## APPELLATE CIVIL.

*Before Mookerjee and Chotzner JJ.*

JADUNATH SARKAR

*v.*

HARAN CHANDRA SARKAR.*

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*March* 30.

*Partition—Partition Act (IV of 1893), ss. 2 and 9—Notice of appeal, effect of non service of, in partition suit.*

Where in a suit for partition, a partition of the property in suit and a sale of one of the allotments obtained after partition was ordered :

*Held*, that this was not authorised by s. 2 or by s. 9 of the Partition Act.

Where notice of appeal had not been served on a particular defendant who had no present interest :

*Held*, that notice need not be served.

APPEAL by Jadu Nath Sarkar and others, the defendants.

This appeal arose out of a suit for partition of joint property. A preliminary decree was passed on the 17th May, 1920, which defined the different shares of the parties, and a Commissioner was appointed to allot the shares. The parties realised that no convenient partition could be effected. On the 25th June and 17th July, 1920, various share-holders applied to the Court under section 2 of the Partition Act for an order for sale instead of partition. The Court at first declined to interfere, but later on ordered the Commissioner to make a fresh allotment, and to separate a one-fourth share on one side of the plot for the plaintiff, and to sell the remaining three-fourths share.

* Appeal from Original Decree, No. 131 of 1921, against the decree of Kunja Behari Biswas, Subordinate Judge of 24-Parganas, dated May 5, 1921.

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Accordingly the Commissioner submitted a report which was confirmed by the Court on the 5th May, 1921, by its final decree. The defendants appealed and contended that the order made by the Court was not authorised by section 2 of the Partition Act, 1893.

*Babu Manmatha Nath Roy* and *Babu Rama Prosad Mookerjee*, for the appellants.

*Babu Jogesh Chandra Roy*, *Babu Sarat Chandra Mookerjee*, *Babu Pramatha Nath Bandopadhya* and *Babu Pramatha Nath Mookerjee*, for the respondents.

MOOKERJEE J. This is an appeal against the final decree in a suit for partition of joint property. A preliminary decree was made on the 17th May, 1920, which defined the shares of the parties, and directed that partition be made equitably, with due regard to the convenience of all the parties concerned. This decree contemplated that eleven allotments should be made. A Commissioner was appointed and plans were drawn up for the purpose of allotment. The parties appear to have realised at this stage that in view of the size and shape of the land and of the number of share-holders, no convenient partition could be effected. The result was that on the 25th June and 17th July, 1920, applications were made by various share-holders under section 2 of the Partition Act, 1893, for an order for sale instead of division; but the Subordinate Judge declined to make an order under section 2 at that stage, before receipt of the report of the Commissioner. On examination of the report, he was later on satisfied that the allotments as made by the Commissioner should not be accepted inasmuch as the proposed plan of division involved the opening of a pathway through several rooms, one-storeyed and two-storeyed, of an old dilapidated

structure. He consequently set aside the scheme drawn up by the Commissioner and proceeded to consider the applications made by the share-holders, who owned more than two-thirds share in the property, for sale instead of a division, under section 2 of the Partition Act. The plaintiff who holds an one-fourth share strongly objected and urged that he should not be turned out of his ancestral home. The Subordinate Judge felt pressed by this contention and held that the most convenient and equitable course would be to separate an one-fourth share on one side of the plot for the plaintiff and then to allow the remaining three-fourths share to be sold. He further directed that as the plaintiff desired to remain in his ancestral home, he should have the option to take the best portion, in other words, the one-fourth share to be allotted to him should abut on the roadside. The Commissioner who was directed to make a fresh allotment on this basis, submitted a report which was ultimately confirmed by the Subordinate Judge. The defendant has appealed to this Court and has contended that the order made by the Subordinate Judge is not authorised by section 2 of the Partition Act, 1893, which provides as follows :

"Whenever in any suit for partition in which, if "instituted prior to the commencement of the Act, "a decree for partition might have been made, it "appears to the Court that by reason of the nature "of the property to which the suit relates, or of the "number of the share-holders therein, or of any other "special circumstances, a division of the property "cannot reasonably or conveniently be made, and "that a sale of the property and distribution of the "proceeds would be more beneficial for all the share-"holders, the Court may, if it thinks fit, on the "request of any of such share-holders interested

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"individually or collectively to the extent of one "moiety or upwards, direct a sale of the property and "a distribution of the proceeds".

It is plain that this section contemplates a sale of the entire property in suit. No doubt, the section has to be read along with section 9 which provides that in any suit for partition the Court may, if it shall think fit, make a decree for a partition of part of the property to which the suit relates and a sale of the remainder under the Act. The case hereby contemplated is plainly of this description, namely, where there are two parcels, one capable of division but the other incapable of division, the Court is competent to direct a partition of the one parcel and a sale of the other. Section 9, in our opinion, does not support the order made by the Subordinate Judge. What he directed in essence was, not a sale of part of the property in suit, but a partition of the property in suit and a sale of one of the allotments obtained after partition. This is not authorised by section 2 or by section 9. We are consequently of opinion that the decree made by the Subordinate Judge is in contravention of the provisions of the Partition Act, 1893, and must be set aside. We have carefully considered various suggestions for division which have been made before us. But we have arrived at the conclusion that in the best interest of all the parties, the only course which may reasonably be adopted is a sale of the entire property in terms of section 2.

We may add that an objection was taken that the appeal had become incompetent inasmuch as the notice of appeal had not been served upon one of the parties, namely, defendant No. 10. There is no real force in this contention. No doubt, in a suit for partition of joint property all the share-holders must be represented before the Court. But it so happens

that this particular defendant has not a present interest in the property. She is the mother of three other defendants, Nos. 7, 8 and 9. It is only in the event of a partition amongst her sons (which is not within the scope of this suit as framed) that she would become entitled to a share in lieu of maintenance: *Hemangini* v. *Kedarnath* (1), *Chowdhry Ganesh Dutt* v. *Jewach* (2). The preliminary decree here did not contemplate a partition amongst these three defendants *inter se*; what was intended was that there should be eleven allotments and that one of these allotments should be given to the four defendants forming a group (7, 8, 9 and 10). Consequently, the absence of defendant No. 10 does not stand in the way of the consideration of this appeal.

The result is that this appeal is allowed, the decree of the Subordinate Judge set aside and an order made for a sale of the property and distribution of the proceeds. We make no order as to the costs of this appeal, and direct the Subordinate Judge to arrange for the sale as early as practicable.

CHOTZNER J. concurred.

B. M. S. *Appeal allowed.*

(1) (1889) I. L. R. 16 Calc. 758; L. R. 16 I. A. 115.

(2) (1903) I. L. R. 31 Calc. 262; L. R. 31 I. A. 10.