

reasons for holding that the plaintiffs had their remedy by way of appeal. A ruling of this Court in *Partab Rai v. Ram Kishan* (1) decided by Straight, J., and myself, is in point in this respect.

Cause remanded.

Before Sir John Elge, Kt., Chief Justice, and Mr. Justice Brodhurst.

MUHAMMAD ABDUL KARIM (DEFENDANT) v. MUHAMMAD SHADI KHAN
AND OTHERS (PLAINTIFFS).*

Partition of mahal—Application by co-sharer for partition—Notice by Collector to other co-sharers to state objections upon a specified day—Objection raised after day specified by original applicant—Question of title—Distribution of land—Jurisdiction—Civil and Revenue Courts—Act XIX of 1873 (N.-W. P. Land Revenue Act), ss. 111, 112, 113, 131, 132, 241 (f)—Civil Procedure Code, s. 11.

Reading together ss. 111, 112, and 113 of the N.-W. P. Land Revenue Act (XIX of 1873), as they must be read, the objection contemplated in each of them is an objection to be made by the person upon whom the notice required by s. 111 is to be served, *i e.*, a person who is a co-sharer in possession, and who has not joined in the application for partition.

So far as ss. 111, 112, 113, 114 and 115 are concerned, a Civil Court is the Court which has jurisdiction to adjudicate upon questions of title or proprietary right, either in an original suit in cases in which the Assistant Collector or Collector does not proceed to inquire into the merits of an objection raising such a question under s. 113, or on appeal in those cases in which the Assistant Collector or Collector does decide upon such questions raised by an objection made under s. 112. The remaining sections relating to partition do not provide for or bar the jurisdiction of the Civil Court to adjudicate upon questions of title which may arise in partition proceedings or on the partition after the time specified in the notice published under s. 111. S. 132 is not to be read as making the Commissioner the Court of appeal from the Assistant Collector or the Collector upon such questions, nor does s. 241 (f) bar the jurisdiction of the Civil Court to adjudicate upon them.

Where, therefore, after the day specified in the notice published by the Assistant Collector under s. 111, and after an Amin had made an apportionment of lands among the co-sharers of the mahal, the original applicants for partition raised for the first time an objection involving a question of title or proprietary right, and this objection was disallowed by the Assistant Collector and the partition made, and confirmed by the Collector under s. 131,—held that the objection was not one within the meaning of s. 113, that the remedy of the objectors was not an appeal from the Collector's decision under s. 132, and that a suit by them in the Civil Court to establish their title to the land allotted to other co-sharers was not

* Second Appeal No. 448 of 1886, from a decree of H. A. Harrison, Esq., District Judge of Meerut, dated the 17th December, 1885, reversing a decree of Maulvi Ahmad Ali Khan, Munsif of Bulandshahr, dated the 29th September, 1885.

1887

barred by s. 211 (f), and, with reference to s. 11 of the Civil Procedure Code, was maintainable.

MUHAMMAD
ABDUL
KARIM

Habibullah v. Kunji Mal (1) distinguished. *Sundar v. Khuman Singh* (2) referred to.

MUHAMMAD
SHADI KHAN.

THE facts of this case are sufficiently stated in the judgment of the Court.

Babu *Jogindro Nath Chaudhri* and *Munshi Hanuman Prasad*, for the appellant.

The Hon. *T. Conlan* and *Pandit Nand Lal*, for the respondents.

EDGE, C. J., and BRODHURST, J.—This is an appeal by the defendants in the suit from a decree of the Judge of Meerut, dated the 17th December, 1885, by which he decreed the appeal to him of the plaintiffs, and declared the plaintiffs' proprietary right to the land in suit, and declared that the defendant should bear all costs in his Court and in that of the Munsif of Bulandshahr.

The present action arises out of certain partition proceedings in the Revenue Court. The plaintiffs, who were the proprietors of two out of three portions of a *patti* which had been previously partitioned, applied to have some common lands partitioned between their respective portions of their previously partitioned *patti*. The defendant was the owner of the remaining portion of the previously partitioned *patti*. The Assistant Collector of the District, on receiving the application, published the notifications, and caused to be served the notices, prescribed by s. 111 of the N.-W. P. Land Revenue Act, XIX of 1873. Then notice was served upon, amongst others, the defendant, who was a co-sharer in the mahal, who had not joined in the application. No objection within the meaning of ss. 112 and 113 of the Act was taken within the time specified by the notice. It appears that the Amin, in preparing the apportionment, allocated the land in suit, which was a portion of the common land to which the application for partition referred, to the defendant in respect of his portion of the previously partitioned *patti*. On this the plaintiffs raised an objection before the Assistant Collector on the ground that the common land in question had in the previous partition been allotted to their portions of the *patti*, and that the defendant had no title to any of the common

land in question, or to have any of it allocated to his portion of the *patti*. The Assistant Collector declined to entertain the objection, on the ground that the plaintiffs had not made this objection within the time specified in the notices, and made the partition allocating the land in suit to the defendant.

Upon this, on the 6th May, 1885, the plaintiffs brought the action in which this appeal has arisen for a declaration of title to the land so allocated to the defendant. On the 26th June, 1885, and after the commencement of this action, the Collector of the District, under s. 131 of the Act, sanctioned and confirmed the partition so made by the Assistant Collector, and duly published a notification of the fact in accordance with the provisions of s. 131. No appeal against the decision of the Collector was brought. The Judge of Meerut in the appeal before him found that the plaintiffs had established their title to the land in suit, and the only question before us is whether or not this action is, under the circumstances, maintainable in the Civil Court.

Mr. *Chaudhri*, on behalf of the defendant-appellant, contended that the remedy of the plaintiffs was by an appeal from the decision of the Collector under s. 132 of the Act, and that the action related to the distribution of land of a mahal by partition within the meaning of cl. (f) of s. 241 of the Act, and was not maintainable in the Civil Court. In support of his contention he cited *Habibullah v. Kunji Mal* (1). This case does not appear to us to support Mr. *Chaudhri's* contention. The point there was whether the allotment in partition was a reasonable distribution of the land partitioned, and did not involve a question of title. Pandit *Nand Lal*, on behalf of the plaintiffs-respondents, contended, on the other hand, that s. 241 did not apply, and that questions of title arising in partition could not be raised and determined by action in the Civil Courts unless they were disposed of by the Collector in accordance with the provisions of s. 113 of the Act. In support of his contention he cited *Sundar v. Khuman Singh* (2), which authority, we think, supports the contention.

It appears to us that the objection raised by the plaintiffs to the partition in question was not one within the meaning of s.

(1) I. L. R., 7 All. 447. (2) I. L. R., 1 All. 613.

1887

MUHAMMAD
ABDUL
KARIM
v.
MUHAMMAD
SHADI KHAN.

1887

MUHAMMAD
 ABDUL
 KARIM
 v.
 MUHAMMAD
 SHADI KHAN.

113. "The objection" referred to in that section must be an objection made to the partition "on or before the day specified" as provided by s. 112. In order to see what is the day referred to as the "day specified" we must look at s. 111. We find that it is enacted by s. 111 that the Collector "shall serve a notice on all such of the recorded co-sharers in the mahal as have not joined in the application, requiring any co-sharer in possession, who may object to the partition, to appear before him to state his objection, either in person, or by a duly authorised agent, on a day to be specified in the notice, not being less than thirty or more than sixty days from the date on which such notice was issued." Reading ss. 111, 112 and 113 together, as we think they must be read, it is obvious that the objection contemplated in each of those sections is an objection to be made by the person upon whom the notice required by s. 111 is to be served, that is, a person who is a co-sharer in possession who had not joined in the application for the partition, and consequently not an applicant for the partition. Besides, the question of title in this case did not and could not have arisen "on or before the day specified" in the notice served by the Collector, as it could not be intended that the Collector shall proceed to make the partition until after the expiration of the time specified in the notice for making objection to partition. If an Assistant Collector or Collector does not proceed to inquire into the merits of an objection as to title or proprietary right coming within s. 113, he should decline to grant the application for partition "until the question in dispute has been determined by a competent Court." The competent Court referred to must be a Civil Court having jurisdiction to adjudicate upon questions of title. It is important to bear in mind that in those cases in which the Collector or Assistant Collector adjudicates upon questions of title or proprietary right under s. 113, a right of appeal is given, and that appeal is not from an Assistant Collector to a Collector or from a Collector to a Commissioner, but from an Assistant Collector or Collector, as the case may be, to the Civil Court. The result, so far as ss. 111, 112, 113, 114 and 115 are concerned, is that a Civil Court is the Court which has jurisdiction to adjudicate upon questions of title or proprietary right either in an original action in cases in which the Assistant Collector or Collector does not proceed to inquire into the merits of such an

objection under s. 113, or on appeal in those cases in which the Assistant Collector or Collector does decide upon questions of title or proprietary right raised by an objection made under s. 112. The remaining sections relating to partition do not appear to provide for or to bar the jurisdiction of the Civil Court to adjudicate upon questions of title which may arise in partition proceedings, or on the partition after the expiration of the time specified in the notice to be served by the Collector under s. 111, unless s. 132 is to be read as making the Commissioner the Court of appeal on questions of title, or unless s. 241 (f) is to be construed as barring the jurisdictions of the Civil Courts to deal with such objections. We can see no reason why it should be assumed that in the cases where questions of title arise subsequently to the "day specified" in the notice, the Legislature intended by s. 132 that those questions should be for the final or other determination of the Commissioner of the District, whilst it is expressly provided by s. 113 that the Civil Court as to questions of title raised by an objection made at an earlier stage under s. 112, should have either original or appellate jurisdiction.

It appears to us that the appeal provided for by s. 132 is an appeal on any questions other than questions of title or proprietary right arising on or out of the partition made or sanctioned or confirmed by the Collector, and that the Commissioner would have no jurisdiction to adjudicate upon questions of title arising during the proceedings prior to the making of the partition, or out of or upon the partition when made. If this be the correct interpretation of s. 132, there would be no Court or officer with jurisdiction to adjudicate upon questions of title arising in or on the partition of a mahal subsequently to the "day specified" in the Collector's notice under s. 111, if, as is contended by Mr. *Chaudhri*, s. 241 (f) bars the jurisdiction of the Civil Courts to entertain or adjudicate upon such questions. This would be a result which the Legislature could not have intended. It is true that in one sense the determination of title by a Civil Court may affect the distribution of land of a mahal by partition, but it would affect such distribution so far only as the distribution of the land depended on title, but it would not affect the distribution on all or any of the other various questions or considerations which the Assistant Collector or Collector would have to deal with in

1887

MUHAMMAD
ABDUL
KARIM
v.
MUHAMMAD
SHADI KHAN.

1887

MUHAMMAD
ABDUL
KARIM

v.
MUHAMMAD
SHADI KHAN.

making the partition. In our opinion s. 241 of the Act does not bar the jurisdiction of the Civil Court to adjudicate upon questions of title or proprietary right in cases such as that under consideration.

Under these circumstances s. 11 of the Code of Civil Procedure applies. We are of opinion that this action is maintainable, and this being the only question which arose before us in appeal, we dismiss this appeal and confirm the decree of the Judge of Meerut with costs.

Appeal dismissed.

1887
February 24.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Brodhurst.

FATEHYAB KHAN AND OTHERS (PLAINTIFFS) v. MUHAMMAD YUSUF
AND ANOTHER (DEFENDANTS).*

MUHAMMAD YUSUF AND ANOTHER (DEFENDANTS) v. FATEHYAB KHAN
AND OTHERS (PLAINTIFFS).*

*Easement—Private right of way—Obstruction—Acquiescence—Suit for removal
of obstruction—Decree for plaintiff qualified by declaring that parties retain
rights exercised prior to obstruction.*

In a suit for the removal of a building which the defendants had erected and which was an obstruction to the plaintiffs' right to use a courtyard adjoining their residences, it appeared that the land on which the building stood did not belong to either party, but that all the inhabitants of the *mohalla* had from time immemorial exercised a right of way over it to and from their houses. It also appeared that on a part of the same land, there had formerly stood a thatched building used as a "sitting place" by the residents of the *mohalla*. The lower appellate Court, while decreeing the claim, observed that the defendants, if they liked, could construct and use a shed "according to the old state of things," and "without offering obstruction to" the right of the plaintiffs to "use it as a sitting-place when necessary."

Held that this was not a declaration of a right in the defendants to build, but merely a statement that the decree would not operate as an interference with the rights of the parties to have a similar thatched building set up as had existed in former times. *The Official Trustee of Bengal v. Krishna Chunder Mezoondar* (1) distinguished.

Held also that the right which was alleged to have been obstructed was not a public right of way, but a right which was confined to the people dwelling in the *mohalla* and going to and from the houses in the *mohalla*; and that the suit, being brought in respect of an interference with a private easement, was maintainable

* Second Appeals Nos. 364 and 433 of 1886, from the decrees of Maulvi Maksud Ali Khan, Subordinate Judge of Saharanpur, dated the 24th November, 1885, modifying the decrees of Babu Ganga Saran, Munsif of Saharanpur, dated the 24th June, 1885.