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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.

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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,

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* Second Appeal No. 588 of 1888.

(1) 11 B. 662. (2) 12 B. 371 (376).

or that it was apparent and continuous and necessary for enjoying the share as it was enjoyed when the partition took effect.

Held, also, that the High Court is not bound, in second appeal, by a finding of fact of a lower appellate Court, when such finding is not supported by any reasons.

[R., 5 Bom.L.R. 956; 8 C.W.N. 425 (432); 8 Ind. Cas. 939=4 S.L.R. 180; 1900 P.L.R. 175 (177).]

SECOND appeal from the decree of John Fitz Maurice, Acting Assistant Judge of Satara, in appeal No. 413 of 1886 of the District File.

The parties to the present suit were originally in joint possession of certain land. In 1865 they divided the land, and, about ten years later, built at their joint expense a partition wall between their respective portions, leaving a hole and a drain in the wall for the passage of water from plaintiff's land to defendant's land. In 1885 the defendant stopped the flow of water by this drain. Hence the present suit for an injunction to restrain the defendant from causing the obstruction.

The Subordinate Judge held that the plaintiff was entitled to have the water from his land pass through the drain, and he made a decree for the plaintiff.

[453] On appeal, the Assistant Judge reversed the decree of the Subordinate Judge, and dismissed the suit. His reasons are stated in the following extract from his judgment:—

"The claim is not of the nature of a right asserted by an owner of upper land that water falling thereon should be allowed to flow *naturally* on to adjacent lower land. The right asserted here is that the water should be allowed to flow in a specific manner through a specific drain.

"Nor has it been shown that the water must of *necessity* be carried this particular way. Defendant in his written statement asserted that the plaintiff could carry off the water otherwise.

"It is not asserted by plaintiff that defendant ever entered into an agreement with him to carry off the water in this manner. Plaintiff admits (Ex. 27) that no arrangement was made about this passage of water in the partition deed, the copy of which, I may observe, was rightly decided by the lower Court to be inadmissible in evidence (*vide* ss. 17 and 49 of the Registration Act III of 1877)."

Against this decision the plaintiff appealed to the High Court.

Branson (with him *Daji Abaii Khare*), for appellant.—The easement we claim is necessary for the enjoyment of our property. It is also an apparent and continuous easement, and, as such, will pass, by implication of law, on a severance of the tenements—Gale on Easements, p. 88; *Charu Surnokar* v. *Dokouri Chunder Thakoor* (1); *Ratanji* v. *Edalji* (2); *Chunilal* v. *Husein* (3), *Morgan* v. *Kirby* (4).

Ganesh R. Kirloskar, for respondent.—The easement claimed is different to what existed before partition, and the lower Court distinctly finds that it is not an easement of necessity. The cases cited do not, therefore, apply.

Branson, in reply.—The lower Court's finding as to the nature of the easement is not supported by any reasons. It is not, therefore, conclusive in second appeal—*Kamat* v. *Kamat* (5).

(1) 8 C. 956.
(2) 8 B.H.C.R. O.C.J. 181.
(3) Printed Judgments for 1886, p 128.
(4) 2 M. 46 (52).
(5) 8 B. 368.

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JUDGMENT.

[454] BIRDWOOD, J.—A partition was made of the joint property of the plaintiff and the defendant in 1865. Ten years afterwards, a wall was built between the divided lands at the joint expense of the parties; and a drain was left in the wall for the passage of water from the plaintiff's land to the defendant's land. The defendant has lately stopped the flow of water by this drain; and the suit is brought for an injunction to restrain him.

The Subordinate Judge has awarded the claim; but the Assistant Judge has reversed his decree, mainly on the ground that the plaintiff has not shown that the water must of necessity be carried off by the drain in the wall, and that there was no express agreement for the water to be so carried off. But the plaintiff 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, or that it was apparent and continuous and necessary for enjoying the share as it was enjoyed when the partition took effect. That would be the test applicable under the Indian Easements Act, 1882; and a similar test has been applied in parts of India where the Act is not in force. (See *Amutool Russool* v. *Jhoomuch Singh* (1), *Charu Surnokar* v. *Dokouri Chunder Thakoor, and Ratanji* v. *Edalji* (3). In *Polden* v. *Bastard* (4) Erle, C.J., said: "There is a distinction between easements, such as a right of way or easements used from time to time, and easements of necessity or continuous easements. The cases recognize this distinction, and it is clear law that, upon a severance of tenements, easements used as of necessity, or in their nature continuous, will pass by implication of law."

We cannot treat the Assistant Judge's finding as to the necessity of the easement claimed in this case as satisfactory, as he gives no reasons for it. Such a finding is not binding on a Court of second appeal—*Kamat* v. *Kamat* (5).

The decree of the lower appellate Court is reversed, and the case remanded for a rehearing on the merits with reference to the foregoing remarks. Costs to abide the result.

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14 B. 455.

[455] APPELLATE CIVIL.

Before Mr. Justice Birdwood and Mr. Justice Jardine.

SADASHIV RAYAJI (*Original Plaintiff*), *Appellant v.* MARUTI VITHAL AND OTHERS (*Original Defendants*), *Respondents.**

[11th February, 1890.]

The Indian Oaths Act (X of 1873), s. 9—Vakil—Agent—Agent holding a power of attorney authorizing him to act and appear for a party to a suit—Vakil's or agent's authority to terminate suit by an offer to be bound by the oath of the opposite party.

An agent, holding a power of attorney authorizing him to act and appear for a party to a suit, cannot bring the suit to a close by offering to be bound by the

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* Appeal from Order No. 30 of 1889.

(1) 24 W. R. C. R. 345. (2) 8 C. 956. (3) 8 B. H. C. R. O. C. J. 181.
(4) L.R. 1 Q. B. 156 (161). (5) 8 B. 368.