APPELLATE CIVIL.

Before Addison and Din Mohammad JJ.

NAWAB ABDUL HASSAN KHAN (PLAINTIFF) Appellant

versus

MST. MAHMUDI BEGAM AND OTHERS (DEFENDANTS) Respondents.

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Nov. 29.

Civil Appeal No. 848 of 1932.

Indian Stamp Act, II of 1899, section 2 (15) and Art. 45, proviso (c): Decree for partition based on award of arbitrators—whether liable to stamp duty—and whether suit for money can be based on the unstamped decree — if separable from the partition.

In February, 1923, an award was made partitioning the property left by the ancestor of the parties, which was later made a decree of the Court. Neither the award nor the decree was stamped. In para.9 of the award the first party was declared to be entitled to receive Rs.49,090 from the second party on account of *mesne* profits, etc. In August, 1925, the first party sued out execution of the decree in respect of para.9, which was refused. In 1929, the first party instituted the present suit praying for a decree for Rs.49,090 against the second party, which was rejected by the trial Court on the ground that the decree of 1923, on which the suit was based, was not stamped. The question before the High Court was whether the decree passed on an award directing partition is chargeable with stamp duty notwithstanding that the award was also chargeable.

Held, that both the award and the decree based thereon were "instruments of partition" within the meaning of section 2 (15) of the Indian Stamp Act, 1899, and as such liable to stamp duty under Article 45. If the award had been duly stamped the maximum stamp duty on the decree would, in the Punjab, have only amounted to 12 annas under proviso (*c*) of Article 45. As, however, the award in the present case had not been stamped there was no provision of law which could save the decree from stamp duty under this Article.

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But held also, that as para.9 of the award was not a part of the decree *effecting partition* but was an order standing by itself, it could be proved without reference to the partition decree, which alone was inadmissible without payment of the stamp duty and penalty.

Case law, discussed.

First Appeal from the decree of Lala *Ram Kanwar, Senior Subordinate Judge, Delhi, dated 26th February, 1932, dismissing the plaintiff's suit.*

KISHEN DAYAL and BISHEN NARAIN, for Appellant.

FAKIR CHAND, SHUJA-UD-DIN, and MOHAMMAD AMIN, for Respondents.

DIN MOHAMMAD J.

DIN MOHAMMAD J.—The parties to this appeal are descended from *Maulvi* Inayat-ul-Rahman Khan of Delhi. The appellant Nawab Abdul Hassan Khan will hereafter be called the first party and the respondents, the heirs of Khan Bahadur Ghulam Mohammad Hassan Khan, the second party.

Some time after the death of the said *Maulvi*, disputes arose between the first party and the second party over the property left by him which were referred to the arbitration of *Khan Bahadur Khwaja* Tasudduq Hussain and *Maulvi* Sayed Ahmad Imam. The former died during the pendency of the arbitration proceedings and was replaced by *Khan Bahadur Pirzada* Mohammad Hussain. The arbitrators were required not only to partition the property among the disputants, but also to settle the accounts of the *mesne* profits between them.

On the 17th January, 1921, the second party made an application under paragraph 17, Schedule II, Civil Procedure Code, to the Court of the Senior Subordinate Judge, Delhi, that the agreement to refer to arbitration be filed in Court. On the 7th March, 1922,

this application appears to have been revived. Necessary steps under clause 4 of paragraph 17 were taken and the arbitration proceedings continued. On the 15th February, 1923, the award was made. On the 19th February, 1923, judgment was pronounced according to the award in the following terms :—

" I hereby pass a decree in terms of the arbitrator's award, dated the 15th February, 1923 (13 sheets)."

On the same day a decree was drawn up in accordance with the judgment but neither the award nor the decree was stamped.

The award was divided into various paragraphs. Paragraphs 1 to 8 dealt with the preliminary proceedings and the partition of both moveable and immoveable property. The immoveable property was divided into three lots, A, B, and C. Lot A fell to the share of the first party, lot B to that of the second party and lot C was kept joint. The parties accepted this division and affixed their signatures to the award. Paragraph 9 related to the settlement of accounts and declared the first party entitled to receive Rs.49,090 from the second party. This sum was made up of the following items in the award :—

	Rs.	
(1)	38,532	on account of *mesne* profits ;
(2)	10,088	on account of debt due to Sikandar Jahan Begum, sister of the first party ;
(3)	270	on account of the excess in the value of the property.
Total ..	48,890.	The total mentioned in the award, however, is Rs. 49,090.

Para. 10 summarised the award, para. 11, dealt with *wakfs* and para. 12 (wrongly described as

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para. 13 in the award) further separated the share of a member of the second party from his other co-sharers.

On the 13th August, 1925, the first party sued out execution of the decree to the extent of paragraph 9 only, but his application was rejected on the 1st July, 1927, and this order was confirmed by the High Court on the 14th November, 1927.

On the 2nd February, 1929, the present suit was instituted by the first party, praying for a decree for Rs.49,090 against the second party. Various pleas were raised by the defendants, but the Subordinate Judge without disposing of anyone of them came to the conclusion on a preliminary objection that the decree of the Court, dated the 19th February, 1923, on which the plaintiff's claim was based, could not be brought on the record or admitted in evidence without the payment of the requisite stamp duty and penalty and called upon the plaintiff to state whether he was prepared to do this by the 26th of February, 1932. The plaintiff refused, on which the Subordinate Judge dismissed his suit. Plaintiff has appealed.

Counsel for the appellant contends that the final order contemplated in section 2 (15), read with Article 45, Schedule I, Stamp Act, means an order in a regular partition suit and not one based on an award directing partition, as it could not be the intention of the Legislature to require the same amount of stamp duty twice for one transaction, which would be the result if a decree based on such an award was also included in the said final order. He further urges that even if the award was unstamped no objection could be raised on that score, as it had already been admitted in evidence without any objection and consequently was now merged in the decree which did not

require to be stamped. He finally argues that under any circumstances that portion of the decree which is material for this purpose is not liable to stamp duty, and as the decree can be split up and the portion of the decree dealing with partition is not being referred to in the suit he should be allowed to prove that portion of the decree only on which he relies without payment of stamp duty and penalty. As against this, counsel for the respondents maintains that both the award and the decree are equally liable to the same amount of stamp duty, that the decree cannot be split up in the manner in which it is sought to be done and as both are unstamped, section 35, Stamp Act, is a clear bar to their being admitted in evidence for any purpose. unless they are duly stamped.

The question involved in this case being important from the point of view of administration and not free from difficulty, it is necessary to closely examine the authorities cited and the arguments advanced to us. In support of his main contention, besides arguing the case on general principles, counsel for the appellant has relied on *Balaram* v. *Ramkrishna* (1) and *Raje Udajiram* v. *Rajeshwar* (2). Counsel for the respondents on the other hand has placed his reliance on *Kalidas Lalbhai* v. *Tribhuvandas Bhagwandas* (3), *Tadepalli Peda Nagabhushanam* v. *Tadepalli Pitchayya* (4), *Saraiya Qadar* v. *Qudsia Begam* (5), *Muzaffar Hussain* v. *Sharafat Hussain* (6), *Jotindra Mohan Tagore* v. *Bejoy Chand Mahatap* (7) and *Thiruvengadathamiah* v. *Mungiah* (8). I will discuss these authorities below in the order in which they appear here.

(1) (1905) I. L. R. 29 Bom. 366.
(2) (1922) 67 I. C. 310.
(3) (1907) I. L. R. 31 Bom. 68.
(4) (1917) 42 I. C. 365.
(5) (1914) 24 I. C. 643.
(6) 1933 A. I. R. (Oudh) 562.
(7) (1905) I. L. R. 32 Cal. 483.
(8) (1911) I. L. R. 35 Mad. 26.

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In *Bularam* v. *Ramkrishna* (1), the reference arose out of a suit for partition which had been dismissed by the trial Court, but decreed on appeal. When the plaintiffs applied for the execution of the decree the trial Judge adopted the procedure prescribed in Order XXVI, rules 13 and 14, Civil Procedure Code, and passed the final decree. A question arose as to whether the decree required to be stamped as an instrument of partition and the Subordinate Judge made a reference to the High Court in the following terms :—

" Whether a final decree for partition not made upon an award or an agreement of the parties, is liable to be stamped as an instrument of partition ?"

A Bench of three Judges held that a decree passed in accordance with a Commissioner's report is a final order for effecting a partition passed by a Civil Court and must, therefore, be stamped as an instrument of partition. The reasons recorded to the contrary by the Subordinate Judge in his order of reference were ignored. Counsel for the appellant lays great stress on the fact that the terms of reference expressly mentioned a final decree for partition, not made on an award, and as the reply given by the learned Judges should be taken to cover the reference this authority supports his contention that a decree passed on an award does not require a stamp. The fallacy underlying this argument is, however, too obvious. In the first place, the reply to the reference is clearly confined to a decree based on a Commissioner's report; secondly, the question that is now before us was not referred to the learned Judges at all and the reply cannot in any manner be so strained as to exclude decrees passed on awards; thirdly, it is also possible to interpret the terms of reference to mean that so far

(1) (1905) I. L. R. 29 Bom. 366.

as decrees based on awards were concerned there was no donbt in the mind of the Subordinate Judge; and, fourthly, the terms of reference of the Subordinate Judge cannot serve as a proper guide to us in interpreting the judgment subsequently delivered nor are we expected to draw our inspiration from the language employed therein. This authority, therefore, is of no use to the appellant.

In *Raje Udajiram* v. *Rajeshwar* (1), a partition decree had been passed eight years before and had also been executed and acted upon for six years when a question arose in the course of an application for its amendment that it was not a valid decree at all as it was unstamped. The learned Additional Judicial Commissioner (Mr. Prideaux) remarked that it was too late at that stage to call for a decree upon a properly stamped paper and that though a document might be inadmissible in evidence, it did not follow that it was invalid. He also observed that when an instrument had been admitted in evidence such admission should not be called in question at any stage of the same suit or proceeding. This decision also does not throw any light on the question before us nor does it help the appellant in any way.

In *Kalidas Lalbhai* v. *Tribhuvandas Bhagwandas* (2), a Bench composed of three Judges held that an award deciding that a party should take into his possession property specified therein on certain conditions came within the purview of section 2 (15) of the Indian Stamp Act and was liable to stamp duty. The following passages occurring in the judgment of Beaman J. are worth perusal :—

" The terms of section 2, clause 15, provide for all the cases, for parties having divided or agreed to

(1) (1922) 67 I. C. 310. (2) (1907) I. L. R. 31 Bom. 68.

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divide, for arbitrators, to whom reference has been made, directing a partition, and, last, for the Courts effecting a partition. * But, whether with or without a previous reference to arbitration, parties may be obliged to have recourse to the Courts, and in that case the Court either by adopting the award of arbitrators, which one party disputes, or where there has been no award, by its own decrees makes an effectual partition." It would appear that it was present to the mind of Beaman J. that a case might arise when a decree may be obtained on an award, and he tried to explain that the functions of both were different, inasmuch as while an award may merely direct partition the decree would effect the partition actually.

In *Tadepalli Peda Nagabhushanam* v. *Tadepalli Pitchayya* (1), the only question decided by the learned Judges was that if a defendant, under a decree or award for partition, obtained a share allotted to him of the property, and he wished to execute the decree, he should pay his share of the Court-fee payable on the entire decree. It is not clear from the report whether the decree was based on an award or not, nor does the question before us appear to have been discussed.

In *Suraiya Qadr* v. *Qudsia Begam* (2), the learned Judicial Commissioners while concluding their judgment observed:—"As the final decree operates to effect a partition of moveable or immoveable property *in specie* it will be treated as an instrument of partition." This proposition is too obvious to be discussed.

(1) (1917) 42 I. C. 365. (2) (1914) 24 I. C. 643, 661.

In *Muzaffar Hussain* v. *Sharafat Hussain* (1), a Special Bench of the Oudh Chief Court, relying on *Thiruvengadathamiah* v. *Mungiah*, (2), lays down that a decree passed on the basis of a compromise filed by the parties in a partition suit, which has the effect of allotting specific portions of property to the parties, is an instrument of partition and must be stamped. This again is beside the mark.

In *Jotindra Mohan Tagore* v. *Bejoy Chand Mahatap* (3), a Bench of the Calcutta High Court went so far as to lay down that a decree for partition, to be operative, must be engrossed on stamped-paper and until the Judge signed the decree it could not be said that the suit had terminated. In that case where in a suit for partition the Commissioner's report had been confirmed and a decree had been directed to be drawn in accordance therewith, but the final decree had not yet been signed, the learned Judges treated the litigation as pending and directed a new party to be added.

In *Thiruvengadathamiah* v. *Mungiah* (2), a decree reciting a *razinamah* made by consent of parties, allotting specific properties to the several parties and directing other parties to deliver possession was considered chargeable with stamp duty. It may be mentioned that in the present case also the award bears the signatures of the parties and the decree based on it, being tantamount to be made by consent of parties, can further be described as an instrument whereby co-owners have agreed to divide property in severalty.

It will thus appear that none of the authorities cited to us has any direct bearing on the question under consideration. It becomes necessary, therefore, to fall

(1) 1933 A. I. R. (Oudh) 562. (2) (1911) I. L. R. 35 Mad. 26.
(3) (1905) I. L. R. 32 Cal. 483.

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back upon the relevant sections of the enactment itself to find out whether a decree passed on an award directing partition is liable to stamp duty, notwithstanding that such an award is also chargeable. Section 2 (15), Stamp Act, reads as follows :—

" ' Instrument of partition ' means any instrument whereby co-owners of any property divide or agree to divide such property in severalty, and includes also a final order for effecting a partition passed by any Revenue authority or any Civil Court and an award by an arbitrator directing a partition."

The duty leviable upon this instrument is prescribed in Article 45, Schedule I, Stamp Act, provisos (*a*) and (*c*) of which are important for the purpose of this case and are reproduced below :—

" (*a*) When an instrument of partition containing an agreement to divide property in severalty is executed and a partition is effected in pursuance of such agreement, the duty chargeable upon the instrument effecting such partition shall be reduced by the amount of duty paid in respect of the first instrument, but shall not be less than eight annas (twelve annas in Bengal, Madras, U. P. and Punjab, and rupee one in Bombay);

* * * * * * *

(*c*) Where a final order for effecting a partition passed by any revenue authority or any Civil Court or an award by an arbitrator directing a partition, is stamped with the stamp required for an instrument of partition and an instrument of partition in pursuance of such order or award is subsequently executed, the duty on such instrument shall not exceed eight annas (twelve annas in Bengal, Madras, Punjab, U. P. and rupee one in Bombay.)

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In my view, these provisions are exhaustive in themselves on the question involved in the present case and just as it is not permissible to add to or subtract from the definition, as given in section 2 (15), similarly it would be illegal to engraft any exceptions or impose any limitations on Article 45 beyond those that are clearly set forth in the provisos. A plain reading of the relevant provisions leads to the conclusion that every final order effecting a partition passed by any Civil Court is an instrument of partition and so is every award by an arbitrator directing a partition. Standing by itself, therefore, either of the two is chargeable with duty of the amount indicated in Article 45 as the proper duty therefor. The only argument employed against this interpretation is that it will work a great hardship on the person who, not remaining content with a mere award, further seeks to convert it into a rule of Court and obtains a decree therefrom based on that award. Now, in the first place, this consideration should be foreign to a Court of law. A Court has to interpret the law as it stands and is not competent to play the role of a legislator and to introduce amendments based on equitable considerations to remove the possible defects. Secondly, this argument does not hold good and is completely answered by the provisos to Article 45. The Legislature, in my opinion, anticipated this contingency and made an adequate provision for it by enacting that when once a duty was paid in relation to one instrument and a second instrument was subsequently executed in pursuance thereof it will be chargeable with a maximum duty of twelve annas only, so far as our Province is concerned. As I interpret proviso (*c*) I find it fully applicable to the case before us. The award that was made was an instrument of partition chargeable with duty and so was the decree

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that followed the award. It is proper to say that one instrument of partition was subsequently executed in pursuance of another. If, therefore, the award had been stamped with proper duty, twelve annas only would have sufficed for the decree, but as it is not so stamped there is no provision of law which can save the decree from stamp duty as prescribed in Article 45, Schedule I, Stamp Act.

I would, therefore, hold that the decree so far as it effected partition in this case was and is chargeable with stamp duty under Article 45 and could not be admitted in evidence without payment of duty and penalty. In this view of the case it is not necessary for me to determine whether any objection could now be taken to the award on the ground of want of stamp when no such objection was taken at the time when it merged in the decree.

But this does not settle the question before us. Counsel for the appellant contends that paragraph 9 of the decree on which he has based his claim is not liable to stamp duty and should be allowed to be separated from the rest. He relies on *Chimnaji* v. *Ranu* (1), *Krishnasami Ayyangar* v. *Rajagopala Ayyangar* (2) and *Randhir Singh* v. *L. Thaman Lal* (3). The Bombay case dealt with an instrument, one part of which was liable to stamp duty of one amount and the other to that of a different amount and the learned Judges observed that that part of the document could be acted upon for which sufficient duty had been paid. The Madras case is merely an authority for the proposition that the definition of decree implies that an order directing accounts to be taken is separable from the rest of the decree adjudicating on the rights

(1) (1879) I. L. R. 4 Bom. 19. (2) (1893) I. L. R. 18 Mad. 73.
(3) 1934 A. I. R. (All.) 951.

claimed or the defences set up in the suit. In the Allahabad case an insufficiently stamped promissory note was used as an acknowledgment. Though none of these authorities is directly in point, I think, that on the broad principles of law as well as of justice it is only fair to hold that para.9 is not a part of the decree effecting partition and is an order standing by itself. The appellant has undertaken to forego a sum of Rs. 270 on account of the excess in the value of the property and has thus obviated the necessity of any reference to that portion of the decree which deals with partition. This further strengthens his case. Under the rules of the Civil Procedure Code it is permissible to join in one suit as many reliefs as can be legally claimed together and it is apparent that a relief for *mesne* profits is expressly permitted to be joined in a suit for possession whether with or without partition. In these circumstances it cannot be said that the decree passed in this case is inseparable. It is to all intents and purposes made up of as many decrees as there are reliefs claimed and it is only for the sake of convenience that it has been drawn up as one document. On these grounds I would hold that para.9 could be proved in this case without reference to the partition decree which is clearly inadmissible unless duty and penalty are paid.

For the reasons given, I would accept this appeal, set aside the order of the Senior Subordinate Judge and remand the case to him under Order 41, rule 23, Civil Procedure Code, for disposal in accordance with law. The Court-fee paid will be refunded.

Before concluding, I must direct the Subordinate Judge to impound both the original award and the decree under section 33, Stamp Act, as they have been found not to be properly stamped and have come before

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him in the performance of his functions. He should then send them in original under section 38 (2), Stamp Act, to the Collector for any action that he may deem fit under section 40, read with section 29, Stamp Act.

ADDISON J.—I agree.

A. N. C.

Appeal accepted,

Case remanded.

APPELLATE CIVIL.

Before Addison and Din Mohammad JJ.

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Dec. 4.

WARYAM SINGH (DEFENDANT) Appellant

versus

THAKAR DAS-DHAMALI RAM (PLAINTIFF) AND ALLAH DITTA (DEFENDANT) } Respondents.

Civil Appeal No. 452 of 1931.

Transfer of Property Act, IV of 1882, section 53 : Suit by one creditor for a declaration that a mortgage effected by the debtor in favour of another creditor is fraudulent and void — Major part of consideration found to be fictitious — whether the whole *transaction should be set aside.*

One W. S. effected a mortgage of his property by means of a registered mortgage deed, in favour of A. D. for a consideration of Rs.1,400; one of his creditors instituted a suit for a declaration that the mortgage was fraudulent and not binding upon other creditors. The defence was that as A. D. was also a creditor of W. S. the principle of section 53 of the Transfer of Property Act did not apply. The trial Court found the transfer for consideration and dismissed the suit. On appeal the Additional District Judge, finding that out of the consideration of Rs.1,400 an item of Rs.222 only was genuine, the rest of the items being fictitious, held that the transfer was void *in toto* against the creditors and could not be upheld even to the extent to which it was supported by consideration. On appeal to the High Court by W. S.—