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dismissing the application—"the darkhást shows that no attempt has been made to satisfy that decree out of the Bombay property, and, therefore, no execution can be taken out here." This curt statement is not a proper judgment. The District Judge ought to have considered the statutes as interpreted by the decisions.

Section 223 of the Civil Procedure Code required the Surat Court to certify to the Bombay Court the fact of execution or the reasons of failure. This is inconsistent with a power to refuse to execute the decree on the ground that the proceedings of the Bombay Court were irregular or mistaken. The cases cited in support of the District Judge's order—*Haji Musa* v. *Purmanand*[1] and *Imdád Ali* v. *Jagan Lal*[2]—relate to decrees passed without jurisdiction, and are irrelevant to questions of mere procedure. Although it is unnecessary to consider section 239, we may refer to *Beerchunder* v. *Maymana Bibee*[3] and *Shib Norain* v. *Gobind Doss*[4] as showing the limits of the function of the Court to which the decree has been transferred.

For these reasons the Court sets aside the decree of the District Judge and remands the cause to the District Court for disposal according to law. Costs of this appeal on the respondents; other costs to abide the result.

Case remanded.

(1) I. L. R., 15 Bom., 216.
(2) I. L. R., 17 All., 478.
(3) I. L. R., 5 Cal., 736.
(4) 23 Cal. W. R., 155.

APPELLATE CIVIL.

Before Sir C. Farran, Kt., Chief Justice and Mr. Justice Parsons.

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GOPAL HARI JOSHI RAIRIKAR (ORIGINAL PLAINTIFF), APPELLANT, *v.* RAMAKANT RANGNATH JOSHI RAIRIKAR AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

Partition—Inám village—Right of management.

Property consisting of an ordinary inám village and a cash allowance payable out of the revenue of another village is liable to partition at the suit of a co-sharer, except when it is held on saranjám or other impartible tenure, or where the terms of the

*Appeal, No. 37 of 1891.

original grant impose a condition upon its enjoyment that the management shall rest with a particular branch of the family of the grantees; and possibly a long-continued practice from which a family custom may be inferred, may operate to bring about the same result.

APPEAL from the decision of Ráo Bahádur Chunilal Manekłal, First Class Subordinate Judge of Poona.

Suit for partition. The plaintiff sued to recover his share in the inám village of Ahire and of a cash allowance paid by Government. The thirteenth defendant (Vinayak Vaman Joshi) contended that he was entitled to manage the village and to receive the cash allowance and to divide them among all the co-sharers according to their shares; and that the plaintiff was, therefore, not entitled to partition.

The Subordinate Judge found that the property in dispute was not liable to partition; that defendant No. 13 had a right to manage the whole of the property as contended by him, and that the plaintiff was not entitled to any relief. He, therefore, rejected the claim. The plaintiff appealed.

Manekshah J. Taleyarkhan, for the appellant (plaintiff):—The original grant of the inám was made by the Peshva in 1762 to six brothers who were the ancestors of the parties. The grant contains no condition with respect to the management of the inám. The village remained in the management of Chinto, one of the six brothers and the ancestor of defendant No. 13, because he was the active member of the family, and subsequently the management continued in his branch of the family merely by agreement and for the convenience of the family. Under these circumstances the possession of defendant No. 13 cannot be adverse to the other members of the family—*Narayan Jayannath Dikshit* v. *Vasudeo Vishnu Dikshit*[1]; *Shankar Baksh* v. *Hardeo Baksh*[2].

Purushottam P. Khare and *Shamrav Vithal*, for respondents.

FARRAN, C. J.:—The plaintiff has sued in this case for partition of the village of Ahire and of a cash allowance payable by Government out of the revenue of the village of Vagaz. It is admitted that he is entitled to a one-fifth share in the property sought to be partitioned, but his claim is resisted by Vinayak Váman Joshi, the thirteenth defendant, on the ground that he, Vinayak, is

(1) I. L. R., 15 Bom., 247. (2) I. L. R., 16 Cal., 397.

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entitled to manage the village, and to receive the cash allowance on behalf of all the co-sharers, and to distribute the profits of the village and the cash allowance amongst them in proportion to their respective shares, and that the plaintiff is, therefore, not entitled to partition.

The Subordinate Judge has held that the defendant Vinayak has established that position. The question which we have to determine upon this appeal is whether the facts of the case, which are practically undisputed, justify that conclusion.

The Subordinate Judge has relied upon the case of *Dikshit* v. *Dikshit*[1] as establishing the proposition that the right to manage property on behalf of co-sharers is an interest in land which is recognized by the law. That case is certainly an authority for that conclusion when the land is held upon *saranjám* or other impartible tenure. In the present case the village in suit is an ordinary inám village, and there is nothing peculiar or impartible in the nature of the cash allowance. Doubtless even in such cases it may be that the terms of the original grant by the ruling Power can impose as a condition upon its enjoyment that the management shall rest with a particular branch of the family of the grantees, and possibly a long-continued practice from which a family custom may be inferred may operate to bring about the same result. Upon that we do not consider it necessary to express any opinion.

The judgment of the Privy Council in *Shankar Baksh* v. *Hardeo Baksh*[2], however, shows that there must be very clear and cogent evidence to establish the existence of such an anomalous estate. In our opinion, the evidence in the present case is insufficient for this purpose. We deal with that relating to the village of Ahire in the first instance. The cash allowance from Vagaz and the revenues of another village, not mentioned in suit, are in some of the documents, to which we shall have to refer, mentioned along with the Ahire village. They all in many respects stand upon the same footing. The original grant of the village of Ahire, which is dated 27th December, 1762, is a simple grant in inám to the sons of Vithal.

(1) I. L. R., 15 Bom., 247. (2) I. L. R., 16 Cal., 397.

The reasons assigned for the grant are that the grantees were great and worthy Bráhmins and performed the *shatkarma*, wishing well to the Rájeshri Swámi, and that Chinto Vithal, the youngest of the six, had served the Sarkár with singleness of purpose, by undergoing much trouble and risk. It contains no conditions or provisions with reference to the management or the partition of the village. The confirmatory grant is similar. As a fact, however, it would seem that the village was entered in the name of Chinto and that he managed it for the co-sharers. He appears to have been the most active and energetic member of the family. The sons of Vithal were joint at the date of the grant, but subsequently became separate in estate. They did not, however, when they separated, partition the village, but left it to be managed on their behalf by Chinto, who divided the produce of it between them. In 1777-78 the village was attached by the Government of the day and remained under attachment until the year 1800. At the latter date Chinto was dead, but his adopted son Trimbak succeeded in getting the attachment removed. The tákid ordering its removal, dated 14th November, 1800, directs that the inám of the village should be continued as before to Trimbak Chinto. The Subordinate Judge treats this order as in the nature of a fresh grant after a forfeiture, but it is in terms simply an order releasing the village from attachment, and it has not been contended before us that it is of a different character. When the attachment was removed, the village was held as before under the terms of the original grant. (His Lordship then examined the further evidence in the case and continued.)

The management of the villages has continued since 1830 with the family of Vaman and is now in the hands of his son Vinayak.

From the long continuance of the management in Chinto's branch of the family, coupled with the terms of the documents to which we have referred, we are asked to draw the inference that by the custom of the family the village of Ahire is impartible and that the management of it rests, of right, with Chinto's branch. It appears to us, however, that the documents emanating from the ruling Power, subsequent to the

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original grant, were not intended to have the effect of varying the terms of that grant, but that, recognizing its validity, they provide for the continuance of the enjoyment of the villages in accordance with its terms, and that when they recognize Chinto's branch as in the management of the villages, they recognize merely the actual mode of management which the grantees had adopted. When we look to the documents which passed between the members of the family themselves we see that that mode of management was adopted for family convenience and rested upon agreement. The terms of the yádis of 1820 and 1830 appear to us to be conclusive upon this point. The presumption then arises that the management confided to Vaman in 1830 by the agreement of that year continued with him and his sons upon the same terms until now. Neither, therefore, by the terms of the original grant nor of the subsequent orders of the ruling Power, nor by family custom, nor by adverse possession (if such there could be in a case like this), has Chinto's branch of the family, it appears to us, acquired a right to perpetual management of the village of Ahire or in consequence to resist its partition.

The cash allowance stands upon the same footing, save that, as it is paid by Government, and the Court cannot direct Government in what manner they are to pay it—a matter which is entirely in their option—no direction for its partition can be made by this Court; the Court can only declare that as between the several parties entitled to the allowance no right to recover it in the first instance has been established by the defendant Vaman, and that the several co-sharers are entitled to receive it in proportion to their shares.

The decree of the lower Court must, for these reasons, be reversed and a decree made for a partition and declaration in accordance with this judgment. The costs will be awarded as provided in the decree.

Decree reversed.