

1909

RAM DHANI
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v.
LALIT SINGH.

section 92 of the Transfer of Property Act, 1882, has been made by an appellate court, an application under the last paragraph of section 93 must be made not to that court but to the court of first instance. It is pointed out to us that this ruling was not followed by our brother RICHARDS in the case of *Babu Prasad v. Khiali Ram* (1). Our learned brother in that case held that although the court of first instance was the proper court for dealing with applications of the kind yet the appellate court had jurisdiction also to allow an enlargement of time in cases in which there had been appeals. We are unable to agree in the view expressed by our learned brother. We are of opinion that the earlier ruling is correct. We therefore allow the preliminary objection but we do not express any opinion as to the merits of the application. It is stated that the money payable to the prior mortgagee has actually been paid and a receipt therefore obtained. Under these circumstances there will possibly be little difficulty in obtaining an extension of time from the proper court.

We dismissed the application, but under the circumstances, without costs.

Application rejected.

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March 8.

APPELLATE CIVIL

Before Mr. Justice Sir George Knox and Mr. Justice Griffin.

NARAIN DASS (DEFENDANT) v. BHUP NARAIN AND ANOTHER (PLAINTIFFS).*

Act (local) No. III of 1901 (Land Revenue Act), section 233 (k)—Suit for partition of Dera and site—Civil and Revenue Courts—Jurisdiction.

In a suit for partition of a *Dera* standing on agricultural land situate in a *mahal* in which the plaintiffs had a share, *held* that though the suit was in name one for partition of a building, it was really a suit for partition also of the land on which the building stood, and that it was barred by section 233 (k), Land Revenue Act.

THE facts of this case are as follows :—

In 1867 the village Sarkara was divided into two *mahals*, *mahal Surkh* and *mahal Multani*. The plaintiffs and the defendants,

*First Appeal No. 101 of 1909 from an order of Girraj Kishore Dutt, Subordinate Judge of Bareilly, dated the 16th of July 1908.

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are joint owners of *mahal Surkh*, but *mahal Multani* is exclusively owned by the defendants. When the Revenue Court partitioned the village in 1867, the site on which the house in dispute stands was allotted in its entirety to *mahal Multani*. The house, however, which is known as a *Dera* is in the joint possession of all the proprietors of the village. The plaintiffs on the strength of that possession brought this suit for partition of the house and for separate possession of a share therein to the extent of their share in the village. The court of first instance dismissed the suit holding that the plaintiffs were not the owners of the site of house and that they, therefore, could not get partition and separate possession of the site of the *Dera* now in dispute. On appeal the Subordinate Judge reversed the finding of the court of first instance and remanded the case. The defendants appealed to the High Court.

Babu *Sital Prasad Ghose* for the appellants, contended that the plaintiffs not being owners of the site of the house admittedly situate in *mahal Multani* which was exclusively owned by the defendants, could not claim partition and separate possession of a portion thereof. If the plaintiffs or their predecessors had any share in the site of the house they ought to have raised this objection at the time of partition before the Revenue Court. They are now barred by section 233 (k) of the Land Revenue Act (III of 1901) from raising any such objection. He relied on *Kalika Prasad Tewari and others v. Naresk Dutt Tewari* (1)

Munshi *Gobind Prasad*, for the respondents relied on *Abdul Rahman v. Mashini Bibi* (2); *Iswar Prashad v. Jagannath Singh* (3).

KNOX, and GRIFFIN, JJ.—The order under appeal is an order passed by the Subordinate Judge of Bareilly whereby reversing the decree of the lower court he remanded the case to that court to be replaced on its original number on the file of that court and to be disposed of according to law. The order continues, "The lower court will pass a final decree in the plaintiff's favour for separate possession by partition." The plaintiff's claim a five-ninth share in the property in dispute which is called a *dera*

(1) S. A. No. 1145 of 1906, decided on the 4th of March, 1908.

(2) Weekly Notes, 1899 p. 49.

(3) Weekly Notes, 1906, p. 124.

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situate in an agricultural village. They admit that the site upon which the *dera* stands is situate in a *mahal* of the village called *mahal Multani* in which they have no share. They themselves are owners of property in a *mahal* of the village known as *mahal Surkh*. When the Revenue Courts partitioned the village in 1867, the site on which the *dera* stands was allotted in its entirety to *mahal Multani*. The title of the plaintiffs rests partly upon inheritance from certain persons who were proprietors in possession of the *dera*, partly upon purchase. They say that they have repeatedly asked the defendant to partition the *dera* and to give them possession over their share. As the defendant refuses to accede to this request they have brought the present suit for partition of their share in the *dera* and for exclusive possession over it. The defence, amongst other grounds, with which we are not concerned, raises the question that plaintiffs cannot ask for partition of the *dera*, but might ask for the rent of that portion of it which is occupied by the defendant. The court of first instance, holding that the claim was virtually one for partition and separate possession of the site of the *dera* in suit and that it was unmaintainable, dismissed the suit. The lower appellate court found that as the plaintiffs were owners of a portion of the house in dispute they were entitled to separate possession of their share of the house by partition and the mere fact that the defendant was owner of the site of the house cannot defeat the plaintiffs' rights to claim partition of the building itself. The defendant appeals from this order and his plea is that the plaintiffs are not owners of the site of the house which is situate in a *mahal* exclusively owned by him and the plaintiffs are not entitled to claim partition of the house in dispute. On behalf of the respondents our attention was called to the cases of *Abdul Rahman v. Mashina Bibi* (1), and *Iswar Parshad v. Jagarnath Singh and others* (2). In the first of these two cases it was held that it was not within the jurisdiction of a Court of Revenue to partition a 'chhauni' or collection house. The second case was a case in which the parties were co-sharers in the village and while the village remained undivided the defendants had erected a building. On

(1) Weekly Notes, 1899, p. 49. (2) Weekly Notes, 1906, p. 194.

partition the revenue authorities allotted the plot on which the building stood to the share of the second party the plaintiffs. The plaintiffs sued for demolition of the building and for recovery of possession of what they deemed to be their share of the land covered by the defendants' building. It was held that the suit for demolition was bad, but that it was still open to the plaintiffs to ask the Revenue authorities to assess ground rent on the premises occupied by the defendants. Neither of these two cases is on all fours with the present case. The suit as it stands, though in name a suit for partition of the building, is in reality a suit also for partition of the land on which that building stands. It is a matter which arises on partition and which should be dealt with by the Revenue Courts. In our opinion section 233, clause (k), forbids the Civil Court exercising jurisdiction over a suit of the form in which this one has been brought. We decree the appeal, set aside the decree of the court below, and restore that of the court of first instance with costs.

Appeal decreed.

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Before Sir John Stanley, Knight, Chief Justice and Mr. Justice Banerji.
MUSAMMAT DHUMAN (DEFENDANT) v. SYED ABDULLAH KHAN,
(PLAINTIFF).*

1909
March 12.

Torts—Malicious prosecution—Amount of damages—Second appeal.

In a suit for damages for malicious prosecution the question of the amount of damages is a question of fact and it is not open to the High Court to interfere in second appeal upon such a question. *Bans Madhab Chatterjee v. Bholu Nath Banerjee* (1), and *Jageswar Sarma v. Dina Ram Surma* (2) referred to.

THE facts of this case are as follows:—

Musammat Dhuman, the appellant, filed a criminal complaint against the respondent Nawab Abdulla Khan charging him with stealing the ornaments which had been on the person of a girl named Shirin Jan and which it was alleged belonged to the appellant. She also complained that Nawab Abdullah Khan had wrongfully confined that girl and a maid-servant. The complaint was dismissed by the criminal court. Nawab

*Second Appeal No. 236 of 1908 from a decree of H. E. Holme, District Judge of Jhansi, dated the 23rd December 1907, confirming a decree of Pramatha Nath Banerji, Subordinate Judge of Jhansi, dated the 21st August 1907.