

*Mussammatt* Daulat Kaur a decree for maintenance against her husband, *Sardar* Ude Singh, at Rs.10 *per mensem* from the 27th November, 1933.

The respondent, Ude Singh, shall pay *Mussammatt* Daulat Kaur's costs in all the Courts in both appeals.

ABDUL RASHID J.—I agree.

A. N. C.

*Husband's appeal dismissed.*

*Wife's appeal accepted.*

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UDE SINGH

v.

MST. DAULAT  
KAUR.

TEK CHAND J.

### APPELLATE CIVIL.

*Before Addison and Din Mohammad JJ.*

MAQBUL AHMAD (DEFENDANT) Appellant

*versus*

MST. AFZAL-UL-NISA

(PLAINTIFF)

ABDUL JABBAR & OTHERS

(DEFENDANTS)

} Respondents.

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Jan. 3.

**Civil Appeal No. 433 of 1931.**

*Partition — Suit for — Defendants desiring separation of their shares—whether Court should grant their requests—Stamp duty on decree — same as on “instrument of partition” — Indian Stamp Act, II of 1899, sections 2 (15), 29 (g) and article 45 : Court-fees—whether payable on application for execution of “stamped” decree.*

In a partition suit of the property left by one A. H., a Muhammadan, one of the defendants, M.A. (the present appellant) prayed that his 7/16th share in specific houses should also be partitioned and awarded to him. The trial Court held that M. A. was not entitled to a partition decree unless he came before the Court as a plaintiff or paid the proper Court-fee.

*Held*, that in a partition suit each party stands in the position of a plaintiff with reference to the others and if any of the defendants desires that his share should also be

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separated, the trial Court should separate it. It is not necessary that such defendant should either come into Court as a plaintiff or pay proper Court-fee on his share before a partition decree can be drawn up in his favour.

*Loke Nath Saha v. Radha Gobinda Shaha* (1), *Debi Sahai v. Tara Chand* (2), and *Wasdeo v. Rup Chand* (3), referred to.

*Held further*, that such a decree would fall within the definition of "an instrument of partition" within the meaning of section 2 (15) of the Indian Stamp Act and that, under section 29 (g), it is the duty of the Court to decide the proportion of the stamp payable by each person who desires separation of his share.

*And*, that it would be impossible for any of the parties to execute the decree until the stamp duty is first levied and paid.

*But*, that it is not necessary for the defendants who claim execution under such a *stamped* decree to pay Court-fees as well in order to have their shares separately allotted to them.

*Venkatasubbumma v. Ramanudhayya* (4), and *Hem Chandra Mahto v. Prem Mahto* (5), followed.

*First Appeal from the final decree of Lala Chiranjiv Lal, Subordinate Judge, 1st Class, Delhi, dated 12th December, 1930, refusing defendant's prayer to have his share separated.*

KISHEN DAYAL and S. N. BOSE, for Appellant.

SHUJA-UD-DIN, L. SAUNDERS, KHURSHAID ZAMAN and MOHAMMAD AMIN, for (Plaintiff) Respondent.

ADDISON J.

ADDISON J.—One Abdul Hamid died leaving nine houses and one shop in Delhi. His heirs were, a son, Abdul Samad and two daughters as well as his widow *Mussaminat* Mahmud-ul-Nisa, defendant No.3. One

(1) (1926) 86 I. C. 765.

(3) 23 P. R. 1905.

(2) 22 P. L. R. 1918.

(4) (1932) I. L. R. 55 Mad. 975

(5) 1926 A. I. R. (Pat.) 154.

of the daughters, *Mussammât Afzal-ul-Nisa*, instituted this suit for partition of her 7/32nd share of the property. Abdul Samad is dead and is represented by his son, Abdul Jabbar, and widow, *Mussammât Anwar-ul-Nisa*, defendants 1 and 2. The other sister, *Mussammât Niab-ul-Nisa*, is also dead and is represented by her son, Abdul Rashid, and husband, Abdul Majid, defendants 4 and 5, respectively. The other defendants are transferees of portions of the property from various members of the family. The numbers of the houses are 2698, 2699, 2700, 2796, 2797, 2798, 2800, 2801 and 2802, while the number of the shop is 2770. It was recited in the plaint that Abdul Samad, the son, had mortgaged in his lifetime his 7/16th share in four properties, namely, houses Nos. 2800, 2801, 2802 and shop No. 2770 to one Lachhu Mal whose son is defendant No.11. Defendant No.11 obtained two decrees for the sale of this share in these four properties. These decrees were purchased by defendant No.6, Maqbul Ahmad, who subsequently in execution purchased Abdul Samad's 7/16th share in these four properties. It was further recited in the plaint that before this auction sale took place plaintiff and other members of the family referred the matter of the partition of the estate of Abdul Hamid to arbitration and an award was given on the 29th October, 1923, according to which house No.2800 fell to plaintiff's share. Maqbul Ahmad was taking possession of his share in this property as well as in the other three properties and plaintiff brought a suit for a declaration to restrain him on the ground that property No.2800 had come to her share on partition. Her suit was, however, dismissed on the ground that the award was obtained collusively in order to defeat the claim of Maqbul Ahmad, defendant No.6. Ac-

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cordingly, the plaintiff instituted this suit for partition of the whole property.

Various defences were raised. The shares are not in dispute nor is it disputed that Maqbul Ahmad, defendant No.6, is entitled to 7/16th of the four properties mentioned. The cases of the other transferees need not be specially mentioned here. An order was recorded by the first judge, who was trying the suit, as follows :—

“ The question whether Maqbul Ahmed, defendant, should be turned out of the share of the properties purchased by him and should be awarded a share in the remaining property should be decided after the preliminary decree, as it relates to the mode of partition.”

At this stage it may be mentioned that the shop No.2770 has already been partitioned between the parties and it was agreed before us that no further partition proceedings as regards it were necessary and that it should be excluded from this partition. It has also to be mentioned that there is a suit pending by Maqbul Ahmad for partition of his share of house No.2802, without including his share in the other properties purchased by him.

The trial Judge found that the partition effected by the award was invalid as it was collusive. The shares of the other transferees were set out and at the end of the judgment directing a preliminary decree to be drawn up it was said that the vendees should be allowed property alienated to them if the equities permitted this. Due regard, however, should be paid to the state of the family, its debts, nature of property, etc., etc. It was directed that in the proceedings for drawing up the final decree regard should be had to

these directions. The preliminary decree is dated the 23rd July, 1930, and there was no appeal against it.

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Thereafter a local commissioner was appointed to submit a report as to the mode of partition. On the 18th October, 1930, he submitted a report setting out the values of all the ten properties. In this he valued house No.2800 at Rs.2,768-2-0. He valued the share of *Mussamat Afzal-ul-Nisa* at Rs.3,065-9-0. He suggested that plaintiff should be allowed this house No.2800 as her share and that the defendants should pay her the deficiency of Rs.297-7-0.

The plaintiff herself objected to this report pointing out that shop No.2770 had been valued at Rs.2,006-13-3, while its value was more than Rs.4,000. She further asked that, instead of house No.2800 and a share of shop No.2770 being given to her, she might be given shop No.2770 and house No.2801 the value of which, according to the commissioner, was Rs.2,921-6-0. Most of the defendants also filed objections as regards the undervaluation of the property and asked for a complete partition of the shares of all the heirs. Maqbul Ahmad, defendant No.6, specifically mentioned that house No.2800 awarded to the plaintiff had been very much undervalued and he added that he was being deprived of his share in the specific numbers purchased by him at the Court auction. *Mussamat Afzal-ul-Nisa* put in another petition admitting that shop No.2770 had already been partitioned, agreeing that this previous partition should be maintained and stating that she had no objection to Maqbul Ahmad getting his share in house No.2800 allotted to her by the commissioner. As already stated, it was agreed before us that this shop No.2770 should be excluded from the partition, as it had

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already been partitioned. It has also to be noted that house No.2800 had been valued at a much higher figure in the collusive award proceedings already alluded to.

After these objections were put in, the trial Court ordered on the 28th October, 1930, that the local commissioner should make proposals for the complete partition of the property. Accordingly, he put in a report, dated the 17th November, 1930, suggesting a partition into four shares namely, those of the original heirs of Abdul Hamid, *i.e.* his widow, two daughters and son. No attempt was made in this report to give Maqbul Ahmed and others the shares they were entitled to. The properties were valued at the same figures as had been given in the first report. Maqbul Ahmad, defendant No.6, again objected to the commissioner's proposals and prayed that a competent commissioner might be appointed to prepare a complete scheme to settle the shares of the parties once for all. There were also objections on behalf of the other defendants. Maqbul Ahmad again pointed out that the local commissioner had awarded the same house No.2800 to *Mussamat* Afzal-ul-Nisa, which she obtained under the collusive award proceedings. In this second report of the commissioner, the shop No.2770 was excluded, so that the value of the share of the plaintiff became Rs.2,626-8-0, whereas the value of the house No.2800, according to the commissioner, was Rs.2,768-2-0. Maqbul Ahmed again asked that his 7/16th share in houses No.2800, No.2801 and No.2802 should also be partitioned and awarded to him. In her application of the 28th October, 1930, the plaintiff, *Mussamat* Afzal-ul-Nisa, had stated in paragraph 3 that she would be content to get a 7/16th share in property No.2800

awarded to her and that she had no objection to the remaining portion going to Maqbul Ahmad.

Instead of framing issues on the numerous objections taken to the commissioner's report, the trial Court at once proceeded to pass a final decree which is dated the 12th December, 1930. It was stated in this order that Maqbul Ahmad was not entitled to possession of the share he claimed in respect of the properties purchased by him until he came before the Court either as a plaintiff in respect of all these properties or paid proper Court-fees in respect of them. The Judge, therefore, directed that a final decree should be drawn up allotting house No.2800 to the plaintiff and directed her to deposit Rs.141-10-0 for distribution among the other co-sharers. Against this decision Maqbul Ahmad, defendant No.6, has preferred this appeal.

From what has been said it will be clear that the trial Judge has acted very hastily in this matter. He should have framed issues, gone into the question of undervaluation and seen whether it was possible to allow Maqbul Ahmad portions of the properties or some of the properties, a share of which was purchased by him. Seeing that it is admitted that shop No.2770 has already been partitioned, these properties are now houses Nos.2800, 2801, 2802. There has been no proper adjudication as regards the valuation of the properties and the way they should be allotted.

Apart from that, the trial Judge has erred in holding that Maqbul Ahmad, or any other of the co-sharers, must either come into Court as a plaintiff or first pay proper Court-fees before a partition decree could be drawn up in their favour. This has never been laid down. In *Loke Nath Saha v. Radha Gobinda Shaha* (1), the Calcutta High Court said that

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in a partition suit each party stands in the position of a plaintiff with reference to the others and that the Court had no reason to refuse the prayer of the defendants for partition of their share if the plaintiff's right to claim partition had been established. In *Debi Sahai v. Tara Chand* (1), it was held that every co-sharer is entitled to obtain possession of the share allotted to him under a decree for partition whether he is a plaintiff or defendant, while it was held in *Wasdeo v. Rup Chand* (2), that as a decree for partition is a joint declaration of the rights of all the co-sharers interested in the property of which partition is sought, each co-sharer is entitled to obtain possession of the share allotted to him under the decree whether he be plaintiff or defendant. It was, therefore, necessary for the trial Court also to separate the shares of those defendants who desired that to be done.

It may be pointed out that such a decree would fall within the definition of an instrument of partition within the meaning of section 2 (15) of the Indian Stamp Act, and that under section 29 (g) of the Stamp Act it is the duty of the Court to decide the proportion of the stamp payable by each person who desires his share separated. Article 45 is the article under which this stamp duty is levied. It would, of course, be impossible for any of the parties to execute the decree until the stamp duty was first levied and paid.

Whether, however, it is necessary for the defendants who claim execution under such a stamped decree also to pay Court-fees is a more difficult matter and I am doubtful if it arises at this stage of the case. As, however, the matter has been argued before us, I proceed to discuss this question.

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(1) 22 P. L. R. 1918. (2) 23 P. R. 1905.



In *Nawab Mir Sadrudin v. Nawab Nurudin* (1), a defendant to a partition suit applied for execution in his favour of the decree therein. The Judge ruled that he could execute the decree when he had paid Court-fees on his share. The decree itself imposed no such term as to Court-fees. It was held by a Division Bench of the Bombay High Court that the execution Court was not justified in requiring payment of an additional Court-fee on the plaint. In this case, of course, the final decree had been passed without any stipulation as to its not being capable of execution by the defendants until the executing defendant had paid Court-fees on his share. Another Division Bench of the Bombay High Court held in *Gandhi Vadilal Chhaganlal v. Gandhi Manaklal Chhaganlal* (2), that, where a complete decree had been drawn up on the award and the executing Court dismissed the application for execution on the ground that there was no decree as the necessary Court-fees had not been paid, the order dismissing the application for execution was wrong and execution should have been allowed. Here, again, it will be seen that there was no provision in the decree to the effect that any defendant executing the decree must first pay Court-fees on his share. In *Tadepalli Peda Nagabhushanam v. Tadepalli Pitchayya* (3), however, a Division Bench of the Madras High Court held that, if a defendant under a decree or award for partition gets a share of the property allotted to him, he must, if he wishes to execute the decree, pay his share of the Court-fee payable on the entire decree. There was practically no discussion of the question by the Judges who decided the case.

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(1) (1905) I. L. R. 29 Bom. 79.

(2) 1923 A. I. R. (Bom.) 41.

(3) (1917) 42 I. C. 365.

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The view taken by this Bench of the Madras High Court was not taken by a Division Bench of the Patna High Court in *Hemchandra Mahto v. Prem Mahto* (1). It was there said that there was nothing in the law which requires a defendant in a partition suit to pay Court-fees in order to have his share separately allotted to him. The decree that is finally drawn up has to be stamped as an instrument of partition under the Stamp Act and except that duty no other duty is payable by the defendant.

Further, another Division Bench of the Madras High Court in *Venkatasubamma v. Ramanadhayya* (2), took the same view as the Patna High Court. The Judges stated that they did not agree with the decision in *Tadepalli Peda Nagabhushanam v. Tadepalle Pitchayya* (3), and that they preferred the reasoning in the Patna decision.

There are also some remarks by Jenkins C. J. in *Nawab Mir Sadrudin v. Nawab Nurudin* (4), which seem to indicate that he was of the same view. He said: "Now *ex concessis* this Court-fee is to be imposed, if at all, in respect of the plaint, but the plaint is not the defendant's document, so why should he pay any fee on it. We can find nothing in the Court-fees Act which imposes the burden." This seems to show that he was of the same view as was taken by the Patna High Court and by the Madras High Court in its later decision, though it was unnecessary for him to come to this decision as in the case before him the final decree had been drawn up without any stipulation that it could not be executed until each defendant had paid his share of the Court-fee. In my

(1) 1926 A. I. R. (Pat.) 154. (3) (1917) 42 I. C. 365.

(2) (1932) I. L. R. 55 Mad. 975. (4) (1905) I. L. R. 29 Bom. 79.

judgment the law is correctly laid down in *Venkata-subbamma v. Ramanadhayya* (1) and *Hem Chandra Mahto v. Prem Mahto* (2).

For the reasons given, this appeal must be accepted and the final decree set aside. The case will be remanded to the trial Court to proceed with the case from the stage of the preliminary decree. A new commissioner should be appointed and he should be directed to divide the property into as many lots as the parties desire. Of course, any of the parties can elect not to have their shares divided but to leave them undivided, or any group can ask for their share to be treated as joint. When the Court has ascertained this, the commissioner should be instructed, after a proper valuation of the property, to make proposals for the partition of the various shares desired. So far as possible the share of the appellant, Maqbul Ahmad, should be given out of houses Nos.2800, 2801 and 2802. If this is not possible, some reasonable arrangement should be made. This remark applies to the others as well. Shop No.2770 should be treated as already partitioned. As regards the suit instituted by Maqbul Ahmad for partition of house No.2802, it should be consolidated with this suit and only one partition effected. Parties will bear their own costs here. Other costs in connection with the making of the final decree will be in the discretion of the Court of first instance.

DIN MOHAMMAD J.—I agree.

P. S.

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*Appeal accepted.*

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(1) (1932) I. L. R. 55 Mad. 975.

(2) 1926 A. I. R. (Pat.) 154.