APPELLATE CIVIL.

Before Mr. Justice Mukerji and Mr. Justice Ashworth, and on a reference also before Sulaiman, J.

FAQIRA AND ANOTHER (PLAINTIFFS) *v.* HARDEWA AND OTHERS (DEFENDANTS).*

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July, 26.
November, 3.
December, 22.

Civil Procedure Code, order XXII, rule 4, sub-rule (3)—Abatement of appeal—How far abatement as regards one defendant affects the others—Act (Local) No. III of 1901 *(United Provinces Land Revenue Act), sections* 111(*a*) *and* 233 (*k*)*—Partition—Ouster of jurisdiction of civil court.*

A suit for a declaration of title was filed against two separate sets of defendants and was dismissed, and an appeal against this decision was also dismissed. The plaintiffs appealed to the High Court, and pending this appeal one of the defendants of the second set died and no steps were taken within time to bring his heirs on to the record. *Held* by SULAIMAN, MUKERJI, and ASHWORTH, JJ., (on a special reference as to how far the appeal had abated) that the appeal abated as to the second set of defendants, but not as to the first set, whose interests were separate and distinct from those of the second.

Held also by MUKERJI and ASHWORTH, JJ., that the suit, having been filed after the commencement of partition proceedings in a court of revenue, was not maintainable.

THE facts of this case were as follows :—

The appellants with two others instituted a suit for declaration of title. Their case was that in the khewat their proper share was 60 out of an entire quantity of 148 shares, the share of the defendants Nos. 1 to 3 was 79 out of the same quantity and of the defendants Nos. 4 to 8, seven out of the same quantity. According to the khewat the entire share was divided into 89 portions and the

*Second Appeal No. 1569 of 1925, from a decree of P. C. Plowden, Additional Judge of Meerut, dated the 9th of July, 1925, confirming a decree of P. C. Mogha, Subordinate Judge of Muzaffarnagar, dated the 12th of February, 1925.

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plaintiffs were recorded in respect of 3, defendants Nos. 1 to 3 in respect of 79 and the remaining defendants Nos. 4 to 8 with respect to 7 shares. The plaintiffs sought, as already stated, a declaration of title with the ultimate object of applying to the revenue court for correction of the khewat.

The suit was resisted by the defendants Nos. 1 to 3 alone and they maintained, *inter alia*, that the khewat was correct. The defendants Nos. 4 to 8 did not contest the suit.

The suit was dismissed on the ground of want of jurisdiction in the civil court because certain partition proceedings were pending in the revenue court. After the institution of the second appeal the defendant No. 4, Pat Ram, died and his heirs were not brought on the record. It was contended on behalf of the respondents that Pat Ram's legal representatives not having been brought on the record, the whole of the appeal had abated. The appeal having come before a Bench consisting of MUKERJI and ASHWORTH, JJ., the Bench, whilst agreeing that the appeal abated so far as the deceased respondent Pat Ram was concerned, differed as to how far this conclusion affected the continuance of the appeal as against the other respondents. The following question was therefore submitted to the Hon'ble the CHIEF JUSTICE with a view to its being decided by a larger Bench :—"In the circumstances of the present case, can the appellants be permitted to be heard in the absence of the legal representatives of the deceased Pat Ram?"

The point referred was then considered by a Bench consisting of SULAIMAN, MUKERJI and ASHWORTH, JJ., who, after hearing further argument, came to the unanimous decision that the appeal failed as against defendants Nos. 4 to 8, but not as against defendants Nos. 1 to 3.

The appeal then went back to the original Bench for disposal.

Babu *Piari Lal Banerji* and Babu *Surendra Nath Gupta*, for the appellants.

Dr. *Kailas Nath Katju* and Mr. *R. N. Gurtu*, for the respondents.

MUKERJI, J.—The plaintiffs in the court of first instance are the appellants before us. They instituted the suit out of which this appeal has arisen to obtain a declaration that the number of shares recorded in their favour in the khewat is too little, and that instead of there being 60 shares out of 146 shares they have been recorded as owning 3 shares out of 89 shares.

The suit was contested by the defendants Nos. 1 to 3 and was dismissed by the courts below on the ground of limitation and on the ground that maintenance of the suit was barred under the provision of section 233 (*k*) of the Land Revenue Act. The first court went into the merits of the matter and was of opinion that if there were no bar the plaintiffs were entitled to succeed. The lower appellate court has not gone into the merits of the case.

The two points that we have to consider are (1) whether the suit was barred by time, and (2) whether it was barred by section 233 (*k*) of the Land Revenue Act.

Point No. I.—It appears that there was a partition in the village at the instance of certain parties who are not before us. The shares of these people who had applied for partition were separated in 1324 F. (1st of July, 1916 to 30th of June, 1917). It was then that the entry in the khewat, now complained of, was made. The Plaintiffs stated in paragraph 9 of the plaint that they asked the defendants to get the khewat corrected, but they declined to do so. The plaintiffs, however, did not adduce any evidence to prove that they had actually made

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any request to the defendants to have the khewat corrected. We must, therefore, take it that there was no request made and no such request was refused. The question then is, what would be the date for starting limitation under article 120 of the Limitation Act?

It appears that the reason for the institution of the present suit was that on the basis of the alleged wrong entry in the khewat the defendants Nos. 1 to 3 filed an application in the revenue court for partition. This application was made on the 3rd of November, 1923, and the 21st of December, 1923, was fixed for the co-sharers, including the plaintiffs, to appear and file objections, if any, to the application for partition. On the 19th of December, 1923, the present suit out of which the appeal has arisen was filed. We have to take it, therefore, that the present suit was filed in order to prevent the defendants Nos. 1 to 3 from obtaining the benefit of the entry in their favour in the khewat by means of partition. No fact has been alleged or proved which establishes that previous to the filing of the application for partition the fact had been brought to the notice of the plaintiffs that there was a wrong entry in the khewat, and that advantage of that wrong entry was likely to be taken by the defendants Nos. 1 to 3. In the circumstances my opinion is that "the right to sue", within the meaning of article 120 of the Limitation Act, accrued to the plaintiffs on the filing of the application for partition and not earlier. In this view the suit would not be time-barred.

On the question as to whether the suit is barred by the provisions of section 233 (*k*) of the Land Revenue Act the position is this. The application for partition, as already stated, was made on the 3rd of November, 1923. On that application being made the revenue court became seised of the whole case as between the plaintiffs on the one hand and defendants Nos. 1 to 3 on the other. If any question of title arose between the parties, the

revenue court became competent to deal with it in certain ways mentioned in section 111 of the Land Revenue Act. If no question of title arose, the only thing that the revenue court had to do was to distribute the property in any manner it deemed fit, and the civil court would have no voice in the matter. Ordinarily, of course, a question of title has to be decided by the civil court, and the civil court alone. In order to avoid a conflict of jurisdiction, section 111 of the Land Revenue Act was framed. It gives the revenue court certain directions as to how to proceed in the case of a question of title being raised before it. Section 110 of the Land Revenue Act directs that the Collector, on receiving an application for partition, shall see if, on the face of it, it is in order and shall issue a proclamation if he finds that the application has nothing objectionable on the face of it. A date has to be fixed by the Collector, and on the date fixed, the co-sharers, if they are recorded in the khewat as such, have to appear before the Collector and to raise such objections as they may be advised. If the objection should relate to title, the Collector has one of three things to do: (*a*) decline to grant the application until the question in dispute has been determined by a court of competent jurisdiction, (*b*) ask any of the parties 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. It will be noticed that the Collector, if he so wishes, can try the question of title himself. If he does not want to try the question himself, he can confer jurisdiction on the civil court by asking either of the parties to institute a suit within three months. This should exhaust the ways in which the question of title raised has to be decided, that is to say, either the Collector has to decide it or he should call upon any of the parties to institute a suit, but in that case the suit should be instituted in the civil court. Thus having exhausted the ways and means of having a question of

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title decided, the third course open to the Collector is to decline to grant the application as mentioned in clause (*a*) of section 111 of the Land Revenue Act. The question is what this clause (*a*) means. Does it mean that the Collector has to refuse the application for partition altogether or can he hold it in suspense till the question of title raised has been determined by a competent court? As I read the *whole of section* 111, the direction is that the Collector may dismiss the application *in toto* saying, as a part of his order, that an application like that shall not be maintained till it is armed with a decree of a competent court, which would ordinarily mean a civil court. This would prevent the presentation of another similar application for partition the next day. The idea is that a second or third application for partition shall not be maintained till the question of title raised has been finally determined by a competent court. The clause (*a*) may again mean that the Collector may keep the application in suspense, where, for example, a civil suit may already be pending between the parties at the date of the application. In my opinion, even in the latter case, the result would be the same, namely, the Collector would deny jurisdiction in himself to decide the question of title. It cannot be the case that simultaneously the question of title should be pending both before the revenue court and the civil court.

I am fortified in my reading of clause (*a*) to section 111 by this fact that we do not find any directions like those to be found in sub-sections (2) and (3) of section 111 with regard to the clauses (*b*) and (*c*) of sub-section (1). In the case of clause (*b*), sub-section (1), we find the provision in sub-section (2) that the Collector is told how he is to proceed if he has once taken action under clause (*b*). In the case of the Collector proceeding under clause (*c*), sub-section (1), he is told, by sub-section (3), how he is to proceed. But in the case of the

Collector proceeding under clause (*a*) of sub-section (1), he is not told what he has to do. The only inference can be that, the Collector having declined to entertain the application for partition, no occasion for giving him any further direction arises. In other words, my reading of section 111 is this. First, the Collector declines jurisdiction where the ground for his declining jurisdiction for partition would be that the applicant has not got a decree of a competent court in support of his title. For example, a man whose name is not recorded in the khewat or a man whose name is recorded in the khewat for a small share but he asks for a larger share, comes with an application for partition. The Collector may say :—" I refuse to entertain your application. If you want to apply for partition, you must come armed with a decree of the civil court declaring that you are entitled to the share claimed or to the larger share ". Secondly, the Collector may assume jurisdiction, and in that case the question will be whether he will try the question of title himself, or whether he will have it decided by the civil court in the regular way. In the latter case he has to limit the time within which he would direct one of the parties to have the matter decided by the civil court. The reason is this that the partition application cannot be left pending indefinitely at the sweet will of a party. No party can say that he would institute the suit within, say, a year of the order. Thirdly, the Collector may assume jurisdiction himself and try the question of title himself. In that case he would decide it as if he were a civil court, with the further result that an appeal would lie to the District Judge or to the High Court as if from the judgement of a court of civil jurisdiction.

If this reading of mine of section 111 of the Land Revenue Act be correct, the Collector, on being told by the present plaintiffs that they had instituted a suit in the civil court, could not confer a jurisdiction on the civil

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court by simply saying, as he did in this case, "wait till such and such a date" (see the order quoted in the judgement of the first court). He could certainly proceed with the application, in spite of the fact that a suit had been instituted in the civil court. As I have already said, the Collector was authorized by the provision of section 111 of the Land Revenue Act to decide the question of title himself. To decide that question, therefore, he was a court of competent jurisdiction, as the application for partition had been made in his court before the suit for declaration was filed in the civil court. Section 10 of the Code of Civil Procedure came into play and the issue which arose for decision in either case could be tried by the revenue court alone. If, therefore, the Collector proposed (I do not think that he did propose to do so) to deny himself jurisdiction, he had to proceed in the regular way by bringing into operation clause (*b*) of section 111 and not otherwise. He was bound to record a formal order directing the present plaintiffs to institute a suit within three months of the order. The suit that had already been instituted was not within the jurisdiction of the civil court to entertain, and, therefore, was of no value. For the above reasons I agree with the courts below that the cognizance of the suit was barred and it was rightly dismissed.

I would dismiss the appeal with costs.

ASHWORTH, J.—I concur in the view of my learned brother that the suit was rightly dismissed under section 233 (*k*) of the U. P. Land Revenue Act. I would, however, also hold, in agreement with the lower courts' decision, that it was barred by limitation under section 120 of the Limitation Act. As regards the question of jurisdiction, the intention of the partition court underlying its order of the 4th of July, 1924, has to be observed from the surrounding circumstances. One of these circumstances is the law which should have been in the

mind of the Collector. On that date the Collector was informed by the present applicant, that the applicant had filed a suit in the civil court for a declaration as to the shares to which he was entitled. On receiving this information the Collector passed an order in the following terms:—"Application filed and affidavit that a civil suit has been filed. Wait until the 21st of September, 1924". Now that was a correct and sufficient order if the appellant's suit for a declaration of title had been filed before the partition suit. It was not a correct order if the civil suit for such a declaration had been filed subsequent to the partition suit. In the latter case the Collector should have said that he was not concerned with such a suit inasmuch as the civil court was debarred from entertaining such a suit under section 233 (*k*) of the U. P. Land Revenue Act. The court should have then gone on to consider which of the three courses prescribed in section 111 of the Land Revenue Act it decided to employ. If it decided to employ the course allowed by clause (*a*), then it would have passed an order in the terms of clause (*a*) even if it did not specifically refer to that clause. The effect of such an order would have been to require the appellants to get the title to the shares determined by a civil court having jurisdiction. That would be in this case by a civil court not barred by section 233 (*k*). Section 233 (*k*) of the Land Revenue Act is a bar to the institution of a suit. It is not a bar merely to the continuance of a suit. When in that suit the defendants raised the plea of want of jurisdiction of the civil court under section 233 (*k*), they must have referred to the fact that the plaintiff had no right to institute the suit. If the plaintiff had no right to institute the suit, the defect could not be cured by an order *pendente lite* of the revenue court under section 111 (*a*). I hold that no order can be passed under section 111 (*a*) when a suit in the civil court for declaration of title has been insti-

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tuted before the partition suit, because the entertainment of the partition suit in that case would be barred by section 11 of the Code of Civil Procedure. If the application for partition has preceded the institution of the civil suit, that institution is bad and cannot be corrected by an order under section 111 (*a*) of the U. P. Land Revenue Act. If an order is passed under clause (*a*), then the only proper course for the plaintiff in the civil suit is to withdraw the suit already instituted by him and to file another suit. The former suit was barred by section 233 (*k*), but the latter suit would not be so barred owing to the obtaining of an order under clause (1) of section 111. I may remark that it is settled law that section 233 (*k*) read with section 111 of the Land Revenue Act means that a civil court cannot entertain a suit as to a declaration of title, when that title is a matter that can be determined and must be determined in a pending partition suit.

As to the question of limitation, I cannot agree that the institution of the partition suit by the respondent operated so as to give the appellant a right to sue. The appellant in his plaint set forth that the right to sue arose from a denial of his title by the respondent. He failed to bring any evidence to prove such denial. Consequently we must hold that there was no such denial. Again in the plaint the appellant never set forth that the bringing of the partition suit made it to the interest of the respondent to deny his title. The only ground on which he suggested in his plaint that the respondent was interested to deny his title, as distinct from the fact of his actually having denied it, was that the mistake in the khewat had been made and maintained. This mistake was made and obviously known to the appellant more than six years before the bringing of the declaration suit. Nothing has occurred since then, in my opinion, to give the respondent a greater interest in denying the appellant's alleged title than has existed all along. At any

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rate limitation must be decided on the plaint. It is nowhere alleged in the plaint that the fact of the respondent's bringing the partition suit gave him an interest in denying the plaintiff's title which he did not possess before. On this grounnd I would concur with the lower courts that the suit is barred by limitation.

On this ground, as well as on the other ground of jurisdiction, I concur that the suit should be dismissed.

BY THE COURT.—For the reasons given above the order of the court is that the appeal shall stand dismissed with costs.

Appeal dismissed.

Before Sir Grimwood Mears, Knight, Chief Justice and Mr. Justice Mukerji.

AZIZ AHMAD KHAN AND OTHERS (PLAINTIFFS) *v.* CHHOTE LAL AND OTHERS (DEFENDANTS).*

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January, 4.

Act No. IV of 1882 (*Transfer of Property Act*), *sections* 74, 82, 95 *and* 100—*Suit for contribution—Limitation—Act No. IX of* 1908 (*Indian Limitation Act*), *schedule* 1, *article* 132—"*Subrogation*"—"*Incumbrance*".

JR, being the owner of a large amount of immovable property, executed a number of mortgages on different dates and in favour of different mortgagees, and in several instances the same items of property were mortgaged more than once. One of these mortgages, dated the 23rd of September, 1899, was put in suit and a decree obtained thereon, when one *CL*, who was a party to the decree and was interested as a puisne mortgagee of one of the items included in the mortgage and also as a purchaser of the same, paid the whole of the decretal amount on the 19th of July, 1916. Thereafter *CL* sold all the rights which he had acquired by this payment to *AA* and others, who on the 25th of April, 1922, brought the present suit, asking for contribution as against several properties held by the defendants.

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*First Appeal No. 95 of 1924, from a decree of Ganga Nath, Subordinate Judge of Moradabad, dated the 13th of November, 1923.