

(1996) 01 CAL CK 0031

In the Calcutta High Court

Case No : Appeal from Appellate Decree No. 244 of 1895

Jagadiswari Debya

APPELLANT

Vs

Koilash Chandra Lahiri and Monmohini Debya and others

RESPONDENT

Date of Decision : 01-01-1996

Acts Referred:

Citation : (1996) 01 CAL CK 0031

Final Decision : Dismissed

Judgement

Macleay, C.J.—The question for our decision is :—" Whether having regard to the provisions of sec. 265 of the Civil Procedure Code, the Civil Court can make a partition of land of a revenue-paying estate when no separate allotment of the Government revenue is asked for." A preliminary objection has been raised that no appeal lies in this case. It becomes necessary, therefore, to ascertain what the proceedings in the suit have been. The appealing Defendant raised the objection in his written statement that the suit ought to have been brought in the Collectorate and not in the Civil Court. This point was decided against him both by the Subordinate Judge and by the District Judge. On the 8th December 1888, the Subordinate Judge made an interlocutory decree for partition which was affirmed by the District Judge on the 6th June 1889. This decree, in my opinion, was a decree within the meaning of section 2 of the Code of Civil Procedure, and was appealable.

2. This decree apparently did not indicate by whom the partition was to be effected whether by the Collectorate or by an Amin.

3. It was assumed, on the hearing of the appeal, that the Civil Court Amin was appointed by an order of the Munsiff, dated the 30th November 1889, and the argument on both sides proceeded on that footing. I, however, have sent for the file of the proceedings and find as a fact, that the Amin was not appointed by that order and that it is not very clear, upon the proceedings, when or by whom he was appointed. The partition, however, was effected by the Amin and he made his final report on the 15th February 1892. The Defendant never objected until

this appeal to such appointment, on the contrary he treated the appointment as good, and from time to time challenged the conclusions and findings of the Amin. There has been much litigation over the Amin's report, but on the 30th January 1894, the Subordinate Judge made a final decree which was substantially affirmed by the District Judge on the 22nd September 1894. For 5 or 6 years, therefore, the partition proceedings have been going on by the Amin. Much time has been expended and much expense incurred. It is now urged for the first time on this appeal which was filed on the 2nd February 1895, that all those proceedings are irregular, and that the Collector and not a Civil Court Amin ought to have made the partition. Inasmuch as it is not clear when or by whom the Amin was appointed or by whose order, I am not disposed to say finally whether any such order is or is not appeal-able; nor is it of any moment that I should do so having regard to the view I take of the merits of the case : nor is it necessary to decide whether or not it is too late now for the defendant to raise the point. I may point out, however, that there is nothing to show that he even objected to the appointment of the Amin; on the contrary he appears to have completely acquiesced in the proceedings, and if it were necessary to decide the point, it might be difficult to distinguish the present from the case of *Gyan Chunder Sen v. Durga Charan Sen* I.L.R.7 Cal., p. 318 a case which appears to me to be based upon a sound equitable principle and to be consonant with common sense. I need scarcely point out the grave inconvenience and probable injustice which would result from any other conclusion. It would mean that partition proceedings under an interlocutory decree may go on and without any objection for years by an Amin, and then when concluded after much time and money has been expended, the whole of the proceedings may be set aside as irregular, on the ground that the partition ought to have been made by the Collector, and not by an Amin, although the appointment of the latter has never been objected to. I think a Court of Justice should struggle against so important a conclusion. To obviate in future the possibility of so unfortunate a result, I think, the Judges making interlocutory decrees in partition suits should indicate clearly upon the face of them whether the partition is to be made by the Collector or by a Civil Court Amin. From the case I have already cited this apparently is what they should do. But, as I have said before in my view of the construction of sec. 265 of the Civil Procedure Code, the above considerations, qua the present case, became quite academical. Upon the merits of the appeal, in my opinion, the present suit is " not for the partition or for the separate possession of a share of an undivided estate paying revenue to Government," within the meaning of sec. 265 of the Code : in other words it is not for, what is called a " perfect " partition. The suit is one for the partition not of the parent, or whole estate, but of a part only of the estate," and it does not seek to affect, or question any division or payment of the revenue. In my opinion, the words of the section do not apply and were not intended to apply to such a the present, and I approve of and follow the decision in the case of *Debi Singh v. Sheo Lal Singh* ILR 16 Cal. 203. I do not think that section intended to make it compulsory that the Collector should make the partition, save in cases, whereas the result of partition the

revenue would or might be affected.

4. The partition in the present case cannot affect the question of revenue. I answer the question; submitted by the reference in the affirmative. The appeal must be dismissed with costs.

Macpherson, J.

5. I am disposed to think that in this case the appellant can in the appeal against final decree raise the question that the partition should have been made by the Collector and not by the Civil Court. He can do so without questioning the legality or propriety of the preliminary decree for partition as that decree did not direct how the partition was to be made.

6. Assuming that an appeal lies the objection that the partition should have been made by the Collector in my opinion fails.

7. The decree referred to in sec. 265 of the CPC is, I think, a decree either for the partition of an undivided revenue-paying estate into several separate revenue-paying estates, or for the separate possession of a share of an undivided revenue-paying estate to be held as a separate estate --a decree, that is to say, which directs a distribution of the revenue as well as a division of the land wholly or in part. If the words-- "the separate possession of a share" stood alone there might be some doubt as to their meaning, but taken with the context, they clearly, I think, bear the meaning which I have put upon them. When no distribution of the revenue is asked for, I am unable to see any distinction between a case in which the Plaintiff being a fractional co-sharer of the whole estate wants a partition of the land of the whole estate, and a case in which his interest being limited to some particular portion of the estate he wants a partition of the land of that portion only. If the section prohibits the Civil Court from making the partition in the one case it does so I consider equally in the other. So long as the revenue remains undistributed there is no partition of the estate, and a person owns a share of an undivided revenue-paying estate, whether his share consists of a fractional part of the whole estate or of a fractional part of the land in some specific part of the estate. If the Civil Court is prohibited from making a partition of the land of the entire estate, although the estate itself is not partitioned the prohibition must be referable to the words "the separate possession of a share of an undivided estate." But these words would apply as much to a division of the land of a specific part of the estate as to the land of the whole estate.

8. I am unable, therefore, to see the force of the distinction drawn in the case of Meherban Rawoot v. Beharilal Barik ILR 23 Cal. 79 and the case of Debi Singh v. Sheolal Singh ILR 16 Cal. 203. The two cases seem to me to conflict on principle and the latter case was, I think, rightly decided.

9. Unless it is contained in sec. 265, there is no law in force in the Lower Provinces of Bengal, which prevents the Civil Court from making a partition in

whole or in part of the land of an undivided revenue-paying estate so long as there is no distribution of the revenue and the land of the entire estate remains liable as before for the revenue payable on account of the entire estate. Section 265, in my opinion, contains no such prohibition.

Trevelyan, J.

10. The two questions which we have to decide in this case are first, whether an appeal lies, and second, whether the provisions of sec 265 of the CPC apply. I am satisfied that an appeal lies in this case. The" matter of complaint is the appointment of a Civil Court Amin to partition the property.

11. This appointment was not made in the decree which ordered partition but was made by a subsequent order. That order was, in my opinion, an interlocutory order pending the suit which had not been finally decided. It was not an order in execution, and therefore, not appealable as being an order under sec. 244. I am unable to see how there can be any execution except of a final order or decree which is capable of being enforced against the person or property of a party bound by it. The subsequent proceedings after an interlocutory decree, are the natural consequence of that decree but are not as far as I can see, within the ordinary acceptation of the term in execution of it. I think there is a clear distinction between acts done in pursuance or in consequence of a decree or order or acts done in execution of it.

12. With regard to the second question, I am of opinion that sec. 265 has no application to the present case. That section applies only to a case where the decree comprehends the partition of the whole of an estate paying revenue to Government. A decree for possession of share of a portion of an undivided estate is not a decree for " possession of a share of an undivided estate," in any sense, and having special regard to the ordinary meaning of an estate paying revenue to Government as including only an estate with a separate Toujee and number in the Collector's register, I think that there is the more reason for supposing that the section only applies to a decree for possession of a whole estate. It has been argued that the section only applies in a case where the plaintiff asks, and the decree provides, for the partition of the revenue. It is in my opinion unnecessary to decide that point upon this reference as this suit only refers to a share of an estate, but were it necessary to decide it, I would say that there is nothing in the section which so limits its operation. A suitor cannot ask a Civil Court to divide the revenue, and the Civil Court has no power in any way to order or deal with the division of revenue. [Sec. 29 of Act VIII (B.C.) of 1896.]

13. I cannot suppose that the section should have been intended to apply only to a case where a suitor has asked a Civil Court to give him what the Court cannot give him, i.e., a division of the revenue and where the Court has complied with that request.

14. It is for the Collector when an order has been made under sec. 265 to partition the revenue not in pursuance of the Civil Court's decree, but in

pursuance of the powers given to him by the Revenue Law

O'Kinealy, J.

15. I concur in the judgment delivered by Mr. Justice Trevelyan.

Banerjee, J.

16. The suit, out of which this Reference has arisen, was brought by the Plaintiff, Respondent for the partition of certain mouzahs held jointly by her and the Defendants and forming a portion of an estate paying revenue to Government, the plaint distinctly stating that all that is asked for is a division of the land without any division of the revenue.

17. The defendants urged that the suit was not cognizable by the Civil Court and raised various other objections; but the first Court found for the plaintiff upon all the issues raised, and made what it called an interlocutory decree in his favour on the 8th of December 1888, directing that the property in suit be partitioned between plaintiff and the defendants according to the shares mentioned in the plaint. The decree contains no direction as to whether the partition is to be made by the Collector or the Civil Court Amin, but there was an order passed on the same day, directing that the partition should be made by an Amin. Some of the Defendants preferred an appeal against that decree, but the -appeal was dismissed by the District Judge on the 6th of June 1889.

18. A Commission was then appointed to make the partition. The Commissioner made certain allotments of the land, and a decree was made by the first Court on the basis thereof on the 10th of May 1892. This decree was set aside on appeal, and the case remanded to the first Court; and the decree made by that Court after the remand was affirmed with some modification by the decree of the District Judge, dated the 21st of September 1894.

19. Against this decree the Defendant No. 1 has preferred the second appeal now before us, and the only ground urged on her behalf is that the land in suit being part of an estate paying revenue to Government, the decree for partition could be carried into effect only by the Collector as provided by section 265 of the CPC and the partition effected by the Commissioner appointed by the Civil Court must be set aside as illegal.

20. A preliminary objection is raised on behalf of the Plaintiff, Respondent that it is not open to the appellant to urge the above ground, firstly, because she did not prefer any appeal against the order of the first Court directing a commission to make the partition though that order was appealable, and secondly, because even if the order was not appealable, she acquiesced in that order and without taking any exception to it allowed the partition to be made by an Amin.

21. I am of opinion, that the first branch of the preliminary objection must fail. The order of the first Court directing a Commissioner to make the partition was not an appealable order, no appeal being given against any such order by section

588 of the Code of Civil Procedure; and if it was not an appealable order the mere fact of the defendant No. 1 not having appealed against it cannot stand in the way of her urging the ground now raised.

22. It was argued by the learned counsel for the Respondents that the order in question being one relating to the execution of a decree for partition was an order u/s 244, and was, therefore, a decree as defined in section 2; and that consequently it was appealable.

23. To this argument there are two answers. In the first place in the view I take of section 265 of the Code as will be presently stated, I think that the decree for partition made on the 8th of December 1888, though it determined certain rights of the parties and was appealable as a decree [see *Dulkni Golab Koer v. Radhu Dubri Koer* ILR 19 Cal. 463] was not a decree made under that section nor the final decree in the suit, but was as the Court that made it properly describes it, an interlocutory decree, and that the order made in the proceedings subsequently taken to effect the partition before the final decree was passed, should be treated as an order made in further proceedings in the suit, and not as an order made in execution of decree within the meaning of section 244, see *Dwarka Nath Misser v. Barinda Nath Misser*. ILR 22 Cal. 425 In the second place even if the order directing the partition to be made by a Civil Court Amin or Commissioner can be properly viewed as an order made in the execution of a decree, still it cannot, in my opinion, be regarded as an order coming within the scope of section 244, and therefore, within the meaning of the term decree. It is not every order made in execution of a decree that comes within section 244. If that were so, every interlocutory order in an execution proceeding, such as an order granting or refusing process for the examination of witnesses would be appealable; and far greater latitude would be given of appealing against orders in such proceedings than is allowed as against orders made in suits before decree, a thing which could hardly have been intended see *Sree Nath Roy v. Radha Nath Mookerjee* ILR 9 Cal. 774 *Behari Lal Pundit v. Kader Nath Mullick* ILR 18 Cal. 469; an order in execution proceedings can come u/s 244 only when it determines some question relating to the rights and liabilities of parties with reference to the relief granted by the decree; not when, as in this case, it determines merely an incidental question as to whether the proceedings are to be conducted in a certain way.

24. I may add that the language of section 244, which enacts that certain "questions shall be determined by order of the Court executing a decree and not by separate suit," clearly indicates that the question contemplated by the section must be of a nature such that it is possible to suppose that but for the section they could have formed the subject of determination by a separate suit. But a question of an incidental character can never come under that description, and an order determining such a question cannot, therefore, be a decree as defined in section 2.

25. The order under consideration not being in my opinion appealable, it

becomes unnecessary to determine the further question raised as to the effect of a party not appealing within time against a decree or an order which is appealable, a question regarding which there is some conflict of authority. See the cases of *Bolaram Dey v. Ram Chunder Dey* ILR 23 Cal. 279 *Biswa Nath Bhaki v. Bani Kantha Dutta* ILR 23 Cal. 407 which relate to the effect of not appealing from an order which is a decree within the meaning of section 2 of the Code, and the cases of *Chedi Lal v. Badulla* ILR 11 All. 35 *Savitri v. Ramji* ILR 14 Bom. 232 and *Kanta Prosad Hazari v. Jugat Chandra Dutta* ILR 23 Cal. 335 which relate to the effect of not appealing from appealable orders.

26. It remains now to consider the question raised in the second branch of the preliminary objection which, strictly speaking, is not in the nature of a preliminary objection, namely, whether the Defendant No. 1 by having acquiesced in the order directing the partition to be made by an Amin, and having allowed the partition to be made, without protest, has precluded herself from urging the point now pressed before us. If the point raised for the appellant that the partition ought to have been made by the Collector and not by an Amin, is one of procedure only and not one of jurisdiction, then the appellant having acquiesced in the procedure adopted by the Court of first instance cannot now take exception to it. The case of *Gyan Chunder Sen v. Durga Charan Sen* ILR 7 Cal. 318 is clear authority on the point. The appellant's contention would also be met by section 578 of the Code of Civil Procedure. But it is urged for the appellant that if the case comes u/s 265, the question raised on her behalf would be one of jurisdiction and not of procedure merely. As this last mentioned point is not altogether free from doubt, and as in the view I take of section 265, the appeal fails on the merits, I do not think it necessary to consider whether the objection raised on behalf of the appellant is one of jurisdiction or of procedure only.

27. Turning now to the question raised on behalf of the appellant, namely, whether having regard to the provisions of section 265 of the Civil Procedure Code, the Civil Court can make a partition of land of a revenue-paying estate when on separate allotment of the Government Revenue is asked for, I am of opinion that the question should be answered in the affirmative.

28. Section 265 runs as follows:--"If the decree be for the partition, or of the separate possession of a share of an undivided estate paying revenue to Government, the partition of the estate or the separation of the share shall be made by the Collector according to the law, if any, for the time being in force for the partition or the separate possession of shares of such estates.

29. In construing this section, bearing in mind the observations of their Lordships of the Privy Council in *Norendra Nath Sarkar v. Kamal Bashini* ILR 7 Cal. 318 we must in the first instance examine the language of the enactment. The section evidently contemplates two classes of cases namely, one for the partition of an undivided estate paying revenue to Government, and the other for the separate possession of a share of such an estate: and the question is,--what is meant by

the partition of an undivided estate paying revenue to Government," and what by "the separate possession of a share" of such an estate? As I understand these expressions which are not explained in the Code, the former means the division of an undivided estate paying revenue to Government into a number of smaller estates corresponding to the shares or interests of the several joint proprietors, each being liable only for a portion of the revenue assessed on the original or parent estate, and the latter, the separate possession of his share by a co-proprietor of the undivided estate, the separated share forming a distinct estate liable only for its legitimate portion of the revenue, the remainder of the parent estate continuing joint and being burdened with the remainder of the revenue. I may add that the words "separate possession of a share" which occur also in section 225 of Act VIII of 1859, the former law on the subject appear to have been taken from section 4, clause 2 of Regulation XIX of 1814, the law relating to partition of estates in force when the Code of 1859 was passed. The words "partition" and "separate possession of a share" in the absence of any conflicting contest must imply complete partition and complete separation and the presence of the phrase "paying revenue to Government" in the contest as qualifying the term "undivided estate" evidently suggests that the partition and separation must involve not only a division or separation of the land of the estate but also a division of where as in tip's case the suit is for the partition not of an undivided estate paying revenue to Government but of the lands of a portion of such an estate, the separation of the revenue payable to Government in respect thereof. But revenue payable to Government still remaining undivided the case does not in my opinion come within the scope of section 265, and the partition, should be made not by the Collector but by the Civil Court.

30. This is the conclusion I deduce from the grammatical construction of the section; and an examination of the law in force for the partition or the separate possession of shares of an estate paying revenue to Government which is referred to in the section itself, will confirm that conclusion and show the reason why a decree for complete partition or separation of a share of such an estate that is one for the division of the land and the revenue is required to be made by the Collector while a partition or separation of the land alone without any division of the revenue is left to be effected by the Civil Court. That law, so far as the district from which this case comes is concerned, is to be found in Act VIII of 1876 (B.C.); section 5 of the Act provides that all partition of estates which shall be ordered to be made after the commence merit of this Act shall be made under the provisions of this Act, and no such partition made otherwise than under this Act shall relieve any lands from liability to Government for the total demand of land revenue assessed upon the estate of which they form a part." Sec. 6 lays down the principle on which the revenue assessed on the parent estate is to be distributed over the separate estates. Sec. 29 says :--"Subject to the provisions of section eleven, a Civil Court may at any time direct the Collector to assign to any person lands representing a specified interest in any estate or in any specified village or tract of land in an estate, to be held by such person as a

separate estate or to divide off from any estate any specified village or lands and to assign them to any person to be held as a separate estate, provided that an application for such partition and separation shall be presented by such person as required by sections seventeen, eighteen and nineteen; but no Civil Court shall in any case specify the amount of revenue for which any separate estate which it may direct to be formed under the provisions of these sections shall be liable. " And section 30 enacts that " the Collector shall assess the land revenue on every such separate estate in accordance with the provisions of this Act, and no Civil Court shall direct the Collector to carry out a partition otherwise than in accordance with the provisions of this Act. "

31. The first of the abovementioned sections (sec. 5) shows that a partition in order that it may result not only in the divisions of the land, but also in the division of liability for Government revenue, must be made according to the provisions of the Act, and that a partition not so made will have the liability to Government for the total revenue untouched; and the last two sections (29 and 30) show that though it is competent to the Civil Court (subject to the provisions of section 11) to direct the Collector to assign to any person, either lands representing any specified interest or any specified lands, to be held by him as a separate estate, no one except the Collector can determine the amount of revenue to be assessed upon such separate estate and divide the joint liability for revenue.

32. The object of this provision is evidently to insure the safety of Government revenue by leaving it to a responsible revenue officer alone to distribute the revenue in cases of partition, so that there may be no risk of the separated estates being through error or collusion burdened with disproportionate liabilities.

33. Where, as in the case before us, the parties do not require a division of the revenue, or where, as in cases coming under sections 11, 13 and 14 of Act VIII of 1876 (B. C), they cannot, unless they comply with certain conditions, ask for a division of the revenue, and all that they ask for is a division of the lands, the liability for revenue continuing joint there is no reason why the Collector should be asked to effect the partition. In fact, the Civil Court cannot direct the Collector to make any partition in the last mentioned class of cases, it being prohibited to do so by the latter part of section 30 quoted above.

34. It has been said that section 265 of the CPC applies to all cases where partition or separate possession of a share of an entire state is asked for, irrespective of the consideration whether division of the revenue is asked for or not, because no division of the revenue can be asked for in such a suit in the Civil Court, the Civil Court having no jurisdiction to make any such division. I am unable to accept this reasoning as correct. It is true that section 29 of Act VIII of 1876 (B. C.) shows that the Civil Court has no power to specify the amount of revenue for which any separate estate shall be liable; but that same section shows that the Civil Court may direct the Collector to assign lands to any person to be held by him as a separate estate, that is, having regard to the definition of

the terms "estate" and "separate estate" in sec. 4, clauses VIII, XXVI, as a distinct quantity of land liable for a separate amount of revenue. So that though the Civil Court cannot divide the revenue, it may declare that the revenue should be divided.

35. Section 396 of the CPC was referred to as lending support to the Appellant's contention. It was argued that besides sec. 265, this is the only other provision in the Code for the partition of immoveable property; and as the property in suit cannot be said to be property not paying revenue to Government, this section cannot apply to it; and if sec. 265 is also inapplicable, there is no provision in the Code with reference to the present case.

36. The language of sec. 396, no doubt, does create a little difficulty. It is very likely that this section was intended to cover all cases other than those provided for by sec. 265. But the legislature has not said so clearly, and in sec. 396 it has departed from the phraseology adopted in section 265 to an extent which would make it difficult to say that it had any such intention. If section 396 was inapplicable to this case, still the Court could issue a commission for local investigation and preparation of a map of the lands in suit u/s 392 with a view to make a decree for partition. It remains now to consider the cases cited in the argument on this point. Some of these, such as the cases of *Ranee Shama Sundari v. Koer Poresh Narain Roy* 20 W.R. 182, *Chandra Nath Nandi v. Har Narain* ILR 7 Cal. 153, *Ramjoy Ghose v. Ramranjan Chatkravarty* 8 C.L.R. 367, and *Badri Rai v. Bhagvat Narain* ILR 8 Cal. 649 are not decisions in point, but only contain dicta of the learned Judges, which might be construed in favour of the Appellant. In two of the cases *Damodar Misser v. Senabati Missran* ILR 8 Cal. 537 and *The Secretary of State v. Nandanlal* ILR 10 Cal. 435, it appears that division of revenue was either asked for or involved in Plaintiffs' prayer, so that nothing that was said by the learned Judges there, can be in conflict with the view I take. As against the dicta relied upon for the Appellant, there are the dicta of the learned Judges in the case of *Zahrn v. Gowri Sankur* ILR 15 Cal. 198, which favour the opposite view. The two cases, which are really in point and are in conflict with one another, are those of *Debi Singh v. Sheo Lal Singh* ILR 16 Cal. 203. *Meherban Rawoot v. Behari Lal* ILR 23 Cal. 679. For the reasons stated above, I consider the decision in the former correct, and I would respectfully dissent from that in the latter. In the result I would answer the question stated in this reference in the affirmative, and dismiss this appeal with costs. Appeal dismissed.