APPELLATE CIVIL.

Before Mr. Justice Mookerjee and Mr. Justice Carnduff.

1909
March 9.

ANANDA KISHORE CHOWDHRY
v.
DAIJE THAKURAIN.*

Partition—Estates Partition Act (Bengal VIII of 1876), s. 63, and (Bengal V of 1897), s. 2, cl. (b)—Private Partition—Partition Proceedings commenced under Act V of 1876 (B.C.) whether governed by Act V of 1897 (B.C.)—Partition by Collector, whether open to objection—Limitation Act (XV of 1877), Sch. II, Art. 14—Order-Sheet, ex parte entry in—Specific Relief Act (I of 1877), s. 42—Dispossession during pendency of suit—Plaint, amendment of.

Where a partition proceeding commenced under s. 63 of Act VIII of 1876 (B.C.) before Act V of 1897 (B.C.) came into operation, and the Subordinate Judge decided that the suit was not maintainable under the provisions of Act V of 1897 (B.C.):

Held, that under s. 2, cl. (*b*), Act V of 1897 (B.C.), where a suit had been instituted under Act VIII of 1876 (B.C.), all subsequent proceedings for partition must be carried on under Act VIII of 1876 (B.C.) as if Act V of 1897 (B.C.) had not been passed, and the question of the maintainability of the suit should have been determined with reference to the provisions not of Act V of 1897 (B.C.) but of Act VIII of 1876 (B.C.)

Where an application for partition fulfilled the requirements of ss. 18 and 19 of Act VIII of 1876 (B.C.) and objection under s. 12 of Act VIII of 1876 (B.C.) was disallowed by the Collector, and the order of the Collector was upheld by the Board of Revenue, and the partition was proceeded with:

Held, that under s. 12 of Act VIII of 1876 (B.C.) the Collector had no jurisdiction to make the partition.

Where the Board of Revenue on appeal decided that the private partition set up was not established and the Collector proceeded with the partition, and subsequently in a suit to set aside the partition by the Collector it was decided by the Subordinate Judge that the finding of the reality of the alleged partition by the Revenue Court was conclusive and that the Civil Court had no jurisdiction to investigate the competency of the Collector to make the partition in view of s. 12 of Act VIII of 1876 (B.C.):

Held, that the Civil Court was competent to decide the matter in controversy, and that, therefore, the suit was maintainable.

* Appeal from Original Decree, No. 172 of 1907, against the decree of Ambika Charan Dutt, Addl. Sub. Judge of Darbhanga, dated March 9, 1907.

Where in a partition suit commenced under Act VIII of 1876 (B.C.), the provisions of s. 25 of Act V of 1897 (B.C.) were applied, and it was decided that the suit was barred :

Held, that provisions of s. 25 of Act V of 1897 (B.C.) were not applicable but the corresponding section of Act VIII of 1876 (B.C.), and that the suit was not barred under that section or under Art. 14 of the Limitation Act (XV of 1877).

Laloo Singh v. *Purna Chander Banerjee* (1), *Raj Chandra Roy* v. *Fazijuddin Hossein* (2), *Narendra Lal Khan* v. *Jogi Hari* (3) and *Alimuddin* v. *Ishan Chandra Dey* (4) referred to.

Parbati Nath Dutt v. *Rajmohun Dutt* (5) distinguished.

An *ex parte* entry in the order-sheet of the Collector is no evidence of possession of a party.

Mir Tapurah Hossein v. *Gopi Narayan* (6) referred to.

An amendment of the plaint would be allowed when the plaintiff had been dispossessed during the pendency of the suit, so as to make it appropriate to a suit for possession.

Jugdeo Singh v. *Habibullah Khan* (7) followed.

APPEAL by Ananda Kishore Chowdhry and others, the plaintiffs.

The plaintiffs appellants are the members of a joint Hindu family and the owners and proprietors of 8 annas share of Mehal Rohan Bhowanipur, original with dependencies pargana Ahis, bearing Touzi Nos. 1 and 2, and the defendants respondents, the owners of the remaining 8 annas share of the said mehal.

The plaintiffs alleged that the said mehal had been partitioned between the ancestors of the plaintiffs and the defendants and the plaintiffs' ancestors and thereafter the plaintiffs held possession of the 8 annas share of the said mehal which fell to their lot, and that the said privately partitioned *putties* were settled and confirmed by a judgment of the Subordinate Judge of the Tirhut, dated the 5th July 1856; and that under a survey operation which was completed in 1309 *Fusli*, the private partition was allowed to stand, except that 129 bighas 10 cottas 8 dhur of land of the said mehal were kept joint by the Survey officers.

(1) (1896) I. L. R. 24 Calc. 149.
(2) (1904) I. L. R. 32 Calc. 716.
(3) (1905) I. L. R. 32 Calc. 1107.
(4) (1906) I. L. R. 33 Calc. 693.
(5) (1901) I. L. R. 29 Calc. 367.
(6) (1907) 7 C. L. J. 251, 262.
(7) (1907) 6 C. L. J. 612.

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It was also alleged that partition proceedings started by the defendant in 1884 before the Collector of Darbhanga, the plaintiffs' objection that the mehal had already been privately partitioned, and that the Collector could not partition it again prevailed, and the petition for partition dismissed on the 14th of July 1895. But on appeal by the defendants to the Commissioner of Patna, the order of the Collector was reversed and the partition proceedings ordered to be proceeded with, and the same was confirmed, on appeal, by the Board of Revenue subsequently.

The cadastral-survey operations commenced in 1307 *Fusli*, corresponding with 1899-1900, and the *putties* of the plaintiffs and the defendants as formerly partitioned under the private partition allowed to remain in tact, and the objections of the defendants to the same rejected, and the order made absolute on the 22nd February 1899: that thereafter the partition proceedings were again taken up, and the plaintiffs filed an objection on the basis of the aforesaid survey papers, which was rejected on the 25th April 1902; and an appeal by the plaintiff from the said order was dismissed by the Commissioner on the 25th September 1902.

The Deputy Collector proceeded with the partition proceedings. The plaintiffs thereupon filed an objection on the 23rd September 1904, which was rejected on the 3rd April 1905, and the appeal against the said order dismissed by the Collector on the 26th April 1905, and by the Commissioner on the 31st July 1905, and by the Board of Revenue on the 21st December 1905. The partition proceedings went on and the case was sent up to the Collector of Darbhanga under section 58 of Act V of 1897 (B.C.) for his approval of the taktabandi, in the absence of the plaintiffs, and the same was approved of by the Collector on the 8th March 1906. The plaintiff thereupon brought the present suit for a declaration that the properties, the subject-matter of the suit, having been privately partitioned, could not be partitioned again by the Collector under the Estates Partition Act. The Subordinate Judge dismissed the plaintiffs' suit. Against that decision the plaintiffs appealed to the High Court.

Babu Jogesh Chandra Roy and *Rajendra Chandra Guha*, for the appellants, contended, *first*, that the suit was not maintainable under the provisions of Act V of 1897; *secondly*, that it was barred by limitation under section 25 of Act V of 1897; *thirdly*, that under section 119 of Act V of 1897 the plaintiffs were precluded from questioning the validity of the order made by the Revenue Court; and *fourthly*, that the suit was barred under section 42 of the Specific Relief Act.

Babu Satish Chandra Ghose, for the respondents, contended that the decision of the Revenue Courts upon the question of the reality of an alleged private partition was conclusive between the parties, and the Civil Court had no jurisdiction to investigate whether or not it was competent to the Collector to make the partition in view of the provisions of section 12 of Act VIII of 1876 read with section 148 of that Act. Reference was made to sections 11, 21, 31, 32 and 149 of the same Act and to *Raj Narain Das* v. *Shama Nando Das Chowdhry* (1).

MOOKERJEE AND CARNDUFF JJ. This is an appeal on behalf of the plaintiffs in a suit for declaration that the immovable properties, which form the subject-matter of litigation, had been privately partitioned and could not form the subject-matter of partition by the Collector under the Estates Partition Act. There has been no investigation into the facts of the case, but the Subordinate Judge has dismissed the suit on several preliminary grounds, namely, *first*, that the suit was not maintainable under the provisions of Act V of 1897; *secondly*, that it was barred by limitation under section 25 of that Act; *thirdly*, that under section 119 of the Act, the plaintiffs were precluded from questioning the validity of the order for partition made by the Revenue Court; and *fourthly*, that the suit was barred under section 42 of the Specific Relief Act.

The plaintiffs have appealed to this Court, and on their behalf it has been contended that the view taken by the

(1) (1899) I. L. R. 26 Calc. 845.

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Subordinate Judge on each of the above points is erroneous and that the case ought to be tried on the merits. In our opinion, this contention is well-founded and must prevail.

It is obvious as regards the first ground that the Subordinate Judge has committed a serious error in applying the provisions of Act V of 1897 to the circumstances of this case. It appears that proceedings were commenced before the Collector for partition of the estate so far back as 1884, and from the papers placed before us, it is fairly clear that the order under section 63 of Act VIII of 1876, which was in force when the partition proceedings were commenced, must have been made before 1897 when the Act now in force came into operation. We hold, therefore, that under section 2, clause (*b*) of Act V of 1897, all subsequent proceedings for partition must be carried on under Act VIII of 1876, as if Act V of 1897 had not been passed. It follows consequently that the Subordinate Judge ought to have determined the question of the maintainability of the suit with reference to the provisions, not of Act V of 1897 but of Act VIII of 1876. Now, let us turn for a moment to the provisions of Act VIII of 1876 and see whether the present suit is barred. Section 12 of Act VIII of 1876 provides that no partition of an estate in which private division has already been made is to be made by the Collector except on a joint petition of all the proprietors or by an order of the Civil Court. In other words, 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. Section 21 provides that, if, in the opinion of the Collector, the application for partition fulfils the requirements of sections 18 and 19, that is, is in proper form and is accompanied by the necessary documents, and if in his judgment there does not appear to be any objection to the making of the partition, he may invite objections thereto—one of the objections may be under section 12 of the Act, for any of the proprietors upon issue of

notice under section 21 may appear before the Collector and contend that he has no jurisdiction to make the partition in view of the provisions of section 12. If such objection is taken, it may be allowed by the Collector under section 23 or it may be overruled by him under section 31. In the latter contingency, the Collector directs that the application be admitted and declares the estate to be under partition. In the case before us, so far as we can gather from the materials on the record, an objection was taken that, in view of the provisions of section 12, the Collector had no jurisdiction to make the partition. The allegation that there had been a private partition was challenged, and it was determined by the Collector and ultimately by the Board of Revenue, that the private partition set up was not established, and that consequently there was no bar to the partition of the estate. This order appears to have been made so far back as the 29th April 1886. It is now contended by the respondent that the decision of the Revenue authorities upon the question of the reality of the alleged private partition is conclusive between the parties, and that the Civil Court has no jurisdiction to investigate whether or not it was competent to the Collector to make the partition in view of the provisions of section 12. In support of this view, reliance is placed upon the provisions of section 148 of Act VIII of 1876. In our opinion the section mentioned is of no assistance to the respondent. That section provides that certain specified orders are not liable to be contested or set aside by a suit in the Civil Court. An order under section 31 overruling an objection taken under section 21 to the effect that the partition cannot proceed in view of the provisions of section 12 does not fall within the scope of section 149. It is suggested by the learned vakil for the respondent that, as an order under the first clause of section 32 cannot be challenged in a Civil Court, an order under section 31 also must by implication be taken to fall within the scope of section 149. There is obviously no foundation for this contention. On the other hand, the very circumstance that orders under sections 11 and 32 are expressly excluded from the cognizance

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of the Civil Court, makes it fairly obvious that an order under section 32 of the description now before us was not intended to be excluded from challenge in a Civil Court. In our opinion the policy which underlies section 149 is clearly against the contention of the respondent. The object obviously is to exclude the jurisdiction of the Civil Court in cases where the question relates to the division of the Government revenue or to the details of the partition. Where, however, the question raised goes to the very root of the matter and relates to the jurisdiction of the Collector to make a partition in spite of the provisions of section 12 of the Act, it is impossible to hold that the Civil Court is not competent to decide the matter in controversy between the parties. The view taken by the Subordinate Judge that the suit is not maintainable cannot, therefore, be supported.

The second ground upon which the Subordinate Judge has dismissed the suit is that it is barred by limitation under section 25 of the Estates Partition Act. Here also the Subordinate Judge has fallen into error in relying upon the provisions of Act V of 1897. The question, however, remains whether the suit is barred under the corresponding section of Act VIII of 1876. Section 26 of that Act provides that no suit instituted in a Civil Court by any person claiming any right or title in the parent estate after the lapse of four months from the issue of an order of the Collector under clauses (*a*) and (*b*) of section 24 or after the lapse of four months from the issue of an order of the Collector under section 31 declaring the estate to be under partition, shall avail to stay or affect the progress of any proceedings which shall have been taken under the Act for the partition of the estate; and all rights which may be conferred on any person by the final decree in such suit shall be subject to such proceedings in the manner hereinafter provided. This section has to be read with the provisions of section 24, and if the two sections are taken together, there cannot, in our opinion, be any doubt that section 26 has no application to the circumstances of the present case. Section 24 prescribes the procedure to be followed when the

objection raises any question of title or right. Section 26 then provides that if the objector institutes a suit to have his title or right established, and if he succeeds in the litigation, the decree of the Civil Court is to be subject to the result of the partition proceedings before the Collector; in other words, the successful litigant before the Civil Court takes the allotment which would otherwise have fallen to his opponent. It is clear, therefore, that the suit is not barred by the provisions of section 26 of Act VIII of 1876, nor can it be suggested that the suit is barred under the provisions of Art. 14 of the Limitation Act. That article no doubt provides that a suit to set aside any act or order of an officer of Government in his official capacity, not otherwise expressly provided for, must be commenced within a year from the date of the act or order. It has been held, however, in the cases of *Laloo Singh* v. *Purna Chander Banerjee* (1), *Raj Chandra Roy* v. *Fazijuddin Hossein* (2), *Narendra Lal Khan* v. *Jogi Hari* (3) and *Alimuddin* v. *Ishan Chandra Dey* (4) that an order made without jurisdiction is a nullity and need not be set aside; to an order of this description, Art. 14 has no application. The case of *Parbati Nath Dutt* v. *Rajmohun Dutt* (5) in which an apparently contrary view was taken is really distinguishable. In that case it was held that a suit by a party to an enquiry under section 116 of Act VIII of 1876 (against whom there has been an adverse decision of the Revenue authorities), for a declaration that the land was part of his howla, was governed by Art. 14. There, however, the Revenue authorities had jurisdiction to pass the order, and as the plaintiff was a party to the order, it may be suggested that he was bound to set it aside before he could ask for any relief. If the contention of the plaintiff in the case before us is well-founded, that is, if it is established that there was a private partition as alleged in the plaint, the order of the Collector was clearly without jurisdiction in view of the provisions of section 12 of

(1) (1896) I. L. R. 24 Calc. 149.
(2) (1904) I. L. R. 32 Calc. 716.
(3) (1905) I. L. R. 32 Calc. 1107.
(4) (1906) I. L. R. 33 Calc. 693.
(5) (1901) I. L. R. 29 Calc. 367.

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Act VIII of 1876; and it would be wholly unnecessary for the plaintiff to have such order set aside. The suit is, therefore, not barred under Art. 14 of the Limitation Act.

The next ground upon which the Subordinate Judge has held that the suit is not maintainable is equally unfounded, for he has proceeded upon the provisions of section 119 of the Estates Partition Act, which has no application. This ground, therefore, cannot be supported.

The fourth and last ground upon which the Subordinate Judge has dismissed the suit is that as the defendants are in possession, the plaintiff cannot maintain a declaratory action, and, therefore, in view of the provisions of section 42 of the Specific Relief Act, the suit is bound to fail. It is pointed out, however, that upon the question of possession of the defendants, there is really no evidence on the record. The Subordinate Judge has relied apparently upon an entry in the order-sheet of the Collector to the effect that possession has been delivered to the defendants. In view, however, of the decision of this Court in *Mir Tapurah Hossein* v. *Gopi Narayan* (1) the entry in the order-sheet of the Collector is no evidence that the defendants are in possession. If the defendants allege that they are in possession the fact has to be proved. No doubt they may produce the return of the peon who is alleged to have given them possession, and the peon may also be examined. But the *ex parte* entry in the order-sheet by itself is no proof of possession as against the plaintiff. Apart from this consideration, however, it is fairly clear that if the defendants are now in possession, they must have obtained possession during the pendency of this suit. It is worthy of note that the order of the Collector which recites that possession has been delivered was made on the 29th January 1907 while the suit had been commenced on the 9th April 1906. The suit, therefore, could not be affected by an event which happened during its pendency: *Ram Ratan Sahu* v. *Mohant Sahu* (2) and *Waman Rao Damodar* v. *Rustomji Edalji* (3). The plaintiff, however,

(1) (1907) 7 C. L. J. 251, 262. (2) (1907) 6 C. L. J. 74.
(3) (1896) I. L. R. 21 Bom. 701.

would be entitled, under circumstances like these, to ask for leave to amend the plaint so as to make it appropriate to a suit for possession. This is clear from the decision of this Court in *Jugdeo Singh* v. *Habibullah Khan* (1). Reliance was again placed by the respondents upon the decision of this Court in the case of *Raj Narain Das* v. *Shama Nando Das Chowdhry* (2), which, however, has been subsequently set aside on review.* But if that judgment were good law, the present case is clearly distinguishable, because there the dispossession had taken place before the suit was commenced; here the dispossession, if any, must have taken place after the commencement of the suit and the plaintiff cannot in any view be blamed for framing it as a declaratory action.

The result, therefore, is that this appeal must be allowed, the judgment and decree of the Subordinate Judge set aside, and the case remitted to him to be tried on the merits. The appellants are entitled to their costs in this Court.

As the suit was dismissed by the Court below on a preliminary ground, we direct that the Court fees paid by the appellants on the memorandum of appeal to this Court be returned to them under section 13 of the Court Fees Act.

S. A. A. A. *Appeal allowed*

(1) (1907) 6 C. L. J. 612. (2) (1899) I. L. R. 26 Calc. 845.

* See I. L. R. 33 Calc. 1362.