

1919.

GANPATRAO
SULTANRAOv.
ANANDRAO
JAGADEBRAO.

execution and the matter must for that purpose be remanded for a further trial to the First Class Subordinate Judge at Ahmednagar.

The application was in time, because the excess, if any, was levied on the 29th of November 1910 and a suit was by *bona fide* mistake brought on the 14th of November 1913 and was pending until the 31st of March 1915 in the Subordinate Judge's Court at Shevgaon. It was not possible to take further steps until the 19th of May 1915 owing to the intervention of the Easter Holidays and the Summer vacation in the First Class Court at Ahmednagar. It has been ascertained that no certificate has so far been sent to the decretal Court by the First Class Subordinate Judge at Ahmednagar under section 41 and that, therefore, the jurisdiction to try the matter has still been retained by the First Class Subordinate Judge at Ahmednagar under section 42 of the Civil Procedure Code. The question whether the excess has or has not been levied in execution would in my opinion undoubtedly be a question relating to the execution of the decree within the meaning of section 47 of the Civil Procedure Code.

Order set aside.

R. R.

APPELLATE CIVIL.

Before Mr. Justice Shih and Mr. Justice Hayward.

1919.

July 15.

RAOJI BHIKAJI KONDKAR (ORIGINAL DEFENDANT No. 1), APPLICANT v.
LAXMIBAL, WIDOW AND HEIR OF ANANT LAXMAN KONDKAR
(ORIGINAL PLAINTIFF), RESPONDENT.*

Civil Procedure Code (Act V. of 1908); section 110—Privy Council—Leave to appeal—Valuation of claim—Value as at the date of the decree under appeal.

* Civil Application No. 352 of 1918.

In a suit for partition of joint family property, the amount or value of the subject matter, for the purposes of section 110 of the Civil Procedure Code of 1908, is the value of the share which the appellant claims and not the value of the entire family property. Such value ought to be ascertained as at the date of the High Court decree under appeal.

1919.

RAOJI
BHIKAJI
v.
LAXMIBAI.

THIS was an application for leave to appeal to His Majesty in Council.

The facts were that Anant (husband of Laxmibai) sued to recover half a share in the joint family property from his uncle Raoji (defendant No. 1) and his grandmother (defendant No. 2). He valued his share at Rs. 12,000. The trial Court awarded a third share to defendant No. 2, and a third share each to the plaintiff and defendant No. 1. After the passing of this preliminary decree, and before partition could be carried out by metes and bounds, defendant No. 2 died. The plaintiff applied to the Court contending that the mother's share devolved upon plaintiff and defendant No. 1 in equal shares on her death. The Court acceded to the application and enlarged the plaintiff's share to one half.

Defendant No. 1 appealed to the High Court contending that in the events that had happened he was entitled to the whole share of defendant No. 2, and that the lower Court had erred in awarding an additional one-sixth share to the plaintiff.

The High Court disallowed the contention and upheld the decree passed by the trial Court, see L. L. R. 42 Bom. 535.

Defendant No. 1 applied for leave to appeal to the Privy Council.

A. G. Desai, for the applicant.

P. B. Shingne, for the opponent.

SHAH, J.:—This is an application for leave to appeal to His Majesty in Council from the decree of this Court.

1919.

RAOJI
BHIKAJI
v.
LAXMIBAI.

in First Appeal No. 130 of 1916 on the ground that the requirements of section 110 of the Civil Procedure Code are satisfied.

In the suit as originally brought the plaintiff claimed one-half share in the family property and valued it at Rs. 12,000. The defendant No. 1, his uncle, and defendant No. 2, his grand-mother, pleaded that he was entitled only to one-third share. A decree was passed in his favour to the extent of one-third share in the property. After the preliminary decree was passed the defendant No. 2 died and the plaintiff then made an application to have the decree amended by claiming a moiety in the one-third share of his grand-mother. The trial Court held that on her death that share became equally divisible between the plaintiff and defendant No. 1. The defendant No. 1 preferred an appeal to this Court which related to the one-sixth share which the plaintiff claimed after the death of defendant No. 2 over and above the one-third share already awarded to him. This Court confirmed the decree of the trial Court holding that the plaintiff was entitled to divide equally with the defendant No. 1 the share which defendant No. 2 could have claimed in her life-time.

As the decree of the lower Court is confirmed by this Court, under section 110 it is essential that the appeal must involve some substantial question of law. This condition, in my opinion, is satisfied in the present case. The appeal raises the question as to whether on the death of Yeshawadabai the plaintiff became entitled to a moiety of her share in the property or whether the defendant No. 1 was exclusively entitled to that share.

As to the value of the subject-matter of the suit in the Court of first instance it is clearly over Rs. 10,000. But the subject-matter in dispute on appeal to His Majesty in Council would be the one-sixth share of the whole

estate. If the value of this one-sixth share is Rs. 10,000 or upwards, the applicant would be entitled to the certificate. But if the value of that share is less than 10,000, he cannot succeed.

It is urged on behalf of the applicant that even if the value of the one-sixth share be less than Rs. 10,000, under the second paragraph of section 110 the decree sought to be appealed from in this case involves, directly or indirectly, a claim to or question respecting property of the value exceeding Rs. 10,000. It is contended that under this paragraph of the section the property referred to must be taken to be whole property of the family sought to be partitioned and not only the one-sixth share. I am of opinion that this contention is not sound. In this case the decree from which the applicant seeks to appeal to His Majesty in Council involves, directly or indirectly, a claim to or question respecting one-sixth share of the property only. It is not suggested that by that decree any property outside the one-sixth share to which the appeal to this Court related would be affected. A similar contention as to the true meaning of the second paragraph of section 110, Civil Procedure Code, in relation to a partition suit was considered and negatived by Jenkins C. J. and Russell J. in *De Silva v. De Silva*⁽¹⁾.

The applicant, therefore, can succeed only if he is able to satisfy this Court that the one-sixth share of the family property including the mesne profits is worth Rs. 10,000 or upwards. The value of the share according to the value of the family property estimated by the plaintiff in the plaint would be only Rs. 4,000 exclusive of the mesne profits. But the applicant asserts through his son, who has made an affidavit, that the whole property during the year 1918-1919 has considerably increased in value and is worth nearly Rs. 66,000, and

1919.

RAOJI
BHUKAJI
v.
LAXMIBAI.

1919.

RAOJI
BHIKAJI
v.
LAXMIBAI.

that on that calculation the value of the one-sixth would exceed Rs. 10,000. The opponent has filed a counter-affidavit made by her father Bapuji Atmaram Tendulkar in which the correctness of the allegation made on behalf of the applicant is questioned. Thus there is a dispute between the parties as to the value of this property. Where such wide fluctuations in the value of the property are asserted, it is essential to fix the date with reference to which the value of the property should be estimated for the purpose of this application. Having regard to the terms of section 110 it seems to me that the value of the one-sixth share on the date of the decree from which the applicant seeks to appeal to His Majesty in Council must be determined and must be taken into account in determining whether the requirements of section 110 are satisfied. This view is supported by the decision in *Surandra Nath Roy v. Dwarka Nath Chakravarti*⁽¹⁾.

It is necessary, therefore, to know the market-value of the one-sixth share of the property in suit at the date of the decree of this Court, *i.e.*, on or about the 30th of January 1918. As the parties are not agreed as to the value of the property under Rule 5 of Order XLV we refer the dispute as to the value of the one-sixth share in the whole property, which is the subject-matter in dispute on appeal to His Majesty in Council, for report to the trial Court.

The lower Court will also report as to the value of one-sixth share of the mesne profits from the date of the suit to the date of the High Court decree. Apparently the mesne profits have not been ascertained yet. For the purpose of this application it is necessary that they should be estimated as the one-sixth share in the mesne profits forms part of the subject-matter of the appeal to His Majesty in Council.

(1) (1916) 44 Cal. 119.

The report to be made to this Court in one month.

1919.

HAYWARD, J.:—I agree. The plaintiff's one-half share was the subject-matter of the suit and was valued at Rs. 12,000 in the Court of first instance. The defendant No. 1's claim in appeal is for one-half of the one-third share of defendant No. 2 which would be at the previous rates only Rs. 4,000. But it has been contended that the value of the property has risen and that the value of the claim in appeal would now be Rs. 11,000, being one-sixth of the total value now estimated to be Rs. 66,000, and affidavits have been put in by the parties on either side affirming and contesting this position. There must, therefore, in my opinion be an enquiry as to the real value under Rule 5 of Order XLV of the Schedule to the Civil Procedure Code.

RAOJI
BHUKAJI
v.
LAXMIRAJ.

It has been urged that in any case the value of the share only ought not to be regarded, but the value of the whole property. But it seems to me that we ought in this matter to follow the decision of *De Silva v. De Silva*⁽¹⁾ and not the contrary decision of *Lala Bhugwat Sahay v. Rai Pashupati Nath*⁽²⁾. On the other hand the value of the subject-matter of the appeal ought, in my opinion, to be the value at the date of the decree of the High Court as held in the case of *Surendra Nath Roy v. Dwarka Nath Chakravarti*⁽³⁾.

There is in my opinion a substantial question of law involved, viz., the exact effect of the proceedings in the litigation as regards the share of the deceased defendant No. 2 and the legal effect of that position under the rules of Hindu law.

Order accordingly.

R. R.

(1) (1904) 6 Bom. L. R. 403.

(2) (1906) 10 C.W. N. 564

(3) (1916) 44 Cal. 119.