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grant a certificate for this purpose. Moreover, as the execution case had been already struck off his file by him, the appellant before us ought, under s. 290, to have applied to the Sudder Munsif of Rungpore, who passed the original decree of the 31st December 1862, for the issue of a fresh certificate.

We, therefore, dismiss this appeal, but without costs, as no one appears for the respondent.

Appeal dismissed.

Before Mr. Justice White and Mr. Justice Mitter.

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Feb'y 18.

RAJCOOMAREE DASSEE (PLAINTIFF) v. GOPAL CHUNDER BOSE
AND OTHERS (DEFENDANTS).*

Decree for Partition, Execution of—Partition of a Poojah Dalan—Consent of Co-parceners—Modification of Execution Order by Court.

A decree directed partition of a family dwelling-house (1) with its appurtenances, including a poojah dalan and courtyard adjoining it. In execution of that decree, the Civil Court Ameen, at the request and with the consent of two out of three co-parceners, did not partition the poojah dalan and courtyard. To this the third co-parcener objected, but her objection was overruled by the lower Courts, and it was directed that the property in question should remain undivided. *Held*, that the Court would be disinclined to order the property to be divided without giving the co-parcener or co-parceners who might wish to keep it entire an opportunity of doing so.

Held per WHITE, J., that, having regard to the form of the decree, it was not open to the Court executing it to order that any part of the property should remain joint, except with the consent of all the co-parceners who were parties to the suit.

Semble per MITTER, J., that the lower Courts were not precluded by the decree from dealing with the property in the mode in which they had done.

IN this case the respondent before the Court obtained a decree on 9th February 1875 against the appellant and one Ambica Churn Biswas for partition of a six-anna share of a

* Miscellaneous Special Appeal, No. 301 of 1877, against the order of H. B. Lawford, Esq., Officiating Judge of Zilla 24-Pergunnahs, dated the 29th June 1877, affirming the order of Baboo Kristo Mohun Mookerjee, Additional Subordinate Judge of that District, dated the 28th April 1877.

(1) Partition of a family dwelling-house may be claimed as of right by a Hindu.—*Ramnanth Mookerjee and others, Marsh., 35.*
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family dwelling-house together with its appurtenances, including a poojah dalan with a courtyard adjoining it. The appellant was a soulless Hindu widow claiming her late husband's six-anna share in this property, of which a four-anna share belonged to Ambica Churn Biswas and the remaining six-anna share to the respondent. Several objections were taken by the appellant in the Courts below to the partition made by the Civil Court Ameen. The only one material to the present report had reference to the poojah dalan and courtyard, which, at the request of the respondent, and with the consent of Ambica Churn Biswas, the Ameen had not partitioned. As to this objection the Subordinate Judge was of opinion that, under the principles of the butwarrah law, the poojah dalan and courtyard should be kept joint, as it was meet that the place of family worship should be always kept joint; and he did not consider the Court would be departing from the direction in the decree by ordering the place of family worship to remain undivided. He further expressed his opinion that if the objector, a Hindu widow, had a son living to perpetuate religious worship in her husband's house, such a frivolous objection would not have been raised, more especially as the other co-parceners were willing that the property in question should remain as it was.

On appeal the lower Appellate Court upheld the decision of the Subordinate Judge, being of opinion that it was quite impossible that a fair and equitable partition of this part of the property could be made.

The present appeal to the High Court was accordingly presented.

Baboo *Hemchunder Banerjee* for the appellant.

Baboo *Radhica Churn Mitter* for the respondent.

WHITE, J.—Several objections have been taken by the appellant to the partition which was made by the Ameen in this case, and upon which the orders of the two lower Courts have proceeded. To none of them do I think that this Court can yield in special appeal, except that which complains that certain

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property has not been divided as directed by the decree. The property which has been thus dealt with by the lower Courts consists of a poojah dalan, certain rooms on either side of it, a courtyard adjoining the dalan, and the western wall of the courtyard. This property has not been divided, but ordered by the Courts below to remain joint.

I think that, having regard to the form of the decree, it was not open to the Court in executing that decree to order that any part of the property should remain joint, unless it was with the consent of all the co-parceners who were parties to the suit. It appears that in this case two of the co-parceners did consent to this portion of the property remaining unpartitioned, but one of them, who is the appellant before us, objected to its remaining joint. This portion of the property is in its nature divisible, and no authority has been cited to show that it is undivisible by reason of the uses to which it is put. We must, therefore, set aside that part of the order of the lower Courts which declares that the property in question shall remain joint. Considering, however, the nature of the property and the fact that some of the co-parceners desire that it should continue undivided and be used as heretofore in its present condition, we are not prepared to direct that it should be divided amongst the three co-parceners in proportion to their shares, without giving the co-parcener or co-parceners who may wish to keep it entire an opportunity of doing so, if he or they can agree on the subject with the other co-parceners. The order, therefore, which we shall make in the present case is the following:—Let the poojah dalan, the rooms on either side of it, the courtyard attached thereto, and the western wall of that courtyard, being the property left undivided by the order of the lower Court appealed against, be valued, and if any one or two of the co-parceners wish to retain the same separately or jointly as part of his or their share, let the proportionate share of its value be paid to the remaining co-parcener or co-parceners who do not wish to retain the same. If none of the three co-parceners agree to take the same as part or parts of their share or shares, paying to the other or others of them a proportionate share of its value, or if the three co-parceners cannot agree

amongst themselves as to which of them shall be allowed to take the same as part of his or their share or shares, then let this property be divided between the three co-parceners in proportion to their respective shares in the same. This will give to the two co-parceners who wish to keep it undivided an opportunity of doing so by paying a six-anna share of the value to the appellant, Rajcoomaree.

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Each party will bear his own costs in this Court.

MITTER, J.—I concur in this order. But I desire to add that I would put it, not upon the ground that the lower Courts are precluded by the decree from dealing with this property in the mode in which they have done, but upon the ground that the order which we have passed is more equitable.

Decree varied.

Before Mr. Justice Kemp and Mr. Justice Morris.

BHYRUB CHUNDER (JUDGMENT-DEBTOR) v. GOLAP COOMARY
 (DECREE-HOLDER).*

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*Right of Appeal—Decree—Execution-Proceedings—Registration Act
 (XX of 1866), ss. 52, 53.*

There is no appeal from a decree, nor from orders passed in execution of a decree, made under s. 53 of Act XX of 1866 (Registration Act).

Hurnath Chatterjee v. Futtick Chunder Summaddar (1), Radha Kristo Dutt v. Gunga Narain Chatterjee (2), Huro Soonduree Debia v. Punchoo Ram Mundul (3) followed:—

IN this suit the judgment-creditor applied for execution of a decree obtained under s. 53 of Act XX of 1866 (Registration Act) upon an agreement specially registered under s. 52 of that Act. The judgment-debtor raised the point

* Miscellaneous Special Appeal, No. 173 of 1877, against the order of Baboo Digamber Biswas, Subordinate Judge of Zilla East Burdwan, dated the 22nd of March 1877.

(1) 18 W. R., 512.

(2) 23 W. R., 328.

(3) 24 W. R., 225.