

*Before Mr. Justice Mitter and Mr. Justice Macpherson.*

IN THE MATTER OF THE PETITION OF BHOLA NATH DASS AND OTHERS,  
BHOLA NATH DASS AND OTHERS *v.* SONAMONI DASI. \*

1885  
July 30.

*Appeal—Civil Procedure Code (Act XIV of 1882), ss. 2 and 396—Order  
for partition in execution of decree.*

An order under s. 396 of the Code of Civil Procedure declaring the rights of the parties in a partition suit but leaving their shares to be determined in execution of the decree, is a "decree" within the meaning of s. 2 of the Code, and an appeal therefore lies from such order.

SONAMONI DASI, the plaintiff in the suit in the execution proceedings in which this rule was obtained, sued for partition of moveable and immoveable property which belonged originally to two brothers, Gopal Chandra Das, father of the defendants, and Mohesh Chandra Das, the husband of the plaintiff. Both Gopal Chandra and Mohesh Chandra being dead, the plaintiff as heir of her deceased husband claimed an eight-anna share of the joint properties, and also asked for damages and mesne profits. A deed had been executed by the parties in Pous 1290 (December 1883), whereby it was agreed that of the articles used in performing religious ceremonies those mentioned in Sch. 3 should remain in the custody of the defendants, while the plaintiff should enjoy a similar right in respect of the articles specified in Sch. 4.

The plaintiff alleged that the defendants had not delivered to her the articles mentioned in Sch. 4, and that the defendants having in contravention of the terms of the deed refused to allow her the use of the articles specified in Sch. 3, on the occasion of the Doljatra ceremony, she was, by virtue of the stipulation in the deed, entitled to the possession of these articles. She also claimed an iron chest as belonging to her exclusively. The defence was that a portion of the properties, of which partition was claimed, had been already divided; that the defendants had not refused to allow the plaintiff to use the articles specified in Sch. 3; that, of the articles mentioned in Sch.

\* Civil Rule No. 796 of 1885, against the order of Baboo Nuffer Chandra Bhatta, First Subordinate Judge of 24-Pergunnahs, dated the 12th of May 1885.

1885  
 BHOLA NATH  
 DASS  
 v.  
 SONAMONI  
 DASI.

4, the defendants had in their hands only eleven lanterns and nothing else; that the iron chest was joint property; and that the defendants were not liable for damages and mesne profits.

The Subordinate Judge made the following order:—

“The properties specified in Sch. 1 annexed to the plaint and the articles Nos. 1—18 of the Sch. 2 annexed to the defendant’s written statement will be divided into two equal lots, one of which is to be assigned to the plaintiff and the other to the defendants. The partition will be made by Commissioners, who will have due regard to the convenience of the parties. Compensation may be awarded for equalising the shares. The costs of the partition will be borne equally by the parties.

“The plaintiff’s claim with reference to the properties mentioned in Sch. 3 is dismissed.”

“The defendants are directed to deliver to the plaintiff the property No. 74 referred to in Sch. 4 or its value Rs. 22, and also the iron chest claimed or its value Rs. 70. The claim for damages and mesne profits is dismissed.”

The defendants appealed and petitioned for and obtained a rule calling on the plaintiffs to show cause why partition should not be stayed pending the appeal.

*Baboo Kissen Kumal Bhattacharjee*, for the petitioners.

*Baboo Uma Kali Mookerjee* showed cause.

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

It has been contended before us that this Rule ought to be discharged, because the appeal in connection with which it was issued was not filed in accordance with the provisions of the Code of Civil Procedure.

The contention of the opposite party is that the order which has been passed by the lower Court under s. 396 of the Code defining the several rights of the parties interested in the property in dispute, is not “a decree” as defined in s. 2; that it is merely an interlocutory order against which, it has been urged, no appeal lies.

We are of opinion that this contention is not sound. As re-

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 Prinsap 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,