settlement (Sec. xiv., cl. 4), and the Act applies to land formerly settled (Sec. 3). The Civil Courts then regain jurisdiction in cases of encroachment: *Bápuji v. Raghunáth (a)*. Before Reg. XVII. of 1827, the Civil Court undoubtedly had jurisdiction in boundary disputes (Sec. 31). This may be gathered from cl. 6 of that section. The Regulation transferred the jurisdiction of boundary disputes to the revenue courts. It is now repealed, and the object of Bombay Act II. of 1866 was to retransfer suits in general to the Civil Courts. Act VIII. of 1859, Sec. 1, gives the Civil Courts jurisdiction in all except certain prohibited classes of cases. The parties cannot call on the Government to appoint a Survey Officer to settle the boundary under Bombay Act I. of 1865. There is, therefore, no tribunal except the Civil Courts to which, in such cases as the present, the aggrieved person can have recourse.

Supposing the District Court to have been correct in its view that there was no jurisdiction, it ought to have transferred the suit, or caused it to be transferred, to a Revenue Court, under Act XVI. of 1838.

Shántarám Náráyan, for the respondent:—By Bombay Act II. of 1866, the jurisdiction of the Revenue Courts in boundary disputes was abolished. The Civil Courts were invested with a jurisdiction restricted by the exception at the beginning of Sec. 2, extending only to the cases specified in the same section. Sec. 3 gives jurisdiction to the Survey officers under Bombay Act I. of 1865.

The plaint does not set forth anything but a boundary dispute.

Cur. adv. vult.

(a) 6 Bom. H. C. Rep., A. C. J. 72.

November 7th. The judgment of the court was delivered by

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WEST, J. :—The appellant in this case, suing as plaintiff in the court of first instance, complained that the defendant, who is here the respondent, by transferring the stones set down to mark the boundary, had included within his own field a strip of land six cubits wide, properly belonging to the field of the appellant. The suit was for the recovery of this land, with four trees growing upon it, by the restoration of the boundary to its former position.

The respondent answered that a portion of the land sought by the plaintiff was the property of Government, forming part of the demarcating strip between the two properties of himself and the appellant. The remainder, he averred, was his own. The disturbance of the boundary stones, which he admitted had occurred, had been made, he asserted, by the plaintiff himself, with a view to encroachment upon the land of the defendant.

It was asserted by the plaintiff that he had made two ineffectual applications to the Mámlatdár, and this was not denied by the defendant, part of whose case indeed was that the plaintiff's land, having been measured, had been found in excess, and that the result was a decision confirming "the boundary mark as before"—that is, we apprehend, in a way favourable to the defendant.

Upon this the plaintiff brought his suit in the court of the Munsif of Talegám. The Munsif pronounced partly in favour of his claim, but this decision the Assistant Judge, in appeal, annulled, on the ground that, as the contention was of the nature of a boundary dispute, the jurisdiction of the Civil Court was excluded by Bombay Act II., Sec. 3, of 1866. The ground of the present special appeal is that the view of the law taken by the Assistant Judge was a mistaken one, because the suit, besides the establishment of the boundary, was brought to remove the defendant from his usurped possession of a portion of the plaintiff's land and of his trees.

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There can be no doubt, upon the wording of Bombay Act II. of 1866, that it was not intended to include boundary disputes amongst those subjects the judicial cognisance of which was transferred by the Act from the Revenue to the Civil Courts. The enumeration in the preamble is of "cases relating to the rent of land, and the use of wells, tanks, water-courses, and roads to fields." In Sec. 2, by which jurisdiction is given to the Civil Courts, the cases mentioned are precisely the same, and in Sec. 3 it is expressly provided that "all disputes regarding boundaries shall be dealt with in accordance with the provisions of Bombay Act I. of 1865." Therefore, if any class of suits can be pronounced to fall properly and reasonably within the meaning of the expression "disputes regarding boundaries," for such suits a tribunal must in the first instance be sought under the provisions of Bombay Act I. of 1865, and to the same Act we must look for the nature and effect of any order or decree passed according to the rules which it prescribes.

The late learned Chief Justice of this court has pronounced an opinion, in which most of those who have given attention to the subject will be ready to concur, that "it is not easy to say what is a boundary dispute"—that is, as distinguished from a suit for ejectment, or to repel interference with possession. It would seem, indeed, that the two classes of cases are not divided by any unvarying line of separation; that they overlap one another as it were; and that to assign any particular suit to the one or to the other is frequently a matter rather of convenience than of judicial principle. Amongst the parallels which a study of various systems brings to light, not the least curious is that of the same difficulties as to the proper treatment of boundary disputes having arisen under the Roman Law as those with which we have at this day to deal, almost two thousand years later, in the Presidency of Bombay. That law provided that contiguous estates should be demarcated by a strip of land serving as a pathway to both, and incapable of acquisition by any prescriptive title. The determination of disputes regarding its proper position was at first assigned to skilled arbitrators, discharging in this

respect much the same function as officers of the Revenue Survey under our system. Then, however, came the question of what properly fell within the cognisance of these arbitrators. It was answered by limiting their function in deciding disputes to the cases of usurpations not extending beyond the strip of land serving as a boundary. At a later period it was attempted to make them final judges in all questions of encroachment. Then their powers were restricted, again extended, and lastly they were made consulting surveyors, giving evidence in all limitroph cases to an ordinary tribunal which disposed of such cases, except that all title by prescription was excluded, in the same way as of other land disputes.

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It is perhaps possible from this comparison to forecast with a good deal of probability the course which the law in this Presidency is likely to take in ultimately settling the tribunal before which boundary disputes are to be taken for adjudication. In an early stage of progress such disputes lead to frequent and violent affrays. They require prompt decision. Local knowledge is essential to a just determination of them; and the means of placing such knowledge at the disposal of a distant court are but imperfectly developed. The revenue dependent on the cultivation of the land suffers by any insecurity of tenure. These considerations seem to furnish a reason for the endeavours, to which our Government has been almost unconsciously prompted, to make the revenue officers' voice decisive of boundary disputes, while the new conditions, introduced by advancing civilisation, make such a method of adjudication harmonise less and less with the general working of the judicial system.

Under the Hindú system boundary disputes seem to have been regarded by the authors of the Institutes of Manu (VIII., 246 *et seq.*) and Yájñavalkya (II., 150) as embracing cases of encroachment. Elaborate rules are laid down for demarcating villages and establishing permanent indications of their proper limits, some of which, handed down by tradition, are embodied in the Bombay Survey Rules and in Act I. of 1865. The *pátil* was in later times bound to bring

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about an understanding, if possible, between contending neighbours (Reg. I., Sec. 67, of 1808), and the superintendence of the higher revenue officer extended to this as well as his other duties. These powers of adjustment probably received a very liberal interpretation, which, indeed, was quite in accordance with the ideas of the people. In 1827, Reg. XVII. expressly gave the cognisance of boundary disputes in the first instance to the Collector (Sec. xxxi., Art. 5). Reg. VI. of 1830 enabled him to transfer the investigation of such suits to his Assistants. Act XVI. of 1838, while handing over a portion of his jurisdiction to the ordinary courts, expressly reserved his powers in boundary cases (Sec. 1, cl. 3). But in none of these enactments is any definition of what is a "boundary dispute" to be found. It may be gathered, from the separate provisions made in the first and last of them, that a boundary dispute was regarded by the Legislature as something distinct from a suit for possession, but how the distinction for practical purposes was to be drawn was not laid down. This was left for the courts to do, and the late Şadr Adálat favoured the jurisdiction of the Collector. In the case of *Antajee Krishna v. Sono Sudasew (b)*, a claim apparently by two *khots* to land, as being included properly within the boundaries of their village, but encroached on under pretence of its belonging to the neighbouring village, was held to have been rightly disposed of by the Collector as a boundary dispute. Another case (p. 151) of the same nature was disposed of in the same way, on the ground that it involved a boundary dispute cognisable by the Revenue Court. The same principle seems to have guided the decision at 4 Bom. H. C. Rep., A. C. J. 167, where also there was a mixed case of possession and disputed boundary. It may be gathered from these decisions that where a contention could be broadly described as a boundary dispute, the late Şadr Court and, following it, the High Court were prepared to support the Collector's jurisdiction, though a question of the right to possession, itself cognisable by the ordinary courts, incidentally arose in it.

(b) 1 Morris, 155.

As the operations of the Revenue Survey spread over the Presidency, the officers of that department disposed (perhaps at first without any strictly legal authority) of innumerable petty boundary disputes, and the rules under which they proceeded received definition and legislative sanction in Bombay Act I. of 1865. By this Act the powers of the Survey officer are strictly limited to the time of the survey and assessment, and to operations connected therewith (Secs. 8, 11, and 13). For such purposes he may settle a boundary, if disputed, "according to the village records, or, failing these, according to occupation as ascertained from the village officers, the cultivators of adjoining lands, or other evidence" (Sec. xiv., cl. 2). An appeal (Sec. xiv., cl. 3) to the superior officer is allowed (Sec. 9) if made within six months, and the Superintendent of Survey may alter the boundaries for twelve months after the introduction of the survey—cl. 4. From that time forth he is *functus officio*, and even the charge of the boundary marks, as an executive duty, devolves (Sec. 46) on the Collector.

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The proviso in clause 4 of Sec. xiv. of the Survey Act is important. By it "the determination of any boundary under this section shall not debar any one claiming any right in the land from any legal remedy he would otherwise have for dis-possession." It follows that the settlement of a boundary dispute under this section was not intended to have that conclusive effect, as to an incidental question of possession (as distinguished from a question of title), which had been assigned by the Sadr Court to a Collector's decision under Act XVI. of 1838 and Reg. XVII. of 1827. For the disposal of such questions so far as they related to mere possession, a substantially new tribunal, the Mámlatdár's Court, had been created by Bombay Act V. of 1864. A decision of that court, or of the Collector's Court under the Regulation and Act XVI. of 1838, might, as against his neighbour, determine a ryot's actual holding by a boundary different from that laid down for revenue purposes by the Survey officers, though the two were intended to coincide, * and

* Joint Report, para. 17.

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would in general be made to coincide by a fresh adjustment of the survey boundary under the 4th clause of Sec. xiv., Bombay Act I. of 1865.

The term "boundary dispute" had thus, for the purposes of Bombay Act I. of 1865, assumed a much narrower sense than before. Its settlement could no longer dispose of a question of possession, but was rather made dependent on the adjudication of the latter. This was as to such disputes arising in the progress of a survey. For disputes arising before the commencement of a survey, or more than a twelve-month after its completion, the Act makes absolutely no express provision. The Collector's powers under Reg. XVII. of 1827 and Act XVI. of 1838 still subsisted, and these, it is probable, were thought sufficient for the disposal of any cases that were likely to arise. Accepted in the latitude given to them by the Şadr Adálat, they undoubtedly were so.

Then, however, came Bombay Act II. of 1866. By this the enactments giving the Collector jurisdiction in boundary cases were wholly repealed. At the same time such cases, as we have seen, were excepted from the enlarged jurisdiction conferred on the ordinary Civil Courts, and to supply the extinguished jurisdictions no other provision is made than that all boundary disputes shall be dealt with in accordance with the provisions of Bombay Act I. of 1865. As to the boundary disputes before a survey, that Act makes no provision. As to disputes in the course of a survey its provisions have been considered. In the case before us the survey was completed, as is admitted, several years ago. It is, under Sec. 3 of the Survey Act, "in force subject to the provisions of this Act;" but amongst those provisions there is not one for the judicial disposal, in a case like the present, of a question of disputed boundary. The only section which really bears on the subject is Sec. 46, under which, and under Act III. of 1846 of the Government of India, the Collector has power to enforce the maintenance and repair of boundary marks. We must not suppose that by boundary disputes in Act II. of 1866 the Legislature intended a class of contentions for which absolutely no provision is

made in the Act to which it refers for their settlement. We must rather reduce the sense of this vague and fluctuating phrase within such limits that the two Acts may be consistent and, as far as possible, coöperative. There may be a complaint by A that B has damaged or deranged the boundary marks fixed by the Survey officers.* B denying this statement, a contention arises, which may properly be termed a boundary dispute. It is one which the Collector can dispose of in the exercise of his powers as an executive officer, under Secs. 46 and 12 of the Survey Act, by enforcing the replacement or repair of the marks. "Boundary dispute" is thus reduced to a contention as to where the boundary had been fixed. Its determination may afford valuable evidence for a Civil Court, but of itself confers or withdraws no right of possession. On the other hand, though a Civil Court may have determined that a certain strip of ground is the property of A as against B, the Collector may insist that the survey boundary shall be maintained so as to sever such ground from the remainder of A's holding, and compel him to settle for its revenue, if at all, through B. This is certainly a narrow sense of the words "boundary dispute," but it is an intelligible one; and as it is the only one accordant with the remedy provided †, it is the sense in which we must accept those words. Taking the words thus, the Collector still has a beneficial and independent function to perform, but his orders establish no right which can clash with the decision of a Civil Court on a claim for possession or of title. He who wishes a boundary line or mark to be restored must apply to the Collector; he who desires to recover land usurped by his neighbour must file a plaint in court, which in the case of a claim for mere possession, according to the ruling in *ex parte Nagová* (c), may be either the Mámlatdár's or the ordinary Civil Court. This view of the question is consistent with that taken by the court in a case already referred to—*Bápuji Balvant v. Raghunáth*

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* Survey Rule 22.

† By Act I. of 1865, Sec. 35; Survey Rules 5 and 12.

(c) 3 Bom. H. C. Rep., A. C. J. 108.

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Vithal (d). There the Chief Justice said "the question is whether there is any encroachment, for if so the Civil Courts will have jurisdiction;" and it seems clear that, dealing with such a case as a boundary dispute, the Collector can no longer give any remedy beyond an order that certain stones shall be set up in certain places, or certain mounds repaired.

In the case before us the plaintiff sought both a restoration of boundary marks and a restitution of land. The former complaint was one for the disposal of the Collector as a boundary dispute, in which he is interested for the Government, and which he has authority and special means to deal with; the latter is a suit for ejectment within the cognisance of the Civil Court. The Civil Court, therefore, must determine whether or not the plaintiff is entitled to recover the land alleged to have been encroached upon by the defendant, although that court cannot finally decide the contention as to the proper place of the boundary marks, and although what that place is may be an incidental point, which it is important that the court should consider.

The Court, accordingly, reverses the decree of the Assistant Judge, and remands the cause for retrial on the merits. Costs to abide the final decision.

Decree reversed and case remanded.

(d) 6 Bom. H. C. Rep., A. C. J. 72.