

APPELLATE CIVIL.

Before Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Coyajee.

CHUNILAL JAMNADAS AND OTHERS-(ORIGINAL DEFENDANTS), APPELLANTS
v. MULCHAND HARJIVANDAS (ORIGINAL PLAINTIFF), RESPONDENT*.

1922.

February 16.

Partition decree—Application by plaintiff for execution—Subsequent application for leave to drop execution proceedings—Defendant allowed to continue same proceedings.

The plaintiff applied to execute a partition decree. One of the properties to be partitioned being a house, a commissioner was appointed to effect its division. The commissioner submitted a report, but before it could be given effect to, the house was burnt down. The plaintiff was then anxious to drop the execution proceedings, but the defendants wanted to go on with the proceedings themselves:—

Held, that the defendants could continue the proceedings in order that the suit property might be partitioned.

FIRST appeal from the decision of P. M. Bhatt, First Class Subordinate Judge at Broach.

Execution proceedings.

* The decree under execution was a partition decree. The plaintiff applied to execute the decree by partition of certain lands in the possession of the defendants. The defendants objected that a house in the plaintiff's possession should be partitioned first. The Court thereupon appointed a commissioner to effect a division of the house. The commissioner in due course submitted a report; but before effect could be given to the report, the house in question was burnt down.

The plaintiff then applied to be allowed to drop the execution proceedings; but the defendants objected and were willing to take up the proceedings themselves.

* First Appeal No. 97 of 1921.

1922.

CHUNILAL
v.
MULCHAND.

The execution Court acceded to the plaintiff's application.

The defendants appealed to the High Court.

G. N. Thakor, for the appellants.

M. H. Mehta, for respondent No. 1.

MACLEOD, C. J. :—This was a partition suit in which a consent decree for partition was obtained on 8th November 1911 from the First Class Subordinate Judge, Broach. The plaintiff, on the 12th March 1915, took out a Darkhast for partition of the suit property and moveables. Commissioners were appointed, who submitted a report with regard to ornaments. But with regard to a certain house Mr. Hargovandas was appointed commissioner to effect a division of it. He made a report, but before the report could be given effect to, the house was burnt down. The plaintiff then wanted to drop the execution proceedings, but the defendants objected. The Court allowed the plaintiff to drop the execution proceedings. The result would be that those defendants who wished to continue the execution proceedings could not do so without having to issue a fresh Darkhast. We see no reason why the defendants should not have been allowed to continue the Darkhast in order that the suit property might be partitioned. Therefore we allow the appeal and direct the Darkhast to continue at the instance of the defendants. The plaintiff to pay the appellants' costs in both Courts.

Appeal allowed.

R. R.