

proprietors, and confusion of boundaries *per se* is no ground to support such a bill."

In this case the litigants are independent proprietors, and it is impossible to regard them as individuals having such relations the one to the other as would entitle us to treat the whole of land in their possession as a common fund capable of adjustment in such a way as to enable us now to give  $\frac{4}{22}$  of the whole to one and the remaining  $\frac{18}{22}$  to the other. In our opinion the plaintiff has not shown a sufficient equity in himself as against the defendants in the suit, more especially when regard is had to the findings of fact by the lower Appellate Court, and therefore the decree of the lower Appellate Court must be confirmed with costs.

*Decree confirmed.*

### APPELLATE CIVIL.

*Before Sir L. H. Jenkins, K.C.I.E., Chief Justice, and Mr. Justice Batty.*

NAWAB MIR SADRUDIN (ORIGINAL APPLICANT), APPELLANT, v. NAWAB NURUDIN AND OTHERS (ORIGINAL OPPONENTS), RESPONDENTS.\*

1904.  
August 22.

*Partition suit—Decree—Application for execution by defendant—Order for execution subject to payment of court fees.*

A defendant to a partition suit applied for execution in his favour of the decree therein. The Judge ruled that on the defendant's "paying the court fees, the matter will be sent to the Collector for partition." The decree itself imposed no such term as to court fees.

The defendant having appealed against the said order,

*Held*, reversing the order, that the executing Court having regard to the terms of the decree was not justified in requiring payment of an additional court fee on the plaint.

APPEAL against an order passed by Krishnamukh A. Mehta, Acting First Class Subordinate Judge of Surat, in an execution proceeding.

One Hazrat Amtulnissa *alias* Mamdi Begum, widow of Nawab Mir Kamaloodin Husenkhansaheb, brought a suit for partition of certain properties, including three villages, against Mir Nurudin Husen Khan and twenty-three others, in the Court of

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the First Class Subordinate Judge of Ahmedabad. The several defendants having also claimed their shares in the properties, a decree for partition was passed in the suit and the shares of the several sharers were defined. The decree also granted mesne profits to the sharers in proportion to their shares and further provided, "any further orders or inquiries required for the purpose of carrying out the above decree are hereby reserved." Afterwards five of the defendants, including the present appellant (original defendant 4), having presented five separate darkhasts for the execution of the decree in their favour and for the recovery of their shares, the Judge passed the following order:—

The shares already determined by the statements of the Commissioner, Mr. Motibhai, should be partitioned and given into the possession of the different applicants \* \* \* through the Collector of the District, on their paying the necessary court fees in Court. On their paying the court fees, the matter will be sent to the Collector for partition.

Against the said order defendant 4 having preferred an appeal,

*H. C. Coyaji* appeared for the appellant (applicant, defendant 4):—The Judge had no authority to impose a term which was not in the decree. The Court executing a decree has to carry it out as it stands and cannot vary it. There is no provision in the Court Fees Act empowering the Court to refuse execution of a decree on the ground of non-payment of court fees. Section 6 of the Act lays down no more than that a document chargeable with court fees shall not be filed, exhibited or recorded in any Court of Justice and that such document shall not be received or furnished by any public officer unless the proper fee for it is paid.

*G. S. Rao* appeared for the respondents (opponents):—In a partition suit each defendant is in the same position as the plaintiff. He cannot, therefore, ask the Court to give him possession of his share by partition unless and until he pays the requisite court fee: *Lakshman v. Babaji*<sup>(1)</sup>, *Balvant v. Nana*<sup>(2)</sup>, *Mahadeva v. Laxuman*<sup>(3)</sup>.

(1) (1888) 8 Bom. 31 at p. 34.

(2) (1893) P. J. p. 92.

(3) (1892), P. J. p. 13.

JENKINS, C. J.:—The only point in contest before us is whether the lower Court could refuse to send the decree in this suit to the Collector for execution except on the terms of court fees being paid.

*Prima facie* it is the right of every litigant to call on the Courts to take such action as may be requisite to secure the execution of a decree containing a direction in his favour.

The appellant before us is a defendant in a partition suit and all he claims is execution in his favour of the decree therein and the lower Court has ruled that on his "paying the court fees the matter will be sent to the Collector for partition."

The decree itself imposed no such term: what right then has the executing Court to do so?

The Courts have no right to tax the subject; that is the function of the Legislature, and so we must be satisfied that there is some enactment which justifies the demand made in this case by the executing Court.

Now *ex concessis* this court fee is to be imposed (if at all) in respect of the plaint; but the plaint is not the defendant's document, so why should he pay any fee on it? We can find nothing in the Court Fees Act which imposes the burden.

But apart from this what is the consequence when the proper court fee is not paid? Simply that the document shall not be "filed, exhibited or recorded in any Court of Justice" and that it shall not be "received or furnished by any public officer."

There is no provision which stands in the way of the appellant's application.

We are not now considering what stamp the plaint should have originally borne; the only question is whether the executing Court having regard to the terms of the decree is justified in requiring payment of an additional court fee on the plaint and that we answer in the negative.

Clearly no court fee is payable in respect of the mesne profits.

We therefore reverse the decree of the lower Court and send back the case to be disposed of on the merits. Costs will follow the result. The money paid into Court under the order of 13th October 1903 must be refunded to the appellant.

*Decree reversed. Case remanded.*

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