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BIRESWAR MUKERJI v. ARDHA CHANDER ROY.

Solicitor for the appellant, Shib Chander Roy Chaudhri: Mr. *S. G. Stevens.*

Solicitors for the respondent, Ardha Chander Roy Chaudhri: Messrs. *T. L. Wilson & Co.*

Solicitors for the respondents, Gobind Mohini and Bamasunderi Debi: Messrs. *Barrow* and *Rogers.*

C. B.

FULL BENCH.

Before Sir W. Comer Petheram, Kt., Chief Justice, Mr. Justice Prinsep, Mr. Justice Tottenham, Mr. Justice Pigot, and Mr. Justice Ghose.

DULHIN GOLAB KOER (DEFENDANT No. 1) *v.* RADHA DULARI KOER (PLAINTIFF) AND OTHERS.*

1892. *March* 12.

Appeal—Order declaring the rights of parties to a partition in certain specific shares appealable before actual partition made—Civil Procedure Code (Act XIV of 1882), *ss.* 2, 396—*Partition suit.*

Held by the FULL BENCH (PRINSEP, J., doubting):—That an order in a suit for partition, which declares the specific rights of the parties and the property to be partitioned, decides that the suit must be decreed, as after such an order the suit could not be dismissed by the Court by which it was made, and is therefore an order which adjudicates upon the rights claimed and the defence set up in the suit, and which, as far as the Court expressing it is concerned, decides the suit within the definition of a decree in s. 2 of the Civil Procedure Code, and is therefore appealable as a decree.

THE question argued before the Full Bench was, whether or not, in a suit for partition by metes and bounds, an order declaring the rights of the parties to partition in certain specific shares is appealable before the partition has been made.

The order of the Referring Bench (PRINSEP and O'KINEALY, JJ.) was as follows:—

"A preliminary objection has been raised to the hearing of this appeal that the order appealed is not a final order within the

*Appeal from Original Decree No. 44 of 1891 against the decree of Babu Jodu Nath Das, Roy Bahadur, Second Subordinate Judge of zillah Tirhut, dated the 20th January 1891.

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definition of a decree as given in section 2 of the Code of Civil Procedure, and that consequently it is not appealable. The order declares the specific rights of the parties and the property to be partitioned, but it leaves it open to the parties to state whether they desire that a complete partition by metes and bounds should be made. We have been referred to the case of *Bhoobun Moyi Dabea* v. *Shurut Sundery Dabea* (1), in which it was held in a similar case that no appeal would lie. Apparently, an appeal was allowed in the cases of *Sakharam Mahadev Dange* v. *Hari Krishna Dange* (2), *Bhola Nath Dass* v. *Sonamoni Dasi* (3), and *Bepin Behari Moduck* v. *Lal Mohun Chattopadhya* (4). Again, the reasons given by the Privy Council in *Rahimbhoy Habibbhoy* v. *Turner* (5), which was a case of account, interpreting the term 'final decree' in section 595, seem, however, to support the contention of the appellant. Having, therefore, some doubts in this matter, we accordingly refer to the Full Bench, whether in a suit for partition by metes and bounds an order declaring the rights of the parties to partition in certain specific shares is appealable before the actual partition has been made."

The order upon which the above question arose is set out below in the judgment of the Chief Justice :—

Mr. *Evans* (with him Mr. *Twidale*, Baboo *Hem Chunder Banerji*, and Baboo *Umakali Mookerji*) appeared for the appellants.

Mr. *W. C. Bonnerjee* (with him Dr. *Rashbehary Ghose*, Baboo *Saroda Churn Mitter*, Baboo *Degumber Chatterjee*, and Baboo *Raghunundun Pershad*) appeared for the respondents.

Mr. *W. C. Bonnerjee*.—Section 396 of the Code provides for commissions of partition, and a decree being passed in accordance with the report of the Commissioners, and section 540 provides for an appeal from such a final decree. 'Decree' is defined by section 2, which was introduced by Act XII of 1879. If it had been intended to allow appeals in cases of the present kind, there would have been a special reference to them similar to that to suits for an account in section 2, the definition in which

(1) I. L. R., 12 Calc., 275.
(2) I. L. R., 6 Bom., 113.
(3) I. L. R., 12 Calc., 273.
(4) I. L. R., 12 Calc., 209.
(5) I. L. R., 15 Bom., 155; L. R., 18 I. A., 7.

was intended to be exhaustive and not illustrative only [*Coverji Luddha* v. *Morarji Punja* (1).] There can be no appeal except as against a decree, as defined by section 2, or against an order mentioned in section 588. It is the decree mentioned in section 396 which decides the suit. Under section 541 a copy of the decree is required to be annexed to the appeal. Section 396 only contemplates one decree, and is unambiguous. The preliminary decree in partition suits only decides certain preliminary questions. An appeal only lies from a final decree, *Ebrahim* v. *Fuckhrunnissa Begum* (2). I am not aware of any case in this Court where it was held that an appeal would lie from the preliminary decree in a partition suit. I rely on the decision in *Bhoobun Moyi Dabea* v. *Shurut Sundery Dabea* (3). There is but one decree under section 396. Here there are various findings in the plaintiff's favour, and the Court will proceed to divide the property.

Mr. *Evans*.—The fallacy lies in treating the words 'deciding the suit' in section 2 as equivalent to 'finally disposing of the suit.' The distinction is recognized in *Rahimbhoy Habibbhoy* v. *Turner* (4). It is argued that the suit is not disposed of until the arithmetical result is worked out. The practice in Chancery was to make decretal orders and afterwards final decrees. Here the decree consists of the order at the end of the judgment which can be made formal and complete. The doctrine that a party must wait till the suit is finally disposed of before an appeal can be preferred breaks down when applied to the case of a mortgage or a will. Where in a mortgage suit forgery is set up, and there is a decree for an account, it would be unjust to cause the defendant to wait until the account has been taken: so in a partition suit, where a will has to be construed, it would be unreasonable to preclude either party from appealing until the Commissioners have made their return. In the present case everything has been decided except what physical pieces of property will be the equivalent of certain shares. The intention which the other side would attribute to the Legislature is not a probable one. The case of *Gyan Chunder Sen* v. *Durga*

(1) I. L. R., 9 Bom., 183 (195).
(2) I. L. R., 4 Calc., 531.
(3) I. L. R., 12 Calc., 275.
(4) I. L. R., 15 Bom., 155; L. R., 18 I. A., 6.

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Churn Sen (1) illustrates how such matters were dealt with under the Code of 1877, where there was no definition of decree, and no one ever doubted then that there was an appeal. It is open to us to apply to the High Court under section 622 of the Code or section 15 of the Charter to have the decree drawn up in accordance with the terms of section 206 of the Code. Under Act VIII of 1859 'decrees' were not defined, but decrees containing orders for partition were constantly appealed. Under Act X of 1877, section 396 merely dealt with the method of proceeding with Commissions. Act XII of 1879 was passed in consequence of a decree in a suit for accounts, in which it was held that no appeal lay, and the accounts are not finished yet. The reported cases are in my favour or are distinguishable.

Dr. *Rashbehary Ghose*, in reply.—The argument as to a mortgage suit is unsound, as section 86 of Act IV of 1882 speaks of decrees and not of orders. The words in section 2 of the Code are not to be regarded as merely explanatory or illustrative. The actual relief sought in a partition suit is possession in severalty. We raise no question as to the order being informal.

The Court (PETHERAM, C.J., PRINSEP, TOTTENHAM, PIGOT, and GHOSE, JJ.) delivered the following opinions:—

PETHERAM, C.J. (TOTTENHAM, PIGOT and GHOSE, JJ., concurring).—No separate decree was drawn up in this case, but the last two paragraphs of the judgment of the Subordinate Judge are as follows:—

"For these reasons it is ordered that a partition of the properties mentioned in list No. 1 of the plaint, with the exception of the *thakurbari* and of the houses mentioned in list No. 2, be made. The defendant No. 3 through his pleader states that his share may be separated also. The defendant No. 2 does not want her share to be separated. Thus one share (one-fourth) will be given to the plaintiff. Another share (one-fourth) will be given to the defendant No. 3. The remaining share (half) belonging to the defendants Nos. 1 and 2 will be kept joint. The *thakurbari* and the *thakurs* specified in list No. 3 will be kept joint.

(1) I. L. R., 7 Calc., 318.

A scheme for the worship of the *thakurs* by turns by the co-sharers will be made at the time of the passing of the final decree. The costs of the partition will be borne by the parties in proportion to their respective shares. The parties are required to state within two days whether they desire that the partition should be made by one or more Commissioners."

The question which has been referred to this Bench is whether the order contained in these paragraphs is appealable.

It is admitted on all sides that it is not appealable as an order, as it is not included in the list of orders in section 588 of the Code from which an appeal is given by that section, and the only question is whether it is within the definition of a decree in section 2 and so appealable as a decree.

It has been said by the pleader for the plaintiff that he does not wish to argue that as no separate document has been drawn up and signed, giving effect to the decision of the Court, there has been no formal expression of an adjudication upon the rights claimed, and that point not being raised before us by him or referred to us by the Divisional Bench, we need not deal with it here.

Our answer to the question referred to us is that an order in a suit for a partition, which declares the specific rights of the parties and the property to be partitioned, decides that the suit must be decreed, as after such an order the suit could not be dismissed by the Court by which it was made, and is therefore an order which adjudicates upon the rights claimed and the defence set up in the suit, and which, as far as the Court expressing it is concerned, decides the suit within the definition of a decree in section 2 of the Civil Procedure Code, and is therefore appealable as a decree.

PIGOT, J.—I must add that had the point been raised, I should have felt a difficulty in holding that a paragraph in the judgment, not drawn up in the form of a decree, and not embodied in a separate form, is, within the terms of the Code of Civil Procedure, a decree at all.

But the point is not raised before us, and I am not bound to deal with it.

PRINSEP, J.—I have had considerable difficulty in arriving at satisfactory conclusion as to the effect that the Legislature

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intended to give to an order within the terms of section 396, Civil Procedure Code, directing a partition to be made by Commissioners, as in the case now before us. It is contended that the order of the Court declaring the several parties interested in immoveable property under partition and their several rights therein, amounts to a formal expression of an adjudication upon rights claimed, and that such adjudication, so far as regards the Court expressing it, decides the suit, and consequently that the order is a decree within the meaning of section 2 of the Code. Section 396, however, provides that the Court in question shall pass a decree in accordance with the report of the Commissioners, if approved of. It would, therefore, seem that that section contemplates that the final decree in the suit should be passed after report made by the Commissioners. No doubt a similar course is provided by section 215A in a suit in which it is necessary to take an account. The definition of a decree as given in section 2, however, specially declares that an order passed in such a case shall be within the definition of that term. I am inclined to agree with the Chief Justice of the Bombay High Court in holding that this part of the definition of a decree in section 2 is exhaustive and not explanatory [*Coverji Luddha* v. *Morarji Punja* (1),] and, in that view, it would not, in my opinion, be impossible to include an order, such as I have described, in a suit for partition as an adjudication deciding a suit. The actual decision of the suit would be when the decree of the Court was finally delivered, and this, it would seem, is declared by section 396 to be after the report of the Commissioners. The observations of their Lordships of the Privy Council in the case of *Rahimbhoy Habibbhoy* v. *Turner* (2) refer to an order in a suit for accounts directing that such accounts be taken, and in considering whether such an order was appealable as a final decree under section 595, their Lordships held that it complied with all the necessary essentials. Section 265, no doubt, describes as a decree for partition an order which leaves the partition itself to be made by the Collector where the property to be divided is an estate paying revenue to Government, but in such a case the

(1) I. L. R., 9 Bom., 183 (195).

(2) I. L. R., 15 Bom., 155; L. R., 18 I. A., 6.

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proceedings of the Civil Court are closed when such an order is passed, and therefore, so far as that Court is concerned, the order finally decides the suit. The order would consequently be a decree within the terms of section 2. I observe that section 265 is reproduced from the previous Code of 1859, whereas the terms of section 396 are entirely new. The difficulty is increased by the definition of the term 'decree,' as it now stands, having been the result of a further modification of the Code. I think, therefore, that the matter before us is not without much difficulty. No doubt, for the convenience of the parties themselves, it is desirable that an order, such as that now before us, should be regarded as a decree and be a proper subject for appeal; so that the parties, who are in dispute in regard to the amount of their respective shares, may not be put to the expenses of a partition by metes and bounds, when such partition may turn out to be absolutely infructuous if the Appellate Court should find that the shares have been wrongly determined. Consequently, as the larger interpretation is open to us, and this interpretation is decidedly for the benefit of suitors, I think it should be adopted.

A. A. C.

REFERENCE FROM THE RECORDER OF RANGOON.

Before Sir W. Comer Petheram, Knight, Chief Justice, and Mr. Justice Ghose.

MOUNG TSO MIN (PETITIONER) *v.* MAH HTAH (RESPONDENT).*

1892
April 27.

Divorce—Burman Buddhists, Law as to Divorce among—Buddhist Law—Dhammathats, Authority of the—Menu Kyay, Authority of the—Desertion—Procedure.

In a suit for divorce instituted by a Burman husband on the ground that his wife had deserted him for no reason whatever, and had been living separate for the past eight months, refusing to resume cohabitation with him (there being no charge against the wife of misconduct affecting morality or of any bad habits), the wife pleaded in defence that the above

* Civil reference in divorce case No. 4 of 1891, made by W. F. Agnew, Esq., Recorder of Rangoon, dated the 4th of May 1891.