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ment to be determined. But looking to the language of section 15, which clearly contemplates the reference of such a dispute being provided for in the subsequent part of the Act, we think that—as there is no other provision made for it—we should give the term "apportionment," in Part IV, a liberal construction as including the case where the Court has to decide between rival claimants of the entire compensation. It is to be further remarked that all such disputes may end in an apportionment of the compensation. An appeal will, therefore, in our opinion, lie in this case. The District Judge was wrong in supposing that the claimants had made any admissions on which the case could be rightly disposed of. He ought to have given the parties an opportunity of adducing their evidence. We, therefore, reverse the decision of the District Judge, and remand the case for re-hearing. Costs to abide the result.

*Decree reversed and case remanded.*

## APPELLATE CIVIL.

*Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Birdwood.*

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*August* 12.

DATTA'TRAYA VITHAL, (ORIGINAL PLAINTIFF), APPELLANT, *v.* MAHA'DA'JI PARASHRA'M AND OTHERS, (ORIGINAL DEFENDANTS), RESPONDENTS.*

*"Sheri" lands—Lease by Government for a certain number of years—Partition—Section 265 of the Civil Procedure Code (Act XIV of 1882)—General rule of Hindu law as to partition.*

Under section 265 of the Civil Procedure Code (Act XIV of 1882) a Civil Court cannot effect partition of lands paying revenue to Government. The Collector alone is empowered under that section to do so.

The general Hindu law as to partition, which lays down that, except in certain special cases determined by family custom or usage, partition of all family property can be made, is applicable to *sheri* lands leased by Government for a certain number of years; there is no Act of Legislature which excludes lands leased by Government from its operation.

THIS was a second appeal from the decision of Khán Bahádur M. N. Nánávati, First Class Subordinate Judge of Ratnágiri, with appellate powers.

Suit for partition.

*Second Appeal, No. 559 of 1889.

The facts of the case necessary for the purpose of this report were as follows :—

The plaintiff, Dattátraya Vithal Kulkarni, alleged that the property in dispute, in all eighteen *thikans*, was the joint property of the plaintiff and defendants Nos. 1—6; that he was entitled to one-twelfth share therein; that the first seventeen *thikans* were taken on lease from the Government in the year 1845-46; that the last *thikan*, No. 18, was so taken in the year 1852-53 in the name of Parashrám Yashvant, father of defendant No. 1; that in the year 1871-72 the sharers separated, and enjoyed the profits of their separate shares till the year 1879-80, when defendant No. 1, Mahádáji Parashrám Kulkarni, caused obstruction to the plaintiff's enjoyment. The plaintiff, therefore, sought for partition and separate possession of his one-twelfth share; or, in the alternative, if partition could not be effected, to be declared entitled to the joint possession of his share. The plaintiff also claimed mesne profits.

Defendant No. 1, Mahádáji Parashrám, answered that he had sold his interest in *thikan* No. 18 to defendant No. 7, Zavier, but the sale was invalid and ineffectual; that the co-sharers had, under an agreement, placed the property in dispute under his management on consideration of his paying them a certain quantity of produce, and Rs. 30 in cash; that the said agreement would operate as a bar to partition; and that the suit was time-barred.

Defendant No. 2, Govind Venkáji Kulkarni, having died after the institution of the suit, was represented by his son Bháskar Govind and grandson Váman Venkáji, who supported the plaintiff's claim, and asked for the partition of his share.

Defendant No. 3, Jagannáth Vithal Kulkarni, also did the same.

Defendants Nos. 4, 5 and 6, Raghunáth Vithal Kulkarni, Náráyan Vithal Kulkarni and Sitárám Ghánáshám Kulkarni, did not put in an appearance.

Defendant No. 7, Zavier Jeremias João Vitorino DeSouza, set up and relied on his purchase of *thikan*, No. 18, from defendant No. 1.

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The Subordinate Judge (Khán Bahádur Ruttonji Mancherji) found *inter alia* (1) that defendant No. 1 did not hold the *thikans* in dispute from his *bhaubands* as a permanent tenant, but was entitled to the sole management thereof, and his *bhaubands* were entitled to claim from him their shares of the net profits; (2) that partition could not be allowed; (3) that the *sheri thikans* in suit were not partible, and (4) that the plaintiff was entitled to a decree declaring his one-twelfth share in the net profits of the *thikans*, and nothing more. The Subordinate Judge passed a decree accordingly.

Against the decree of the Subordinate Judge the plaintiff appealed to the District Court, which confirmed it.

In his judgment the Subordinate Judge made the following remarks:—

"The property in suit is '*sheri*' lands; and the plaintiff in his deposition states that, since the term of the lease was to expire in a very few years, the first defendant was allowed to hold them on the ground that he was to pay the other sharers their shares of the profits thereof. This is the '*tharáv*' (agreement) relied upon by the first defendant, and it is thus fully admitted. Mr. Kulkarni, relying on the decision on the point at I. L. R., 7 Bom., 538, said that the '*tharáv*' was invalid. But the plaintiff in deposing to it does not say that the '*tharáv*' was *never* to divide. It cannot, therefore, be bad in law on the ground mentioned in the decision referred to. But here it is not so much this '*tharáv*' that stands in the way of the partition sought for, as the nature of the property sought to be partitioned. It is admittedly '*sheri*' lands, obtained on lease from Government. The first and seventh respondents' pleaders contended that no leasehold property could ever be divided. * * * No authority was cited, on the one side or the other, to show whether '*sheri*' lands are partible or not. Section 265 of the Civil Procedure Code suggests that they are partible, for it makes no distinction between revenue-paying land of one sort and any other sort. However, on consulting authorities, I find that it is only permanently settled lands that are partible, and not those that are but temporarily settled, like the lands in suit.

*Vide Muttu* v. *Kadalalaga*(1); *Badri Roy* v. *Bhugwat Nárán Dobey*(2); *Ajoodhya Persád* v. *Collector of Durbhungah*(3).

Against the decree of the District Court the plaintiff appealed to the High Court.

*Shántárám Náráyen* (Government Pleader) for the appellant:—The lower Court was wrong in holding that the property in dispute was from its very nature not partible. The property is *sheri* land,—that is, Crown land let out by Government for a particular number of years. Formerly such lands were let out by Government on very easy terms. The lower Court has not taken a correct view of the rulings which it has made applicable to the present case. In *Muttu* v. *Kadalalaga* the point was whether partition should be effected by the Collector, or by the Commissioner appointed by the Court. The decision in *Badri Roy* v. *Bhugwat Nárán Dobey* lays down that it is the Collector who is to effect partition of property paying revenue to Government. The case of *Ajoodhya Persád* v. *Collector of Durbhungah* is also inapplicable, because it depends upon the provisions of the Butwara Act, which is in force in Bengal. The general principle of Hindu law is that all immoveable property is divisible, and so long as no special custom or usage is proved with respect to the indivisibility of the property in dispute, the ordinary principle must prevail. The lower Court itself says that section 265 of the Civil Procedure Code seems to be applicable to the present case, and yet, having taken an erroneous view of the cases referred to, it held the property to be indivisible.

*Shámráv Vithal* for respondent No. 7:—The lower Court held that the interest which the Government granted under the lease was not partible. "*Sheri*" holdings do not stand on the same footing with the holdings under survey tenure. In the present case, a lease for thirty years was granted by the Government; and the lower Court, therefore, held that as there was a grant of a limited interest only, not the land, but only its income could be partitioned. If the land be divided during the existence of the lease, the Government will be put to great inconvenience after the expiration of the period mentioned in the

(1) I. L. R., 6 Mad., 97. (2) I. L. R., 8 Calc., 649.
(3) I. L. R., 9 Calc., 419.

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lease. This circumstance was present to the mind of the Court when it held that the land was not liable to partition. The Collector would naturally object to the partition of such land.

*Mánekshán Jehángirshán Taleyárkhán* for respondent No. 1.

*Vásudeo Gopál Bhandárkar* for respondents Nos. 2—5.

SARGENT, C. J.:—The lands in question are admittedly *sheri* lands leased by Government for thirty years. The Subordinate Judge has held, on the authority of *Muttu* v. *Kudalalaga*(1), *Badri Roy* v. *Bhugwat Náráin Dobey*(2), and *Ajoodhya Persád* v. *Collector of Durbhungah*(3), that such lands, as being only temporarily settled, are not partible. The ruling in *Muttu* v. *Kudalalaga*, that section 265 of the Civil Procedure Code does not apply to *rayatwari* land, but only to permanently settled estates, has never been the construction placed on that section in this Presidency. The other cases do not relate to leasehold lands, nor would they support the view taken by the Subordinate Judge, even if they did so relate. The decision in *Badri Roy* v. *Bhugwat Náráin Dobey* is merely to the effect that the partition of revenue-paying land cannot be effected by the Civil Court, which is precisely what section 265 provides. In *Ajoodhya Persád* v. *Collector of Durbhungah* nothing turned on the lands being permanently settled. The general Hindu law, except in certain special cases determined by family custom and usage, allows of the partition of all family property, and there is no Act of the Legislature which excludes lands leased by Government from its operation;—and lastly, the lands in suit come within the terms of section 265 as revenue-paying lands, the actual partition of which is entrusted to the Collector himself. As to the second issue, the Subordinate Judge has recorded a finding that the *tharáv* was a bar to partition;—but as he gives no reasons for his finding, and indeed in his judgment uses language which would seem to imply that he had not arrived at a distinct opinion on the question, we cannot accept his finding. We must, therefore, reverse the decree, and send back the case for a fresh decision. Costs to abide the result.

*Decree reversed.*

(1) I. L. R., 6 Mad., 97. (2) I. L. R., 8 Calc., 649.
I. L. R., 9 Calc., 419.