

1901

REFERENCE
UNDER
SECTION
57 OF ACT
NO. II OF
1899.

of the Act and Rules, not a stamp at all, and in a case where any such stamp is used the Collector is not competent to take action under Rule 16. We agree with the view of the Board of Revenue, and this is our answer to the reference.

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February 14.

Before Sir Arthur Strachey, Knight, Chief Justice, and Mr. Justice Banerji.

LACHMI NARAIN (DEFENDANT) v. JANKI DAS (PLAINTIFF).*

Hindu Law—Joint Hindu family—Suit for partition—Partition of the whole joint family property not claimed.

The plaintiff, a member of a joint Hindu family, sued the defendant, another member of the same family, for partition of certain property, which had once been the property of the joint family as a whole, but which at the time of the suit had come to be the joint property of the plaintiff and the defendant only. *Held*, that it was not necessary for the plaintiff to include in the suit other property, which belonged jointly to the plaintiff, the defendant and other members of the joint family. *Perushottam v. Atmaram* (1) referred to.

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

Pandit *Sundar Lal*, for the appellant.

Pandit *Moti Lal Nehru* (for whom Pandit *Mohan Lal Nehru*), for respondent.

STRACHEY, C. J. and BANERJI, J.—The plaintiff belongs to one branch of a joint Hindu family and the defendant-appellant to another branch. Din Dayal and Nain Sukh Rai were two brothers. The plaintiff is the grandson of Din Dayal, and the defendant is one of the sons of Nain Sukh Rai. In 1864 there was a partition of some of the joint family property between Din Dayal's branch and Nain Sukh Rai's branch. Certain other parts of the joint family property, however, were not divided in that partition. Among the joint properties which were left undivided was the property now in suit, which consists of a gateway, certain bullock sheds, rooms and the like. As regards this property, it appears that the plaintiff has acquired the interest of all the other persons in his, that is, Din Dayal's, branch, of

* Second appeal No. 40 of 1899 from a decree of Babu Baijnath, Rai Bahadur, Additional District Judge of Saharanpur, dated the 1st October 1898, confirming a decree of Pandit Kunwar Bahadur, Munsif of Muzaffarnagar, district Saharanpur, dated the 10th September, 1897.

the family. Similarly in the property in suit the defendant-appellant Lachmi Narain has acquired the interests of all the other members of Nain Sukh Rai's branch.

The present suit is a suit for partition of the property in question, in which the plaintiff claims a one-half share against Lachmi Narain, who is the owner of the other half. It was objected in the Courts below, and the objection was repeated in this appeal by the defendant, that the suit ought to have been dismissed on the ground that it is a suit for partition of a portion only of the joint family property. That plea is based on the fact that there is other property belonging jointly to the two branches, Din Dayal's and Nain Sukh Rai's, which was not divided in the partition of 1864, in which other persons besides the plaintiff and Lachmi Narain are jointly interested, but which is not included in this suit. Two of those other persons belong to Din Dayal's branch and two to Nain Sukh Rai's branch. In that other property the plaintiff and the defendant-appellant would each be entitled to one-sixth and the rest to the remaining five sixths. Now it will be observed that as regards the property in suit the only persons interested are the plaintiff and the defendant-appellant. What is suggested is that the claim for partition of this property is bad, because it does not include a claim for partition of other property against not only the defendant-appellant but other persons who have no interest in the property in suit at all.

The cases in which it has been held that a suit will not lie for partition of a portion only of joint family property are different. No case has been cited to us in which the principle of those cases has been applied where partition is sought of property belonging exclusively to the plaintiff and the defendant. We see no reason why that principle should be extended to such a case. In Mr. Mayne's Treatise on Hindu Law, 6th Ed., pp. 647, 648, one of the exceptions to the general rule that every suit for partition should embrace all the joint family property is stated to be where a portion "is held jointly with strangers who have no interest in the family partition, and therefore cannot be made parties to the general suit for partition." The authority for this exception is *Purushottam v. Atmaram* (1). In that case there were two properties—one owned

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jointly by the family of the Parashares; the other owned jointly by the families of the Parashares and the Khandves. The plaintiffs, who were Parashares, brought a suit against the members of their family for partition of the first mentioned property only, and that property was divided among the Parashares. The same plaintiffs afterwards brought another suit against the members of both families for partition of the second property. It was held that the claim was not barred by section 43 of the Code of Civil Procedure, as the cause of action out of which it arose was different from the cause of action in the former suit, and that it could not have been joined in the former suit. The only substantial difference between the point considered in that case and the point before us is that the Parashares and the Khandes were distinct families, whereas here the plaintiff and the defendant are members of a joint Hindu family whose property has been partly divided. Still, so far as the property now in suit is concerned, the members of the family, other than the plaintiff and the defendant, are, to all intents and “purposes, strangers” to both; they have “no interest” in the partition claimed, and most of the reasoning of the learned Bombay Judges seems fully applicable. Thus Mr. Justice Parsons says (p. 598):—“It cannot be said that the claim of the plaintiffs to obtain their share of property owned jointly by them and B is founded on the same cause of action as their claim to obtain the share of property owned jointly by them and B and C. If the cause of action is founded on a refusal on the part of the defendants to divide, then the refusal in each case is that of different persons owning different rights. If it is founded on the right to claim a partition of what is joint, then the subject-matter is different, for the joint property of A and B is not the joint property of A, B and C.” Mr. Justice Ranade says (p. 600):—“This claim against the Khandves could not have been joined in the old suit for a family partition without infringing the provisions of sections 28, 29 and 44 of the Code about the misjoinder of parties and of subject-matters.” All this seems to apply equally to a case where the property not included in the suit belongs jointly to the plaintiff and the defendant, and persons who, though not “strangers” in the sense of members of another family, have no more interest than “strangers” in the property

in suit, and, if so, it seems that Mr. Mayne's third exception should be enlarged so as to cover such a case.

We think that the Court below was right, and dismiss this appeal with costs.

Appeal dismissed.

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Before Mr. Justice Knox and Mr. Justice Burkitt.

GULKANDI LAL AND OTHERS (DEFENDANTS) v. MANNI LAL (PLAINTIFF)*

Civil Procedure Code, section 373—Suit for partition—Withdrawal of suit—Joint petition by parties praying that the suit might be struck off—Subsequent suit for partition barred.

The plaintiff and the defendants in a suit for partition having arrived at a compromise, presented to the Court a joint petition asking that the suit might be struck off (*bharij kardiya jawe*). The Court passed orders accordingly in the terms of the petition, striking off the suit. The terms of the compromise were not however inserted in the decree, and were never carried out. Subsequently the plaintiff brought a second suit for partition of the same property.

Held, that it was incumbent on the plaintiff to see that the Court did its duty and recorded a proper order in the suit with reference to section 373 of the Code of Civil Procedure, and that, as he had not done so, he must be taken to have withdrawn his suit without permission to sue again, and his second suit was barred by section 373 of the Code.

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

Pandit *Moti Lal Nehru* (for whom Pandit *Mohan Lal Nehru*), for the appellants.

Mr. *W. K. Porter* and *Munshi Gobind Prasad*, for the respondent.

KNOX and BURKITT, JJ.—On the 27th July, 1889, the plaintiff-respondent to this second appeal sued the present appellants and others, and prayed for the same relief in respect of what was virtually the same subject-matter as he now sues for in this suit: the only difference as regards the subject-matter is that in the present suit a certain portion of the property, for the partition of which he originally sued, has been omitted from the plaint. In other respects the suit of 1889 and the present suit are precisely the same. Before the suit of 1889 was determined, the parties

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* Second Appeal No. 840 of 1898 from a decree of Rai Pandit Indar Narain, Subordinate Judge of Farrukhabad, dated the 28th July, 1898, confirming a decree of Babu Prithi Nath, Munsif of Kaimganj, dated the 16th March, 1898.