1887

PARBHUDÁS LAKHMIDÁS v. SHANKARBHÁI.

SARGENT, C. J.:—We think that the Collector should deliver possession of the shares after making the requisite division. Section 265 of the Civil Procedure Code (XIV of 1882) contemplates the "partition" being completely carried out by the Collector; and the circumstance that it does not provide for the Collector's reporting to the Court, as is the case with lands not paying revenue to Government by section 396, points to the conclusion that the term "partition" is not confined to mere division of the lands in question into the requisite parts, but includes the delivery of the shares to their respective allottees. This view is further confirmed by the language of the sections in Bombay Act V of 1879, which lay down the rules to be observed by the Collector in carrying out a partition. In clause 2, section 113, the Collector is directed to "make over" to one of the sharers any number which may remain after partition has been carried out as far as possible, and in section 114 the Collector is to "divide" the estate into shares according to the respective rights of the co-sharers, and to "allot" such shares to the co-sharers." Lastly, we have reason to believe that this is the general practice of Collectors.

APPELLATE CIVIL.

Before Mr. Justice Nánábhdi Haridás and Mr. Justice Jardine.

RAISINGJI, (ORIGINAL DEFENDANT), APPELLANT, *v.* BALVANTRA'O, (ORIGINAL PLAINTIFF), RESPONDENT.*

1887. *March* 28.

Practice—Civil Procedure Code (Act XIV of 1882), *Sec.* 562—*Order of remand—Issues undecided—Procedure.*

A Subordinate Judge decided a suit on the grounds (1) that it was *res judicata*, (2) that it was barred by limitation. On appeal, the Assistant Judge upheld the decree on the first-mentioned ground without deciding the point of limitation. On second appeal, the High Court reversed the Assistant Judge's decision, holding that the suit was not *res judicata*, and remanded the case to be tried on the merits. On receipt of the order of the High Court, the Assistant Judge reversed the decree of the Subordinate Judge without giving any decision on the point of limitation, and remanded the case to the Subordinate Judge to be tried on the merits. From this order the defendant appealed to the High Court.

* Appeal, No. 1 of 1887.

1887.

RAISINGJI v. BALVANTRÁO.

Held, that the order of remand by the Assistant Judge was unauthorized under section 562 of the Civil Procedure Code (Act XIV of 1882). When the High Court remanded the case to be tried on the merits, the whole case was left open to the Assistant Judge, and before he could reverse the Subordinate Judge's decree he was bound, under section 562 of the Code, to determine whether the decision of the Subordinate Judge on the question of limitation was right or not.

THIS was an appeal from an order of A. Stewart, Assistant Judge (F. P.) of Broach.

In the plaintiff's suit *against* the defendant the Subordinate Judge of Vágra, in the Broach District, raised several issues, but rejected the plaintiff's claim, on two grounds only, *viz.*, (1) that the question raised in the suit was *res judicata*, (2) that the suit was barred by limitation. On appeal, the Assistant Judge confirmed the lower Court's decree upon the first ground only, *viz.*, that of *res judicata*, and omitted to go into the question of limitation. On second appeal, preferred by the plaintiff, the High Court reversed the Assistant Judge's decision, holding that the question in the suit was not *res judicata*, and remanded the case to be tried on the merits. The Assistant Judge, on receipt of the High Court's order of remand, at once reversed the decree of the lower Court without going into the question of limitation, and remanded the suit to be tried on the merits.

From this order the defendant preferred an appeal to the High Court.

Ráv Sáheb *Vásudev Jagannáth* for the appellant:—The remand order was wrong. The Assistant Judge ought to have considered and decided the point of limitation. Not having done so, he was not in a position to remand the case. When the High Court reversed his decree on the point of *res judicata*, and remanded the case to the Assistant Judge, the whole case was open to him as it had come to him from the Subordinate Judge, who had decided against the plaintiff on the ground *(inter alia)* of limitation. The plaintiff, therefore, was entitled in appeal to have that point also decided by the Assistant Judge, and until that was done, the case could not be amended. The order of remand is not good under section 562 of the Civil Procedure Code (Act XIV of 1882).

Mánekshah Jehángirshah for the respondent:—The Assistant Judge had power to remand the case. Although he confirmed

the decree of the Court of first instance expressly on the ground of *res judicata*,-the decree was confirmed as a whole, and the point of limitation was included in the decision. The point considered by the High Court was only the question of *res judicata*. On that point, therefore, the decree of the Assistant Judge was upset, but on the point of limitation the decree of the Assistant Judge confirming that of the Subordinate Judge still remained in force.

NA'NA'BHA'I HARIDA'S, J.:—We think the order of remand in this case is unauthorised by section 562 of the Civil Procedure Code. The Subordinate Judge disposed of the suit originally on two grounds—*res judicata* and limitation. In appeal, his decision was upheld by the Assistant Judge only on the first ground, *res judicata*. The question of limitation was not gone into. In second appeal, the High Court reversed the decision of the Assistant Judge, holding that the suit was not barred on the ground of *res judicata*, and it remanded the case for the lower Appellate Court to decide it on the merits. This, we think, left the whole case open to the Assistant Judge, and before he could reverse the Subordinate Judge's decree, and remand the case for a fresh decision, he was bound, under section 562 of the Civil Procedure Code, to determine whether the Subordinate Judge's decision on the question of limitation was right or not. We, therefore, reverse his order, and direct him to come to a finding on that point. If he finds the suit not barred by limitation, it will be open to him to remand the case for disposal on the merits.

The Assistant Judge to dispose of the costs of this appeal in disposing of the appeal before him.