APPELLATE CIVIL.

Before Mr. Justice Mookerjee and Mr. Justice Carnduff.

1909
March 9.

MACKENZIE
v.
NARSINGH SAHAI.*

Partition—Appeal—Preliminary Decree—Final Decree—Appeal against preliminary decree after final decree, legality of—Civil Procedure Code (Act XIV of 1882) s. 562—Practice.

Where in a partition suit a final decree had been made and an appeal was preferred against the preliminary decree only :—

Held, that it was not open to the appellant to challenge the correctness of the preliminary decree without preferring an appeal against the final decree.

Madhu Sudan Sen v. *Kamini Kanta Sen* (1) referred to. *Baikunta Nath Dey* v. *Nawab Salimulla Bahadur* (2) followed.

Uman Kunwari v. *Jarbandhan* (3), *Sheo Nath Singh* v. *Ram Din Singh* (4) not followed.

APPEAL from a preliminary decree in a partition suit, by M. H. Mackenzie, executor to the estate of the late E. S. Llewhellin, the defendant first party.

The plaintiffs brought a suit for the partition and recovery of possession of zerait land and for mesne profits. The defendant first party contested the suit on various grounds amongst others that the partition of zerait land only is not maintainable unless the entire mahal was partitioned. That the plaintiffs are not entitled to mesne profits. The lower Court, on the authority of *Kamla Prosad Singh* v. *Bhagbati Charan* (5), held that the suit was maintainable, and passed a preliminary judgment and decree on the 11th and 16th of April 1907 respectively, and a final decree on the 10th of July 1907.

The present appeal against the preliminary decree of the Subordinate Judge was filed on the 19th of July 1907.

* Appeal from Original Decree, No. 295 of 1907, against the decree of Ambica Charan Dutt, Subordinate Judge of Darbhanga, dated April 11, 1909.

(1) (1905) I. L. R. 32 Calc. 1023.
(2) (1907) 6 C. L. J. 547.
(3) (1908) I. L. R. 30 All. 479.
(4) (1895) I. L. R. 18 All. 19.
(5) Unreported.

Babu Jogesh Chandra Roy (*Babu Akshay Kumar Banerji* with him), for the respondent, raised a preliminary objection that the right of appeal from an interlocutary order ceases with the disposal of the suit, hence, where there was no appeal against the final decree, there could be no appeal against the preliminary decree : *Baikunta Nath Dey* v. *Nawab Salimulla Bahadur* (1).

Babu Samatul Chandra Dutt, for the appellant. By analogy, the fact that a suit has been decided by a Court of first instance in compliance with an order of remand made under section 562 of the Code of Civil Procedure (Act XIV of 1882) is no bar to the filing of appeal from the order of remand or to the hearing of such an appeal : *Uman Kunwari* v. *Jarbandhan* (2). See also *Sheo Nath Singh* v. *Ram Din Singh* (3).

MOOKERJEE AND CARNDUFF JJ. This is an appeal on behalf of the first party defendant in a suit for partition of joint property, and is directed against the preliminary decree made on the 11th April 1907.

A preliminary objection is taken to the hearing of the appeal on the ground that before the appeal was presented to this Court the final decree in the suit had been made by the Subordinate Judge on the 10th July 1907, and that consequently it was not open to the appellant to challenge the correctness of the preliminary decree without preferring an appeal against the final decree. In our opinion this contention is well founded and the appeal is incompetent.

The principle applicable to cases of this description was laid down by this Court in *Madhu Sudan Sen* v. *Kamini Kanta Sen* (4) where it was ruled that the right of appeal from interlocutary orders ceases with the disposal of the suit. That principle, in our opinion, is equally applicable to cases of suits in which there is first a preliminary decree and, ultimately, a final decree. That this principle, which was followed in

(1) (1907) 6 C. L. J. 547.
(2) (1908) I. L. R. 30 All. 479.
(3) (1895) I. L. R. 18 All. 19.
(4) (1905) I. L. R. 32 Calc. 1023.

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Baikunta Nath Dey v. *Nawab Salimulla Bahadur* (1), is applicable to the case before us, admits of no controversy, and follows obviously from the application of a simple test. If this appeal is heard on the merits and the preliminary judgment of the Subordinate Judge set aside, what would be the position of the parties ? The final decree, which up to the present moment has not been questioned by way of appeal, would still stand, and that decree would entitle the plaintiff to eject the appellant. If the appeal is heard and decided in favour of the appellant, in order to give him any relief, the final decree against which no appeal has been preferred would have to be indirectly set aside. It is difficult to appreciate how such a state of things could possibly have been contemplated by the Legislature. Nor does any question of hardship arise, for, on the 19th July 1907, when the appeal now under consideration was presented to this Court, it was open to the appellant to prefer an appeal against the final decree which had been made nine days previously. It is needless for our present purposes to consider, under what circumstances no appeal was filed against the final decree. The fact remains that up to the present time the final decree has not been challenged. We must take it, therefore, that on the 10th July 1907, as soon as the final decree was made, the appellant lost his right to prefer an appeal to this Court against the preliminary decree of the 11th April 1907.

Our attention was invited to the decision of a Full Bench of the Allahabad High Court in *Uman Kunwari* v. *Jarbandhan* (2), in which it was ruled that the fact that a suit has been decided by the Court of first instance in compliance with an order of remand made under section 562 of the Code of Civil Procedure is no bar to the filing of an appeal from the order of remand or to the hearing of such an appeal. After consideration of this decision, we adhere to the view taken by this Court in the cases previously mentioned. We observe that one of the reasons given by the learned Judges of the Allahabad High Court is that if an appeal is not preferred against an order of remand,

(1) (1907) 6 C. L. J. 547 (2) (1908) I. L. R. 30 All. 479.

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the party would be without remedy, because according to the practice of the Allahabad High Court, as indicated in *Sheo Nath Singh* v. *Ram Din Singh* (1), the party aggrieved by the order of remand would not be entitled in an appeal against the final decree to limit his grounds to the order of remand alone. No such rule, however, prevails in this Court; in our opinion, if the final decree has been made, it is not only open to but is the duty of the party who is aggrieved by the order of remand, which up to that stage has not been questioned by way of appeal, to prefer an appeal against the final decree and to question the validity of the interlocutory order.

The appeal, therefore, fails and must be dismissed with costs.

S. A. A. A. *Appeal dismissed.*

(1) (1895) I. L. R. 18 All. 19.

CIVIL RULE.

Before Mr. Justice Doss and Mr. Justice Richardson.

1909

March 19.

BIPRA DAS DEY

v.

RAJARAM BANERJEE.*

Bengal Tenancy Act (VIII of 1885) s. 170—Decree for arrears of rent due on two holdings—Claim, whether maintainable—Civil Procedure Code (Act XIV of 1882) s. 278.

Section 170 of the Bengal Tenancy Act (VIII of 1885) does not apply to a decree obtained by a co-sharer landlord for his share of rent in respect of two holdings; and that, therefore, when the holdings are attached in execution of such a decree, a claim under section 278 of the Code of Civil Procedure is maintainable.

Hridaynath Das Chowdhry v. *Krishna Prasad Sircar* (1) and *Baikanta Nath Roy* v. *Thakur Debendro Nath Sahi* (2) referred to.

RULE granted to the petitioner, Bipra Das Dey.

The opposite party along with his other co-sharers brought a suit for recovery of arrears of rent in respect of two holdings.

* Civil Rule No. 498 of 1909, against the order of Charu Chandra Mitra, Munsif, 1st Court of Bankura, dated Jan. 25, 1909.

(1) (1907) I. L. R. 34 Calc. 298; 11 C. W. N. 497.

(2) (1906) 11 C. W. N. 676.