

expressly doing so, as it did in the case of security for good behaviour. The order of the District Magistrate rejecting the application was in our opinion right. There was no allegation that there had been any change in the circumstances between the time that the Magistrate made his order and the application to the District Magistrate. The only thing that can be said against the District Magistrate's order is that it was made without giving the applicant or his pleader an opportunity of being heard. If this view which we have just expressed be correct, we think that applications for revision made to the High Court in respect of orders to give security to keep the peace ought not to be rejected *solely* on the ground that the applicant has not first made an application to the District Magistrate. The High Court is the only court which can interfere in revision in a matter like this. We reject the present application to this Court, but in doing so our order is to be without prejudice to any application in revision to this Court from the first order directing security to be given to keep the peace, or to any further application which the applicant may be advised to make to the District Magistrate under section 125.

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*Application rejected.*

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## FULL BENCH.

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*Before Sir Henry Richards, Knight, Chief Justice, Justice Sir Pramada Charan Banerji and Mr. Justice Tudball.*

BIJAI MISIR AND ANOTHER (PLAINTIFFS) v. KALI PRASAD MISIR AND OTHERS (DEFENDANTS).\*

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*Act (Local) No III of 1901 (United Provinces Land Revenue Act), section 233 (k)—Partition—Suit in civil court to recover property which had been the subject of a partition.*

Certain co-sharers in a village applied for partition of their shares under section 107 of the United Provinces Land Revenue Act, 1901. Notice was issued to all the recorded co-sharers, as required by section 10 of the Act, and thereupon an application was made by other co-sharers, under clause (2) of the section, praying for partition of their shares. In that application the applicants set forth the extent of the shares which they prayed should be formed into one lot, or *qura*. Subsequently a proceeding was drawn up under

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\* Appeal No. 61 of 1916, under section 10 of the Letters Patent.

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section 114 of the Act, declaring the basis upon which partition was to be effected. Some time after the partition was completed certain of the parties to the partition proceedings instituted a suit in a civil court to recover possession of shares other than those specified in the application aforesaid, upon which the partition had been based. *Held* by BANERJI and TUDBALL, J J., RICHARDS, C. J., *dissentiente*, that the suit was barred by section 233 (b) of the Act. *Muhammad Sadiq v. Laute Ram* (1) referred to. *Shambhu Singh v. Daljit Singh* (2) distinguished.

THIS was a suit for possession of property which had been the subject of a partition by a Revenue court. The property in dispute belonged to one Ganga Saran. Bijai and Sardar plaintiffs were the first cousins of Ganga Saran, and Kali Prasad was his nephew. Plaintiffs brought a suit for possession of shares in three villages on the allegation that they and Deoki were nearer reversioners and as such entitled to one-third each of the property of Ganga Saran deceased and Kali Prasad being one degree more remote, had no right to succeed. Plaintiffs applied for mutation in respect of Bankata and Kali Prasad objected and claimed a share and also set up Musammat Shyamraji, who claimed the whole property as daughter of Ganga Saran. The allegation was that whenever plaintiffs set up a claim Shyamraji was put forward, and so under this undue influence plaintiffs entered into a compromise taking one-third for themselves, and giving one-third to Kali Prasad, and one-third to Deoki's sons. They therefore brought this suit for possession of the one-third in the possession of Kali Prasad. The defence was that there was no undue influence, that the compromise was entered into as a settlement of family dispute and was valid, that the plaintiff allowed this share to be entered in Kali Prasad's name in the partition proceedings and the suit was barred as regards Bankata by section 111 and section 233 of the Land Revenue Act. The Munsif held that there was no undue influence and the compromise was consequently valid and the suit was barred by section 111 and section 233 of the Land Revenue Act. The Judge found that the agreement of compromise was not stamped sufficiently and was unregistered and was therefore inadmissible in evidence, that there was undue influence, and the suit was not barred by section 111 and section 233 of the Land Revenue Act. He decreed the suit as regards all the three villages. Defendants appealed to the High Court, and a single Judge of the Court decreed the

(1) (1901) I. L. R., 28 All., 291. (2) (1916) I. L. R., 38 All., 248.

appeal as regards Bankata, holding that the suit was barred by section 233 (k) of the Land Revenue Act, and dismissed the appeal as regards the other villages. The plaintiffs preferred a Letters Patent Appeal, and, there being a difference of opinion, the matter was referred to a Full Bench.

Munshi *Harnandan Prasad*, for the appellant :—

The suit is not barred by section 233 (k) of the Land Revenue Act. Mere omission to assert his right by the plaintiff would not bar him. The plaintiff does not seek to disturb the partition. He only wants a declaration that he is entitled to a particular portion of the property. The object of section 233 (k) of the Land Revenue Act is that the units of the mahal should not be disturbed i. e., if a particular portion is allotted to one mahal, a man should not be allowed to have it allotted to another mahal by the institution of a suit. The present suit will have no such effect and is consequently not barred; *Kalka Prasad v. Manmohan Lal* (1), *Shambhu Singh v. Daljit Singh* (2).

Dr. *Surendra Nath Sen*, for the respondents.

BANERJI, J.—In the suit out of which this appeal has arisen the plaintiffs claimed, among other reliefs, possession of a share in the village of Bankata, and it is this part of the claim with which we are concerned in this appeal. It appears that certain co-sharers in the aforesaid village applied for partition of their shares under section 107 of the Land Revenue Act. Notice was issued to all the recorded co-sharers as required by section 110 of the Act, and thereupon an application was made on the 11th of September, 1912, by the parties to this suit and other co-sharers under clause (2) of the section, praying for partition of their shares. In that application they set forth the extent of the shares which they prayed should be formed into one lot or *qura*. After this application was made, a proceeding was drawn up by the Revenue Court under section 114 of the Act, declaring the basis upon which partition was to be effected, and in that proceeding the extent of the plaintiffs' share was put down as that mentioned in the application to which I have referred. Nearly a year after this, that is, in August, 1913, the plaintiffs

(1) (1916) I. L. R., 88 All., 302.

(2) 1916) I. L. R., 88 All., 243.

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instituted the present suit. The question to be determined is whether the suit is barred by the provisions of section 233 (k) of the Land Revenue Act. I should have considered that the point was fully concluded by authority in this Court, had it not been for the decision in the recent case of *Shambhu Singh v. Daljit Singh* (1). In my opinion the present suit is in substance a suit in respect of the partition of a mahal within the meaning of clause (k) of section 233. That section provides that no Civil Court shall take cognizance of a suit in respect of the several matters mentioned in the section. One of these matters is "partition or union of mahals, except as provided in sections 111 and 112." In determining whether the section applies we have to look to the substance of the claim and not to the form in which it is dressed up. If, as observed by STRACHEY, C. J., in *Muhammad Sadiq v. Laute Ram* (2), the object of the suit is to establish the plaintiff's ownership and possession in respect of property as to which the revenue authorities in making a partition have declared that it should go to the defendant, that is a matter relating to partition, and a Civil Court is forbidden to take cognizance of it by the provisions of section 233. I am unable to distinguish this case from the case last mentioned, which is very similar to the present. It is a Full Bench decision by five Judges of this Court, and the view taken in it was held in subsequent cases also. I see no reason to depart from the course of rulings on the point. No question of *res judicata*, in my opinion, arises in a case like this. Had the question of the title of the parties been decided by the Revenue Court under sections 111 and 112, the matter would have been *res judicata*. In my opinion the present suit is barred by reason of the prohibition contained in section 233, and not on the ground of *res judicata*. It is not necessary for the purposes of this case to say whether I agree or disagree with the ruling in *Shambhu Singh v. Daljit Singh* (1) referred to above, as the facts of that case are different from those of the present case, but if it is deemed that the principle involved in that case is the same as that which arises in this, I am unable, with great deference, to acquiesce in all that was said in that case. In my judgement the decision of the learned Judge

(1) (1910) I. L. R., 36 ALL., 243. (2) (1901) I. L. R., 28 ALL., 291.

of this Court from which this appeal has been preferred under the Letters Patent is correct and I would dismiss the appeal.

**TUDBALL, J.**—The facts of the case have just been stated by my learned colleague **BANERJI, J.** It is unnecessary to repeat them. In substance the present suit is merely an effort to turn round and annul the partition made by the Revenue Court. The appellants were parties to that partition, the property in dispute was the subject matter of that very proceeding and the present case is nothing but a very very clear instance to which section 233, clause (k), applies beyond doubt. The case is clearly distinguishable from the case of *Shambhu Singh v. D aljit Singh* (1), for in that suit the subject matter thereof had not been the subject matter of a partition case in any way at all. I would dismiss the appeal.

**RICHARDS, C. J.**—The facts have been fully stated by my learned brother **BANERJI**. The property claimed by the plaintiff in the present suit has in recent partition proceedings been allotted to the defendants. The plaintiff was a party to these proceedings and there is no doubt that he could then have put forward the title he now alleges (sections 111-112, Land Revenue Act). While I do not agree with my learned brothers that the present suit is barred by the provisions of section 223 (k), I quite appreciate the objection of allowing parties to partition proceedings in the Revenue Court to re-open in the Civil Court questions of title which could, and ought, to have been decided before partition, in the manner provided by the Revenue Act. If the result of the view taken by the majority of the Court in this case is to settle, that parties to partition proceedings in the Revenue Court cannot re-open questions of title in the Civil Court, which have been or ought to have been decided before partition, some good and little harm will probably be done, particularly if the Revenue Courts by their rules and practice give proper facility and opportunity for the raising and decision of such questions. If, however, as a consequence of our decision persons are prevented from asserting their rights in the Civil Court merely because of partition proceedings in the Revenue Court to which they were not parties (or in which they were not interested to assert such

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rights) grave injustice will often be done. The only question for decision in the present appeal is whether or not the Civil Court could take cognizance of the present suit having regard to the provisions of section 233 (k) of the Land Revenue Act. The suit is in form a suit which is brought every day in the Civil Court. It is an ordinary suit for possession of land. Possession of the land in dispute is the appropriate relief for the plaintiff to seek. It is only after, at least partial investigation, that the suit could possibly be said to have been instituted contrary to the provisions of section 233 (k), notwithstanding the partition proceedings. One at least of my colleagues would, I think, have held the suit cognizable had it not been for the fact that the plaintiff was a party to the proceeding in the Revenue Court. In the case of *Shambhu Singh v. Daljit Singh* (1), there had also been partition proceedings and the plaintiff was seeking to recover possession of property which had been dealt with (wrongly it is true) in those proceedings. The court below had held that the suit was barred by section 233 (k). I gave my reasons at some length in that case for holding that the suit was not barred and I referred to another case decided about the same time by the same Bench; *Kalka Prasad v. Manmohan Lal* (2). My brother TUDBALL expressed his concurrence in both cases. I did not understand him to take exception to anything I said in the course of my judgement. At the same time it must be admitted that the facts in the case of *Shambhu Singh v. Daljit Singh* (1), differ materially, at least on the merits. It is, however, common to all three cases that there had been recent partition proceedings in the Revenue Court and the property in dispute in the Civil Court had been dealt with by the Revenue Court in the partition proceedings. Section 233 (k) 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 by sections 111-112." The question is, what is the meaning of "partition or union of mahals?" The expression "partition" is followed by the expression "union of mahals." In the course of the argument it was said, (with the approval of both my colleagues) that "partition" meant the

(1) (1916) I. L. R., 38 All., 243.

(2) (1916) I. L. R., 38 All., 302.

opposite of "union of mahals." I agree, and think that the word "partition" and the word "union of mahals" refer to "units" of area which the revenue authorities create in the course of partition proceedings. If this is the correct meaning of the expressions, the institution of the present suit was not contrary to the provisions of section 233 (k). If the plaintiff in this suit was successful, the property would remain in the same unit in which it was placed by the Revenue Court, notwithstanding the plaintiff's decree for possession. The "unit" would not be affected, though the ownership of the property in it would be. If the meaning which I give is the correct meaning, then a suit which seeks to affect a "unit" created by the Revenue Court as a "unit" cannot be instituted by any person whether he was or was not a party to partition proceedings and the meaning of a badly drawn section becomes comparatively clear. There are obvious reasons why the Legislature might have confined the power of altering and creating revenue areas (which for the want of a better name I call "units") to the Revenue Courts. The reasons for the exclusion (even partial exclusion) of the power to decide questions of title or the right to possession to property in those units for the Civil Court is not so obvious. My learned colleagues agreed that "partition" meant the opposite of "union of mahals," still they seem to think that it also means the determination of the title to the specific land allotted. It seems to me that to assert that there has been no "partition" in the Revenue Court because the plaintiff was not a party to those proceedings is to assert contrary to fact. The section does not say that a person cannot institute a suit in respect of a partition to which he was a party. It seems to me that the very words "except as provided by sections 111-112" show that the expression "partition" is not confined to divisions actually made, because sections 111-112 contemplate the raising of questions of title before partition. The section cannot be read as meaning that no person can institute a suit in the Civil Court which can in any way affect a contemplated division of zamindari. Such suits are instituted every day before any proceedings are taken in the Revenue Court and appear to be recognized by the Code of Civil Procedure. The rights of the

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parties are declared by the Civil Court and it is only the actual division that is carried out by the Revenue Court. If you give any meaning to the expression "partition" other than the meaning I have given it and substitute that other meaning of the word "partition," and then read the section giving the language its ordinary meaning and I think you will find that confusion at once arises. It is said that the words "except as provided by sections 111-112" show that the expression "partition" means or at least includes the actual division as between the parties and the determination of their title. It may possibly be that the framers of the section hoped the introduction of these words would prevent subsequent questions of title being raised. Another explanation might be to obviate some contradiction or inconsistency between sections 111-112 and section 233(k). If the Legislature intended to prevent questions of title being re-opened after partition, it would have been simpler, fairer, and less calculated to do injustice if the rules of "*res judicata*" as laid down in the Code of Civil Procedure had been incorporated. It is unnecessary for me to repeat what I have said in my judgements in *Kalka Prasad v. Manmohan Lal* (1) and *Shambhu Singh v. Daljit Singh* (2). As the view of the majority of the Court will prevail, I need not consider what the order of this Court would have been had the views of my colleagues coincided with mine.

BY THE COURT.—The order of the Court is that the appeal is dismissed with costs.

*Appeal dismissed.*

## REVISIONAL CIVIL.

*Before Justice Sir George Knox.*

SUNDAR NATH (PLAINTIFF) v. MALLU AND OTHERS (DEFENDANT).\*

*Civil Procedure Code (1908), order V, rule 3; order IX, rule 12—Order for personal attendance of plaintiff—Non-attendance of plaintiff on adjourned date—Dismissal of suit.*

An order made by a court for the personal appearance of a party to a suit on a particular date does not imply that the party to whom it is issued is bound to appear in any subsequent date to which the suit may be adjourned.

\* Civil Revision No. 193 of 1916.

(1) (1916) I. L. R., 38 All., 902.

(2) (1916) I. L. R., 38 All., 243.

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