ORIGINAL CIVIL.

Before Mr. Justice Bakewell.

1911
October 4.

THIRUVENGADATHAMIAH (PLAINTIFF),

v.

MUNGIAH AND ANOTHER (DEFENDANTS).*

Stamp Act, II of 1899, s. 2 (15), sch. I, art. 45—Final decree affecting partition what is.

To make an order chargeable with stamp duty under section 2 (15) of the Stamp Act of 1899, it must effect an actual division of the property. An order declaring the rights of the parties and directing further proceedings for the ascertainment of the specific shares is not such an order.

Courts ought not to pass inter m orders and direct proceedings in execution for the ascertainment of the specific shares. The final order should be passed after the specific shares have been ascertained.

A decree reciting a razinamah made by consent of parties, allotting specific properties to the several parties and directing other parties to deliver possession is chargeable with stamp duty under article 45 of schedule I as a final order effecting partition within section 2 (15). Being made by consent of parties, it is also an instrument whereby co-owners have agreed to divide property in severalty and falls within the first part of section 2 (15).

THE facts are stated in the judgment.

The draft partition decree in this case having come on for orders on the 28th September 1911 in the presence of Mr. V. V. Srinivasa Ayyangar, vakil for the plaintiff for determination as to whether the said decree is chargeable with stamp duty under section 2 (15) and article 45 of schedule I of the Stamp Act, 1899, and having stood over for consideration till this day, the Court made the following

V. V. Srinivasa Ayyangar for plaintiff.

P. Doraiswami Ayyangar for first defendant.

ORDER.—It has been the practice in the Registrar's office to require the parties to pay the stamp duty leviable upon a partition under the Stamp Act, 1899, schedule I, article 45, before the issue of the final decree in a partition suit, on the ground that the decree is a final order for effecting a partition passed by a Civil Court within the meaning of section 2 (15) of the Act, which defines an "instrument of partition."

The learned vakil for the plaintiff has argued that the duty is not chargeable upon the decree in this case, since it is not a final order within this definition, and that final order means an order

* Civil Suit No. 374 of 1910.

made in execution delivering to the parties the shares which have been determined by the decree of the Court.

To make an order chargeable under the section it must effect an actual division of the property and therefore an order declaring the rights of the parties and directing further proceedings for the ascertainment of the specific portion to be taken by each party, or for the demarcation of a share of immoveable property by metes and bounds, will not fall within the section. The Courts have sometimes passed such interim orders and directed further proceedings to be in execution, but this procedure is irregular, and the Court should, after the specific share of each co-sharer has been determined, pass the final order or decree allotting a particular and ascertained property to each co-sharer and vesting it in him (See *Jotindra Mohan Tagore* v. *Bejoy Chand Mahatap*(1).) Further proceedings on such a final order will be for delivery of possession merely and in execution, and will not be for effecting a partition. A final order of this kind will be analagous to a final order of the Collector, under section 265 of the Code of Civil Procedure, 1882, effecting a partition of an undivided estate paying revenue to Government.

The decree in the present case recites a razinamah executed by the parties and is made by consent of parties; and the decretal portion allots specific properties to the several parties and directs other parties to deliver up possession, and also provides for the execution of a sale deed and lease of certain immoveable property.

In my opinion the decree affects an actual partition of the property among the parties, *i.e.*, it vests specific portions of the estate in particular parties, and is therefore the final order in the suit effecting a partition, and is accordingly chargeable with duty as an instrument of partition (see *Balaram* v. *Chiloji*(2)).

Any proceedings subsequent to this decree can only be for the purpose of obtaining actual possession of, or the execution of documents relating to, specific properties.

I have been referred to a judgment of WALLIS, J., in Original Suit No. 70 of 1906 in which he expresses the opinion that "final order" in section 2 (15) applies to some order of the Civil Court made in execution; but the above case which is a decision of a Full Bench does not appear to have been brought to the notice of the learned Judge.

(1) (1905) 32 Calc., 483. (2) (1905) I. L. R., 29 Bom., 366.

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I am also of opinion that the decree in the present case, being a consent decree, is an instrument whereby the co-owners have agreed to divide property in severalty since it is the formal record of an agreement entered into by the parties, and that it falls within the first part of section 2 (15).

The stamp paper is directed to be brought in within seven days.

APPELLATE CIVIL.

Before Mr. Justice Wallis and Mr. Justice Krishnaswami Ayyar.

1910.
July 22, 25.
September 5.

VIBUDAPRIYA THIRTHASWAMY AND OTHERS (PLAINTIFFS), APPELLANTS,

v.

ESOOF SAHIB AND OTHERS (DEFENDANTS), RESPONDENTS.*

Highway, right to carry processions in—Where user of highway proved, presumption will be that the right is unrestricted—Trustees, dedication by.

Where user as a highway, sufficient to raise a presumption of dedication has been proved, the dedication will, in the absence of evidence to the contrary, be presumed, if possible, to be unrestricted.

Marching in procession on a highway is not an excessive user of the highway; and a right of unrestricted user will include the right of marching in procession on the highway.

Shadagopachariar v. *Krishnamurthy Rao*, [(1907) I. L. R., 30 Mad., 185], referred to.

A presumption of dedication by trustees will not be made when such dedication will contravene the purposes of the trust. The illegality of such a dedication by the trustees must be clearly proved.

APPEAL against the decree of P. Itteyerah, Subordinate Judge of South Canara, in Original Suit No. 44 of 1904.

The case for the plaintiffs and the defendants is thus set out in the judgment of the lower Court.

Plaint recites that the plaintiffs are Moktessors and managers of Shri Anantheswara temple in Udipi Kasba; that defendants Nos. 1 to 3 are the trustees of the Jammath Mosque and Asarkhana in Udipi Kasba, and the fourth defendant is the Moilar or Khazi of the said mosque, and as such the officiating priest of the Muhammadans of Udipi; that Shri Anantheswara temple is a Hindu religious institution of great sanctity and antiquity, and adjoining it there is another such temple called Chandramowleshwara; that around the site of these temples marked I in

* Appeal No. 81 of 1906.