

APPELLATE CIVIL.

Before Sir Louis Stuart, Knight, Chief Judge and Mr. Justice Muhammad Raza.

LALTA PRASAD (DEFENDANT-APPELLANT) v. BRAHMA
DIN AND OTHERS (PLAINTIFFS-RESPONDENTS).*

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August, 22.

Partition—Preliminary decree for partition defining shares of parties—Limitation Act (IX of 1908) schedule I, article 181—Application for preparation of final decree for partition, limitation applicable to—Second suit for partition, maintainability of.

There is no limitation applicable to an application made in a partition suit after the passing of the preliminary decree by which the shares of the parties are defined, in order that the proceedings may be continued for the purposes of actually effecting a partition and that a final decree for partition may be prepared and article 181 schedule I of Act (IX of 1908) does not apply to the case. *Hakim Saiyed Tajammul Husain and another v. Saiyed Bande Raza and others* (1), relied on. *Nasrat-ullah v. Mujibullah* (2), distinguished.

Where, therefore, a preliminary decree for partition is once passed a second suit for partition is not permissible because it is covering the same ground but the proper course for a party is to apply for a final decree under which his share in the property could be partitioned.

Messrs. K. P. Misra and P. L. Varma, for the appellant.

Messrs. M. Wasim and Khaliqu-uz-zaman, for the respondents.

STUART, C. J. and RAZA, J. :—The parties to this appeal were originally members of a joint Hindu family governed by the Mitakshara law. In the year 1915 Brahma Din, Sita Ram, Ganesh Prasad and Jwala Prasad instituted in the court of the first Subordinate

*First Civil Appeal No. 136 of 1928, against the decree of Babu Bhagwati Prasad, Additional Subordinate Judge of Sitapur, dated the 16th of August, 1928, decreeing the plaintiffs' claim.

(1) (1920) 7 O. L. J., 538.

(2) (1891) I. L. R., 13 All., 309.

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Judge of Sitapur a suit for partition of the joint family property against Lalta Prasad, Ram Dayal Ram Kumar and one of the female members of the family who was entitled to maintenance. The suit was determined by a compromise in 1916. In the compromise the property was divided into 256 shares out of which Brahma Din was declared to be entitled to 112 shares, Sita Ram, Ganesh Prasad and Jwala Prasad to 63 shares, Ram Dayal and Ram Kumar to 52 shares and Lalta Prasad to 29 shares. The decree passed was in the main a preliminary decree of the nature for which provision is made in order XX, rule 18. The property partitioned consisted of :—

- (1) Revenue paying land owned by the family.
- (2) Land mortgaged to the family.
- (3) Groves owned by the family.
- (4) Groves mortgaged to the family.
- (5) Ten houses belonging to the family.
- (6) One house mortgaged to the family.
- (7) Rights under deeds and decrees and amounts due on parol debts.
- (8) Moveable property.

While the decree in part was a preliminary decree it was to a certain extent a final decree for it provided for the immediate partition of the moveable property. It was stated that the revenue paying land belonging to the family should be partitioned by the Revenue Courts. This has been done. The mortgaged property and the rights under the deeds and the amounts due as debts have also been partitioned. This much is admitted. In fact the only portions of the family property which have not been partitioned are the ten houses to which we have referred as item No. 5. Two of these houses have fallen down. Whatever has been done in partition by

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the parties has been done without the assistance of the civil courts. On the 30th of January, 1928, Brahma Din instituted a suit for an absolute separation of his 112/256ths share in the ten houses in question. When the case was examined, it was found that two of the houses had fallen down. There was no opposition from the other members of the family except from Lalta Prasad. Sita Ram is now dead. Lalta Prasad had asserted that no partition could take place because the houses had already been partitioned. He further took exception that there were two other houses belonging to the joint family which had not been included in the previous suit. He desired that they should be added. He next took the plea (which was hardly consistent with the other pleas) that no suit could lie as Brahma Din had exhausted all his remedy by instituting the previous suit. The learned trial Judge passed a decreé of this nature. He found that two of the houses had fallen down and he added the other two houses which Lalta Prasad suggested were joint family property. He found that there had been no previous partition and that Lalta Prasad's plea to that effect was without foundation. He then proceeded not to partition off Brahma Din's share of 112/256 but to grant another declaratory decree (in other words another preliminary decree) that Brahma Din held a share of 112/256 in the eight houses formerly in suit and the two houses added and that Ganesh Prasad held a 63/256ths share in the same houses. It is to be noted that the decree as it stands cannot be executed. It will be necessary for Brahma Din, Ganesh Prasad and Jwala Prasad, if they wish to have their shares separated, to apply for a final decree. They, however, seem satisfied with the relief which they have obtained. Lalta Prasad has appealed. In his grounds of appeal he reiterated that the houses had already been partitioned. His learned Counsel has, however, not argued on that

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portion of the appeal, and has accepted the decision against his client in respect of that plea. The learned Counsel has pressed the plea that the present suit did not lie and that Brahma Din's remedy was to obtain a final decree upon the preliminary decree of 1916. The Allahabad decisions which the learned trial Judge has quoted against this view are based in the main on the pronouncement of a Bench of the Allahabad High Court in *Nasrat-ullah v. Mujib-ullah* (1). It is to be noted that this decision was prior to the passing of Act V of 1908. Act V of 1908 laid down for the first time explicitly that in a partition suit there could be both a preliminary and a final decree. Previous to the passing of that Act there could be only one decree in a partition suit and that decree could undoubtedly become time-barred. The decision of the Bench of the Allahabad High Court at page 313 said:—

“It appears to us that when a decree declaring a right to partition has not been given effect to by the parties proceeding to partition in accordance with it, it is competent for the parties or any of them, if they still continue to be interested in the joint property, to bring another suit for a declaration of a right to a partition in case their right to partition is called in question at a time when, by reason of limitation or otherwise, they cannot put into effect the decree first obtained. In this respect suits for declaration of right to partition differ from most other suits. So long as the property is jointly held so long does a right to partition continue. When a person having a right to partition and desiring to partition has his right challenged it ap-

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pears to us he can maintain a suit for a declaration, provided his prior decree is not still enforceable.”

We lay stress on the words “provided his prior decree is not still enforceable.” As we understand it the preliminary decree of 1916 is enforceable. We adopt the view which was taken by the late Court of the Judicial Commissioner in *Hakim Saiyed Tajammul Husain and another v. Saiyed Bande Raza and others* (1). In our opinion Article 181, Schedule I, Act IX of 1908 cannot apply in a matter like this. “There is no limitation applicable to an application made in a partition suit after the passing of a preliminary decree by which the shares of the parties are defined, in order that the proceedings may be continued for the purpose of actually effecting a partition and that a final decree in partition may be prepared.” This is the head-note of that decision. We accept it as a correct statement of the law on the subject. In these circumstances Brahma Din’s proper course was to apply for a final decree under which his share in the houses could be partitioned. Such an application is not time-barred. It is the case for the learned Counsel for the appellants Lalta Prasad that such an application is not time-barred. But a second suit is not permissible because it is covering the same ground. But it is noticeable that an application for the passing of a final decree in continuation of the preliminary decree of 1916 can only affect the property that was then in suit. The addition of the two houses mentioned in List A attached to Lalta Prasad’s written statement is not justified. The question is simply a question of procedure. Its decision will make little difference in expenditure of time or in any other way, for the present decree before us is not a final decree, and it would be necessary for Brahma Din, Ganesh Prasad and Jwala Prasad to have a final decree

(1) (1920) 7 O. L. J., 538.

based upon it. Whether the final decree is based upon the present decree or upon the previous decree is obviously of little moment. But on the legal aspect of the case we have no choice except to allow the appeal and dismiss the suit. We have already indicated that the fact that we are taking this course will in no way prevent Brahma Din, Ganesh Prasad and Jwala Prasad from applying at once to have a final decree as a consequence of the preliminary decree of 1916. The appeal is allowed and the suit is dismissed. In the circumstances of the case we direct the parties to bear their own costs.

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Appeal allowed.

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Mr. Justice Muhammad Raza.*

THAKUR AMIR HAIDER KHAN (PLAINTIFF-APPELLANT)
v. RAWAT KANHAIYA BAKHSI SINGH (DEFEN-
DANT-RESPONDENT).*

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August, 26.

*Civil Procedure Code (Act V of 1908), schedule III, para-
graph 11—Attachment of judgment-debtor's property in
a money decree—Judgment-debtors competency to
alienate property under attachment—Transfer by judg-
ment-debtor of property under attachment, whether void
or voidable.*

The provisions of paragraph 11 Schedule III of the Code of Civil Procedure must be construed strictly and the declaration it contains that a judgment-debtor shall be incompetent to alienate his property must be read in the exact and obvious sense which the words of that paragraph imply.

Where, therefore, a judgment-debtor effects a sale of immoveable property which is under attachment in execution of a money decree, the transfer is not only voidable but

*First Civil Appeal No. 137 of 1928, against the decree of Pandit Damodar Rao Kelkar, Subordinate Judge of Rae Bareilly, dated the 1st of September, 1928.