

(1880) 04 AHC CK 0014

Allahabad High Court

Case No: None

Asghar Ali Shah

APPELLANT

Vs

Jhanda Mal and
Another

RESPONDENT

Date of Decision: April 15, 1880

Citation: (1880) ILR (All) 839

Hon'ble Judges: Pearson, J; Oldfield, J

Bench: Division Bench

Final Decision: Dismissed

Judgement

Oldfield, J.

This is a suit for possession by establishment of right to a certain share of lands. In the course of proceedings for a partition in the Revenue Court under Act XIX of 1873 instituted on the application of defendant, the plaintiff objected to the extent of the share claimed by defendant and asserted his own right to the share he now claims. His objection was disallowed with reference to a decision in a suit for profits, which had been brought against the plaintiff as lambardar, which the Assistant Collector held to have finally determined the extent of the plaintiff's interest, and the Assistant Collector made an order for the partition to proceed. Both Courts have held that the order of the Assistant Collector in those proceedings is an order of the nature of a decision of a Court of Civil Judicature, u/s 114, Act XIX of 1873, which may be open to appeal, but cannot be contested in a regular suit, and this is the question before us in appeal.

2. Under the provisions of Section 114 it is only orders or decisions passed u/s 113 of the Act for declaring the rights of parties which are held to be decisions of a Court of Civil Judicature and open to appeal to the District or High Court under the rules applicable to those Courts; and we have to see if the Assistant Collector passed any such order in the course of the partition proceedings. Section 113 is as follows:-- "If the objection raises any question of title, or of proprietary right, which has not been

already determined by a Court of competent jurisdiction, the Collector of the District or Assistant Collector may either decline to grant the application until the question in dispute has been determined by a competent Court, or he may proceed to inquire into the merits of the objection. In the latter case the Collector of the District or Assistant Collector, after making the necessary inquiry and taking such evidence as may be adduced, shall record a proceeding declaring the nature and extent of the interests of the party or parties applying for the partition, and any other party or parties who may be affected thereby;" and then follow directions as to the procedure to be observed. It will be seen that the provisions of this section are only to be applied in cases where there has been no decision on the question of title raised by a competent Court, and it is only in such cases that the provisions of the section could properly be put in force, and the section allows the Collector two courses, either to decline to grant the application until the question has been determined by a competent Court, or to proceed to inquire into the merits, and make necessary inquiry and take such evidence as may be adduced, and having done so to record a proceeding declaring the rights of the parties. What is contemplated is clearly an adjudication on the merits, and it is only when the Collector records a proceeding declaring the rights of the parties after such adjudication that his order will be an order passed under that section.

3. In the case before us the Assistant Collector held that there had been a decision by a competent Court on the question of title. This finding put it out of his power to proceed under the section, and as a matter of fact he did not proceed under the section, for he simply gave effect to the former decision and summarily rejected the plaintiff's objection and ordered the partition to proceed; there was no order for declaring rights of parties after adjudication on the merits such as the section contemplates. The Assistant Collector was in error in holding that the former decision was one of a competent Court determining the question of title, but this error on his part does not alter the character of the order which he passed. The cases noticed by the Judge,--*Rameshwar Rai v. Subhoo Rai* H.C.R. N.W.P. 1869 p. 35 10th April, *Bukhta v. Gunga* H.C.R. N.W.P. 1868 p. 161--are to be distinguished from the one before us. They were cases under Act XIX of 1863, and there had been an adjudication apparently on the title, but the procedure observed had been irregular. A case was brought to our notice at the hearing--*Har Sahai Mal v. Maharaj Singh* ILR 2 All. 294--that was also a case of partition made under Act XIX of 1863 and the same remarks apply to distinguish it from the case before us.

4. I would reverse the decree of the lower Courts and remand the case to the Court of First Instance for trial on the merits. Costs to abide the result.

Pearson, J.

5. I concur.