

APPELLATE CIVIL.*Before D. Chatterjee and Walmsley JJ.*

AMBIKA PRASAD SINGH

v.

PERDIP SINGH.*

1914

July 2.

Costs—Partition—Civil Procedure Code (Act V of 1908) s. 107, O. XLI, r. 4, application of—Appellate Court, power of.

It is not necessary for the application of O. XLI, r. 4 of the Code of Civil Procedure that the decree should proceed on every ground common to all the plaintiffs or defendants. It is quite sufficient if it proceeds on any ground common to the party to which the appellant belongs.

Under s 107 of the Code the Appellate Court has the same power as the Court of first instance.

Shama Soonburee Debia v. Jarline Skinner & Co. (1), *Dildar Ali Khan v. Bhawani Sahai Singh* (2) and *Ram Kamal Suha v. Akmal Ali* (3) referred to.

APPEAL by Ambika Prasad Singh, the defendant No. 1.

This appeal arose out of a suit for the partition of a mouza called Pataitia in which the parties had different shares. The defendant No. I appealed against the final decree upon two grounds: *first*, that the allotment of shares was improper; and, *secondly*, that the costs before the preliminary decree should not have been allowed in favour of the plaintiff.

As regards the first point, the High Court, varying the order of the learned judge, restored the

* Appeal from Original Decree, No. 145 of 1910, against the decree of Charu Chandra Mukherjee, Subordinate Judge of Darbhanga, dated Dec-22, 1909.

(1) (1839) 12 W. R. 160.

(2) (1907) I. L. R. 34 Calc. 878.

(3) (1903) I. L. R. 30 Calc. 429.

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arrangement made by the commissioner who had allowed the appellant one block to the north. As regards the second part, each party was directed to bear its own costs.

Babu Ganesh Dutt Singh, for the appellant.

Babu Jogesh Chandra Roy, Babu Rajendra Chandra Guha, Babu Kulwant Sahai, Babu Anilendra Nath Roy Chowdhury, for the respondents.

D. CHATTERJEE AND WALMSLEY JJ. This appeal arises out of a suit for the partition of a mouza called Patailia in which the parties have different shares. The defendant No. 1 appeals against the final decree on two grounds: *first*, that the allotment of shares is improper; and, *secondly*, that the costs before the preliminary decree should not have been decreed in favour of the plaintiff.

As regards the first point, we think that the appellant has a good ground for complaint. The commissioner allowed him one block to the north; but the learned Judge has split that block up into three and allotted him the one farthest from his house. We think that he should have his portion of the northern block as near as possible to his house, that is to say, he will have his northern block from the north-east commencing from Nos. 1852, 1860, 1861, 1862 and go west-wards so as to make this block equal in value to the block which has been allowed him to the north-west. Defendant No. 5 will get the block to his west and defendants Nos. 2 to 4 will get the block to the west of defendant No. 5. The appellant will retain his eastern and south-western blocks and the allotment of blocks will be altered accordingly.

The next question is as to the costs. It is contended that the costs before the preliminary decree

should not have been allotted to the plaintiff and the cases of *Shama Soonduree Debia v. Jardine Skinner & Co.* (1) and *Dildar Ali Khan v. Bhawani Sahai Singh* (2) are quoted in support of this contention. As the appeal is by one of the defendants only, it is contended that, under Order XLI, rule 4, of the Civil Procedure Code, we can make a decree in this respect that will enure to the benefit of all the defendants.

The decree in this case is a decree for partition and proceeds upon a ground common to all the parties, namely, the convenience and inconvenience of each. The appeal also is directed against the whole decree. It is true that the portion of the decree which deals with the question of the incidence of the costs is severed so as to make each party of defendants liable for the costs allocated against it; but that does not prevent the application of Order XLI, rule 4 of the Civil Procedure Code. It has been held in the case of *Ram Kamal Shaha v. Ahmed Ali* (3) that it is not necessary for the application of section 544 (now Order XLI, rule 4) of the Civil Procedure Code that the decree should proceed on every ground common to all the plaintiffs or defendants; and it is quite sufficient if it proceeds on any ground common to the party to which the appellant belongs. We think, therefore, that there is no bar to the application of Order XLI, rule 4 of the Code; and, that being so, it is not necessary to invoke the aid of Order XLI, rule 33, which is couched in very wide terms and gives the Courts of Appeal very wide powers for the purpose of doing justice between the parties.

It has been further argued that the judgment does not order the apportionment of the costs of the suit, that the decree is not in accordance with the

(1) (1869) 12 W. R. 160.

(2) (1907) I. L. R. 34 Calc. 878.

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judgment so far as these costs are concerned and that the decree is, therefore, amenable to amendment. This amendment might of course have been made by the first Court but that would result in a joint decree for the costs of the suit against all the defendants. Such a decree would offend against the principles of the cases of *Shama Soonduree Debia v. Jardine Skinner & Co.* (1) and *Dildar Ali Khan v. Bhawani Sahai Singh* (2). Under section 107 of the Code of Civil Procedure, we have the same power as the Court of first instance; and, in making the final determination in the case, we must pass a decree that is in conformity with law.

In this view of the question raised, we think that the order of the Court below as to the costs incurred before the preliminary decree should be set aside and each party directed to bear its own costs up to that point. The costs of the partition will be apportioned according to the shares of the parties. The success of the appellant being only partial, each party will bear its own costs in this appeal.

S. K. B.

(1) (1869) 12 W. R. 160.

(2) (1907) I. L. R. 34 Calc. 878.