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preliminary order passed in the case clearly shows that those responsible for the conduct of the prosecution were not prepared to ask the Court to find that these men were habitual robbers or habitual receivers of stolen property. For all these reasons I am quite satisfied that the orders complained of cannot be sustained. I set aside the order of the Sub-Divisional Magistrate and discharge Indar, Bhopal and Jhabbu Lal. If they have furnished the securities required, their sureties will be discharged and their own recognizances cancelled. If they are in custody for failure to furnish security, they must be at once released.

Order set aside.

APPELLATE CIVIL.

1918.
February, 4

Before Mr. Justice Piggott and Mr. Justice Walsh.

GANESHI LAL (PLAINTIFF) *v.* BABU LAL AND OTHERS (DEFENDANTS).*

Hindu Law—Partition—Right of a third party to half of the property partitioned subsequently established by suit—Right of original parties to re-partition.

One of two brothers sued the other for partition of what they alleged to be the joint family property. The suit was compromised, and a partition was effected which was embodied in a decree. Subsequently, however, a cousin of the parties established by suit his title to one half of the family property which had been already divided between the two brothers. *Held* that it was open to the two brothers—if not *eo nomine* to re-open the partition already effected—at any rate to ask the court to adjust as between them the loss occasioned by the success of their cousin's suit. *Maruti* v. *Rama* (1) referred to.

GANESHI LAL and Babu Lal were brothers. In 1910 Babu Lal sued Ganeshi Lal for partition of the joint family property, namely a number of houses in Pilkhua in the Meerut district. Ganeshi Lal in his defence stated that there was another item of joint family property, namely a "shop" at Landour (Mussoorie), which also should be included in the partition. The parties entered into a compromise, and on the 21st of December, 1910, a decree was passed in accordance therewith. By this decree one-half of a large house was allotted to Babu Lal and the other half to Ganeshi Lal; and of the smaller houses, some were allotted to Babu Lal and others to Ganeshi Lal, and one was left in their

* First Appeal No. 281 of 1916, from a decree of E. R. Neave, Subordinate Judge of Dehra Dun, dated the 11th of July, 1916.

(1) (1895) I. L. R. 21 Bom., 33[illegible].

joint possession. The effect of the decree upon the "shop" at Landour was a matter of controversy.

In 1914 Khairati Lal, a cousin of the two brothers, brought a suit against them claiming title to one-half of the family property and asking for possession by partition of his half share out of the whole of the property dealt with in the suit of 1910 The two brothers denied that Khairati Lal had any title. The court found in favour of Khairati Lal, and on the 3rd of February, 1915, decreed his claim. The decree awarded him two of the smaller houses which had been allotted to Babu Lal by the partition of 1910, and also that half of the large house which had been allotted to Ganeshi Lal. It appeared that at the time of the litigation of 1910 the two brothers were acting under a *bonâ fide* mistake as to their being the sole owners of the joint family property, and were unaware of the existence of Khairati Lal's title.

The present suit for partition was brought by Ganeshi Lal on the ground that in consequence of Khairati Lal's suit and the decree passed therein he was entitled to re-open the question of the distribution of the property effected by the partition of 1910, including the "shop" at Landour; it was not specifically alleged, however, that the parties were then under a mutual *bonâ fide* mistake. The suit was brought in the court of the Subordinate Judge of Dehra Dun and Mussoorie. One of the pleas raised by the principal defendant, Babu Lal, was that the court had no jurisdiction to try the suit, inasmuch as what was described as the "shop" at Landour was only business located in a house which did not belong to the parties, and consequently there was no immovable property situate within the territorial jurisdiction of the court. The Subordinate Judge was of opinion that he had jurisdiction to try only that part of the suit which related to the said "shop," but that there was no ground for re-opening the partition of 1910 with respect thereto. He, accordingly, dismissed the suit. The plaintiff appealed.

Munshi *Gulzari Lal*, for the appellant:—

The compromise and decree of 1910 effected only a partial partition; the "shop" and business at Landour and a house at Pilkhua were left joint. A subsequent suit for partition lies

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where the former partition was partial. Moreover, the parties to the partition of 1910 had no idea that their cousin Khairati Lal was also entitled to a share, and on that point they were labouring under a *bonâ fide* mistake. One-half of the property having been awarded to Khairati Lal under the decree of 1915, the previous partition was disturbed and the plaintiff was prejudiced in consequence of the common mistake. Under these circumstances the plaintiff is entitled to have the partition reopened and to have the property remaining after the allotment of Khairati Lal's share re-divided. I rely on *Mayne*: Hindu Law, Eighth edition, page 690, and *Maruti* v. *Rama* (1). The lower court is wrong in holding that it had jurisdiction to entertain only a portion of the claim. It had jurisdiction to try the whole suit, if it had jurisdiction at all, that is, if any portion of the property was situate within its territorial jurisdiction.

Dr. *Surendra Nath Sen*, for the respondent:—

The parties to the present suit were co-defendants in Khairati Lal's suit for partition, and in such suits there can be *res judicata* between co-defendants. Having regard to the nature and character of a partition suit, the present plaintiff might and ought to have pleaded in Khairati Lal's suit that there should be a re-adjustment of the shares between the defendants *inter se*. He cannot be allowed to re-agitate the same matter by a separate suit; *Parsotam Rao Tantia* v. *Radha Bai* (2). I am entitled to support the decree of the lower court on this ground, although it was not the ground upon which that court disposed of the case. A partition once effected cannot be re-opened excepting upon some well-defined grounds, which are summarized in *Ramakrishna*: Hindu Law, Volume II, p. 116. The plaintiff has not pleaded either in the plaint or in the grounds of appeal that there was a *bonâ fide* common mistake at the time of the partition of 1910. The lower court has not properly tried the question of jurisdiction. There appears to be no immovable property situate within the jurisdiction of that court. The business at Landour is not immovable property, and the house in which it is located does not belong to the parties. Under section 16 of the Code of Civil Procedure the lower court had no jurisdiction to entertain the suit and it was rightly dismissed.

(1) (1895) I. L. R., 21 Bom., 393. (2) (1910) I. L. R., 32 All., 459.

Munshi *Gulzari Lal*, was heard in reply.

PIGGOTT, J:—This is an appeal by a plaintiff whose suit for partition has been dismissed by the court of the Subordinate Judge of Dehra Dun and Mussoorie. One of the pleas taken in the written statement was that that court had no jurisdiction to try the suit at all. So far as we can gather from the judgement of the learned Subordinate Judge, he seems to have found that he had no jurisdiction to try the whole suit, but had jurisdiction to try part of it, and he has therefore proceeded to try what he regards as a preliminary question sufficient to determine that portion of the suit which he conceived himself to have jurisdiction to try. The conclusion we have come to is that the court below either had jurisdiction to try the entire suit, or had no jurisdiction to try any part of it. Further, we are of opinion that the decision pronounced with regard to a portion of the plaintiff's claim proceeds upon erroneous principles of law and is calculated to make it impossible for the plaintiff in any event to litigate a possibly just claim any further. We must therefore set aside the decree of the court below and remand the case to that court under the provisions of order XLI, rule 23, of the Code of Civil Procedure. In so doing, however, we must make it quite clear that we do not feel able on the materials before us finally to determine the question of jurisdiction. We leave that question still open, and the court below, after receiving this order of remand, should again take that point into consideration at once and pass appropriate orders, according as to whether it finds that it has or that it has not jurisdiction to try the suit. The said suit arises out of the following state of facts. Ganeshi Lal the plaintiff and Babu Lal the principal defendant are brothers. They were admittedly up to the year 1910 members of a joint undivided Hindu family. In the year 1910 Babu Lal brought a suit for partition against Ganeshi Lal. The specification of the property sought to be partitioned given at the foot of the plaint sets forth a number of houses situated in the town of Pilkhua in the Meerut district, and the suit was accordingly filed in the court of the Munsif of Ghaziabad, within whose territorial jurisdiction the said property was situated. In his defence Ganeshi Lal raised a question as to whether the plaint contained

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a complete specification of the property which ought to be brought under partition. He pleaded that Babu Lal and himself were the joint owners of a shop at Landour, the Cantonment of Mussoorie, that this shop was an ancestral business carried on for the benefit of both parties, that it had not been doing wel and that there were heavy liabilities attaching to the business. His written statement implies, if it does not actually state, that this shop or business at Landour was in the possession and under the management of Ganeshi Lal, and it is suggested that Babu Lal's object in suing for the partition of the joint family property at Pilkhua, while omitting all mention of the Landour business, was to saddle his brother Ganeshi Lal with all the liabilities of that business while taking for himself his full half share in the joint property, some of which, it was contended, had been purchased out of the profits of that business at a time when such profits were available. This pleading obviously raises questions of fact and of law which the court conducting the partition would have had to determine before any decree could be passed; but as a matter of fact the case was settled by a compromise between the two brothers. The precise effect of that compromise as regards the business at Landour is a matter of controversy in the present suit; but it is sufficient to note that its result was to partition the immovable property at Pilkhua in a particular manner. One large house was divided between the brothers in equal shares, the eastern portion being assigned to Babu Lal and the western portion to Ganeshi Lal. Certain other houses were assigned, some to one brother and some to the other, and in respect of one house it was provided that it should continue in the joint possession of both parties. A decree was passed on the 21st of December, 1910, in the terms of the compromise. In the year 1914, one Khairati Lal, a cousin of the parties, instituted a suit in which he claimed to recover possession of one-half share of the whole of the property which had been dealt with in the partition of the 21st of December, 1910, alleging himself to be the owner of the same and asking that his moiety might be divided by metes and bounds from the rest and he be put into possession. This suit was contested by both the brothers, who denied that Khairati Lal had any right or title in respect of

any share whatever in this property; but the suit was decreed in Khairati Lal's favour on the 3rd of February, 1915. The result of this decree was that the western portion of the largest of the houses in question, that is to say, the portion which had been assigned to Ganeshi Lal at the partition of 1910, was awarded to Khairati Lal; and along with this one smaller building, described as a shop with a *kachcha* house appertaining thereto, and another *kachcha* built house were awarded to Khairati Lal out of the property allotted to Babu Lal in 1910. The plaintiff claims that, in consequence of the success of Khairati Lal's suit, he is entitled to re-open the question of the distribution of the joint family property, and more particularly of the immovable property, effected at the partition of 1910. We must take it that at that time Ganeshi Lal and Babu Lal honestly believed themselves to be the sole owners of the property in their possession which they then partitioned amongst themselves. There was, therefore, a *bonâ fide* mistake on the part of both parties to the partition, and that mistake has now become apparent and has produced inequitable results because of the success of Khairati Lal's suit. There is good authority for the proposition that under such circumstances the party to the partition who finds himself prejudiced as a consequence of the common mistake is entitled to have the question of the partition re-opened. A very clear case on this point is that of *Maruti* v. *Rama* (1). We agree with the principles laid down by the learned Judge who decided that case and we think that they apply to the case now before us. Ganeshi Lal, however, has chosen to complicate the question in two ways. He wishes to re-open, not merely the question of the division effected of the house property at Pilkhua by the partition of 1910, but also the question then raised by him as to the respective rights and liabilities of himself and his brother in connection with the business at Landour. Believing apparently that he could do this more effectually by means of a suit instituted in the court within whose territorial jurisdiction this Cantonment is situated, he has brought the present suit, not in the court of the Munsif of Ghaziabad, but in that of the Subordinate Judge of Dehra Dun and Mussoorie. The question

(1) (1895) I. L. R., 21 Bom., 333.

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whether that court has any jurisdiction to entertain this plaint depends simply on whether or not any immovable property sought to be partitioned is situated within the territorial jurisdiction of that court. The provisions of section 16, clause (*b*), of the Code of Civil Procedure are quite clear in their application to the present case, and, inasmuch as the defendant Babu Lal does not live or carry on business within the jurisdiction of the Subordinate Judge of Dehra Dun and Mussoorie, no possible question arises as to the effect of any subsequent section of the same Code. Either the court below had jurisdiction to entertain the whole of this suit or it had no jurisdiction to entertain it at all, and this depends on what the parties meant in that court when they spoke of the "shop" situated at Landour. The wording of the plaint suggests that they were speaking only of a "business," possibly carried on in a hired shop; but it has been pressed upon us on behalf of the plaintiff that this point is not made clear beyond dispute by the record as it now stands before us and that there is room for further inquiry in the court below. The only other substantial point in the case turns on the wording of the compromise of 1910 and the decree passed in accordance therewith. We are not sure that we have all the materials before us for pronouncing a final opinion on this point, and it is not advisable that we should endeavour to try this question on the merits before the question of jurisdiction has been finally determined. According to the defendant the effect of the compromise decree of 1910 was not merely to assign the business at Landour with its assets and its liabilities, whatever these might be, entirely to the share of Ganeshi Lal; but it did this independently altogether of the partition of the joint property effected by the other portion of the compromise. Virtually the contention for the defendants is that the decision arrived at between the parties on their own compromise in December, 1910, amounted to a decision that this Landour business did not form part of the assets of the joint family but was entirely a matter for which Ganeshi Lal alone was responsible. This is a question which may yet have to be determined between the parties, and it is possible that further evidence may be required before a decision can be pronounced. The point seems worth mentioning in

order to make it clear that, in saying that Ganeshi Lal is in our opinion entitled to have a re-partition of the joint family property made in consequence of the success of Khairati Lal's suit, we are not pronouncing any opinion one way or the other as to whether the assets or the liabilities of the Landour business should or should not be taken into account in connection with such re-partition. Our order therefore is that we remand this case to the court below under order XLI, rule 23, for re-trial subject to the remarks we have made. We leave all costs of this appeal to be costs in the case.

WALSH, J.—I entirely agree. I only wish to add one word on the point arising on the merits which was substantially argued before us. I agree with the decision in I. L. R., 21 Bom., 333, but I think that there is danger in stating as a general principle that proof of such matter entitles the party to re-partition. I do not think that it entitles him to open up the previous decision except in so far as is necessary to apportion the loss which arises out of the new fact. The right is based simply upon this principle, that where parties arrive at a partition either by agreement, or by a decree (which after all is only a more solemn and binding form of agreement), there is an implied and mutual right of indemnity or contribution in respect of any paramount claim by a third person which throws the burden of a loss not contemplated in the partition proceedings unfairly upon one of the parties. If the original decision has been arrived at by a common mistake, which, of course, in the case of a decree is adopted by the court making the decree, the mistake can be set right *pro tanto*.

Appeal decreed and cause remanded.

REVISIONAL CIVIL.

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February.

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

MUHAMMAD FARZAND ALI (PLAINTIFF) *v.* RAHAT ALI AND OTHERS (DEFENDANTS).*

Civil Procedure Code (1908), *order XLIV, rule* 1—*Application for leave to appeal* in formâ pauperis—*Application rejected—Further application for leave to pay the full court fee also rejected—Revision.*

The rejection of an application made under order XLIV, rule 1, of the Code of Civil Procedure, for leave to appeal as a pauper, is not the rejection of

* Civil Revision No. 129 of 1917.