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debtor was in possession or had acquired a title in any other way, he would in our opinion have a "saleable interest" and the sale could not be set aside. The parties may adduce any further evidence relevant to this issue. The case will be put up on return of the finding and the usual ten days will be allowed for filing objections.

Issue remitted.

FULL BENCH.

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June, 2.

Before Sir Henry Richards, Knight, Chief Justice, Mr. Justice Tudball and Mr. Justice Chamier.

KANHAIYA LAL AND OTHERS (DEFENDANTS) v. TIRBENI SAHAI AND OTHERS (PLAINTIFFS)*.

Civil Procedure Code (1908), sections 96 and 97—Partition—Appeal—Passing of final decree no bar to the hearing of an appeal against the preliminary decree.

When an appeal has once been filed and is pending against the preliminary decree in a suit for partition, the passing of a final decree does not render the appeal nugatory. The final decree depends upon the preliminary decree, and if, as the result of an appeal, the latter is set aside, the former must fall with it.

Kuriya Mal v. Bishambhar Nath (1) overruled. *Khirodamoyi Dasi v. Adhar Chandra Ghose* (2) dissented from. *Muhammad Akhtar Husain Khan v. Tasadduq Husain* (3) and *Lakshmi v. Maru Devi* (4) followed. *Abdul Jalil v. Amar Chand Paul* (5) referred to.

THE facts of the case are, briefly, as follows:—

On the 26th of April, 1912, the court made a preliminary decree in a suit for partition. An appeal was filed, but the lower court, on the 28th of June, 1912, during the pendency of the appeal, passed a final decree on the lines of the preliminary decree. No appeal was filed against the final decree. When the appeal came on for hearing a preliminary objection was raised to the effect that no appeal having been filed against the final decree the appeal could not be maintained. The lower appellate court allowed the objection and dismissed the appeal. The defendants appealed to the High Court.

* Second Appeal No. 465 of 1913, from a decree of E. C. Allen, District Judge of Mainpuri, dated the 18th of April, 1913, confirming a decree of Banke Behari Lal, Subordinate Judge of Mainpuri, dated the 26th of April, 1912.

(1) (1910) I. L. R., 32 All., 225. (3) (1912) I. L. R., 34 All., 493.

(2) (1912) 18 C. L. J., 321. (4) (1911) I. L. R., 37 Mad., 29.

(5) (1913) 18 C. L. J., 223.

Munshi *Gulzari Lal*, for the appellants, submitted that the point for decision in the case was whether or not, in a partition suit where both preliminary and final decrees had been passed, an appeal from a preliminary decree filed before the passing of the final decree could be proceeded with without the final decree having been appealed against. The Code of Civil Procedure laid down a complete scheme for preliminary decrees and provided for appeals against such decrees. The word "decree" as defined in section 2, clause 2, of the Code of Civil Procedure included the preliminary as well as the final decree and applied to suits for partition, partnership accounts, foreclosure and sale, etc. Order XX, rules 15, 16 and 18, dealt with the preparation of preliminary decrees in partnership and partition suits. Section 96 of the Code of Civil Procedure allowed appeals from every decree passed by an original court, and section 97 precluded appeals from final decrees where no appeal had been preferred from preliminary decrees. The preliminary decree was the basis of the final decree, and should be considered as independent of the final decree. Section 97 made it imperative to appeal from the preliminary decree. The decision of a case on remand was no bar to the hearing of an appeal against the order of remand itself; *Uman Kunwari v. Jarbandhan* (1) was in point, and the analogy applied to appeals from preliminary decrees in partition.

The Hon'ble Munshi *Gokul Prasad*, for the respondents, submitted that, whether the preliminary decree in a partition suit was affirmed or set aside, the final decree would remain binding unless that itself was set aside in appeal. It did not necessarily follow that by the preliminary decree being set aside the final decree would also fall. The jurisdiction of the court to pass a final decree was not determined by the passing of the preliminary decree. The jurisdiction of the court to proceed with a case on remand ceased to exist as soon as the remand order was set aside and the analogy of the remand case therefore did not hold good. Preliminary decree in a partition suit only defined certain rights of the parties and suggested the lines on which the partition was to proceed. The jurisdiction of the court did not cease to exist after the passing of the preliminary decree. The passing of a

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preliminary decree did not give jurisdiction to pass a final decree. The jurisdiction pre-existed. The final decree did not rest on the preliminary decree; *Khirodamoyi Dasi v. Adhar Chandra Ghose* (1) and *Kuriya Mal v. Bishambhar Das* (2). It was not contended that no appeal lay from a preliminary decree, but that the appeal from that decree could not be heard unless the final decree also had been appealed against; *Sheonath v. Ramnath* (3) and *Maskenzie v. Narsingh Suhay* (4). If the final decree gave to the parties greater or smaller shares than that given by the preliminary decree, at the worst the former would only be an incorrect decree and could be appealed against. Even where the preliminary decree failed in appeal the final decree remained outstanding. An appeal from final decree was necessary. *Narain Das v. Balgobind* (5) and *Baikuntha Nath Dey v. Nawab Salimulla Bahadur* (6), *Abdul Jalil v. Amar Chand Paul* (7), *Muhammad Akhtar Husain Khan v. Tasaddug Husain* (8) and (*contra*) *Lakshmi v. Maru Devi* (9) were also referred to.

Munshi *Gulzari Lal*, was not heard in reply.

RICHARDS, C. J.—This appeal arises out of a suit for partition. On the 26th of April, 1912, the court of first instance made a preliminary decree for partition. On the 12th of June, 1912, the defendants filed an appeal. On the 28th of June the first court, notwithstanding that an appeal against the preliminary decree was pending, made a final decree on the lines of its preliminary decree. On the 18th of April, 1913, the appeal against the preliminary decree came on for hearing. Objection was taken that the appellant, not having appealed against the final decree of the 28th of June, 1912, could not maintain his appeal against the preliminary decree. The court allowed this objection and dismissed the appeal. The defendants have now come to this Court in second appeal. The question which we have to decide is whether or not the fact that the defendants did not appeal against the final decree precludes the Court from hearing the appeal against the preliminary decree. Section 2, clause (2) of the Code of Civil Procedure

(1) (1912) 18 C. L. J., 321.

(5) (1911) I. L. R., 33 All., 528.

(2) (1910) I. L. R., 32 All., 225.

(6) (1907) 12 C. W. N., 590.

(3) (1865) 10 Moo. I. A., 413.

(7) (1913) 18 C. L. J., 223.

(4) (1909) I. L. R., 36 Calc., 762.

(8) (1912) I. L. R., 34 All., 493.

(9) (1911) I. L. R., 37 Mad., 29.

defines a decree as including a preliminary decree. Section 96 gives a general right of appeal against decrees. Section 97 is as follows :—
 “Where any party aggrieved by a preliminary decree passed after the commencement of this Code does not appeal from such decree, he shall be precluded from disputing its correctness in any appeal which may be preferred from the final decree.” This last provision is not contained in the Code of 1882. I may point out that in a suit like the present more often than not the appellant against a preliminary decree would be unable to put forward any objection against the final decree in the event of his appeal against the preliminary decree being disallowed. In all probability if the preliminary decree was sustained the final decree would follow in its line and could not be challenged. In all such cases the only object of appeal against the final decree would be to keep the appeal against the preliminary decree alive. I have already given my reasons for holding that the mere fact that there is no appeal against the final decree is no reason for not hearing the appeal against the preliminary decree on its merits, in the case of *Muhammad Akhtar Husain Khan v. Tusuddiq Husain* (1). No doubt a contrary view was taken in the case of *Kuriya Mal v. Bishambhar Das* (2). The learned Chief Justice at page 227 says :—“It seems to us that a serious anomaly would be created by the modification of the preliminary decree of the 25th of June, 1908, while the final decree of the 30th of June, 1908, remained in force and had not been appealed against.”

It seems to me that these remarks proceeded upon the erroneous assumption that the final decree remained in force after the preliminary decree upon which it was based had been set aside. In my opinion in a suit for partition when the preliminary decree is set aside on appeal the final decree which is based upon it falls to the ground. If I am right in this, there is no foundation for the supposed anomaly which the learned Chief Justice apprehended. It has been held by the Calcutta High Court that the final decree continued after the preliminary decree had been set aside, but all these decisions proceeded on the basis that a party could challenge the correctness of the preliminary decree on an appeal from the

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final decree. The provisions of the Code to which I have referred above now set this matter absolutely at rest. A party to a suit for partition who has not appealed against the preliminary decree can no longer challenge the correctness of that decree by an appeal against the final decree. In the case of *Khirodamoyi Dasi v. Adhar Chandra Ghose* (1) a bench of the Calcutta High Court decided that, notwithstanding the provisions of section 97 of the Code of Civil Procedure, the final decree still stands. The learned Judges, after quoting the section, say:—"The section does not, however, relieve the person who appeals from the preliminary decree from the necessity of appealing against the final decree, nor does it provide, how, 'if the preliminary decree is contrary to the terms of the final decree, the final decree is to be interfered with after it has been allowed to stand without any appeal being preferred against it.'" With great respect to the learned Judges I think they overlooked that the whole foundation of the rulings in Calcutta was based upon the opinion of that court that a party could challenge the correctness of the preliminary decree upon an appeal against the final decree. The provisions of the Code which they themselves quote show that this can be no longer done. In the course of the arguments the case of *Lakshmi v. Maru Devi* (2) has been cited. The learned Judges in that case took the same view which I take in the present case. I would allow the appeal.

TUDBALL, J.—I fully agree with what the learned Chief Justice has said. Where the second decree depends for its validity upon the first, when the latter is set aside on appeal the former must go with it. Even the Calcutta High Court has resiled somewhat from the position which it took up formerly. In *Abdul Jabil v. Amar Chand Paul* (3) a bench of that Court consisting of the learned Chief Justice and Sir ASUTOSH MOOKERJEE held that "when a preliminary decree for partition has been set aside on appeal, and pending appeal from the preliminary decree, a final decree was passed, no effect remained in the final decree." With that view I fully agree. I would, therefore, allow the appeal.

CHAMIER, J.—I agree. The Code gives a right of appeal against

(1) (1912) 18 C. L. J., 321. (2) (1911) I. L. R., 37 Mad., 29.

(3) (1918) 18 C. L. J., 223.

a preliminary decree and further provides that where any party aggrieved by a preliminary decree passed after the commencement of this Code does not appeal from such decree he shall be precluded from disputing its correctness in any appeal which may be preferred from the final decree. It seems to me that we are not at liberty to read into the Code any provision to the effect that the passing of the final decree shall be a bar either to the institution or the hearing of an appeal against the preliminary decree. I would allow the appeal.

BY THE COURT:—We allow the appeal, set aside the decree of the court below and remand the case to that court with directions to re-admit the appeal under its original number in file and proceed to determine it according to law. Costs here and heretofore will be costs in the cause.

Appeal decreed and cause remanded.

APPELLATE CIVIL.

Before Justice Sir Pramada Charan Banerji and Mr. Justice Chamier.

CHUNNI BIBI (DEFENDANT) v. BASANTI BIBI AND ANOTHER (PLAINTIFFS).^{*}
Act No. I of 1872 (*Indian Evidence Act*), section 92, proviso (1)—*Evidence—Consideration—Admissibility of evidence to prove that the true consideration is other than that which appears from the deed embodying the transaction.*

If one party to a deed alleges and proves that the whole of the consideration the receipt of which was acknowledged in the deed did not pass, the case falls within the first proviso to section 92 of the Indian Evidence Act, 1872, and the other party is at liberty to prove what the real consideration was. Evidence can be given to prove the real nature of the transaction.

Hanif-un-nissa v. Faiz-un-nissa (1) followed. *J. and B. v. Sobah Roy* (2) *Shah Mukhum Lal v. Baboo Sree Kishen Sing* (3) *Lala Himmat Sahai Singh v. Liewhellen* (4); *Hukumchand v. Hiralal* (5); *Indarjit v. Lal Chand* (6); *Kailash Chandra Neogi v. Harish Chandra Biswas* (7); *Nalhu Khan v. Sewak Kauri* (8); *Muhammad Yusuf v. Muhammad Musa* (9) and *Adityam Iyer v. Ramakrishna Aiyar* (10), referred to.

THE facts of this case were as follows:—

^{*} First Appeal No. 293 of 1913, from a decree of B. J. Dalal, District Judge of Benares, dated the 23rd of June, 1913.

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| (1) (1911) I. L. R., 38 All., 340. | (6) (1895) I. L. R., 18 All., 168. |
| (2) (1886) I. L. R., 17 Calc., 176 (note). | (7) (1900) 5 C. W. N., 158. |
| (3) (1868) 12 Moo. I. A., 157. | (8) (1911) 15 C. W. N., 408. |
| (4) (1885) I. L. R., 11 Calc., 486. | (9) Weekly Notes, 1907, p. 181. |
| (5) (1876) I. L. R., 3 Bom., 159. | (10) (1913) 25 M. L. J., 602. |

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