

jurisdiction, and therefore it appears to me most consonant with equity to place the parties as far as possible in the position they occupied before the judgment-debtor moved the Court to pass the order which it had no jurisdiction to pass. On that date, if in fact a trespass had been committed by the decree-holder, it is the judgment-debtor who would have to bring a suit for redress. In no case that I can conceive would the decree-holder have had recourse to the Court. I accordingly pass this order, namely, that the orders of the Courts below be set aside with costs.

*Application allowed.*

## APPELLATE CIVIL.

1905

DEBI DAS  
v.  
EJAZ  
HUSAIN.

1905

June 19.

*Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice  
Sir William Burdett.*

JANKI PRASAD (DEFENDANT) v. GAURI SAHAI (PLAINTIFF) AND OTHERS  
(DEFENDANTS).\*

*Civil Procedure Code, section 396—Suit for partition of immovable property  
—Commissioner appointed to make partition—Court not competent to  
modify commissioner's report.*

Where in a suit for partition of immovable property a commissioner has been appointed under section 396 of the Code of Civil Procedure to ascertain the shares of the parties, the Court when passing its final decree must either accept or reject the report of the commissioner *in toto*, and is not competent to modify it. *Shah Muhammad Khan v. Hanwant Singh* (1) referred to.

THIS was for suit for partition amongst several co-sharers of certain house property. The Court of first instance (Subordinate Judge of Moradabad), after passing a preliminary decree for partition, appointed the amin a commissioner under section 396 of the Code of Civil Procedure for the purpose of fixing the specific shares of the parties. The amin made a report, to which various objections were taken by the parties. On the 3rd of September 1903 the Subordinate Judge passed his final decree in the suit. He did not, however, accept in its entirety the commissioner's report, but modified it by directing that a

\* First appeal No. 278 of 1903 from a decree of Lala Mata Prasad, Subordinate Judge of Moradabad, dated the 3rd of September 1903.

(1) Weekly Notes, 1898, p. 45.

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sum of Rs. 100 should be paid by each of three parties to the plaintiff. Janki Prasad, one of the defendants, appealed to the High Court.

Mr. *Ishaq Khan* and Dr. *Tej Bahadur Sapru*, for the appellants.

Munshi *Gokul Prasad*, for the respondents.

STANLEY, C. J., and BURKITT, J.—It appears to us that the learned Subordinate Judge has acted in contravention of the provisions of section 396 of the Code of Civil Procedure in modifying the report of the commissioner appointed by him under that section and passing a decree upon the report so modified. The suit out of which the appeal has arisen is one for partition of joint family property. A preliminary decree was passed declaring the rights of the parties, but inasmuch as the Court had not sufficient information before it to enable it to effect a partition by metes and bounds, the procedure laid down in the section to which we have referred was applied and a commissioner was appointed. Now, as pointed out by a Bench of this Court in the case of *Shah Muhammad Khan v. Hanwant Singh* (1) in a suit for partition of immovable property not paying revenue to Government, the Court may, if it has the necessary information before it to enable it to do so, pass a decree not merely declaring the rights of the respective parties but actually fixing the particular areas or rooms or parts of the house of which possession is to be given to the parties respectively on partition. But as a rule the Court has not the necessary information before it to enable it to do so, and therefore it becomes necessary for it to appoint a commissioner to make the partition according to the rights of the parties as ascertained and set forth in the preliminary decree. The course to be adopted in such a case is clearly laid down in the section. The commissioner when appointed prepares and signs a report, which is thereupon annexed to the commission and transmitted to the Court. The course which the Court should then adopt is, after hearing any objections which the parties may make to the report, either to quash the report and issue a new commission or pass a decree in accordance with the report. It will be seen that no power is given

(1) Weekly Notes, 1898, p. 45.

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to the Court to pass a decree otherwise than in accordance with the report. This power is withheld for obvious reasons. The commissioner when appointed is empowered to examine witnesses, to make all due inquiries and to inspect the property. He is the person to make the partition according to the rights of the parties as ascertained in the preliminary decree. His report therefore must either be accepted in its entirety or rejected. In this case unfortunately there were some small matters in difference between the parties in regard to the report of the commissioner which were laid before the Court and considered. A sum of Rs. 300 was awarded to the plaintiff by the learned Subordinate Judge, which had not been provided for by the report. Technically, therefore, the objection raised by the appellants is well founded, but it seems somewhat unfortunate that so much time has been spent and expense incurred in obtaining a report which now will prove infructuous. We think that the appellant might well have accepted the slight modification made by the learned Subordinate Judge with a view to carry out an equitable partition between the parties. He is, however, within his rights in presenting this appeal, and we do not see that there is any way out of the difficulty except to allow the appeal, which we accordingly do, set aside the decree of the Court below, and remand the case to that Court with a view to the carrying out of the partition according to law. If the Court considers it necessary to appoint a commissioner to make this partition it must issue a new commission and pass a decree in accordance with the report of the commissioner appointed thereunder or else quash it. We make no order as to the costs of the appeal.

*Appeal decreed.*