

was discussed in the latter decision. That decision, however, proceeded expressly on the authority of *Sahu Ram Chandra's* case <sup>(1)</sup>. That case has been recently considered by the Judicial Committee and certain propositions laid down therein have been overruled. Therefore the decision in *Sant Prasad Singh v. Sheodut Singh* <sup>(2)</sup> cannot now be considered to be an authority on this subject. On the other hand there are the decisions in *Fakirchand Motichand v. Motichand Hurruckchand* <sup>(3)</sup>, *Nunna Brahmayya Setti v. Chidaraboyina Venkitaswami* <sup>(4)</sup> and *Bawan Das v. O. M. Chiene* <sup>(5)</sup>, to mention only three of the decisions which have been referred to by the respondents; and, in my opinion, it is too late now to contend that property over which a person has a disposing power which he may exercise for his own benefit does not include ancestral property which may be sold for the satisfaction of antecedent debts.

I would, therefore, dismiss this appeal with costs.

DAS, J.—I agree.

*Appeal dismissed.*

## REVISIONAL CIVIL.

*Before Das and Ross, J. J.*

RAMJI PANDEY

v.

ALAF KHAN\*

1924.

April, 28.

*Partition Suit—two defendants struck out on application of plaintiff—appeal, whether maintainable—Code of Civil Procedure, 1908, (Act V of 1908), order 1, rule 10.*

\* Civil Revision no. 378 of 1923, from an order of H. W. Williams, Esq., i.c.s., officiating Judicial Commissioner of Chota Nagpur, dated the 27th July, 1923, reversing an order of Babu Debi Prasad, Munsif of Palamau, dated the 1st February, 1923.

(1) (1917) I. L. R. 39 All. 437; L. R. 44 I. A. 126.

(2) (1923) I. L. R. 2 Pat. 724.

(3) (1883) I. L. R. 7 Bom. 438.

(4) (1903) I. L. R. 26 Mad. 214.

(5) (1922) I. L. R. 44 All. 316.

1924.

RAMJI  
PANDEY  
v.  
ALAF KHAN.

In a suit for partition defendants nos. 10 and 11 stated in their written statement that their nephew *B*, defendant no. 12, had no interest in the properties which were the subject matter of the suit. *R* applied to be added as a party on the ground that he had purchased *B*'s interest. He was added as a defendant. Subsequently the plaintiff applied for an order dismissing *B* and *R* from the suit and striking out their names.

Without deciding the question raised by defendants nos. 10 and 11 as to whether *B* had an interest in the properties, the Court ordered the names of *B* and *R* to be struck out, and passed a preliminary decree for partition. This order was set aside in appeal. The plaintiff then applied to the High Court in revision and contended that the order was passed under order 1, rule 11, Code of Civil Procedure, and therefore, was not appealable.

*Held*, dismissing the application, that *R* was entitled to appeal from the order striking out his name from the array of defendants inasmuch as the order was a decree declining to adjudicate upon the claim of *B*, and, therefore, of *R*.

*Rama Rao v. The Raja of Pittapur*<sup>(1)</sup>, applied.

Petition by the plaintiffs.

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

*Parmeshar Dayal*, for the petitioner.

*Ram Chandra Bhaduri* and *Sant Prasad*, for the respondents.

DAS, J.—This application is directed against the order of the learned Judicial Commissioner of Chota Nagpur, dated the 27th July, 1923, by which he set aside the order of the Munsif, dated the 1st February, 1923. The facts are as follows. The plaintiff who is the petitioner in this Court brought a suit for partition as against various persons. He also cited one Bichan Panday as defendant no. 12 in the action. Bichan Panday is the nephew of defendants 10 and 11. The defendants 10 and 11 filed a written statement in which they stated that their nephew Bichan Panday,

had no title to the properties, which were the subject-matter of the partition. Bichan Panday sold his alleged interest in the properties to one Ritubhanjan Singh and on the 27th January, 1923, Ritubhanjan applied that he might be added as a party on the ground that he had purchased Bichan's interest. The Munsif added him as a party-defendant.

On the 31st January the plaintiff applied for an order that Bichan Panday and Ritubhanjan should be dismissed from the action and their names struck out. It is this application which resulted in the order which is the subject-matter of the present proceedings.

The learned Munsif did not decide the question whether Bichan Panday had any interest in the joint property. All that he says is that according to the plaintiff Bichan Panday had no interest whatever in the suit properties and that in those circumstances, he and the purchaser Ritubhanjan should not be made parties. In this view, and without deciding the question which was actually raised, he ordered that the names of Bichan Panday and Ritubhanjan should be struck out and he passed a preliminary decree for partition after striking out the names of Bichan Panday and Ritubhanjan.

The learned Judicial Commissioner on appeal has set aside the order of the learned Munsif.

I have been asked in this application to consider whether there was any jurisdiction in the Judicial Commissioner to deal with the matter at all.

It was contended on behalf of the plaintiff-petitioner that the learned Munsif purported to act under order I, rule 10, of the Code, and that an order under order I, rule 10, is not appealable under the Civil Procedure Code. That position may be conceded to the plaintiffs; but this is an entirely different case. The suit was for partition; Bichan Panday had been added as a party to the suit on the footing that he had an interest in the joint property; Ritubhanjan

1924.

RAMJI  
PANDEY

v.

ALAF KHAN.

DAS, J.

1924.  
 RAMJI  
 PANDEY  
 v.  
 ALAF KHAN.  
 DAS, J.

had actually purchased the interest of Bichan and was added as a party-defendant on his own application. Now a partition suit differs from other suits, in that every party whether arrayed on the side of the plaintiffs or on the side of the defendants is in the position of a plaintiff in so far as every party, whether plaintiff or defendant, is entitled to ask the Court to allot a share of joint property to him. Now this was the position. Ritubhanjan was as a matter of fact on the record as a defendant on the 27th January, 1923, and it was open to him to ask the Court to determine the question whether his vendor had any interest in the joint properties; and if he had, whether he was not entitled to a share in the joint properties. It was open to Ritubhanjan to ask the Court to allot a definite share to him. Now this was the position, and the plaintiff came to Court and said :

“ I do not want to proceed against Ritubhanjan and Bichan Panday.”

Now if this was not a partition, no exception could possibly be taken to the plaintiff withdrawing the suit as against the defendant. A defendant certainly could not complain if the plaintiff himself asked that the suit as against a particular defendant should stand dismissed. But as I have said a partition suit stands entirely on a different footing. Although arrayed on the side of the defendants Bichan Panday was in the position of a plaintiff in so far as he was entitled to ask the Court to allot a share of the properties to him, and the learned Munsif, by the course which he took, declined to consider the case of Bichan Panday. The result of his order is that Bichan Panday is unable to get any relief in the partition action.

That being so, the question is whether the order of the Munsif was appealable. In my opinion it was. Although the order was passed under order I, rule 10, of the Code, the effect of the order was that the Court declined to adjudicate on the question distinctly raised by Bichan Panday. It was held in the case of *Rama Rao v. The Raja of Pittapur* (1) that it is open to

(1) (1919) I. L. R. 42 Mad. 219.

a plaintiff to appeal from the order of the Court striking out the name of the defendant on the ground that the plaint disclosed no cause of action against him. Similarly in this case the effect of the order of the Munsif is that the claim of Bichan and therefore of Ritubhanjan remains undecided. There was an appeal open to Ritubhanjan, not indeed from the order of the Munsif looked upon as an order passed under order I, rule 10, but from that order looked upon as a decree declining to adjudicate upon the claim of Bichan and therefore of Ritubhanjan. That being so, this application must fail and must be refused with costs.

1924.

RAMJI  
PANDEYv.  
ALAF KHAN.

DAS, J.

*Application dismissed.***REVISIONAL CIVIL.***Before Das and Ross, J. J.*

NAWAB SATYID MUHAMMAD AKBAR ALI KHAN

v.

HERBERT FRANCIS\*

1924.

*April, 29.*

*Code of Civil Procedure, 1908 (Act V of 1908), Order XXVI, rule 5, section 115—Examination of plaintiff on commission, principles governing grant of application for—Revision of order granting.*

Application by a plaintiff for examination of himself on commission should be considered on a different footing from an application by the defendant to be examined on commission or from an application by either of the parties for the examination of witnesses on commission.

If the trial Court grants such an application without taking into consideration the fact that the case of a plaintiff stands on an entirely different footing from that of a defendant or witnesses, and the effect of the order is to amount

\* Civil Revision no. 18 of 1924, against an order of Rai Bahadur Surendra Nath Mukharji, Subordinate Judge of Patna, dated the 1st December, 1923.