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RANGAPPA
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VENKAN-
BHAT.

We reverse the decision of the lower appellate Court and restore that of the Subordinate Judge with costs throughout upon the plaintiffs. The cross objections are dismissed with costs.

Decree reversed.

J. G. R.

APPELLATE CIVIL.

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Before Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Shah.

August 17.

RAMCHANDRA DINKAR PRABHU MIRASI, AND OTHERS (HEIRS OF ORIGINAL DEFENDANTS NOS. 10—12) APPELLANTS v. KRISHNAJI SAKHARAM PRABHU MIRASI, AND OTHERS (ORIGINAL PLAINTIFF AND DEFENDANTS NOS. 1 TO 9, 13 TO 25 AND 29) RESPONDENTS.*

Decree—Execution of decree—Partition effected by Collector—Partition not in accordance with the direction of the decree—Wrongful distribution of shares—Mistake—Collector's power to re-open partition—Court's duty to rectify mistake of its agent.

One Atmaram Bhagwant, a member of a Mirasi family, brought a suit for partition of his 1/36th share in three villages. In November 1888 a decree was passed directing that the half share of the Desai family in each of the three villages should first be separated and the remaining share divided between the members of the Mirasi family in accordance with the decree. Atmaram applied for execution of the decree in Darkhast No. 127 of 1893 but before partition was made on this application defendant No. 8 filed Darkhast No. 404 of 1894 for his share. These Darkhasts were disposed of in 1898 when defendant No. 8's share was separated and given into his possession. The appellants (defendants Nos. 10—12) then applied for separate possession of their share in 1900, but when the surveyor prepared a list of lands remaining over after the first partition as the share of the appellants, the latter found that the Khasgi land in one of the villages remaining for their share was less than what they were entitled to and that the plots below and adjoining their houses had been allotted to the share of defendant No. 8. They then applied to the Collector to re-open partition. The Collector declined to do this and referred the matter to the Court on the ground that the appellants refused to take possession of their shares. The appellants,

* Second Appeal No. 590 of 1912.

therefore, applied to the Court for fresh partition and determination of their legitimate share. The lower Courts dismissed their application as being barred by *res judicata*. On appeal to the High Court,

Held, granting the application, that the Court would not allow a mistake of one of its agents in carrying out its directions to work permanent injustice.

SECOND appeal against the decision of V. G. Kaduskar, First Class Subordinate Judge. A. P., at Ratnagiri, confirming the decree passed by V. N. Navaratna, Subordinate Judge of Devgad.

Execution proceedings.

One Atmaram Bhagwant, a member of a Mirasi family brought a suit for partition of his 1/36th share in the three villages named Kuvale, Bharni and Chafet. These villages were owned by the families of Desai and Mirasi each owning one half share in each of the three-villages. In November 1888 a decree was passed for partition, the main provisions of which were (1) that the plaintiff should take into possession his 1/36th share, on a division by metes and bounds of the whole property in dispute except the Kulkarni Watan, but the plaintiff, before taking possession of his share, should pay with their consent to certain of his Mirasi co-sharers certain specified sums of money ; (2) that equal divisions between Desais and Mirasis should be made in each village ; (3) that from the 8 annas separated share of the Mirasis the shares of the sub-sharers should be ascertained the respective fractions being specified in the decree ; (4) that after they had paid the proper Court fee in respect of their shares, their shares were to be separate and as regards the lands which were with the sharers the same were as far as possible to be kept with them at the time of partition subject to certain provisions to secure equality. The plaintiff then applied (Darkhast No. 127 of 1893) for the execution of the said decree. Before the partition was made, on his application, the

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other five sharers also applied, except the appellants (defendants Nos. 10—12) for the separation of their respective shares. Notices were issued to all the parties including the appellants and half the share of the Desai family was first separated as directed by the decree and then the shares of the above six sharers were determined and separate possession was given to all the sharers except the Desai family and the appellants. The six Darkhasts were accordingly disposed of in 1898. The appellants then applied in 1900 (Darkhast No. 727 of 1900) for the separate possession of their share. The usual warrant was sent to the Collector who referred it to the surveyor. When the surveyor prepared a list of lands that remained after the first partition as the share of the appellants, the latter found that the Khasgi lands in Kuvale were far less than what they were legally entitled to and that the plots below and adjoining their houses had been allotted to the share of defendant No. 8. They then applied to the Collector to re-open the partition. The Collector declined but proposed that the surveyor should at the appellants' expense see if they could be compensated out of the Desai's lands. The appellants having failed to pay the expenses, the Collector reported to the Court that the appellants refused to take possession of their shares. The appellants, thereupon, filed the application on the 24th October 1907 attacking the previous partition as fraudulent and requesting that the partition might be reopened to determine their legitimate share.

The defendant No. 8 alone opposed the application. He contended that the partition was made with the consent of all the parties including the appellants and as it was sanctioned by the Court, it could not be re-opened; that the application was out of time and barred by *res judicata*, that the appellants were estopped from disputing the previous partition.

The Subordinate Judge held that the application for revision of the partition was not maintainable and that it was barred by *res judicata*.

The decree was confirmed in appeal.

The appellants then preferred a second appeal.

A. G. Desai for the appellants:—The decree for partition was passed in 1889 and the appellants applied in execution for partition and separate possession in 1900. It is true that the other Darkhasts by other sharers have been finally disposed of in 1898. But the District Judge reports that no final decree has yet been drawn up. Until, therefore, our Darkhast which is the last of its kind is disposed of, the Court continues to have jurisdiction to re-adjust shares or to correct evidently wrong allotment under any previous Darkhasts. There can be no question of *res judicata* in such a case as this. The Collector has to carry out the terms of the decree. The allotment by the Collector clearly contravenes the decretal commands. That being so, the Court will not allow a substantial wrong done to the appellants to remain unredressed. The party benefited by such inequitable allotment cannot take shelter under any technical defence and claim to retain the property wrongly allotted to him.

[SCOTT, C. J.:—Do you rely on the principle laid down in section 316 of the Indian Succession Act?]

The principle of refunding would appropriately apply. The illustration to section 324 of the Act illustrates our case. See also Daniell's Chancery Practice, pp. 910-11; Story on Equity Jurisprudence, Chapter XIV, p. 434, para. 656 (b); *Fisher v. Robinson*⁽¹⁾; *Birkin v. Smith*⁽²⁾.

K. N. Koyajee for the respondent No. 10:—The previous Darkhasts having been disposed of and the

⁽¹⁾ (1892) 9 T. L. R. 135.

⁽²⁾ [1909] 2 K. B. 112.

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manner of division having been settled by the divisions in these Darkhasts, the present question is barred by *res judicata*. Cited, Seton Vol. I, p. 125, Vol. II, p. 1593; Daniell's Chancery Practice, Vol. I, p. 709 (8th edn).

SCOTT, C. J.:—The partition suit in which the execution proceedings (Darkhast 727 of 1900) now in question are taken was brought by the plaintiff, a member of a Mirasi family, interested to the extent of 8 annas in certain 3 villages named Kuvalli, Bharni and Chafet. The other 8 annas in each village belonged to a Desai family. The plaintiff claimed a $\frac{1}{36}$ th share.

In November 1888 a decree was passed for partition, the main provisions of which were (1) that the plaintiff should take into his possession his $\frac{1}{36}$ th share, division by metes and bounds being effected of the whole property in dispute except the Kulkarni Watan, but the plaintiff before taking possession of his share was to pay with their consent to certain of his Mirasi co-sharers including the present appellants certain specified sums of money.

(2) Two equal divisions between Desais and Mirasis were to be made in each village.

(3) Then from the 8 annas separated share of the Mirasis the shares of the sub-sharers should be separated, the respective fractions being specified in the decree.

(4) After they had paid the proper Court fee in respect of their shares, their shares were to be separate, and as regards the lands which were with the sharers the same were as far as possible to be kept with them at the time of partition subject to certain provisions to secure equality.

The plaintiff first filed his application for execution of the decree in Darkhast 127 of 1893 and the main

inquiry in connection with the partition was held under the Collector's direction in that Darkhast proceeding. Thereafter the defendant No. 8 filed Darkhast 404 of 1894 for his share and the Collector's surveyor who had been employed by the Collector on this Darkhast proceeding No. 127 stated in his report in Darkhast 404 that no thikan having in it the houses of any other party had been allotted to defendant No. 8's share. That Darkhast was disposed of in or about 1898 according to the statement of the appellant, but the date cannot be verified as many papers are missing and the only note of the Subordinate Judge which we have relating to any Darkhast other than that of the appellants, relates to Darkhast 118 of 1896 of defendant No. 2 and notes that the warrant for Kuvalegar having been executed and the Darkhastdar raising no objections, this Darkhast is disposed of. The appellants state that they applied for separate possession of their share in 1900, but when the surveyor prepared a list of lands remaining over after the first partition as the share of the applicants the latter found the Khasgi lands in Kuvale remaining for their share far less than they should have got and that the plots below and adjoining their houses had been allotted to the share of other sharers. They then applied to the Collector to re-open the partition. The Collector declined to do this, but proposed that the surveyor should at the applicants' expense see if they could be compensated out of the Desai's lands. The applicants say they wanted time to pay these expenses and the Collector then reported to the Court that the applicants refused to take possession of their share.

It is stated by the Subordinate Judge in these proceedings, in confirmation of the applicants' complaint, that the Collector's surveyor has noted that the applicant's house in Survey No. 76, Falni No. 8 of

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Chafet village was allotted to defendant No. 8's share, while the same defendant got about double his share in the Khasgi lands and for the applicants only about half their proper share remains.

The lower Courts while recognizing the injustice to the applicants in the partition which has been effected felt unable to interfere. The lower appellate Court thought that the share prepared for defendant No. 8 had been and "must have been embodied in the final partition decree and it would operate as *res judicata* even as among the defendants the suit being for partition." There is no trace in the proceedings of any final decree and on inquiry the District Judge has informed us that it was not the practice to make partition decrees final and reports that the last order in the proceedings is one dated the 1st of July 1897 directing the papers sent by the Collector, after effecting compliance with the Court warrant and delivering possession, to be filed.

It is evident from the findings of the lower Courts that the Collector's partition has not been made in accordance with the directions of the decree. The Collector acts ministerially in executing the Court's decree, see *Dev Gopal Savant v. Vasudev Vithal Savant*⁽¹⁾; and an injustice has been done by awarding to defendant No. 8 the appellants' house as well as too much land. The appellants were according to the decree to get their shares on paying the proper Court fee. No time was specified within which such payment should be made. The suit was not the defendants' suit and they should be allowed to pay at their convenience. That they paid and applied for their shares later than the others is no reason for non-compliance by the Court's agent with the terms of the decree. The lower Courts evidently suspected fraud on the part of

(1) (1887) 12 Bom. 371 at p. 376.

defendant No. 8 and possibly the Collector's surveyor in the earlier proceedings. We will not, however, assume it. It is sufficient to say that this Court cannot allow a mistake of one of its agents in carrying out its directions to work permanent injustice.

The applicants must have their right share so far as they can get it at the expense of defendant No. 8.

The case resembles that of a legatee over-paid by an executor by order of the Court. Such legatee must refund to allow of equal distribution of the estate. This principle has long been recognised. It is to be found stated in Vernon's Reports(1690) and is applied in section 135 of the Probate and Administration Act 1881.

We set aside the order of the lower Court, and direct that the papers be returned to the Collector to adjust the shares of the defendant No. 8 and the appellants as far as possible according to the provisions of the decree.

The defendant No. 8 must pay the appellants' costs throughout.

Decree reversed.

J. G. R.

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