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executants of which thereby agreed to be bound by the award of certain arbitrators for partition, is a partition deed and whether it requires to be stamped, as such; under cl. 11 of s. 3 of the Stamp Act. The Commissioner is of opinion that such an agreement is a partition deed and should be stamped as such. We contend that under the present agreement the parties merely agreed to be bound by the terms of the award. The agreement was unnecessary, and it did not effect partition. The award bears the requisite stamp of Rs. 5. Parties may agree to be bound by a decree for partition, but such an agreement by itself would not effect partition. It is the decree that would effect partition. Such an agreement, therefore, cannot be liable to a stamp duty for a partition deed. It would be merely an agreement [681] to abide by the terms of the decree—*Reference under Stamp Act, s. 49 (1).*

Shantaram Narayan (Government Pleader), who appeared for the Government, was not called upon to address the Court.

OPINION.

Per Curiam.—The instrument is an agreement to divide property in severalty, and is, therefore, a partition deed within the definition in cl. 11 of s. 3 of Act I of 1879.

Order accordingly.

15 B. 681.

APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Candy.

LAKSHMAN DADAJI (*Original Defendant*), *Appellant v. DAMODAR AMBADAS* (*Original Plaintiff*), *Respondent*.* [16th February, 1891.]

Decree—Execution—Order in execution that defendant pay money into Court—Appeal by plaintiff against order—Payment into Court by defendant—Refusal of plaintiff pending appeal to take money out of Court—Attachment of the money so paid in by another creditor of defendant—Payment to him—Subsequent application by plaintiff in execution for payment to him—Effect of his previous refusal.

In execution of a decree against the defendant obtained by the plaintiff, an order was made, directing the defendant (*inter alia*) to pay into Court the sum of Rs. 140-8-0. Both parties appealed against this order, but pending the appeals the defendant paid the amount into Court. The plaintiff, however, refused to take it, on the ground that he had appealed against the order under which it was paid in, and the Court subsequently passed an order that the money should be returned to the defendant. But before this could be done, the money was attached by a third person (Ganpatrao Damodar) in execution of his decree against the defendant, and a few days afterwards the money was paid over to him. Shortly afterwards the appeal against the order directing the defendant to pay Rs. 140-8-0 to the plaintiff was heard, and the order was confirmed. Thereupon the plaintiff applied in execution (*inter alia*) for payment of the sum of Rs. 140-8-0. The defendant contended that he had already paid it. The Subordinate Judge directed the defendant to pay this sum into Court within one month. The defendant appealed to the District Court, who confirmed the order of the Subordinate Judge. The defendant then appealed to the High Court.

Held, that the orders of the lower Courts should be reversed. When the defendant paid the Rs. 140-8-0 into Court in execution of the decree the Court

* Second Appeal No. 65 of 1890.

(1) 7 M. 385.

held the money on account of the plaintiff, and the plaintiffs, who had not obtained [682] a stay of execution, could not refuse to take it because an appeal was pending. The plaintiff's refusal, therefore, to take the money out of Court, did not justify the Subordinate Judge in treating the money as the defendant's and in ordering it to be paid to another judgment-creditor of the defendant without his having in any way expressed his assent to the money being so treated.

THIS was a second appeal from the decision of M. B. Baker, District Judge of Nasik.

On the 30th June, 1884, the plaintiff Damodar Ambadas obtained a decree, ordering the defendant to deliver up to him seven-eighths of a house situate at Nasik.

In the year 1885 the plaintiff presented an application (No. 396 of 1885) for the execution of the decree by making a partition of the house. The Court issued a commission for partition, and ordered that the defendant should, on payment of Rs 140-8-0 to the plaintiff, retain possession of one *khana* of a shop in the house, and that the plaintiff should take possession of the rest of the building, and, in default of the defendants paying the said amount, that the plaintiff should recover possession of the whole house.

Both the parties appealed against the said order, and pending the appeals (*viz.*, on the 13th July, 1886) the defendant paid into the Court the sum of Rs. 140-8-0 for the purpose of its being paid to the plaintiff, as directed by the Court. The plaintiff, however, declined to receive it or to take possession of the house, on the ground that the appeal against the order of the Court was then pending.

On the 3rd August, 1886, the Court passed an order that the sum of Rs. 140-8-0 paid in by the defendant should be returned to him. But before he could receive it, one Ganpatrao Damodar Chandavadkar attached it on 21st August, 1886, in execution of a decree against the defendant Lakshman Dadaji, and others. In consequence of the attachment the Court paid the money to Ganpatrao Damodar Chandavadkar on the 28th August, 1886.

On the 10th September, 1886, the defendant presented an application to the Court, representing that he had paid in the money in execution of the plaintiff's decree and not that of Ganpatrao Damodar Chandavadkar, and that Ganpatrao Damodar [683] Chandavadkar should be ordered to return it. This application was rejected by the Court on the 30th October, 1886. Pending the said application (*viz.*, on the 21st September, 1886) the appeals preferred by both the plaintiff and the defendant against the order directing payment of Rs. 140-8-0 by the defendant to the plaintiff were decided, and the order was confirmed.

After the decision of the appeals, the plaintiff presented an application to recover the amount of Rs. 140-8-0 and possession of the house, except one *khana* of the shop, and on failure of the defendant to pay the amount, to recover possession of the entire building.

The defendant (opponent) contended that he had already paid Rs. 140-8-0; that, therefore, the plaintiff could not get possession of the whole building; that the plaintiff was entitled only to get that portion which had been awarded to him by the decree, and that he (the defendant) was entitled to retain one *khana* of the shop.

The Court of first instance (Rao Bahadur Lalshankar Umishankar, (First Class Subordinate Judge) directed the defendant to pay into the

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Court Rs. 140-8-0 within one month from the date of its order, and on his failure to do so that the plaintiff should recover possession of the entire house; on payment of the said amount by the defendant, the plaintiff to recover possession of the house, except one *khana*.

Against the order passed by the Subordinate Judge the defendant appealed to the District Court, which confirmed the order of the Subordinate Judge.

Against the decree of the District Court, the defendant appealed to the High Court.

Ghanasham Nilkanth Nadkarni, for the appellant.

Daji Abaji Khare, for the respondent.

JUDGMENT.

SARGENT, C.J.—It is clear that after the defendant paid the Rs. 140-8-0 into Court in execution of the decree, the Court held the money on account of the plaintiff, and the plaintiff, who had not obtained a stay of execution, could not refuse to take it because an appeal was pending. The plaintiff's refusal, therefore, [684] to take the money out of Court did not justify the Subordinate Judge in treating the money as the defendant's and in ordering it to be paid to another judgment-creditor of the defendant without his having in any way expressed his assent to the money being so treated. The money should have remained in Court. *i.e.*, paid into the treasury as a civil deposit. Order reversed with costs.

Decree reversed.

15 B. 684.

APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Candy.

LONACHAND GANGARAM MARWADI (*Original Applicant*),
Appellant v. UTTAMCHAND GANGARAM MARWADI (Original
*Opponent), Respondent.** [17th February, 1891.]

Succession Certificate Act VII of 1889—Grant of a joint certificate—Object of the Act.

Under the provisions of the Succession Certificate Act (VII of 1889), a joint certificate to recover debts cannot be granted.

Madan Mohan v. Ramdiat (1) and *Jammabai v. Hastubai* (2), referred to.

[R., 19 M. 497=6 M.L.J. 90; 15 M.C.C.R. 288; U.B.R. (1897—1901), 563.]

THIS was an appeal against an order passed by M. B. Baker, District Judge of Nasik.

Application for a certificate to collect debts under Act VII of 1889.

One Lonachand Gangaram Marwadi presented an application to the District Court at Nasik for a certificate under the Succession Certificate Act (VII of 1889) to recover the debts due to his deceased brother Chotiram Gangaram.

Uttamchand Gangaram, another brother of the deceased Chotiram Gangaram, opposed the application of Lonachand on the grounds (*inter*

* Appeal No. 55 of 1890.

(1) 5 A. 195.

(2) 11 B. 179.