APPELLATE CIVIL.

Before C. C. Ghose and Mallik JJ.

HEM CHANDRA CHAKRAVARTI

v.

SARABALA DATTA.*

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Jan. 25.

Partition—Estates under partition and separation, costs by whom payable—Collector, when can reverse, on appeal, order regarding costs passed by the Deputy Collector—Jurisdiction of civil court—Estates Partition Act (Beng. V of 1897), ss. 5, 6, 84, 111, 119.

When an application is made to the Collector, both for separation and partition of an estate, and proceedings are drawn up declaring the estates to be under separation and partition, the case comes under section 6 of the Estates Partition Act (Beng. V of 1897), and all the proprietors concerned are liable to pay the costs under sections 37 and 38 of the Act and not the proprietors of the estate under partition alone as required by section 84.

No appeal lies to the Collector from an order of a Deputy Collector except those enumerated under section 111 or those coming before him for consideration under section 58 of the Estates Partition Act. An order passed by the Collector allowing refund of costs deposited by a party in accordance with the Deputy Collector's order is without jurisdiction.

An order passed on appeal by the Collector interfering with and vacating an order passed by the Deputy Collector under sections 37 and 38 is not an order under Chapter V and does not come under clause (*b*) of section 119 of the Estates Partition Act and is, therefore, liable to be contested in a civil court.

SECOND APPEAL by the plaintiffs, Hem Chandra Chakravarti and others.

The appeal arose out of a suit for a declaration that the order of the Collector of Backerganj, reversing, on appeal, an order of the Deputy Collector, with regard to the refund of certain sums deposited by the defendants as their share of costs, under the Estates Partition Act, was without jurisdiction, illegal and invalid and for a permanent injunction restraining the defendants from withdrawing the said money from the Collectorate. Five estates bearing Nos. 1744,

*Appeal from Appellate Decree, No. 1541 of 1926, against the decree of R. B. Sadhu, District Judge of Backerganj, dated Feb 22, 1926, reversing the decree of Girja Bhusan Sen, Additional Subordinate Judge of that place, dated June 10, 1924.

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1751, 3563, 3566 and 6100 of the Backerganj Collectorate originally belonged to two brothers, *viz.*, Radhakanta Sen, whose share, comprising estates Nos. 1751, 3566 and 8as. of 6100, was known as the *barha hisya* and Krishnaram Sen, whose share, comprising estates Nos. 1744, 3563 and the remaining half of 6100, was known as the *chhota hisya*. Some of the defendants and predecessors of the others acquired estate No. 1744 through a revenue sale. The plaintiffs applied to the Collector for partition and separation of the estates of the *barha hisya* from the rest of the common lands and the usual notices were served on all the proprietors of the five estates. The defendants Nos. 1 to 7 filed a petition of objection stating that the partition of the three estates could not be made without separation of the common lands of the five estates, that, in making the separation, the lands of estate No. 1744 should also be separated and that a fresh record-of-rights of the *mouza* should be prepared for making separation and the partition, as there were considerable changes since the last settlement. At a later stage, they waived their objection to partition and the three estates mentioned in the plaintiffs' application were declared to be under partition under section 29 of the Estates Partition Act. Subsequently, the defendants 1 to 5 applied for partition of their estate No. 1744 and, under section 29, this estate was also declared to be under partition and an estimate of costs of partition of this estate was also duly prepared and approved by the Commissioner. The plaintiffs alleged that, out of Rs. 4,876, the costs of the partition of the five estates and of estate No. 1744 and the extra costs for preparation of the record-of-rights, for which the defendants 1 to 7 were liable, they deposited Rs. 3,069-13. The defendants, however, during the course of the proceedings, filed an objection to the Deputy Collector, who was appointed by the Collector to effect the partition, that they were not liable for costs of the separation of the estates of the *chhota*

hisya or of estate No. 1744 and prayed for refund of the money already deposited by them, which was rejected by the Deputy Collector. But, on appeal, the Collector, without giving any notice to the plaintiffs, allowed the objection and ordered the money to be refunded to the defendants and appeals preferred by the plaintiffs to the Commissioner and the Board of Revenue against the Collector's order were dismissed. The plaintiffs then brought the present suit in the civil court and contended that the Collector's order was without jurisdiction and the defendants were liable for the costs, as they also applied for the separation of estate No. 1744. The Munsif held that a suit did not lie under section 119 of the Estates Partition Act, but as the Collector's order was without jurisdiction, a suit under section 9 of the Civil Procedure Code was maintainable and he decreed the plaintiffs' suit with costs.

On appeal, the District Judge reversed the findings of the Munsif on the grounds that, as sections 45 and 46 of the Estates Partition Act direct preparation of record-of-rights and as it was necessary, with a view to separating and allotting to the three estates of the plaintiffs their proportionate shares of the common lands, the Deputy Collector was bound to prepare the record-of-rights and, according to section 84 of the Estates Partition Act, they should be leviable from the proprietors of the estates under partition alone and the defendants, having withdrawn their application for partition, were not liable for the same. He also held that the suit was not maintainable, as the civil court has no jurisdiction to entertain such a suit.

The plaintiffs, thereupon, appealed to the High Court.

Mr. Brajalal Chakravarti and *Mr. Ramanimohan Chatterji*, for the appellants.

Mr. Gunadacharan Sen and *Mr. Ramendrachandra Ray*, for the respondents.

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MALLIK J. This appeal arises out of a suit for a declaration that the order of the Collector of Backerganj, dated the 1st November, 1920, for refund of a certain amount of money deposited by the defendants as costs of the separation and partition of certain estates, is without jurisdiction, illegal and invalid and, therefore, liable to be set aside and also for the issue of a permanent injunction restraining the said defendants from withdrawing the money from the Backerganj Collectorate.

The allegations on which the plaintiffs brought the suit were briefly these: 5 estates, bearing *touzi* Nos. 1744, 1751, 3563, 3566 and 6100 of the Backerganj Collectorate, originally belonged to two brothers, Radhakanta Sen and Krishnaram Sen. These estates have common lands. Radhakanta's share is known as '*Barha Hisya*' and it comprises estates Nos. 1751, 3566 and eight annas of 6100, while the share of Krishnaram comprises estates Nos. 1744, 3563 and the remaining half of the estate No. 6100. Defendants Nos. 1, 5 and the predecessor of defendants Nos. 2 to 4 purchased the Estate No. 1744 at a revenue sale. The plaintiffs, who became the owners of the '*Barha Hisya*' of Radhakanta applied to the Collector on 22nd January, 1915, for partition, after separation of the lands of estates Nos. 1751, 3566 and eight annas of 6100. To this the defendants filed an objection and in that objection they also prayed that the common land of the estates No. 1744 should be separated and a record-of-rights prepared. Thereupon, proceedings were drawn up on the 24th July, 1915, declaring the estates to be under separation and also under partition under sections 5, 6 and 29 of the Estates Partition Act (Beng. V of 1897). An estimate of cost was prepared—cost of separation of the lands of the 5 estates and also cost of partition of estates Nos. 1751, 3566 and 6100. A certain amount was realised from the defendants, who afterwards filed an application before the Partition Deputy Collector denying their liability to pay. This objection was disallowed, but the Deputy Collector's order was, in appeal, set aside

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by the Collector of the District, who ordered a refund of the money to the defendants. It was this order of the Collector, which the plaintiffs sought to set aside when they instituted the suit that has given rise to the present appeal.

The court of first instance decreed the plaintiffs' suit and declared that the order of the Collector for the refund of the money was without jurisdiction, illegal and invalid and it granted a permanent injunction restraining the defendants from withdrawing the said money. On appeal, the learned District Judge reversed the decision of the court of first instance and restored the order passed by the Collector. The plaintiffs have appealed to this court.

The chief point in controversy before us has been as to whether the learned District Judge was right in holding that the case was one under section 84 of the Estates Partition Act. It was contended on behalf of the appellants that section 6 of the Act and not section 84 was applicable to the case. This contention is, in my opinion, sound and should be given effect to. In the application which the plaintiffs filed on 22nd January, 1915, their prayer was two-fold. They asked, first of all, for a separation of the lands of the estates, and then for a partition of the estates Nos. 1751, 3566 and 8 annas share of 6100. It is true that in the concluding portion of the application, dated 22nd January, 1915, the partition of the estates was only mentioned. But, reading the application as a whole, there cannot, in my opinion, be any doubt that the plaintiff's prayer was first of all for a separation of the lands of the estate and then for a partition of the same. And it was in this light that the plaintiffs' application of the 22nd January, 1915, was taken by the authorities. As observed before, the proceedings which the Collector drew up on the 24th July, 1915, were proceedings whereby the estates were declared to be under separation and also to be under partition under sections 5, 6 and 29 of the Estates Partition Act. I am, therefore, of opinion that the case was under section 6 of the Act and not under section 84, under

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which alone the costs could be realised from the plaintiffs only and the defendants could claim any exemption from liability to pay. If section 6 of the Act applies to the case—and I have held that it does apply—the costs under sections 37 and 38 of the Act are to be levied proportionately on all the proprietors of the estates including the present defendants.

This is about the merits of the case, so far as the liability of the defendants to bear the costs proportionately is concerned. The correctness and validity of the order passed by the Collector allowing a refund of the money to the defendants has been questioned before us on another ground and that was that he had no jurisdiction to pass the order setting aside thereby the order that had been made by the Deputy Collector on the point. The contention of the learned advocate for the appellants, on this point also, must, in my opinion, be maintained. Section 111 of the Estates Partition Act enumerates the orders passed by a Deputy Collector which can be interfered with by the Collector on appeal. But an order, made under sections 37 and 38 of the Act, finds no place in the list under section 111. Our attention was drawn on behalf of the respondents to sub-section 2 of section 111. But this sub-section can have no application, when it is remembered that the proceedings had not come up to the Collector for consideration under section 58. I am, therefore, clearly of opinion, that the order passed by the learned Collector was an order passed without jurisdiction.

The learned District Judge set aside the order passed by the trial Judge on another ground, *viz.*, that the civil courts had no jurisdiction to entertain the plaintiff's suit, and in support of this view of the lower appellate court, our attention was drawn to the provisions of section 119 of the Estates Partition Act. It was said that an order passed under sections 37 and 38 is an order under Chapter V of the Act and, under clause (*b*) of section 119, an order passed under Chapter V is not liable to be contested in any civil court. But the short answer to this contention is that

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the order, the correctness of which was questioned and which was sought to be set aside in the case, was not an order passed under sections 37 and 38 of the Act, but an order, whereby an order passed under those sections was interfered with and vacated.

The result of the aforesaid observations is that the appeal is allowed, the decree of the lower appellate court is set aside and that of the court of the first instance restored. The plaintiff-appellants will get their costs from the respondents throughout.

C. C. GHOSE J. I agree.

A.A. *Appeal allowed.*

APPELLATE CRIMINAL.

Before Rankin C. J. and C. C. Ghose J.

EMPEROR

v.

SATYA RANJAN BAKSHI.*

1929.

Feb. 5.

Rebellion, elements of—Penal Code (Act XLV of 1860), s. 124A.

Advocating expressly any form of rebellion is not a necessary element in an offence under section 124A of the Indian Penal Code. It is quite possible by the abuse of Government officials to make an endeavour to bring into hatred or contempt the Government established by law in British India.

Queen Empress v. *Bal Gangadhar Tilak* (1) referred to.

CRIMINAL APPEAL by the Government.

Two persons, Satya Ranjan Bakshi, editor of the vernacular newspaper "Banglar Katha," and Satya Ranjan Mukherji, the printer and publisher of the said newspaper, were convicted for an offence under section 124A of the Indian Penal Code in connection with an article which appeared in the issue of the 20th

*Criminal Appeal, No. 714 of 1928, against the order of T. Roxburgh, Chief Presidency Magistrate of Calcutta, dated Sep. 3, 1928.

(1) (1897) I. L. R. 22 Bom. 112, 137.