

(1881) 04 CAL CK 0008

Calcutta High Court

Case No: None

Gyan Chuader Sen
and Another

APPELLANT

Vs

Durga Churn Sen

RESPONDENT

Date of Decision: April 7, 1881

Citation: (1881) ILR (Cal) 318

Hon'ble Judges: Pontifex, J; Field, J

Bench: Division Bench

Judgement

Pontifex, J.

We think this case must go back to the District Judge, who has disposed of it on a preliminary technical objection, which we do not think applies. The plaintiff in the case sued for partition, and obtained a decree from the Subordinate Judge. Against that decree the defendant appealed to the District Judge, not, however, raising the present objection, and his appeal was dismissed. The decree of the Subordinate Judge was, that the plaintiff was entitled to a partition, and to a certain share in the property to be partitioned, and there was a direction that an Amin should proceed to the land and partition the property. An Amin accordingly proceeded to partition the property, and he made a report to the Court. Against that report the defendant took objections on the merits. The Subordinate Judge overruled the objections, and confirmed the Amin's report. Against the order of confirmation, the defendant again appealed to the District Judge, and after having acquiesced in all the proceedings that had taken place before the Amin, for the first time in the Court of the District Judge, took an oral objection that partition-proceedings could not be taken in execution of a decree. The District Judge has held, that that objection is tenable, on the ground, that Section 396 of the CPC shows, that partition-proceedings are not to form part of what are ordinarily called execution-proceedings. Section 396 directs, that, in any suit in which the partition of Immovable property, not paying revenue to Government, appears to the Court to be necessary, the Court, after ascertaining the several parties interested in such

property and their several rights therein, may issue a commission to such persons as it thinks fit. Then it goes on to state what the procedure of the commissioners is to be, and it says that they are to "prepare and sign a report, which shall be annexed to the commission and transmitted to the Court, and the Court, after hearing any objections which the parties may make to the report or reports, shall either quash the same and issue a new commission, or pass a decree in accordance therewith." We think it obvious, that what was intended by that section was, that, upon the first hearing of the suit, the Court shall determine whether the plaintiff is entitled to a partition, and shall ascertain who the several persons interested in the property are, and shall direct by a preliminary decree or order that commissioners be appointed to make the partition, But there is no virtue in the word "commission" in Section 396. It is quite competent to the Court to appoint any, person whom it thinks fit as commissioner to make the partition. True, Section 396 refers to "commissioners " in the plural; but, speaking for myself, I think the General Clauses Act would apply, and under it, words in the plural number include the singular, and vice versa. There is no reason that I can see, why in his preliminary decree the Subordinate Judge should not appoint the Amin as commissioner to effect the partition, and what has since been done, is virtually what ought to be done u/s 396. The commissioner prepared a report and returned it to the Court, objections were taken to that report,---those objections were disallowed by the Court; and the Court has affirmed the terms of the partition which had been arrived at by the commissioner, and it then became the duty of the Court to pass a decree in accordance therewith. It is true that the Court has not actually passed a decree, but the order made in execution-proceedings is virtually a decree upon further consideration. The objection was, therefore, at the most a mere technical objection taken after complete acquiescence in all the proceedings. But in my opinion, not even a technical objection lies, because the order of the Subordinate Judge was an order within the meaning of the third clause of Section 396; at all events, after the complete acquiescence in all the previous proceedings, it was too late for the defendant to raise such an objection; and in our opinion it ought not to have been listened to. We think, therefore, that the case must go back to the District Judge to be tried on its merits, the preliminary objection being overruled. It does not appear clearly, whether the objection in the Court below was raised and insisted upon by the defendant, or whether it was an objection taken by the Court. If it was an objection taken by the Court, we think the costs of this hearing should be borne by the parties according to their respective shares in the bel(sic) perty. If it was an objection pressed by the defendant, we think the Court how should deal with the costs of this appeal as to it Seem (sic)ji(sic)Mm having" acquiesced in the Vobe(sic)&fcis (sic)ou(sic)ThV(sic)n" thin H(sic),MS defendant the objection that the provisions of Section 36 S(sic) of the CPC (sic) take require the appointment of (sic)more (sic)thn l(sic)f th(sic)Code of dv.l(sic) Procedure the General Clauses Act, I of 1868 enact Z(sic)Zt (sic) unless there be something repugnant in the subject or context, words in the singular shall include the plural, and vice versa. Having regard

to the language of the third Clause of Section 396 of the CPC I would have some doubt whether there is not in context something repugnant to the plural, "commissioners" including the singular "commissioner;" but is not necessary to determine this question, as I agree that the defendant, by acquiescing in the proceedings, has precluded himself from raising it at the stage at which he took the objection.