Before Mr. Justice Knox, Mr. Justice Blair, and Mr. Justice Banerji.

1895. *August 2.*

HAR CHARAN SINGH (PLAINTIFF) *v.* HAR SHANKAR SINGH AND OTHERS (DEFENDANTS).*

Civil Procedure Code, s. 13—*Res judicata—Court of jurisdiction competent to try the suit in which such issue has been subsequently raised—Act No. XIX of* 1873 *(North-Western Provinces Land Revenue Act) ss.* 113, 114.

Where a Court of Revenue, acting under s. 113 of Act No. XIX of 1873, has decided a question of title or of proprietary right, such decision, being the decision of "a Court of Civil Judicature of first instance," will operate as *res judicata* in a subsequent civil suit in which the same question is being litigated.

THIS was an appeal under s. 10 of the Letters Patent of the High Court from the judgment of Burkitt, J. in an appeal which was heard by a Division Bench consisting of Tyrrell and Burkitt, J.J., in which appeal, the Judges composing the Bench having differed, the decree, in accordance with the provisions of s. 575 of the Code of Civil Procedure, followed the judgment of Burkitt, J. and was a decree dismissing the appeal. The case in first appeal will be found reported in I. L. R., 16 All., at p. 464. The facts of the case are fully stated in the judgment of Knox, J.

Maulvi *Ghulam Mujtaba*, for the appellant.

Mr. *T. Conlan*, Munshi *Jwala Prasad*, and Munshi *Gobind Prasad*, for the respondents.

KNOX, J.—The appellant before us was plaintiff in the Court of first instance. He asked in his plaint to be put in proprietary possession as zamíndár of a 2 anna 8 pie share in each of the villages Amghat, Rupupur and Rampur Udebhan, and of a 5 anna 5 pie share in each of the villages Kachhoha and Bhadoli. He represented that the ancestors of the respondents had been put into possession over all the above-named properties as usufructuary mortgagees in consideration of certain sums lent by their ancestor Bhaya Arjun Singh to the plaintiff. He represented further that the sums so advanced and all interest that might have accrued due on them had been fully repaid by the usufruct of the property mortgaged, and he therefore in his plaint added a prayer for the taking of accounts and for a decree for any *mesne* profits

* Appeal No. 46 of 1894, under s. 10 of the Letters Patent from a judgment of Mr. Justice Burkitt, dated the 4th July 1894.

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that might be found due. If, however, the Court was of opinion that any money was still due from plaintiff he prayed for an order of redemption contingent upon the payment by him of such sum.

The answer made by the respondents was to the effect that upon the expiry of the term mentioned in the mortgage bonds as the date for the payment of the debt, the ancestor of the respondents had presented a petition for foreclosure; that the usual proceedings for foreclosure had ensued, and on the expiry of the year of grace allowed by law the possession of the respondents' ancestors had merged into a proprietary possession adverse to the appellant. Further, it was urged that the ancestor of the respondents had claimed partition of the same property in the Court of Revenue; that the appellant had impugned in the course of the partition proceedings the proceedings relating to foreclosure as defective and urged that the mortgage subsisted. The Revenue Court had inquired into the merits of the objection and, under the provisions of ss. 113 and 114 of the North-Western Provinces Land Revenue Act, held that the respondents were in adverse proprietary possession. This decision was passed on the 19th of October 1888; no appeal had been made from it, and it was now a final decision of a Court of competent jurisdiction and operated as a bar to the trial of the present suit. The Subordinate Judge of Ghâzipur held that s. 13 of the Code of Civil Procedure was a bar to the present suit and ordered that the plaintiff's claim be dismissed.

The plaintiff thereupon instituted an appeal, contending that the lower Court was wrong in holding that the suit was barred under s. 13 of the Code of Civil Procedure. That appeal was heard by a Division Bench of this Court, the Judges who heard the appeal were divided in opinion, and as one of them held that the suit was barred by the principle of *res judicata*, the decree appealed against was affirmed.

The present appeal is brought under s. 10 of the Letters Patent, and the questions raised for our consideration are two :—

(1) Whether the suit is or is not barred by the rule of *res judicata*.

(2) Whether there is or is not any such bar in existence in the shape of a previous suit, and determination so far as the villages of Amghat, Rupupur and Rampur Udebhan are concerned.

As regards the share claimed by the appellant in the villages of Kachhoha and Bhadoli, it is amply evident from the evidence on record, and is in no way disputed, that in the year 1880 Bhaya Arjun Singh, the ancestor of respondents, did claim perfect partition of the land now sued for as being property held by him in his own proprietary right in those mahâls. It is also equally clear that objection was made to the partition by the appellant on the ground that the respondents' ancestor had no higher rights in the land than those of a usufructuary mortgagee.

The Assistant Collector, in whose Court the claim for partition was pending, and in whose Court the objection also had been raised by the appellant, made an inquiry and recorded a proceeding and gave a decision declaring the right of Bhaya Arjun Singh to be a proprietary right in the land claimed.

This decision (we are not concerned with its merits or demerits, or with the reasoning upon which it was based,) was passed on the 19th October 1880. It was a decision which, under the provisions of s. 114 of the North-Western Provinces Land Revenue Act, 1873, must be held to be a decision of a Court of Civil Judicature of first instance. It was open to appeal to the District Court and to special appeal to this Court. No appeal was filed and the decision has long since become final.

The case as presented to us by Mr. *Ghulam Mujtaba* for the appellant is that the decision of the Revenue Court was *ultra vires*; that even if the Revenue Court had jurisdiction, it was not a Court competent to try the subsequent suit. The first part of the contention was based upon error. The learned vakîl had overlooked the fact, patent on the face of the record, that Bhaya Har Charan Singh was a co-sharer in the mahâl and in possession at the time when he raised this objection. The proceeding of the Court of Settlement, to be found at p. 13 of the respondents' book, shows that, even putting aside the disputed share, both Arjun Singh and Har Charan

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Singh were recorded co-sharers in the mahâls Kachhoha and Bhadoli; and the objection founded upon the hypothesis that they had no interests other than those in dispute, hence had no standing, the one to claim partition, the other to raise objection, falls to the ground. It was in fact abandoned.

The main contention was based upon the argument that, as the Revenue Court which decided the question in 1880 was a Court not competent to try this suit now brought, its decision could not operate as *res judicata*. We were referred to the case of *Misr Raghobar Dial* v. *Sheo Baksh Singh* (1) as an authority for the contention that that Court only could be a Court of competent jurisdiction which had jurisdiction over the matter in the subsequent suit in which the decision is used as conclusive. This construction of the phrase "Court of competent jurisdiction" was repeated in *Run Bahadur Singh* v. *Lucho Koer* (2). Both these judgments were considered in *Sheikh Hassu* v. *Ram Kumar Singh* (3), and we were referred to that judgment as an authority for the proposition that the Court of jurisdiction competent to try must be a Court having jurisdiction not only as to the nature but as to the amount of the suit. It was urged upon us that the Court of the Deputy Collector failed in both these respects. It was a Court that could have no jurisdiction either as to the nature or the amount of the present suit.

In maintaining this argument it has been overlooked that the position given by law to Courts of Land Revenue when determining questions in dispute under s. 113 of Act No. XIX of 1873, and passing decision thereon, is the position of a Court of Civil Judicature of first instance. Its decisions are raised to the rank and operative power of decisions of a Court of Civil Judicature of first instance, in other words, to the rank of decisions of a Court *quoad* the matter in dispute, of concurrent jurisdiction. This being the case, we see no reason to deprive such a decision of the power and virtue it would have had if it had been passed by a Court which both in name and in substance filled the position of a Court of Civil

(1) I. L. R., 9 Calc. 439. (2) I. L. R., 11 Calc. 301.
(3) I. L. R., 16 All. 183.

Judicature of the first instance. In such case the decision would undoubtedly have operated as a bar under s. 13 of the Code of Civil Procedure, and we must hold it so to operate in the present case.

On behalf of the respondents it was contended that we should not grant a hearing to the contention that there is no decision of any kind on the record so far as the villages of Amghat, Rupupur and Rampur Udebhan are concerned. The defence raised has been that all the disputed property had been adjudicated upon by the Revenue Court. The judgment covered all the property in dispute and up till now in every Court the appellant has allowed the Courts to proceed upon the assumption that the Revenue Court proceedings covered all the property in all the five villages. We overruled this objection, but gave ample time to the respondents to obtain and produce copies of any decisions affecting the villages Amghat, Rupupur and Rampur Udebhan. Decisions affecting Kachhoha and Bhadoli are on the record.

The respondents have produced no copies of any such decisions, and we must infer that none such exist.

The second contention raised in appeal herefore prevails. We set aside the judgment and decree under appeal so far as it affects the property situate in Amghat, Rupupur and Rampur Udebhan, and remand the suit to the Court of first instance, with directions to readmit it upon its file of pending suits and to decide it according to law. Costs of this portion of the suit to follow the result. As regards the property in Kachhoha and Bhadoli, we dismiss the appeal with proportionate costs.

BANERJI, J.—I am entirely of the same opinion, but I wish to add a few observations.

As regards the property situated in the villages Amghat, Rupupur and Rampur Udebhan, the respondents could not successfully plead the bar of *res judicata* unless they could establish that there was a previous adjudication of the matters now in issue in respect of that property. They have not proved that any such adjudication was ever made. Their allegation was that the matter had been

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finally decided by the Court of Revenue in the partition proceedings which took place in 1880. It appears, no doubt, that a partition was effected under the orders of the Court of Revenue, but no judgment has been produced to show that the matter in issue was finally decided in the partition proceedings. Where the bar of a previous judgment is pleaded, no assumption can be made that such a judgment exists or that such a judgment, even if it exists, decided the issues raised in the present suit. As there is no judgment before us affecting the property situated in the three villages named above, we cannot make any assumption in favour of the respondents, and we cannot presume from the mere fact of that property having been partitioned that the question of title now raised in regard to that property was finally decided between the parties or between those under whom they claim.

As regards the remaining two villages, it is not disputed that the Assistant Collector, by his judgment of the 19th of October 1890, decided, rightly or wrongly, that the predecessor in title of the respondents had acquired absolute proprietary right in the property situated in those villages, and that the mortgage made by the plaintiff had come to an end. In the partition proceedings in which that decision was given, Bhaya Arjun Singh, the person through whom the respondents derive title, claimed the absolute ownership of the share now in question. His claim was resisted by the present appellant, who alleged that the mortgage effected by him still subsisted and had not been foreclosed. A question of title and of proprietary right was thus raised, and under section 113 of Act No. XIX of 1873, two courses were open to the Assistant Collector to whom the application for partition was made. He could either have declined to grant the application until the question in dispute had been determined by a competent Court, or he could himself have proceeded to enquire into the merits of the objection. Had he elected to pursue the first course, the matter now in issue would, having regard to the nature and value of the subject-matter in dispute, have been raised in a Civil Court of jurisdiction competent to try the present suit, and there can be no question that the decision

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of that Court would, by reason of the provisions of section 13 of the Code of Civil Procedure, have barred the trial of the same issues in the present suit. The Assistant Collector chose to pursue the second course, and decided the matter which is in issue in this suit. By the provisions of section 114 of Act No. XIX of 1873, his decision must be held to be the decision of a Court of Civil Judicature of first instance, that is, of the Civil Court which would have tried the question in dispute between the parties had the Assistant Collector referred them to a Civil Court under section 113, instead of enquiring into the merits of the objection himself. As I have said above, the Civil Court which would have tried the question, had the parties been referred to it, would have been the same Court which had jurisdiction to try the present suit. Therefore the decision of the Assistant Collector must be held to be the decision of a Civil Court of jurisdiction competent to try the present suit, and as such, it operates as *res judicata* under the 13th section of the Code of Civil Procedure.

It seems to me to be wholly immaterial for the purposes of the question before us that the decision of the Assistant Collector may have been founded on crude and erroneous notions of law, and that he was personally incompetent by reason of want of jurisdiction to try the present suit.

For the above reasons I agree in the decree and order proposed by my learned colleague.

BLAIR, J.—I concur in both the judgments.

Appeal dismissed.

Before Mr. Justice Banerji.

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AHMAD ALI (PLAINTIFF) *v.* NAJABAT KHAN AND OTHERS (DEFENDANTS).*

Civil Procedure Code, section 13—*Res judicata—Parties to subsequent suit arrayed on the same side as co-defendants in previous suit.*

Where an adjudication between the defendants is necessary to give the appropriate relief to the plaintiff there must be such an adjudication, and in such a case the adjudication will be *res judicata* between the defendants as well as between

* Second Appeal No. 918 of 1894, from a decree of H. Bateman, Esq., District Judge of Saháranpur, dated the 4th May 1894, confirming a decree of Pandit Kanhya Lal, Munsif of Saháranpur, dated the 23rd December 1893.