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RAM CHANDRA DUTT v. JOGESWAR NARAIN DEO.

we must bear in mind that when the Evidence Act was passed in this country, this question of hearsay evidence was not then so definitely settled as it is now. Some of the text-books supported the contention, that hearsay evidence was admissible to prove the date of birth, and looking at illustrations (*k* to *m*) of section 32, we think that view was adopted by the Legislature, and that such a statement is admissible in evidence.

T. A. P.

Before Mr. Justice Prinsep, Mr. Justice Pigot, and Mr. Justice Trevelyan.

1893
May 11.

MOHENDRO CHANDRA GANGULI (PLAINTIFF) *v.* ASHUTOSH GANGULI AND ANOTHER (DEFENDANTS).*

Costs—Costs of preliminary issue in partition suit—Stamp in partition suit.

The plaintiff brought a suit to have 99 items of property partitioned. The plaint bore a court-fee stamp of Rs. 10. The defendants admitted that three of the properties were ancestral and joint, but as to the other items the 2nd defendant stated that they were the self-acquired property of her deceased husband, and contended that the plaint was insufficiently stamped, as the object of the suit was to obtain a declaration of title and possession of properties in which the plaintiff had no interest. An issue was raised on this point, and on this issue the Subordinate Judge allowed the objection and rejected the plaint. On appeal, *Held* by PETHERAM, C.J., and NORRIS, J., that the plaint was sufficiently stamped. The only relief prayed for was partition, and for the purposes of the stamp the cause of action which is stated in the plaint, and that only, must be looked at.

The members of the appeal Bench, however, differed in opinion as regards the question of costs, PETHERAM, C.J., being of opinion that the costs of the appeal should be treated in the same way as the rest of the costs in the case, and be divided between the parties to the partition; and NORRIS, J., holding that the respondent having failed on appeal ought to pay the costs; and on this question an appeal was preferred under the Letters Patent, cl. 15.

Held by PRINSEP and TREVELYAN, JJ.—The costs of the appeals were severable from the general costs of the suit, and therefore, though the suit

* Letters Patent appeal No. 1 of 1893, in appeal from Original Decree No. 60 of 1892, against the decree of Baboo Purno Chunder Shome, Subordinate Judge of 24-Parganas, dated 22nd December 1891.

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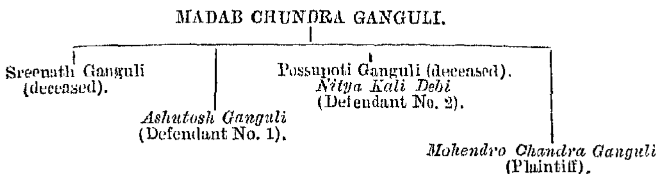
was one for partition, the principle that the unsuccessful party must pay the costs was applicable so far as the appeals were concerned; the respondent therefore should pay all the costs in the two appeals.

Held by PIGOT, J.—The respondent should pay in any event her own costs of the preliminary issue and of the appeal, but that, as to the plaintiff's costs of that issue and of the appeal, they should be in the discretion of the Court as between the parties to this appeal, such costs being in no case to form part of the costs of the partition.

THE facts in this case were as follows: —

Madab Chandra Ganguli died some 32 years ago, leaving him surviving four sons—(1) Sreenath Ganguli, since deceased, (2) Ashutosh Ganguli (defendant No. 1), (3) Possupoti Ganguli (husband of defendant No. 2), and (4) Mohendro Chandra Ganguli (the plaintiff).



When Madab Chandra died he left three items of property, and since then his sons have lived joint in food and worship. Sreenath, the eldest son, died without leaving any heirs or any self-acquired property. Defendant No. 2 in her written statement states that Possupoti, her husband, during his lifetime by his own exertions acquired a large amount of property and made many additions to the family dwelling-house. After the death of Possupoti, family disputes arose, and Mohendro Chandra, the fourth son, sought to have the joint family property partitioned. In his plaint he stated that there were 99 items of property—the original three items which were left by the father, and two other groups one containing 72 items and the other 24 items. These 96 items, he stated, were acquired by Possupoti while he was *kurta* of the family with the joint funds of the family, and that the whole 96 items were worth Rs. 48,424, and his suit being for one-third share, he valued his suit at Rs. 16,141 odd, but brought this suit on a court-fee stamp of Rs. 10, as the suit was one for partition. The Subordinate Judge returned the plaint as being insufficiently stamped, on the ground that the plaintiff could not (by joining in

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his claim three properties as to which his title and possession was not disputed with distinct and independent properties of an enormous value) have the benefit of a suit for establishment of title to, and recovery of, the latter properties on payment of a court-fee stamp of Rs. 10. The Subordinate Judge directed the plaintiff to give evidence of a *primâ facie* character as to his suit being a *bonâ fide* suit for partition of properties of which he was admittedly jointly in possession with the two defendants, in order to show that under colour of a partition suit he was not really seeking an adjudication of title to, and a decree for possession of, large properties in which he had no interest. The plaintiff declined to give evidence, and subsequently the plaint was rejected.

From this order the plaintiff appealed to the High Court. The appeal was heard by PETHERAM, C.J., and NORRIS, J., and on 7th December 1892 they delivered the following judgments:—

PETHERAM, C.J.—This is a suit brought by the plaintiff against his own brother and the widow of another brother for the purpose of partitioning certain properties which the plaintiff says are family property. On the face of his plaint he alleges that one or two items of the property sought to be partitioned had descended to the family from their father, and as to the rest that it had been acquired by the exertions of the family and from family funds whilst the husband of the defendant No. 2 was acting as the *kurta* of the family. The properties said to have been so acquired are very numerous. In the written statement put in by the defendant No. 2, she alleges that she is in possession of this latter kind of property, and that it is not family property at all, but the separate self-acquisitions of her husband. She does not object to the partition of the ancestral property. I should have said that the plaint was stamped with a ten-rupee stamp. Under these circumstances it appears to me that a ten-rupee stamp is, according to the decisions of this Court, the proper stamp in a partition suit, where the only relief claimed is partition. The Subordinate Judge has returned the plaint as being insufficiently stamped, on the ground that, inasmuch as the whole of the property sought to be partitioned does not appear to have been property which descended from an ancestor of the parties, the suit is something more

than a partition suit, inasmuch as the plaintiff's right to share in this property at all will have to be enquired into in it, and he has called on the plaintiff to give some *primâ facie* evidence before he would admit the plaint upon this stamp.

In that view we think he was wrong. First of all, we cannot see by what authority he called upon the plaintiff to give *primâ facie* evidence of this kind at all; secondly, we think that, for the purposes of the stamp, the cause of action which is stated in the plaint, and that only, must be looked at. So far as this plaint is concerned, the only relief which is sought is the partition of property which the plaintiff says is family property, and which he says he is in possession of jointly with the others, because he says the possession of one member of a joint family of family property is the possession of all; and consequently, so far as the plaint is concerned, this is a suit for partition, and nothing else. It may be that to decide the question, what property is in the possession of one member as a member of a joint family, other questions will have to be tried; but if the plaintiff is entitled to have the property partitioned upon a ten-rupee stamp, the fact that the enquiry will be a long and difficult one does not affect the question of the stamp that will have to be paid for it; and if the only thing to be tried is how the joint property of this family is to be partitioned, that is but a suit for partition, and Rs. 10 being the proper stamp for such a suit, the Judge ought to have admitted the plaint.

For those reasons we think that the Judge was wrong, and accordingly we set aside his judgment in this case and send the case back for trial on the merits, with directions that he admit the plaint on a ten-rupee stamp and dispose of the case upon the merits according to law. I think that the question of costs ought to be reserved and ought to be dealt with by the Judge who deals with the rest of the case; and when I say that, I mean that in my opinion the costs of this appeal should be treated in the same way as the rest of the costs in the case. I think that in a partition suit the partition is for the benefit of all, and I think the costs ought in fairness to be divided between the parties. In this particular case I do not see that any of the parties was so far in fault as that he alone ought to be saddled with the costs of any portion of this litigation.

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NORRIS, J.—I agree that the appeal should be decreed, but I see no reason why the respondent should not be made to pay the costs. His case stands on precisely the same footing as the case of any other respondent who has failed on appeal.

The Court being divided in opinion as regards the question of costs, an appeal was preferred by the plaintiff on that question under clause 15 of the Letters Patent. The case came on for hearing before a Bench composed of PRINSEP, PIGOT, and TREVELYAN, JJ.

Baboo Golap Chunder Sarkar for the appellant.—These costs would never have arisen had not the defendants raised the preliminary issue as regards the stamp on the plaint. The plaint having been rejected, the plaintiff was bound to come up in appeal to the High Court; the appeal being successful, the plaintiff should have been given costs in accordance with Norris, J's decision. It is clearly one of those cases in which the costs should follow the event, and the successful party should not be saddled with the costs. The following authorities support this view:—*Himayat Husain* v. *Jai Devi* (1), *Ram Chunder Shaha* v. *Manick Chunder Banikya* (2), *Bunwari Lall* v. *Chowdhry Drup Nath Sing* (3), *Moshingan* v. *Mozari Safad* (4), *Bhadeshwar Chowdhry* v. *Gauri Kant Nath* (5), *Amar Nath* v. *Thakur Das* (6), *Murari Singh* v. *Pryag Singh* (7). The appellant should get his costs in both appeals and in the Lower Court.

Baboo Baidnath Dutt for respondents.—The only question is whether the objection raised is not such that the appellant should be made to pay the costs. The objection raised was a necessary one. The plaintiff endeavoured, by joining three properties, admittedly ancestral, with numerous others which were clearly not so, to get possession of a one-third share of the whole. Very naturally the defendants raised the objection, and it was absolutely necessary that the question should be decided before the plaintiff could take a portion of the whole property. The plaintiff, who has never added

(1) I. L. R, 5 All., 589.
(2) I. L. R, 7 Calc., 428.
(3) I. L. R., 12 Calc., 179.
(4) I. L. R., 12 Calc., 271.
(5) I. L. R., 8 Calc., 834.
(6) I. L. R., 3 All., 131.
(7) I. L. R., 11 Calc., 362.

anything to the family property, endeavoured to take advantage of the industry of his deceased brother. The Subordinate Judge was clearly of the same opinion, or he would not have called on the plaintiff to give *primâ facie* evidence of the *bonâ fides* of his partition suit. The defendants resisted the plaintiff on the grounds that the properties were in their exclusive possession, and that the question as to whom they belong could not be tried on a Rs. 10 stamp. The learned Judges, however, have decided that the question can be so tried, but that is no reason why the defendants should be saddled with the whole of the costs. As the point has been tried for the benefit of all the parties, and the plaintiff refused to go into the witness-box to prove the *bonâ fides* of his claim, the costs should be divided between them in accordance with the view expressed by PETHERAM, C.J.

Baboo Golap Chunder Sarkar in reply.—The other issues will no doubt have to be tried; if I fail eventually, I shall in losing the case be saddled with the costs. The only question is as to whether the property is joint or separate. The Judge in the lower Court wanted the plaintiff to prove that his case was *bonâ fide*. The plaintiff was not bound to go into the witness-box. If the defence was that the property was self-acquired, then the *onus* was on the defendants to prove it. They are not affected by the present decision; if any one is affected, it is the Government.

The following judgments were delivered by the Court (PRINSEP, PIGOT, and TREVELYAN JJ.):—

PRINSEP, J.—In a suit for partition brought by one co-sharer against two others, one of the defendants, amongst other objections, pleaded that the suit which had been instituted on a plaint bearing a stamp of Rs. 10 was undervalued, because the plaintiff had included amongst the joint properties certain valuable properties held exclusively by that defendant as her own, and it was stated that the object of the suit was to bring a suit for possession of that property on an inadequately stamped plaint and thus to defraud the Government revenue.

This was accordingly made the subject-matter of one of the issues, and on this issue the Subordinate Judge rejected the plaint.

On appeal this order was set aside, and the Subordinate Judge was directed to register and try the suit. The learned Judges,

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however, differed in their order as to costs, the learned Chief Justice holding that the costs should form portion of the costs in the suit and be divided between the parties to the partition. Mr. Justice Norris, on the other hand, thought that the ordinary rule should be followed under which the unsuccessful party should pay the costs incurred in the appeal.

I am of opinion that this is not a case in which the parties to the partition should bear the costs rateably, for the matter out of which the appeal has arisen does not necessarily form part of that partition, and it was concerning an objection raised by only one of the parties which has been decided against him. It would therefore not be right to charge the other respondent with costs in a matter not raised by him and to which he was indifferent.

The sole question therefore is whether this is a case in which the usual rule should not be followed and costs follow the decision of the appeal. The matter raised and decided does not, in my opinion, necessarily relate to the decision of the merits of the suit. If it should so happen that the defendant should succeed in retaining the properties which she maintains as her own private properties, and therefore not subject to partition, she will no doubt be properly indemnified in costs. The fact remains that she has got the Subordinate Judge to stop the trial of the suit and to reject the plaint on an objection that the plaint did not comply with the law, and on appeal it has been found that her objection was untenable. She has consequently put the plaintiff to unnecessary expense and delay in the trial of his suit, and he is therefore, in my opinion, entitled to claim reimbursement of the costs incurred in obtaining a trial. I am therefore of opinion that the appellant should obtain the costs of this appeal and also of the appeal from the order of the Subordinate Judge.

PIGOT, J.—I agree with the other members of the Court, and for the same reasons, that the order as to costs proposed by the Chief Justice is one which ought not to be made.

I do not, however, think that the appellant should have the costs of the preliminary issue, and of the appeal upon it, in any event. The order which I think ought to be made is that respondent should in any event pay her own costs of the preliminary issue and of the appeal: but that as to the plaintiff's costs of that issue and

of the appeal, they should be in the discretion of the Court, as between the parties to this appeal, such costs being in no case to form part of the costs of the partition. I think that in this case, if the plaintiff should wholly fail upon the merits of the questions raised between him and the defendant who is respondent in this appeal, it may well be that he ought not to have the costs of this appeal. That would, I think, depend upon the nature of the case made at the hearing, and I should leave this in the discretion of the Court which will try the case upon the merits.

TREVELYAN, J.—The only question before us is one of costs. The suit was brought for partition. Amongst other objections taken by the second defendant, there was one as to the stamp on the plaint, *viz.*, that a stamp of Rs. 10 was insufficient. The Subordinate Judge before trying the rest of the case, tried the question as to the sufficiency of the stamp. He required the plaintiff to get into the box to show that his claim in respect of the properties, the title to which was denied by the defendant, was a *bonâ fide* one. On the plaintiff declining to give evidence in this respect, the Subordinate Judge rejected the plaint with costs. On appeal to this Court the learned Chief Justice and Mr. Justice Norris held that the plaint ought not to have been rejected, but that the case ought to be tried on its merits according to law. They, however, differed as to the costs of the appeal. The Chief Justice thought these ought to be costs in the cause. Mr. Justice Norris thought that the appellant was entitled to his costs.

I think that the view taken by Mr. Justice Norris is the correct one. It is true that a partition suit, like some other classes of suits, is brought frequently for the benefit of all the parties to it, and for that reason it would generally be unfair to require any one party to pay the costs of the litigation; but that principle does not apply where one party has been successful in a matter, the costs of which are severable from the general costs of the suit. In that case the ordinary principle that the successful party is entitled to his costs is applicable. For instance, it has been held that where an agreement not to partition is set up in answer to a claim for partition, the costs of the trial of that question should be paid by the unsuccessful party. It also frequently happens that an issue is raised as to whether a particular property

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is joint or separate. So far as the costs of this issue can be separated from the costs of the suit, it is usual to allow them to the party who is successful on that issue, whether he may or may not ultimately succeed in the suit. Where the defendant raises an objection of a technical character as to the continuance of the suit, and that objection is separately tried and the costs of it are in no way part of the costs of the suit, I think the only right course is to make the unsuccessful party pay the costs. On such an objection he runs the chance either of winning or losing. If he wins he gets the costs of the suit and is relieved of the litigation; and if he loses, he must run the chance of paying the costs. It seems to me that to adopt any other course would have the effect of inviting defendants to raise all sorts of objections, technical or otherwise, in order to impede or defeat the trial on the merits of the case. Unless there is the attendant risk of paying the costs, a defendant would be at no disadvantage when putting forward obstructions of this nature. I think that, acting on the ordinary principle that an unsuccessful litigant should pay the costs of the litigation, we ought to order the second defendant to pay the costs of the appeal. They are in no sense costs of the cause, and therefore I do not agree with the Chief Justice that they should be treated as such. I do not think that they ought to be reserved. I think that it is desirable that the Court should, as far as possible, avoid reserving the question of costs. The Court that determines a question is best able to determine the costs, and reserving the costs in this case may amount to giving the Judge who eventually tries the case an opportunity of reconsidering what has been finally determined by the Chief Justice and Mr. Justice Norris. Even if it turns out that the plaintiff is unsuccessful in this case, I do not see why he should pay the second defendant the costs which he incurred by what has been held to be a wrong objection to the trial of the suit on its merits, or why he should not get the costs which the action of the defendant has forced him to incur. The proper penalty for losing a suit on the merits is to be made liable to pay the costs of the trial on the merits, not the costs of a separate trial on a matter unconnected with the merits in which the plaintiff is successful.

In my opinion this appeal should be allowed and the appellant before us should get the costs of the appeal to this Court and also of the appeal under section 15 of the Letters Patent.

The order requiring him to pay the costs in the Court below has been set aside, as the case is to be tried on its merits. It does not appear that any portion of these costs will be otherwise than useful for the purpose of the trial on the merits.

C., S. *Appeal allowed.*

INSOLVENCY.

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

1893
May 23.

IN RE DHUNPUT SINGH.

Insolvency—Jurisdiction—Gomasta—Trader beyond jurisdiction carrying on business by gomasta within jurisdiction—"Departure"—"Intent"—Insolvent Act (11 *and* 12 *Vict.*, *c.* 21), *s.* 9.

D, resident in Azimgunge, carried on business as a banker and money-lender in (amongst other places) Calcutta through his gomasta *P*, who carried on the business on the second storey of the business premises having his residence on the third storey, the whole of the premises belonging to *D*. *D* having gone away on pilgrimage, the Calcutta business became involved; and on the 6th February 1893 *P* stopped payment and retired to the third storey, but was accessible to all creditors either in the office where business was usually carried on, or in the private room on the third storey. Upon such stoppage of payment telegrams were sent to *D*, who hurried back to Calcutta, and reached it on 11th February, and took up his quarters in the same premises, and subsequently had several meetings with his creditors.

Held that such stoppage of payment was not an act of insolvency within the meaning of the Insolvent Act, and that the retirement of *P* to his rooms on the third storey was not a departure with the intention to defeat and delay the creditors of *D*.

Held further that a departure such as is made an act of insolvency by section 9 of the Act is a departure by the debtor personally, and cannot be committed by any other person on his behalf. Such departure must be his departure, and the intent to depart must be proved to be his intent. Moreover a man cannot commit an act of insolvency by an act of his agent which he has not authorised, and of which act he had no cognisance.

In re Hurruck Chand Golicha (1) dissented from.

(1) I. L. R., 5 Calc., 605.