

APPELLATE CIVIL.

Before Sir M. R. Westropp, Kt., Chief Justice, and Mr. Justice Pinhey.

SAKHARAM MAHADEV DANGE AND OTHERS (ORIGINAL DEFENDANTS),
APPELLANTS, v. HARI KRISHNA DANGE (ORIGINAL PLAINTIFF),
RESPONDENT.*

1881
October 4.

Appeal—Power of the Court of appeal to vary decrees appealed from in consequence of circumstances occurring subsequently to the date of such decrees—Partition suit—Death of a co-parcener pendente lite—Decree for partition when a severance.

When the decree of a Subordinate Court is under appeal to the High Court, it is open to the High Court to vary it, either in points in which it is erroneous, or in respect of matters occurring subsequently to the date of such decree which are admitted.

The plaintiff obtained a decree in a partition suit in the Subordinate Judge's Court for his share in certain joint family property in the possession of the defendants (his co-parceners). The decree was affirmed on appeal. The defendants filed a second appeal in the High Court; but, before it was decided, one of the defendants died. The plaintiff at the hearing of the second appeal claimed a larger share in the family property than he had been awarded by the decree of the Courts below.

Held that he (plaintiff) was entitled to a share in that of the co-parcener who died *pendente lite*, and that the decree appealed from, ought to be varied accordingly.

Joy Narain Giri v. Girish Chunder Myti (1) distinguished.

A decree for partition does not operate as a severance so long as it remains under appeal.

THIS was a second appeal from the decision of W. H. Newnham, Judge of the District Court of Poona, affirming the decision of D. J. Karmarkar, Joint Subordinate Judge at the same place.

The plaintiff Hari Krishna instituted this suit against Sakharam Mahadev and his two brothers, Lakshman and Apaji, for a partition of certain family property in their possession, and claimed one-eighth share in the same. He alleged that his father and the defendants were full brothers. The defendants answered (*inter alia*) that the plaintiff's share was only one-twenty-fourth in the family estate. Vasudev and Keso were made co-defendants on the application of the other defendants. Their defence is not material to the case.

*Second Appeal, No. 126 of 1881.

(1) I. L. R., 4 Calc., 434.

1881

SAKHARAM
MAHADEV
DANGE
v.
HARI
KRISHNA
DANGE.

The Subordinate Judge allowed the plaintiff's claim to one-eighth portion of the moveable and immoveable property belonging to the family estate and in the possession of the first three defendants. That decree was affirmed by the District Judge on appeal. Both the lower Courts found that Vasudev and Keso were divided in interest from Sakharam and his brothers.

The defendants thereupon filed a second appeal in the High Court on the 29th January, 1881. It was registered on the 10th February of the same year.

At the hearing of the second appeal on the 4th October, 1881, *Shamrav Vithal*, who appeared for the respondent (plaintiff), read an affidavit of his client to the effect that one of the principal appellants (defendants), Apaji Mahadev, had died subsequently to the filing of the second appeal, and submitted that the plaintiff was consequently entitled to one-sixth, instead of one-eighth, share in the family property.

C. R. Kirloskar, who appeared for the appellants (defendants), admitted the fact of Apaji's death, but cited *Joy Narain Giri v. Girish Chunder Myti* ⁽¹⁾ as an authority against the plaintiff's claim for a larger share in the family property than that allowed to him by the Courts below.

The following is the judgment of the Court delivered by

WESTROPP, C. J.—This Court does not feel itself at liberty to disturb the finding of the Courts below, that the defendants Vasudev and Keso are separate from the other defendants. Mr. Shamrav Vithal has read the plaintiff's affidavit of the 21st September, 1881. Mr. Kirloskar (after consulting one of his clients, viz., Lakshman Mahadev Dange, the second defendant, (admits that the third defendant, Apaji Mahadev Dange, has died on Magh Vad the 5th, Shaka 1802, (19th February, 1881,) during the pendency of this second appeal without leaving issue male or a widow surviving him, but Mr. Kirloskar has argued that the decree in this cause of the subordinate Judge amounted, in law, to a division in estate between the plaintiff and his co-parceners, and that Apaji having died since that decree, the plaintiff is not entitled to any share of Apaji's share in the estate. Mr. Kirloskar refers to

(1) I. L. R. 4 Calc., 494.

Joy Narain Giri v. Girish Chunder Myti ⁽¹⁾; but in that case the decree of the Fashi, year 1272, treated by the Privy Council as having effected a severance of the joint estate, was not the decree under appeal before the Privy Council in that case—the decree of the year 1272 having, in fact, been affirmed not only by the High Court of Calcutta but also by the Privy Council itself, A. D. 1873. The decree of the Subordinate Judge in the present case is itself now under appeal, and it is open to this Court to vary it either in points (if any) in which it is erroneous or in respect of supplemental matters which, like the death of Apaji Mahadev Dange, are admitted. We cannot hold that the Subordinate Judge's decree operated as a severance so long as it remained under appeal. The death of Apaji Mahadev Dange, *pendente lite* entitles the plaintiff to a sixth share of the estate in lieu of an eighth share awarded to him by the Courts below. We, therefore, vary the decrees of those Courts, by directing that the house be divided into six (not eight) portions, and that one of such portions be made over to the plaintiff,—and that the defendants Nos. 1 and 2 from the 19th February, 1881, (being the day of the death of the defendant Apaji Mahadev Dange), pay to the plaintiff one-sixth share of the net annual income derivable from the three villages held in mortgage in the decree of the Subordinate Judge mentioned, and that the annual payment to the plaintiff in respect of that income from the date of the Subordinate Judge's decree down to the death of the defendant Apaji Mahadev Dange and the other payments (including costs) in that decree directed to be made, be made as therein ordered, and the defendants are to pay to the plaintiff his costs of this appeal.

Decree varied.

(1) I. L. R., 4 Calc. 431.

1881

SAKHARAM
MAHADEV
DANGE
v.
HARI
KRISHNA
DANGE.