APPELLATE CIVIL.

Before Bucknill and Adami, J.J.

AJODHYA PRASAD

v.

RAMKHELAWAN SINGH.*

1926.

June, 9.

Estates Partition Act (Bengal Act V of 1897), section 119—land not being subject-matter of partition proceeding, allotted to one of the parties—objection, no adjudication on—suit for declaration of title and recovery of possession, whether barred—Limitation Act, 1908 (Act IX of 1908), Schedule 1, Article 14, applicability of.

Where, during the partition of an estate, property not comprised in the estate is allotted to a person who is a party to the partition proceedings, the rightful owner of such property can, within 12 years from the date when his right of action accrues, sue for a declaration of his title and, if necessary, for recovery of possession of the property in question, irrespective of whether he was a party to the partition proceeding or not.

Janki Nath Chowdhry v. *Kali Narain Roy Chowdhry* (1), followed.

In a partition proceeding under the Estates Partition Act, certain lands belonging to the plaintiff and appertaining to a tauzi which was not the subject-matter of the proceeding were allocated to the defendant. The plaintiff filed a petition of objection of which no notice was taken by the Batwara Officer and consequently there was no adjudication of plaintiff's claim. Plaintiff brought the present suit for a declaration of his title to, and recovery of possession of the lands in dispute. The defence was, inter alia, that the suit having been brought more than a year after the partition award, was barred under Article 14, Schedule 1, Limitation Act, 1908, and that it was also barred by section 119 of the Estates Partition Act.

*Appeal from Appellate Decree no. 1328 of 1923, from a decision of J. Chatterji, Esq., Additional District Judge of Patna, dated the 30th July 1923, confirming a decision of Babu Ananta Nath Banerji, Munsif of Barh, dated the 29th June 1922.

(1) (1910) I. L. R. 37 Cal. 662.

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Held, (*i*) that the suit was not governed by Article 14 as there was no act or order which could bring the suit within the purview of that Article;

(*ii*) that the suit was not barred by section 119, Estates Partition Act.

Held, further, that if there had been any adjudication upon the question raised by the plaintiff during the course of the batwara proceedings the relative provisions of the Estates Partition Act would have adversely affected his position; but there having been no adjudication upon his petition the mere fact that there was, in the final partition award, an allocation of the land which the objector contended was not properly capable of inclusion in the estate which was being partitioned, could not operate to prevent the claimant from bringing a suit for a declaration of his title and recovery of possession.

Gurybuksh Prasad Tewari v. *Kali Prasad Narain Singh*, (1), referred to.

Appeal by defendant, 1st party.

The facts of the case, so far as they are material to this report, were as follows.

The plaintiffs brought a suit on the 20th October, 1921, against three sets of defendants; the second party and third party defendants need not be considered as of importance for the purposes of this appeal.

The allegation put forward by the plaintiffs was that they had been dispossessed of two pieces of land known as plots no. 2242 and 2735 which properly appertained to mauza Marachi Bhagat Ekhtiyarpur; that this dispossession had come about owing to the fact that in a partition of an adjoining mauza known as Marachi Bariar, the first party defendants had been wrongly allotted these two plots of land which in fact did not belong to mauza Marachi Bariar at all. It may be convenient here to say that the tauzi number of the village Marachi Bhagat Ekhtiyarpur was 86

(1) (1914-15) 19 Cal. W. N. 1322.

and that of Marashi Bariar 641. The plaintiffs claimed the following principal reliefs:—

(1) That on adjudication of their title the Court might be pleased to declare that the two plots in question lay in mauza Marachi Bhagat Ekhtiyarpur; that they were the plaintiffs' bakasht lands in that mauza and that the defendants had no right or title in connection therewith; and

(2) that the Court should be pleased to award the plaintiffs direct possession of the two plots on ouster of the first party defendants.

For a number of years a Collectorate batwara had been taking place in mauza Marachi Bariar; it appeared that these partition proceedings had commenced in 1906; they did not end until 1915. As a result of this partition proceeding, plots 2242 and 2735 were allotted as if they appertained to mauza Marachi Bariar to the defendants first party; delivery of possession appeared to have taken place on the 31st May, and 11th June, 1915, respectively. During the period occupied by this partition proceeding it appeared that a cadastral survey took place sometime in about 1910 or 1911 and there seemed to be no doubt that in the cadastral survey the two plots were entered as part of tauzi number 641; but it was contended by the plaintiffs that that entry was wrong and wrongly obtained. On the 17th July, 1912, the plaintiffs filed a petition in the batwara proceeding asking that plot 2242 should be included in their takhta because they (the plaintiffs) were in possession thereof; however, later, that is to say on the 8th September, 1913, another petition was filed by the plaintiffs pointing out that their previous petition had been discovered to be completely in error and that as a matter of fact both plots 2242 and 2735 did not belong to tauzi number 641 at all but should be excluded therefrom. It was not clear that any notice of any sort was taken of this petition. The manner in which the Additional District Judge dealt with what was supposed to have taken place at the batwara proceedings with regard to these two plots of land is detailed in the judgment of Bucknill, J. It is sufficient to state that these two plots were allocated to the first party defendants as if they appertained to tauzi no. 641, mauza Marachi

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Bariar. The suit was then brought by the plaintiffs some years afterwards for the reliefs already named.

The Munsif of Barh found in favour of the plaintiffs and his decision was affirmed by the Additional District Judge of Patna.

S. N. Rai, for the appellants.

S. Dayal, for the respondents.

BUCKNILL, J. (after stating the facts set out above, proceeded as follows):—There are only two points raised by the learned Advocate, who appeared for the appellants, here. The first of these points is that the period of limitation which applies to a suit of this kind is governed by Article 14 of the Schedule to the Limitation Act, 1918; that is to say that under that article a suit such as this must be brought within one year of the date of the act or order of an officer of Government in his official capacity not otherwise expressly provided for by other articles of the schedule or by the Act itself. In this case, however, there was no act or order, in my opinion, which could be regarded as bringing the period of limitation within the purview of this Article 14.

The second point which was put forward by the learned Advocate who appeared for the appellants was that under section 119 of the Estates Partition Act, it was not possible for the plaintiffs to bring a suit to set aside anything which had taken place under the partition unless they did so under the proviso to that section which proviso however could not be brought into effect under the circumstances of the present case. The material provisions of this section read thus:—

"119. No order (*a*) refusing to admit an application for partition or to carry out a partition on any of the grounds mentioned in section 11, or (*b*) made under section 20; section 30, Chapter V, Chapter VII, Chapter VIII, Chapter IX (except section 81), Chapter X, section 107 or section 117, shall be liable to be contested or set aside by suit in any Court, or by any means other than those expressly provided in this Act: Provided that (*1*) any person claiming a greater interest in lands which were held in common tenancy between two or more estates than has been allotted to him by an order under section 84 or section 83; or (*2*) any person who is aggrieved by an order made under section 88, may bring a suit in a Court of competent jurisdiction to modify or set aside such order".

The learned Advocate contends that there has been no order under section 88 of the Act which is the only possible section which could apply to what took place in this case; and that by the very allocation by the Collectorate of these two plots of land to the defendant first party, the plaintiffs have no recourse to or remedy in any Civil Court. I must admit that I think that this is a fallacious argument. If, as is contended here, property which did not fall in any way within the estate which was being partitioned was allocated to one of the persons, who was a party to the partition proceedings, it seems to me incredible to suggest that the person to whom that property so allocated rightly belonged could not within 12 years from the date when his right of action accrued bring a suit for a declaration of his title and if necessary for recovery of possession of the land in question; and, indeed, I would go a step further and say that it matters not whether such claimant was an outsider, that is to say a person who was not a party to the partition proceedings, or a person who *was* a party to the partition proceedings.

In the case of *Janaki Nath Chowdhry* v. *Kali Narain Roy Chowdhry* (1) this proposition is clearly laid down by Mookerjee and Teunon, J.J. Their Lordships there observed that if in the course of a partition proceeding any question arose as to the extent or otherwise of the tenure, the tenure-holder not being a party to the proceedings, he was not affected in any manner by the decision which might be arrived at by the revenue authorities for the purpose of partition between the proprietors and that it would be unreasonable to hold that a party who appeared before the revenue authorities in his character as a proprietor should be finally concluded by a decision upon a question of title, which would not have been binding upon him, if he had been a stranger to the proceedings.

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Now the learned Advocate who has appeared for the appellants here has quoted to us a considerable number of cases of which the general trend has been to insist upon the importance of the bar presented by section 119 of the Estates Partition Act. The case which perhaps most strongly supports this proposition is perhaps that of *Gurubuksh Prosad Tewari* v. *Kali Prosad Narain Singh* (1). In that case where a party to a partition proceeding objected during the proceedings only to the mode in which the partition was being made but never took any objection that land outside the limits of the property which was being partitioned was being included wrongly in the estate and where the final order for partition was made without such objection, that party was precluded, under the provisions of section 119 of the Estates Partition Act, from bringing a suit for a declaration of title in his favour and for recovery of possession of land which in the suit for the first time he declared belonged to him and did not appertain to the estate which alone should have rightly been partitioned. In the other cases, which were quoted by the learned Advocate we find that the party seeking to bring a suit which would affect the final partition award is generally found to have brought forward his objections during the course of the batwara proceedings and in effect to have had a substantive adjudication thereupon.

Now, it is, therefore, I think at this stage important to ascertain, so far as is possible, whether there really was any adjudication upon this question of the plaintiffs' claim with regard to these two plots of land. I do not think that I can do better than quote on this point from the decision of the Additional District Judge. He says:—

"As to the form of the suit, it was one for declaration of right for recovery of possession of the two plots of land in suit, on the ground that it appertained to tauzi no. 86 (mauza Marachi Bhagat Ekhtiyarpur) Lakheraj and had been in the possession of the plaintiffs on private partition with defendants third party, co-owners of the 2 annas Patti to which the lands in suit had been allotted on a previous

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Civil Court partition effected in a suit (another suit with regard to that mauza). I fail to see how on the suit as framed, the suit would not lie in the Civil Courts, or how section 119 of the Estates Partition Act would oust the Civil Courts of their jurisdiction. Nor do I see how Article 14 of the Limitation Act would apply to the facts of the present case. The suit was not one brought to set aside the order of the Collector nor is there anything to show that any orders had as a matter of fact been passed under section 88 or any action under the provisions of the said section (with regard to these two plots of land) had been as a fact taken by the Collector."

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"All that the appellants could produce is Exhibit A, petition with Raibandi put in on behalf of the plaintiffs during the Collectorate Batwara proceedings on the 17th July 1912 praying for being allotted a Takhta to contain plot no. 2242 amongst others as plaintiffs were in possession thereof. This petition and Raibandi were however discovered to have been a mistake and the plaintiffs put in a petition on the 8th September 1913, Exhibit 5 stating that plot no. 2242 really appertained to their Lakheraj property no. 86 and never formed a part of the revenue paying estate which was being partitioned."

"The appellants did not put in any further evidence to show that any action of the several kinds laid down in section 88 were thereupon taken by the Collector or that any inquiry was made, or any report submitted by the Deputy Collector mentioning the existence of any dispute or *doubt; apparently no serious notice of the petition* had been taken as it (seems to have been) filed after the Deputy Collector had proceeded under section 57 so that the result is that no orders had at all been passed under Chapter IX to come within the bar referred to in section 119, clause (6) or within sub-clause (*ii*) of the proviso of that section. Then again in Collectorate Batwara proceedings based mainly on the previous Cadastral survey, questions of title relating to lands could not be gone into. Having regard to the facts of the present case, I am of opinion that the Court below was justified in holding that section 119 of the Estates Partition Act was no bar to the maintainability of the present suit, and the special limitation provided under Article 14 of the Limitation Act had any application."

It is quite clear, I think, that the authorities indicate that if there had been any adjudication upon this question raised by the plaintiffs during the course of the batwara proceedings (i.e., that plots 2242 and 2735 did not at all lie within the estate which was in the course of being partitioned) the relative provisions of the Estates Partition Act would undoubtedly have affected adversely their position. But it must also be admitted that where there has been no adjudication upon such a claim, the mere fact that there has been in the final partition award an allocation of the land which the objectors have contended was not properly capable of inclusion in the estate which was being

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partitioned cannot operate to prevent the claimants from bringing a suit for a declaration of their title and, if necessary, recovery of possession. If we look at what took place here it certainly appears, as it has appeared to both the lower Courts, that there was no sort of enquiry or adjudication upon the claimants' claim. That being so, it does not appear to me that there was any bar to the right of the plaintiffs to bring the suit in the manner and in the time at which they have so done.

In my view therefore both the lower Courts were correct in their decision and this appeal must be dismissed with costs.

ADAMI, J.—I agree.

Appeal dismissed.

APPELLATE CIVIL.

Before Ross and Kulwant Sahay, J.J.

1926.

June, 10.

DURGA SINGH

v.

MUSSAMMAT RAM DASI KUER.*

Bengal Tenancy Act, 1885 (Act VIII of 1885), section 158B (2)—notice to co-sharer landlords, whether essential—omission to serve, effect of—mere irregularity—sale, whether a nullity.

A sale without a notice under section 158B (2), Bengal Tenancy Act, is not a nullity, but has the effect of a sale under a decree for money.

Ahamad Biswas v. *Benoy Bhusan Gupta* (1), *Norendera Bhusan Ray* v. *Jotindra Nath Roy* (2), and *Rajani Kanta Ghose* v. *Sheikh Rahman Gazi* (3), followed.

Sarip Hechan v. *Tilattama Debi* (4) and *Ghanshyam Chaudhury* v. *Basdeb Jha* (5), not followed.

*Appeal from Appellate Decree no. 254 of 1923, from a decision of Babu Raj Narain, Subordinate Judge of Gaya, dated the 21st December 1922, confirming a decision of Babu Bipra Charan Das, Munsif of Aurangabad, dated the 4th February 1922.

(1) (1918-19) 23 Cal. W. N. 931. (3) (1922-23) 27 Cal. W. N. 765.
(2) (1920) 55 Ind. Cas. 402. (4) (1918) 43 Ind. Cas. 3.
(5) (1921) 60 Ind. Cas. 529.