

prisoners to the complainants to the usual necessity of hitting out hard when there are a number of assailants. The details of blows as to number, succession and person giving, are described by the complainants and their witnesses; but it would be unsafe to believe such persons.

I would, therefore, reverse the convictions and sentences.

*Convictions and sentences reversed.*

1890  
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14 B. 441.

14 B. 450.

[450] APPELLATE CIVIL.

*Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Telang.*

GANOJI UTEKAR AND OTHERS (Plaintiffs) v. DHONDU AND OTHERS (Defendants).\* [16th January, 1890.]

*Execution of decree—Decree for partition—Jurisdiction—Collector, power of, to refuse execution—Practice—Ultra vires.*

The plaintiffs obtained a decree against the defendants for partition and possession of their share in the lands in the village of Kasai. That decree was sent for execution to the Collector. In the meantime a revision survey had been introduced into the village, under which the designation of some of the lands directed to be partitioned was changed from *kholi* to *dhara* lands. The Collector proposed to partition them, as described by the survey; but the plaintiffs having declined the proposal, he refused to partition the lands, and returned unexecuted the decree to the Court. On reference to the High Court.

*Held*, that the Collector had acted *ultra vires*. The plaintiffs were entitled to have the lands partitioned, quite independent of the result of the new survey as regards the character of the lands. The proposal of the Collector was virtually to contravene the command of the Court, which, as a purely ministerial officer, it was not in his power to do either directly or indirectly.

[F., 28 B. 233 = 5 Bom. L.R. 950; R., 15 M.C.C.R. 139; D., 15 B. 527; 5 Bom. L.R. 648.]

THIS was a reference by Rav Saheb N. G. Phatak, Subordinate Judge of Chiplun, in the Ratnagiri District, under s. 617 of the Civil Procedure Code (Act XIV of 1882).

The plaintiffs obtained a decree for partition and possession of their share in the village of Kasai, which was sent in execution to the Collector for partition. A revision survey having been introduced into the village, the Collector returned the decree unexecuted, on the ground that the plaintiffs were unwilling to have their share partitioned according to the descriptions of the village lands under the revision survey.

The Subordinate Judge thereupon referred the following question for the High Court's decision:—

Whether the plaintiffs have a right to ask for partition according to the descriptions of lands contained in the decree, or whether they should be asked to prove in a Civil Court that the old descriptions contained in the decree were the correct ones before obtaining partition?

[451] The Subordinate Judge's opinion on the first part of the question was in the affirmative, and on the second in the negative.

*Vasudev Gopal Bhandarkar*, for the plaintiffs.—The Collector was bound to partition the lands as described in the decree, he being a

\* Civil Reference No. 24 of 1889.

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ministerial officer. He is to carry out the command of the Court and make a complete partition—*Purbhudas Lakmidas v. Shankarbhai* (1). He cannot modify a decree. The Collector in the present case acted without jurisdiction in proposing to divide the land as the new survey described them.

*Vishnu Krishna Bhatvadekar, contra* :—Though the Collector is a ministerial officer he is given a discretion in partitioning. The Collector rightly proposed to partition the lands as they were described at the time of the partition. He would leave the parties to the Civil Court if they thought they were injured by his mode of partition. Where the Collector has exercised his discretion, it is not to be interfered with—*Dev Gopal Savant v. Vasudev Vithal Savant* (2).

## JUDGMENT.

SARGENT, C. J.—This is not a case in which the Collector's mode of partition is complained of as objectionable as in *Dev Gopal Savant v. Vasudev Vithal Savant* (2); but where the Collector refuses to carry out the decree of the Court, on the ground that he has reason to suppose, from the new survey made since the date of the decree, that some of the lands directed to be partitioned by metes and bounds are "dhara," or, in other words, do not belong to the *khots*. This is, to use the language of the Court in *Dev Gopal Savant v. Vasudev Vithal Savant* (2), virtually "to contravene the command of the Court," which, as a purely ministerial officer, it was not in his power to do either directly or indirectly. We must, therefore, hold that the plaintiffs were entitled to have the lands partitioned, quite independent of the result of the new survey as regards the character of these lands.

14 B. 452.

## [452] APPELLATE CIVIL.

*Before Mr. Justice Birdwood and Mr. Justice Jardine.*

PURSHOTAM SAKHARAM (*Original Plaintiff*), Appellant *v.*

DURGOJI TUKARAM (*Original Defendant*), Respondent.\*

[21st January, 1890.]

*Easement—Easements apparent and continuous—Easements of necessity—Implied grant—Finding of fact of a Court of first appeal not conclusive in second appeal if unsupported by reasons—Practice.*

A. and B. were originally in joint possession of certain land. They divided this land in 1865, and, ten years later, built at their joint expense a partition wall between their respective portions, leaving a drain in the wall for the passage of water from A.'s to B.'s land. In 1885 B. stopped the flow of water by this drain. A. thereupon sued for an injunction to restrain B. from causing the obstruction.

The Court of first instance decreed the claim. The appellate Court rejected the claim, on the ground that there was no express agreement between the parties that the water should be carried off by the drain in the wall.

*Held*, that A. would be entitled to the easement claimed by him if he could show either that it was necessary for the enjoyment of his share of the property,

\* Second Appeal No. 588 of 1888.