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January 28.

*Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice
Sir William Burdett.*

MUHAMMAD JAN AND OTHERS (PLAINTIFFS) v. SADANAND PANDE AND
OTHERS (DEFENDANTS).*

*Act No. XIX of 1873 (North-Western Provinces Land Revenue Act), section
113, 114, 241(f)—Partition—Question of title raised before and
decided by Assistant Collector—Appeal to wrong court—Suit in civil
court for declaration of title—Jurisdiction.*

In an application for partition before an Assistant Collector certain parties raised an objection that they were exclusively entitled to a portion of the land sought to be partitioned. The Assistant Collector tried the question of title so raised under section 113 of the North-Western Provinces Land Revenue Act, 1873, and decided it in favour of the objectors. The applicants appealed to the Collector, who entertained the appeal and reversed the finding of the Assistant Collector, and this decision was upheld by the Commissioner and the Board of Revenue. Before the partition proceedings were completed, the unsuccessful objectors filed a suit in the civil court praying for a declaration for a decree that the lands in question were their exclusive property and, if necessary, for possession. *Held*, that the suit was maintainable. No appeal lay on the revenue side from the Assistant Collector's order on the plaintiffs' before the objection, which was now final; and, inasmuch as the suit had been instituted completion of the partition proceedings, it was not obnoxious to the prohibition contained in section 241(f) of Act No. XIX of 1873. *Muhammad Sadiq v. Laito Ram* (1) referred to.

THE facts out of which this appeal arose are as follows:—

Some years prior to the institution of this suit the defendants filed a suit for partition of the lands now in dispute and other property on the allegation that it was joint property. The plaintiffs filed an objection in regard to the property now in dispute, setting up an exclusive title. The objection was decided in their favour by the Assistant Collector by a judgment which decided the question of title.

Notwithstanding the fact that this decision was one upon the question of title the present defendants appealed to the Collector who thereupon reversed the decision of the Assistant Collector. The Collector's order was maintained by the Commissioner and the Board of Revenue.

The plaintiffs then instituted the present suit, praying for a declaration that the property was their exclusive property and,

* Second Appeal No. 588 of 1902, from a decree of L. Marshall, Esq., Officiating District Judge of Ghazipur, dated the 2nd of April, 1902, confirming a decree of Rai Anant Ram, Subordinate Judge of Ghazipur, dated the 19th of December, 1901.

if necessary, for a decree for possession. They also prayed for an injunction to restrain the defendants from proceeding with the partition matter pending the determination of the plaintiff's suit.

The prayer for an injunction was disallowed and the partition proceedings continued, and an order for partition was made and confirmed.

The present suit of the plaintiffs was dismissed by the Court of first instance (Subordinate Judge of Ghazipur) on the ground that it was not cognizable by a Civil Court. The lower appellate Court (District Judge of Ghazipur) affirmed the decree of the Subordinate Judge.

Mr. *R. Malcomson*, for the appellants.

Mr. *Abdul Raoof*, Mr. *B. E. O'Connor*, Hon'ble Pandit *Sundar Lal* (for whom Mr. *M. L. Agarwala*), Maulvi *Muhammad Ishaq*, Maulvi *Muhammad Zahur* and Dr. *Satish Chandra Banerji*, for the respondents.

STANLEY, C.J. and BURKITT, J.—The suit out of which this appeal has arisen was brought by the plaintiffs for a declaration that certain *sir* and *khudkasht* lands which are mentioned in the schedule to the plaint are the exclusive property of the plaintiffs, and, if necessary, also for a decree for possession of this property. The Court of first instance held, for the reasons which we shall presently state, that the suit was not cognizable by a Civil Court and therefore dismissed it. An appeal was preferred, which the lower appellate Court, taking the same view as did the Court of first instance, dismissed. It appears that some years before the institution of the suit the defendants filed in the Revenue Court a petition for partition of the lands now in dispute and other property, alleging that the property was joint property. The plaintiffs filed an objection in regard to the property which forms the subject-matter of the present suit, setting up in that objection an exclusive title to it by adverse possession. The objection was decided in favour of the plaintiffs by the judgment of the Assistant Collector passed on the 3rd October 1898. We shall here set forth the objection which was preferred to the partition proceedings by the objectors and the judgment thereon of the Assistant Collector. There was another objection with

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which we have here no concern. The judgment states the objection as follows:—"The objections of Muhammad Khan, objectors are as follows:—The same objections are in respect of the mahal of Himmat Sahai and Najaf Khan. The *khudkasht* and *sir* lands have always been in separate and exclusive possession of the applicants, who are in possession without the participation of anyone." This appeal, as we have said, has no concern with the second objection, and therefore it is unnecessary to state it. The decision of the Assistant Collector on the first objection raised is as follows:—"It is proved from the evidence of the patwari that the objector is in fact in separate possession of the *sir* land and has never paid any profit in respect thereof. The entry in the village administration paper also is to the same effect, *i.e.* it is mentioned in it that no sharer pays profits to anyone. Besides the *sir* land he (the objector) collects rents from every tenant in proportion to his share. The *karinda* (agent) of the applicant has also admitted this right of his objectors. This objection is therefore allowed. The settled *sir* and *khudkasht* land which have been in his occupation for 12 or more than 12 years, shall be included in his mahal without compensation being allowed." Now it is clear that the objectors, the plaintiffs here, in their objection raised a question of title or of proprietary right within the meaning of section 113 of the Land Revenue Act (Act No. XIX of 1873), and it also appears to us to be clear that the Assistant Collector took the proceedings which are laid down by that section, and after judicial inquiry came to the conclusion that the objection of the plaintiffs was well-founded, and accordingly so decided, that is, he found that the plaintiffs had an absolute and exclusive title to the land, the subject-matter of dispute. An appeal was preferred by the applicants for partition to the Collector, alleging that the property was not exclusively the plaintiffs' property, but was joint property of the applicants for partition and the plaintiffs. This appeal was misconceived. Where a question of title has been raised and decided under section 113, the Court to which an appeal lies under section 114 is the District or High Court. The Collector had no jurisdiction whatsoever to entertain the appeal. However, he did so, and

overruling the objection of the plaintiffs decided for the defendants. On appeal to the Commissioner and Board of Revenue the decision of the Collector was affirmed. It is obvious that the orders so passed by the Collector, the Commissioner and the Board of Revenue were without jurisdiction, and therefore the plaintiffs were entitled to treat them as waste paper. The plaintiffs then instituted the present suit on the 21st of October, 1900, and applied for an injunction to restrain the defendants in the suit, who were the applicants for partition, from proceeding with the partition matter pending the determination of the suit. An objection to the injunction was filed on the 17th of December, 1900, and the objection was allowed on the 19th of December, 1900, the order for an injunction being refused. The partition proceedings were continued, and on the 12th of June, 1901, the partition was completed and the order for partition was confirmed on the 20th of June, 1901, that is, eight months after the institution of the present suit and considerably more than two years from the time when the objection to the partition was filed before the Assistant Collector. The Court of first instance dismissed the suit on the ground that it was not cognizable by a Civil Court, ignoring, as it appears to us, the fact that a question of title and proprietary right was raised at the earliest moment and overlooking the fact that where a question of title is raised the appeal from the decision of the Assistant Collector lies to the District or to the High Court. In the course of his judgment the learned Subordinate Judge observes:—"In fact this suit has been instituted to upset all the partition proceedings, which having become complete have resulted in the delivery of possession." This statement is inaccurate, inasmuch as the suit was commenced long before the partition proceedings had been completed, and an objection was taken at the outset of the proceedings. Then he observes that the Full Bench ruling of the High Court in the case of *Muhammad Sadiq v. Late Ram* (1) is fully applicable to the suit. He therefore dismissed the plaintiffs' claim. The decision in the case referred to appears to us to have no bearing upon the present case. In that case no question of title affecting the partition which was capable of

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being raised under sections 112 and 113 of the Land Revenue Act was raised during the partition proceedings, and the partition was completed before any suit was instituted. In this case, as we have pointed out, a question of title was raised at the earliest possible moment and that question of title was decided by the Assistant Collector in favour of the plaintiffs. Therefore, as it seems to us, it is idle to say that the present suit was brought to upset partition proceedings which had already been completed. On appeal the learned District Judge appears to have fallen into several inaccuracies. He says in supporting the view of the Court below that the suit was not cognizable by a Civil Court: that "the suits are an attempt to get a pronouncement from a Civil Court to interfere with partition proceedings which have been completed." If he means thereby to imply that the suit was instituted after the partition proceedings had been completed, that statement is based upon an entire error in regard to the true facts. Then, after dealing with the judgment of the Assistant Collector to which we have already referred, he observes:—"In my opinion the Collector's order of the 12th of December, 1898, did not deal with and dispose of any question of title, such as would be referred under section 113 or appealed under section 114 to the Civil Court, but with one of procedure under section 118, Act XIX of 1873, with which the Civil Courts are not concerned; the particular matter in dispute is indeed one relating to the 'distribution of the land by partition,' which is expressly barred from the cognizance of the Civil Courts by section 241(f) of Act XIX of 1873." We fail to understand how the learned District Judge came to advance this argument in support of his decision. It is clear, as we have pointed out, that a question of title was raised by the objection which was filed in 1898 and the Assistant Collector's order did deal with that question of title. In view of that order, which was passed on the 3rd of October, 1898, it appears to us idle to say that a question of title was not raised and was not determined by the Assistant Collector. The objection was not an objection under section 118, so far as regards at all events the *khudkasht* and *sir* lands, which the objectors claimed to be their exclusive property and with which only this suit is concerned. We wholly fail to understand

how the learned District Judge dealt with the matter as a question of procedure. Then again the learned District Judge says :— “What is fatal to these suits is that they have been brought after the completion of the partition proceedings, and the lower Court was right in relying on the Allahabad High Court Full Bench ruling,” to which we have referred. Then he says :—“The present case is beyond all doubt, because the alleged cause of action does not arise from any question of title pending the determination of which the partition proceedings might have been suspended.” Now the suits, as we have pointed out, were not brought after the completion of partition proceedings, but some eight months before the completion of those proceedings. Therefore the learned District Judge was in entire error in regard to this. Moreover the plaintiffs’ cause of action was in respect of a claim of title to the land, and therefore the partition proceedings might have been properly suspended pending the determination of the question raised in the suit. The plaintiffs not merely raised a question of title, but they got a determination of that question in their favour by a Court competent to give that decision, and this decision of the Assistant Collector, though amounting to a final decision, as there was no appeal from it to a competent Court, has been entirely ignored by both the lower Courts. We may further point out that the learned District Judge is mistaken in saying that “the particular matter in dispute is indeed one relating to the ‘distribution of the land by partition.’” The matter in dispute was in no way connected with the distribution of the land by partition. The plaintiffs set up an exclusive title to a portion of the property sought to be partitioned. The decrees of the lower Courts, therefore, cannot be supported. They are based upon *data* which are erroneous and they are not sound in point of law. We therefore allow the appeal, set aside the decrees of the two lower Courts, and, as the case has been decided upon a preliminary point and we have overruled the decision upon that point, we remand the case under the provisions of section 562 of the Code of Civil Procedure to the Court of first instance through the District Judge, with directions that it be restored to its original place in the file of pending suits and be disposed of

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on the merits. The plaintiffs will have the costs of this appeal in any event. All other costs will abide the event.

Appeal decreed and cause remanded.

Before Mr. Justice Sir George Know and Mr. Justice Aikman.

NETRAPAL SINGH (PLAINTIFF) v. KALYAN DAS AND OTHERS
(DEFENDANTS).*

*Act No. IV of 1882 [Transfer of Property Act], sections 10, 110(g)—
Perpetual lease—Covenant against alienation without covenant for re-entry
—Construction of document.*

Where a perpetual lease of a village to the lessee and his heirs contained a covenant against alienation by the lessee, but no covenant giving to the lessor a right of re-entry upon breach of the former covenant, it was held that the successors in title of the lessor could not recover the property the subject of the lease from the alienees of the successors in title of the lessee. *Nil Madhab Sikdar v. Narattam Sikdar (1)* and *Paramashri v. Viltappa Shanbaga (2)* followed.

THE facts of this case are as follows:—

In the year 1848, Tikam Singh made a perpetual lease of mauza Chalasni, one of the villages of the Amargarh taluka, in favour of his brother Sheo Baran Singh on an annual rent of Rs. 900. The lease contained the following stipulation:—"Sheo Baran Singh himself or his heirs shall not be competent to make a transfer by means of sale or mortgage, &c., to anyone, and Sheo Baran Singh shall be responsible therefor." Nur Singh and Balwant Singh, the sons of Sheo Baran Singh, having alienated the property the subject of the abovementioned lease, Netrapal Singh, the successor in title of the lessor, sued the alienees and the representatives of the lessee to recover possession of the village Chalasni. The lease was put in evidence; but it was found to be torn, the latter portion being missing. The plaintiff tendered evidence to show that this missing portion contained a covenant giving the lessor a right of re-entry in the event of a breach of the covenant against alienation. The Court of first instance (Additional Subordinate Judge of Aligarh) dismissed the suit, chiefly upon the ground that it was barred by limitation. The plaintiff appealed to the High Court.

* First Appeal No. 48 of 1904, from a decree of Maulvi Maulah Bakhsh Additional Subordinate Judge of Aligarh, dated the 7th of November, 1903.

(1) (1899) I. L. R., 17 Cal., 526. (2) (1902) I. L. R., 20 Mad, 157.