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It is perfectly clear that the defendants distinctly claimed a proprietary title, or at least a portion of the bundle of rights which go to make up proprietary title. An appeal did lie to the District Judge. I, therefore, admit the application, set aside the order of the District Judge and direct the Judge to readmit the appeal on its original number and proceed to hear and decide it according to law. I make no order as to costs.

Application allowed.

APPELLATE CIVIL.

1913

January, 10.

Before Sir Henry Richards, Knight, Chief Justice, and Mr. Justice Banerji.

BHARAT INDU AND OTHERS (PLAINTIFFS) *v.* YAKUB HASAN AND ANOTHER (DEFENDANTS).*

Civil Procedure Code (1908), *order XX, rule* 18—*Partition—Appeal—Preliminary decree—Subsequent interlocutory order giving directions for preparation of final decree.*

In a suit for partition a preliminary decree was passed and confirmed on appeal. When the case went back to the court of first instance for the passing of a final decree that court passed an order directing that actual partition should be made in accordance with certain directions then given by it. *Held* that no appeal would lie against such an order, but its propriety could be questioned in appeal from the final decree. The Code of Civil Procedure contemplated the preparation of only one preliminary decree, and the order in question could not be regarded as more than an interlocutory order containing directions as to the preparation of the final decree.

THIS was an appeal under section 10 of the Letters Patent from a judgement of a single Judge of the Court. The facts of the case are set forth in the judgement under appeal, which was as follows :—

"This was a suit for partition of certain houses. A preliminary decree was passed dismissing a portion of the claim, but declaring the plaintiff's right to possession by partition of certain specified shares in each of the two houses. This declaration was, however, subject to a condition, viz., that a smaller fractional share in each house, that is to say, a portion of the share declared to belong to the plaintiffs, was subject to a charge of Rs. 877-0-0 in favour of the defendant Yakub Husain and directing that the plaintiffs should pay the same before they could obtain possession. That decree was contested up to Letters Patent appeal before the Court, and was substantially affirmed. The plaintiffs then presented to the court of first instance an application to the effect that they had no desire to redeem the fractional shares subject to the charge of Rs. 877, but could be content with actual partition of a smaller share in each house arrived

* Appeal No. 79 of 1912 under section 10 of the Letters Patent.

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at by deducting the share subject to the charge from the share decreed in their favour in the preliminary decree. The learned Subordinate Judge, on receiving this application, proceeded to frame certain issues. He came to the conclusion that the plaintiffs were in effect abandoning a portion of their claim, and that they had a right to do this at any stage of the suit, even after the passing of the preliminary decree. Dealing with the question on this basis, he arrived at the conclusion that the plaintiffs were entitled without making any payment at all, to a share of $\frac{25}{105}$ in one house, and of one-third in the other. He ordered separation by actual partition by metes and bounds of the shares thus ascertained from the rest, of each of the houses in question, and a formal order was drawn up which undoubtedly reads like a preliminary decree in a partition suit and fulfils all conditions of such a decree, embodying the declaration and the direction above stated. An appeal against this having been lodged in the court of the District Judge, the learned District Judge has held that the order complained of is not a decree and that no appeal lies against the same. This order is supported before me on behalf of the respondents on the ground that there can not be more than one preliminary decree in a suit for partition, and that the defendant should be content to wait for the passing of a final decree in the suit, when he would be entitled in appeal from such a decree to challenge the correctness of the order now in question. After examining the record it seems to me that this much is certainly clear, viz., that the learned Subordinate Judge concerned himself to the the passing a second or supplementary preliminary decree in the suit, as if on an amended plaint. It is a little difficult to discuss the abstract question whether an appeal lies or not, without allowing it to be complicated by the further question whether the order complained of is a good order in law, or one which the learned Subordinate Judge was entitled to pass. I take the defendant's contention to be that the learned Subordinate Judge had no right to do anything beyond correctly interpreting and carrying out the terms of the preliminary decree before him. If the learned Subordinate Judge had dealt with the matter from this point of view, that is to say, that the only question before him was whether the preliminary decree as passed would or would not bear a certain interpretation, an order passed by him on this basis would be a mere interlocutory order only to be challenged by way of appeal from the final decree. The order before me, however, is not of this nature. It seems to me that the learned Subordinate Judge dealt with the matter upon a new set of facts which had come into existence since the passing of the preliminary decree which had been appealed to this Court. He considered that the plaintiffs were abandoning a portion of their claim and had a right to take such a step, with or without any formal amendment of the plaint, even after a preliminary decree had been passed. If this view is correct, it necessarily involves the passing of a second preliminary decree on a new set of facts. There is no force in the analogy which was pressed upon me in argument between the present case and that of a plaintiff in a partition suit, who acquires, by inheritance or otherwise, a further share in the property in suit after the preliminary decree has been passed. If, however, the learned Subordinate Judge was mistaken in the point of view from which he regarded the plaintiff's application, and if as a matter of fact nothing could happen which would justify the passing of a second

or supplementary decree, then his whole proceedings are open to question because he did not confine himself to merely interpreting the preliminary decree as originally passed, but undoubtedly thought it to be susceptible of modification in view of facts which had subsequently occurred, namely, the abandonment by the plaintiffs of a portion of their claim. To sum up, therefore, my opinion regarding this appeal,' I hold that it is not in itself an impossibility that there should be a second preliminary decree passed in a suit for partition if such second decree is based upon facts or circumstances alleged to have come into existence after the passing of the first preliminary decree. I hold that the question whether in the present case any circumstance had or had not occurred since the passing of the first preliminary decree sufficient to justify the passing of a second preliminary decree, is a question which has to do with the merits of the decision now called in appeal and not with the question whether an appeal lies. I hold that the order appealed against is in fact a second preliminary decree in this partition suit and was intended to be a second preliminary decree, and was open to appeal to the District Judge. I therefore set aside the order of the lower appellate Court and remand this case to that court under the provisions of order XLI, rule 23, of the Code of Civil Procedure, directing it to be re-admitted to the file of pending appeals and dispose it of accordingly. Costs will abide the event."

Babu *Sarat Chandra Chaudhri* (for Dr. *Satish Chandra Banerji*), for the appellants :—

The respondents should have waited till a final decree was passed. The law only contemplated one preliminary decree. See Code of Civil Procedure, order XX, rule 18. The court could have passed a preliminary decree with directions for further inquiry. Matters could be inquired into with a view to facilitate the preparation of the final decree. The judge did not make a second preliminary decree. He laid down the lines on which the final decree was to be passed. Any objection could be taken in appeal against the final decree. At this stage no appeal lay. The order passed was not a decree.

Babu *Piari Lal Banerji*, for the respondents :—

Any directions for preparation of the final decree were in the nature of interlocutory orders; but the court could not pass an amended decree in substitution of the first preliminary decree. No appeal lay against an interlocutory order; but this order went beyond that; for example, if after the preliminary decree one of the defendants dies and the plaintiff claims that his share has been augmented and the court makes an adjudication, could not then he appeal from that order? It was submitted that he could. If a court reviews its judgement after appeal the order is not a nullity

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and an appeal lies. A decree was any order declaring the rights of parties and the second order here did so, inconsistently with the first decree.

RICHARDS, C.J., and BANERJI, J.:—The facts out of which this appeal arises are very shortly as follows:—There was a suit for partition. A preliminary decree was made. Appeals right up to a Letters Patent appeal were taken against that preliminary decree, but without success, and the decree of the court which made the preliminary decree for partition was confirmed. On the case going back to the court of first instance for the passing of a final decree an application was made by the plaintiff in which he asked to be allowed to abandon certain shares to which he had been declared entitled subject to a charge. His case apparently was that he would not press for these shares because they were not worth the charge. He also stated that, having regard to certain events which had happened whilst the appeals were pending, the shares of certain other persons had been acquired by him, and he asked that his share on partition might be augmented accordingly. The court of first instance went into these matters and granted the plaintiff's application and directed that actual partition should be made in accordance with his decision. There was an appeal against this decision to the lower appellate Court. It held that no appeal lay inasmuch as no final decree had as yet been made. An appeal was then preferred to this Court, and a learned Judge of this Court set aside the decree of the lower appellate Court holding that the decision of the court of first instance appealed against was really a second preliminary decree. We think that the decision of the learned Judge of this Court was not correct. The Code of Civil Procedure contemplates one preliminary decree and no more. We do not for a moment suggest that any hardship has been done to the respondent by the decision of the court of first instance. We, however, think that we should state in our judgement, that it must be clearly understood that it will be open to the respondent to challenge the propriety of the decision of the court of first instance, dated the 19th of August, 1911, after a final decree has been made in the matter. That order in our opinion is only to be regarded as an interlocutory order preparatory to the making of a final decree. We accordingly allow the appeal, set aside the order of the learned Judge of this

Court and restore that of the lower appellate court. We direct that the costs of all these proceedings shall be costs in the cause.

Appeal allowed.

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BHARAT INDU v. YAKUB HASAN.

Before Mr. Justice Tudball and Mr. Justice Muhammad Rafiq.

GULAB CHAND (DEFENDANT) *v.* SHANKAR LAL, (PLAINTIFF) AND OTHERS (DEFENDANTS.)*

1913

January, 21.

Civil Procedure Code (1908), *order V, rules* 1 *and* 2 ; *order IX, rule* 13—Ex parte *decree—Appearance of defendant in answer to a preliminary application not equivalent to appearance in answer to the plaint.*

Held that the fact that before the admission of a suit one of the proposed defendants had appeared by pleader on a miscellaneous application for his appointment as guardian *ad litem* to a minor defendant, did not absolve the court from the necessity of serving such defendant, when the suit was admitted, with a copy of the plaint and notice of the date fixed for hearing.

THE facts of this case are fully stated in the judgement of the Court.

Babu *Lalit Mohan Banerji*, for the appellant.

Mr. *B. E. O'Conor* and Pandit *Mohan Lal Sandal*, for the respondents.

TUDBALL and MUHAMMAD RAFIQ, J J.:—The appellant in this case was the defendant in a suit, in the court below, which was decreed *ex parte* against him. He applied under order IX, rule 13, of the Code of Civil Procedure to have the *ex parte* decree set aside on the ground that summons had not been served on him and therefore he was unable to appear and defend the suit. The suit was against the appellant and his minor brother Har Bilas as owners of the firm Gulab Chand Har Bilas. Har Bilas was a minor, and when the plaint was filed there was an application by the plaintiff asking the court to appoint Gulab Chand as guardian of the minor. Notice of this application was issued to Gulab Chand. On the 27th of July, 1911, he filed a vakalatnama and objected to his appointment as guardian of the minor. His objection was allowed, and finally on the 1st of September, one Musammat Champo was appointed guardian. On the same day the suit was registered and summons was ordered to issue. Summons was issued to Gulab Chand, but it was returned unserved. Therefore the court passed an order that as there was a vakalatnama on the

* First Appeal No. 66 of 1912 from an order of Baijnath Das, Subordinate Judge of Agra, dated the 30th of March, 1912.