

order for compensation. In reference to what is stated to be the opinion of Mr. Justice Prinsep in his work on the Criminal Procedure Code, I have referred to his work, and I find that in his note on section 250 he does not express an opinion on the question, but after a reference to a case in the Madras High Court,* in which it was held that the appellate Court was not competent to award compensation under the provisions of the Code as it existed before the introduction of section 423(1)(d), merely adds the words "but see section 423(1)(d) of this Code, which enables an appellate Court to make any consequential or incidental order that may be just or proper in a case under appeal." The learned author does not here express an opinion, but merely directs attention to the section which he quotes. In a later edition of his work, namely, the 13th edition at page 250, Sir Henry Prinsep has altered his previous comments, substituting for the words which I have quoted from his earlier edition the following words:—"It is doubtful whether under the terms of section 423(1)(d) of this Code, which enables the appellate Court to make any consequential or incidental order that may be just and proper in the case under appeal, this ruling has not become obsolete." For the foregoing reasons I set aside the order of the District Magistrate in so far as he directs Rs. 5 to be paid as compensation to each of the opposite party.

1906

 BALLU
 PANDE
 v.
 CHITTAN.

*Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice
 Sir George Knox.*

 1906
 April 21.

BISHESHAR DAS AND ANOTHER (PLAINTIFFS) v. RAM PRASAD AND
 ANOTHER (DEERDANTS).†

*Joint Hindu family—Partition—Suit for partition dismissed for default—
 Fresh suit—Civil Procedure Code, sections 13, 102 and 103.*

Where a suit for partition was dismissed for default and a fresh suit was instituted, held that the right to enforce partition is a legal incident of a joint tenancy, and as long as such tenancy subsists so long may any of the joint tenants apply to the Court for partition of the joint property. *Nasrat-ullah v. Mujib-ullah* (1), followed.

 * (1875) 8 Mad., H. C. Rep., App. vii.

† Second Appeal No. 1035 of 1904, from a decree of J. H. Cuming, Esq., District Judge of Aligarh, dated the 11th of July, 1904, confirming a decree of Maulvi Maula Bakhsh, Additional Subordinate Judge of Aligarh, dated the 30th of April, 1904.

(1) (1891) I. L. R., 18 All., 309.

1906

BISHESHAR
DAS
v.
RAM
PRASAD.

THE plaintiffs and defendants were members of a joint Hindu family. The plaintiffs filed a suit for partition of the joint assets, but the suit was dismissed for default on July 27th, 1903.

In December, 1903, the plaintiffs instituted a fresh suit for division of the assets alleging a fresh demand on their part in October, 1903, and a fresh refusal by the defendants.

The Court of first instance (Additional Subordinate Judge of Aligarh) dismissed the suit under section 102 of Code of Civil Procedure.

The lower appellate Court (District Judge of Aligarh) held that the effect of the prior decree was to deprive the plaintiffs of the right to partition; that there was no proof of any fresh demand being made, and that it would not affect the case if there was: that if the prior suit was dismissed under section 102 of the Code of Civil Procedure the present suit was barred by section 103; that if the former suit was regularly dismissed the remedy was by appeal and that remedy had not been sought.

The plaintiffs appealed to the High Court.

Mr. *Abdul Majid* and *Babu Durga Charan Banerji*, for the appellants.

Dr. *Satish Chandra Banerji*, for the respondents.

STANLEY, C.J. and KNOX, J.—The principle laid down in the case of *Nasrat-ullah v. Mujib-ullah* and others (1) appears to us to govern this case. In that case it was held that where a decree declaring a right to partition has not been given effect to by the parties and the decree has become by lapse of time or otherwise unenforceable, it is competent to the parties, or any of them, if they continue still to be interested in the joint property, to bring a fresh suit for a declaration of their right to partition. In the course of their judgment the learned Chief Justice, Sir John Edge, and one of us stated as follows:—“It appears to us that when a decree declaring a right to partition has not been given effect to by the parties proceeding to partition in accordance with it, it is competent to the parties or any of them, if they still continue to be interested in the joint property, to bring another suit for a declaration of a right to a partition in case their right to partition is called in question at a time

when by reason of limitation or otherwise they cannot put into effect the decree first obtained. In this respect suits for declaration of right to partition differ from most other suits. So long as the property is jointly held so long does a right to partition continue. When a person having a right to partition, and desiring to partition, has his right challenged, it appears to us he can maintain a suit for a declaration, provided his prior decree is not still enforceable." As it appears to us, the right to enforce partition is a legal incident of a joint tenancy, and so long as such tenancy subsists so long may any of the joint tenants apply to the Court for partition of the joint property. For these reasons the Courts below have erred in dismissing the suit. We must therefore allow the appeal. As the case in both the lower Courts was determined upon a preliminary point, we set aside the decree and remand the suit to the Court of first instance through the lower appellate Court, with directions that it be reinstated on the file of pending cases in its original number and be disposed of on the merits. Costs here and hitherto will abide the event.

1906

 BISHESHAR
DAS
v.
RAM
PRASAD.

Before Sir John Stanley, Knight, Chief Justice.

EMPEROR v. JAGDEO SINGH.*

 1906
April 21.

Criminal Procedure Code, section 110—Security for good behaviour—Subsequent conviction—Forfeiture of bond—Imprisonment for unexpired portion of period for which security had been given.

Held that where a person has given security for good behaviour and his security is subsequently forfeited the amount of his forfeited bond may be exacted, but he cannot be also committed to prison for the unexpired portion of the term for which security had been taken.

THE applicant, Jagdeo Singh, was in June, 1904, called upon to furnish security for his good behaviour for three years or in default to suffer rigorous imprisonment. The security was furnished and Jagdeo Singh was released.

On October 2nd, 1905, Jagdeo Singh was convicted of the offence of criminal trespass. Jagdeo Singh was on October 16th sent to prison for the unexpired balance of the three years,

* Criminal Reference No. 176 of 1906.