

## APPELLATE CIVIL.

1917  
June, 28.

*Before Mr. Justice Piggott and Mr. Justice Ryves.*

ILIAS AHMAD AND OTHERS (DEFENDANTS) v. BULAQI CHAND (PLAINTIFF).<sup>\*</sup>  
*Act No. IV of 1893 (Partition Act), section 4—Suit for partition—Undertaking  
by defendants to purchase plaintiff's share in the subject matter of the suit.*

Where the defendant to a suit for partition by metes and bounds has definitely undertaken, according to the provisions of section 4 of the Partition Act, 1893, to purchase the share of the plaintiff in the property sought to be partitioned, he cannot be permitted to resile from his undertaking, and the court is bound to direct a sale.

THIS was a suit for partition of a house. The plaintiff's suit was resisted upon a variety of grounds, but in their written statement the defendants claimed the benefit of section 4 of the Partition Act, 1893, and made an unconditional offer to purchase the plaintiff's share. The court of first instance decreed a partition by metes and bounds. The defendants appealed against that decree, and obtained its reversal upon the ground that they had claimed the benefit of section 4 of Act No. IV of 1893. On this the first court proceeded to value the share and passed a simple money decree in favour of the plaintiff for the sum awarded on account of compensation for the house and costs of the suit. Against this decree the defendants appealed and their appeal was dismissed. The defendants thereupon appealed to the High Court.

*Dr. S. M. Sulaiman*, for the appellants.

*Munshi Gokul Prasad*, for the respondent.

PIGGOTT and RYVES, JJ. :—Putting on one side a small matter of detail which is not in issue now before us, the essential point to be determined in this second appeal is the following: The plaintiff respondent and the defendants appellants are the joint owners of a certain house, the plaintiff's share being  $\frac{2}{3}$  and that of the defendants appellants  $\frac{1}{3}$ . The plaintiff sued for partition of his share. His suit was resisted upon a variety of grounds; but in paragraph 7 of the written statement the defendant did claim the benefit of section 4 of the Partition Act, No. IV of 1893; and did make an unconditional offer to purchase

<sup>\*</sup> Second Appeal No. 452 of 1916, from a decree of Ganga Sahai, Subordinate Judge of Moradabad, dated the 1st of October, 1915, confirming a decree of Ganga Nath, Munsif of Sambhal, dated the 15th of July, 1915.

the plaintiff's share. The court of first instance decreed a partition by metes and bounds, and it would seem that a final decree was actually passed. The defendants went up in appeal against that decree and obtained its reversal, on the ground that they had claimed the benefit of section 4 of Act IV of 1893 and were entitled to a decree for the sale to them of the plaintiff's share. On this the first court proceeded to value that share at Rs. 1,062-3-8, and, after certain further complications, a decree was passed which, in form, is a simple money decree in favour of the plaintiff for the sum awarded on account of compensation for the house together with the costs of the suit. To avoid misunderstanding, we may note that the decree actually passed was for a sum of Rs. 1,020-7-8 and costs, the award having been slightly reduced in consequence of an agreement come to by the parties upon a question of detail. Against this decree the defendants appealed and in their memorandum of appeal they took a number of objections to the amount awarded to the plaintiff as compensation, but they took no objection against the form of the decree passed. The learned Subordinate Judge went thoroughly into the questions raised by the memorandum of appeal before him, decided them all against the defendants, and dismissed their appeal, affirming the decree of the first court. The defendants now come to this Court in second appeal, contending that the form of the decree passed is wrong, and that there should have been a conditional decree for sale subject to payment by the defendants of Rs. 1,020-7-8 within a period to be fixed by the court, with an alternative provision that, in the event of the defendants failing to pay this sum, the plaintiff shall be entitled to proceed to the partition of his share by metes and bounds. In substance, therefore, the defendants claim that they should be allowed an opportunity of resiling from the offer made by them to purchase the plaintiff's share at a valuation. We might perhaps dispose of this matter by saying that the point is one which the defence, if it intended to raise at all, ought to have taken before the lower appellate court, and that we are not disposed to entertain it at the stage of second appeal. The matter has, however, been argued out before us as a question of law, and we feel bound to say that in our opinion there is no

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force in the main contention on which this appeal is based. The question can only be decided with reference to the provisions of section 4 of Act IV of 1893. The object of that section is to provide in certain cases an alternative course, by which a plaintiff claiming partition by metes and bounds may be compelled, at the option of the defendants, whether he himself likes it or not, to forego his legal right to such partition and to accept pecuniary compensation in lieu thereof. It may be quite true, as has been argued before us on behalf of the present appellants, that this section was enacted for the benefit of the defendants in a partition suit; but it is equally true that it involves a statutory interference with the legal rights of the plaintiff, and it is not unreasonable that it should be strictly construed so as to limit that interference. The section says that under certain circumstances, if the defendant to a partition suit "*shall undertake*" to buy the share sought to be partitioned, then the court shall direct a sale of such share to the person who gives the undertaking. The words, as they stand, seem to admit of only one interpretation. There must be something more than a mere offer to purchase. There must be an undertaking to do so, which means presumably an unconditional offer from which the person making it will not be permitted to resile, and on such undertaking being given, the court is bound to direct a sale.

There is one point, however, in connection with the decree passed in this case about which we entertain some doubts. We are satisfied that the court was bound under the circumstances to pass a decree which would have the effect of transferring to the present defendants-appellants the  $\frac{1}{4}$  share in the house in suit which belongs at present to the plaintiff, for a sum of Rs. 1,020-7-8. It seems to us difficult to hold that the decree actually passed has this effect, and we feel some doubt as to the precise form of decrees which the Legislature intended to be passed in such a case. It is conceivable that the intention of the Legislature was that the court should pass a decree compelling the plaintiff in a case like the present to execute a deed of sale in favour of the defendants, in the same manner as is done in the case of a suit for the specific performance of a contract of sale. After the execution of such a document by the plaintiff, or by the

court in his behalf in the event of his declining to do so, the defendants would become liable to the plaintiff for the unpaid purchase money and the plaintiff would obviously be entitled to maintain a suit for the recovery of the same if he were not paid. As the point has not been raised in the memorandum of appeal before us, we do not desire to pronounce a final opinion as to the form of decree which should be passed in a case to which section 4 of Act IV of 1893 is applicable. It is perhaps doubtful whether the Legislature intended a procedure so cumbrous as that above suggested; but at any rate the decree passed should be one which has the effect in law of transferring the ownership of the plaintiff's share to the defendants who have undertaken to purchase it, that is to say, which gives these defendants a good document of title as against the plaintiff. We feel it incumbent upon us to modify the decree in the present case, at any rate to such extent as seems to us absolutely necessary in order to produce that effect. We direct therefore that the decree be amended so as to run in this form, that the plaintiff is entitled to recover from the defendants Rs. 1,020-7-8, together with such costs as may be awarded to him in all three courts, and that the court shall put the defendants in possession of the undivided  $\frac{2}{3}$  share of the house in dispute at present belonging to the plaintiff and declare them to be the owners of the same. We do not think that the defendants are entitled to any indulgence in the matter of costs. Their appeal is dismissed, except in so far as the decree of the court below has been directed to be modified, and the defendants will pay the costs of this appeal.

*Decree varied.*

*Before Mr. Justice Piggott and Mr. Justice Walsh.*

SIDDIQA BIBI (PLAINTIFF) v. RAM AUTAR PANDE AND OTHERS

(DEFENDANTS).\*

*Act (Local) No. II of 1901 (Agra Tenancy Act), section 167.—Jurisdiction—Civil and Revenue Courts.—Suit by assignee of right to receive rent from a fixed rate tenant for declaration of assignee's title and for an injunction against zamindar and tenant.*

The transferee of an assignee of the zamindar of the right to realize rent from a tenant at fixed rates of certain plots of land in a village filed a suit in a

\* Second Appeal No. 520 of 1916, from a decree of S. R. Daniels, Additional Judge of Allahabad, dated the 4th of March, 1916, confirming a decree of E. Bennet, Subordinate Judge of Mirzapur, dated the 8th of July, 1915.

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