APPELLATE CIVIL

Before Mr. Justice Coxe and Mr. Justice Teunon.

SHASHI BHUSHAN BEED

v.

JOTINDRA NATH ROY CHOWDHRY.*

1911

May 9.

Partition, suit for—Procedure—Amendment of plaint by order of Court altering nature of suit—Acquiescence by plaintiff—Appeal, in disregard of amendment of plaint, not barred.

It is incumbent on the Court, in a suit for partition, to come to a clear and definite finding that the plaintiff had title to the property, before proceeding further into the case, and a judge on appeal should also observe the same procedure.

Bidhata Rai v. *Ram Chariter Rai* (1) referred to.

If the Judge, on appeal, finds the question of title to the property in favour of the plaintiff, any finding on the question of possession does not debar the Judge from affirming the preliminary decree for partition passed by the first Court and does not justify him in remanding the case to the lower Court for retrial.

At the hearing of the appeal, the Judge held that the plaint should be amended and the plaint was accordingly amended with the acquiescence of the plaintiff, so as to alter the nature of the suit. A fresh written statement was filed by the defendant and fresh issues were framed. These facts did not preclude the plaintiff from filing an appeal, within the time allowed by limitation, if, on reflection, he thought that the action taken by him in amending the plaint was injudicious.

SECOND APPEAL by the legal representatives of Shashi Bhusan Beed, the plaintiff.

This was a suit for partition of immoveable property.

The allegation in the plaint were, *inter alia*, that Mathuranath Roy Chowdhry and Priyanath Roy Chowdhry had equal shares in the properties mentioned in schedules A and B annexed to the plaint. After the death of Mathuranath his

* Appeal from Order, No. 50 of 1910, against the order of F. Roe, District Judge of 24-Pergs., dated Nov. 26, 1909, reversing the decree of Mahim Chandra Sarkar, Subordinate Judge of that District, dated May 12, 1909.

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share devolved upon the defendant, and the share of Priyanath upon his three sons. The sons of Priyanath mortgaged their share to one Mirza Ahmed Beg. The said Mirza, in execution of his own mortgage-decree and also in execution of money-decrees obtained by others, purchased the properties in dispute and took possession of the same. On the death of the said Mirza, his estate was taken over by the Administrator-General of Bengal, who had his name registered under the Land Registration Act. Subsequently in a partition suit in the High Court amongst the heir of the said Mirza, the properties described in schedules A and B were allotted exclusively to the eldest son of the said Mirza, *viz.*, Guznafar. The plaintiff purchased the interest of Guznafar in the properties in dispute. The plaintiff was in possession of his undivided share in the aforesaid properties jointly with the defendants and had his name registered under the Land Registration Act. The defendants having refused to partition the lands amicably, the plaintiff brought this suit for partition and separate possession of his share.

The defendants virtually admitted the plaintiff's right to the properties described in schedule B to the plaint, but denied his title to the properties in schedule A, and with regard to these properties, the defendant contended, *inter alia*, that the defendants had acquired title to the said properties by adverse possession and that the plaintiffs were not entitled to the reliefs sought.

The Subordinate Judge found in favour of the plaintiffs on the questions of title and possession and passed a preliminary decree for partition.

On appeal, the District Judge held that the suit was really a suit to obtain declaration of title and possession. The view was accepted by the plaintiff's pleader and the plaint was amended and the *ad valorem* court-fee for a title suit was paid. The Judge then remanded the case to the Court below for retrial.

Against this order of remand, the legal representatives of the plaintiff appealed to the High Court.

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Babu Mahendranath Roy (with him *Babu Bipinchandra Mallik*), for the appellant. The appellant's title to and possession of some of the joint properties in suit being admitted, the suit ought to have been regarded a suit for partition and the court-fee should have been taken as such. *Bidhata Rai* v. *Ram Chariter Rai* (1). See also *Mohendro Chandra Ganguli* v. *Ashutosh Ganguli* (2). The decrees of Land Registration Court are evidence of possession: *Shyama Sundari Dasya* v. *Mahomed Zarip* (3). As regards the admission of the pleaders in the Court below, they being on points of law are not binding: *Beni Pershad Kocri* v. *Dudhnath Roy* (4). The remand order is illegal. The preliminary decree has not been set aside even. There should be a decree for partition for the plots in schedule B, at any rate, title to, and possession in, which are admitted.

Babu Saratchandra Roy Chaudhuri (with him *Babu Lalitmohan Banerji*), for the respondent. The judgment of the District Judge is quite correct. He finds that the suit is not a *bona fide* suit for partition. *Ad valorem* Court-fee must be paid and was paid. The appellant is precluded from questioning the remand order, it being made at his instance and for his benefit. The case of *Bidhata Rai* v. *Ram Chariter Rai* (1) is distinguishable. Further, here the group of properties regarding which possession and title is admitted are situated at a quite different place and far away from those regarding which there is real dispute. The title has not been found in favour of the appellant. If the appellant has lost his title by adverse possession, he cannot get relief by bringing a partition suit.

Babu Mahendranath Roy, in reply. Possession of one co-sharer is possession of another. The remand was neither at the instance of, nor for the benefit of, the appellant. The learned Judge took one view of the law and the pleader for the appellant partially admitted the same. The pleaders below were prepared to pay the court-fee as on a suit for recovery of possession ,but they would not admit that the plaint-

(1) (1907) 12 C. W. N. 37.
(2) (1893) I. L. R. 20 Calc. 762.
(3) (1907) 9 C. L. J. 91.
(4) (1899) I. L. R. 27 Calc. 156.

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iff was out of possession. The lower appellate Court has not dealt with the proper issues in the case. Theoretically, the appellant might have come up in appeal here the day after the order of remand was made, but he has appealed in time, and the proceedings in the first Court which were taken immediately after remand could not be a bar to his getting relief. We want the case to be tried on the pleadings as it stood before the order of remand.

Cur. adv. vult.

COXE AND TEUNON JJ. This is a suit for partition of the lands described in the two schedules attached to the plaint. It is admitted that the plaintiff is co-owner with the defendants of the lands described in schedule 2; but his title to, and possession of, any interest in the lands described in the first schedule to the plaint is denied.

The suit was decreed by the Subordinate Judge, and a preliminary decree for partition was passed.

The defendants appealed to the District Judge. The District Judge came to no clear finding on the principal question in the suit, namely, whether the plaintiff was entitled to partition of the lands described in the first schedule. He regarded the suit as one to obtain a declaration of the plaintiff's title and possession, under the garb of a suit for partition; and he considered that the court-fee payable should be calculated *ad valorem* on the property in suit and the case retried as a suit for declaration of title and recovery of possession. This view appears to have been accepted or, at any rate, acquiesced in, by the plaintiff's pleader; and he agreed to amend his plaint, so as to make it one for a declaration of the plaintiff's title as well as for partition and to pay the necessary Court-fee. The learned District Judge thereupon directed that the case should go back to the Subordinate Judge, apparently for retrial.

Against this order the plaintiff appeals, and it is argued on his behalf that this order of the District Judge remanding the case, is not justified by law.

It appears to us that this contention ought to prevail. No doubt it was incumbent on the learned District Judge, before he could affirm the preliminary decree for partition passed by the Subordinate Judge, to come to a clear and definite finding that the plaintiff had title to the property which is the subject of this appeal, that is to say, the property described in the first schedule to the plaint. Unless the plaintiff can make out his title to the property, he clearly has no right to partition of it. But, as regards the question of possession, it appears to us that, if the plaintiff has title to the property and is a co-owner of that property with the defendants, the doubts felt by the learned District Judge with regard to his possession did not justify him in refusing the relief sought. The learned District Judge does not explain how this case is distinguishable from that of *Bidhata Rai* v. *Ram Chariter Rai* (1), which was cited and relied upon by the Subordinate Judge. So far as the facts have been laid before us that decision appears to be applicable. It has been argued that as the property described in the first schedule is totally different from the property described in the second schedule, that ruling is inapplicable. To this contention we are not prepared to accede. If the plaintiff and the defendants are, as a matter of fact, co-owners of the land described in both schedules, and the plaintiff's possession is admitted in the lands described in the second schedule, which appear to constitute the more valuable portion of the property, the fact that the lands in the first schedule are situate in a different village, and are entirely different properties from those contained in the second schedule, does not in our opinion, take the case outside the scope of the decision which we have quoted. We think, therefore, that the proper course for the District Judge to have adopted on this occasion was to have come to a distinct finding as to whether the plaintiff had succeeded in proving his title to the lands comprised in the first schedule attached to the plaint. He was not entitled to remand this point for retrial to the Subordinate Judge. If he

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found it against the plaintiff, there was an end to the case, so far as that property was concerned. But if he found it in favour of the plaintiff, then his finding in respect of possession did not debar him from affirming the preliminary decree for partition, and did not justify him in remanding the case to the Subordinate Judge for retrial.

It has, however, been argued on behalf of the respondent that the plaintiff is now precluded by his own conduct from contesting the propriety of the District Judge's decision. It appears that he acquiesced in that decision and amended his plaint; that the defendant subsequently filed a written statement and that fresh issues were framed. But no authority has been shown us for holding that the plaintiff is precluded by this conduct from filing an appeal within the time allowed by limitation, if, on reflection, he thinks that the action he has taken is injudicious.

Accordingly the case must go back to the learned District Judge, in order that the appeal may be reheard on the pleadings as they stood before the amendment. He must come to a decision as to whether the plaintiff had a subsisting title at the time of the institution of the suit; and if he finds that in favour of the plaintiff, he must then come to a decision as to whether the Subordinate Judge's preliminary decree for partition, so far as regards the property described in the first schedule to the plaint, should or should not be affirmed.

As regards the property described in the second schedule to the plaint, it is admitted by both sides that that ought to be partitioned.

The costs will abide the result.

S. M.

Case remanded.