

12 B. 371—13 Ind. Jur. 27.

[371] APPELLATE CIVIL.

Before Mr. Justice West and Mr. Justice Birdwood.

DEV GOPAL SAVANT (*Original Applicant*), Appellant v.
 VASUDEV VITHAL SAVANT (*Original Opponent*), Respondent.*
 [11th July, 1887.]

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Execution of decrees—Decree for partition—Civil Procedure Code (XIV of 1882), s. 265—Land Revenue Code (Bombay Act V of 1879), s. 113—Collector's powers in executing partition decrees—Civil Court's jurisdiction to control Collector's action—Practice—Persons not parties to proceedings in appeal not bound by the result of those proceedings.

Decrees in three separate suits for the partition of a certain estate having been referred to the Collector of Ratnagiri for execution under the Civil Procedure Code (Act XIV of 1882), s. 265, Bhiv Savant and Ramachandra Gopal, (brother of the first appellant), who were parties to the suits, objected to the Collector's mode of partition, and applied to the Court to set aside the Collector's scheme, and to direct a fresh partition. The Subordinate Judge of Vengurla granted the application, and set aside the partition ordered by the Collector. Against this order Vasudev Vithal Savant, who was plaintiff in one of the suits, appealed to the District Court, and in the appeal he made Bhiv Savant alone the respondent. The District Court reversed the order of the Subordinate Judge, and upheld the order of the Collector. Thereupon Bhiv Savant preferred a second appeal to the High Court against the decision of the District Court. To this appeal neither Ramchandra Gopal nor his brother, the present appellant, were made parties. The High Court having confirmed the decision of the District Court, proceedings were taken to carry out the partition according to the Collector's original scheme. The appellant objected, on the ground that the Collector's scheme had been set aside by the Subordinate Judge, and that he (the appellant) had not been a party to the proceedings in either of the appellate Courts. He contended that he was, therefore, not bound by the decisions of the appellate Courts, and that the order of the Subordinate Judge, setting aside the partition ordered by the Collector, was still in force so far as he was concerned. He, therefore, applied, that the property should be divided in accordance with that order. His application was rejected by the Court of first instance as time barred, inasmuch as more than a year had elapsed since the date of the order of the Subordinate Judge, and during that time the applicant had taken no steps to enforce the order. In appeal, the Acting District Judge confirmed the order of the lower Court, holding that the order of the Subordinate Judge was no longer in force, having been set aside by the High Court. On second appeal to the High Court.

Held, that the appellant was not bound by the final decision of the High Court. The original order being in his favour, he could not be deprived of the benefit of that order without having the opportunity to defend it. Not having been a party to the proceedings in appeal, he was not affected by the result of those proceedings.

[372] Where there are several respondents before the Court of first appeal, though one of them may represent his fellows in a further appeal, he cannot represent a person who was not his co-respondent, and against whom, therefore, no decree could have been made on a point common to the two, or on any point at all.

Held, nevertheless, that the appellant could not succeed in the present appeal, the object of which was to revive the order of the Subordinate Judge. That order was one which the Subordinate Judge had no power to make. It involved taking the execution of the decree for partition out of the Collector's hands into his own, in direct contradiction of the law. In case of partition of lands, s. 265 of the Civil Procedure Code (Act XIV of 1882) and s. 113 of Bombay Revenue Code (Bombay Act V of 1879) place the execution of the decree entirely in the Collector's hands. This does not deprive the Court of judicial control of its decree; as for instance, if it should appear to have been obtained by fraud or surprise; but in the present case nothing of that kind was relied on. Nor was it asserted that the Collector had acted in bad faith, or contravened the command of the Court, or

* Second Appeal, No. 693 of 1886.

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transgressed the law. What was alleged was that he had made an objectionable partition. This was not a ground on which the Subordinate Judge could interfere. [F., 15 B. 527 (529) ; R., 14 B. 450 (451); 28 B. 238 (240) = 5 Bom L. R. 949 (950).]

THIS was an appeal from the order of H. Batty, Acting District Judge of Raunagiri, in appeal No. 31 of 1885.

The parties to this appeal were, along with others, parties to three different suits for partition of the same property.

In original suit 527 of 1865, Ganesh Har Savant was plaintiff.

In original suit 35 of 1866, Ramchandra Gopal was plaintiff.

In original suit 36 of 1866, Vasudev Vithal Savant was plaintiff.

In all these suits decrees were passed for partition of the same property ; and execution being applied for, the Collector was referred to, under s. 265 of the Code of Civil Procedure (Act X of 1877), for partition of the estate.

When the Collector was about to effect partition, one Bhiv Savant, who was a party to all the three suits, objected to the Collector's mode of division, and applied to the Court to set aside the Collector's scheme, and direct a fresh partition. In this application he was joined by Ramchandra Gopal, the plaintiff in suit No. 35 of 1866, and brother of the present appellant. The Subordinate Judge of Vengurla entertained the application, made an inquiry into the matter, and ultimately set aside the partition ordered by the Collector.

Against this order, Vasudev Vithal Savant, the plaintiff in suit No. 36 of 1866, appealed to the District Court, and made Bhiv Savant alone a respondent. The District Court reversed [373] the order of the Subordinate Judge, and upheld the Collector's proceedings. The High Court confirmed the District Court's decision in second appeal No. 185 of 1883.

The present appellant (Dev Gopal) and his brother Ramchandra Gopal were not parties to the appeal either to the District Court or to the High Court.

After the High Court's decision, when the Collector's original scheme for partitioning the estate was sought to be carried out, the present appellant objected, on the ground that as he was not a party to the proceedings in either of the appellate Courts, he was not bound by the final decision of the High Court, and that the order of the Subordinate Judge for setting aside the partition ordered by the Collector was still in force so far as he was concerned. He, therefore, applied for a distribution of the property in accordance with that order.

This application was rejected by the Court of first instance, on the ground that more than a year had passed since the order for a fresh partition had been made by the Subordinate Judge, and the applicant had taken no steps to enforce it. The application was, therefore, dismissed as time-barred.

In appeal, the Acting District Judge held that the Subordinate Judge had no power, under the present Code of Civil Procedure, to order the Collector to make a fresh partition, and that even if his order were legal, it was no longer in force, having been set aside by the High Court. He, therefore, confirmed the order of the Court of first instance.

Against this decision a second appeal was preferred to the High Court.

Ghanasham Nilkant, for the appellant.—The appellant was not made a respondent in the District Court, nor was he a party to the appeal to this Court. He is, therefore, not bound by this Court's decision. The order appealed against was in his favour. He cannot be deprived of the

benefit of that order, without the opportunity of defending it. The Collector acts ministerially in executing a decree of a Civil Court, and his action is subject to the control of the Court whose decree he has to execute—[374] *Mahadaji Karandikar v. Hari D. Chikne* (1) and *Lallu Trikam v. Bhavla Mithia* (2).

If a partition is made unfairly by the Collector, it may be set aside by the Court. Refers to *Parbhudas Lakhmidas v. Shankarbai* (3).

The order of the Subordinate Judge for setting aside the division ordered by the Collector was, therefore, legal.

Manekshah Jahangirshah, for the respondent.—The appellant was sufficiently represented by the other co-sharers, who were respondents before the District Court and appellants in this Court. Section 544 of the Code of Civil Procedure provides for a case of this kind. The appellant was as much interested as the other co-sharers in the proceedings in appeal. And as the order of the District Court proceeded upon a point common to all the co-sharers, he must be held bound by the final decision of this Court—*Babaji Dhondshet v. The Collector of Salt Revenue* (4). Under the Code of Civil Procedure a certain discretion is given to the Collector in the execution of a decree. So long as he does not exercise that discretion perversely, the Civil Court cannot interfere and take the execution out of his hands. In the present case it is not alleged that the Collector transgressed the law or contravened the decree. The Subordinate Judge had, therefore, no jurisdiction to order a fresh partition.

JUDGMENT.

WEST, J.—In this case the appellant, as represented by his brother, now deceased, presented to the Subordinate Judge certain objections to the partition which the Collector was about to make of an estate under a decree. The Subordinate Judge entertained the application, obtained a report from a surveyor, and thereupon made an order for superseding the distribution ordered by the Collector.

An appeal was made to the District Court, where the District Judge reversed the Subordinate Judge's order; and on a further appeal to this Court this decision of the District Court was confirmed. But the present appellant was not a party to either of those appeals. Several applications for execution of several [375] decrees had been consolidated in the Court of first instance; the parties concerned were numerous; and in naming the respondents in the District Court the appellants then omitted the present appellant and his brother, who thus dropped out of the further proceedings.

The effect of the High Court's decree was to re-establish the *status quo ante* the Subordinate Judge's order made on the present appellant's objections. But when it was proposed to give effect to the Collector's original project of distribution, the appellant objected that the order made for setting aside that project—and made on his application—must be regarded as still in force as to him, because he had not been even called on to defend it against the appeal to the District Court. It has been contended before us that as there is a kind of joint interest amongst the parties prejudiced by a decree affecting them on a common ground, such that one party appealing may bind his co-judgment-debtors by the result—*Babaji Dhondshet v. The Collector of Salt Revenue* (4); so when some of the respondents in the District Court became appellants in the High Court,

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(1) 7 B. 332.

(2) 11 B. 478.

(3) 11 B. 662.

(4) 11 B. 596.

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they represented all the persons in the same interests. But it does not follow that because all who stand on the same right and are similarly affected are bound in an appeal by the result of the judgment between one of their number and the respondent that they should necessarily be bound, without notice, by the steps in a further appeal. If the judgment has been in their favour, they ought not to be deprived of the benefit of it without having the opportunity of defending it. In this case, however, the respondents before the District Court were the appellants here, and though one of them might represent his fellows in a further appeal, he could not represent a person who had not been his co-respondent, and against whom, therefore, no decree could have been made on a point common to the two, or on any point at all.

It cannot, therefore, be held that the first appellant is bound because he was represented in the appeals. The only question would be whether the High Court's decree could be carried out against any of the co-sharers when effect could not be given to it without interfering with the holdings of other co-sharers who had not been parties before the High Court.

[376] But we are asked now to revive the order of the Subordinate Judge, and that cannot be done without contradicting the decree of this Court, since a partition as amongst some of the co-sharers on a particular principle must needs affect all. It is desirable, before we deal with that problem, to consider whether the Subordinate Judge's order was one that he could legally make. Now the Collector no doubt acts ministerially in executing a decree of a Civil Court, but then a certain discretion is allowed to him; and so long as he keeps within the bounds thus prescribed, the Civil Court has no right to replace his discretion by its own. In the case of a partition of lands, s. 265 of the Code of Civil Procedure and s. 113 of the Bombay Revenue Code (Bombay Act V of 1879) place the execution entirely in the Collector's hands—*Parbhudas Lakmidas v. Shankarbhai* (1). This does not deprive the Court of judicial control of its decree, as for instance, if it should appear to have been obtained by fraud or surprise; but in the present case nothing of that kind was relied on. Nor was it asserted that the Collector had acted in bad faith, or contravened the command of the Court, or transgressed the law. What was alleged was that he had made an objectionable partition. This was not a ground on which the Subordinate Judge could interfere. His order involved taking the execution out of the Collector's hands into his own, in direct contradiction to the law. We cannot resuscitate an order so obviously wrong as this, and we must, therefore, confirm the decree of the District Court. But each party is to bear his own costs throughout the present proceedings.

Order confirmed.

(1) 11 B. 662.