

1905
FEB. 24.
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APPELLATE
CIVIL.
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32 C. 582=9
C. W. N. 421.

was that a Court of its own motion under section 32 of the Code of Civil Procedure, could add a party necessary to a suit, but if such addition be made after the period of limitation expired, the Court would have to dismiss the suit for limitation after such party had been so added. This case, however, does not quite apply to the facts of this case; and we find that the view therein expressed was dissented from by a Division Bench of this Court in the case of *Fakera Pasban v. Bibi Azimunnissa* (1) following an earlier case, *Grish Chunder Sasmal v. Dwarka Nath Dinda* (2).

We hold that the claim is not barred by limitation.

The question that then arises is as to the liability of the *debutter* estate now in the hands of the defendant Raja Peary Mohun Mukerjee.

Mr. Hill, the learned counsel for the appellant, did not contest that the Raja is the present *sebit*, the real question being as to the liability of the *debutter estate* or, rather, to the extent of such liability. That Bejoy Krishna Mukerjee met with considerable [601] opposition from the defendant, and was thus unable to collect all the rents and profits due to the *debutter estate*, there cannot be any doubt. And it is obvious that, if he had to pay any money from his own pocket for the benefit of the *debutter estate*, that estate should make good the same.

[Their Lordships then proceeded to decide the question as to the amount of the liability of the *debutter estate*, and, after going into the matter of accounts, affirmed the decree of the Court below and dismissed the appeal and the cross appeal with costs.]

Appeals dismissed.

32 C. 602 (=9 C. W. N. 862=2 Cr. L. J. 552.)

[602] CRIMINAL REVISION.

Before Mr. Justice Henderson and Mr. Justice Geidt.

PRAYAG MAHATON v. GOBIND MAHATON.*

[22nd March, 1905.]

Jurisdiction—Immoveable property, dispute as to—Bundh—Possession—Title—Costs—Damages—Criminal Procedure Code (Act V of 1893) ss. 145, 148.

Proceedings under s. 145 of the Criminal Procedure Code were instituted with reference to a *bundh* erected by the second party upon land claimed both by the first and second parties.

The Magistrate treated the case as if it were solely one of title and made an order directing the removal of the *bundh*, and he further awarded one of the parties Rs. 50 for the damage done to his crops as well as for costs in the case.

Held that the entire order was illegal and should be set aside, including the order as to costs.

[Ref. 60 I. O. 325=32 C. L. J. 270=22 Cr. L. J. 213.]

RULE granted to the petitioner Prayag Mahaton.

This was a Rule calling upon the District Magistrate of Bankipore and the opposite party to show cause why the order dated the 28th November 1904 should not be set aside on the ground that the order was not one contemplated by s. 145 of the Criminal Procedure Code and why the order as to costs should not be set aside.

* Criminal Revision No. 93 of 1905, made against the order passed by Begin Behari Paramanik, Deputy Magistrate of Bankipore, dated the 28th of November 1904.

(1) (1899) I. J. R. 27 Cal. 540.

(2) (1897) I. L. R. 24 Cal. 640.

The petitioner, the 2nd party, erected a *bundh* in Chilbili upon land claimed both by him and by one Gobind Mahaton, the 1st party. Proceedings under s. 145 of the Criminal Procedure Code were instituted against both parties before the Deputy Magistrate of Bankipore, and they were called upon to produce evidence as to their claims to the *bundh* and to the land upon which it had been erected.

The Deputy Magistrate after taking evidence on behalf of both parties passed the following order on the 28th November 1904.

[603] This is a dispute about the construction of a *bundh* in Chilbili by the 2nd party Prayag Mahaton and others.

The 1st party claims the land on which the *bundh* has been put up as theirs, whilst the 2nd party claims the land as theirs.

From the evidence of witnesses for the 1st party as well as those adduced for the 2nd party it is apparent that the *bundh* has been put up on the *pyne* belonging to Chilbili. The water here flows from south to north, and the police on enquiry found it also so. Now this *bundh* puts a stop to the flow of Chilbili water by this *pyne*. The evidence both for the 1st party and 2nd party proves that there is some land of Chilbili even on the north of this *bundh*: when such is the case, the 2nd party had no earthly reason to enter upon Chilbili land and put up this *bundh* to cause damage to Chilbili crops.

Under these circumstances I order that the *bundh* should be removed, the rule against party No. 1 is hereby cancelled and the rule against Prayag Mahaton, party No. 2, made absolute. This order is to remain in force so long as it is not set aside in due course of law by a competent Civil Court, under section 145 of the Criminal Procedure Code. Prayag Mahaton to pay Rs. 50 as costs to party No. 1, Gobind Mahaton, for the damages of crops as well as costs in this case.

Babu *Surendra Mohun Das* for the petitioner.

Babu *Satish Chunder Mookerjee* for the opposite party.

HENDERSON and GRIDT, JJ. In this case it appears that there was a dispute with regard to a *bundh* measuring 32 feet in length and one foot in breadth, and the parties were called upon under section 145 of the Criminal Procedure Code to produce their evidence as to their respective claims over the *bundh* in dispute and to the land on which the *bundh* stood.

From first to last the Magistrate has dealt with the matter as if he had to try a question of title and not to a mere question of possession. He has found not only to whom the land upon which the *bundh* was erected, belonged, but he has directed that the *bundh* should be removed. Moreover he has directed that his order shall remain in force so long as it is not set aside in due course of law by a competent Civil Court under section 145 of the Criminal Procedure Code, and he has directed one of the parties to pay costs to the other for damages done to crops as well as costs in the case.

A Rule was granted to set aside these orders as not having been contemplated by section 145.

The Rule must be made absolute.

[604] In the first place, it was the duty of the Magistrate to enquire as to which party was in possession and not to treat the case as if the matter before him was solely one of title. In the second place he had no power to make an order under section 145 directing the *bundh* to be removed.

Further the Magistrate was not entitled to make an order under section 148 except for the costs incurred for witnesses and pleader's fees or both, but treating the matter throughout as if it had been a Civil case, he has awarded one party so much for damages to his crops.

We think the entire order must be set aside, including the order as to costs, upon the grounds stated in the Rule.

Rule absolute.

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