HITENDRA SINGH v. MAHARAJA OF DARBHANGA

That being their Lordships' opinion, the appeal fails and they will humbly recommend to His Majesty that the appeal should be dismissed with costs.

Solicitors for appellants: *Watkins* and *Hunter*.

Solicitors for respondent no. 1: *Pugh & Co.*

APPELLATE CIVIL.

Before Das and Ross, JJ.

1928.

March, 12.

BEAS SINGH

v.

BALDEO PATHAK.*

Estates Partition Act, 1897, (*Act V of* 1897) *sections* 27, 29 *and* 119—*court, inherent power of, to add parties to appeal —suit instituted more than four months after proceeding under section* 29— *decree, nature of—section* 27—*Collector, jurisdiction of—previous private partition, Civil Court, power of to decide—extent of jurisdiction—acts of Collector performed in exercise of statutory powers—Civil court, interference by—"parent estate", meaning of.*

Apart from statutory provision there is an inherent power in the court to add parties to an appeal.

Pulin Behari Roy v. *Mahendra Chandra Ghosal*(1) followed.

A decree of the Civil Court made in a suit instituted more than four months after the Collector had recorded a proceeding under section 29, Estates Partition Act, 1897, must conform to the provisions of section 27.

Therefore a decree setting aside a Collectorate partition on the ground of a previous private partition passed in a suit institued more than four months after a proceeding had been recorded under section 29, is illegal. The Collector has full jurisdiction to make a partition and to decide all objections

* Appeal from Appellate Decree no. 1265 of 1925, from a decision of F. F. Madan, Esq., I.C.S., District Judge of Gaya, dated the 29th of May, 1925, confirming a decision of Babu N. B. Chatterji, Subordinate Judge of Gaya, dated the 29th of November, 1924.

(1) (1922) 34 Cal. L. J. 405.

to his making it, and the functions of the Civil Court in respect of partition proceedings before the Collector are defined and limited in the Act.

The Collector, therefore, is the only authority to decide whether the estate has been previously partitioned, and section 119 is a bar to the Civil Court deciding that question afresh after it has been decided by the Collector.

Girwardhary Singh v. *Bachu Singh* (1), followed.

Ananda Kishore Chowdhry v. *Daije Thakurain* (2), dissented from.

Narsingh Thakur v. *Bishun Pragash Singh* (3), *Manno Chaudhary* v. *Munshi Chowdhary* (4) and *Kuldip Sahay* v. *Raj Kumar Singh* (5), distinguished.

Apart from section 119 the Civil Court has no jurisdiction to interfere with the acts of the Collector duly performed in the exercise of his statutory powers.

Even if a private partition has taken place there is still a " parent estate " within the meaning of the Estates Partition Act, 1897, if proceedings for the partition of that estate are in progress or if the partition thereof has been effected under the Act.

Appeal by the defendants.

This was an appeal by the defendants first party being defendants nos. 1 to 3 in a suit brought by the plaintiffs to set aside a collectorate partition. The plaint was filed on the 19th of September, 1923, and the allegations were that mauza Bambhai bearing tauzi no. 2351 had an area of 161 bighas and that more than fifty years before the lands of the mauza had been partitioned among all the proprietors. It was alleged that the defendants first party the largest co-sharers in the village had applied before the Collector for partition but that no notice under section 21 of the Partition Act was served on the plaintiffs. When they heard of the suit they filed an objection

(1) (1910) 5 Ind. Cas. 354.
(2) (1909) I. L. R. 36 Cal. 726.
(3) (1923) 4 Pat. L. T. 629.
(4) (1918) 3 Pat. L. J. 188.
(5) (1923) 4 Pat. L. T. 633.

1928.

BEAS SINGH v. BALDEO PATHAK.

alleging the previous partition, but by collusion between the defendants and the batwara officers they were prevented from knowing the date fixed for hearing the objection which the Collector accordingly rejected. The cause of action arose on the date on which their objection was rejected by the Collector. The reliefs that were sought in this suit were as follows:

"*I.* It may be adjudicated that the entire area appertaining to mahal Bambhai, pargana Goh, district Gaya, has already been partitioned among all the proprietors by a private partition, as per details given in paragraphs 3 to 8 of the plaint and that all the proprietors have accepted and admitted the same and have been in possession of the takhtas formed by private partition.

II. Defendants nos. 1, 2 and 3, 1st party, or any of the defendants have no right to get partition effected under section 7 of the Partition Act 5 of 1897.

III. The Collector's order, dated 27th September, 1921 is illegal, *ultra vires* and ineffectual.

IV. A temporary and thereafter a permanent injunction may be issued against the Collector of Gaya restraining him from any proceedings relating to partition of mahal Bambhai, pargana Goh, until decision of this suit or at any time thereafter.

V. By issuing a temporary and thereafter a permanent injunction defendants nos. 1, 2 and 3, 1st party, may be refrained from getting the partition effected until the decision of this suit or at any time thereafter.

VI. The costs of this suit with interest may be awarded against defendants nos. 1, 2 and 3, 1st party, or against those whom the Court may deem proper".

The defence of the defendants first party was that the lands of Bambhai measured 247 acres; that no formal private partition of the village had ever taken place; that all the processes in the Collectorate proceedings were duly served and that the plaintiffs had full knowledge of all the proceedings and their objection on the ground of a private partition was rejected by the Batwara officers as it could not be proved. It was further pleaded that the entire partition proceedings were finished and delivery of

possession had been given and consequently the suit was not maintainable. The defendants second party, while not contesting the suit, admitted in their written statement that when their objection to the partition was rejected by the Collector then they filed a petition for the allotment of takhtas of their respective shares.

From the issues framed by the trial Court it appeared that there was no issue on the question of fraud in the batwara proceedings and consequently, in the High Court this part of the plaint was considered to have been abandoned. The suit was not treated at the trial as a suit based upon fraud. The Subordinate Judge found that there had been a previous partition as alleged by the plaintiffs and that accordingly a parent estate did not exist and the Collector had no jurisdiction to effect a partition of the village. He therefore declared that mahal Bambhai had been privately partitioned and that the defendants had no right to get a re-partition of the mahal and that the order of the Collector, dated the 27th of September, 1921, (that is, the order making the partition) was illegal and ultra vires and the partition made under the said order was set aside. The District Judge dismissed the appeal and thus confirmed this decree. He agreed that the private partition had been proved, and that it was complete.

S. M. Mullick and *S. N. Rai*, for the appellants.

C. C. Das (with him *S. S. Bose*, *D. L. Nandkeolyar*, *S. Dayal* and *B. N. Singh*), for the respondents.

Ross, J. (after stating the facts set out above proceeded as follows):—A preliminary objection was taken by the respondents that the appeal was not competent because two of the defendants second party, namely, Isri Singh and Bishun Singh had died after the decree of the lowed, Appellate Court and before the filing of the appeal in the High Court and their representatives had not been brought on the record.

1928.

BRAS SINGH v. BALDEO PATHAK.

ROSS, J.

So far as Bishun Singh is concerned, the point is immaterial because his heirs and representatives are already parties and the only question is with regard to Isri Singh's representatives. It appears from the order sheet that an application to set aside the abatement of the appeal was refused, but later on a notice was issued upon the parties including the representatives of Isri Singh to show cause why they should not be added as respondents. No cause has been shown by the representatives of Isri Singh and it is clear from the attitude that they adopted during the partition proceedings that they do not oppose the appeal. The opposition is by the plaintiffs respondents and the contention is that as this is a suit relating to partition, the appeal is not properly constituted in the absence of one of the co-sharers and consequently no party can be added under Order XLI, rule 20. Whatever the powers of the Court may be under Order XLI, rule 20, it has been held more than once that apart from statutory provision there is an inherent power in the Court to add parties to an appeal: *Pulin Behari Roy* v. *Mahendra Chandra Ghosal* (1). The only question is whether this is a proper case in which this power should be exercised. This depends upon the merits; and if it be found that the suit is not maintainable and the decree without jurisdiction, then in order to remove the anomaly which would arise from the absence of these respondents and the consequent continuance of the decree in their favour, it seems to me proper that they should be added, especially as the objection is a purely technical one with no substance of justice in it.

The decree is contested on the ground that even assuming the maintainability of the suit, the previous partition was on the findings not a complete partition and therefore section 7 of the Act was no bar to a Collectorate partition. The argument is that on the plaintiffs' own showing only 161 bighas were divided

(1) (1922) 34 Cal. L. J. 405.

whereas the area of the parent estate is 247 acres. The finding of the learned District Judge on this point is not altogether satisfactory, because all that he says is that the survey area is greater than that of the time of the private partition, being 247 acres; but this is explained by the addition of lands of village Ajun before the survey. The real question was as to the area of the parent estate and on this point there is no decision; and it would in my opinion have been necessary to remand the appeal for a decision on this point if the decree had otherwise been sustainable.

The principal question is whether in view of the provisions of the Estates Partition Act the present suit can be maintained. The partition is complete and cannot be set aside without setting aside the orders made under Chapter VIII and Chapter X of the Act; and section 119 expressly provides that no order under these Chapters shall be liable to be contested or set aside by suit in any Court or by any means other than those expressly provided in the Act. It is further argued that section 25 is a bar to the suit. Section 21 requires the Collector, when a proper application has been made to him for partition, to publish a notification, inter alia, inviting any person claiming any proprietary right in the estate who may object to the partition, to state his objection either by person or by a duly authorized agent on or before a day to be specified in the notification. Section 22 enables the Collector on a consideration of the objection if he is of opinion that there is good and sufficient reason for rejecting the application, to reject it. Section 29 requires the Collector, if no objection is made within the specified time or when all objections have been disposed of, and if the Collector has no reason to believe that any obstacle exists to his making the partition as applied for, to direct that the application be admitted and to record a proceeding declaring the estate to be under partition, and containing various other declarations and orders. Section 23 deals with such objections as raise

1928.

BEAS SINGH v. BALDEO PATHAK.

ROSS, J.

any question of right or title or of extent of interest as between any applicant and any other person claiming to be a proprietor of a parent estate. When such an objection is raised, the Collector may either direct that the partition proceedings shall proceed or direct that the proceedings be postponed for four months. Under section 24, at the expiration of the said four months the Collector shall resume the proceedings unless the objector or some other person (*a*) has obtained an order from the Civil Court asking that such proceedings should be stayed or (*b*) shows that a suit has been instituted before the Civil Court to try some question of such a nature as to lead the Collector to think that the proceedings ought to be stayed until the question has been finally decided or until the proceedings in such Court in respect thereof shall have terminated. Then section 25 provides that no suit instituted in a Civil Court, after the lapse of four months after the Collector has (*a*) made a direction under clause (*a*) or (*b*) of section 23, or, (*b*) recorded a proceeding under section 29, by any person claiming any right or title in or to a parent estate, shall avail to effect or stay the progress of any proceedings which may have been taken under this Act for the partition of the estate. It is not said that the present suit was instituted before four months had elapsed after the Collector recorded a proceeding under section 29. Consequently the suit could not affect or stay the progress of any proceedings under the Act. Then section 26 defines the nature of the decree that may be passed by the Civil Court after a proceeding under section 29 and before delivery of possession under section 94. Section 27 defines the nature of the decree which may be passed by the Civil Court after delivery of possession in a suit instituted after the lapse of four months mentioned in section 25. It would therefore appear that as the present decree does not conform to section 27, it is illegal. Learned Counsel for the respondents in a very able argument seemed to accept this position and admitted

that the partition should not be set aside, but claimed that he should get the lands to which he has been found to be entitled by the private partition, in the partition as made by the Collector. It is sufficient to say that this is not the suit that has been brought and that section 5, clause (*2*) of the Act already provides—

"If the interest of such recorded proprietor is the proprietary right over specific mauzas or lands forming part of the parent estate and held by him in severalty, he shall be entitled to have assigned to him as his separate estate the said mauzas or lands",

and there is no reason to suppose that this section has not been complied with in the collectorate proceedings.

Learned Counsel for the respondents however relies on certain decisions which he contends give the Civil Court jurisdiction in a suit of this nature. These decisions are *Ananda Kishore Chowdhry* v. *Daije Thakurain* (1), *Narsingh Thakur* v. *Bishun Pragash Singh* (2), *Kuldip Sahay* v. *Raj Kumar Singh* (3) and *Manno Chaudhry* v. *Munshi Chaudhry* (4). Now the three last cases were cases where an injunction was sought against the defendants restraining them from proceeding further before the Collector in a batwara which was being made. They have therefore no direct application to the present case. But in any case, all that was decided was that section 25 did not bar such a suit. The first case is the only one which deals with the maintainability of such a suit as the present. Mukharji, J. in that decision said "In a case in which it is established that an estate has been privately partitioned, the Collector has no jurisdiction to partition it again under the Estates Partition Act except in one or other of two contingencies namely, either upon the joint petition of all the proprietors or by the order of the Civil Court." If this means that the Collector is the only authority to decide whether the estate has been previously partitioned, I agree. But if it means that the Civil Court can

(1) (1909) I. L. R. 36 Cal. 726.
(2) (1923) 4 Pat. L. T. 629.
(3) (1923) 4 Pat. L. T. 693.
(4) (1918) 3 Pat. L. J. 188.

1928.

BEAS SINGH v. BALDEO PATHAK.

ROSS, J.

decide the question afresh after it has been decided by the Collector, then with all respect I am unable to agree to this view. The Collector has full jurisdiction to make a partition and to decide all objections to his making it. The Collector has a larger, and in some respects an exclusive jurisdiction in the matter of partition. The functions of the Civil Court in respect of partition proceedings before the Collector are carefully defined and limited in the Act. This suit is outside those limits. The decree rests on a finding as to a previous partition; but the Collector was competent to decide that question and did decide it. The result is two conflicting decisions. Which then is to prevail? Is the Collector bound to ignore his own decision and give effect to that of the Civil Court; or, is the decree of the Civil Court a brutum fulmen? It is precisely to meet such a situation that section 119 has been enacted and, in my opinion, that section fully meets this case and bars the civil remedy. The learned Judge appears to have overlooked the distinction which he himself drew in later cases between want of jurisdiction and an error in the exercise of jurisdiction. The utmost that can be said is that the Collector wrongly decided against the objection based on previous partition, although how he could have come to any other decision in the absence of the parties who made the objection, it is difficult to say. But assuming that there was an error that was an error in the exercise of jurisdiction and does not take away the jurisdiction to make the partition.

The learned Subordinate Judge was of opinion that as there had been a previous partition the parent estate did not exist and consequently the Collector had no jurisdiction to effect a partition. This reasoning appears to me to be defective. The existence of a parent estate cannot be questioned: it is a matter of definition. Even if a private partition had taken place, there was still an " estate " within the meaning of the Partition Act and " parent estate " within the meaning of that Act is defined as an " estate "

for the partition of which proceedings are in progress under this Act or of which the partition has been effected under this Act. Consequently whether or not there had been a private partition, there certainly was a parent estate still in existence indisputably.

The point has been put clearly in *Girwardhary Singh* v. *Bachu Singh* (1) where Holmwood and Chatterjee, JJ., dealing with a partition which the Civil Court was asked to set aside, though on different grounds from the present, said " The only case where a final decision of a Court can be set aside merely on the ground of want of jurisdiction is when the Judge has no inherent jurisdiction over the subject matter of the suit. Irregularity in the exercise of its jurisdiction by a competent Court must be made the subject of objection at the time and the defendant cannot subsequently dispute the jurisdiction of the Court." And in this case, as in that case, the question is academical, because the Collector had jurisdiction to decide the question. I am of opinion therefore that section 119 is a bar to the present suit. I am further of opinion that apart from section 119, the Civil Court has no jurisdiction to interfere with the acts of the Collector duly performed in the exercise of his statutory powers. The Courts below seem to have lost sight of the principle of comity between Courts. The Civil Court has no jurisdiction over the Collector and where the Legislature has given full jurisdiction to the Collector in the matter of partition, it is the duty of the Civil Court to respect that jurisdiction.

On these grounds the decrees passed by the Courts below are in my opinion bad and must be set aside. The appeal is therefore decreed with costs in all the Courts and the suit is dismissed.

DAS, J.—I agree.

Decrees set aside.

(1) (1910) 5 Ind. Cas. 454.