

PRIVY COUNCIL

L. Guran Ditta

Vs.

T.R. Ditta

P.C.A.Nos.16 and 17 of 1933
(Lords Atkin, Alness and Sir Shadi Lal JJ.)

06.12.1934

JUDGMENT

LORD ATKIN J.

1. These are two appeals from orders of the Court of the Judicial Commissioner, North-West Frontier Province, made in what may be hoped to be the final stages of a protracted litigation in the course of a family dispute. T.R. Ditta, now deceased and represented by the respondents, was the son of one Teku Ram, by a wife who predeceased him. His two brothers, Guran Ditta and Hari Chand, are the sons by another wife, Mt. Gujri, who survived him and was a party to the litigation. Teku Ram, amongst other property, was entitled to a deposit of Rs. 1,00,000 in the Alliance Bank of Simla, in the names of his wife, Mt. Gujri, and himself or either or the survivor. After his death the widow instructed the bank to pay to the appellant, Guran Ditta, which they did on 14th May 1921 the amount with interest, amounting to Rs. 1,05,000. In August 1921, T.R. Ditta commenced a suit against the two brothers and Mt. Gujri claiming that the Rs. 1,00,000 was part of the estate of Teku Ram, and claiming his share, one-third, as part of the joint property. The widow set up an absolute gift to her, which was negatived by both the Courts in India, and a money decree was made against the widow and Guran Ditta jointly and severally for payment of the sum with interest, this amounting to Rs. 37,368. This amount was levied from Guran Ditta personally by attachment of a deposit of his with the Treasury, and was paid on 10th January 1925. Guran Ditta appealed to the Privy Council and the appeal was heard on 1st March 1928. Meantime T.R. Ditta had, on 10th November 1926, instituted another suit for the partition of the rest of the joint family properties consisting of immovables and the proceeds of Rs. 20,000 War Bonds. He, of course, excluded the lac of rupees which had been the subject of the first suit, in respect of

which he had a decree. But, subject to this, it is quite clear that the suit was one for final partition of the whole of the joint family property.

2. On 22nd December 1927, the District Judge made a decree in favor of the plaintiff for "possession by partition" of the immovable property. On 24th April 1928 the Judicial Committee gave judgment on the first appeal. They affirmed the finding that there had been no gift of the lac of rupees to his wife, but held that it was contrary to practice unless in very exceptional cases to grant partial partition, and they set aside the money decree. They had been told that T.R. Ditta had commenced a suit for final partition of the whole property; and they thought that all further questions should be determined in the final partition. Unfortunately, the legal advisers of the parties in this country had not been informed when the case was argued on 1st March 1928, that the District Judge had made a decree in the partition suit on 22nd December 1927; and it is obvious that their Lordships were in fact unaware of this decree when they gave judgment. On the other hand, if they had known that it had been given, there is no reason to suppose that the decision would have been different. They would have known that the first decision would be of the nature of a preliminary decree, and that it would always be open to the parties before a final decree upon proper procedure to bring in further property for partition. At any rate, in fact as between the parties it was finally adjudged that T.R. Ditta was not entitled to his decree for Rs. 37,368. Thereupon Guran Ditta applied in the first action for restitution of the amount which he had paid on the money decree now set aside, and on 23rd December 1929, the District Judge made an order accordingly. He did not direct payment to Guran Ditta, but ordered that the sum of Rs. 37,368 be paid into Court with interest at 5 per cent from the date when it was paid in execution proceedings. The dispute in the first appeal is as to the order for payment of interest. On appeal to the Judicial Commissioner he set aside so much of the order as directed payment of interest, being of opinion that as T.R. Ditta was really entitled to the money and was only being called to restore it owing to the wrong information which gave rise to their Lordships' alteration of the decree interest should not be awarded. Their Lordships cannot accept this reasoning. The duty of the Court when awarding restitution under Section 144 of the Code is imperative. It shall, place the applicant in the position in which he would have been if the order had not been made: and for this purpose the Court is armed with powers (the "may" is empowering, not discretionary) as to mesne profits, interest and so forth. As long ago as 1871 the Judicial Committee in *Rodger v. Comptoir D'Escompte de Paris*, (made it clear that interest was part of the normal relief given in restitution: and this decision seems rightly to have grounded the practice in India in

such cases. In the present case it is now *res judicata* between the parties that T.R. Ditta was not entitled to the sum in question until he got it as his share under a general partition: and a decree giving it to him was in fact set aside. There seems to be no reason for supposing that the decision of the Judicial Committee would have been in anyway different if they had been informed that the Judge had made his decree in the partition action. The decision was based upon the well-established objection to a partial partition. Guran Ditta therefore having had to pay money which on final adjudication was held not to be due, was entitled to have restitution made, and restitution ordinarily involves interest. Their Lordships therefore think that on Appeal No. 16 the judgment of the Judicial Commissioners should be set aside and the judgment of the District Judge restored.

3. The second appeal is based upon the contention that the decree made by the District Judge on 22nd December 1927, was a final decree, and that it cannot now be altered by exercising any of the powers of amendment given by the Code of Civil Procedure. It is unnecessary to refer to the various proceedings by which eventually it was decided that it was the duty of the District Judge to include the Rs. 1,05,000 as part of the property to be partitioned. From what has been said before, it seems clear that so far as the decision of the Judicial Commissioners given on 22nd July 1930 was based on the assumption that their Lordships in April 1928 then knew of the so called final decree, and held it to preliminary only, the decision was based on a misapprehension, for their Lordships did not then know of the decree, and therefore cannot have construed it. Nevertheless, the reasoning of the learned Judicial Commissioners in explaining the actual decree appears to their Lordships to be correct. The decree was, in fact, preliminary, and left partition to be effected finally by the subsequent order of the Court. The decree as it stood could not have been made effective without a further order. Their Lordships find themselves in complete accord with the remarks of the learned Judicial Commissioner as to the importance of the Courts in the Province strictly following the procedure laid down by the Code of Civil Procedure in such matters. Fortunately any difficulty is remedied in the present case. Their Lordships have no doubt that justice required and civil procedure permitted the partition proceedings to include the Rs. 1,05,000 in question: and the appeal on this matter should be dismissed.

4. They are therefore of opinion that appeal No. 16 of 1933 should be allowed, that the judgment of the Judicial Commissioners dated 24th March 1930 should be set aside with costs, and the order of the District Judge, dated 23rd December 1929, should be

restored. The appeal No. 17 of 1933 should be dismissed. Their Lordships will humbly advise His Majesty accordingly. As the appellant has had to come to this Board to recover his interest, though he has failed in the second appeal, their Lordships are of opinion that there should be no costs to either party of these appeals.

Order accordingly.

Cases Referred.

1871) 3 PC 465=40 LJ PC 1=7 Moore PC 314=19 W R 449=24 LT 111