

1908
February 28.

Before Mr. Justice Sir George Knox and Mr. Justice Aikman.
KHASAY AND OTHERS (PLAINTIFFS) v. JUGLA AND ANOTHER
(DEFENDANTS).*

Act (Local) No. III of 1901 (North-Western Provinces and Oudh Land Revenue Act), sections 110, 111 and 233(k)—Partition—Suit for recovery of property in Civil Court—Jurisdiction.

Held that the prohibition contained in section 233(k) of the North-Western Provinces and Oudh Land Revenue Act, 1901, applies only to suits with respect to partitions in which the plaintiff has had an opportunity of having his objections considered under section 111 and has not availed himself of it.

IN this case certain co-sharers applied for partition. On the date fixed for objections the defendants, other co-sharers, came in and applied for partition of their share including a share to which yet other co-sharers, the plaintiffs, had a claim. This application, though beyond time was entertained by the Assistant Collector. The plaintiffs then brought this suit for the disputed property and the first Court (Subordinate Judge of Agra) gave them a decree. The lower appellate Court (District Judge of Agra) reversed this decision, holding that the suit was barred by the provisions of section 233(k) of the North-Western Provinces and Oudh Land Revenue Act (III of 1901).

Hence this appeal.

Babu *Jogindro Nath Chaudhri*, Hon'ble Pandit *Madan Mohan Malaviya* and Munshi *Ratan Chand*, for the appellants.

Hon'ble Pandit *Sundar Lal* and Pandit *Baldeo Ram*, for the respondents.

KNOX and AIKMAN, JJ.—Khasay and Bansi, plaintiffs appellants, and Jugla and Mohan, defendants respondents, are co-sharers in the village Paigaon. An application for partition of the village had been presented by co-sharers other than these four men, and the proclamation required by section 110, clause (1) of Act No. III of 1901, had been issued, fixing the 28th of February, 1902, as the day on which the co-sharers were to appear before the Collector and state their objections, if any, to the application. Sub-section (2) of the same section provides that any recorded co-sharers not joining in the application may

* Second Appeal No. 310 of 1904, from a decree of W. F. Wells, Esq., District Judge of Agra, dated the 8th of January, 1904, reversing a decree of Babu Rajnath Prasad, Subordinate Judge of Agra, dated the 3rd of November, 1903.

within any time before the day fixed apply for partition, in which case the co-sharers so applying shall be deemed to have joined in the original application. There had been a dispute between the plaintiffs and the defendants mentioned above with regard to the right to a ten biswansi share which had belonged to certain co-sharers who had long left the village. On the date fixed by the proclamation the defendants Jugla and Mohan put in an application that their share might be made to constitute a separate mahal and include this disputed ten biswansi share. This application was entertained by the Assistant Collector. It is clear that it was not presented within the time allowed by sub-section (2) of section 110, and it ought therefore to have been treated as a fresh application for partition and a fresh proclamation should have been issued. This was not done. It was impossible, therefore, for the plaintiffs to have preferred objections under sub-section (2) of section 110, and no objection put forward by them could have been entertained under section 111. That section refers to objections raising questions of title made on or before the date fixed in the proclamation. The plaintiffs applied to the Assistant Collector to stay the partition proceedings so that they might institute a suit in the Civil Court. Their application was refused. They then instituted the suit out of which this second appeal has arisen, and they did so before the completion of the partition proceedings. They obtained a decree in the Court of first instance declaring their rights in the disputed property. On appeal the learned District Judge of Agra held that the suit was not maintainable in the Civil Court: having regard to the provisions of section 233, clause (b) of Act No. III of 1901. This enacts that no person shall institute any suit in the Civil Court with respect to the partition of mahals, except as provided in sections 111 and 112. In our opinion this prohibition cannot apply to the present case. We think it is clear that it applies only to suits with respect to partitions in which the plaintiff has had an opportunity of having his objections considered under section 111 and has not availed himself of it. In the present case the plaintiffs, as we have shown, had no such opportunity. We are fully alive to the grave objections to interference by the Civil Court in partition proceedings in the

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Revenue Court, and where a party has had the opportunity of representing his case in the Revenue Court and has not availed himself of it, we should have no hesitation in holding that the jurisdiction of a Civil Court is barred by section 233. In the present case we have no alternative but to allow the appeal. We set aside the decree of the lower Court and remand the case to that Court under the provisions of section 562 of the Code of Civil Procedure, with directions to readmit the appeal under its original number in the register of pending appeals and proceed to dispose of it on the merits. Costs here and hitherto will abide the event.

[*Cf. Muhammad Jan v. Sadanand Pande.* (1)—ED.]

Appeal decreed and cause remanded.

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Before Mr. Justice Banerji.

LAKHRAJ BHARTHI (PLAINTIFF) v. ANRUDH TIWARI AND OTHERS
(DEFENDANTS).*

Pre-emption—Evidence of Custom—Custom need not be immemorial.

In order that a custom of pre-emption may be held to be established it is not necessary to show that the custom is immemorial, in the sense of the English common law. Hence where in a village which came into existence after 1846 there was found in 1861 evidence of a custom of pre-emption amongst the co-sharers, and further evidence of such a custom in 1885, it was held that the custom was sufficiently established for the Courts to give effect to it. *Kuar Sen v. Mamma* (2), *Gokul Dichhit v. Maheshri Dichhit* (3) and *Mohidin v. Shivlingappa* (4) followed.

THE facts of this case sufficiently appear from the judgment of the Court.

Mr. J. Simeon, for the appellants.

Hon'ble Pandit Madan Mohan Malaviya, for the respondents.

BANERJI, J.—This appeal arises out of a suit for pre-emption based upon a custom alleged to prevail in the village. The defendant denied the existence of the custom and also the right of the plaintiff to claim pre-emption. There was a further dispute

* Second Appeal No. 586 of 1904, from a decree of T. A. H. Way, Esq., officiating District Judge of Gorakhpur, dated the 5th of April 1904, confirming a decree of Pandit Guru Prasad, B.A., Munsif of Deoria, dated the 6th of January, 1904.

(1) Weekly Notes, 1906, p. 30.

(2) (1895) I. L. R., 17 All., 87.

(3) Weekly Notes, 1905, p. 266.

(4) (1899) I. L. R., 23 Bom., 686.