

Court held that a joint occupancy tenant is entitled to sue for, and a civil court is competent to grant, a decree for partition of a joint occupancy holding, though, if the zamindar is not made a party to the suit for partition, such decree will not affect the mutual rights and liabilities of the zamindar and the occupancy tenants as they stood prior to the partition. The same principles would apply to a partition between statutory tenants in common.

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Following these rulings, we hold that the plaintiffs have a right to claim partition of their share in the tenancy holding and the civil court has jurisdiction to grant the decree prayed for.

We accordingly uphold the decree of the court below and dismiss the appeal with costs.

*Appeal dismissed.*

## APPELLATE CIVIL.

*Before Sir Louis Stuart, Kt., Chief Judge, and Mr. Justice Wazir Hasan.*

QAZI MASLAHUDDIN (PLAINTIFF-APPELLANT) v. RAM KISHEN AND ANOTHER (DEFENDANTS-RESPONDENTS).\*

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*Pre-emption—Civil Procedure section 148, and order 41, rule 32—Extension of time fixed for deposit of pre-emption money—Appellate court's power to extend the time for deposit of pre-emption money.*

In a pre-emption suit the trial court passed a decree for pre-emption on payment of a certain sum in court within a prescribed time. The decree-holder appealed and with it made an application under section 148 of the Code of Civil Procedure for extension of the time fixed for payment. The

\* Second Civil Appeal No. 365 of 1926, against the decree of Jotindra Mohan Basu, Second Additional District Judge, Lucknow at Unao, dated the 15th of September, 1926, confirming the order of Shaukat Husain, Additional Subordinate Judge of Unao, dated the 7th of May, 1926, decreeing the plaintiff's suit.

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appellate court granted the application in the absence of the respondents and extended the time by one month. At the hearing of the appeal the appellate court allowed the respondent's objection that the order of extension of time made by it under section 148 of the Code of Civil Procedure was *ultra vires* and dismissed the appeal against which order the present appeal was filed.

*Held*, that the jurisdiction with which a court is invested by the provisions of section 148 in the matter of enlargement of time is restricted to cases where time for doing an act is fixed by the court otherwise than by its decree in a suit. But once an appeal is preferred from a decree the appellate court becomes seized of the entire proceedings and becomes vested with the jurisdiction of confirming, varying or reversing the decree from which the appeal is preferred. It follows that the appellate court had jurisdiction to extend the time, though not under section 148, but under the provisions of rule 32 of order 41 of the Code of Civil Procedure by varying the decree of the court of first instance in that behalf. *Ram Dial v. Musammal Jafri Begam*, (1904) 7 O. C., 359, and *Ganga Dhar v. Anrudh Singh*, (1908) 11 O. C., 144, followed; and *Narendra Bahadur Singh v. Ajudhia Prasad*, (1910) 13 O. C., 28, *Latifunnissa v. Achambhit Lal*, (1911) 14 O. C., 85, *Hasibunnisa v. Mahmudunnisa*, (1914) 17 O. C., 377, and *Imam Khan v. Abdul Sattar Khan*, (1924) 11 O. L. J., 74, referred to.

Mr. *Ali Muhammad*, for the appellant.

Mr. *Bisheshwar Nath Srivastava*, for the respondents.

STUART, C. J., and HASAN, J.:—This is the plaintiff's appeal from the decree of the Additional District Judge of Lucknow at Unao, dated the 15th of September, 1926, affirming the decree of the Additional Subordinate Judge of Unao dated the 7th of May, 1926.

The suit, out of which this appeal arises, was laid for the relief of pre-emption in respect of a sale dated the 30th of June 1925, of a certain zamindari

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share situate in village Jhalotar in the district of Unao. The consideration for the sale is stated in the sale deed to be the sum of Rs. 6,355. The plaintiff impeached the validity of the consideration and stated that the market value of the property in suit was no more than Rs. 3,000. He accordingly prayed for a decree for possession on payment of Rs. 3,000. The plaintiff's title to pre-empt was accepted in defence, but his challenge directed against the validity of the sale consideration was disputed.

The court of first instance held that the entire consideration was valid and passed a decree in favour of the plaintiff conditional on payment into court of the sum of Rs. 6,355 less the plaintiff's costs of the suit on or before the 7th of July, 1926. The decree of the court further contained the direction that in default of such payment the suit would stand dismissed with costs. This judgment was pronounced, as already stated, on the 7th of May, 1926.

The plaintiff preferred an appeal from the decree of the court of first instance to the lower appellate court on the 5th of July, 1926, that is to say, two days before the expiry of the period fixed for the deposit of the sale consideration. On the date of the filing of the appeal the plaintiff made also an application to the appellate court praying for extension of time for payment of the sum of money decreed against him by the court of first instance. The application purported to have been made under the provisions of section 148 of the Code of Civil Procedure. The Court heard the application in the absence of the respondents and made an order on the 6th of July, 1926 permitting the plaintiff to deposit the money within one month from the 7th of July, 1926. The money was accordingly deposited within the extended period.

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When the appeal came up for hearing in due course in the presence of the respondents a preliminary objection was taken that the decree made by the court of first instance in favour of the plaintiff-appellant had lapsed by reason of his failure to deposit the decretal amount within the 7th of July, 1926, and that the order of extension of time made by the appellate court was *ultra vires*. The Court gave effect to this objection and dismissed the appeal without modifying the decree of the court of first instance by extending the period prescribed for payment.

The sole point urged in appeal is that in the circumstances of the case the lower appellate court should have extended the period for payment by its own decree. No other point was urged in the appeal.

The lower appellate court was of opinion that it had no jurisdiction to extend the time as it had done on the application under section 148 of the Code of Civil Procedure, and in support of that opinion has referred to certain decisions of the late court of the Judicial Commissioner of Oudh. Those decisions are:—*Narendra Bahadur Singh v. Ajudhia Prasad* (1), *Latifunnisa v. Achambhit Lal* (2), *Hasibunnisa v. Mahmudunnisa* (3) and *Imam Khan v. Abdul Sattar Khan* (4). The *ratio decidendi* of these decisions is that the jurisdiction with which a court is invested by the provisions of section 148 in the matter of enlargement of time is restricted to cases where time for doing an act is fixed by the Court otherwise than by its decree in a suit. The basis on which this opinion rests lies in the fact that when once a decree has been made it cannot be varied or set aside except on appeal or on review. But once an appeal is preferred from a decree the appellate court becomes

(1) (1910) 13 O.C., 28.

(2) (1911) 14 O.C., 85.

(3) (1914) 17 O.C., 377.

(4) (1924) 11 O.L.J., 74.

seized of the entire proceedings and becomes vested with the jurisdiction of confirming, varying or reversing the decree from which the appeal is preferred, vide rule 32 of order 41 of the Code of Civil Procedure.

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It follows that the appellate court had jurisdiction to extend the time, though not under section 148 but under the provisions of rule 32 of order 41 of the Code of Civil Procedure by varying the decree of the court of first instance in that behalf. To the same effect are the decisions in the cases of *Ram Dial v. Musammam Jafri Begam* (1) and *Ganga Dhar v. Anrudh Singh* (2).

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Having regard to the order of the lower appellate court passed on the 6th of July, 1926, already referred to, there can be no question that that court was of opinion that the present case was a fit case in which an extension of time might be made. The only error which the lower appellate court committed was its refusal to incorporate that order into its decree.

We accordingly allow this appeal and modify the decree of the lower appellate court and that of the court of first instance by extending the period of payment to the date on which the payment was actually made by the plaintiff-appellant in pursuance of the order of the appellate court passed on the 6th of July, 1926. The appellant will receive his costs from the respondents in this Court. As regards the costs in the lower courts, we affirm the order of those courts.

*Appeal allowed.*

(1) (1904) 7 O.C., 359.

(2) (1933) 11 O.C., 144.