gards the question whether the order under s. 396 comes within the definition of "decree" as given in s. 2, there is no difference between such an order and one passed under similar circumstances regarding the partition of an immoveable property paying revenue to Government. There is as much reason to characterize the one as the other a "decree." On referring to s. 265, we find that the Legislature speaks of an order defining the rights of the parties to a suit for the partition of an undivided estate paying revenue to Government as a "decree"

We think that an order passed under s. 396 is a "decree" as defined by s. 2. It has been contended that it does not come within the definition, because the adjudication of right under s. 396 does not decide the suit; but we think that practically it does. All that remains to be done is simply an enquiry into minor matters necessary for the final disposal of the case. We think that an order under s. 396 of the Code of Civil Procedure is a "preliminary decree" passed in the suit which gives the parties the right of appeal.

It is not disputed that hitherto, on both sides of this Court, such appeals have been allowed. It is also clear that considerations of the balance of convenience are in favour of an appeal being allowed. We are, therefore, of opinion that the contention of the opposite party is not valid.

The Rule will be made absolute with costs.

J. V. W. *Rule absolute.*

Before Mr. Justice Prinsep and Mr. Justice Grant.

BHOOBUN MOYI DABEA AND OTHERS (DECREE-HOLDERS), *v.* SHURUT SUNDERY DABEA AND OTHERS (JUDGMENT-DEBTORS).*

1885 *August* 12.

Appeal—Civil Procedure Code (Act XIV of 1882), ss. 2 and 396—Order in Partition suit leaving proceedings to be taken in execution of decree.

The proceedings contemplated by s. 396 of Act XIV of 1882 are proceedings in a suit before decree, and in order to enable the Court in that suit to determine exactly the terms of that decree. Where those proceedings, however, were left to be taken in execution of the decree, the High Court treating it as an error in point of form, and without deciding whether or not

* Appeal from Order No. 125 of 1885, against the order of Baboo Parbati Coomar Mitter, First Subordinate Judge of Mymensingh, dated the 17th February 1885.

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an objection if it had been taken would have been fatal to the proceedings, dealt with the case in the same way as was done in *Gyan Chunder Sen* v. *Doorga Churn Sen* (1) regarding the further proceedings taken after decree declaring the rights of the several parties as proceedings to obtain a decree on further consideration.

Where in a partition suit an order was made in the course of such proceedings by which the position of some of the parties to the suit was determined but no declaration was made of the exact rights of each of the parties, *Held*, it was a mere interlocutory order and no appeal would lie from it.

Semble, such an order is not a decree within the terms of s. 2, Act XIV of 1882—*Bholanath Dass* v. *Sonamoni Dasi* (2) distinguished.

THE suit in which these execution proceedings arose was a suit for partition of a ten-anna share of a taluk, the remaining six annas of which had been partitioned by metes and bounds in another suit. The decree was obtained for partition of the ten-anna share, and the decree-holders applied to have the partition made in reference to the papers prepared in the previous suit. The Civil Court Ameen was, according to the petitions of the respective parties, directed to make the partition in reference to those papers only, and without making a fresh survey of the estate. He submitted his report to which all the parties took objections before the Subordinate Judge, with the result that he confirmed the allotments made to two of the parties, and directed possession to be given to them of their shares, and with respect to the rest ordered that the allotment should be revised in certain particulars.

On appeal from his order,—

Baboo *Hem Chunder Banerjee*, and Baboo *Issur Chunder Chuckerbutty*, appeared for the appellants.

Baboo *Sreenath Dass*, Baboo *Grija Sunkur Mozoomdar*, and Baboo *Mokoondnath Roy*, for the respondents.

The judgment of the Court (PRINSEP and GRANT, JJ.) was as follows :—

The matter before us relates to a partition, through the Court, of certain immoveable property held by the parties. The

(1) I. L. R., 7 Calc., 318 ; 8 C. L. R., 415.
(2) Ante, p. 273.

suit was for partition by metes and bounds, on proof that the parties held respectively certain specific shares. The Subordinate Judge was content with passing a decree declaring the parties entitled to partition as holding certain specific shares, but he has reserved the actual partition by metes and bounds until proceedings taken in execution and an enquiry by a Commissioner. The result has been that the enquiry contemplated by the terms of that order and provided for by s. 396 of the Civil Procedure Code, has been made in proceedings in execution of that decree. Now, as regards the form of these proceedings, we think that they have been mistaken. The proceedings contemplated by s. 396 are proceedings in a suit, and, as we understand it, before the passing of the decree, in order to enable the Court in that suit to determine exactly the terms of that decree. However, the error, such as it is, is merely on a point of form, and as it has not been made the subject of an objection (and we desire to add that we do not wish it to be understood that if it had been made the subject of an objection, it would have been fatal to the proceedings taken), we think we should regard it in the manner in which it was dealt with in the case of *Gyan Chunder Sen* v. *Doorga Churn Sen* (1), that is to say, the further proceedings taken after the decree declaring the rights of the several parties should be regarded as proceedings to obtain a decree upon further consideration, the expression used being one which is familiar to the English Courts of Law. The lower Court has in these proceedings found, on the report of the Commissioner, that two of the parties are entitled to certain parcels of land, but though it has found that the other two parties are entitled to the remaining portion, it has refrained at present from declaring exactly the lands to which each of these parties are entitled as between themselves. One of these last mentioned parties has now appealed to this Court against the order made, giving two of the co-sharers certain specific parcels of land. A preliminary objection has been raised that in the present state of the proceedings no appeal would lie. If the order passed be regarded as an order, it would seem that it is not appealable, as no special provision has been made by

(1) I. L. R., 7 Calc., 318: 8 C. L. R., 415.

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s. 588. But it is contended that this order should be regarded as a decree within the terms of the definition given in s. 2. Section 2 declares that a decree means "the formal expression of an adjudication upon any right claimed, or defence set up, in a Civil Court when such adjudication, so far as regards the Court expressing it, decides the suit." It is clear that the present order does not decide the suit, although it may determine the position of one of the parties in that suit. But as an authority for the appeal now made to us we are referred to a judgment delivered by Mitter and Macpherson, JJ., in *Bholanath Dass* v. *Sonamoni Dasi* (1) on the 30th July last. In that case the learned Judges held that, in a suit for a partition of immoveable property not being an estate paying revenue to Government, an appeal would lie against an order or decree merely declaring the rights of the parties to certain specific shares, although the principal object of that suit as laid, *viz.*, the particular lands to which each of the co-sharers would be entitled, had not yet been determined. It is sufficient for us at present to state that we should feel some hesitation in applying the principle upon which the Court may have proceeded in that case generally to somewhat analogous matters arising in other suits, and as, in our opinion, the order passed does not apply strictly to the case before us, we do not feel embarrassed by that decision. We should not be disposed to hold, as we have been asked to hold in the present case, that any interlocutory order in the course of a suit or proceeding under which the position of some of the parties to the case may have been determined, could properly be made the subject of an appeal, except under some special provision of the law, until the decree shall have been pronounced, that is to say, until the actual decision of the suit shall have been arrived at. In the present case, although the rights of the Maharani and Nabab Ali, two of the co-sharers may have been determined with regard to certain specific plots, no final order has yet been passed, because the exact rights of the two other parties have not been determined. It therefore seems to us that, until the entire matter before the Court shall have been concluded, no appeal would lie.

(1) Ante p. 273

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We think it is to be regretted that in dealing with suits for partition of immoveable property not being estates paying revenue to Government, the lower Courts should be in the habit of passing what are termed decrees in the suits containing merely declaratory orders, leaving still open for determination the main issues. Such matters should be decided before any decree is passed, and this would seem to be contemplated by s. 396 which refers to proceedings in a suit. We are inclined to think that this mode of dealing with cases of this description arises in a great measure from a desire of the lower Courts to clear their files of such suits as involve tedious and lengthened enquiries, and thus not to lay themselves open to animadversion for dilatory proceedings when their work comes before their executive superiors. As we are of opinion that no appeal lies in the present stage of the proceedings, but that, if so advised, the appellant can hereafter raise the points which he desires to raise in the present proceedings, the appeal is dismissed, but, under the circumstances, without costs.

J. V. W. *Appeal dismissed.*

Before Mr. Justice Wilson and Mr. Justice Beverley.

KRISTO CHUNDER DASS AND OTHERS (DEFENDANTS) *v.* O. STEEL (PLAINTIFF.)*

1885. *August* 11.

Waste lands—Act XXIII of 1863, *ss.* 8, 18—*Suit for possession—Statute, Interpretation of.*

Where an Act expressly takes away one particular remedy which would otherwise have been open for enforcing a right of property, or in any other particular interferes with proprietary rights, but does not, in express words or by necessary implication, declare that those rights shall cease, the method of interpretation which ought to be adopted is to give effect to the Act exactly so far to its words extend, and no further.

There is nothing in Act XXIII of 1863 to prevent a person who has a good title and has throughout been in possession, or who has a good title, and at any time succeeds in peaceably getting possession, and is not ousted in a possessory suit, or who for any other reason is in the advantageous

* Appeal from Appellate Decree No. 590 of 1884, against the decree of H. Muspratt, Esq., District Judge of Sylhet, dated the 28th December 1883, reversing the decree of Baboo Ram Coomar Pal, Rai Bahadur, Subordinate Judge of that District, dated the 31st of January 1883.