divisible into five parts between the three sons, the mother and the father, he obtaining only a one-fifth share and that would be the share which the defendants have acquired under the sale. It has, however, been contended before us that as regards, at any rate, a six pies share (*i. e.*, one-third of the eighteen pies sold), which the mother assigned away by the *kabala* dated the 12th September 1881, it passed absolutely to the purchaser, and therefore the plaintiffs cannot claim it. We are, however, unable to accept this contention as correct; for the mother was entitled to hold her one-fifth share in lieu of maintenance only, and had, therefore, no absolute power of disposal, though, no douht, the Mitakshara describes such property (*i.e.*, property acquired by partition) as "woman's property" [see *Judoonath Tewaree* v. *Bishonath Tewaree* (1), *Lalljeet Singh* v. *Raj Coomar Singh* (2), Mayne's Hindu Law, paras. 614 to 617, Viramitrodaya (Babu Golap Chunder Sarkar's Translation), pp 224, 225] ; and there has been no contention raised before us as to the correctness of the decision of the Subordinate Judge that upon the death of the mother, her share devolved upon her sons.

We have now dealt with all the questions that were raised before us in the course of this appeal; and the conclusion that we arrive at is that the decree of the Court below is right, and that this appeal must be dismissed with costs.

S. C. C. *Appeal dismissed.*

Before Sir W. Comer Petheram, Knight, Chief Justice, and Mr. Justice Beverley.

BOLORAM DEY AND ANOTHER (DEFENDANTS) *v.* RAM CHUNDRA DEY (PLAINTIFF).*

1895 *September* 9.

Appeal—Order declaring the rights of parties to a partition suit in certain specific shares—Omission to appeal from appealable order in suit—Limitation Act (XV of 1877), Schedule II, Art. 152—Civil Procedure Code (Act XIV of 1882), sections 2 and 591.

In a suit for partition the Court of first instance (the Munsif) on the 28th of February 1893 passed the following order: "Plaintiff is entitled

*Appeal from Appellate Decree No. 1354 of 1894, against the decree of J. Knox Wight, Esq., Additional Judge of 24-Pergunnahs, dated the 23rd of May 1894, affirming the decree of Babu Gopal Krishna Ghose, Munsif of Baripore, dated the 30th of June 1893.

(1) 9 W. R., 61. (2) 12 B. L. R., 372 ; 20 W. R., 336.

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to a moiety of the lands described in the plaint, and to a decree thereto. The lands set out in the plaint will, therefore, be divided into two equal shares by a Civil Court Amin, and when that is done, one of these shares will be decreed to plaintiff with costs of the suit." On the 30th June 1893, the Munsif decreed the suit in accordance with the report of the Amin. On the 11th August 1893, the defendants filed an appeal from the final decree to the District Judge, and questioned the legality of the order of the 28th February 1893.

Held, that the order of the 28th February 1893, declaring the rights of parties to a partition in certain specific shares, was a decree within the meaning of section 2 of the Code of Civil Procedure, and therefore appealable. The defendants, not having filed an appeal from that order within thirty days from its date (see Art. 152 of Schedule II of the Limitation Act) were not at liberty to question the correctness of the said order, an appeal from it being then barred by limitation.

Dulhin Golab Koer v. *Radha Dulari Koer* (1) followed.

THE plaintiff in this case brought a suit for the partition of certain property, and on the 28th of February 1893 the Munsif passed the following order:—

"Plaintiff is entitled to a moiety of the lands described in the plaint, and to a decree thereto. The lands set out in the plaint will, therefore, be divided into two equal shares by a Civil Court Amin, and when this is done, one of these shares will be decreed to plaintiff with costs of the suit."

The Civil Court Amin proceeded to partition the lands, and afterwards made his report to the Munsif, who, on the 30th of June 1893, decreed the suit in accordance with the report submitted by the Amin. From that decree the defendants appealed on the 11th of August 1893, and that appeal was dismissed by the Additional Judge who confirmed the Munsif's decision. The defendants appealed to the High Court.

Dr. *Asutosh Mookerjee* for the appellants.

Babu *Upendra Chander Bose* and Babu *Norendra Nath Bose* for the respondent.

Dr. *Asutosh Mookerjee* for the appellants.—My contention is, that in an appeal from the final decree in a partition suit, the validity of the preliminary order, directing partition to be made, may be questioned. The case of *Hurry Persad Chatterjee* v. *Prosunno Chunder Chatterjee* (2) is precisely in point. There is

(1) I. L. R., 19 Calc., 463. (2) 1 Hay, 397.

no law which renders it imperative upon the suitor to appeal from every interlocutory order by which he may conceive himself aggrieved: see the observations of the Judicial Committee in *Moheshur Singh* v. *Bengal Government* (1), *Forbes* v. *Ameeroonissa Begum* (2), and *Sheonath* v. *Ramnath* (3). In *Shah Mukhun Lall* v. *Sree Kishen Singh* (4), the Judicial Committee, in an appeal from the final decree in an account suit, allowed the legality of the preliminary order, directing accounts to be taken, to be questioned, though such preliminary order was appealable as a decree: see *Rahimbhoy Habibbhoy* v. *Turner* (5). The case of *Chand Ram* v. *Brojo Gobind Doss* (6) shows that the practice has always been the same: see also *Googlee Sahoo* v. *Prem Lall Sahoo* (7), *Goodall* v. *Mussoorie Bank* (8), *Har Narain Singh* v. *Kharag Singh* (9), *Savitri* v. *Ramji* (10). The case relied upon by the lower Court, *Dulhin Golab Koer* v. *Radha Dulari Koer* (11), was never intended to bar an appeal. Looking to the judgments of Prinsep and Pigot, JJ., I submit the principle of that decision ought not to be extended so as to bar an appeal.

Babu *Upendra Chunder Bose* for the respondent.—The decision of the Full Bench in *Dulhin Golab Koer* v. *Radha Dulari Koer* (11) is binding on this Court, and is conclusive upon the question raised. Taking that decision along with section 2 of the Civil Procedure Code, and section 4, and article 152 schedule II, of the Limitation Act, the appeal to the lower Court was clearly barred. The case of *Hurry Persad Chatterjee* v. *Prosunno Chunder Chatterjee* (12) must be taken to have been impliedly overruled by the Full Bench, and can no longer be regarded as good law. The cases before the Judicial Committee do not apply, as they deal with interlocutory orders. Their principle is now embodied in section 591 of the Civil Procedure Code, which refers only to orders appealable under section 588 of the Code, and not to those appealable as decrees under

(1) 7 Moo. I. A., 283 (302). (2) 10 Moo. I. A., 340 (359).
(3) 10 Moo. I. A., 413 (423).
(4) 12 Moo. I. A., 157 (184); 2 B. L. R., P. C., 44 (59).
(5) I. L. R., 15 Bom., 155; L. R., 18 I. A., 6.
(6) 19 W. R., 14. (7) I. L. R., 7 Calc., 148.
(8) I. L. R., 10 All., 97. (9) I. L. R., 9 All., 447.
(10) I. L. R., 14 Bom., 232. (11) I. L. R., 19 Calc., 463.
(12) 1 Hay., 397.

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section 2. The case of an account suit stands on a different footing from a partition suit, inasmuch as in an account suit, after the accounts have been taken, nothing may be found due from the defendant, and an appeal may not be necessary.

Dr. *Asutosh Mookerjee* in reply.

The judgment of the High Court (PETHERAM, C. J., and BEVERLEY, J.) after stating the facts as above, up to and including the defendants' appeal from the Munsif's decision on the 11th August 1893, continued as follows:—

The question we have to consider is, whether in that appeal the plaintiff was at liberty to question the correctness of the order of the 28th of February, or whether an appeal from that order was then barred by time, it not having been filed within thirty days of the 28th February. The case of *Moheshur Singh* v. *Bengal Government* (1) was decided on the 4th of February 1859, and in that case the Judicial Committee of the Privy Council held that, as there was no law or regulation prevailing in India which rendered it imperative upon the suitor to appeal from every interlocutory order by which he might conceive himself aggrieved, the Appellate Court might correct any erroneous interlocutory order, although it was not brought under its consideration until the whole cause had been decided and brought before them by appeal for adjudication. In *Forbes* v. *Ameeroonnissa Begum* (2), decided on the 9th of December 1865, the Committee observed that, as the order then in question was an interlocutory one *which did not purport to dispose of the cause*, it was within the principle laid down in the case just cited, and that the appellant was not precluded from questioning it on the appeal from the final judgment in the case.

The same principle was also affirmed in *Sheonath* v. *Ramnath* (3) on the 28th of November 1865.

The Indian Limitation Act came into operation on the 1st of October 1877, and by article 152 of the second schedule to that Act an appeal to the Court of the District Judge under the Code of Civil Procedure must be filed within thirty days from the date of the decree or order appealed against. Decrees

(1) 7 Moo. I. A., 283 (302). (2) 10 Moo. I. A. 340 (359).
(3) 10 Moo. I. A. 413 (423).

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and orders are defined by section 2 of the Civil Procedure Code, which came into operation on the 1st of June 1882, and it was decided by a Full Bench of this Court, in the case of *Dulhin Golab Koer* v. *Radha Dulari Koer* (1) that such an order as that of the Munsif of the 28th of February 1893, made in a suit for partition, was a decree and not an order within the meaning of the Civil Procedure Code, as it was an order which decided that the suit must be decreed in favour of the plaintiff. Section 591 of the Civil Procedure Code provides that all orders from which no appeal is given by the Code may be objected to at the hearing of the appeal from the final decree, and embodies so much of the principle contained in the cases of *Moheshur Singh* v. *Bengal Government* (2), *Forbes* v. *Ameeroonnissa Begum* (3) and *Sheonath* v. *Ramnath* (4), as the Legislature thought fit to include in the statutory law of this country, but neither the decisions of the Judicial Committee, nor the Legislature, have ever said that where an order is made in a suit after which the suit cannot be dismissed, and which is a decree within the meaning of the Code, either party to the suit can appeal against such decretal order on the hearing of an appeal by him from the final decree, although he has allowed the time given by law for appealing from such decretal order to elapse without doing so. We think that the conclusion at which the District Judge arrived in this case was correct, and the appeal will be dismissed with costs.

S. C. G. *Appeal dismissed.*

REFERENCE FROM BOARD OF REVENUE.

Before Sir W. Comer Petheram, Knight, Chief Justice, Mr. Justice Prinsep, and Mr. Justice Pigot.

1895 *December* 12.

IN THE MATTER OF A REFERENCE FROM THE BOARD OF REVENUE UNDER SECTION 46 OF THE STAMP ACT, 1879.*

Stamp Act (I of 1879), Schedule I, Articles 21, 60 (b)—Conveyance—Transfer of lease.

When by one and the same deed there is a conveyance of freehold lands and good-will and a transfer of interests secured by leases, the deed should be

* Civil Reference No. 4 of 1895, made by the Board of Revenue, dated the 15th November 1895.

(1) I. L. R., 19 Calc., 463. (2) 7 Moo. I. A., 283.
(3) 10 Moo. I. A., 340. (4) 10 Moo. I. A., 413.