APPELLATE CIVIL.

Before Mr. Justice Ramesam and Mr. Justice Madhavan Nair.

CHIVUKULA VENKATASUBBAMMA (FIRST DEFENDANT), APPELLANT,

1932, March 8.

v.

GOLLAPUDI RAMANADHAYYA AND TWELVE OTHERS (PLAINTIFF AND DEFENDANTS TWO TO THIRTEEN), RESPONDENTS.*

Partition—Suit for—Defendant asking for his share to be separated and given in—Power of Court to do so—Indian Stamp Act (II of 1899)—Partition decree stamped as an instrument of partition under—Non-liability of defendant to pay court-fee in such suit.

If, in a suit for partition, a defendant asks for his share to be given, the Court can order his share to be separated and given, and the right of the Crown to some revenue on the claim of the defendant is satisfied by the direction in the Indian Stamp Act that the decree as finally drawn up should be stamped as an instrument of partition and except that stamp duty no other duty as court-fee is payable by the defendant in such a suit.

APPEALS against the decree of the Court of the Additional Subordinate Judge of Bapatla in Original Suit No. 2 of 1925.

B. Somayya for appellant.

M. Patanjali Sastri and *Kasthuri Seshagiri Rao* for first respondent.

V. S. Narasimhachar for second to eighth and tenth to thirteenth respondents.

Other respondents were unrepresented.

Cur. adv. vult.

* Appeals Nos. 67 of 1926 and 467 of 1925.

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JUDGMENT.

RAMESAM J.—These are two cross-appeals against the decree in Original Suit No. 2 of 1925 on the file of the Additional Subordinate Judge's Court of Bapatla. The plaintiff in the suit was one Gollapudi Ramanadhayya, a retired Pleader of the District Court of Guntur. The suit is filed for partition of certain properties into two equal shares and for recovery of possession of one share with profits. There were four items of property which were the subject of the suit. They originally belonged to one P. Subramaniam who was the adoptive father of Mangayya, the deceased husband of the second defendant. Subramaniam executed a deed of usufructuary mortgage, dated 21st September 1878, in favour of one Chimpiri for 50 years. Chimpiri assigned the mortgage bond by a document dated 27th July 1885, Exhibit A, to one Krishnayya who assigned his interest by sale deed, dated 19th July 1908, Exhibit G, in favour of the plaintiff and Mangayya, the son of the original mortgagor. The plaintiff's case was that Mangayya in Exhibit G was only a benamidar for the first defendant and the first defendant is therefore entitled to a half-share of the mortgaged properties and the plaintiff to the other half and that afterwards the equity of redemption in items 1 and 2 of the mortgaged properties was purchased by the plaintiff himself and in the case of items 3 and 4 by the husband of the first defendant under sale deeds, Exhibits C and I, dated 10th December 1900 and 17th December 1900 respectively. The Subordinate Judge gave a decree for partition of the suit properties and for delivery of a half-share to the plaintiff. He also found that Mangayya in Exhibit G was not a benamidar for the first defendant. Appeal No. 467 of 1925 was filed by the second defendant against the decree in favour of the plaintiff. In the appeal the

only point raised related to Exhibit C. The second defendant contended that the sale deed, Exhibit C, was benami for the second defendant and this being found against the second defendant, the point is repeated in the appeal. Appeal No. 67 of 1926 was filed by the first defendant in respect of the finding that Mangayya in Exhibit G was not a benamidar for the first defendant. Taking up Appeal No. 467 of 1925 first, we see no reason to differ from the conclusion of the lower Court.

[His Lordship gave reasons for the above conclusion and proceeded:]

We find that Exhibit C is supported by consideration. Appeal No. 467 of 1925 therefore fails and must be dismissed with costs.

We now come to Appeal No. 67 of 1926. This appeal was not pressed by the appellant and is withdrawn. It is therefore dismissed with costs of the second respondent. But an important question arises in regard to this appeal. The plaintiff filed a memorandum of objections in relation to the mesne profits against the second defendant and her tenants. This memorandum of objections was filed in Appeal No. 67 of 1926 and not in Appeal No. 467 of 1925. The reason that the plaintiff urges is that the tenants were not parties in Appeal No. 467 of 1925 and as he desired to have a decree for mesne profits both against the second defendant and her tenants he could file the memorandum of objections only in Appeal No. 67 of 1926. To get rid of this memorandum of objections the second defendant now contends that Appeal No. 67 of 1926 does not lie as it was only against a finding, and as the appeal does not validly lie there can be no valid memorandum of objections in it. In reply it is urged by the plaintiff and by the first defendant that, the suit itself being one for partition,

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each sharer was in the position of a plaintiff. The first defendant could have asked for a decree for her half-share and as this was refused by the lower Court an appeal lies. To the argument so stated, the second defendant objects that no court-fee was paid by the first defendant in the Court below. The result of accepting the second defendant's argument would be that, as no court-fee was paid by the first defendant in support of her claim for a decree for a half-share, there is no valid claim in the Court below and therefore no valid appeal in this Court. The question therefore resolves itself into this, namely, when in a suit for partition one of the sharers asks for a decree for his share he should have paid court-fee to make his claim effective. If there is a valid appeal in this Court, the withdrawal of the appeal by the appellant does not prevent the hearing of the memorandum of objections under Order XLI, rule 22, clause 4, Civil Procedure Code. But if the appeal itself was not validly filed, then the memorandum of objections could not be heard. In *Shivmurteppa* v. *Virappa*(1) it was observed at page 130 :

> "It is the right of every defendant in a partition suit to ask to have his own share divided off and given to him, and the fact that the partition suit has been brought by a purchaser cannot alter or annul that right."

With reference to an objection raised by the Subordinate Judge that the defendant will get his share without any costs to him in court-fees, it was observed :

> "A defendant claiming a share on partition is, *qua* that claim, in the position of a plaintiff and could be called on to pay court-fees on the value of his claim."

But that judgment does not make it clear when the court-fee can be demanded. That case arose before the present Stamp Act (II of 1899) was passed. The Act had been passed a month before the judgment of

(1) (1899) I.L.R. 24 Bom. 128, 130.

the High Court was delivered. But as no reference was made to the Act, the remarks of the High Court must have been made apart from the Stamp Act. In *Nawab Mir Sadrudin* v. *Nawab Nurudin*(1) the question was incidentally gone into by JENKINS C.J., afterwards a member of the Judicial Committee of the Privy Council. There the question arose in the stage of the execution after the passing of a decree. The learned Judge held that the order requiring the decree-holder to pay court-fees is erroneous when there is no such condition in the decree. In *Hemchandra Mahto* v. *Prem Mahto*(2) the question was elaborately examined by MULLICK Ag. C.J. and KULWANT SAHAY J. (Patna). It was there held that the defendant is merely to ask for his share and it is then open to the Court to order the defendant's share also to be separated, that the right of the Crown to some revenue on the claim of the defendant is satisfied by the direction in the Stamp Act that the decree as finally drawn up should be stamped as an instrument of partition, and that except that stamp duty no other duty as court-fee is payable by the defendants in such a suit. We agree with the reasoning of KULWANT SAHAY J. in this judgment. The learned Advocate for the second defendant relied on the analogy of an administration suit and the decision in *Shashi Bhushan Bose* v. *Manindra Chandra Nandy*(3). But, in our opinion, this has nothing to do with the matter and does not touch the reasoning in *Hemchandra Mahto* v. *Prem Mahto*(2). The first of the two sentences from *Shivmurteppa* v. *Virappa*(4) already quoted by me was quoted with approval in *Tukaram Mahadu* v. *Ramchandra Mahadu*(5). But nothing is said about court-fees. In *Ramaswami*

(1) (1904) I.L.R. 29 Bom. 79. (2) (1925) 90 I.C. 739.
(3) (1916) I.L.R. 44 Calc. 890. (4) (1899) I.L.R. 24 Bom. 128, 130.
(5) (1925) I.L.R. 49 Bom. 672, 683.

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Aiyar v. *Rangaswami Aiyar*(1) it was held in an administration action that the Court is not entitled to demand, from the creditors of the deceased, court-fees on the value of their claim and that section 11 of the Court Fees Act should not be applied by analogy. We do not agree with the decision in *Peda Nagabhushanam* v. *Pitchayya*(2) in so far as it lays down that court-fees are to be paid. That decision might be distinguished on the ground that the decree provided that each of the defendants must pay the necessary court-fee before getting his share. We prefer the reasoning in the Patna decision already referred to. We are therefore of opinion that Appeal No. 67 of 1926 was validly filed and the withdrawal of the appeal by the appellant cannot affect the memorandum of objections. The memorandum of objections has therefore to be considered and disposed of.

It relates to (i) the plaintiff's claim for mesne profits for an extra year and (ii) the difference between the rate awarded by the Subordinate Judge and the rate now claimed. The Subordinate Judge has awarded mesne profits only for three years. By the time the suit was filed, namely, 19th February 1923, mesne profits for four years had accrued due to the plaintiff, the Maghabaula Amavasya of the four years all falling within three years prior to the plaint. The plaintiff claims for each year Rs. 330-7-6 instead of Rs. 300 awarded by the Court below. Without going into further details we may at once say that the learned Advocate for the respondent has rightly conceded these matters. Therefore it is enough to say that these two items are allowed in favour of the plaintiff.

The next item in the memorandum of objections relates to the plaintiff's claim for the subsequent profits.

(1) (1931) I.L.R. 55 Mad. 26. (2) (1917) 6 L.W. 448.

The Subordinate Judge left this for enquiry. But it appears that the various lease deeds filed in the case cover the subsequent years also, certainly up to March 1928, when the usufructuary mortgage expired. Therefore there is no need for further enquiry. Here again we may observe that the learned Advocate for the respondent has rightly conceded and therefore we hold that the plaintiff is entitled to mesne profits up to March 1928. Therefore the plaintiff is entitled to subsequent profits at Rs. 344-8-0 per annum for five more years. According to the definition in the Civil Procedure Code mesne profits include interest. It is also so held in *Grish Chunder Lahiri* v. *Shoshi Shikhareswar Roy*(1) and *Pankunni Menon* v. *Raman Menon*(2). But we think in this case it is enough to award interest at the rate of four per cent per annum from the date of accrual up to the date of payment.

[His Lordship discussed matters not necessary for this report and concluded as follows :—]

We do not therefore make any order as to costs of the memorandum of objections.

MADHAVAN NAIR J.—I agree and have nothing to add.

G.R.

(1) (1900) I.L.R. 27 Calc. 951 (P.C.).
(2) (1931) I.L.R. 54 Mad. 955 (F.B.).