

specific performance, but which would make his conduct amount to a repudiation on his part of the contract." Such a case as would entitle a purchaser to a return of the earnest money is that of *Alokeshi Dassi v. Haru Chand Dass* (1). In that case the defendant vendor unsuccessfully denied the contract *in toto* and there was no repudiation of the contract by the plaintiff, and it was held that plaintiff purchaser was entitled to a refund of the deposit made by him. The present case is unlike that case according to the finding of the lower appellate court. The plaintiff in this case was in default, in that he repudiated the contract, although full opportunity was given to him of completing it. We think that the lower appellate court rightly dismissed his suit. We accordingly dismiss this appeal with costs.

*Appeal dismissed.*

*Before Mr. Justice Sir George Knox and Mr. Justice Griek.*

LACHMAN DAS (DEFENDANT) *v.* HANUMAN PRASAD

(PLAINTIFF).\*

*Act (Local) No. III of 1901 (United Provinces Land Revenue Act), section 233 (k)—Partition—Revenue Court irregularly entertaining an application for allotment of a share to applicant—Suit in Civil Court for declaration of title as to share so allotted—Jurisdiction.*

Some of the co-sharers in a mauza applied for partition. H, one of the non-applicants, came in within the time limited in the proclamation issued under section 110 of the Land Revenue Act, 1901, and asked for his share also to be partitioned off. After the time for objecting to the partition had expired, L filed an application claiming a share in the portion alleged by H to be his share, and without notice to H this application was granted, and part of the share allotted to him was given to L. H then sued in the Civil Court asking for a declaration of his title to the plots so allotted to L. *Held* that, however erroneous the procedure of the revenue authorities might have been, H's suit was barred by section 233 (k) of the Land Revenue Act, 1901. *Muhammad Sadiq v. Laute Ram* (2) followed. *Khasay v. Jugia* (3) and *Muhammad Jan v. Sadanand Pande* (4) distinguished.

THE facts of this case were as follows :—

In qasba Khair there were several *khatas*. On the 11th December, 1905, Bilas Rai and others who owned certain shares in same *khatas*, except *khata* No. 34, applied for perfect partition

\* First Appeal No. 141 of 1909, from an order of Jagat Narain, Additional Subordinate Judge of Aligarh, dated the 20th of March, 1909.

(1) (1897) I. L. R., 24 Calo., 897.

(2) (1901) I. L. R., 23 All., 291.

(3) (1906) I. L. R., 23 All., 432.

(4) (1905) I. L. R., 23 All., 894.

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THE DELHI  
CLOTH AND  
GENERAL  
MILLS  
COMPANY,  
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making the other co-sharers parties to their application. The officer in charge of the partition issued a proclamation under section 110 of Act No. III of 1901, calling on the recorded co-sharers who had not joined in the application to appear and show cause on or before the 12th April, 1906. On the 10th April, 1906, the plaintiff in the present suit filed an application stating that he had no objection to the application of Bilas Rai and others but he further prayed that his own share be made into a separate and distinct mahal. Lachman Das, who had purchased only plots Nos. 979 and 1518 in *khata* No. 34 in execution of a decree, did not file any objection to the petition of the plaintiff. The application of the plaintiff was proceeded with, and the amin allotted to him the lands in dispute. On the 21st October, 1907, Lachman Das put in a petition before the partition officer stating that he had a title to the extent of two bighas and odd in all the lands in *khata* No. 34 and the allotment by the Amin was wrong and improper. On the 28th October, 1907, the partition officer, without issuing notice to the plaintiff, decided the objection in favour of Lachman Das. Thereupon the plaintiff instituted the present suit for a declaration that he was the owner in possession of the plots in dispute, and that the defendant had no right or share in it. The main defence of the defendant was that the suit was barred by the rule of *res judicata* and that section 233, clause (k) of Act No. III of 1901 applied to the case and that it was consequently not cognizable by the Civil Court. The court of first instance dismissed the suit, but the lower appellate court reversed the decree and remanded the suit.

The defendant appealed.

Mr. *M. L. Agrwala*, for the appellants, contended that the suit was barred by section 233, clause (k) of Act No. III of 1901, and by the rule of *res judicata*. The plaintiff ought to have raised the question of proprietary title when he appeared in answer to the proclamation. The partition having been completed, the suit was not maintainable. He relied upon *Muhammad Sadiq v. Laute Ram* (1) and *Nathi Mal v. Tej Singh* (2).

Munshi *Huribans Sahai*, for the respondent, submitted that the suit was not barred by the rule of *res judicata* inasmuch as the

(1) (1901) I. L. R., 23 All., 291.

(2) Weekly Notes, 1907, p. 190

objection of Lachman Das raised a question of proprietary title and the partition officer was not competent to decide it. The partition officer was competent to determine a question of title only when an objection was raised in the manner pointed out in section 111 of Act No. III of 1901. The plaintiff could not get any relief from the superior revenue courts, inasmuch as they had no jurisdiction to determine a question of title. The decision was merely waste paper. Further, as the plaintiff had no opportunity of meeting the objection raised by the defendant the jurisdiction of the civil court is not barred; *Awadh Behari Lal v. Ishri Prasad* (1), *Khasay v. Jugla* (2) and *Muhammad Jan v. Sadanand Pande* (3). The suit was brought some eighteen months before the completion of the partition proceedings. The full Bench in *Muhammad Sadiq v. Laute Ram* expressly left this question open.

KNOX and GRIFFIN, JJ. :—Lala Hanuman Prasad, respondent in the present appeal was plaintiff in the court of first instance. He came to court saying that he was the owner in possession of certain zamindari property, consisting of numbers which are given in the schedule to his plaint, of which the total amount is 14 bighas 9 biswas. He alleged that the defendant had no right or share in these plots of land, that in the same village, the defendant Lachman Das, now appellant had purchased at auction 2 bighas 5 biswas, which was a grave-yard, and of which the numbers were 979 and 1518. He makes other allegations regarding the defendant Lachman Das' possession *quoad* these plots, but we are not concerned with these allegations in this appeal. He then goes to say that Bilas Rai, one of the co-sharers in Kasba Khair, applied to the Revenue Court in 1905 for the partition of the kasba Khair. The usual proclamation regarding partition was issued, and before the time allowed by the proclamation had expired, Hanuman Prasad came before the Collector and said that he had no objection to the partition and asked that a separate lot might be prepared of his property. Apparently Lachman Das had notice of the application of Bilas Rai, and it is admitted that he was present at the partition

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(1) Weekly Notes, 1907, p. 172. (2) (1906) I. L. R., 28 All. 432.  
 (3) (1906) I. L. R., 28 All. 234.

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proceedings which ensued. According to Hanuman Prasad, when their proceedings had gone on some way, namely, in October 1907, and after the amin had drawn up lots, Lachman Das put in a petition to the effect that he was a co-sharer in *khata* No. 34. Hanuman Prasad says that no notice was given to him of this petition, and that behind his back the Revenue Court passed an order on the 21st of October, 1907, to the effect that Lachman Das was to have a share in the whole of the *khata* corresponding to the amount claimed by him, the result of which was that, instead of Lachman Das being given merely the two plots of grave land, he was given a share in the lands of the *khata* and, amongst that, of land which the plaintiff had asked to be marked out in a separate lot in his favour. Upon this Hanuman Prasad, on the 22nd November, 1907, instituted the suit out of which this appeal has arisen, asking for a declaration that he was the owner and in possession of the plots in suit.

The court of first instance, holding that the plaintiff ought to have applied to the Revenue Court and that the Civil Court had no jurisdiction, dismissed the suit. On appeal the learned Subordinate Judge, holding that Hanuman Prasad had no opportunity to assert his title in answer to the petition put in by Lachman Das and could maintain a suit in the Civil Court, which could adjudicate upon the question of title raised before it, set aside the decree of the first court and remanded the case for trial on the merits. In appeal, Lachman Das urged that section 233 (k) of Local Act No. III of 1901 bars the suit. He further contended that the plaintiff ought to have raised any question of title he possessed when he appeared in answer to the original proclamation for partition, and also that the decision of the Revenue Court operated as *res judicata* to the present claim. The partition proceedings, we are told, were not completed until the 15th of April, 1909, some 18 months after Hanuman Prasad instituted his suit in the Civil Court. So far as we can judge from the papers before us, the petition put in by Lachman Das was untrue, misleading and put in before the Revenue Court out of time. The allegation of Hanuman Prasad is that he holds the land in severalty. This appears to be the fact, and the allegation appears to have commended itself to the partition

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offices and he acting, as he would, under section 117 of Act III of 1901, allotted to Hanuman Prasad the lands held by him in severalty. The only lands, if any, to which the defendant was entitled were the two plots which we may term in this judgement the cemetery land. The procedure of the court, so far as we may say anything about it, after Lachman Das' application was entirely irregular. At the same time we are also compelled to hold that Hanuman Prasad should have gone to the Revenue Court and to get put right the manifest irregularity in procedure which he says was committed by the Revenue Court. Had he done so, and if his allegations are correct, we have little doubt that the Revenue Court would have put matters right. Instead of that he has come to this court and he is met by the bar contained in section 233 (k) of the Land Revenue Act. Section 233 (k) says that no person shall institute any suit or other proceedings in a Civil Court with respect to the partition or union of mahals except as provided by sections 111 and 112. Unless Hanuman Prasad can show that his case comes clearly within the provisions of section 111, his suit is barred by section 233 (k). He attempts to show this by saying that Lachman Das in his application of the 21st of October, 1907, raised a question of title, and as he never had any opportunity to answer that question of title, and in this way he tries to bring his case within the rulings in *Khasay v. Jugla* (1) and *Muhammad Jan v. Sudanand Pande* (2). Both these cases are clearly distinguishable from the present case. We can only repeat here what was laid down in the Full Bench case of *Muhammad Sadig v. Laute Ram* (3), in which it was held that any exercise of jurisdiction of a Civil Court which would disturb or in any way affect the distribution of land made by partition is barred by section 241 (f) of Act XIX of 1873, now section 233 (k) of Act No. III of 1901, no matter whether a question of title or any other question is raised in the suit.

We decree the appeal, set aside the decree of the court below and restore the decree of the court of first instance. We make no order as to costs.

*Appeal dismissed.*

(1) (1906) I. L. R., 28 All., 432. (2) (1906) I. L. R., 28 All., 394.

(3) (1901) I. L. R., 28 All., 291.