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May 19.

Before Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Pearson, Mr. Justice Spinkie, and Mr. Justice Oldfield.

REFERENCE BY BOARD OF REVENUE, N.-W. P., UNDER ACT I OF 1879.

Instrument of partition—Stamp—Act I of 1879 (Stamp Act), ss. 3, cl. (11), 29, and sch. i, No. 37.

Held that the words "the final order" used in the definition of an "instrument of partition" in Act I of 1879 mean, not the order authorising a partition to proceed, but the order passed after the partition has been made declaring the various allotments of land. Also that the stamp-duty chargeable under that Act on an instrument of partition is chargeable in respect of the entire property sought to be divided, and not merely in respect of that portion of it allotted to the applicant for partition. Also that for the purposes of that Act the value of the property is to be computed with reference to its market-value and not with reference to the Court Fees Act, 1870.

THIS was a reference by the Board of Revenue, North-Western Provinces, under s. 46 of Act I of 1879, the nature of which will appear from the opinion of the Board, which was in the following terms:—

"The new Stamp Act requires that partitions effected by the Revenue Courts shall be liable to stamp duty, and cl. (11) of s. 3 defines an 'instrument of partition' as 'the final order for effecting a partition passed by any Revenue Authority'. The question has been raised whether this 'final order' is the order passed by a Revenue Court authorising a partition to proceed, or the order passed after the partition has been made declaring the various allotments of land. The Board think that the latter is unquestionably 'the final order' referred to. The import of this order is defined in the 21st rule of the Board's rules for partitions (Circular No. $\frac{8}{1134}$, dated the 13th November, 1875, page 63, Part II of Board's Circulars (1).

"The question is also raised as to the extent of the property specified in the instrument of partition. Sch. i, No. 37, directs that the duty on an instrument of partition shall be 'the same duty as a bond for the amount of the value of the property divided as set forth in such instrument.' The instrument of partition sets forth that out of such property previously undivided a certain portion is assigned to the applicant for partition. Is the entire property to be valued for the purposes of the Stamp Act, or merely the portion assigned to the applicant for partition? The Board

(1) See p. 668.

think that the stamp-duty should be computed on the whole of the undivided property which the parties seek to divide, and which is mentioned for this purpose in the partition instrument.

“There remains the further point as to how the *value* of the property is to be computed, as it has been thought that the method of valuation laid down by cl. v. of s. 7 of the Court Fees Act for the case of land should be followed. The Board consider that the provisions of the Court Fees Act cannot apply to valuations of stamp-duty under the General Stamp Act. The value of property for the purposes of the latter Act is the market-value, *i.e.*, what the property would fetch if sold, and this must be ascertained by the Court issuing the final orders in the partition proceeding.”

The Board was not represented.

The following judgments were delivered by the High Court:

STUART, C. J.—I concur in the view taken by the Board of Revenue on all the questions submitted to us by this reference. I would point out, however, that it is scarcely correct to describe an instrument of partition as “the final order for effecting a partition passed by any Revenue Authority.” By s. 3, cl. (11), an instrument of partition is defined to be “any instrument whereby co-owners of any property divide or agree to divide such property severally, and *includes also* a final order for effecting a partition passed by any Revenue Authority.” So that there must be in the first place the recorded act of partition or division by the co-owners or their agreement or contract to make it, and the “final order” which follows is simply the *fiat* of the Revenue Authority sanctioning the partition by means of which the partition becomes a completed act, and there can of course be no effectual partition until this is done. And such must also be taken to be the meaning of s. 131 of the Revenue Act XIX of 1873, which provides that “every partition shall either be made by the Collector of the District, or, if made by an Assistant Collector, be reported to the Collector of the District for his sanction and confirmation,” a provision which, if taken by itself, without reference or relation to any other enactment, would seem to signify that partition of property rested exclu-

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sively on the independent action of the Collector without any necessary regard to the views or purposes of the co-owners.

As to the question submitted to us in the third paragraph of the Board's letter, I am clear that the Board is right in suggesting that the stamp-duty should be computed on the *whole* of the undivided property which the parties seek to divide, and in my opinion no matter how far or within what limits that division may be carried out. Our attention was directed to s. 29 of the new Stamp Act, which provides that the stamp-duty on an instrument of partition shall be payable "by the parties thereto in proportion to their respective shares in the property comprised therein," and it was argued that the portion of property divided off to the particular co-sharer or co-sharers who apply for partition should only be chargeable with stamp-duty corresponding in value to the particular share or shares partitioned. But this view of s. 29 appears to me to be based upon too narrow a construction of its terms. That section does not say that the stamp-duty shall only be payable on the share or shares partitioned off, but on the contrary declares that the expense of providing the proper stamp shall be borne by the parties thereto in proportion to their respective shares in the property comprised in the instrument of partition. By the expression "the parties thereto" must be understood not merely the party or parties applying for partition, but the whole co-sharers who must necessarily be parties in the partition proceedings and equally bear the proper stamp-duty. For the effect of the partition proceedings is that the property thereby loses its identity as a previously undivided *mahál*, and there is nothing unreasonable in making any instrument of partition, it matters not how limited the division may be, chargeable with stamp-duty pertaining to the value of the whole.

In further support of this view the stamp-duty chargeable on an instrument of partition as given in No. 37, sch. i of the new Stamp Act was referred to. The duty is there declared to be "the same duty as a bond (No. 13) for the amount of the value of the *property divided* as set forth in such instrument." Here the words "the value of the *property divided*" must as I have shewn mean

the value of the entire property affected by the partition proceedings. And on turning to No. 13 of the same schedule the stamp duty of two annas and upwards according to the value is distinctly set out.

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In regard to the last question referred to us, I am clearly of opinion in concurrence with the Board that the value of the property to be computed is the market-value, and that the Court Fees Act has no application to such a question.

PEARSON, J.—The first question proposed for our consideration is whether the order passed by a Revenue Court authorising a partition to proceed, or the order passed after the partition has been made declaring the various allotments of land, is the final order for effecting a partition spoken of in cl. (11), s. 3, Act I of 1879. An order authorising a partition to proceed is in some sense an order for effecting a partition, but the order which declares the various allotments of the land is in my opinion the final order which effects the partition.

The next question is the extent of the property specified in the instrument of partition. That instrument sets forth that of such and such property previously undivided a certain portion is assigned to A the applicant for partition. We are asked whether the entire property is to be valued for the purposes of the Stamp Act or merely the portion assigned to the applicant for partition. In my opinion the entire property has been the subject-matter of partition, and the stamp-duty required by No. 37, sch. i, Act I of 1879, should be calculated upon its value and not merely on the value of the portion assigned to the applicant for partition. The portion assigned to the applicant could only be separated and allotted to him in severalty by a process which dealt with the entire property and separated and allotted the remainder of it to another party. The opinion now expressed appears to be supported by the terms of cl. e, s. 29 of the Act, which provide that the stamp-duty shall be payable in the case of an instrument of partition, not by the applicant for partition, but by the parties thereto,—and the other co-sharers in the entire undivided property must be parties to the partition of it equally with the applicant for partition—in

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proportion to their respective shares in the property comprised therein, and it cannot be denied that the partition comprises the entire undivided property.

The last question is how the value of the property is to be computed, whether in reference to its actual value in the market, or to the rules laid down in the Court Fees Act for determining the fee payable on plaints and appeals. The Court Fees Act has no relevance to the present matter, and in my opinion the market value of the property, the subject-matter of partition, should furnish the basis for calculating the stamp-duty required by No. 37, sch. i, Act I of 1879.

Thus on the questions referred by the Board of Revenue, I have arrived at the same conclusion as the Board has formed.

SPANKIE, J.—Looking at the first question, the “final order for effecting a partition passed by any Revenue Authority” appears to be that which would be made under s. 131, Act XIX of 1873. I find no place in the Act for the agreement referred to in the 21st paragraph (1) of the Board’s Circular. The notification published by the Collector under s. 131 of the Act would probably contain all the particulars referred in the Board’s letter.

As to the second question, looking at the definition of “instrument of partition” in cl. (11), s. 3 of Act I of 1879, it would seem that it is “any instrument whereby co-owners of any property divide or agree to divide such property in severalty, and includes also the final order for effecting a partition by any Revenue Authority”. By s. 29 of the Act, in the absence of an agreement to the contrary, in the case of an instrument of partition, the expense of providing the proper stamp is to be borne by the parties thereto in proportion to their respective shares in the property comprised therein, or when the partition is made in execution of an order passed by the Revenue Authority in such proportion as such Authority directs. The property comprised in the instrument of partition

(1) Rule 21.—“If all agree to the proposals or to such amended proposals as the Collector may think fit to make, their agreement shall be recorded and attested by the Collector. If any ob-

jections are raised, the Collector shall hear them and record an order overruling them, or amending the proposals to meet them as he thinks fit.”

has to be valued, and the parties thereto contribute towards the expense of the stamp in proportion to their shares in the property. If a stamp of one hundred rupees was required, and the property was worth ten thousand rupees, and five share-holders, being co-owners, *divided or agreed* to divide in severalty, the proportionate value of their shares would be two thousand rupees each, and each one would pay the duty on two thousand rupees, unless there was an agreement to the contrary, or where a Revenue Authority had directed otherwise in a partition made under his orders. The last part of cl. c, s. 29 of the Act, gives the revenue officer full authority in the matter and the "final order" is the instrument of partition.

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As to the third question the value is doubtless the market value.

OLDFIELD, J.—I agree with the Board of Revenue that the order which declares the various allotments of the land requires the stamp. The stamp should be paid on the value of the whole property which by the instrument of partition the co-owners are dividing or agreeing to divide: so far as I understand this is the view taken by the Board.

I also agree with the Board that the stamp should be computed on the market-value of the property.

APPELLATE CIVIL.

Before Mr. Justice Pearson and Mr. Justice Straight.

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FARZAND ALI (DEFENDANT) *v.* YUSUF ALI AND OTHERS (PLAINTIFFS).*

Plaint, amendment of—Remand by Appellate Court—Act X of 1877 (Civil Procedure Code), ss. 53, 562.

By the amendment of the plaint, a suit for the restoration of a pond, which it was alleged the defendants were wrongfully filling up, to its original condition, was altered into one for the protection of the plaintiffs from any infringement of, or for a declaration of, their right to a share in the produce, and the use of the water, by way of easement. *Held* that the alteration in the plaint was a material one.

* First Appeal, No. 125 of 1879, from an order of H. G. Keene, Esq., Judge of Meerut, dated the 7th August, 1879, reversing a decree of Maulvi Azmat Ali Khan, Munsif of Bulandshahr, dated the 5th June, 1879.