

1905.
HAJI HASUM
v.
CHUNILAL.

particular average loss occasioned by the ship being stranded. The other question referred does not in this view of the case arise.

Attorneys for the plaintiffs: *Messrs. Wadia, Ghandi & Co.*

Attorneys for the defendants: *Messrs. Little & Co.*

R. R.

APPELLATE CIVIL.

Before Sir L. H. Jenkins, K.C.I.E., Chief Justice, Mr. Justice Russell and Mr. Justice Aston.

1905.
March 16.

BALARAM BUDHARAM MARVADI AND OTHERS, DECREE-HOLDERS, v. RAMKRISHNA VALAD CHILOJI, JUDGMENT-DEBTOR.*

Civil Procedure Code (Act XIV of 1882), section 396—Indian Stamp Act (II of 1899), section 2 (15)—Decree for partition—Commissioner's report—Decree in accordance—Final order—Instrument of partition—Stamp.

A decree for partition passed in accordance with a Commissioner's report under section 396 of the Civil Procedure Code (Act XIV of 1882) is a final order for effecting a partition passed by a Civil Court and must therefore be stamped as an instrument of partition under section 2 (15) of the Indian Stamp Act (II of 1899).

REFERENCE under section 60 of the Indian Stamp Act (II of 1899) by Janardan Damodar Dikshit, Subordinate Judge of Sinnar in the Nasik District.

The facts were as follows:—

The plaintiffs, Balaram Budharam Marvadi and others, sued the defendants, Ramkrishna valad Chiloji and others, to recover possession of moveable and immoveable properties mentioned in the plaint. The first Court dismissed the suit. On appeal by the plaintiffs, the First Class Subordinate Judge of Nasik with Appellate Powers held that the plaintiffs were entitled to a half share in the house and land in dispute. He, therefore, passed a decree in the following terms:—

Plaintiffs Nos. 1 and 2 (appellants) should effect division of the property in the suit, that is to say, of the house and the open land with the defendants

* Civil Reference No. 9 of 1904.

(respondents) and take possession of half property out of the same and take the costs in both the Courts from the defendants (respondents) in proportion to the claim awarded. The rest of the claim is rejected with costs. The defendants (respondents) should recover their costs to the extent of the claim disallowed from the plaintiffs (appellants) and should bear their costs to the extent of the claim awarded.

1905.

BALABAM
v.
RANKRISHNA.

Subsequently the plaintiffs having applied for the execution of the decree, the Subordinate Judge of Sinnar adopted the procedure prescribed in section 396 of the Civil Procedure Code (Act XIV of 1882) and passed the final decree. Thereupon a question having arisen as to whether the decree required to be stamped as an instrument of partition under the Stamp Act (II of 1899) in order to give effect to it, the Subordinate Judge made a reference under section 60 of the Act in the following terms:—

“ Whether a final decree for partition not made upon an award or an agreement of the parties, is liable to be stamped as an instrument of partition ? ”

The opinion of the Subordinate Judge was in the negative. The following is an extract from the Subordinate Judge's remarks:—

To say that a decree which is the most important document in a suit should be written upon a stamped paper, would be to introduce confusion, irregularity and inconvenience in the procedure, a result which the Legislature, perhaps, never contemplated. The provisions of the Stamp Act cannot be inconsistent with or override the provisions of the Civil Procedure Code. The Court is bound to bring the suit to termination. It must proceed to judgment (Indian Law Report 22 Calcutta 425 and 24 Calcutta 725). Upon the judgment decree must follow and a decree when passed must be given effect to in execution (*Nabab Mir Sadrudin v. Nabab Noorudin*, VI Bombay Law Reporter, 834). Suppose for a moment that after the judgment the party in whose favour the judgment is made refuses to supply a stamp, would the Court be justified in refusing to pass a decree in conformity with the judgment in such a case? I hope not. Then there is again reason in charging the stamp duty levied on instrument of partition on awards upon which decrees are made. The application to file an award is made upon an eight-anna Court-fee stamp and it is the *fiat* of the Court that converts it into a decree. In suits for partition full Court-fee is paid and it could not have been intended by the Legislature that an additional stamp duty requisite on an instrument for partition should be paid. Besides this, decrees made on awards are final decrees in the sense in which that term is used in the Civil Procedure Code, while decrees for partition are even subject to second appeal and are not final.

1905.

BALARAM
v.
RAMKRISHNA.

Rao Bahadur *V. J. Kirtikar* (Government Pleader) appeared for the Government of Bombay.

JENKINS, C. J.:—I am of opinion that a decree passed under section 396 of the Civil Procedure Code in accordance with a Commissioner's report is a final order for effecting a partition passed by a Civil Court and must therefore be stamped as an instrument of partition: see section 2 (15) of the Indian Stamp Act, 1899.

RUSSELL, J.—I concur.

ASTON, J.—I also concur.

Order accordingly.

G. B. R.

ORIGINAL CIVIL.

Before Mr. Justice Tyabji.

1904.
November 19.

MUSA YAKUB MODY, PLAINTIFF, v. MANILAL AJITRAI, DEFENDANT.*

*Cause of action—Malicious prosecution—Letters Patent clause 12—
Leave—Liability of prosecutor when prosecution ordered by Court.*

'Cause of action' means that bundle of essential facts which it is necessary for a plaintiff to prove before he can succeed in the case.

A person is responsible not merely for starting a prosecution but also for continuing the same and he is so responsible whether such prosecution was ordered by the Court or was initiated by the party himself.

The plaintiff, a resident in British India, was charged with a criminal offence by the defendant in the Magistrate's Court at Rajkot. In order to secure his attendance the defendant moved the Bombay Government to initiate extradition proceedings against the plaintiff before the Chief Presidency Magistrate in Bombay who however held that a case for extradition had not been made out.

The plaintiff obtained leave from the High Court to file a suit against the defendant in Bombay for malicious prosecution. On an application by the defendant to have the leave rescinded,

* Suit No. 453 of 1904.