

1887

RAM DAS
CHAKRABARTI
v.

THE OFFICIAL LIQUIDATOR,
COTTON
GINNING
COMPANY,
LD., CANN-
FORE.

Case (1); *Ward's Case* (2); *Robinson's Case* (3); *Wallis's Case* (4); *Shewell's Case* (5); *Puffe's Case* (6); *Ind's Case* (7); *Oravley's Case* (8); and *Household Fire Insurance Company v. Grant* (9).

This case has, if we may say so, been argued with very great ability by Mr. Hill and Mr. Strachey.

In the result, we find that the appellant had not authorized Charu Chandra to obtain any shares in the Company for him, and never ratified the acts of Charu Chandra, and had not received any notice of allotment, and that it is not proved that any notice of allotment, properly addressed, was posted to the appellant, and that there was no contract or ratification of a contract by or on behalf of the appellant, to take any shares in the Company, and that he never acted as a shareholder of the Company. Under these circumstances the appeal must be allowed with costs, and the order below set aside, and the appellant's name must be removed from the list of contributories. The liquidator's costs, including those which he may have to pay to the appellant, will come out of the estate (10).

Appeal allowed.

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

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February 2.

AMIR SINGH AND OTHERS (PLAINTIFFS) v. BALMATI PRASAD (DEFENDANT).^{*}

Partition—Question of title—Act XIX of 1873 (N.-W. P. Land Revenue Act), ss. 112, 114—Irregular procedure—Civil Procedure Code, s. 13—Res judicata.

Upon an application made under Chapter IV of the N.-W. P. Land Revenue Act (XIX of 1873) for partition of common land in which the owners of six *pattis* were interested, into six equal parts, an objection was raised that the land should be divided into parts proportionate to the size of the different *pattis*. The Assistant Collector, before whom the objection was made, disallowed it with reference to the provisions of the *munjib-ul-arz* in which the custom of the village was recorded, and made the partition in the manner prayed. No appeal was preferred by the objectors to the District Judge. The Collector confirmed the partition, and after

^{*} Second Appeal No. 506 of 1886, from a decree of H. A. Harrison, Esq., District Judge of Meerut, dated the 15th December, 1885, confirming a decree of Maulvi Jafar Husain, Munsif of Meerut, dated the 9th September, 1885.

(1) L. R., 11 Eq. 86.

(2) L. R., 10 Eq. 659.

(3) L. R., 4 Ch. 330.

(4) L. R., 4 Ch. 325.

(5) L. R., 2 Ch. 387.

(6) L. R., 4 Ch. 768.

(7) L. R., 7 Ch. 485.

(8) L. R., 4 Ch. 322.

(9) L. R., 4 Ex. D. 216.

(10) As to the cases in which the official liquidator is personally liable for costs, see the judgment of Kekewich, J., in *Fraser v. Province of Brescin Steam Tramways Company (Limited)*, decided on May 2, and reported in the *Times Law Reports* for May 4, at page 587—REP.

an appeal to the Commissioner, the Assistant Collector's decision was upheld. The objectors then brought a suit in the civil Court for a declaration that the defendants were only entitled to a share of the common land proportionate to the area of their *pattis*.

Held that the objection which was raised in the Revenue Court was one which raised a question of title or of proprietary right in respect of the common land within the meaning of s. 113 of the N.-W. E. Land Revenue Act; that the decision of the Assistant Collector was a decision within the meaning of s. 114 of the Act; and that consequently the suit was barred by s. 13 of the Civil Procedure Code.

Held also that the question was not affected by any mistakes in procedure that had been made in the Revenue Courts.

The parties to this suit were co-sharers in the village of Ganeshpar, which consisted of six *pattis* of unequal areas. In November, 1884, the defendants applied to the Revenue Court under chapter IV of the N.-W. P. Land Revenue Act (XIX of 1873) for partition of certain *shamilat* or common land into six equal shares. On receiving this application, the Assistant Collector issued the notification required by s. 111 of the Act, and thereupon the plaintiffs objected to partition being made in the manner proposed, contending that the common land should be divided, not into equal shares, but into shares proportionate to the areas of the different *pattis*. The Assistant Collector considered this objection, and disposed of it by an order in the following terms:—

“An objection is made to the partition of the *shamilat* as claimed, on the ground that the applicants have claimed to share without regard to the area of the different *pattis*. The objectors claim that regard should be had to the area. The entry in the *wajib-ul-arz* is that regard is only to be had to the *pattis*, not to the area, *i.e.*, the *shamilat* is entered as *maurosi*. It is also said that expenses are borne equally by all the *pattis*. The *wajib-ul-arz* was signed by the present objectors. The objection is dismissed.”

The Assistant Collector accordingly made a partition of the common land in the manner prayed by the applicants, and the partition was confirmed by the Collector under s. 131 of the Land Revenue Act. The objectors made no appeal to the District Judge under s. 114, but they appealed to the Commissioner of the Division, who remanded the case to the Collector, who recorded a proceeding affirming the Assistant Collector's decision. This proceeding was dated the 19th May, 1885.

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The present suit was brought by the plaintiffs in June, 1885, for a declaration that the defendants (the successful parties in the proceedings before the Revenue Court) were only entitled to a share of the common land proportionate to the extent of their *pattis*. The suit was instituted in the Court of the Munsif of Meerut. In defence it was pleaded that the suit was barred by s. 13 of the Civil Procedure Code, inasmuch as the objection raised in the Revenue Court involved a question of title or proprietary right within the meaning of s. 113 of the Revenue Act, and the order of the Assistant Collector dismissing the objection was a decision of a Court of civil judicature within the meaning of s. 114, and, not having been made the subject of appeal to the District Court under the same section, was final.

The Court of first instance dismissed the claim. On appeal, the District Judge of Meerut affirmed the Munsif's decree. In the course of his judgment, the learned Judge made the following observations :—

“ Now the question is whether the Assistant Collector's proceedings were under ss. 113 and 114 of Act XIX of 1873. The Court is of opinion that they were. There is no question that the objection was inquired into and the evidence of the *wajib-ul-arz* and *khwat* considered, and these proceedings were held before the order for partition was made. On the documentary evidence, the Assistant Collector found against the objector. *Bateshar Nath v. Faiz-ul-hasan* (1) is referred to by the respondents. For the appellants, *Ashgar Ali Shah v. Jhanda Mal* (2) is referred to; but in that case there was no inquiry : the Assistant Collector held that the matter at issue had already been disposed of by a competent Court. In this case, evidence was considered, *viz.* that of the *wajib-ul-arz* and *khwat*, and a proceeding was recorded disallowing the objection, and finding that the *shamilat* land should be partitioned equally among the six *pattis*.

“ If the objection was, as the Court holds, disposed of under ss. 113 and 114 of Act XIX of 1873, then the finding could only be called in question by appeal to the Judge. Irregularities of procedure could have been called in question in appeal, if such there have been ; but because the appellants neglected to take the

(1) L. L. R., 5 All. 280.

(2) I. L. R., 2 All. 839.

proper course of appealing is no reason why they should institute a suit to obtain what they should have obtained by an appeal.

“The Court, holding that the objection was disposed of under ss. 113 and 114 of Act XIX of 1873, finds that the present suit will not lie. The appeal is dismissed. The appellants will bear all costs. Interest as usual.”

From this decree the plaintiffs appealed to the High Court.

Munshi *Hanuman Prasad* and Pandit *Nand Lal*, for the appellants.

Pandit *Bishambhar Nath*, for the respondent.

EDGE, C. J.—It appears that on the partition of common land in which the owners of six *pattis* were interested, the question arose as to how the common land should be allotted. The present plaintiffs said that it should be allotted in proportion to the size of the *pattis*; the owners of the other *pattis* said that it should be partitioned in proportion to the number of the *pattis*, *i. e.*, into six equal shares. That objection was raised by the present plaintiffs before the Assistant Collector, who heard the evidence, examined the *wajib-ul-arz*, and decided that the plaintiffs were not entitled to have more than a one-sixth share in respect of their *patti*. From that decision an appeal was made to the Collector, and again to the Commissioner, and the Assistant Collector's decision was upheld. In the result this action was brought in the civil Court in order to ascertain what the rights of the plaintiffs were in the common land. An objection is raised on behalf of the defendants on the ground that the proceedings in the Revenue Courts came within s. 113 of the Revenue Act (XIX of 1873), and in that the decision of the Assistant Collector was a decision within the meaning of s. 114 of the same Act, consequently the present action was barred by s. 13 of the Civil Procedure Code. I think the whole thing turns upon the decision of the question whether the objection which was raised in the Revenue Court, was an objection which raised a question of title or proprietary right? I think that the question involved there, in the objection taken before the Assistant Collector, must necessarily have raised a question of title or proprietary right. It is true that the title and proprietary right of the plaintiffs in their own *patti* was not questioned, nor

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were the titles and the proprietary rights of other pattidárs in their own *pattis* ever questioned. The question was, how was the common land to be divided, and what were the rights of the parties as to the *quantum* of common land to which they were entitled? That question must necessarily be decided by some custom or rule of law, and if it is to be decided by custom or by rule of law, it must involve a question of title or proprietary right. The plaintiffs, in order to succeed, must have said that by custom or rule of law they were entitled to a larger area in the common land than was allotted to them. I cannot see how this could have been determined without a question of title or proprietary right being raised between the owners of the various *pattis*, not in respect of their *pattis*, but in respect of the common land. That being so, I think this case falls within s. 13 of the Civil Procedure Code, and this action is barred. I agree with the Judge below in the observation made by him that any mistakes of procedure did not affect this question. The appeal is dismissed with costs.

BRODHURST, J.—In my opinion the suit has been properly dismissed by the lower appellate Court, and I concur in dismissing the appeal with costs.

Appeal dismissed.

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

RAM BAKHSH (PLAINTIFF) v. DURJAN AND OTHERS (DEFENDANTS)*.

Evidence—Bond—Contemporaneous oral agreement providing for mode of repayment.—Act I of 1872 (Evidence Act), s. 92.

In defence to a suit upon a hypothecation bond payable by instalments, it was pleaded that, at the time of the execution of the bond, it was orally agreed that the obligee should, in lieu of instalments, have possession of part of the hypothecated property, until the amount due on the bond should have been liquidated from the rents; that, in accordance with this agreement, the plaintiff obtained possession of the land; and that he had thus realized the whole of the amount due.

Held that the oral agreement was not one which detracted from, added to, or varied the original contract, but only provided for the means by which the instalments were to be paid, and that it was therefore admissible in evidence.

The plaintiff in this case, one Ram Bakhsh, sued to recover a sum of money, principal and interest, due on a bond executed in

* Second Appeal No. 573 of 1886, from a decree of M. S. Howell, Esq., District Judge of Aligarh, dated the 8th January, 1886, reversing a decree of Maulvi Muhammad Sami-ullah Khan, Subordinate Judge of Aligarh, dated the 31st January, 1884.