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been instituted, that it should have been instituted in another court. As regards the question of limitation it will be for the plaintiff when presenting his plaint to the court, which is now the proper court in which to present it, to make an application under the relevant section of the Limitation Act.

*Ziaul Hasan and Yorke, JJ.*

Following the view taken by the Allahabad High Court in the case referred to, we allow the application in revision with costs, set aside the order of the learned District Judge and restore the order of the original court that the plaint be returned to the plaintiff for presentation to the proper court. The parties will bear their own costs in the lower courts.

*Application allowed.*

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## APPELLATE CIVIL

*Before Mr. Justice Ziaul Hasan and Mr. Justice R. L. Yorke*

1938

*September, 5*

CHINTAMAN TEWARI (PLAINTIFF-APPELLANT) *v.* BHAGIRATHI TEWARI AND OTHERS (RESPONDENTS)*

*Civil Procedure Code (Act V of 1908), section 2(2)—Preliminary decree, meaning of—Decree declaring rights of parties and requiring further proceedings to be taken before plaintiff can get relief claimed, whether preliminary decree—Limitation Act (IX of 1908), article 181—Article 181, whether applies to an application for final decree in a partition suit.*

Where a decree not only declares the rights of the several parties interested in the property but also requires further proceedings to be taken before the plaintiffs could get relief claimed by them, it is a preliminary decree. *Tajammul Husain* v. *Bande Raza* (1) and *Lalta Prasad* v. *Brahma Din* (2), referred to.

Article 181 of the first schedule of the Indian Limitation Act does not apply to an application for a preliminary decree in a partition suit being made final. *Bisheshwar Gir Goshain* v. *Satish Chandra Chatterji* (3), dissented from.

*First Civil Appeal No. 72 of 1936, against the order of Mr. Kishun Lal Kaul, Civil Judge of Fyzabad, dated the 23rd of April, 1936.

(1) (1920) 7 O.L.J., 538. (2) (1930) I.L.R., 5 Luck., 280.
(3) (1929) Oudh, 117.

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CHIN TAMAN TEWARI v. BHAGIRATHI TEWARI

Mr. *H. D. Chandra,* for the appellant.

Mr. *Hargobind Dayal Srivastava,* for the respondents.

*Ziaul Hasan, and Yorke, JJ.*

ZIAUL HASAN AND YORKE, JJ.:—This is an appeal against an order of the learned Civil Judge of Fyzabad dismissing the appellant's application for preparation of a final decree in a partition suit as time-barred.

The decree which was sought by the appellant to be made final was passed on a compromise on the 16th of February, 1920, in a suit for partition brought by the appellant and five others.

The learned Civil Judge, while holding that article 181 of the first schedule of the Indian Limitation Act does not apply to an application for a preliminary decree in a partition suit being made final was of opinion that the decree in question was not such a preliminary decree and that consequently the case was governed by article 181. In order to see how far the learned Judge was right in his opinion about the nature of the decree, it is necessary to refer to the compromise on which it was based. That compromise runs as follows:

> *Paragraph* 1—Out of the property mentioned in list A. 8 annas share is entered in the *khewat* in the name of Musammat Chaurasi. This 8 anna share will remain in possession of defendant No. 1 for her life-time without power of transfer. After her death all the parties of this suit shall divide it (among themselves) according to the pedigree mentioned in paragraph 1 of the plaint.
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> *Paragraph* 2—Up to this time the parties have lived as members of a joint Hindu family and from today's date the joint family has broken up. According to the pedigree mentioned in paragraph 1 the share of each party be determined; and the sons of Bhagirath also want to separate from their father. The parties shall divide privately the property mentioned in list A within two months from today's date. But if they do not divide it privately within two months, then the court shall divide it by appointing an Amin.
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> *Paragraph* 3—The plaintiffs and the defendant No. 3 shall be liable to pay only that amount of debt that has been contracted by the father of plaintiffs and the defend

ant No. 3 up to this time, whether it be under a deed or under a *ruqqa* and which subsists up to this time (such as) some defendant renewed the deed in his own name. The amount of that debt shall be determined before the passing of the final decree. For the present a preliminary decree shall be passed in favour of the plaintiffs.

*Paragraph* 4—In list B a few houses are entered. The defendant No. 2 shall be considered to be the owner of the house which is in his possession; and Musammat Chaurasi who lives at this time in the Thakurdwarawala house, shall remain in possession of the same without power of transfer till her life time. Out of the houses only that house shall be partitioned among the plaintiffs and the defendant No. 3 in which they live. The house known as Thakurdwarawala house shall not be partitioned. Each party shall be liable for its repairs to the extent of his share in it; and each co-sharer shall be liable to pay his proportionate share (of expenses) to meet the expenses of the Thakurdwara.

*Paragraph* 5—The suit of the plaintiffs be dismissed as regards the lists C and D. Whatever ornaments and utensils are in possession of a party they shall be considered to be his property.

*Paragraph* 6—If any party does not pay the expenses of his share, then the party paying more than his share shall be entitled to realize that extra sum from the party who was liable for its payment.

*Paragraph* 7—The plaintiffs and the defendant No. 3 shall pay whatever amount of debt they are held to be liable for. For the settlement of the dispute concerning the exact amount of debt we are entrusting the matter to Thakur Lal Bihari Singh Saheb, vakil and Babu Mahendra Deo Varma Saheb, vakil. The parties shall abide by and accept whatever amount (of debt) is adjudged by the said persons. If, after the recovery of possession the plaintiffs and the defendant No. 3 do not pay the money due to any defendant, then according to this deed of compromise, that defendant shall realize his money from the plaintiff and the defendant No. 3 by execution of the decree.

We are of opinion that the learned Civil Judge was quite wrong in thinking that the decree which incorporated the terms of the compromise mentioned above

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was not a preliminary decree. The learned Judge has obviously fallen into the error of taking the expression "by which the shares of the parties are defined" occurring in the cases of *Tajammul Husain* v. *Bande Raza* (1) and *Lalta Prasad* v. *Brahma Din* (2) as a definition of a preliminary decree, though the cases do not at all purport to define a preliminary decree. That expression is only a description of a preliminary decree which may be applicable to some preliminary decrees but may not be applicable to others. For a definition of a preliminary decree the learned Judge ought to have referred to the explanation to section 2(2) of the Code of Civil Procedure which says—

> "A decree is preliminary when further proceedings have to be taken before the suit can be completely disposed of."

Order XX, rule 18(2) of the Code also says—

> "If and in so far as such decree relates to any other immovable property or to movable property, the court may, if the partition or separation cannot be conveniently made without further inquiry, pass a preliminary decree declaring the rights of the several parties interested in the property and giving such further directions as may be required."

Applying these tests to the decree in question we have no doubt left in our minds that the decree was a preliminary decree. Under paragraph 1 of the compromise 8 annas share was to be divided after Musammat Chaurasi's death among the parties according to the shares to which they were entitled in view of the pedigree. Similarly paragraph 4 provided that a house occupied by the plaintiffs and defendant No. 3 was to be partitioned. Thus the decree not only declared the rights of the several parties interested in the property but also required further proceedings to be taken before the plaintiffs could get the relief claimed by them.

The learned counsel for the respondents went so far as to contend that even if the decree in question be deemed to be a preliminary decree article 181 of the

(1) (1920) 7 O.L.J., 538. (2) (1930) I.L.R., 5 Luck., 280.

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first schedule of the Limitation Act applied and that therefore the period of limitation must be taken to be three years from the date of the decree. We cannot however accept this argument for a moment The case of *Bisheshwar Gir Goshain* v. *Satish Chandra Chatterji* (1) relied on by him does not lay down the correct law on the subject, in view of the decisions in *Lalta Prasad* v. *Brahma Din* (2) and *Tajammul Husain* v. *Bande Raza* (3).

We therefore decree the appeal with costs and setting aside the order of the learned Civil Judge send back the case to him for proceedings with the appellant's application for the preparation of a final decree.

*Appeal allowed.*

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## FULL BENCH

*Before Mr. Justice G. H. Thomas, Chief Judge, Mr. Justice Ziaul Hasan and Mr. Justice R. L. Yorke*

1938

September, 14

SITA RAM (APPLICANT) *v.* GAYA DIN (OPPOSITE PARTY)*

*Stamp Act (II of 1899), sections 40 and 60—Court impounding document and sending it to Collector—Collector certifying it to be duly stamped—Court, whether can reopen question of stamp by making reference to High Court—Reference to High Court about stamp after the Collector's certificate, whether maintainable.*

Where a court impounds a document as being insufficiently stamped and sends it to the Collector and the Collector certifies under section 40(1) of the Stamp Act that it is duly stamped, the certificate is, under section 40(2), conclusive evidence of the matters stated therein, and the court cannot subsequently reopen the question by making a reference to the High Court. The proper time for making a reference to the High Court under section 60(1) of the Stamp Act is before it passes the order impounding the document.

THOMAS, C. J. and ZIAUL HASAN and YORKE, JJ.:—This reference. dated the 15th of July, 1938, by the

*Civil Reference No. 6 of 1938, made by Braj Nath Zutshi, Esq., Munsif of Kheri, under section 60 of the Stamp Act, dated the 15th of July, 1938.

(1) (1929) Oudh, 117. (2) (1930) I.L.R., 5 Luck., 290.
(3) (1920) 7 O.L.J., 538.