

APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and
Mr. Justice Nánábhái Haridás.

1886.
March 25.

PARBHUDA'S LAKHMIDA'S, PLAINTIFF, v. SHANKARBHAI AND
OTHERS, DEFENDANTS.*

Civil Procedure Code (Act XIV of 1882), Sec. 265—Execution—Decree for partition referred to Collector—Collector bound to partition and deliver over possession to several allottees under decree—Practice.

The duty of the Collector, to whom a decree has been referred under Section 255 of the Civil Procedure Code (Act XIV of 1882) for partition, is not confined to mere division of the lands decreed to be divided, but includes the delivery of the shares to their respective allottees.

THIS was a reference by Ráv Sáheb Harilál Chhaganlál Satyavádi, Subordinate Judge of Nadiád, under section 617 of the Civil Procedure Code (Act XIV of 1882).

The plaintiff applied for execution of the decree obtained by him in Suit No. 74 of 1883, which directed the defendants to deliver possession of the southern half of the field then in dispute. The execution of the said decree was referred, under section 265 of the Code of Civil Procedure, to the Collector of Kaira, who, being of opinion that delivery of possession was not part of this duty, ordered measurement of the share decreed to the plaintiff only, and returned the proceedings without giving plaintiff possession of his share.

The question referred for decision was—whether the Collector, to whom an application for execution of a decree for partition or separate possession of a share of land paying revenue to Government had been referred under section 265 of the Code of Civil Procedure, was simply to make a division of land by measurement, or was also bound to deliver possession of the shares, as directed by the decree.

The Subordinate Judge of Nadiád was of opinion that delivery of possession in such cases was part of the Collector's functions.

There was no appearance for the parties.

* Civil Reference, No. 45 of 1885.

SARGENT, C. J.—We think that the Collector should deliver possession of the shares after making the requisite division. Section 265 of the Civil Procedure Code (XIV of 1882) contemplates the “partition” being completely carried out by the Collector; and the circumstance that it does not provide for the Collector’s reporting to the Court, as is the case with lands not paying revenue to Government by section 396, points to the conclusion that the term “partition” is not confined to mere division of the lands in question into the requisite parts, but includes the delivery of the shares to their respective allottees. This view is further confirmed by the language of the sections in Bombay Act V of 1879, which lay down the rules to be observed by the Collector in carrying out a partition. In clause 2, section 113, the Collector is directed to “make over” to one of the sharers any number which may remain after partition has been carried out as far as possible, and in section 114 the Collector is to “divide” the estate into shares according to the respective rights of the co-sharers, and to “allot” such shares to the co-sharers.” Lastly, we have reason to believe that this is the general practice of Collectors.

1887

PARBHUDÁS
LAKHMIDÁS
v.
SHANKAR-
BHÁI.

APPELLATE CIVIL.

Before Mr. Justice Nánábhái Haridás and Mr. Justice Jardine.

RAISINGJI, (ORIGINAL DEFENDANT), APPELLANT, v. BALVANTRA'O,
(ORIGINAL PLAINTIFF), RESPONDENT.*

1887.
March 28.

*Practice—Civil Procedure Code (Act XIV of 1882), Sec. 562—Order of remand—
Issues undecided—Procedure.*

A Subordinate Judge decided a suit on the grounds (1) that it was *res judicata*, (2) that it was barred by limitation. On appeal, the Assistant Judge upheld the decree on the first-mentioned ground without deciding the point of limitation. On second appeal, the High Court reversed the Assistant Judge’s decision, holding that the suit was not *res judicata*, and remanded the case to be tried on the merits. On receipt of the order of the High Court, the Assistant Judge reversed the decree of the Subordinate Judge without giving any decision on the point of limitation, and remanded the case to the Subordinate Judge to be tried on the merits. From this order the defendant appealed to the High Court.

* Appeal, No. 1 of 1887.