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have considered these cases and are clearly of opinion that the question arising before us did not arise and was not decided in them. The lower appellate court has also referred to a decision of the Board of Revenue in *Ram Bahadur* v. *Ram Niranjan Pathak* (1). That decision is also not in point. Besides, we find that in two other cases, *Pirthi Singh* v. *Beda* (2), and *Maula Khan* v. *Mamnoon* (3), the Board of Revenue took a contrary view which is in accord with our own.

The result is that this appeal succeeds and it is accordingly allowed.

Before Mr. Justice Banerji and Mr. Justice King.

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March, 8.

HALIMA BEGAM (PLAINTIFF) *v.* MUHAMMAD MOHITULLAH AND ANOTHER (DEFENDANTS).*

Land Revenue Act (Local Act III of 1901), section 233(k)—Civil Procedure Code, section 11—Res judicata as between co-plaintiffs or co-defendants—Partition of mahal into pattis—No question of title raised as between the co-sharers of one of these pattis—Subsequent suit by one of these co-sharers against the others, claiming a larger share than that recorded in her name at the partition.

A mahal was partitioned into four pattis. One of the pattis was allotted to *A*, *B* and *C* jointly and the share of each in the patti was recorded in accordance with the entries in the khewat. The partition was effected on the application of two other co-sharers of the mahal, who asked for separation of their shares; also, probably *A*, *B* and *C*, who were members of the same family, applied for having the share belonging to the family formed into a separate patti. At the partition no question was raised by *C* about the correctness of the share in the patti recorded in her name. Subsequently *C* brought a suit against *A* and *B*, claiming a larger share in the patti than that recorded in her name. *Held* that the suit was not

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*First Appeal No. 512 of 1927, from a decree of P. C. Mogha, Subordinate Judge of Aligarh, dated the 6th of July, 1927.

(1) (1921) 3 L.R., All., (Rev.) 165. (2) (1919) 3 U.D., 355.

(3) (1920) 4 U.D., 697.

barred either by the principle of *res judicata* or by the provisions of section 233(*k*) of the Land Revenue Act.

The parties to the present suit were arrayed upon the same side in the partition proceedings. If they applied jointly for having their shares formed into one separate patti, then they were in the position of co-plaintiffs; otherwise, they were in the position of co-defendants. As no partition was sought or effected between them *inter se*, and a patti proportionate to the total value of their recorded shares was allotted to them jointly, there was no conflict of interest between them; and for the purpose of effecting the partition it was unnecessary to determine the shares of the parties *inter se*, and no such question was raised or decided, or ought to have been raised. The rule of *res judicata*, therefore, did not bar the present suit.

According to the interpretation put by the Full Bench, in the case of *Muhammad Sadiq* v. *Laute Ram* (1). on the corresponding section 241(*f*) of the former Land Revenue Act, the effect of section 233(*k*) of the Land Revenue Act, 1901, is not to debar the raising in a subsequent civil suit of every question of title which could have been raised by a party to the partition, but only of a question of title affecting the partition. In the present case the question of title now raised in the civil suit would not have affected the partition even if it had been raised during the partition proceedings, as no partition was being effected between the present parties *inter se*.

Section 233(*k*) of the Land Revenue Act does not bar a suit raising a question of title between joint co-sharers in a unit formed by the partition, on the ground that such question might have been raised in the partition proceedings. The present suit is not a suit which aims at altering the distribution of property effected by the partition; any alteration of the recorded shares of the parties *inter se* in the patti would not amount to an alteration in the distribution of property effected by the partition.

The language of section 233(*k*) of the present Land Revenue Act is even wider than that of section 241(*f*) of the former Act, and any civil suit which would be barred under the section of the former Act would also be barred under the present Act.

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

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Messrs. *T. A. K. Sherwani* and *S. K. Dar*, for the appellant.

Dr. *M. Wali-ullah* and Messrs. *P. L. Banerji* and *M. A. Aziz*, for the respondents.

BANERJI and KING, JJ. :—These two connected appeals arise out of a suit for possession of zamindari shares in certain villages specified in the plaint and for mesne profits.

The relationship between the parties would appear from the following pedigree :—

HIDAYAT ULLAH KHA =MASRUR-UN-NISSA.

Amanat Ullah.	Mohit-Ullah, defendant No. 1.	Halima Begam, plaintiff.	Azmat-Ullah.	Kaniz Fatima, defendant No. 2.

Hidayat Ullah Khan, the father of Halima Begam the plaintiff, had zamindari property in two villages, Akbarpur and Bisaulia. His wife Mst. Masrur-un-nissa (the plaintiff's mother) owned property in two other villages, Bilauna and Hamirpur. Hidayat Ullah died in 1885 and Masrur-un-nissa died in 1890 leaving three sons Amanat Ullah, Azmat Ullah and Mohit Ullah (defendant No. 1) and one daughter, Halima Begam the plaintiff.

The plaintiff's case is that on the death of her father and mother she succeeded to a share of 40 sihams out of 280 sihams in her parents' property in the four villages. Her eldest brother Amanat Ullah died in 1905 and she inherited a further share of 16 sihams out of 280 as his heir. She therefore claims 56 sihams out of 280 sihams in the four villages as heir to her father, mother and eldest brother.

Azmat Ullah her younger brother died on the 29th of January, 1925, leaving a widow Kaniz Fatima (defendant No. 2). Plaintiff claims as heir of Azmat Ullah 28 sihams out of 280 sihams in the ancestral property and a quarter share in 6 bighas 12 biswas

which Azmat Ullah purchased in Bilauna. Azmat Ullah's property is in possession of his widow Kaniz Fatima in lieu of her dower debt. According to the plaintiff, the dower debt was Rs. 1,000 only and the plaintiff claims possession of her share in Azmat Ullah's estate upon payment of her proportionate share, namely one quarter, of the dower debt to Kaniz Fatima.

The plaintiff alleges that she lived on good terms with her brothers and did not know whether mutation had been effected in her favour as heir of her parents and of her brother Amanat Ullah, but on the death of Azmat Ullah a dispute arose regarding the mutation and she discovered that she was only recorded as the owner of 16 out of 280 sihams in Bilauna, Hamirpur and Bisaulia. She claims therefore 56 sihams in Akbarpur and 40 sihams in the other three villages without any payment, and claims further 28 sihams in all the four villages and one-quarter of 6 bighas 12 biswas in Bilauna on payment of Rs. 250 to Kaniz Fatima.

The plaintiff's claim in respect of Akbarpur and Bisaulia is not disputed.

As regards Bilauna, the principal defence is that the plaintiff relinquished her share in her mother's estate in Bilauna and that the defendants have been in adverse possession of the share claimed by the plaintiff for more than 12 years. Kaniz Fatima contended that her dower debt was Rs. 12,000 and not Rs. 1,000. As regards the 6 bighas, 12 biswas purchased by Azmat Ullah in Bilauna, Mohit Ullah contended that although the property was purchased in the name of Azmat Ullah it was in fact purchased jointly by Azmat Ullah and Mohit Ullah who each paid half the purchase money; so the plaintiff is only entitled to a quarter share in one-half of that property.

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As regards the claim to a share in Hamirpur, the principal defence was that the claim was barred under section 233(*k*) of the U. P. Land Revenue Act, 1901, as the village had been partitioned, and in the partition proceedings the plaintiff was allotted a share corresponding to the share entered in her name in the khewat and her suit for a larger share is now barred.

The trial court held that the alleged relinquishment by the plaintiff of her share in her mother's estate in Bilauna was not proved and it was not proved that the defendants have been in adverse possession of the plaintiff's share. As regards the property purchased in the name of Azmat Ullah, the finding was that he purchased it for himself and that Mohit Ullah was not a joint owner. This finding is not challenged in appeal. The dower was found to be Rs. 12,000 and the plaintiff's claim to a further share in Hamirpur was held to be barred by section 233(*k*) of the Land Revenue Act.

Both parties have appealed against the decree. We first deal with the defendants' appeal.

The first point for consideration is whether it has been proved that the plaintiff relinquished her share in her mother's estate in Bilauna.

[After discussing the evidence the following conclusion was arrived at.]

In our opinion, the plaintiff's statement, coupled with her subsequent conduct, shows that she really did relinquish her share in her mother's estate in Bilauna.

It has been urged that in any case the defendants have established title by adverse possession as against the plaintiff for more than 12 years. We are not prepared to accept this contention. . . . We agree with the court below that the defendants have not established title by adverse possession.

This disposes of the points which have been argued before us on behalf of the defendants appellants.

We now turn to the plaintiff's appeal, No. 512 of 1927. The main question is whether the trial court was right in holding that the plaintiff's claim for a larger share in village Hamirpur was barred either by section 233(*k*) of the Land Revenue Act or by the rule of *res judicata*.

In 1906 two co-sharers of village Hamirpur made an application to the revenue court for separation of their shares by partition. It must be presumed that notice was given to all the other recorded co-sharers including the present plaintiff Mst. Halima Begam. We find from the khewat of the village for the year 1315 Fasli that the result of the partition was to divide the mahal into four pattis. One of the pattis was allotted to the two brothers Mohit Ullah Khan and Azmat Ullah Khan and to their sister Mst. Halima Begam jointly, the two brothers being recorded as owning 14 shares and Halima Begam being recorded as owning one share in this patti. Presumably the members of this family must have applied for having their shares formed into a separate patti. The imperfect partition of the mahal and village into four pattis was sanctioned and declared to come into force on the 1st of July, 1908.

Now the question is whether the plaintiff can claim in a civil court a share larger than the share allotted to her in the partition.

The question of *res judicata* may be disposed of briefly. The parties to the present suit, or their predecessors in title, were arrayed upon the same side in the partition proceedings. If they applied jointly for having their shares formed into a separate patti, as appears probable, then they were in the position of co-plaintiffs. Otherwise they were in the position of co-defendants. No partition was effected between the

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parties *inter se*. A separate patti was allotted to them jointly, proportionate to the total value of their recorded shares. There was no conflict of interest between them and for the purpose of effecting the partition it was unnecessary to determine the shares of the parties *inter se*. In such circumstances we hold that the plaintiff's claim to a larger share as against her brothers is not barred by the rule of *res judicata*. The extent of the shares of the parties *inter se* was not raised or decided by the revenue court. Although it was open to the plaintiff to have raised the question of title in the partition proceedings, it is difficult to say that she *ought* to have raised such question and in any case it cannot be held that she ought to have raised the question as a ground of defence or attack, since there was no conflict of interest between the parties *inter se*. We hold, therefore, that the rule of *res judicata* does not bar the present suit.

The next question is whether the plaintiff's claim is barred by section 233(*k*).

Section 233(*k*) prohibits the institution of a civil suit or proceeding with respect to "partition . . . . except as provided in sections 111 and 112". The present suit was certainly not instituted as provided in section 111; so the only question is whether it is a "suit with respect to partition". This language is very wide, but ever since the decision of the Full Bench in *Muhammad Sadiq* v. *Laute Ram* (1) it has been understood as referring to a suit which aims at altering the distribution of property effected by the partition. In the absence of authority we should find it difficult to hold that the present suit is of such a nature. There was no division of property between the parties. One patti was allotted to them jointly. It is true that the extent of their respective interests was recorded in accordance with section 114, but it would be difficult to hold that any alteration of the

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

recorded shares of the parties *inter se* would amount to an alteration in the distribution of property effected by the revenue authorities.

The plaintiff's advocate has cited a number of rulings in which it has been held that where a civil suit does not aim at disturbing the distribution of property effected by the revenue court, so as to alter the total amount of shares in any mahal or patti or to alter the area of any mahal or patti, but merely aims at substituting the plaintiff for the defendant as owner of a share or plot of land in a mahal or patti, then the suit is not barred by section 233(*k*). We may refer to *Data Din* v. *Nohra* (1), *Ram Rekha Misra* v. *Lallu Misra* (2) and the Full Bench decision in *Kalka Prasad* v. *Manmohan Lal* (3). In all these cases the parties had conflicting interests in the partition proceedings, i.e. they were allotted separate mahals or pattis. Nevertheless, it was held that a civil suit by one party claiming a share in property allotted by partition to the opposite party was not barred by section 233(*k*). In the present case the revenue court made no division of property between the parties and there was no conflict of interest between them. The rulings cited are, therefore, distinguishable upon the facts. Although we hold that section 233(*k*) does not bar the present suit, we wish it to be clearly understood that we do not arrive at that conclusion on the strength of these rulings which seem to be hardly reconcilable with the Full Bench decisions in *Muhammad Sadiq* v. *Laute Ram* (4) and *Bijai Misir* v. *Kali Prasad Misir* (5). Our decision is supported by two other rulings cited by the plaintiff, to which we shall presently refer.

The respondents' learned counsel contends for the proposition that if the plaintiff could have claimed a

(1) [1930] A.L.J., 1046.
(2) (1931) I.L.R., 53 All., 568.
(3) (1916) I.L.R., 38 All., 302.
(4) (1901) I.L.R., 23 All., 291.
(5) (1917) I.L.R., 39 All., 469.

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larger share under section 111 and failed to do so, then she is debarred from raising the question in the present suit. He relies strongly upon the Full Bench decision in *Muhammad Sadiq* v. *Laute Ram* (1). This is undoubtedly the most authoritative Full Bench decision on this point, as it was passed by five Judges unanimously. The decision turns upon the construction of the corresponding provisions of the North-Western Provinces Land Revenue Act, 1873, which laid down that "no civil court shall exercise jurisdiction over any of the following matters", one of the matters mentioned in clause (*f*) being, "the distribution of the land or allotment of the revenue of a mahal by partition". The language of section 233(*k*) of the present Land Revenue Act is even wider, and we think that any civil suit which would be barred under the Act of 1873 would also be barred under the present Act of 1901. In that case it was held that "If a party to a partition . . . . desires to raise any question of title affecting the partition, he must do so according to the procedure laid down in sections 112 to 115 of the Act. If a question of title affecting the partition, which might have been raised under sections 112 and 113 of the Act during the partition proceedings, is not so raised and the partition is completed, section 241(*f*) of the Act debars the parties to the partition from raising subsequently in a civil court any such question of title." In our opinion the Full Bench decision does not go to the length of laying down the proposition for which the respondents contend. The decision does not refer to *every* question of title which might be raised by a party to a partition, but only to a question of title *affecting the partition*. We consider this qualification very important. In the case before the Full Bench the question of title which might have been raised did affect the partition, because there was a conflict of interest between the parties to whom separate mahals were being allotted in the partition

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

proceedings. Supposing *A*, *B* and *C* are co-sharers in a mahal, their respective shares being recorded as 8 annas, 5 annas and 3 annas, and supposing *A* applies for separation of his share into a separate mahal, if *B* and *C* do not wish for any partition *inter se* and prefer to remain joint in one mahal, then the revenue court would only be concerned in dividing the original mahal into two shares of equal value. If after the partition *C* claims as against *B* a declaration that his share in the new mahal which has been allotted to them jointly is not three-eighths but one-half, then we understand that his suit would not be barred, on the authority of the Full Bench ruling, because the question of title would not have affected the partition even if it had been raised during the partition proceedings. If, on the other hand, *B* and *C* applied to have their property divided *inter se* in accordance with their recorded shares, so that the revenue court formed three mahals proportionate to 8 annas, 5 annas and 3 annas respectively, then if after the confirmation of the partition *C* claims a one anna share in *B's* mahal, such suit would in accordance with the Full Bench ruling be barred, because it is a question of title which might have been raised during the partition proceedings and which would have affected the partition. If *C* had raised the question during the partition proceedings and had established his claim, then the revenue court instead of allotting to *B* and *C* unequal mahals proportionate to 5 annas and 3 annas respectively, would have allotted two equal mahals proportionate to 4 annas each. Interpreting the Full Bench ruling in this light, we find that it is no authority for the contention that the plaintiff's suit is barred by section 233(*k*), because the question of title, though it might have been raised under section 111, did not affect the partition.

Not a single ruling has been cited in which it has been held that section 233(*k*) bars a suit raising a

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question of title between joint co-sharers in a unit formed by partition, because such questions might have been raised in partition proceedings. On the other hand, the plaintiff's learned advocate has cited clear authority for the view that a suit in such circumstances is not barred, namely *Lal Bihari* v. *Parkali Kunwar* (1) which was followed by a single Judge of the Chief Court for Oudh in *Musammat Phuljhari* v. *Har Prasad* (2). These rulings are directly in point and the former is of special importance, as the two learned Judges who decided that case were parties to the Full Bench decision in *Muhammad Sadiq* v. *Laute Ram* (3) and must have found that decision distinguishable upon the facts. We agree with them and follow their ruling.

We find therefore that the plaintiff's suit is not barred by section 233(*k*). This finding relates to the plaintiff's share inherited from her mother before the date of the partition. The trial court seems to have made a mistake in dismissing the plaintiff's claim to her share in the estate of Azmat Ullah who died after the partition. Her claim in respect of her share in Azmat Ullah's estate could not possibly be barred by section 233(*k*) or the rule of *res judicata*. The plaintiff's appeal on this ground has not been contested.

The last point is whether the trial court is right in fixing the dower debt of Bibi Kaniz Fatima at Rs. 12,000 instead of Rs. 1,000. [The evidence was discussed and the following conclusion was arrived at.] We have considered the evidence and the arguments on both sides and agree with the trial court in finding that the dower debt is proved to be Rs. 12,000.

The result is that the defendants' appeal succeeds to this extent that we set aside the decree for 40 out of 280 sihams in Bilauna (relief A) and set aside the decree for Rs. 172 mesne profits in respect of that share in Bilauna.

(1) (1920) I.L.R., 42 All., 309. (2) (1926) I.L.R., 1 Luck., 318.
(3) (1901) I.L.R., 23 All., 291.

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The plaintiff's appeal succeeds to this extent that we decree the plaintiff's claim in reliefs A and B in respect of Hamirpur also, with *pendente lite* and future mesne profits to be determined hereafter by the court below.

In other respects both appeals are dismissed. As each party has partly succeeded and partly failed, we make no order regarding costs.

Before Mr. Justice Banerji and Mr. Justice King.

1932 *March*, 8.

JUTHI UPADHIYA AND OTHERS (DEFENDANTS) v. KESHO PRASAD SINGH (PLAINTIFF).*

Agra Tenancy Act (Local Act III of 1926), section 72(6)—Remission of rent—Diluvion—Local custom—Custom alleged but not proved.

Sub-section (6) of section 72 of the Agra Tenancy Act, 1926, means that if there is a local custom under which remission of rent can be claimed in alluvial tracts by reason of diluvion calamities, and if a claim for remission is made under such local custom, then the provisions of the section will not apply. The local custom referred to in sub-section (6) means an existing local custom and does not apply to a local custom which is merely alleged to exist but in fact does not exist. So, the mere fact that the tenant has claimed a remission under an alleged local custom, which he has failed to prove, does not prohibit the court from granting a remission under section 72, sub-section (1).

Dr. *M. L. Agarwala* and Mr. *Jwala Prasad Bhargava*, for the appellants.

Mr. *Haribans Sahai*, for the respondents.

BANERJI and KING, JJ.:—This was a suit for arrears of rent due by an agricultural tenant. The main defence was that the area of the holding had been decreased by diluvion and that the defendant was entitled to remission of rent under a local custom.

The trial court found that the alleged custom, which is described as the custom of *Balpanchat* and *Bijmar*, did not prevail in the village, so the defendant was not

*Second Appeal No. 1986 of 1928, from a decree of Kameshwar Nath, District Judge of Ghazipur, dated the 10th of July, 1928, confirming a decree of Muhammad Wasi, Magistrate of First Class of Ballia, dated the 29th of February, 1928.