

Their Lordships will humbly advise His Majesty that this appeal should be dismissed. The appellant will pay the costs.

1904.
SHIVABASAVA
v.
SANGAPPA.

Appeal dismissed.

Solicitors for the appellant:—Messrs. *Holman, Birdwood & Co.*

Solicitors for the respondent:—Messrs. *T. L. Wilson & Co.*

APPELLATE CIVIL.

Before Sir L. H. Jenkins, K.C.I.E., Chief Justice, and Mr. Justice Aston.

SATYABHAMABAI KOM PANDURANG SAKHARAM AND ANOTHER (ORIGINAL DEFENDANTS 7 AND 8), APPELLANTS, v. GANESH BAL-KRISHNA AND OTHERS (ORIGINAL PLAINTIFF AND DEFENDANTS 1—6 AND 9—12), RESPONDENTS.*

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June 8.

Civil Procedure Code (Act XIV of 1882), sections 373 and 582—Partition suit—Decree based on an agreement—Appeal by plaintiff—Application for withdrawal of suit—Decree dismissing appeal—Appeal.

A decree for partition was passed in the original Court based* in part on an agreement to which the plaintiff and some of the defendants were parties. The plaintiff appealed and subsequently purported to withdraw from the suit. The Judge in appeal passed a decree dismissing the appeal, but determining that the effect of the withdrawal was to set aside the decree passed by the first Court.

Some of the defendants preferred a second appeal.

Held, that when in a partition suit defendants have by concession of the plaintiff acquired rights which otherwise could not have existed, it is not open to the plaintiff, who has made that concession, afterwards to annul its effect by withdrawing from the suit in the Appellate Court.

A question having arisen as to whether or not the decree of the lower Appellate Court was appealable under sections 373 and 582 of the Civil Procedure Code (Act XIV of 1882),

Held, that sections 373 and 582 of the Civil Procedure Code do not support the conclusion that rights actually vested by the decree of the first Court can afterwards be annulled by the plaintiff withdrawing of his own free will and without permission of the Court. The result of the adjudication was that there was a formal expression of an adjudication by the lower Appellate Court upon a right claimed by the defendants (appellants in second appeal) and thus there

* Second appeal No. 429 of 1903.

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was a decree within the meaning of the Civil Procedure Code from which an appeal would lie.

SECOND APPEAL against the decision of Mahadev Shridhar, First Class Subordinate Judge of Ratnágiri with appellate powers, dismissing an appeal against the decree passed by G. D. Deshmukha, Subordinate Judge of Dápoli.

The plaintiff sued to recover by partition his share in certain properties which, it was alleged, were the ancestral properties of himself and his other co-sharers. There were in all thirteen defendants to the suit and among them defendants 7, 8 and 9 were the widows of three co-sharers. The defendants generally expressed their willingness to effect a partition. During the progress of the suit the parties came to an understanding that the three widows, who had a claim for maintenance, should be put in possession of such shares as their deceased husbands would have got as a provision for their maintenance. After the whole of the evidence had been recorded and arguments finished and the case had been adjourned for delivering judgment, the plaintiff applied to the Subordinate Judge for the withdrawal of the suit stating that he and defendants 1 and 2 had arrived at an amicable settlement. The Court rejected the application on the grounds that it was made at a very late stage of the suit and was strenuously opposed by defendants 4—13. Subsequently the Court passed a decree giving to the co-sharers their respective shares. With respect to the widows, defendants 7, 8 and 9, the Subordinate Judge made the following remarks :—

The next question to be determined is that of the widows of the deceased coparceners. They are three in the present case, defendants Nos. 7, 8 and 9. Defendant No. 9 has already obtained a decree of a competent Court for her maintenance (Exhibit 77). So her case requires important consideration in the present suit, as she by her written statement relinquishes her right under that decree if she be awarded possession of her husband's share for maintenance. Defendants Nos. 7 and 8 urge that they be put into possession of the shares of their respective husbands as a provision for their maintenance. This arrangement is not only convenient and good to prevent multiplicity of suits by the widows, but the principal parties to the suit, namely, the plaintiff, defendants Nos. 1 and 2 have admitted the propriety of it, and they all admit that the widows be delivered into their possession and enjoyment the respective shares of their deceased husbands as a provision for their maintenance and that they

then shall forego all their claims against the parties to this partition suit for their maintenance which is under the Hindu law a charge on the ancestral property. I do not see any legal hitch to draw up a decree awarding to the widows, defendants Nos. 7 and 8, possession of the shares of their respective husbands in the ancestral property. This arrangement will be beneficial to all the parties concerned, as the widows will remain satisfied and there would occur scarcely a chance for mischief-mongers to have the widows as mere tools in their hands and to have any scope for the exercise of their determined and deadly mischiefs.

Against the decree of the Subordinate Judge the plaintiff and defendant 1 presented two separate appeals to the District Court, and after the appeals had been pending for some time the plaintiff applied to the Judge for permission to withdraw the suit with liberty to bring a fresh one. Defendants 7 and 8, who were respondents in the appeals, opposed the application on the grounds, *inter alia*, that the plaintiff's application for withdrawal of the suit having been rejected by the Subordinate Judge he had no right to present another application so long as the order of the Subordinate Judge was not set aside and that a decree having been passed in their favour the plaintiff's application, if granted, would affect their rights. At the hearing the plaintiff's pleader having declined to proceed with the appeal whether or not the Court allowed the suit to be withdrawn with or without permission to bring it again, the Judge granted the plaintiff's application and observed thus:—

The questions are:—

(1) Whether the plaintiff should be compelled to proceed with the appeal, and if he refuses, what steps should be taken to compel him to do so?

(2) Whether the withdrawal should be allowed only to the extent of the plaintiff's own share and the decree of the lower Court upheld in all other respects?

I must answer the first question in the negative. There is no procedure to compel a plaintiff to prosecute a suit which he has abandoned. All the Court can do is to refuse to grant liberty to him to bring the suit again on the same cause of action and to punish him by directing him to pay the defendants' costs.

As regards the second issue when there is an appeal, it cannot be said that there is a decree in favour of any party. The matter is *sub-judice*, and the party in whose favour the decree in the lower Court was passed can only be said to have a chance of the same decree being upheld. I do not think, therefore, that the withdrawal should be limited to the plaintiff's share and that the decrees in favour of defendants should be upheld.

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I do not understand how the withdrawal by plaintiff can be prejudicial to defendants. They shall be in the position in which they would have been if no suit had been brought by plaintiff. They may have been put to costs, and these of course they can get from plaintiff.

I cannot understand how, when the plaintiff withdraws from the suit, the appeal can be heard and decided when there is none before the Court as appellant.

I think I cannot hear and decide the appeal when the plaintiff withdraws from the suit. I refuse to grant liberty to plaintiff to bring another suit on the same cause of action. I lay all costs on plaintiff.

Defendants 7 and 8 preferred a second appeal.

Setalvad (with *G. B. Rele* and *C. A. Rele*) appeared for appellant 1 (defendant 7).

H. C. Coyaji appeared for appellant 2 (defendant 8).

N. M. Samarth appeared for the respondents (defendants 1—6 and 9—13):—We have to urge a preliminary objection.

Setalvad:—We had anticipated the preliminary objection. We will state it after narrating the facts in connection with it. The plaintiff brought the present suit for partition principally against defendants 1 and 2 who were in possession of the property. After the close of the trial and when the case was ripe for judgment, the plaintiff, in company with defendants 1 and 2, applied to withdraw the suit. The Court being of opinion that it would not be justified in granting the application, rejected it and passed a decree for partition, giving us a certain share on the strength of a mutual agreement between the parties. The plaintiff appealed and, after the appeal had been pending for a long time, he again applied to the Judge for withdrawal of the suit with liberty to bring it again. We strenuously opposed the application, yet the Judge passed an order which has the effect of setting aside the whole decree of the first Court. Now, the preliminary objection which the respondents want to urge is that the order of the Judge was passed under section 373 of the Civil Procedure Code and an order passed under that section is not appealable. Our answer is that section 373 of the Civil Procedure Code is not applicable, because the order of the Judge is not merely an order

under that section, but it has the effect of a decree inasmuch as it affected our decretal rights. Further, the Judge dismissed the plaintiff's appeal and has taxed our costs in appeal.

N. M. Samarth :—We contend that section 373 of the Code applies and the order of the Judge is not appealable.

We submit that at present we are concerned with the appeal. Though there is no ruling which would apply on all fours, still there are cases which fortify our contention that no appeal lies: *Genda Mal v. Pirbhu Lal*⁽¹⁾; *Jogodindro Nath v. Sarut Sunduri Debi*⁽²⁾; *Jagdish Chaudhri v. Tulshi Chaudhri*⁽³⁾.

By the withdrawal the defendants stand in the same position in which they were before the suit was brought. It is discretionary with the Court to grant such application, and we submit that in the present case the discretion was not improperly exercised.

JENKINS, C. J. :—This appeal arises out of a suit brought by the plaintiff to establish his right to a share in the property set out in the plaint and to obtain partition. The defendants are coparceners and the widows of deceased coparceners, and these widows are defendants 7, 8 and 9 to the suit.

A decree for partition was passed by the Second Class Subordinate Judge, and it was a part of his adjudication that the widows defendants 7, 8 and 9 in place of getting maintenance should receive the shares which their deceased husbands would have got in the joint property. This part of his adjudication was based on an agreement to which the plaintiff in the suit was a party.

This decree was passed by the Second Class Subordinate Judge, notwithstanding the fact that the plaintiff in the interval between the hearing and the passing of the decree applied, under section 373 of the Code of Civil Procedure, for leave to withdraw with liberty to bring a fresh suit. That application the Judge refused to grant.

The plaintiff then appealed to the District Court, and while his appeal was pending, he applied to the Subordinate Judge,

(1) (1895) 17 All. 97.

(2) (1891) 18 Cal. 322.

(3) (1893) 16 All. 19.

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A. P., for leave to withdraw his suit with liberty to bring a fresh suit.

The Subordinate Judge, A. P., declined to grant this application, and thereupon the plaintiff purported to withdraw from the suit.

The Subordinate Judge with appellate powers appears to have been considerably embarrassed by this conduct of the plaintiff and the result was that he passed a decree dismissing the appeal, but determining that the effect of the withdrawal was to set aside the decree passed by the first Court.

From this the widows, defendants 7 and 8, have appealed.

A preliminary objection has been urged that no appeal lies inasmuch as an order passed under section 373 is not appealable. In support of that contention Mr. Samarth has cited to us certain authorities, but in our opinion they do not touch the present case.

It appears to us clear that when in a partition suit a defendant has by concession of the plaintiff acquired rights which otherwise could not have existed, it is not open to the plaintiff who has made that concession, afterwards to annul its effect by withdrawing the suit in the Appellate Court. Sections 373 and 582, which are the only sections on which the plaintiff relies, do not support the conclusion that rights actually vested and created by the decree of the first Court can be afterwards annulled by a plaintiff withdrawing of his own free will and without the permission of the Court. The result of the adjudication in this case is that we have a formal expression of an adjudication by the lower Appellate Court upon a right claimed by the widows, defendants 7 and 8, who are appellants before us, and thus there is a decree within the meaning of the Code from which an appeal would lie.

On the merits the appellants have good grounds of complaint, and they are in the circumstances entitled to come to this Court by way of second appeal. The decree, therefore, that we pass is that the decree of the first Court be restored with costs throughout.

It has been brought to our notice that an appeal by other parties was presented some time ago to the District Court. If,

as is suggested, that appeal is one which, notwithstanding the lapse of time, can with propriety be prosecuted, then our present confirmation of the decree of the first Court must be without prejudice to it.

Decree of the first Court restored.

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APPELLATE CIVIL.

Before Mr. Justice Chandavarkar and Mr. Justice Aston.

KALABHAI BAPUJI CHUDASAMA AND OTHERS (ORIGINAL PLAINTIFFS),
APPELLANTS, v. THE SECRETARY OF STATE FOR INDIA IN COUNCIL
(ORIGINAL DEFENDANT), RESPONDENT.*

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July 6.

Bombay Revenue Jurisdiction Act (X of 1876, as amended by Act XVI of 1877), section 4—"Any other written grant"—Land free from assessment—Treaty—Civil Courts—Jurisdiction—Specific Relief Act (I of 1877), section 42—Suit for declaration—Consequential relief—Amendment of plaint—Construction of documents.

In section 4 of the Bombay Revenue Jurisdiction Act (X of 1876), the clauses (h), (i), (j) and (k) are independent of one another: the source of title referred to in each stands apart from the rest and each clause is connected only with that portion of the proviso which precedes clause (h). The expression "any other written grant" in clause (j) therefore means any written grant other than that which falls within clauses (h) and (i) of the section.

The term "treaty" in section 4 (a) of the Act is not to be broadly construed but is to be confined in its interpretation to its accepted meaning, *i.e.*, an agreement between two or more independent sovereign powers or states.

Generally speaking the name given by the parties to a document is not conclusive as to its nature; but the designation given by the parties themselves to it cannot be lost sight of where the document is ambiguous and is susceptible of more than one construction as to its nature and scope.

The effect of the amendment by Act XVI of 1877 is that nothing in section 4 of the Bombay Revenue Jurisdiction Act (X of 1876) shall be held to prevent the Civil Courts in the Districts mentioned in the second schedule annexed to that Act from exercising jurisdiction over claims against Government to hold lands wholly or partially free from payment of land revenue.

The plaintiff filed a suit against the Secretary of State for India in Council for a declaration that they were entitled to hold certain lands free from assessment. The defendant objected that the suit was barred under section 42 of the Specific Relief Act (I of 1877). After the settlement of the issues in the

* Appeal No. 104 of 1903.