

**Alimuddin Vs. Ishan Chandra Dey**

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**Court :** Kolkata

**Decided On :** Feb-22-1906

**Reported in :** (1906)ILR33Cal693

**Judge :** Rampini and ;Geidt, JJ.

**Appellant :** Alimuddin

**Respondent :** ishan Chandra Dey

**Judgement :**

**Rampini and Geidt, JJ.**

1. These four appeals relate to four suits, which were brought by the plaintiff for declaration of his right to certain lands, for a direction that the Collector should proceed with their partition under the Estates Partition Act, and for possession to be given to the plaintiff and his co-sharers.

2. The facts of the case are as follows: Proceedings under the old Estates Partition Act (VIII of 1876) were taken with regard to estate No. 1893, but certain persons objected that the plots in dispute did not appertain to estate No. 1893, but to other mehals. The Collector consequently passed an order, excluding these disputed lands from partition.

3. The plaintiff complained that this order of the Collector was wrong on the merits and he said that the lands really appertain to estate No. 1893 and ought to have been partitioned; and he now prays that this be ordered to be done and that possession be given to him and his co-sharers.

4. Both the Lower Courts have held that the suits are barred under Article 14 of Schedule II of the Limitation Act.

5. The plaintiff now appeals to this Court; and on his behalf it is contended, first, that the order of the Collector excluding the lands in dispute from partition is ultra vires and consequently a nullity, and that Article 14 of the second Schedule of the Limitation Act does not apply; and, secondly, that Article 14 of Schedule II of the Limitation Act cannot apply to suits brought for a declaration of title.

6. In support of the first of these pleas the learned pleader, who appears on behalf of the plaintiff appellant, points out that the partition of this estate No. 1893 was begun, when Act VIII of 1876 was in force, and before the passing of the new Estates Partition Act (V of 1897); and he also points out that it is apparent that the orders under Section 63 must have been passed long before the coming into operation of Act V of 1897, because in one of the suits, namely, Suit No. 169, the order was passed on the 9th May 1896, and that being so, as all the suits relate to the partition of the same estate, the orders under Section 63 in the four suits must have been passed under the provisions of Act VIII of 1876. Hence he says that under Section 2 of Act V of 1897, the partition of this estate must have been carried out under the provisions of the old Act, unless all the proprietors requested otherwise, but as there is no evidence of any such request having been made, it must be presumed that Act VIII of 1876 applies. He contends, therefore, that the order of the Collector excluding the said lands from partition, is not an order which he was entitled to pass under Section 116 of Act VIII of 1876. He calls attention to the fact that, under the terms of Section 116 of Act VIII of 1876, the Collector can only adopt one of two courses, if any objection is raised before him. That is to say, he can either strike off the partition case, or proceed with the partition, treating the disputed land as part of the estate under partition. It is true that, under Section 88 of Act V of 1897, the Collector can now take any one of the three courses, that is

to say, (1) he may order the partition case to be struck off, (2) he may order the partition to be proceeded with, treating the disputed land as part of the estate under partition, or (3) he may direct the partition to proceed, the disputed land not being treated as part of the estate under partition. But the third of these courses was not one, which the Collector had jurisdiction to adopt under Section 116 of Act VIII of 1876; and that being so, as the proceedings for partition of estate No. 1893 were clearly carried out under the provisions of Act VIII of 1876 (which is apparent, not only from the fact that, in suit No. 169 the order was passed before the coming into operation of the new Act, but from the order dated the 17th January 1899 in suits Nos. 168 and 171, in which it is expressly stated that the proceedings were under Act VIII of 1876), the order of the Collector in this case was therefore one passed without jurisdiction: hence it is argued that it is a nullity. In support of this contention the learned pleader for the appellant relies upon the case of Bejoy Chand Mahatab Bahadur v. Kristo Mohini Dasi (1894) I.L.R. 21 Calc. 626 which proceeds upon the authority of two cases of the Bombay High Court, namely, the decisions in the cases of Shivajiyesji Chawan v. The Collector of Ratnagiri (1886) I.L.R. 11 Bom. 429 and Nagu v. Yalu (1890) I.L.R. 15 Bom. 124, and which was followed in Narendra Lal Khan v. Jogi Hari (1905) I.L.R. 32 Calc. 1107.

7. We consider that this contention must prevail. In our opinion the order of the Collector was not such an order as he could pass under the provisions of Section 116 of Act VIII of 1876; and, consequently, on the authority of the rulings above referred to, that order must be treated as a nullity and the suits held not to be time-barred.

8. The Lower Courts have relied upon the case of Parbati Natle, Dutt v. Raj Mohuu Dutt (1901) I.L.R. 29 Calc. 367, But that was a case in which the Collector passed an order, not excluding from, hut including certain lands in, the partition; and such an order is, admittedly, one, which he had jurisdiction to pass under Section 116 of Act VIII of 1876. Hence the case on which the Lower Courts rely is clearly distinguishable from the case now before us.

9. It is unnecessary for us to enter into the second ground of appeal raised by the appellant.

10. We accordingly set aside the order of the lower Appellate-Court and remand the suits to that Court to be proceeded with on the merits.

11. The costs of these appeals will abide the result.

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