

APPELLATE CIVIL.

1910
January 20.*Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Piggott.*

KURIYA MAL (PLAINTIFF) v. BISHAMBHAR DAS (DEFENDANT).*

Partition—Appeal—Appeal against preliminary decree after passing of the final decree.

After the passing of the final decree in a suit for partition, no appeal will lie which does not challenge the final as well as the preliminary decree. *Mackenzie v. Nar Singh Sahai* (1) followed. *Uman Kumari v. Jarbandhan* (2) distinguished.

THIS was a suit for partition of a house. On June 25th, 1908, the court of first instance, the Munsif of Ghaziabad, passed a preliminary decree in favour of the plaintiff, declaring his right to possession by partition of a half share in the house in suit. On June 30th, 1908, the same court passed a final decree, giving the plaintiff possession of a specified half-share in the house according to a plan which had in the meantime been prepared by a Commissioner, and adding certain orders as to costs, which had been held over at the time the preliminary decree was passed. On July 28th, 1908, one of the defendants appealed to the court of the District Judge of Meerut against the preliminary decree of June 25th, 1908, without impeaching the final decree, which had in the meantime been passed. The District Judge passed a decree which purported to be in modification of the decree of June 25th, 1908, and directed that the plaintiff's claim in respect of a one-fourth share in the house in dispute be dismissed, besides also modifying the order as to costs.

The plaintiff appealed to the High Court and raised the preliminary point that no appeal would lie merely from the preliminary decree for partition, when a final decree had been passed.

Munshi *Haribans Sahai* (with him Pandit *Mohan Lal Sandal*) for the appellant.

Dr. *Satish Chandra Banerji* (for Babu *Jogindro Nath Chaudhri*) for the respondent.

*Second Appeal No. 1025 of 1908 from a decree of Louis Stuart, District Judge of Meerut, dated the 20th of August 1908, modifying a decree of Harihar Lal, Bhargava, Munsif of Ghaziabad, dated the 25th of June 1908.

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STANLEY, C. J., and PIGGOTT, J.—This was a suit for partition of a certain house. On June 25th, 1908, the court of first instance, the learned Munsif of Ghaziabad, passed a preliminary decree in favour of the plaintiff, declaring his right to possession by partition of a half share in the house in suit. On June 30th, 1908, the same court passed a final decree, giving the plaintiff possession of a specified half-share in the house according to a plan which had in the meantime been prepared by a Commissioner, and adding certain orders as to costs, which had been held over at the time the preliminary decree was passed. On July 28th, 1908, one of the defendants appealed to the court of the District Judge of Meerut against the preliminary decree of June 25th, 1908, without impeaching the final decree, which had in the meantime been passed. The learned District Judge passed a decree which purports to be in modification of the decree of June 25th, 1908, and directs that the plaintiff's claim in respect of a one-fourth share in the house in dispute be dismissed, besides also modifying the order as to costs. The plaintiff coming to this Court on second appeal raises as a preliminary point the plea that where in a partition suit a final decree has been made it is not open to an appellant to challenge the correctness of the preliminary decree without also appealing against the final decree. We have been referred to no direct authority of the Court on the point. The respondent before us relies, as did the learned District Judge, on the decision of this Court in *Uman Kumwari v. Jarbandhan* (1). It was there laid down that the fact that a suit had been decided by the court of first instance in compliance with an order of remand made under section 562 of the Code of Civil Procedure (Act XIV of 1882) is no bar to the filing of an appeal from the order of remand or to the hearing of such an appeal. In our opinion that ruling does not cover the case now before us. A right of appeal from an order of remand under section 562 of the Civil Procedure Code of 1882 was expressly given by section 588 of the said Code, and this Court proceeded upon the ground that such right of appeal could not be taken away in the absence of some direct provision to the contrary. Moreover, in considering what the effect of the reversal of an

(1) (1909) I. L. R., 30 All., 479.

order of remand, under section 562 aforesaid, would be, this Court was careful to point out that anything done in pursuance of such an order would become *ipso facto* of no effect on the reversal of the said order, because the court concerned would have no jurisdiction to pass any further order in the case (except by way of review), unless empowered to do so by the order under section 562 itself. No such consideration arises in the case now before us, as it is clear that the learned Munsif after passing his preliminary decree had jurisdiction, and indeed was bound to proceed in due course to pass a final decree in the case. It seems to us that a serious anomaly would be created by the modification of the preliminary decree of June 25th, 1908, while the final decree of June 30th, 1908, remained in force and had not been appealed against. There is direct authority on the point in the case of *Mackenzie v. Narsingh Suhai* (1), which decision is in favour of the contention raised before us by the appellant. We follow this ruling, and set aside accordingly the order and decree of the lower appellate court and restore that of the court of first instance. The plaintiff appellant will get his costs from the defendant respondent in this and the lower appellate court.

Appeal decreed.

PRIVY COUNCIL.

UDAI RAJ SINGH AND OTHERS (PLAINTIFFS) v. BHAGWAN BAKHSH SINGH AND ANOTHER (DEFENDANTS).

[On appeal from the Court of the Judicial Commissioner of Oudh at Lucknow].

Transfer of immovable property in Oudh—Oral gift inter vivos—Act No. I of 1869 (Oudh Estates Act), sections 13, 16 and 17—Act No. IV of 1882 (Transfer of Property Act), section 123—Deed, construction of—whether testamentary or deed of gift inter vivos—Legatee predeceasing testator.

Under the Oudh Estates Act (I of 1869) immovable property is not transferable by gift *inter vivos* otherwise than by registered deed.

Although an adopted son is exempt from the operation of section 13, as being one of the special class therein designated, a gift to him to be valid must comply with the provisions of sections 16 and 17 of the Act; the two sets of sections not being contradictory of each other.

By a deed dated the 5th May, 1887, executed by a taluqdar in favour of his adopted son, the predecessor in title of the appellant, the executant (after

Present :—Lord MACNAGHTEN, Lord COLLINS, Sir ARTHUR WILSON and Mr. AMERU ALL.

(1) (1909) I. L. R., 36 Calc., 762.

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