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aside the *ex parte* decree of the court below and directing the court below to re-admit on to its pending file the petition of objections filed by the appellants against the award of the arbitrator and to hear and dispose of the same according to law. No order as to costs.

Appeal decreed and cause remanded.

FULL BENCH.

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February, 17.

Before Sir Henry Richards, Knight, Chief Justice, Mr. Justice Tudball and Mr. Justice Muhammad Rafiq.

KALKA PRASAD (DEFENDANT) v. MANMOHAN LAL (PLAINTIFF)*
Act (Local) No. III of 1901 (United Provinces Land Revenue Act), sections 111, 112, 233 (h)—Civil Procedure Code (1908), section 11; order II, rule 2—Partition—Suit for possession of property the subject of partition.

A person who was really entitled to one half of a four biswa zamindari share, but was recorded only in respect of a $3\frac{1}{2}$ biswa share applied for partition of the latter share. After the date fixed for filing objections the person who was recorded in respect of the remaining one-fourth biswa share came in and asked for partition of that one-fourth biswa share. The partition was completed, but subsequently the original applicant brought a suit to recover the one-fourth biswa share.

Held that the suit was not barred by section 233 (h) of the United Provinces Land Revenue Act (1901), neither was it barred by order II, rule 2, of the Code of Civil Procedure, inasmuch as that rule did not apply to proceedings under the Land Revenue Act, nor by the rule of *res judicata*.

THE facts of this case are very fully stated in the order of TUDBALL, J., referring the appeal to a Divisional Bench, which was as follows:—

This appeal arises out of a suit for possession. It is a defendant's appeal. As the lower appellate court has only decreed the claim in part, the plaintiff has filed objections in regard to that part of his claim which has been disallowed.

The facts are slightly complicated. One Dilsukh Rai was the owner of a ten biswa share in the village now in dispute, i.e., he owned half the village, and his share has been called "*a* 10 biswa ashri," i.e., an original ten biswa share, in some parts of the

* Second Appeal No. 1285 of 1914 from a decree of Baijnath Das, Subordinate Judge of Bareilly, dated the 28th of April, 1914, modifying a decree of Muhammad Zia-ul-Hasan, Munsif of Haveli, dated the 20th of November, 1913.

litigation in which it has also been involved, while in other parts it has been called a "20 biswa *farzee*" share because it was subsequently partitioned off into a separate mahal of 20 biswa. Throughout this judgement it will be treated as a ten biswa *asli* share except where I use the word "*farzee*".

Dilsukh Rai died leaving a widow and four sons. In place of his name, those of the widow and the four sons were recorded in Government records each as the owner of a 2 biswa share as below:—

2 Biswa	...	Musammat Jamna.
2 Biswa	...	Gauri.
2 Biswa	...	Dilwari.
2 Biswa	...	Mul Chand.
2 Biswa	...	Piyare Lal.

Total 10 Biswas

On 11th March, 1869, Mul Chand and Piyare Lal mortgaged the whole 10 biswas to Nand Kishore, the father of the present plaintiff Manmohan Lal. The mortgagee subsequently sued the widow and the three sons Gauri, Dilwari and Piyare Lal on the basis of the mortgage. The mortgagor Mul Chand had in the meantime died without leaving any issue and the ten biswas which stood in his name had been divided up among the other four, so that the khewat stood as follows:—

2½ Biswa	...	Jamna.
2½ Biswa	...	Gauri.
2½ Biswa	...	Dilwari.
2½ Biswa	...	Piyare Lal.

The mortgagee obtained a decree as against the shares of Mul Chand and Piyare Lal only, i.e., for the sale of four biswas, and he purchased this four biswas in execution of this decree on 20th of March, 1880. He applied for mutation of names and obtained it, but a curious error occurred and is really the cause of the present litigation. Nand Kishore's name was recorded as the owner of 3½ biswas instead of four biswas, the balance of 1½ biswas remaining under the name of Gauri. The khewat stood thus:—

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2 Biswa	Jamna	} instead of {	2 Biswa Musammat Jamna,
2½ Biswa	Gauri		2 Biswa Gauri.
2 Biswa	Dilwari	} instead of {	2 Biswa Dilwari.
3¾ Biswa	Nand Kishore		4 Biswa Nand Kishore.

The next fact to be noted is that the shares standing in the name of Musammat Jamna and Dilwari were attached and sold in execution of a decree obtained by the United Service Bank and were purchased by one Kali Charan on the 22nd of June, 1883.

Kali Charan, however, apparently did not obtain possession and he sued for it in 1890. His suit came up to this Court where in 1894 he was held entitled only to the two biswa of Dilwari.

In that same year, however, Kali Charan purchased the two biswa which had stood in Musammat Jamna's name from the two remaining sons, Gauri and Dilwari. Piyare Lal had died in the meantime.

In the meantime also Gauri's original 2 biswa share had, prior to 1891, been acquired by Musammat Jafri Begam. Gauri had sued to recover it but his suit was dismissed in 1891.

When therefore in 1894 Kali Charan purchased the two biswa which stood in Musammat Jama's name, the khewat stood as follows :—

4 Biswa	...	Kali Charan.
2 Biswa	...	Jafri Begam.
¼ Biswa	...	Gauri.
3¾ Biswa	...	Nand Kishore.

Gauri's name remained up to the year 1901. Nand Kishore was the lambardar of the mahal.

One other piece of litigation must here be mentioned.

In 1888 Nand Kishore, seeing the result of Kali Charan's suit in which it had been held that Musammat Jamna had no title to the two biswa share which stood in her name, brought a suit against Gauri and all others concerned for a declaration that, as Musammat Jamna had no share, i.e. Nand Kishore, by acquiring the shares of Mul Chand and Piyare Lal had become the owner of five biswa share. It was finally held on appeal on the 22nd of September, 1899, as between the parties that he, Nand Kishore, was the owner of four biswas only. The date of this decision should be noted; also the facts that Nand Kishore was the

lambardar and that his name stood recorded as against only $3\frac{1}{2}$ biswas only.

In 1901 the one-fourth biswa standing in the name of Gauri was attached and sold in execution of a decree obtained against him, Gauri, by one Narain Das. It was purchased by Kalka Prasad on the 29th of August, 1901. The latter obtained mutation of names on the 2nd of August, 1902. He is said to have paid off a pre-existing mortgage of Rs. 150 which was on the property. The khewat then stood as follows :—

Kali Charan	... 4 Biswas
Jafri Begam	... 2 Biswas.
Kalka Prasad	... $\frac{1}{4}$ Biswa.
Nand Kishore	... $3\frac{1}{2}$ Biswas.

In the year 1910 Kali Charan applied to the Revenue Court for partition of his four biswa share.

The usual notice and proclamation was issued to the other co-sharers, the date fixed being 10th of September, 1910. On the 9th of September, 1910, i.e., within the time allowed by the proclamation, Manmohan Lal, the present plaintiff respondent, one of the two sons of Nand Kishore, who had died, applied for partition of his $\frac{1}{2}$ share in the $3\frac{1}{2}$ biswas which stood in the name of himself and his brother Govind Prasad. On the 10th of September, 1910, Kalka Prasad applied for partition of his $\frac{1}{4}$ th biswa share, i.e., a five biswansi share.

Kalka Prasad's application was not within time. If he wished to have his share partitioned he ought to have applied before the date fixed. However, no objection was raised by anybody and the partition was carried out and Kalka Prasad was put into possession of his separate mahal by the Revenue Court. The partition came to an end on the 1st of September, 1911.

Presumably it came into force according to law from the 1st of July, 1912. Govind Prasad's $\frac{1}{2}$ share in the $3\frac{1}{2}$ biswas was made into a separate mahal. There was a dispute between Manmohan Lal and Gobind Prasad and under an award, dated the 2nd of December, 1912, Gobind Prasad's share in the village was transferred to Manmohan Lal. The latter now has sued Kalka Prasad for possession of the $\frac{1}{4}$ th biswa share which the latter now holds as a

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separate mahal. The suit was instituted on the 18th of August, 1913. The court of first instance held that the plaintiff not having contested Kalka Prasad's claim in the partition case, and not having claimed as his share any more than $\frac{1}{2}$ of the $3\frac{1}{2}$ biswas, his present suit was barred by the provisions of section 233, clause (k), of the Revenue Act and dismissed the suit *in toto*. The lower appellate court held that the claim was thus barred only in respect of one-half, that in regard to the other half, the plaintiff was the successor in title of Gobind Prasad and as Gobind Prasad was not an applicant for partition and had had no legal opportunity of objecting to Kalka Prasad's application for partition his, Gobind Prasad's, claim in the Civil Court could not be barred by section 233 (k) of the Revenue Act and the plaintiff in respect to half of the property was the successor in title of Gobind Prasad. He therefore decreed half of the claim and dismissed one-half.

The defendant appeals in regard to one-half and the plaintiff objects as to the half of his claim disallowed and also in respect to mesne profits which the court below refused to grant.

The fourth ground of appeal is that the plaintiff and Gobind Prasad were members of a joint Hindu family and the plaintiff was the manager thereof and his application for partition of the 9th of September, 1910, was on behalf of the family and was binding on Gobind Prasad as well and therefore the whole claim is barred by section 233 (k) of the Revenue Act. This plea is based on the plea that the plaintiff, when he applied for partition applied for partition of the whole $3\frac{1}{2}$ biswa share owned by him and his brother. This latter point is really a question of fact, and it was found against the appellant in the court below. It was rightly held against him.

The ten biswa original share, i.e., *asli* share, has by a previous partition become a mahal in itself, mahal zangari, and was a 20 biswa mahal. Manmohan Lal applied for partition of $3\frac{1}{2}$ biswas out of the 20 biswas of mahal zangari, i.e., one-half of the original $3\frac{1}{2}$ biswas out of the original 10 biswas. His petition clearly shows this, as he states that the area of his share would be 49 bighas, 2 biswas, 8 biswansis, out of a total area of 262 bighas odd which made up mahal zangari

It is clear, therefore, that the plaintiff applied only for partition of his own share in the mahal and that no action on his part in so doing would have any binding effect on Gobind Prasad.

The fourth ground of appeal is thus of no force.

The third ground of appeal has not been pressed. There are thus left the first two only.

(1) Because the whole suit is barred by section 233 (k), Act III of 1901.

(2) Because the suit is barred by the principle of *res judicata*.

The objections are :—

(1) that the plaintiff's claim as to his own personal half share is not barred by section 233 (k), Act III of 1901 ;

(2) that the plaintiff is entitled to his mesne profits.

Here I must note that one point was raised in the argument before me which was not raised in either of the courts below nor even in the grounds of appeal to this Court.

It is urged that Kalka Prasad, having paid off a prior mortgage of Rs. 150, is entitled to retain the property until that sum is repaid to him.

Now the fact that this mortgage ever existed or that it was redeemed by Kalka Prasad was not put forward in the written statement, nor was any issue raised upon it, or decided. The only trace of this mortgage on the record is to be found in the judgement of the first court where there is a mention of it.

Kalka Prasad filed objections as a respondent in the court below, but even in that court he did not put forward this plea.

In its decision on the 5th issue the court of first instance says :—

“ It is proved that the defendant after purchasing the property in question redeemed a mortgage which stood against it by payment of a sum of Rs. 150.”

The fifth issue was in regard to the suit being barred by section 115, Evidence Act, and section 41, Transfer of Property Act, and had no concern with the payment of this mortgage. The point was not taken in the court below and there is therefore no finding as to the actual facts by that court. In my opinion it is too late to raise it here in second appeal. I, however, do not propose to decide this appeal. It seems to me that the questions of law involved are of considerable importance and should be decided by

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a larger Bench. I therefore refer this appeal to a Bench of two Judges for decision.

Mr. *Nihal Chand* and *Munshi Iswar Saran*, for the appellant.

The Hon'ble *Munshi Gokul Prasad*, for the respondent.

RICHARDS, C. J.—The facts connected with this appeal are very fully stated in the order of my learned colleague who referred the case. The suit is one to recover possession of certain property which originally was a quarter biswa *asli* share which has now been by partition formed into a separate mahal. It appears that in the year 1910 one Kali Charan made an application in the Revenue Court for partition of his four biswa share. A $3\frac{3}{4}$ biswa stood in the names of the plaintiff and his brother, who are the sons of one Nand Kishore. One Kalka Prasad, the present defendant, was also recorded in respect of one-fourth biswa. This is the one-fourth biswa that is now in dispute. On the day after the date fixed for the hearing of objections this Kalka Prasad made an application for the partition of the one-fourth biswa which stood in his name. He made this application in the same proceeding as the proceeding of Kali Charan. The result was that the partition was held and a mahal of half of the $3\frac{3}{4}$ biswas was made in favour of the plaintiff. Kalka Prasad had a mahal formed of the one-fourth biswa which stood in his name and Kali Charan had a mahal formed of the four biswa share. The plaintiff has now instituted the present suit to recover possession of the mahal allotted to Kalka Prasad. He was met with various objections. The lower appellate court decided in favour of the plaintiff as to half, and in favour of the defendant as to the other half. It held that the plaintiff having regard to what previously occurred was not entitled to the share, the half which he claimed in his own right, but the half which he claimed by succession to his brother the court has held him entitled to. The defendant has appealed and the plaintiff has filed a cross-objection.

Three questions of law have been raised for our decision; firstly it is said that having regard to the partition the suit is barred by the provisions of section 233 (c) of the Land Revenue Act. The second point is that the plaintiff not having included in his

application for partition all the shares to which he was entitled cannot now claim what he omitted. The third ground is that the claim is barred by the rule of *res judicata*. With regard to the first point, section 233 of the Land Revenue Act provides that no person shall institute any suit or other proceeding in the Civil Court "with respect to partition or union of mahals" except as provided in sections 111 and 112. I find it impossible to hold that the present suit is a suit "in respect of partition or union of mahals" and I have given my reasons for so holding in the judgement this day delivered in Letters Patent Appeal No. 94 of 1915. With regard to the second point I see no reason why a person entitled to more than one share in a mahal is necessarily bound to include in his application for partition all that he is entitled to. No doubt the revenue authorities might, under certain circumstances, refuse to make partition unless the applicant was prepared to have partition of all he was entitled to. No doubt also, if a question subsequently arose as to the title of the plaintiff, an inference might be drawn against the plaintiff, (specially if there was a conflict of evidence) from the fact that when he had an opportunity of putting forward a claim to the disputed share he had not done so. But these matters are entirely outside the question which we have to decide. Order II, rule 2, of the Code of Civil Procedure provides that suits in a Civil Court shall include the whole of the claim to which the plaintiff is entitled. But order II, rule 2, does not apply to proceedings in the Revenue Court under the Land Revenue Act. In my opinion the mere fact that the plaintiff did not claim all that he was entitled to at the time of partition does not necessarily bar his present claim. The third point is that of *res judicata*. The rules of *res judicata* will be found in section 11 of the Code of Civil Procedure. It only arises when the first court is competent to decide the subsequent suit. No doubt, under section 111 of the Revenue Act, under certain circumstances a Revenue Court becomes a Civil Court and its decrees are to be treated as the decrees of the Civil Court. Those circumstances are to be found in the section itself. Section 111 says:—"If, on or before the day so fixed, any objection is made by a recorded co-sharer, involving a question of proprietary title which has not

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been already determined by a court of competent jurisdiction, the Collector may either—

(a) decline to grant the application until the question in dispute has been determined by a competent court, or

(b) require any party to the case to institute within three months a suit in the Civil Court for the determination of such question, or

(c) proceed to inquire into the merits of the objection.

Clause 3 provides :—“ If the Collector decides to inquire into the merits of the objection, he shall follow the procedure laid down in the Code of Civil Procedure for the trial of original suits.”

Section 112 provides :—“ All decrees passed under sub-section (3) of the preceding section shall be held to be decrees of a court of civil jurisdiction of the first instance.” It thus appears that it is only when an objection is made by a recorded co-sharer involving a question of proprietary title which the Collector determines to decide himself that the decision of the Revenue Court can be held to operate as *res judicata*. In the present case there was no objection filed at all. Kalka Prasad filed no objection but merely put in a claim (out of time) to have the one-fourth biswa formed into a separate mahal. No question of title to this one-fourth biswa was ever raised by an objection nor could it have been raised. The court never determined to try the question nor has it in fact ever given any decision on the point. It seems to me therefore that the present suit is not barred by the rule of *res judicata*.

Some attempt has been made to contend that the defendant was entitled to set up a prior mortgage which he alleges that he paid off. In my opinion this contention is disposed of by the remarks of our learned colleague who referred the case and I entirely agree with the view he has taken.

As to the plea of section 41 of the Transfer of Property Act in my opinion this is disposed of by the lower appellate court and so far as it is a finding of fact it is binding on us in second appeal.

In my opinion the appeal should be dismissed and the objection should be allowed and the decree of the court below should

be modified by giving the plaintiff a decree as claimed except as to mesne profits.

TUDBALL, J.—I agree. It seems to me that there can be no question that section 233 (b) and the rule of *res judicata* do not bar the present claim in any way. As regards order II, rule 2, it is clear that that portion of the Code of Civil Procedure does not apply to the courts acting under the Revenue Act. That Act lays down a procedure in chapter IX for all Revenue Courts. It does make certain portions of the Civil Procedure Code applicable to those courts, but only to a very small extent, and certainly it does not apply order II, rule 2. As far as I can see there is nothing in the Revenue Act which will prevent a man from applying in the Revenue Court for the partition of a portion of his share in the mahal and to have that portion separated into a distinct mahal. Under these circumstances it is impossible to apply the principles of order II, rule 2, in partition cases in the Revenue Court. With regard to the plea raised under section 41 of the Transfer of Property Act this is completely settled by the judgement of the court below. All the circumstances of the case negative the plea that there was any consent either express or implied.

In my opinion the appeal should be dismissed. The cross-objection should be allowed so far as the claim for possession of the plaintiff's half share is concerned and also as to costs. I would disallow the claim for mesne profits.

MUHAMMAD RAFIQ, J.—I concur.

BY THE COURT.—The order of the Court is that the appeal will be dismissed, the cross-objection will be allowed save in respect of mesne profits. The plaintiff's claim shall stand decreed except as to mesne profits with costs in all courts.

Appeal dismissed. Cross-objection partly allowed.

REVISIONAL CRIMINAL.

Before Justice Sir George Knox.

EMPEROR v. BHIMA AND ANOTHER.*

Criminal Procedure Code, section 239—Procedure—Joint trial—Thief and receiver triable together.

Held that, in the absence of evidence clearly disassociating the act of receiving the stolen property from the theft thereof, the theft and the receipt of the

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