APPELLATE CIVIL.

Before Sir Lawrence Jenkins, K.C.I.E., Chief Justice, and Mr. Justice Aston.

1905. *September 15.*

MALUBHAI LADHABHAI AND OTHERS (ORIGINAL DEFENDANTS 16—41), APPELLANTS, *v.* SURSANGJI JALAMSANGJI AND OTHERS (ORIGINAL PLAINTIFFS AND DEFENDANTS 1—15), RESPONDENTS. *

Gujarát Tálukdárs' Act (Bom. Act VI of 1888), sections 10, 11, 16 and 17(1)—Tálukdári Settlement Officer—Decision—Appeal—Second appeal—Subsequent suit in a Court of competent jurisdiction—Res judicata.

* Second appeal No. 78 of 1905.

(1) Sections 10, 11, 16 and 17 of the Gujarát Tálukdárs' Act.

10. (1) Every person who has obtained a final decree of a Court of competent jurisdiction declaring him to be entitled to a share of a tálukdári estate and every co-sharer whose name is recorded, as such, in the settlement register prepared in accordance with section 5 and, pending the preparation of the said register, every person whose title to any such share as aforesaid is not disputed by any other person claiming a share in the same estate, shall be entitled to have his share divided from the rest of the estate and to hold the same as a separate estate.

(2) Any two or more such co-sharers or persons shall be entitled to have their shares divided from the rest of the estate and to hold the same jointly as a separate estate.

11. Applications for partition shall be made to the Tálukdári Settlement Officer or to such other officer as the Governor in Council appoints in this behalf.

16. (1) An appeal shall lie from any decision, or from any part of a decision, passed under the last preceding section by the Tálukdári Settlement Officer or other officer aforesaid, to the District Court, as if such decision were a decree of a Court from whose decisions the District Court is authorized to hear appeals.

(2) Upon such appeal being made, the District Court may issue a precept to the Tálukdári Settlement Officer or other officer aforesaid, requiring him to stay the partition pending the decision of the appeal.

17. (1) When it has been decided to make a partition, the Tálukdári Settlement Officer or other officer aforesaid shall give the parties the option of making the partition themselves; in the event of their not agreeing, or of their failing to make the partition, within a period prescribed by the Tálukdári Settlement Officer or the officer aforesaid in this behalf, the Tálukdári Settlement Officer or other officer aforesaid shall either make it himself, or, if he thinks fit, shall entrust it to arbitrators appointed for this purpose by the parties.

(2) In making the partition, the Tálukdári Settlement Officer or other officer aforesaid, and any person acting under his orders shall have the same powers to enter on the estate under partition, for marking out the boundaries, surveying the land and other purposes as are conferred on Survey Officers by the Bombay Land Revenue Code, 1879.

Certain proceedings which had arisen out of an application to the Tálukdári Settlement Officer under section 11 of the Gujarát Tálukdárs' Act (Bom. Act VI of 1888) went up to the High Court in second appeal.

Subsequently the same question having arisen between the same parties in a regular suit in a Court of competent jurisdiction,

Held that the question was not *res judicata*. A Tálukdári Settlement Officer is not a Court of jurisdiction competent to try the suit. He is an administrative officer according to the machinery prescribed by the Bombay Legislature.

"In considering the competency of a Court for the purpose of deciding on a question of *res judicata*," the Court "must look to the powers of the Court in which the suit was instituted, and not to the powers of the Court by which that suit was decided on appeal."

Toponidhee Dhirj Gir Gosain v. *Sreeputty Sahanee* (1) followed.

SECOND appeal from the decision of L. P. Parekh, Judge of the Court of Small Causes at Ahmedabad with appellate powers, reversing the decree of V. M. Mehta, Subordinate Judge of Dhanduka.

The parties to the suit were Chudasama Girasias in the Dhanduka Táluka of the Ahmedabad District. The following is the brief history of the litigations in their family which led to the present suit.

In the year 1889 three sharers of the branch of Bavaji Pochanji and one sharer of the branch of Samatsang Pochanji applied to the Tálukdári Settlement Officer for partition of their joint tálukdári lands against three other sharers of the branch of Samatsang Pochanji. The Tálukdári Settlement Officer, Mr. Younghusband, instituted proceedings and held that the sharers of Bavaji's branch, which was the elder branch, were entitled to 1½ shares and those of Samatsang's branch to 1 share according to the custom of *Motap*. In pursuance of the said decision the shares of different parties were determined and a notification to that effect was issued on the 27th July 1892.

While Mr. Younghusband's order regarding partition was being carried out, the sharers belonging to Samatsang's branch filed a suit, No. 2 of 1893, before Mr. Quin, who had succeeded Mr. Younghusband as the Tálukdári Settlement Officer, against the sharers of Bavaji's branch and prayed that the order of Mr. Younghusband should be set aside as being illegal and a

(1) (1880) 5 Cal. 832 at p. 838.

1905.

MALUBHAI v. SURSANGJI.

fresh decree ordering partition by equal shares should be passed. Mr. Quin thereupon heard the case and held that the custom of *Motap* was not proved. He therefore ordered partition to be made according to the rules of Hindu Law. Against the said order there were various proceedings, and the High Court finally upheld the order on the 26th January 1897 in second appeal No. 596 of 1896.

The plaintiffs, who were the representatives of Bavaji's branch, thereupon brought the present suit for a declaration that they were entitled to 1½ shares and that the decree in suit No. 2 of 1893 was illegal and not binding upon them. They further prayed for an injunction restraining the defendants from executing the decree passed by Mr. Quin for division by equal shares.

Out of fifty-one defendants, one set of them admitted the plaintiffs' claim on the ground that the descendants of Bavaji, who was the senior representative, were entitled to 1½ shares and the descendants of Samatsang, who was junior, were entitled to one share. The second set admitted the claim and stated that they were not parties to suit No. 2 of 1893 and that the decree therein was fraudulently obtained and they were not bound by it. The third set contended *inter alia* that the shares of the parties were determined in suit No. 2 of 1893, and that as the plaintiff's father (defendant 1 in the present suit) was a party to that suit, the decree therein, which was ultimately confirmed by the High Court on the 26th January, 1897, in second appeal No. 596 of 1896, created the bar of *res judicata* to the present suit.

The Subordinate Judge found that the descendants of Bavaji and Samatsang were entitled to 1½ and 1 shares respectively. But he rejected the claim on the ground of *res judicata*.

On appeal by the plaintiffs, the First Class Subordinate Judge of Ahmedabad with appellate powers confirmed the decree.

The plaintiffs having preferred a second appeal, No. 480 of 1900, the High Court (Jenkins, C. J., and Aston, J.), on the 29th September 1903, reversed the decree and remanded the case for trial on the merits.

On the remand the Judge of the Court of Small Causes with appellate powers held that the plaintiffs were entitled to 1½

shares and that the decree passed in suit No. 2 of 1893 and the decrees subsequently passed in further proceedings, which had arisen under that decree, were not binding on the plaintiffs. He therefore reversed the decree and ordered the defendants to refrain permanently from executing the said decrees against the plaintiffs.

Defendants 16—41 preferred a second appeal.

Modi (with *Rao Bahadur V. J. Kirtikar*, Government Pleader, and *R. V. Desai*) appeared for appellants 1 and 2 (defendants 17 and 18).

L. A. Shah appeared for respondents 3, 6, 9, 10, 13 and 15 (defendants 2, 5, 12, 13, 15 and 17).

Scott (Advocate General) with *M. N. Mehta* appeared for respondents 1, 2, 4, 5, 7, 8 and 11 (plaintiffs 1 and 2 and defendants 3, 4, 8, 11 and 14).

JENKINS, C. J.:—The plaintiffs have brought this suit to obtain the final decree of a Court of competent jurisdiction declaring them to be entitled to a share of a tálukdári estate.

They allege a custom of *motap*, in accordance with which their ancestor Bavaji obtained a greater share in the family property than his younger brother Samatsang, and the lower Appellate Court has, on remand, held the custom proved. A decree has been passed on the basis of this finding, and from that decree the present appeal has been preferred. It is objected that the custom has not been proved in that the evidence is not clear and unambiguous, and the custom has not been shown to be certain, ancient and invariable.

It cannot be said that the Judge of the lower Appellate Court was not aware of these requisites to the legal proof of a custom, for in the forefront of his judgment he enumerates them and cites the case in which they are stated.

And we hold, notwithstanding the searching criticism to which his judgment has been subjected by Mr. Modi, that there is evidence on the record on which the Subordinate Judge was entitled to hold as he did.

He has held that on the death of Pragji, an ancestor removed by about 9 degrees in the direct line from the present plaintiffs, the family estate descended in accordance with this custom, and there is evidence in support of this. He has further held that

1905.

MALUDBHAI v. SURSANGJI.

the families of Bavaji and Samatsang respectively have been proved to have actually enjoyed the family property in shares sanctioned by the custom from 1850 or 1851, and from this long enjoyment he has inferred a division between those two in conformity with it.

In this he was (in our opinion) within his rights as the final Judge of facts, and we hold that no error has been shown which would entitle us to interfere in second appeal.

Moreover, it is to be noted that the Judge of the lower Appellate Court has determined that the long enjoyment should be held to have ripened into a right; so that on this finding of fact also the conclusion as to the shares of the parties can be supported.

The only other question is whether the defendants are bound by the result of the proceedings, which culminated in a decree of this Court passed on the 26th of January 1897. The Judge of the lower Appellate Court has decided this in the negative, and this conclusion is impugned by the appellants.

These proceedings arose out of an application to the Tálukdári Settlement Officer under section 11 of the Gujarát Tálukdárs' Act, 1888.

From his decision an appeal was preferred under section 16 to the District Court, and from that Court's decree there was an appeal to the High Court.

The result of those proceedings was that the custom of *motap* was negatived.

It is contended that this constitutes *res judicata* so far, at any rate, as concerns those of the present litigants who were parties to those proceedings.

We do not agree with this.

The law of *res judicata* is to be found in section 13 of the Civil Procedure Code, and to make its terms applicable it must be shown that the Tálukdári Settlement Officer is a Court of jurisdiction competent to try this suit. But this he clearly is not: he is an administrative officer and not a Court: and by no straining of words can he be described as a Court of jurisdiction competent to try this suit. If need be, this is made even clearer by the terms of section 10 of the Gujarát Tálukdárs' Act.

True it is, those proceedings came up to the High Court, and it has been held such an appeal will lie, though the proceedings originate before an administrative officer in accordance with a machinery prescribed by the Bombay Legislature: *Jamsang* v. *Goyabhai*[1]. But, assuming, as we now must, that they rightly came to this Court, still on the authorities that would not better the plea of *res judicata*. It was said by White, J., in *Toponidhee Dhirj Gir Gosain* v. *Sreeputty Sahanee*[2] that "in considering the competency of a Court for the purpose of deciding upon a question of *res judicata*, we must, I think, look to the powers of the Court in which the suit was instituted, and not to the powers of the Court by which that suit was decided on appeal." Effect was given to this view in *Bharasi Lal Chowdhry* v. *Sarat Chunder Dass*,[3] and it should, we think, be followed by us.

Then how does the case stand apart from the doctrine of *res judicata*? Section 10 of the Act prescribes that every person who has obtained a final decree of a Court of competent jurisdiction declaring him to be entitled to a share of a tálukdári estate shall be entitled to have his share divided from the rest of the estate and to hold the same as separate estate. This (in our opinion) applies to a defendant as well as to a plaintiff in whose favour a declaration has been made, and clearly contemplates that the Court should declare not only the existence of the share but also its extent.

No doubt the right assumes that there is an estate to be divided, in other words, an undivided estate; and that condition exists here, for notwithstanding the prior application to the Tálukdári Settlement Officer, and the consequent proceedings, it is not suggested that there has been any such partition as is mentioned in section 17, or that the estate has otherwise ceased to be undivided.

We therefore think the lower Appellate Court has rightly decided and that the decree should be confirmed. The appellants must pay the costs of the appeal, two sets of costs being allowed to the respondents, and the costs of the cross-objections must be borne by the respondents by whom they were filed.

G. B. R. *Decree confirmed.*

(1) (1891) 16 Bom. 408. (2) (1880) 5 Cal. 832 at p. 838

(3) (1895) 23 Cal. 415.