Privy Council Appeal No. 4 *of* 1923.

Patna Appeal No. 28 *of* 1920.

Lachmi Narain Marwary and others - - - - - - - *Appellants*

v.

Balmakund Marwary and another - - - - - - - *Respondents*

FROM

THE HIGH COURT OF JUDICATURE AT PATNA.

JUDGMENT OF THE LORDS OF JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 10TH JULY, 1924.

Present at the Hearing :

LORD SHAW.
LORD PHILLIMORE.
SIR JOHN EDGE.
MR. AMEER ALI.

[*Delivered by* LORD PHILLIMORE.]

This is a suit for partition brought in 1913 by the youngest of a family of brothers against two of his brothers and the children of a third brother.

The eldest brother of all was omitted from the suit because it was suggested that he was already separate in estate. The original defendants, however, disputed this; and he was at their instance made a defendant party.

At the hearing the Subordinate Judge took the view that he was separate and dismissed him from the suit.

Appeal was thereupon taken to the High Court at Patna, and ultimately the following consent decree was made :—

> " It is agreed by all the parties that if the property which is now in possession of Shew Narayan Marwari is brought into the hotch-pot, they will accept a partition on any terms that the Court shall direct.

These appeals are accordingly dismissed in terms of the following Order :—

The whole property will be divided into four equal shares, of which the plaintiff will get one. Shew Narayan Marwari, however, will be entitled to retain the property which is now in his possession on payment in cash of any amount by which his share will be found by the lower Court to exceed the value of one-fourth share of the whole property. In the event of the property now in possession of Shew Narayan being found to be less than the value of one-fourth share of the whole property, he will be entitled to receive an amount by which this property is found less than the value of one-fourth share.

Each party will bear its own costs throughout.

Patna, 26th June, 1919."

The suit was thereupon remitted to the Subordinate Judge in order that the necessary steps for effecting the partition of the undivided property into fourths and that the valuation of the eldest brother's share might be taken.

After decree it is open to any party to a suit, to whose interest it is that further proceedings be taken, to initiate the supplementary proceedings ; but in the ordinary case it is the plaintiff who moves.

The Subordinate Judge accordingly fixed a day for hearing the parties and gave them notice. But when the day came neither the plaintiff nor his pleader appeared. The defendants, or some of them, were represented, but took no steps ; and the Judge, after waiting all day, made the following order :—

" 5.11.19. I have been waiting for plaintiff and his pleaders till 4.20 p.m., but no one appeared on repeated calls. Defendant is present. The suit is dismissed for want of further prosecutions."

This was an unfortunate order.

It appears from a subsequent judgment delivered by the learned Judge that it was rather made *in terrorem*, and in the expectation that the plaintiff after this sharp reminder would put himself in order by applying within the prescribed period of thirty days to have the order set aside, submitting to the necessary consequence of having to pay the costs thrown away by reason of his neglect.

The plaintiff, however, was again dilatory, and his pleader does not seem to have been well versed in the procedure, with the result that no such application was made in time, and recourse had to be had to the High Court ; and even then the first application was irregular.

The High Court was, however, fortunately in the interests of business and of justice, able to mould the application into one for the exercise of its powers of revision under Section 115 of the Code of Civil Procedure, 1908. Thereupon the High Court decided that the case came both under paragraph (*a*) and under paragraph (*c*) of that section ; and that the Subordinate Judge had exercised a jurisdiction not vested in him by law and had acted in the exercise of his jurisdiction with material irregularity ; and they set aside the order of the Subordinate Judge and ordered the

case to be restored to his file; but they made the plaintiff pay the defendants' costs.

It is from this order that the present appeal is brought by the defendants other than the eldest brother.

Their Lordships must express their surprise that there should be any such appeal. The parties had agreed that there should be partition, and would naturally wish that the partition should be completed, and that any obstacle which the dilatoriness or neglect of one of them had interposed should be removed. It was nearly seven years since the suit had been begun. The erring brothers had been chastened and made to pay their costs; and it is difficult to discover that they had any grievance.

But as the matter has been presented to their Lordships, it must be decided. And their Lordships think that the decision of the High Court should be affirmed.

Their Lordships do not think it necessary to determine that the case came under paragraph (*c*) of Section 115. But they think that the order which he made was one which he had not jurisdiction to make.

It was based, as he subsequently explained, upon Order XVII, Rule 2. The Order is one headed: "Adjournments," and Rule 2 is as follows:—

> "Where on any day to which the hearing of the suit is adjourned the parties or any of them fail to appear, the Court may proceed to dispose of the suit in one of the modes directed in that behalf by Order IX or make such other Order as it thinks fit."

Rule 3 of Order IX enables the Court to dismiss the suit when neither party appears; and Rule 8 of Order IX directs the Court, when the defendant appears and the plaintiff does not appear, to dismiss the suit, unless the defendant admits the plaintiff's claim or some part of it.

In the opinion of the Judges of the High Court, Order XVII, Rule 2 did not apply, because in this case it was "never intended that there should be a hearing of the suit in the ordinary sense of the word, but merely some interlocutory matter decided between the parties as to the future conduct of the suit."

In their view the "hearing" mentioned in this rule only occurs when the Judge is taking the evidence or hearing arguments or otherwise coming to the final adjudication of the suit, with perhaps one extension to the occasion when issues are to be settled; and was not meant to extend to occasions when interlocutory orders were being sought.

Their Lordships do not think it necessary to determine whether the word "hearing" should or should not have this particular limitation; because they think that the decision can be supported on another ground. After a decree has once been made in a suit, the suit cannot be dismissed unless the decree is reversed on appeal. The parties have, on the making of the decree, acquired rights or incurred liabilities which are fixed, unless or until the decree is varied or set aside. After a decree any party can (as already stated) apply to have it enforced.

The Subordinate Judge seems to have felt this, for he observed :—

" This Court has no jurisdiction to nullify the consent decree passed by the Honourable High Court, and the object of dismissal was not to discharge or vacate appellate decree. The decree is certainly in existence, but the plaintiff is not entitled to further relief in the present litigation."

In the first part of these observations the learned Judge seems to be qualifying his order as useless. By the second part he puts the plaintiff into an intolerable position, not able to go on with his suit, and yet not in a position to bring a fresh suit. Their Lordships are fully sensible of the necessity of leaving the Judges in India with ample power of discipline, and means to check neglect and delay. If, for instance, the Subordinate Judge had made an order adjourning the proceedings *sine die*, with liberty to the plaintiff to restore the suit to the list on payment of all costs and Court fees (if any) thrown away, it would have been a perfectly proper order.

But, for the reasons which have been given, the case did not come under Order XVII, Rule 2, and the order made was made without jurisdiction, and was rightly set aside by the High Court, and this appeal should be dismissed with costs.

Their Lordships will humbly recommend His Majesty accordingly.

In the Privy Council.

LACHMI NARAIN MARWARY AND OTHERS

v.

BALMAKUND MARWARY AND ANOTHER.

DELIVERED BY LORD PHILLIMORE.

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