

(1937) 04 AHC CK 0038
In the Allahabad High Court

Lala Banwari Lal and Others

APPELLANT

Vs

Lala Beni Prasad and Others

RESPONDENT

Date of Decision : 20-04-1937

Acts Referred:

Citation : (1937) 04 AHC CK 0038

Final Decision : Dismissed

Judgement

1. This is a first appeal brought by certain defendants against an order of 9th December 1936 by the learned Civil Judge of Allahabad, and the appellants ask that this Court should direct that complete accounts should be taken and adjusted between the parties up to the time when the suit finally terminates. The case arose in a partition suit brought by a member of a joint Hindu family claiming 1/60th share and asking for delivery of separate possession of his share. A preliminary decree was passed in favour of the plaintiff on 14th February 1927, and on 30th January 1930 the trial Court ordered that the plaintiff should prepare 60 lots. Certain defendants preferred an appeal against the preliminary decree to the High Court, F.A. No. 262 of 1927 which was withdrawn. A civil revision was filed by certain parties including the plaintiff in the High Court and that revision was the subject of a compromise which was embodied in an order of this Court on 13th July 1931. That order set out among other points:

There will be no accounting for mesne profits prior to the institution of the suit, but the entire net income after meeting the necessary expenses or losses during the pendency of the suit shall be a part of the divisible property; the exact amount to be ascertained by reference to the books of account.

2. In accordance with that compromise a Commissioner was appointed and learned Counsel for the appellants points to an order of the trial Court, Mr. Brij Behari Lal dated 27th July 1934 headed "Directions of the Court to the present Commissioner". Para. 4 of those directions stated: "The last balance shall be up to Diwali 1933". Para. 6 : "These directions are subject to the terms of the

compromise which are to be carried out".

3. Now learned Counsel for the appellants points out that in a petition dated 27th February 1933 to the Commissioner the contesting defendants had urged in para. 2 that the accounts as they stand from the date of institution of the suit up to the date of the passing of final decree have only to be looked into and ascertained by the Commissioner.

4. Now it is not shown that, this application to the Commissioner was brought to, the notice of Mr. Brij Behari Lal and no issue was framed by him on any such point. His order of 28th July 1934 cannot be said to be a judicial decision between the parties because he had framed no issue and he had apparently heard no argument on the point. Subsequently, when the report of the Commissioner came before the trial Court, objection was taken to the period for which accounting had taken place and the matter was argued at great length before the trial Court and the trial Court passed a lengthy order of twenty typed pages finishing with this direction:

For reasons given above I hold that in terms of the compromise the accounting in the case can only be up to 13th January 1931, the date of the compromise, and not up to the Diwali festival of 1933 or to any subsequent date. Issue decided accordingly.

5. Now one of the points urged against this order is that even if this case is treated as a revision and not as a first appeal, the order passed by Mr. Ratan Lal on 9th December 1936 was without jurisdiction because of the previous order of Mr. Brij Behari Lal of 28th July 1934. We consider that this argument is unsound because the previous order was merely a direction to the Commissioner and was not a judicial decision of any issue. We consider therefore that if this present application were treated as a revision, it has not been shown that the Court below acted in any manner in which the provisions of Section 115, Civil P.C., would apply. Learned Counsel for the appellants therefore must defend his application to this Court as an appeal. The opposite party have claimed that no right of appeal lies from the order in question because the preliminary decree had been passed and the final decree has not yet been passed and the present order is an order passed during the hearing of the suit and cannot according to the respondents amount to a decree. Learned Counsel for appellants claim that the present order was a decree because it finally decided the rights of the parties so far as the lower Court is concerned on certain matters which are to be decided between them. That may be so, but we are of opinion that that fact alone does not make this order amount to a decree. This question has been twice before Benches of this Court and on each occasion the decision of this Court has been against the claim of the appellants. In *Bharatendu v. Yaqub* (1913) 35 All 159, there was a Letters Patent appeal against the decision of Piggott, J., who had held that after a preliminary decree had been passed in a partition case, it is open to the trial Court to pass an order amounting to a decree which is not a final decree. The Letters Patent Bench disagreed with that contention and held :

"The CPC contemplates one preliminary decree and no more." The matter came before a Bench of this Court in F.A. No. Nawab Hassan v. Syed Hasan Murtaza First Appeal No. 447 of 1932, in a similar case in a partition suit where a preliminary decree had been passed and a Bench of this Court held as follows:

No final decree has yet been passed. The order which is impugned in this appeal is an interlocutory order in which the Court has adjudicated upon certain questions relating to the exact share of the plaintiff. It is now settled law that suits for partition remain pending till a final decree is passed, and an interlocutory order of this kind cannot be considered to be one passed in execution proceedings. As a matter of fact, no decree capable of execution has yet been passed. It will be open to the appellants to challenge this order in an appeal from the final decree; no appeal has from the order itself at this stage.

6. The Court also held that no revision lay if the application were treated as revision. Learned Counsel relied on a ruling of a Bench of the Calcutta High Court reported in (Raja) Peary Mohan Mookerjee Vs. Manohar Mookerjee, . In this case there had been a decree of the High Court that the sale of a certain village by a trustee was not legal and the Court had ordered that inquiry should be made by the Court below as to the amount of profits which were recoverable. An order was passed by the Court below defining the extent and character of the liability of the shebait to render an account specifying the mode, the period and the properties and leaving the question of the amount to be decided later. Now an appeal was taken from that order and the Calcutta ruling held that that order amounted to a decree. The position in that case was not exactly the same as the present case, because there had been a final decree passed by the High Court and presumably the inquiries which were directed were inquiries under Order 20, Rule 12. But the Calcutta ruling refers to the decision of Piggott, J. as an authority on which it based its decision that an appeal lay. As the Letters Patent Appeal Bench of this Court set the decision of Piggott, J. aside, we do not consider that the Calcutta ruling would be a good authority in this Court. Learned Counsel also referred to a ruling of their Lordships of the Privy Council reported in Bhup Indar Bahadur Singh v. Bijai Bahadur Singh (1901) 23 All 152. That, however, was an order passed in execution and we are of opinion that this has no bearing on the present case because the order in question was not passed in execution. Reference was also made to AIR 1934 307 (Oudh) In that case the trial Court had held that a talukdari estate in the hands of the defendant was liable to contribute towards the discharge of a dower decree and an appeal was taken against that order of liability to contribute. The question was argued as to whether an appeal would lie before the amount of contribution was decided and the Oudh Chief Court held that the appeal would lie. We consider, however, that this is a case where the liability to contribute was similar to the preliminary decree that a person is an accounting party and as it was in the nature of a preliminary decree, an appeal might lie against that decree. The ruling is no authority for the proposition advanced by learned Counsel for the appellants.

7. We consider that the weight of authority of two Benches in this Court clearly shows that the view of this Court has been that in a suit for partition there are only two decrees : (1) a preliminary decree and (2) a final decree. No third decree can be passed by the trial Court and we hold that the argument by the learned Counsel for the appellants that the trial Court had authority to pass an indefinite number of decrees, between the preliminary decree and the final decree, is incorrect. For these reasons we dismiss this appeal. The plaintiff alone of the array of respondents has taken the objection that no appeal lies and the matter has been decided on this objection. Accordingly we allow one set of costs only to the plaintiff. The other respondents although they are represented by learned Counsel did not take this objection and we do not allow them costs.