APPELLATE CIVIL.

Before Mukherjea and Latifur Rahman JJ.

1939

April 26.

JADU NATH BANERJI

v.

SECRETARY OF STATE FOR INDIA IN COUNCIL.*

Embankment—*Repairs—Notice of apportionment of costs—Jurisdiction of Collector—Civil Court, Jurisdiction of—Bengal Embankment Act, 1882 (Ben. II of 1882), ss. 14, 42, 56, 57, 58, 84, 85—Bengal Embankment Act, 1873 (Ben. VI of 1873), Sch. D.*

The Collector has no jurisdiction to act under s. 68 of the Bengal Embankment Act, 1882, and finally apportion the costs for repairs of an embankment amongst the *zemindârs* and tenure-holders, unless, in respect of the enquiry relating to the apportionment, the notice under the provisions of s. 56 of s. 57 of the Bengal Embankment Act, 1882, has been previously published and served on such *zemindârs* and tenure-holders.

For the expense of each particular repair of the embankment there must be a separate notice on the *zemindârs* and the tenure-holders under s. 56 or s. 57 of the Bengal Embankment Act, 1882, and their objection must be heard before the final order for apportionment is made under s. 68 of the Act.

When an embankment mentioned in Sch. D annexed to the Bengal Embankment Act, 1873, is replaced by a new embankment on a perfectly new site according to the provisions of s. 14 of the Bengal Embankment Act, 1882, such new embankment does not *ipso facto* become a D schedule embankment under the Bengal Embankment Act, 1873.

By virtue of the provisions of ss. 84 and 85 of the Bengal Embankment Act, 1882, a civil Court has no jurisdiction to interfere with the Collector's final order under s. 68 of the Bengal Embankment Act, 1882, even if the Collector erroneously apportioned the costs for repairs of an embankment in violation of the provisions of s. 42 of the Bengal Embankment Act, 1882.

APPEAL FROM APPELLATE DECREE preferred by the plaintiff.

This appeal arises out of a suit, in which the plaintiff raised the question, whether, under the provisions of the Bengal Embankment Act, 1882, the Collector of 24-*Parganâs* could realise from the

*Appeal from Appellate Decree, No. 1345 of 1937, against the decree of B. M. Mitra, Additional District Judge of 24-*Parganâs*, dated May 15, 1937, affirming the decree of Anil Bihari Ganguli, Special Subordinate Judge of 24-*Parganâs*, dated Feb. 24, 1936.

plaintiff the costs of repairs of an embankment on the left bank of the Piali river. The question raised in this suit arose in the following way. Schedule D annexed to the Bengal Embankment Act of 1873 mentions a number of embankments. In the present case, these embankments have been called as D schedule embankments. The present case relates to D schedule embankment No. 88. Generally, by virtue of the provisions of s. 42 of the Bengal Embankment Act, 1882, the costs of repairs done in respect of any D schedule embankment cannot be realised from the *zemindârs* and the tenure-holders whose lands are protected by such embankment. It appears that by virtue of a Government notification of August 11, 1903 (Ex. 9), a part of the D schedule embankment No. 88 was removed and a new embankment on a new site was constructed. This newly-constructed embankment was repaired by the Collector who finally apportioned the costs under s. 68 of the Bengal Embankment Act, 1882, and assessed the plaintiff with costs. Under s. 70 of the Bengal Embankment Act, 1882, the Collector took steps to realise the apportioned costs of repairs from the plaintiff. The plaintiff alleged that this new embankment was covered by Sch. D and instituted the present case, denying his liability for the assessed costs of repairs. The other material facts appear from the judgment. Both the lower Courts dismissed the plaintiff's suit and hence this Second Appeal by the plaintiff.

Amarendra Nath Bose, *Hemanta Kumar Bose* and *Biswanath Naskar* for the appellant. The embankment in question is a D schedule embankment and hence no costs can be realised from the appellant. The notification states that previous D schedule embankment would be removed and a new one should be constructed "in its place". This clearly shows that the present embankment is a D schedule embankment. I contend also that the Collector acted in violation of s. 42 of the Bengal Embankment Act, 1882, inasmuch as the appellant's lands were already

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under protection during the existence of the D schedule embankment which was removed. If this is so, as I submit it is, then under s. 42 the appellant cannot be assessed with the costs for repairing and the Collector acted *ultrâ vires*. I submit that no notice under s. 56 or s. 57 was served. The service of this notice is a condition precedent and unless this is proved the Collector acted without jurisdiction.

The Assistant Government Pleader, Ramaprasad Mukhopadhyaya, with him the *Senior Government Pleader, Sarat Chandra Basak,* for the respondent. The present embankment is not a D schedule embankment. If it had been so, then the Government would have issued necessary notification under s. 43 of the Bengal Embankment Act, 1882. I submit that the service of notice either under s. 56 or s. 57 of the Act is not a condition precedent and cannot and does not raise a question of jurisdiction. This question of notice was not specifically raised as is now attempted on behalf of the appellant. I submit that under s. 114 (*e*) of the Indian Evidence Act there is a presumption that these notices were served. I also rely on the provisions of ss. 84 and 85 of the Bengal Embankment Act, 1882, and submit that the civil Court has no jurisdiction to decide the contentions raised by the appellant in this appeal.

Bose, in reply.

The rest of the argument appear from the judgment.

MUKHERJEA J. The appeal is on behalf of the plaintiff, and the suit was one for a declaration that the embankment described in the schedule to the plaint was a D schedule embankment for which the Government was not entitled to realise costs from private proprietors under the Bengal Embankment Act. It was also alleged that the order of apportionment passed by the Collector under s. 68 of the Bengal Embankment Act was illegal and *ultrâ vires*, and that, as there was no notice served on the plaintiff in compliance with the provisions of the Act, no liability attached to him under the law. The

plaintiff further claimed a permanent injunction restraining the defendant from realizing the embankment costs from the plaintiff.

The defence was really of a two-fold character. The first defence was that the embankment in dispute was not a D schedule embankment; and it was contended, in the second place, that notices were duly served on the plaintiff and other parties interested, and that the Collector was quite within his rights in making the order of apportionment under s. 68 of the Act, and to this order no exception could be taken in a civil Court. Both the Courts below have accepted the defences of the defendant and have dismissed the plaintiff's suit. It is against this decree of dismissal that the present Second Appeal has been preferred.

The first question that arises for our determination is as to whether or not the embankment in suit is one which is included in schedule D of the Bengal Embankment Act of 1873, and in which case, it is admitted, the costs are to be borne by the Government and not by the proprietors or tenure-holders.

The facts seem to be that there was a D schedule embankment on the left bank of the river Piali, which protected the major part of *touzis* 208, 1515 and 1124 of the 24-*Parganâs* Collectorate, which are owned by the plaintiff. In 1901, one Brajendra Kumar Ghosh applied to the Collector for shifting the embankment, so that a greater area might be protected, and he also proposed that the new embankment should be provided with sluices through which the area protected might be properly drained.

It appears that the Collector took action on this application and the construction of the present embankment was started on the basis of a notification which is dated August 11, 1903. The notification runs as follows:—

The Lieutenant Governor, having considered the report and the Board's recommendation of the project, is pleased to order, under s. 14 of the Act, that

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the embankment in question shall be removed and a new one with two drainage sluices constructed *in its place* at an estimated cost of Rs. 68,151 in accordance with the plan by the Executive Engineer.

Later on in 1907 by another notification the Government ordered that a portion of the original D schedule embankment should be removed from the D schedule.

Under section 43 of the Embankment Act, the Government is competent, at any time, to direct by notification published in the official Gazette, that any embankment not mentioned in the schedule D be included therein, and the provisions of the section shall apply in that case to such embankment. It is not disputed that, in the present case, there was no such notification issued by the Government under s. 43.

Mr. Bose on behalf of the appellant lays stress upon the words "in its place" which occur in the Government notification mentioned above. I am unable to accept his contention as sound. It is a new embankment altogether raised on a perfectly new site. The mere fact that it replaced a D schedule embankment does not necessarily mean that it must be included in the D schedule without any further notification. In my opinion, the words "in its place" used in the notification of August 11, 1903, meant nothing more than that the new embankment was intended to serve the same purpose as was served by the old embankment. As, in my opinion, it is not a D schedule embankment, it is not necessary for the Government to rely upon s. 18 of the Act to realise its costs from private proprietors and it is not necessary for us to consider the question as to whether or not the area is a prohibited area within the meaning of s. 6.

The next question raised by Mr. Bose is that, under s. 42 of the Embankment Act, the Collector could have apportioned or charged the costs of repair only on lands not protected by the old embankment;

but in the present case he has imposed the costs upon the entire lands of the three *touzis* including lands which were protected by the old embankment. The Courts below have overruled this point by saying that there was no evidence to show that the Collector has apportioned the costs on lands not liable to be charged. Mr. Bose has taken exception to this finding and he has placed before us several pieces of documentary evidence which would have a bearing on the point as to whether or not the lands protected by the old embankment were included in the present case.

It seems to me that there is some substance in the argument of Mr. Bose. But even if that be so, I do not think that this is a question that can be enquired into by a civil Court. The order of the Collector was passed under s. 68 of the Embankment Act, and it was open to the plaintiff to take an appeal against that order to the Commissioner as provided for in s. 84. There are also powers of general control and supervision vested in the Commissioner and the Government as provided for in s. 85 of the Act; and it is expressly laid down in s. 86 that, subject to the provisions mentioned aforesaid, the order passed by the Collector under s. 68 shall be final.

Mr. Bose contends that the civil Court would have jurisdiction if the order of the Collector was *ultrâ vires*. But the whole question is whether it would be *ultrâ vires* simply because the Collector apportioned costs on certain lands which he should not have done under the provisions of the Act. In my opinion, this may be at the most an erroneous decision or an irregular exercise of the jurisdiction which the Collector undoubtedly possessed, and in no sense it can be said to be an usurpation of jurisdiction by the Collector which would make the order a nullity and without jurisdiction. I am unable therefore to accede to this contention raised by Mr. Bose.

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Mr. Bose then argues that his client could not have preferred an appeal to the Commissioner, or taken the matter before the Board of Revenue because he did not receive any notice prior to the apportionment order under the provisions of s. 56 or 57 of the Act. In my opinion, a notice under s. 56 or 57 is a condition precedent to creation of liability of the proprietor or the tenure-holder as the case may be under the Bengal Embankment Act and, unless and until due publication or service of the notice is proved, the very foundation of the liability is taken away. In this particular case, the question of notice was certainly raised by the plaintiff in his plaint, and he denied that he received any notice preparatory to the passing of the apportionment order by the Collector under s. 68. This allegation was traversed by the defendant in the written statement. The trial Court observed in its judgment that from the evidence it appeared that every attempt was made by the Collector to have the notice served and to act according to law, but whether that notice was served in the proper manner or not was a question of fact into which the Judge did not think it proper to enter. It is difficult to appreciate this part of the judgment of the Special Subordinate Judge, and the question does not seem to have been discussed at all by the lower appellate Court.

Mr. Mookerjee points out that this question was not raised in this specific manner before the Courts below. All that was said was that the order of amalgamation of costs made by the Collector was wrong in law. It may be that the question of notice was really argued as part of this other argument, but, in point of fact, the question does appear to have been raised before the trial Court and the evidence bearing upon it was considered.

Now, from the evidence, as it appears on the record, I find that the costs of embankment which the Government sought to recover from the plaintiff are the costs of repairs of several years from 1917 to 1925.

It is not disputed before us that for each particular repair there must be a notification upon the parties interested, their objections must be heard, and then only could an order of apportionment be passed by the Collector under the provisions of s. 68. What appears to have been done here is this: there were two proceedings one of the year 1921-22 and another of the year 1924-25. In the first of these proceedings an order was passed not only for the costs of that particular year but of four previous years as well. Similarly in the proceedings of 1924-25 the costs of two previous years were added to and amalgamated with the costs which were incurred in that year. If there were really separate proceedings in respect of separate repairs and notifications were duly issued in respect of all of them in compliance with the provisions of the Act, the mere order of amalgamation would be a purely formal matter which could not injure any party, and could not be regarded as illegal. But what is pointed out here is that there is no evidence to show that there was notification issued in respect of the costs of repairs of the four years previous to 1921-22 or two years prior to 1924-25. The order-sheet (Exs. D and D1) and also the notices (Ex. E series) seem to support this contention on behalf of the appellant. They all refer to the notices issued in respect of the costs incurred in the years 1921-22 and 1924-25. There is no material whatsoever from which it could be gathered that there was any notice in respect of the costs of the earlier years.

Mr. Mookerjee raised the objection that this is a new point which was not raised in either of the Courts below and the appellant should not be allowed to make out a new case for the first time in Second Appeal. But I think, as there was a general denial of the service of notice in the plaint, it would be incumbent upon the defendant before he can fasten the liability upon the plaintiff to prove that there was notification issued in pursuance of the provisions of the Act, which was a condition precedent to create the

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liability so far as the present plaintiff was concerned. Of course if there was no evidence adduced on the side of the plaintiff the order-sheet and the notices would be *prima facie* sufficient to discharge the burden on the defendant. But here it is pointed out by Mr. Bose that neither the order-sheet nor the notices mention the name of the present plaintiff, and it does not show that any notice was issued or served on him. At any rate, these papers do not show that there were notices issued upon the parties interested in respect of the costs incurred in years other than the years 1921-22 and 1924-25.

In my opinion, this is a matter which requires investigation and, in the circumstances, I am constrained to set aside the judgment and decree of the lower appellate Court and send the case back to that Court in order that the appeal may be reheard on this point alone. The appellate Court will consider as to whether there was proper service of notice under s. 56 of the Embankment Act upon the plaintiff, for the years that the embankment costs are sought to be recovered from him, and come to a decision on the evidence adduced. It would be open to him to ask the parties to adduce additional evidence on the point, if it thinks desirable. If the lower appellate Court holds that there was due service of notice, the decree of dismissal made on the previous occasion will stand. If, on the other hand, it is found that there was no service of notice for all or any of the years, the plaintiff will be entitled to a declaration that the costs of those years are not realizable from him.

There will be no order for costs of this appeal. Future costs will abide the result.

LATIFUR RAHMAN J. I agree.

Case remanded

N. C. C.