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appellant, where the Magistrate had made an order granting maintenance, and it was sought to have such order set aside or superseded by a suit in the Civil Court.

As to the contention raised that the Hindu law does not authorize maintenance being granted to illegitimate children, we need only refer to the case of *Chuoturya Run Murdun Syn* v. *Sahub Purhulad Syn* (1), where the right of an illegitimate child to claim maintenance under the Hindu law was affirmed. But apart from the Hindu law, we should think that, upon general principles, the defendant, having begotten the child, is bound to provide for its maintenance, if that is necessary.

32 C. 479=13 C. W. N. 150 =8 I. C. 550.

Upon all these grounds, we think that the appeal should be dismissed with costs. We order accordingly.

Appeal dismissed.

32 C. 483.

[483] APPELLATE CIVIL.

Before Mr. Justice Pratt and Mr. Justice Mitra.

JOTINDRA MOHAN TAGORE *v.* BEJOY CHAND MAHATAP .*

[22nd Dec. 1904.]

Parties, addition of—Partition, suit for—Civil Procedure Code (Act XIV of 1882) s. 32—Pending litigation—Addition of party after the decree, but before it is engrossed on stamped paper—Stamp Act (II of 1899), s. 2 (15), Sch. I, Art. 45.

A suit for partition, even when the report of the Commissioners is confirmed and a decree is directed to be drawn in accordance therewith, is a pending litigation, until the Court signs the final decree.

A decree for partition, to be operative, must be engrossed on stamped paper as required by the Stamp Act and until the Judge signs the decree so engrossed, it cannot be said that the suit has terminated; and an order directing a party to be added under s. 32 of the Civil Procedure Code can be made in such a suit before it has actually terminated.

Lingammal* v. *Chinna Venkatammal* (2), *Mihin Lal* v. *Imtiaz Ali* (3), *Oriental Bank Corporation* v. *Charriol* (4), *Heard* v. *Borgwardt* (5) and *Keith* v. *Butcher* (6) *discussed.

[Fol. 35 Mad. 26; 2 M. L. T. 260.]

APPEAL by the plaintiff, Maharaja Bahadur Sir Jotindra Mohan Tagore.

This appeal arose out of an application in a suit for partition. On the 14th January 1901, one J. J. Winterscale brought a suit for partition in the Court of the Subordinate Judge of 24-Pergannahs, against several persons, one of whom was the present appellant. Winterscale, three days before the institution of his suit parted with a portion of his interest in favour of the Maharaja of Burdwan, who was at that time a minor under the Court of Wards. The Maharaja of Burdwan, although he was recorded **[484]** in the Collectorate as the proprietor of a separate estate, was however, not made a party to the suit for partition.

On the 9th August 1901 the Court passed its preliminary decree directing the appointment of Commissioners for partition by metes and

* Appeal from Order No. 176 of 1904, against the order of Behari Lal Banerjee, Subordinate Judge of 24-Parganas, dated April 19, 1904.

(1) (1857) 7 Moo. I. A. 18; 4 W. R. (P. C.) 132.
(2) (1883) I. L. R. 6 Mad. 227.
(3) (1896) I. L. R. 18 All. 332
(4) (1886) I. L. R. 12 Cal. 642.
(5) (1883) W. N. 173, 194.
(6) (1884) L. R. 25 Ch. D. 750.

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bounds. The present appellant asked the Commissioners to include the plot sold to the Maharaja of Burdwan in the share allotted to him, but they declined to do so, and included it in the share allotted to Winterscale.

The Commissioners submitted their report on the 7th March 1903, and the Court confirmed it on the 28th March 1903. But no final decree was then drawn and could not be drawn, as under section 2, sub-s. 15 of the Stamp Act, the order was necessary to be engrossed on a non-judicial stamped paper, but no stamp was filed at the time. The Court called upon Winterscale to put in the necessary stamp, but he did not do so, and on the 31st July 1903 the Court declined to draw up the final decree. In July 1903 Winterscale's interest in the property was sold in execution of a decree against him and was purchased by the Maharaja of Burdwan.

On the 24th August 1903 the present appellant Maharaja Sir Jotindra Mohan Tagore filed a petition praying that the Maharaja of Burdwan be substituted as plaintiff in the place of Winterscale on the ground of the devolution of the latter's interest. On the 9th September 1903, Winterscale applied for the withdrawal of the suit, and on the following day the Maharaja of Burdwan put in a petition declining to be placed as plaintiff on the record of the suit. The appellant, however, without waiting for the order that might be passed on the petitions above mentioned, put in the necessary stamps for the preparation of the decree. Thereafter the appellant applied to be himself transferred from the category of the defendants and to be made the plaintiff, and Winterscale to be made a defendant; and the Maharaja of Burdwan also applied to be made a defendant.

On the 8th February 1904 the Court allowed the appellant to be made a plaintiff in the case, and directed that Winterscale should be made a defendant.

On the 16th February the appellant's petition for making the Maharaja of Burdwan the plaintiff was withdrawn.

[485] On the 19th April 1904 the Court by an order allowed the Maharaja of Burdwan to be made a defendant. Against this order the plaintiff appealed to the High Court.

Dr. *Rash Behary Ghose* (Babu *Hara Prosad Chatterjee* with him) for the appellant. The Court had no power under s. 32 of the Civil Procedure Code to add a party after the decree was passed. In this case the Commissioners submitted their report and the Court accepted it and passed a decree. The questions involved were adjudicated upon and settled, and nothing was left for the Court to do. The learned Subordinate Judge thinks that the case of *Lingammal* v. *Chinna Venkatammal* (1) supports his view, but it does nothing of the kind. In that case the period of adjudication had passed and the presence of the party added was not necessary for adjudication of questions raised in the suit. The law laid down in the case of *Campbell* v. *Holyland* (2) is not good law; if that be so, a party can be added after the formal decree has been drawn up! *The Duke Buccleuch* (3) is also a quite different case from the present. We have nothing to do with the practice of the Chancery Court. In that case assessment of damages remained to be determined. The present case is not *sub judice* within the meaning of the ruling in *Oriental Bank Corporation* v. *Charriol* (4).

[MITRA, J. The final decree was not drawn up and could not be drawn up as the plaintiff had not paid the necessary Court-fees.]

(1) (1883) I. L. R. 6 Mad. 227.
(2) (1877) I. R. 7 Ch. D. 166.
(3) [1892] P. 201.
(4) (1886) I. L. R. 12 Cal. 642.

Under the Civil Procedure Code the decree must bear the date of the judgment. A suit is terminated as soon as the Court has pronounced its judgment: *Harris* v. *Quine*. (1) The mere fact the decree is to be drawn up makes no difference, because the decree is to bear the date of the judgment.

[MITRA, J. In a suit for partition as also in a suit for mesne profits, something is to be done by the parties before the final decree can be drawn up, *i.e.*, the payment of Court-fees. In such cases, the decree does not, as a matter of course, follow the judgment.]

Persons, who have no co-ordinate interest, have no right to be a party to a partition proceeding, therefore the Maharaja of **[486]** Burdwan, who was only a lakhirajdar, had no right to come in: see Freeman on Partition, s. 562.

[MITRA, J. Under the Estates Partition Act, a lakhirajdar has a right to come in: see s. 88 of the Act.]

Application under s. 32 of the Code must be made without any delay.

Mr. *Garth* (Mr. *Sinha*, Babu *Basanta Coomar Bose* and Babu *Shorashi Charan Mitter* with him) for the respondents. The case was still *sub judice*, and there was something left to be done. The question of stamp was to be decided. Until the stamp duty was paid the decree could not be finally issued and signed, and therefore the suit did not come to a final determination. So long as the suit has not come to a final determination under s. 32 of the Civil Procedure Code, a party can be added. The appellant was estopped by personal estoppel: Bigelow on Estoppel p. 537. The plaintiff having come under s. 372 of the Civil Procedure Code saying that the proceedings were still pending, he could not now turn round and say that the proceedings had come to an end and that the Maharaja of Burdwan could not be added as a party under s. 32 of the Civil Procedure Code. As a matter of convenience the lakhirajdar should be allowed to come in, in order to enable the Court to deal effectually with the rights of the parties. The Maharaja of Burdwan, although a lakhirajdar, is a necessary party: see *Hemadri Nath Khan* v. *Ramani Kanta Roy* (2) and *Byjnath Lall* v. *Ramodeen Chowdry* (3). There were no laches at all on our side.

Dr. *Rash Behary Ghose*, in reply.

Cur. adv. vult.

PRATT AND MITRA, JJ. This is an appeal under clause (2) of section 588 of the Code of Civil Procedure in a suit for partition commenced on the 14th January 1901 in the Court of the Subordinate Judge of the 24-Pergannas by one Winterscale, who has now ceased to have any interest in the subject-matter. Originally **[487]** there were 121 defendants, and the present appellant Maharaja Sir Jotindra Mohan Tagore was one of them.

Winterscale was, at the date of the institution of the suit, the registered proprietor of a share of 3 annas 4 gundas 2 krants and 65 tils of mouzah Alipore, and this share bore a separate number 33 in the revenue roll of the district and a revenue of Rs. 139-2-6. He had, however, three days before he lodged the plaint, *i.e.*, on the 11th January 1901, parted with his interest in 5 bighas 5 cottahs and 12½ chittaks of land in favour of the Maharaja of Burdwan, who was then an infant under the Court

(1) (1869) L. R. 4 Q. B. 653, 658.
(2) (1897) I. L. R. 24 Cal. 675.
(3) (1874) L. R. 1 I. A. 106; 21 W. R. 233.

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of Wards. The revenue payable, as corresponding to the land demised by Winterscale, was Rs. 5 annas 6 and pies 3, and on the 31st May 1901 the Maharaja of Burdwan was recorded in the Collectorate of the 24-Pergannas as the proprietor of a separate estate, which was numbered 33-1. The Maharaja, however, was not made a defendant in Winterscale's suit. The persons made defendants were the proprietors of other specified shares of mauzah Alipore, the appellant before us who was proprietor of estates Nos. 14 and 91 having a share of 4 annas and 7 gundas.

None of the parties raised any objection to the frame of the suit on the score of the non-joinder of the Maharaja of Burdwan, and on the 9th August 1901, the Court passed its preliminary decree for partition directing the appointment of Commissioners for partition by metes and bounds.

The Commissioners appointed for the purpose held several meetings, and it appears from their proceedings that they became apprised of the existence of the interest of the Maharaja of Burdwan in the property. The present appellant asked the Commissioners to include the plot sold to the Maharaja of Burdwan in the share of land allotted to him, but they declined to do so and included it in the share allotted to Winterscale.

The Commissioners submitted their report on the 7th March 1903, and the Court confirmed it on the 28th March 1903. But no final decree was then drawn and could not be drawn, as under section 2, sub-section 15 of the Indian Stamp Act, the final order in a suit for partition is an instrument of partition within the meaning of that expression in the Act, and under Art. 45 of the First Schedule of the Act, the order was necessary to be engrossed [488] on a non-judicial stamped paper of the value of Rs. 3,375 ; but no stamp was filed at the time.

The Court called upon the plaintiff Winterscale to put in the necessary stamped paper, but the requisition was not complied with, and on the 31st July 1903 the Court declined to draw up the final decree. In the meantime an event happened which led to a complicated series of proceedings with the result that the Court directed the addition of the Maharaja of Burdwan as a party defendant in the suit. This order was made on the 19th April 1904, and the present appeal is directed against this order.

In July 1903, Winterscale's interest in the proprietary right to estate No. 33 was sold in execution of a decree against him and was purchased by the Maharaja of Burdwan ; Winterscale's interest ceasing, he would not like to be out of pocket by Rs. 3,375. The sale was confirmed in August (the precise date is not given). On the 24th August 1903 Maharaja Sir Jotindra Mohan Tagore filed a petition asking that the Maharaja of Burdwan be substituted as plaintiff in place of Winterscale on the ground of the devolution of the latter's interest. The Court issued the usual notice. On the 9th September 1903, Winterscale applied for the withdrawal of the suit as he thought he was the *dominus litis*, and on the following day the Maharaja of Burdwan put in a petition declining to be placed as plaintiff on the record of the suit. The Court fixed the 7th November for the hearing of the matters referred to in the above petitions. The appellant without however waiting for the orders that might be passed on the 7th November, put in the necessary stamps for the preparation of the decree. But it does not appear that the fact was brought to the notice of the Court.

The hearing of the case was thereafter postponed from time to time at the request of one or other of the parties. On the 18th December 1903, defendant No. 77, Kunja Behari Bose, put in a petition supported by an affidavit stating that on the death of the defendant Rajkissore

Mandal, his four sons had been brought on the record in his place but one of these sons, viz., Panchanan Mandal had died subsequently and no steps were taken to revive the suit against his heirs within the time allowed by law, and that therefore the partition proceedings should be set aside.

[489] Thereafter the appellant applied to be himself transferred from the category of the defendants and to be made the plaintiff, and Winterscale to be made a defendant; and the Maharaja of Burdwan also applied to be made a defendant. The case was fixed for hearing on the 30th January 1904. On the 29th January 1904, defendant No. 121 brought to the notice of the Court the fact of the death of defendants Nos. 54 and 87 who, it was alleged, had died more than six months before, and other irregularities in the description of some of the other defendants were also pointed out.

On the 8th February 1904, the Court allowed the appellant's petition to be made the plaintiff in the case and directed that Winterscale should be made a defendant, and the plaint was accordingly amended. On the 16th February, the appellants' petition for making the Maharaja of Burdwan the plaintiff was withdrawn.

There then remained for disposal the application of the Maharaja of Burdwan to be made a defendant, and the applications of the defendants Nos. 77 and 121 with reference to the death of some of the other defendants. But before the disposal of these applications, defendants Nos. 50, 51, 88, 101, 101-1, 102, 104, 110 and 121 applied by separate petitions that the Maharaja of Burdwan might be added as a party to the suit; Katyani Devi, widow of defendant 109, also applied to be made a party on the allegation that her husband had died before the order confirming the Commissioner's report.

The application of the Maharaja of Burdwan to be made a defendant was heard on the 27th February, and those of the defendants Nos. 50, 51, 88, 101, 101-1, 102, 104, 110 and 121 were heard on the 12th March, and, as we had said the Court on the 9th April, made an order allowing these applications, the effect of which was disastrous in one view of the case, as it would necessitate the reopening of the partition proceedings from the very beginning.

The legality and propriety of this order is questioned by the appellant on two grounds:—

(i) That the suit was at an end on the 28th March 1903, when the report of the Commissioners was confirmed and a decree [490] directed to be drawn in accordance therewith, and that no order under section 32 of the Court could be passed thereafter.

(ii) That the discretion vested in the Court under that section has been improperly exercised.

The appellant, however, has been met *in limine* by the plea that the appeal is defective on account of the non-joinder in it of all the defendants as respondents. The appellant has arraigned as respondents the Maharaja of Burdwan, Winterscale, and only such of the defendants as expressly prayed for the Maharaja of Burdwan to be made a party and not the other defendants, who are undoubtedly interested in the result of the litigation. The parties, who asked for the abatement of the suit or for its revival by substitution of the names of the deceased defendants, and whose applications could not be dealt with by the lower Court below on account of the record of the case having been called up to this Court for the

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purposes of this appeal are not before us. The other defendants are not mere idle spectators. It is very desirable that in a case like this all persons interested in the result of the litigation should have an opportunity to be heard in appeal. It is quite probable that these defendants were fully agreeable to the order passed by the lower Court and would have supported it. At all events there is no reason for the assumption that they would have, if arraigned as respondents, supported the appellant. We are, therefore, of opinion that this appeal ought to fail on this ground. We may note that no application has been made to us on behalf of any of the parties for the addition of these defendants as respondents and for a further hearing, after service on them, of the notice of this appeal.

We have heard learned counsel on the questions raised by the appellant and we now proceed to deal with them.

The conduct of the appellant himself and some of the other defendants go to show that they were under the impression that there was no bar in law to the Court making an order under the second clause of section 32, Civil Procedure Code, notwithstanding that the report of the Commissioners had been confirmed. The suit was evidently considered by them to be pending and that the Court had full seisin of it. The question has been raised on the application of the Maharaja of Burdwan after the appellant, [491] originally himself a defendant, had on his own application been shifted to the position of the plaintiff, and the original plaintiff to the category of defendants under the same section 32. If the order of the lower Court, which is appealed against, is bad on the ground of want of authority under section 32, the appellant was not entitled to have the position of a plaintiff on the same ground. But we do not propose to rest our judgment on the narrow ground of the conduct of parties. In our opinion the lower Court was competent to make the order at any time during the pendency of the suit, and it was a pending litigation until the Court signed the final decree. A decree to be operative must, under the Indian Stamp Act, be engrossed on paper as required by that Act, and until the Judge signs the decree so engrossed, it cannot be said that the suit has terminated. The order confirming the Commissioner's report in this case must be taken to be an interlocutory order made in the course of the suit and preparatory to the order that might determine finally the rights of the parties.

Ordinarily the judgment contains the decision as to the rights of the parties and directs what the relief granted is. The decree, which follows, is merely the formal expression of an adjudication arrived at in the judgment. After the judgment is pronounced the parties are not required to do any act to enable the Court to frame and sign the decree, and, as provided in section 205, Civil Procedure Code, the decree has retrospective effect and bears the same date as the judgment. But where, as in a suit for partition, the parties are required by law to do a certain act, and the Court cannot frame its decree until such act is performed, the adjudication contained in the judgment does not decide the suit. We are not, therefore, prepared to say that the lower Court acted without jurisdiction in making an order in the present suit under section 32, Civil Procedure Code, whatever may be said in any other case.

Section 32 authorizes the Court to add a party "at any time" in order to enable it effectually and completely to adjudicate upon and settle all the questions involved in the suit." This must, however, be done before an "effectual and complete" adjudication and settlement of the questions

raised. In our opinion the facts [492] show that there had been no such adjudication and settlement before the day on which the order in dispute was made.

The reported cases, to which our attention has been drawn by learned counsel on either side, are not directly in point. In *Lingammal* v. *Chinna Venkatammal* (1), the learned Judges expressed a doubt as to the applicability of section 32 of the Civil Procedure Code after the period of adjudication was over, but they still declined to interfere with the order made by the lower Court. The case was not also one of the nature we have to deal with here. *Mihin Lal* v. *Imtiaz Ali* (2) deals with the question of the right of an Appellate Court as to adding a party and remanding a case for a fresh adjudication after such addition. *Oriental Bank Corporation* v. *Charriol* (3) does not carry the case of either side further than the words of section 32 itself as to adjudication and settlement of the question raised in a case. The power of the Court depends on the questions whether the case is *sub judice*.

Order XVI, Rule II of the Judicature Act, dealing with the power of addition of a plaintiff or a defendant uses the expression " at any stage of the proceedings," and the same words as occur in section 32 of our Act, viz., " necessary to enable the Court effectually and completely to adjudicate upon and settle all the questions " are used in it. It has been held on a construction of the rule that fresh parties cannot be added after final judgment. But in *Heard* v. *Borgwardt* (4), leave was given to have the judgment set aside and to amend the writ by adding certain other parties as defendants. This was, however, under an entirely different system of procedure-law. In *Keith* v. *Butcher* (5), an order for foreclosure had been made but not drawn up, and an order was subsequently made under this rule to restore the action and amend the plaint by adding as defendants certain puisne encumbrancers. We agree, however, with the learned counsel for the appellant that the interpretation of the law of procedure in England is not a safe guide for the interpretation of procedure-law in India, even if the words used are similar, the systems being different in many essential particulars. At the same time we [493] cannot but note the advance made towards simplicity in a system of adjective law to which our system is greatly indebted. One of the aims of the present procedure-law as in England as well as India is the avoidance of a multiplicity of suits with reference to the same subject-matter, and the course adopted by the lower Court is eminently fitted for the purpose.

As regards the propriety of the order, there cannot be much doubt. The Maharaja of Burdwan, who was a minor until the 19th October 1902, was brought into the litigation by the appellant himself. His presence was undoubtedly necessary for a complete and effective partition of village Alipore. He could reopen the entire proceedings in the suit commenced by Winterscale by a supplementary suit, if he were not made a party to this. Many of the other parties desired that there should be a final adjudication in their presence and there were other matters brought to the notice of the lower Court, which also might tend to reopen the proceedings. The case is thus distinctly one for the addition of the Maharaja of Burdwan as party defendant.

(1) (1883) I. L. R. 6 Mad. 227.
(2) (1896) I. L. R. 18 All. 332.
(3) (1886) I. L. R. 12 Cal. 642.
(4) (1883) W. N. 173, 194.
(5) (1884) L. R. 25 Ch. D. 750.

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We are accordingly of opinion that the order of the lower Court is correct and we dismiss this appeal with costs.

The rule issued in this case necessarily falls through. We discharge it without costs.

Appeal dismissed ; Rule discharged.

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32 C. 494 (=9 C. W. N. 372=1 C. L. J. 118.)

[494] APPELLATE CIVIL.

Before Mr. Justice Harington and Mr. Justice Mookerjee.

TOKHAN SINGH *v.* GIRWAR SINGH.*

[8th February, 1905.]

Execution of decree—Security for costs—Sale of properties given as security—Mortgage—Transfer of Property Act (IV of 1882), ss. 67, 99—Costs—Interest on costs.

As security for the costs of the respondents in appeal to the Privy Council the appellants executed a duly attested and registered bond whereby they " put certain immoveable properties in security " for such costs.

The Privy Council in dismissing the appeal awarded the respondents their costs, who thereupon in execution applied for the sale of the properties comprised in the bond :

Held, that the effect of the bond was to create a mortgage ; and that having regard to s. 99 of the Transfer of Property Act, the properties could not be sold without instituting a suit under s. 67 of the Act.

Girindra Nath Mukerjee v. *Bejoy Gopal Mukerjee*, (1) *Abdul Karim* v. *Salimun*, (2) and *Gokul Mandar* v. *Padmanand Singh*, (3) referred to.

Ramji Haribhai v. *Bai Parvati*, (4) *Ganga Dei* v. *Shiam Sundar*, (5) and *Janki Kuar* v. *Sarup Ram*, (6) dissented from.

Bans Bahadur Singh v. *Mughla Begam*, (7) and *Shyam Sundar Lal* v. *Bajpai Jainarayan*, (8) distinguished.

When the order of the Privy Council awards costs, but is silent as to interest on the costs so awarded, it is not competent to the Court executing the order to direct payment of the costs with interest.

Forester v. *Secretary of State for India*, (9) *Dakkhina Mohan Roy* v. *Saroda Mohan Roy*, (10) followed.

[T. P. Act, S 99—Suit, necessity for : Fol. 35 Cal. 61 : Ref. 6 C. L. J. 462 ; 23 C. W. N. 769=51 I. C. 736 ;
T. P. Act, S. 58—Security Bond if should be registered : Ref. 31 Mad. 330.]

APPEAL by the judgment-debtors, Tokhan Singh and others.

[495] The appellants, judgment-debtors, had preferred an appeal to Her late Majesty in Council and in giving security for costs of the respondents as required by s. 602 of the Civil Procedure Code, executed a security bond to the amount of Rs. 4,000 in favour of the Registrar of the Appellate Side of the High Court, the material portion of which is given in the judgment of Harington, J.

The bond was duly attested by two witnesses and registered and in effect created a mortgage as defined in s. 58 of Transfer of Property Act.

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* Appeal from Order, No. 309 of 1903, against the order of Mati Lal Haldar, Subordinate Judge of Monghyr, dated Aug. 12, 1903.

(1) (1898) I. L. R. 26 Cal. 246.
(2) (1899) I L. R. 27 Cal. 190.
(3) (1902) I. L. R. 29 Cal. 707.
(4) (1902) I. L. R. 27 Bom. 91.
(5) (1903) All. W. N. 201.
(6) (1895) I. L. R. 17 All. 99.
(7) (1880) I. L. R. 2 All. 604.
(8) (1908) I. L. R. 30 Cal. 1060.
(9) (1877) I. L. R. 3 Cal. 161 ; L. R. 4 I. A. 137.
(10) (1896) I. L. R. 23 Cal. 857.