

On the hearing of the first appeal it was admitted that if the decree of 1862 were excluded from the record the plaintiff had no case.

Against that decree the plaintiff now preferred a special appeal to the High Court.

Mr. J. G. Apear, and Baboo *Bhobani Charan Dutt*, for the appellants.

Baboo *Unnoda Pershad Banerjee*, for the respondents.

The judgment of the High Court (TOTTENHAM and AGNEW, JJ.) was as follows:—

This case is not distinguishable from those to which the lower Appellate Court refers as having governed his decision that the decree formerly obtained by Sidhi Nazar Ali Khan when in possession as an auction-purchaser is not available as evidence in favour of the plaintiff-appellant, who does not, in any way, claim through that individual; and that decision is in accordance with the ruling of the Full Bench in *Gujju Lal v. Fatteh Lall* (1) which we think should in this case be followed.

The case of *Hira Lal Pal v. Hills* (2), cited for the appellant, shows that in certain cases judgments not *inter partes* may be taken into consideration, but it does not pretend to lay down that such judgments can be treated as conclusive evidence which is what was sought in this case in respect of the judgment and decree in question.

The appeal must be dismissed with costs.

Appeal dismissed.

Before Mr. Justice Tottenham and Mr. Justice Agnew.

BEPIN BEHARI MODUCK AND OTHERS (DEFENDANTS) v. LAL MOHUN CHATTOPADHYA (PLAINTIFF) AND ANOTHER (DEFENDANT)*

1885.
August 31.

Hindu Law—Partition—Purchaser from Hindu widow, Right of, to partition—Alienation by Hindu widow of share in family dwelling house—Decree for partition—Order directing commission of partition to issue, Appeal from—Appealable order—Civil Procedure Code (Act XIV of 1882), ss. 2, 396.

* Appeal from Appellate Decree No. 1008 of 1885, against the decree of Baboo Mahendra Nath Mitter, Subordinate Judge of Burdwan, dated the 10th of March 1885, reversing the decree of Baboo Gopal Chundra Basu, Munsiff of Cutwa, dated the 13th of March 1884.

(1) I L. R., 6 Calc., 171.

(2) 11 C. L. R. 523.

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An assignee of a Hindu widow, though a stranger to the family, is in the same position as the Hindu widow and is entitled to sue for partition of the joint family dwelling house, and all that the Court has to see to is that the partition should be carried out in such a way as not to affect the rights of the reversioners.

Where an Appeal Court made a decree or order directing a commission to issue directed to an Amin to make a partition of certain property into certain specified shares and to allot the shares to the parties to the suit, *Held*, that such order amounted to a decree within the meaning of s. 2 of the Code of Civil Procedure, and that, though called a decree, it was in fact an order in the terms of s. 396 of the Code and was a proper order to make.

IN this case the plaintiff sued to obtain partition of a family dwelling house and to have a one-third share, which he alleged he had purchased, allotted to him.

He stated that the first three defendants were entitled to the remaining two-thirds share, and that the fourth defendant Karunamoyi, a widow, had been entitled to the remaining one-third share on partition, and that he had purchased that share from her, she having been forced to sell it for necessity and he having paid the proper value of it to her. He further alleged that after the purchase, which took place on the 13th Bhadro 1290 B.S. (28th August 1883), he served a notice on the first three defendants, asking them to come to an amicable partition, but that they had neglected to do so and therefore he brought the present suit.

The first three defendants contested the suit upon various grounds. They admitted that Karunamoyi was entitled to a one-third share, but they impeached the sale to the plaintiff and alleged that it was a benami transaction, and that no consideration had passed. They further contended that the suit was barred under ss. 13 and 43 of the Civil Procedure Code inasmuch as Karunamoyi had previously instituted a suit for partition and failed; they also denied the receipt of the notice, and contended that the plaintiff, being a stranger to the family, was not entitled to partition.

The Munsiff held that the suit was not barred, as Karunamoyi's previous suit was dismissed for nonjoinder, and express leave was given her to institute another suit for partition. He found

that the notice had been served, though it was unnecessary, and that the sale was a *bond fide* transaction and for legal necessity; but he refused to decree partition on the ground that, as the plaintiff was a stranger, he ought not to be allowed to intrude upon the privacy of the defendants' house and put them to inconvenience, and he gave the plaintiff a decree for Rs. 200, the purchase money paid by him to Karunamoyi with interest.

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Against this decree the plaintiff appealed, and the defendants preferred a cross appeal against the finding that the sale had been for valuable consideration. The lower Appellate Court agreed with the findings of fact of the first Court and dismissed the cross appeal, but it disagreed with the decision of the Munsiff as to the plaintiff's right to a partition, and gave the plaintiff a decree for partition, and directed a commission to be issued to the Civil Court Amin to divide the property into two shares, *viz.*, two-thirds for the defendants and one-third for the plaintiff, and to allot such shares to the parties. It further gave the Amin power to award such sums as he might think fit to the parties for the purpose of equalizing the value of their respective shares.

Against that decree the defendants now brought a special appeal to the High Court, upon the ground that the plaintiff, being a stranger, had no right to partition, and that the lower Court had not followed the procedure prescribed by the Code; and that there was no decree which could be executed.

. Baboo *Umbica Charan Banerji*, for the appellants.

Baboo *Guru Das Banerji*, for the respondents.

The judgment of the High Court (TOTTENHAM and AGNEW, JJ.) was as follows:—

The plaintiff in this suit claimed the partition of a share in a Hindu family dwelling house purchased by him from a widow.

The first Court, having regard to the inconvenience which it considered would be entailed on the other members of the family if the partition were allowed, made a decree in favor of the plaintiff only for the sum which he had paid for the share in question.

The lower Appellate Court reversed that decree and decreed actual partition in favor of the plaintiff.

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The grounds taken in this second appeal are, that the purchaser of the share of a Hindu widow in a family dwelling house is not entitled to a partition of that share inasmuch as possibly the Hindu widow had no right to alienate her share; and further that the lower Appellate Court has not followed the procedure laid down in the Code; that in fact there has been as yet no decree which can be executed. It is contended that in a suit for partition, if the Court thinks that the plaintiff is entitled to obtain it, it must, before making a final decree, have the partition carried out by commissioners as provided by s. 396. Therefore the order of the lower Court against which this second appeal has been filed as if it were a decree, is not a decree at all. At any rate there is no decree which can be executed.

In our opinion the appellant must fail on both contentions. That a Hindu widow has a right to partition has been established by the Full Bench decision in *Janoki Nath Mukhopadhyaya v. Mothuramath Mukhopadhyaya* (1), and the assignee of a Hindu widow is in the same position. All that has to be secured in favor of the reversioners is that the partition should be so carried out as not to affect their rights. The lower Appellate Court, therefore, was right in law in holding that the plaintiff is entitled to actual partition.

As to the other point, we think it clear that the adjudication of the plaintiff's right to obtain a partition amounts to a decree within the meaning of s. 2 of the Code of Civil Procedure. Therefore an appeal will lie against that decree.

As to the decree not being capable of execution, we think that is an objection which need not stand in the way of either of the parties. The lower Appellate Court has in its decree made an order in the terms of s. 396, that the Civil Court Amin shall carry out the partition in the manner prescribed. Whether the order to the Amin goes direct from the lower Appellate Court, or whether it goes from the Court of original jurisdiction, the Munsiff, seems to us to be of no importance. We, therefore, see no reason for interference in the matter.

While this appeal was pending, it seems that an application

(1) I. L. R., 9 Cal., 580.

to execute the decree was made before the Munsiff, and the Munsiff took steps to execute it. Thereupon a rule was obtained in this Court to show cause why execution should not be stayed pending the hearing of this appeal. We have, therefore, now to dispose of that rule. As we see no reason for interfering with the decree passed by the lower Appellate Court, it follows that there can be no reason for staying execution in the terms of the rule.

The appeal is dismissed with costs, and the rule discharged.

We make no order as to the costs in the rule.

Appeal dismissed.

Before Mr. Justice Mitter and Mr. Justice Macpherson.

SMITH (PLAINTIFF) v. DINONATH MOOKERJEE AND OTHERS
(DEFENDANTS.)*

1885
September 2.

Voluntary payment—Landlord and Tenant—Government revenue, Payment of, by putnidar—Defaulting proprietor, Liability of, to recoup putnidar who pays Government revenue for him, when a separate account has been opened—Revenue sale law (Act XI of 1859), ss. 9, 10, 11, 13, 14 and 54—Contract Act (Act IX of 1872), ss. 69, 70.

A putnidar who had made certain payments on account of Government revenue due by his superior landlords who had defaulted, although a separate account had been opened for the payment of such Government revenue, brought a suit to recover the amount so paid. In such suit it was contended that the payments were merely voluntary, and that the plaintiff could not recover them.

Held, that the plaintiff was "interested" in making the payments, and was therefore entitled to recover under s. 69 of the Contract Act.

Held, further, that s. 70 of the Contract Act applied to the case, inasmuch as the word "does" in that section includes payments of money, and also that the plaintiff was entitled to recover under s. 9 of the revenue sale law as he believed in good faith that his interest would be endangered by a sale taking place.

The liability of a landlord under s. 9 of the revenue sale law to recoup a person paying Government revenue for him does not depend upon the question of whether the money was originally deposited or not, but accrues upon its being credited in payment of the arrears.

IN this case the plaintiff sought to recover the sum of

* Appeal from Appellate Decree No. 1722 of 1884, against the decree of C. A. Kelly, Esq., Judge of Nuddea, dated the 7th of August 1884, affirming the decree of Baboo Amrita Lal Chatterji, Subordinate Judge of that district, dated the 28th of August 1882.