

As regards the money that has been paid to the Rent Controller, there must be some sensible arrangement for withdrawing that.

The plaintiff will get costs on scale No. 2.

S. K. R.

Attorneys for the plaintiff: *Haara & Roy.*

Attorney for the defendant: *J. N. Dutt.*

1921  
BITHALDAS  
CHANDAK  
v.  
LALBEHARI  
DUTT &  
SONS.

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### CIVIL APPELLATE.

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*Before Chatterjea and Panton, JJ.*

PROBHAT CHANDRA BISWAS

v.

GOPAL CHANDRA MUKHERJI AND OTHERS.\*

1921  
June 28.

*Partition Suit—Partition suits whether within the purview of O. XLI, r. 33 of the Civil Procedure Code (Act V of 1908).*

The Appellate Court is competent to exercise the powers conferred upon it by O. XLI, r. 33, in partition suits. There is no restriction of the powers as to any class of suits under that rule.

SECOND APPEAL by Probhat Chandra Biswas, the defendant No. 1.

In this partition suit, the plaintiffs' share was one-third and the defendant's share two-thirds in respect of the disputed properties. With regard to the homestead lands it was held that the plaintiff was entitled to get from the defendants the price of his share of the lands, under section 4 of the Partition

\* Appeal from Appellate Decree No. 1100 of 1919, against the decree of M. Smither, District Judge of Dacca, dated Feb. 19, 1919, affirming the decree of Dharendra Kumar Mukherji, Munsif of Munshiganj, dated Feb. 11, 1918.

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Act, IV of 1893. The High Court holding the valuation at Rs. 116-10-8 to be too low remanded the case for a fresh finding on the point after taking additional evidence. After remand the trial Court increased the value to Rs. 233. The defendant No. 1 thereupon preferred an appeal and the Appeal Court's judgment was as follows:—"The appellant is one of nine defendants in a partition suit. The other eight defendants have not been made parties to this appeal. In the suit the nine defendants appear as jointly interested in a one-third share of the property under partition. Their shares, as between themselves, have not been specified and determined. The appeal is on three matters, the allotments, the compensation and the costs. The plaintiffs respondents contend that the appeal must fail for want of necessary parties—the other eight defendants. The other eight defendants are necessary parties. It was admitted for the appellant that they are necessary on the question of allotment. As to the compensation and costs, the decree deals with all the defendants jointly. If it is to be set aside or modified as regards one only of the defendants, the question of the share of that defendant will be involved. If he were given or made liable in respect of a certain share, the other defendants, not now parties, might dispute the share and further litigation would be opened up.

The appellant's pleader has asked me to add the other defendants as parties now or pass an order in their favour under Order XLI, rule 33. I do not think I can add them now. The Appellate Court is bound by limitation, in respect of its power to add parties, to this extent, that time will run from the date of the addition, or, at the earliest, from the date of the application for it. I was referred to a case in which the Calcutta High Court allowed a defendant

to be added as a party to an appeal without regard to limitation, but it was a case in which no relief of any kind was to be had for, or against that defendant, but only a certain matter was to be decided in her presence, so as to prevent future disputes. In the present case the addition would be for the purpose of making relief obtainable against the respondent. The new parties to the appeal would have to come as appellants, avowedly, or else as respondents in whose favour, jointly with the appellant, a decree would be prayed for. I do not think the powers given to an Appellate Court by Order XLI, rule 33, are intended to enable it to hear an appeal, as in a partition suit, in which necessary parties have not been joined, but only to give it certain powers when it passes a decree in an appeal which it has been able to hear. This appeal is dismissed with costs." The defendant No. 1 being dissatisfied with this order preferred a second appeal to the Honourable High Court.

*Babu Bireswar Bagchi*, for the appellant.

*Dr. Sarat Chandra Bisak* and *Babu Chandra Shekhar Sen*, for the respondents.

CHATTERJEA AND PANTON JJ. This appeal arises out of a partition suit. The suit was decreed, and the defendant No. 1 alone appealed. There were nine defendants in the suit. The learned Judge held that the questions raised in the appeal could not be decided in the absence of the other eight defendants. The defendant No. 1 thereupon asked the Appellate Court to add the other eight defendants as parties to the appeal under Order XLI, rule 33. The learned Judge refused to do so on the ground that the powers given to an Appellate Court under Order XLI, rule 33, were not intended to be applicable in a partition suit.

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and accordingly dismissed the suit. The defendant No. 1 has appealed to this Court.

We are unable to hold that the Appellate Court has no power to exercise the powers conferred upon it by Order XLI, rule 33 in partition suits. There is no restriction of the powers as to any class of suits under that rule. Whether in any particular case the power should be exercised is one in the discretion of the Appellate Court, but the learned Judge has not exercised any discretion, as he was of opinion that he had no power under the rule in a partition suit. We think, therefore, that the case should go back to the lower Appellate Court in order that it may consider whether the powers conferred upon it by Order XLI, rule 33, should be exercised in this case.

In this Court also all the defendants have not been made parties to the second appeal; only four of them have been made parties. It is stated on behalf of the appellant that the others have no interest in the property and, therefore, have not been made parties. The Court of Appeal below will, therefore, consider this question first of all, and if it finds that the defendants who have not been made parties to this appeal have interest in the suit, the decree of the lower Appellate Court will stand with costs of this Court. If, however, it is found that they have no interest and are not necessary parties, the Court will proceed to decide the other question mentioned in the first part of our judgment and dispose of the appeal according to law, and upon such terms as to costs as he may think fit. The appellant must, however, bear his own costs in this Court.

G. S.

*Appeal allowed : case remanded.*