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KISHUN LAL v. MUHAMMAD SAFDAR ALI KHAN.

s. 315. We were referred to the case of *Kunhi Moidin* v. *Tarayil Moidin* (1), in which the procedure was that the person who sought repayment of money proved in a suit that the judgment-debtor had no saleable interest, and, under s. 315, went to the proper Court to obtain redress of payment. The Subordinate Judge tried this case and dismissed the plaintiff's claim.

In our opinion, according to the Full Bench ruling to which we have above referred, we must give the plaintiff a decree for the rateable share received by the defendant of the Rs. 21,000, speaking roughly, that the plaintiff paid in respect of the purchase. We cannot give the plaintiff the full amount of Rs. 5,235, because, with exception of Rs. 1,016, the defendant received nothing out of the moneys paid by the plaintiff in respect of the purchase of the 20th September 1886. The Rs. 1,016 is accepted as representing the rateable share of the plaintiff's money which the defendant No. 1 received.

We reverse the decree below and give the plaintiff a decree for Rs. 1,016 with proportionate costs, dismissing his claim as to the balance with proportionate costs. We do not allow interest, as we think there was no real foundation for making a claim for the whole of the money.

Appeal decreed.

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April 29.

Before Mr. Justice Straight and Mr. Justice Tyrrell.

MAHABIR PRASAD MISR AND OTHERS (PLAINTIFFS) *v.* MAHADEO DAT MISR AND OTHERS (DEFENDANTS).*

Act X of 1873 (*Oaths Act*) *ss.* 10 *and* 11—*Referee's depositions inadequate for decision of question referred—Appeal after death of referee—Practice.*

Where a cause had been decided under the provisions of ss. 10 and 11 of the Oaths Act (Act X of 1873) with reference to the depositions of a person appointed by agreement of the parties as referee, and where, after the death of the referee, on an appeal being preferred against the decree so based upon those depositions, it was found that the said depositions did not fully cover the questions in issue between the parties.

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* First Appeal No. 146 of 1889, from a decree of Maulvi Ahmad Hasan, Officiating Subordinate Judge of Gorakhpur, dated the 16th May 1889.

(1) I. L. R. 8 Mad., 101.

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Held, that the case should be remanded to the lower Court for disposal according to the usual procedure.

THE facts of this case sufficiently appear from the judgment of of the Court.

Mr. *T. Conlan* and Mr. *W. M. Colvin*, for the appellants.

The Hon'ble Mr. *Spankie* and Munshi *Jwala Prasad*, for the respondents.

STRAIGHT, J. (TYRRELL, J. concurring).—This is a somewhat peculiar case. It will be convenient to state a few facts by way of preliminary to the order I am about to make in this case. The suit was brought by the plaintiffs, appellants, against the defendants upon the ground that their fathers and the ancestor of the defendant Mahadeo Dat Misr had been members of a joint and undivided Hindu family in possession of joint and undivided immovable property; that in 1881, in consequence of some misunderstanding, separation of food and residence had taken place; that subsequently the defendants had by their improper action deprived the plaintiffs of their share in the joint enjoyment of the joint family property; and they sought to have that joint possession and enjoyment restored to them as before.

It is not necessary to discuss the statements contained in the written statement of the defendants; it is enough to remark that, on the 27th March 1889, a petition was filed by the plaintiffs and the defendants in the Court of the Subordinate Judge of Gorakhpur, stating that they had mutually agreed to be bound by the deposition of Mahárája Udai Narain Mal, the owner of the *ráj* of Manjholi in the manner contemplated by ss. 10 and 11 of the Oaths Act. A commission was issued for the examination of the Mahárája, and on two occasions, that is, on the 8th April 1889, and on the 29th April 1889, questions were put to him to which replies were given. Upon the strength of those depositions the Subordinate Judge of Gorakhpur passed a decree in favor of the defendants, holding that the answers given by the Rája precluded the claim of the plaintiffs and established the separate proprietary title of the defendants to the property in respect of which the suit had been brought for declara-

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tion of the plaintiffs' joint interest therein. It is against this decree that this first appeal has been preferred, and the contention on the part of the appellants, *firstly*, was that a proper construction of the Rája's deposition showed that the plaintiffs had succeeded in establishing their joint title to the property in dispute. Mr. *Colvin*, who argued the case on behalf of the appellants, contended that the answers contained in these depositions were so hazy and ambiguous that they were wholly insufficient to justify the decision of the Court below. Mr. *Spankie* for the respondents strenuously urged that, at least as to some of the points, the statements of the Rája were specific enough, and that, according to the last answer given by him in his second deposition, it was clear that the defendants did acquire and were in sole proprietary possession of the property in suit. I cannot agree with this latter contention. Both my brother Tyrrell and myself have perused more than once the two depositions of the Rája, and we think that they do not convey to our minds any clear or precise expression or statement as to the nature of the rights of the several parties in the property in suit. It is at least abundantly clear that at the time the property in dispute came into possession of the parties, either by gift or purchase, they were members of a joint and undivided Hindu family. That being so, the presumption would be that the property so acquired would be the property of that joint and undivided Hindu family until the contrary was proved. Before passing such a decree as has been made in the present case, upon the strength of the statements of the Rája, it was essential that his statements should have been very clear and definite in respect of the specific title acquired by the respective parties as to the several properties in dispute. These depositions do not convey to our minds any such impression, and although I should always be strongly disinclined to assist a party to an agreement under the Oaths Act in getting out of it, yet I am bound to see that the object of the parties when they entered into it has been satisfactorily accomplished by the deposition of the referee, and, if that object has not been accomplished, then that a further deposition should be obtained, or, if that is imposible, as is the case here, owing to the Rája's death, that the question should be tried in the ordinary way by the Court.

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We decree the appeal, reverse the decree of the Court below and remand the case to the Court of the Subordinate Judge of Gorakhpur for restoration to the file of pending cases and disposal according to law. Costs of the appeal and costs incurred in the Court below will follow the result of the suit.

Appeal decreed.

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May 8.

Before Sir John Edge, Kt., Chief Justice, and Mr Justice Mahmood.

GOBIND NATH TIWARI (PLAINTIFF) *v.* GAJRAJ MATI TAURAYAN AND OTHERS (DEFENDANTS).*

Suit for declaratory decree—Declaration sought that certain property was joint ancestral property and not liable to attachment in execution of a certain decree—Court-fee payable on such suit.

The plaintiffs specified in their plaint as the reliefs sought by them:—"(1). That it be declared by the Court that the property mentioned at foot is the joint ancestral property of the plaintiffs and not liable to attachment and sale in execution of the decree of the defendant No. 4, dated 4th December 1883, against the defendant No. 1. (2) That the costs of the suit be also awarded by the decree. The suit is valued with reference to the amount of the decree and the value of the property at Rs. 6,000. (3). That any other relief which the Court may think the plaintiffs entitled to may also be granted."

Held, that the suit should be deemed a suit for one declaratory decree only, without consequential relief, and that a court-fee of Rs. 10 was sufficient.

THE plaintiffs brought their suit in the Court of the Subordinate Judge of Gorakhpur for a declaration that certain property was joint ancestral property and not liable to attachment under a decree to which certain of the defendants were parties. They paid on their plaint a court-fee of Rs. 10. The Subordinate Judge dismissed the plaintiffs' claim without going into the merits, on the ground that it was unmaintainable having regard to the provisions of s. 42 of Act I of 1877 (Specific Relief Act). One of the plaintiffs then appealed to the High Court paying, as in the Court of first instance, a court-fee of Rs. 10. A preliminary objection was taken by the respondents that the court-fee in both Courts was insufficient, and, that being so, the appeal should be dismissed. Before deciding this objection,

* First appeal No. 138 of 1889 from a decree of Maulvi Ahmad Hasan, Subordinate Judge of Gorakhpur, dated the 25th June 1889.