

witnesses on the question of possession and as to the theft of the crop by the petitioners and the learned Deputy Commissioner states in his order that he has carefully read through the record and finds that the Deputy Magistrate's finding on this point was correct.

The order of the Deputy Commissioner is a proper order under section 421. It was unnecessary for him to write a judgment if he found that the case was one which could be dismissed summarily.

I can see no reason to interfere in this case and the application should be rejected.

SCROOPE, J.—I agree. Section 421 of the Code of Criminal Procedure contemplates that a reasonable opportunity of being heard should be given to the appellant or his pleader in support of the appeal, no more and no less; and if after hearing the pleader at the time of presentation of the appeal, as admittedly the Deputy Commissioner did in this case, he then sends for the record and dismisses the appeal without hearing the pleader further, then I do not consider that he infringes the section in question. In fact my view entirely coincides with that expressed on this question in the case of *Emperor v. Basavanappa Basava* (1).

1930.

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 DEVAL  
 MARTON  
 v.  
 KING-  
 EMPEROR.

ADAMI, J.

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## APPELLATE CIVIL.

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*Before Adami and Kulwant Sahay, JJ.*

RAI BIPIN BEHARI BOSE

*v.*

RAI PROMOTHO NATH MITRA.\*

*Partition Suit—costs, each party to bear its own, up to the passing of preliminary decree—absence of exceptional circumstances.*

1930.

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 February,  
 13.

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\*Appeal from Original Decrees no. 58 and 59 of 1928, from a decision of Maulvi Amir Hamza, Subordinate Judge of Gaya, dated the 12th December, 1927.

(1) (1927) 29 Bom. L. R. 488.

1930.

RAI BIPIN  
BEHARI  
BOSE  
P.  
RAI  
PROMOTHO  
NATH  
MITRA.

In a partition suit each party will bear its own costs up to the passing of the preliminary decree, unless there are exceptional circumstances, that is to say, unless the defendants have put up a frivolous contest.

*Dildar Ali Khan v. Bhawani Sahai Singh* (1), *Ambika Prasad Singh v. Perdip Singh* (2) and *Matilal Ghose v. Giris Chandra Ghose* (3), followed.

Appeal by the defendants.

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

*S. N. Bose*, for the appellants.

*S. K. Mitra*, for the respondents.

ADAMI, J.—These appeals are against the preliminary decree in a partition suit. The only point attacked in that decree is the awarding of costs to the plaintiff. The learned Subordinate Judge after finding that the plaintiff had demanded a partition and no steps had been taken by the defendants to agree to his proposal, held that therefore the plaintiff was entitled to costs. It may be mentioned that the plaintiff claimed an 8-annas share in the properties and the defendants did not oppose or in any way contest his claim before the Subordinate Judge.

Now in this Court as in the Calcutta High Court it has always been the general rule that up to the passing of the preliminary decree in a partition suit each party will bear its own costs. There is plentiful authority for this, and we need only refer to the cases of *Dildar Ali Khan v. Bhawani Sahai Singh* (1), *Ambika Prasad Singh v. Perdip Singh* (2) as well as the case of *Matilal Ghose v. Giris Chandra Ghose* (3) which make it quite plain that unless there are exceptional circumstances, that is to say, unless the defendants have put up a frivolous contest, the parties will pay their own costs up to the preliminary decree.

(1) (1907) I. L. R. 34 Cal. 878. (2) (1914) I. L. R. 42 Cal. 451.  
(3) (1909) 12 Cal. L. J. 346.

It is argued by the learned Counsel for the respondents that this Court should not interfere with the discretion exercised by the lower Court, and it is pointed out that the lower Court did give reasons for awarding costs in favour of the plaintiff. But it is clear to me that the reasons he gives are not good reasons and that he acted on a wrong principle. In every partition case, before a suit can be instituted, there must be a demand and a final refusal. In the present case there was a demand and refusal, but the defendants took no further steps to contest the plaintiff's case.

So much of the decree of the lower Court as deals with the question of costs must be modified and the parties will bear their own costs up to the preliminary decree in the suit.

The appeals are allowed to this extent. Each party will bear its own costs in this Court.

KULWANT SAHAY, J.—I agree.

*Decree modified.*

## APPELLATE CIVIL.

*Before Macpherson and Fazl Ali, JJ.*

RAMKUMAR AGARWALA

v.

RAMCHARAN HANUMAN SONAR.\*

*Code of Civil Procedure, 1908 (Act V of 1908), section 47 and Order XXI, rules 95 and 97—proceeding between judgment-debtor and stranger auction-purchaser, whether a proceeding between parties to the suit—order in the proceeding, whether appealable as decree—section 47—Order XXI, rules 95 and 97, application under, whether a proceeding relating to the execution, discharge or satisfaction of the decree.*

\*Appeal from Appellate Order no. 156 of 1929 and Civil Revision no. 263 of 1929, from an order of Babu Sadhu Charan Mahanti, Subordinate Judge of Chaibasa, dated the 26th April, 1929, reversing an order of Babu Nideshwar Chandra Chandra, Munsif of Jamshedpur, dated the 22nd September, 1928.

1930.

RAI BIPIN  
BEHARI  
BOSE  
v.  
RAI  
PROMOTHO  
NATH  
MITRA.

ADAMI, J.

1930.

February,  
10, 14.