

Before Mr. Justice Piggott and Mr. Justice Walsh.

RAJJAB SHAH AND OTHERS (PLAINTIFFS) v. TAHIR SHAH AND OTHERS
(DEFENDANTS) *

1920
November,
23.

Civil Procedure Code (1908), order VII, rule 7—Other relief—Suit for possession by partition—Property incapable of being partitioned—Relief by declaratory decree or by decree for joint possession.

In a suit for partition of a defined share in certain immovable property the plaintiffs established their title to share in the property, but it was at the same time found that the property was impartible. Held that this was not a reason for dismissing the suit, but the plaintiffs should have been given a decree for joint possession according to their share. *Sri Mahant Govind Rao v. Sita Ram Kesho* (1) referred to.

THE facts of this case sufficiently appear from the judgment of the Court.

Pandit Narmadeshwar Prasad Upadhya, for the appellants.

Dr. S. M. Sulaiman, for the respondents.

PIGGOTT and WALSH, JJ. :—The essential point for determination in these two connected second appeals is a simple one and seems to us almost too clear for argument. The plaintiffs came into court alleging in substance that they were entitled to a fractional share in certain property by reason of inheritance from one Pir or Pira Shah. They alleged that the defendants had wholly dispossessed them, were denying their title and keeping the entire profits of the property to themselves. They asked for possession by partition, that is to say, to have the fractional share, to which they claimed title, separated from the rest by metes and bounds and handed over to them. The defence set up raised a number of issues all of which were tried out by the court of first instance. On many questions of fact the findings of that court were in favour of the plaintiffs, but on two points the decision went against them. The court held that the property in suit was not susceptible of division by metes and bounds. It held further that the suit was barred by the twelve years' rule of limitation. On appeal by the plaintiffs the lower appellate court held that the suit was within time, but still dismissed the entire suit upon a finding that the property was not

* Second Appeal No. 711 of 1918 from a decree of E. H. Ashworth, District Judge of Cawnpore, dated the 7th of March, 1918, modifying a decree of Kshirod Gopal Banerji, Subordinate Judge of Cawnpore, dated the 12th of December, 1916.

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susceptible of partition and that the plaintiffs, having sought no other relief, could obtain no other. It is clear that, in argument at any rate, the point was taken on behalf of the plaintiffs that they might in the alternative be given relief by way of a decree declaring their title, but the lower appellate court overruled this contention, virtually on the ground that to grant it would change the entire nature of the suit. The plaintiffs filed this appeal against the decision of the lower appellate court, but also instituted another suit out of which second appeal No. 202 of 1919 has arisen. In this suit they asked for a mere declaration of their title; but the question of law involved has now been differently decided in the courts below and this second suit has been dismissed on the ground that relief by way of declaration not only might have been sought in the former suit, but necessarily should have been claimed in the alternative. It is obviously unjust to the plaintiffs that both these decisions should stand, and as a matter of fact we think the decision of the courts below in the first suit was clearly wrong. Even before the passing of the present Code of Civil Procedure, Act No. V of 1908, it was held that upon a suit for actual possession the plaintiff might, in the discretion of the court, obtain a decree for a declaration of title, if for any reason the court found it impossible to grant relief by way of actual delivery of possession. As authority for this it is sufficient to cite the case of *Sri Mahant Govind Rao v. Sita Ram Kesho* (1). Under the present Code, however, provision has been made in order XXI, rule 35, clause (2), for the execution of a decree for delivery of joint possession over immovable property, an amendment of the law which clears up certain difficulties which had previously been felt by the courts. If, therefore, the only difficulty in the way of the plaintiffs in the first suit was the impartible nature of the property, it seems obvious that the courts, finding themselves unable to separate by metes and bounds the plaintiffs' share from the rest, should have granted as much of the plaintiffs' prayer as they could and given the plaintiffs a decree for joint possession over such share as they found lawfully to belong to them. There has been some argument before us about the decision of the courts below regarding one particular item of

(1) (1898) I. L. R., 21 All., 53.

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property, in respect of which the suit seems to have been dismissed upon a different finding which is clearly a finding against the plaintiffs on the question of title. It looks like a finding of fact; but it is not necessary for us to go further into the matter, because in our opinion the case will have to go back to the lower court for decision on the merits. The suit has been dismissed in that court upon the finding that the plaintiffs, by reason of the nature of the relief sought in their plaint must either get a decree for partition by metes and bounds or no decree at all. We reverse that finding, holding that the plaintiffs, if their title is established, should receive a decree for joint possession over such fractional share in the property in suit as the court finds to be their rightful due. The case must now go back to the lower appellate court in order that the defendants respondents may have an opportunity, if they wish to do so, of supporting the decree of the court of first instance on any of the points which have been decided in favour of the plaintiffs. In fact the lower appellate court will have to try the suit on the merits unless the defendants now withdraw any of the pleas upon which issues were framed in the court of first instance. Our order, therefore, on Second Appeal No. 711 of 1918 is that we set aside the decree of the lower appellate court and remand the case to that court, with orders to readmit the same on to its file of pending appeals and to dispose of it on the merits. We think that the plaintiffs are clearly entitled to their costs of this appeal, and we order accordingly.

Appeal decreed and cause remanded.

Before Justice Sir Pramada Charan Banerji and Mr. Justice Gobul Prasad.
GYAN SINGH AND OTHERS (PLAINTIFFS) v. ATA HUSAIN AND OTHERS
(DEFENDANTS)*

1920.
December, 8.

Act No. IX of 1908 (Indian Limitation Act), schedule I, article 181—Civil Procedure Code (1903), order XLI, rule 33—Mortgage—Preliminary decree for sale specifying separate liability of each property for a separate sum—Appeal by some only of the defendants—Decree reversed as against appellants—Application for final decree against the other defendants—Limitation.

A preliminary decree in a suit on a mortgage declared the liability of each of the properties against which the mortgage was sought to be enforced and

*First Appeal No. 174 of 1918 from a decree of Kshirod Gopal Banerji, Subordinate Judge of Cawnpore, dated the 5th of January, 1918.