

two years. We convict him also of the offence punishable under section 218 of the Indian Penal Code; he framed a record which he knew to be incorrect knowing it to be likely that he would thereby cause injury to the public. The record in respect of which we convict him under section 218 was the false record to which he obtained the signature, on the second occasion, of Abdul Wahid. Under section 218 we sentence Kutb-ud-din to be rigorously imprisoned for two years. The latter sentence will commence on the expiration of the former. A warrant will forthwith issue for the arrest of Kutb-ud-din.

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APPELLATE CIVIL.

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February 12.

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

SHAH MUHAMMAD KHAN AND OTHERS, (DEFENDANTS) v. HANWANT
SINGH (PLAINTIFF).*

Civil Procedure Code, section 108—Application to set aside a decree passed ex parte—Limitation—Act No. XV of 1877 (Indian Limitation Act), Sch. ii, Art. 164—Suit for partition—Nature of decree in such suit—Civil Procedure Code, section 396—Execution of process for enforcing the judgment.

The action of an amin appointed under section 396 of the Code of Civil Procedure in a partition suit to demarcate the shares assigned to the respective parties to the suit is not the executing of a process for enforcing the judgment within the meaning of article 164 of the second schedule to the Indian Limitation Act, 1877. *Dwarika Nath Misser v. Barinda Nath Misser* (1) referred to.

IN this case the respondent obtained on the 30th September 1896 a decree for partition of certain immovable non-revenue-paying property against Shah Muhammad Khan and others. This decree was a decree of an interlocutory nature not capable of execution until the actual shares of the parties to it had been properly demarcated by means of the procedure prescribed by section 396 of the Code of Civil Procedure. An application,

* First Appeal No. 58 of 1897, from an order of Pandit Rai Indar Narain, Subordinate Judge of Meerut, dated the 1st May 1897.

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described by the Court which passed the decree (Subordinate Judge of Meerut) as an application for execution was made by the respondent on the 13th of February 1897, in pursuance of which an amin was sent to prepare lots for partition. The amin on the 3rd and 4th of March 1897 made a survey of the property and prepared lots, and on the 18th of March returned a report to the Court, on the basis of which report notice was issued to the defendants fixing the 17th of April 1897 for the allotment amongst the parties of the lots prepared by the amin. On that date some of the defendants applied under section 108 of the Code of Civil Procedure to have the decree of the 30th of September 1896 set aside as having been passed *ex parte* without due notice having been served upon him. This application was dismissed by the Subordinate Judge as barred by limitation, he being of opinion that the sending of the amin to demarcate the lots was the "executing of a process for enforcing the judgment" within the meaning of art. 164 of the second schedule to the Indian Limitation Act, 1877. Against this order of dismissal the applicants appealed to the High Court.

Munshi *Ram Prasad*, for the appellants.

Pandit *Moti Lal*, for the respondent.

EDGE, C. J. and BURKITT, J.—This appeal has arisen in a suit for the partition of immovable property not paying revenue to Government. The Court in which the suit was made a decree for partition, which we must construe as an interlocutory decree, but a decree nevertheless within the meaning of section 2 of the Code of Civil Procedure, defining the interests of the parties to the suit; that is, it was in effect an interlocutory decree declaring the interests of the parties. Now in suits for partition of immovable property not paying revenue to Government, the Court, no doubt, if it has the information before it necessary to enable it to make a decree not only declaring the rights of the parties but actually fixing the particular areas, or rooms, or parts of the houses, as the case may be, of which possession is to be given to the parties respectively on partition, may make such a decree

without employing the procedure of section 396 of the Code of Civil Procedure, and the decree so made would be enforceable in execution, and possession of the respective areas, rooms, &c., could be given to the parties in execution of the decree. But where, as most generally happens, a Court has not the information necessary to the making of such a decree, it must make a preliminary or interlocutory decree of a declaratory nature, and then adopt the procedure of section 396 of the Code of Civil Procedure by appointing a commissioner or commissioners, whose duty will be, not to give possession, for at that period there would be no decree capable of execution by possession, but who should allot such shares to the parties, award the sums to be paid in case sums are to be paid, and then prepare and sign a report appointing the shares and distinguishing such shares by metes and bounds, if ordered so to do. The commissioner or commissioners must then submit that report to the Court, and the Court, after giving the parties an opportunity of objecting to the report, may quash the report and proceedings of the commissioner or commissioners and issue a new commission, or pass a decree in accordance with the report. The decree in accordance with such report would be a decree allotting the specific shares, areas, rooms, &c., distinguishing them where possible by metes and bounds or other adequate description, and decreeing to the respective parties possession of those portions of the property allotted to them. In the latter case which we have been putting that would be the final decree. It is true that the interlocutory decree—following the principle laid down by their Lordships of the Privy Council—would be appealable, but for all that it is not the final decree or the decree which is capable of execution, except possibly for such costs as it might award to be paid. It is merely of the character of an interlocutory and declaratory decree. In such a case as the present, which falls under the second category, the appointment of a commissioner, whether he be the amin of the Court or some one else, is not the issuing of a process in execution of a decree, nor are any proceedings of such commissioner

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the carrying out of any process in execution. The time has not yet arrived for execution of the decree. It was in our opinion correctly decided by the High Court at Calcutta in *Dwarka Nath Misser v. Barinda Nath Misser* (1) that proceedings under section 396 of the Code of Civil Procedure for the purpose of effecting partition are proceedings in the suit itself and not proceedings in execution of a decree.

In the present case a decree, which we must regard as simply declaratory and interlocutory, was made in the absence of the defendants, who are appellants here. All these appellants with one exception were minors. They applied for an order to set aside the decree under section 108 of the Code of Civil Procedure. The Court considering that the appointment of an amin under section 396, under which section only at the stage of the case he could have been appointed to act, was the issuing of a process for enforcing the judgment, and that the action of the amin in proceeding to the place and making the allotment was the executing of a process for enforcing the judgment, applied article 164 of the second schedule of the Indian Limitation Act, 1877, and dismissed the application. There has been in this case no execution of a process for enforcing the judgment. The application was within time. We set aside the order of the Court below with costs and remand the case under section 562 of the Code of Civil Procedure to that Court to be disposed of on the merits.

Appeal decreed and cause remanded.

(1) I. L. R., 22 Cal., 425.
