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Mr. *Narain Prasad* has referred me to article 24 of the second schedule to the Provincial Small Cause Courts Act (Act No. IX of 1887). According to that article a suit to contest an award is not triable by a Court of Small Causes. The answer to this argument is that the present suit was not a suit to contest an award. On the contrary, it was a suit to enforce an award by asking for delivery of the money which was payable under the award.

The learned counsel has referred me to the decision of *Madho Prasad* v. *Lalta Prasad* (1). There the suit was of a nature similar to that of the present suit and the court held that the suit was not cognizable by the Court of Small Causes. It is apparent, however, that this decision was delivered with reference to the language of the old Small Cause Courts Act (Act No. XI of 1865). A reference to section 6 of this old Act shows that certain suits were declared to be cognizable by Courts of Small Causes and consequently by implication all other suits were excluded from all Small Cause Court jurisdiction. It is clear that under the old Act the present suit would not have been entertainable in a Court of Small Causes; but the scheme of the Act has been altered, and I am unable to find any provision in the second schedule to the present Act (Act No. IX of 1887) which would indicate that a suit for money due under an award is not a suit which is cognizable by a Court of Small Causes. In my opinion it was so cognizable, and I think the decision of the Judge of the court below was correct. I dismiss the application. I make no order as to costs as the proceedings have been *ex parte*.

Application dismissed.

APPELLATE CIVIL.

Before Sir Grimwood Mears, Knight, Chief Justice, and Justice Sir Pramada Charan Banerji.

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November, 21.

RAM NARAIN (PETITIONER) v. HARNAM DAS AND OTHERS (OPPOSITE PARTIES).*

Civil Procedure Code (1908), *order XLV, rule* 13—*Partition—Appeal from preliminary decree—Application for stay of further proceedings in the suit.*

Order XLV, rule 13, of the Code of Civil Procedure does not authorize the staying of proceedings in a suit for partition, where a preliminary decree has

* Application in Privy Council Appeal No. 5 of 1918.

(1) Weekly Notes, 1881, p. 159.

been passed and it remains to pass the final decree, because an appeal from the preliminary decree has been filed and is pending. *Laliteswar Singh* v. *Bhabeswar Singh*, (1) referred to.

THE facts material for the purpose of this report may be briefly stated as follows:—In a suit for partition of alleged joint family property, consisting of houses, shops, bonds and Bank deposits, the defence, *inter alia*, was that the property was the self-acquired and separate property of the defendants. The court of first instance decided this question against the plaintiffs and dismissed the suit. On appeal the High Court reversed the finding, passed a preliminary decree for partition and remanded the case for further proceedings and for the passing of a final decree. The defendants filed an appeal to the Privy Council, and applied to the High Court to stay further proceedings in the lower court pending decision of the appeal by the Privy Council.

Munshi *Panna Lal*, for the respondents, took a preliminary objection that the High Court had no jurisdiction to stay the further proceedings, which were proceedings in the suit itself and not in execution of a decree. He referred to the definition of a "preliminary decree," and submitted that no decree capable of execution had yet been passed at all. Proceedings between the passing of a preliminary decree and the passing of a final decree were not to be deemed proceedings in execution of any decree. Reliance was placed on the decisions in *Madho Ram* v. *Nihal Singh* (2) and *Gajadhar Singh* v. *Kishan Jiwan Lal* (3).

Order XLV, rule 13, of the Code of Civil Procedure which enabled the court under certain conditions to stay proceedings in execution of the decree appealed from did not, therefore, cover the present application. The ruling in the case of *Laliteswar Singh* v. *Bhabeswar Singh*, (1) was directly in point.

Dr. *Kailas Nath Katju*, (with The Hon'ble *Saiyid Raza Ali*), for the appellants, submitted that the High Court had jurisdiction under order XLV, rule 13, of the Code of Civil Procedure to pass such orders or give such directions as it might consider fit and necessary. Clause (*d*) of rule 13 of order XLV was not confined to matters in execution of a decree, and would

(1) (1909) 9 C. L. J., 561. (2) (1915) I. L. R., 38 All., 21.

(3) (1917) I. L. R., 39 All., 641.

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cover the present case. Great hardship and injustice might occur if further proceedings in a partition suit could not be stayed in cases like the present.

Munshi *Panna Lal*, in reply, pointed out that the possession of the parties would not be disturbed, and no harm was likely to be done to any of them, until a final decree capable of execution was passed.

MEARS, C. J.:—In this case the appellant is appealing to the Privy Council in respect of proceedings brought and which have up to the present resulted in a preliminary decree of this Court, which decides that the property in dispute in the action is joint property and is liable to partition. Proceedings to ascertain the respective shares are pending or in process of taking place in the court below, and the appellant has applied to this Court with a view to our staying such proceedings. He has filed an affidavit in which he gives reasons which *primâ facie* are good reasons for assenting to that application if in fact we have the power to grant it. But our attention has been called to the provisions of order XLV, rule 13, and to the case of *Lalliteswar Singh* v. *Bhabeshwar Singh* (1), from which it appears clear that as the matter now stands we have no power to stay these proceedings. Now at one stage of the matter I thought it extremely desirable that an application should be made to the court below so that if possible the Judge should make an order adjourning the partition proceedings until the decision of the Privy Council was known. But it has been pointed out that the property consists of a few houses and that the movable part of it is in cash and shares, things whose value is easily ascertainable. Further, it has been pointed out that when the respondent to the appeal, the present holder of the decree, applies to execute the decree, it will be then open to the appellant to urge before the Judge of the lower court reasons why execution should be stayed. I think generally that it would be desirable, and I have no doubt that it is the practice, for Judges in the lower courts to be very cautious in these cases, and where they find an appellant pursuing an appeal expeditiously to be very chary of removing property from the possession of one litigant

(1) (1909) 9 C. L. J., 561.

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and placing it in the hands of another who may ultimately be found by the Privy Council never to have been entitled to it. Therefore, if an application is made to execute this decree, I hope that the learned Judge in the court below will give due consideration to all the circumstances and will do his best to prevent the property already in the possession of the appellant from passing into the hands of the respondent until the decision of the Privy Council is made known.

BANERJI, J.—I also am of opinion that this application cannot be entertained under the provisions of order XLV, rule 13. The proceedings in the court below are not proceedings in execution of a decree, but are proceedings in the suit for a final decree for partition. The decree which has already been made is a preliminary decree and this decree has to be made absolute before execution can be taken out. At present the case has not proceeded beyond the stage of a suit in which a preliminary decree has been passed and in which further proceedings are to be taken for the making of a final decree. Order XLV, rule 13, only empowers this Court to direct stay of execution in certain cases where sufficient reason is shown. In the present case no final decree has been passed and no proceedings have been taken for execution of a decree. Therefore the present application is not justified by the provisions of the rule to which I have referred and it seems to me to be premature. When an application for execution is made after the passing of the final decree it will then be time for the present applicant to make such application as he may deem proper. In my opinion this application should be dismissed with costs.

BY THE COURT:—The order of the Court is that the application is dismissed with costs.

Application dismissed.