

## APPELLATE CIVIL.

Before Das and Kulwant Sahay, J.J.

RANJIT SAHI

v.

MAULAVI MUHAMMAD QASIM.\*

1923.

Jan., 29.

*Partition—Suit for—Jurisdiction, value of property for purposes of—Dismissal of suit after passing of preliminary decree, validity of.*

Where, in a suit for partition, there is no question as to the plaintiff's title, the value of the whole property sought to be partitioned is the value for purposes of jurisdiction, and not the value of the plaintiff's share alone.

Therefore, where the value of the entire property is more than Rs. 5,000, an appeal lies from the decree in the suit to the High Court, although the value of the plaintiff's share may be less than that amount.

*Dukhi Singh v. Harihar Singh*(1), distinguished.

Where a preliminary decree has been passed in a suit for partition the suit cannot be dismissed altogether at a later stage.

Appeal by the plaintiffs.

Appeal from a final decree in a suit for partition of certain lands which had been left common in a previous Collectorate partition.

The facts of the case material to this report are stated in the judgment of Kulwant Sahay, J.

*Lachmi Narain Sinha and Hareswar Prasad Sinha*, for the appellants.

*M. Naimutullah* (with him *Ambica Prasad Unadhyay*), for the respondents.

KULWANT SAHAY, J.—This is an appeal against a final decree in a partition suit. The plaintiffs

\* Appeal from Original Decree No. 72 of 1920, from a decision of Babu Brajindra Kumar Biswas, Subordinate Judge of Muzaffarpur, dated the 17th December, 1919.

(1) (1920) 5 Pat. L. J. 640.

brought the suit for partition of certain lands which had been left common in the previous Collectorate partition; and in the plaint the survey number, *khata* numbers and *khesra* numbers of the lands sought to be partitioned are set out. There was a preliminary decree by consent as against the defendants 16 to 20 and *ex parte* as against the other defendants, and by that decree the learned Subordinate Judge ordered a commissioner to be appointed to effect the partition amongst the parties under the terms of the judgment of the 11th August, 1919. It appears that in conformity with the preliminary decree a commissioner was appointed and he effected the partition and submitted his report upon which objections were taken by the plaintiffs as well as by the defendants. The learned Subordinate Judge has now dismissed the suit entirely on the ground that the lands which were claimed to be joint lands in the plaint are not the lands which have been partitioned by the commissioner. In this the Subordinate Judge appears to be completely wrong. A preliminary decree for partition having been passed it was not open to the learned Subordinate Judge at a later stage to dismiss the suit altogether. It was no doubt open to him to come to a decision as to what were the lands which were ordered to be partitioned by the preliminary decree and to effect a partition of those lands, but it was not open to him to dismiss the suit altogether on the ground that the lands which were partitioned by the commissioner were different from the lands ordered to be partitioned under the preliminary decree. The case must go back to the learned Subordinate Judge in order that he may cause the lands which were ordered to be partitioned under the preliminary decree to be partitioned by the commissioner.

A preliminary objection has been taken to the hearing of this appeal by the learned Counsel for the respondents on the ground that the value of the plaintiffs' share of the properties sought to be partitioned is below Rs. 5,000 and therefore the appeal ought to have been filed before the District Judge; and

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he relies upon a decision in the case of *Dukhi Singh v. Harihar Singh* (1). The facts of that case are clearly distinguishable from the present case. In that case there had been a previous compromise decree for partition during the minority of the plaintiff who challenged the validity thereof and brought the suit for an adjudication that the compromise partition decree was not binding upon him and that he was in joint possession with the defendants of the ancestral properties and for a declaration of his  $\frac{1}{4}$ th share in the entire properties and of his right to effect a partition thereof. It was held that the suit was one for declaration with consequential reliefs and was governed by section 7, clause (iv) (c), of the Court-Fees Act and not by Article 17, clause (vi) of Schedule II of the Act. Their Lordships held that having regard to the nature of the suit and the reliefs asked for the value of the suit for purposes of jurisdiction was the value of the plaintiffs' share in the properties and not the value of the entire joint family property. No doubt in considering the question as to whether the appeal in that case lay to the High Court or to the District Court, their Lordships considered the broad question as to the value of suits in partition cases, but to my mind there is a distinction between suits for partition pure and simple, where the plaintiff is in joint possession of his share and there is no dispute as to his title or share, and suits where the plaintiff seeks for an adjudication of his title or extent of share and for partition after such adjudication. In the latter case, it is the value of the plaintiff's share which will determine the jurisdiction of the Court and not the value of the entire property. In the present case there is no question as regards the title of the plaintiff; the only question before the Court was as regards partition; and therefore the value of the whole of the properties sought to be partitioned must be the value for the purposes of jurisdiction. This view is supported by the fact that in a suit for partition, the Court does often on the application of the defendants, effect a partition

(1) (1920) 5 Pat. L. J. 540.

of the shares of the different defendants also amongst themselves, and therefore in such a case the value, for the purposes of jurisdiction cannot be the value of the plaintiff's share only, because the Court deals with the entire estate and effects partition not only of the plaintiff's share but of the defendants' shares also. Moreover a decree in a partition suit is engrossed on a stamped paper as required by Article 45 of the Indian Stamp Act, the stamp duty being payable not only on the value of the plaintiff's share but on the value of all the shares separated and this clearly shows that the value of the plaintiff's share alone cannot determine the jurisdiction of the Court. The Calcutta High Court has uniformly adopted this view and I feel inclined to follow the same. In my opinion the preliminary objection fails and the appeal was properly presented to this Court.

The result is that the decree of the learned Subordinate Judge is set aside and the case is sent back to him for disposal.

DAS, J.—I agree.

*Case remanded.*

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*Code of Civil Procedure, 1909 (Act V of 1908), section 11—Res judicata—Mortgage suit—allegation by person impleaded as subsequent mortgagee that he is prior mortgagee—suit decreed ex parte—Suit in which such mortgagee again asserts the priority of his bond, whether barred.*

Where a person who is impleaded in a suit on a mortgage on the allegation that he is a puisne mortgagee files a written

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\* Appeal from Original Decree No. 101 of 1920, from a decision of B. Satish Chandra Mitra, Subordinate Judge of Monghyr, dated the 21st January, 1920.