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tion. It follows therefore that where the judgment is issued by a court without jurisdiction, it cannot be conclusive between the parties under section 11 of the Code of Civil Procedure. Section 11, Explanation IV, of the Code of Civil Procedure can have no application to such a case. The principle has been discussed by MOOKERJEE, J., in *Krishna Kishore De* v. *Amarnath Kshettry* (1) and we respectfully adopt the following statement of law at page 780: "In this case, as already stated, the question of jurisdiction was neither raised nor decided; the position might have been different if the question had been raised and decided, for where a court judicially considers and adjudicates the question of its jurisdiction and decides that the facts exist which are necessary to give it jurisdiction over the case, the decision is conclusive till it is set aside in an appropriate proceeding. But where there has been no such adjudication, the decree remarks a decree without jurisdiction and cannot operate as *res judicata*."

The result is that we dismiss this appeal with costs.

Before Mr. Justice Mukerji and Mr. Justice Bennet.

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RAM REKHA MISRA (PLAINTIFF) *v.* LALLU MISRA AND OTHERS (DEFENDANTS) AND PARAS RAM MISRA AND ANOTHER (PLAINTIFFS).*

Land Revenue Act (Local Act III of 1901), *section* 233(*k*)—*Partition of mahal—Question of title not raised at partition—Such question subsequently raised by way of defence in a civil suit—Civil Procedure Code, section* 11, *Explanation IV—Constructive* res judicata—*Plea of* res judicata *not raised in lower courts—Practice and pleading.*

At the partition of a mahal the co-sharers of a 4 pie share, as well as the co-sharers of a 13 pie share, desired that separate lots be prepared of their respective shares and this was done. At that time no claim was put forward by the latter that they had acquired by purchase at an auction sale, prior to the application for partition, a 1 pie out of the 4 pie share of the

*First Appeal No. 22 of 1930, from an order of Ali Muhammad, Additional Subordinate Judge of Gorakhpur, dated the 29th of October, 1929.

(1) (1920) I.L.R., 47 Cal., 770 (780).

former. Such claim was, however, put forward some time after the conclusion of the partition proceedings, and disputes arose, and the co-sharers of the 4 pie share brought a suit in the civil court for a declaration that they were the sole owners in possession of the entire 4 anna share. The defendants pleaded that they were owners of a 1 pie share thereof by virtue of the auction purchase made prior to the partition. The question was whether such plea was not barred by section 233(*k*) of the Land Revenue Act, or by the principle of *res judicata*. *Held*, that as it was open to the defendants to raise the question of their title to the 1 pie share in the partition case, and the revenue court could, under section 111 of the Land Revenue Act, have given a valid decision, deemed to be that of a civil court, on that question of title, the raising of the question now was barred by the rule of *res judicata* under Explanation IV, section 11 of the Civil Procedure Code.

Held, further, that section 233(*k*) of the Land Revenue Act did not apply to the case. There were two interpretations that had been put on section 233(*k*), and upon the narrower and right interpretation it only bars suits which would alter the partition in regard to the amount of shares in any mahal or sub-division of a mahal, or suits which would transfer particular fields or holdings from any mahal or sub-division of a mahal. The wider interpretation would make section 233(*k*) co-extensive with, and only a paraphrase of, the rule of *res judicata* and was unjustifiable. It was much more desirable that the true aspect of section 233(*k*) should be understood and it should not be mixed up with the rule of *res judicata*.

Held, also, that it was open to a plaintiff, who had pleaded the proper facts, to argue in the High Court that a certain plea sought to be raised in defence was barred by the rule of *res judicata*, though the question of *res judicata* had not formed an issue in the court of first instance and had not been argued in the lower appellate court and had not been mentioned in the grounds of appeal to the High Court.

Mr. *A. P. Pandey*, for the appellant.

Mr. *Shiva Prasad Sinha*, for the respondents.

MUKERJI and BENNET, JJ. :—This is a first appeal from order brought by one of the plaintiffs against an order of remand of the lower appellate court. The facts in the case are as follows.

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One Faqir Misra owned a 4 pie share in mauza Mahni Sangram. He had two daughters, Mst. Jagrani, who died in 1912, and Mst. Laganmani. Mst. Jagrani had a daughter Mst. Ramkali, who died in 1916, and Laganmani had a son Kamla Prasad, who died in 1912. Kamla Prasad's widow is Mst. Parbati, plaintiff No. 3. On 16th of June, 1905, Faqir Misra gave half his 4 pie share to his daughter Mst. Jagrani and half to his grandson Kamla Prasad. After the death of Mst. Jagrani her daughter Mst. Ramkali inherited her half share. After the death of Kamla Prasad his wife Mst. Parbati, plaintiff No. 3, inherited his 2 pie share. After the death of Mst. Ramkali her 2 pie share went to the collaterals of Faqir, namely, plaintiffs Nos. 1 and 2, and one Chilar Misir. Chilar Misir sold his share to the plaintiffs Nos. 1 and 2 under sale deed, dated the 11th of December, 1926. The result is that the plaintiffs Nos. 1 and 2 now own one half of the share and Mst. Parbati, plaintiff No. 3, owns the other half of the 4 pie share of Faqir. The plaintiffs brought a suit for a declaration that the plaintiffs are in exclusive possession and occupation as absolute owners without the participation of any one else in the entire 4 pie share entered in khewat as No. 18 and that if the plaintiffs be found to have been dispossessed, they should be granted a decree for recovery of possession. The cause of action is stated in the plaint to be that the defendants have been making applications for mutation of their names for one pie out of the 4 pie share. But it is alleged that the defendants have not obtained possession. In the plaint, in paragraph 4, it is set forth that there was a partition in the revenue court of this village, which began on 5th of July, 1912. "At that time every co-sharer in the village made an application and got a separate lot prepared in respect of his property. Accordingly a joint lot comprising the 4 pie share of Faqir Misra was prepared for Mst. Ramkali and Mst. Parbati plaintiff No. 3 and it was numbered as lot 11. In the khewat of the recent settlement the property

in the said lot was entered as No. 18. On the 15th of April, 1916, the partition case was disposed of and the partition proceedings concluded."

In reply to this pleading paragraph 4 of the written statement stated: "As regards paragraph 4 of the plaint the allegation about the partition proceeding is admitted; the rest is not admitted." The written statement further proceeded to state that on the 11th of June, 1903 there was a hypothecation decree in suit No. 384 of 1903 passed in favour of the ancestor of the defendants against Faqir Misra and in execution the ancestor of the defendants and the defendants purchased a one pie share of mauza Mahni Sangram at auction sale in 1909 and obtained formal delivery of possession of this one pie share on the 1st of June, 1911. In paragraph 7, additional pleas, it was stated: "During the partition proceedings the names of these defendants did not stand recorded in the khewat in respect of the one pie share sold. Hence nothing was done during those proceedings and by reason thereof the rights of these defendants cannot be prejudiced. The plaintiffs' claim is altogether wrong and fit to be struck off."

On these pleadings the court of first instance framed an issue, No. 2: "Whether the defendants are auction purchasers of any portion of the disputed property and is the same auction sale binding on the plaintiffs?" On that issue the court of first instance came to the conclusion that "section 233(*k*) of the Land Revenue Act estops defendants from going back upon the partition record and opening a question of proprietary title which they failed to agitate at the proper time". In the first appeal the lower appellate court has set aside that decision and remanded the case to the court of first instance for decision on the remaining issues.

The question which has been raised before this Court is that the defence is barred by section 233(*k*) of the Land Revenue Act and that the court below has erred

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in holding to the contrary. When the case was argued before this Court the question was raised as to whether the defence is or is not barred by the principle of *res judicata*. Objection was taken by the learned counsel for the respondents that the question of *res judicata* had not formed an issue in the court of first instance and had not been argued before the lower appellate court, and had not been mentioned in the grounds of appeal to this Court. But we consider that the question was sufficiently raised by the pleadings of the plaintiff and it is not necessary for the plaintiff to do more in his plaint than set forth the facts on which he can rely for the application of a rule of law. It is open to a plaintiff who has pleaded the proper facts to argue in this Court that under a rule of law he is entitled to a certain finding. Accordingly we consider that in the present case it is open to the plaintiff to argue in this Court that the defence was barred by th rule of res judicata and not merely that the defence was barred by the rule of section 233(*k*) of the Land Revenue Act.

We shall presently consider how far these two sections are related to one another. Now the facts which have emerged in the present case are that the defendants were parties to the partition case in the revenue court and it is admitted that in that partition case a separate *kura* was formed in which the defendants and their predecessors had their 13 pie share separated. Neither of the parties were the applicants for partition. It is apparent therefore that under section 110(2) of the Land Revenue Act, applications must have been made by the predecessors of the plaintiff and by the defendants and their predecessors for the formation of these two separate *kuras*, in the one case a *kura* of 4 pies and in the other case a *kura* of 13 pies. Now section 110(2) lays down that such applications must be made at any time before the date fixed by the proclamation issued under that section. It was for the defence to show that the application of the predecessors of the plaintiff was made

at a time other than the time specified in section 110(2) of the Land Revenue Act and the defence have not alleged that there was any such irregularity or that there is no evidence on the record to that effect. The question of the partition proceedings was raised by paragraph 4 of the plaint and it was open to the defence to plead in the written statement that there was any irregularity which would entitle the defence to prove that the partition proceedings would not be effective against the defence as a bar either under section 233(*k*) or under the rule of *res judicata*. We mention this point because reference has been made to various rulings in which as a matter of fact it was found that the particular applications for formation of a separate *kura* or mahal had been made subsequent to the date fixed. In the present case therefore these rulings have no application, because it is not shown that there was any such irregularity, and the presumption is in favour of regularity of proceedings.

We have been referred to a number of rulings and on a consideration of all these rulings we come to the following conclusions in regard to the meaning of section 233(*k*) of the Land Revenue Act. That section may be interpreted, first, on the narrow view that it only bars suits which ask for alteration of the total amount of shares in a mahal or in a sub-division of a mahal, or suits which ask for khasra numbers or holdings to be changed from one mahal or sub-division of a mahal to another. On this view section 233(*k*) would be no bar to the present suit. There is a wider view of section 233(*k*), in which it may be held to bar any question being raised in the civil court which could have been raised in objection under section 111 of the Land Revenue Act. But this view makes section 233(*k*) to be merely the application of the rule of *res judicata* to partition suits. We consider that on this view, section 233(*k*) is no wider and no narrower than the rule of *res judicata* which is found in section 11 of the Code of Civil Procedure.

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Accordingly in the present case we consider that it is more useful and more correct to consider whether the rule of *res judicata* as laid down in section 11 of the Civil Procedure Code does or does not bar the present defence.

We may at this stage examine briefly some of the various rulings of this Court on the question of section 233(*k*). In the Full Bench ruling of *Shambhu Singh* v. *Daljit Singh* (1), it was held that section 233(*k*) of the Land Revenue Act did not bar a civil suit because that suit did not relate to partition or union of a mahal. The plaintiff had sued for a declaration of his title to a certain share which had been allotted to the defendants. What was meant by this ruling was that such a suit if granted would merely substitute the plaintiff for the defendant as the owner of the share in question and by this substitution the actual arrangement of the shares in the mahals and pattis would not be disturbed. This is what we call the narrow view of the interpretation of section 233(*k*) of the Land Revenue Act.

On the same day there was a decision given in another Full Bench case, by the same Full Bench, in *Kalka Prasad* v. *Man Mohan Lal* (2). It was similarly held that section 233(*k*) of the Land Revenue Act did not bar the suit, in which the plaintiff claimed recovery of possession of the mahal allotted to the defendant. This again would be merely substituting the plaintiff for the defendant as the owner of that mahal. It was held in *Bijai Misir* v. *Kali Prasad Misir* (3) that the suit of the plaintiff to recover possession of certain shares which had been awarded to the defendant in a partition of the revenue court was barred by the provisions of section 233(*k*) of the Land Revenue Act. This suit was decided by a majority of the Court, the Chief Justice dissenting. It is obvious that there is a certain amount of conflict between these decisions. The circumstances of this last ruling were that the plaintiff had been a party to the partition proceedings and the plaintiff had not made any

(1) (1916) I.L.R., 38 All., 243. (2) (1916) I.L.R., 38 All., 302.
(3) (1917) I.L.R., 39 All., 469.

objection at that time to the share in question being allotted to the defendant. At page 472 the late Mr. Justice BANERJI stated :—"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*".

In a later ruling in *Lal Bihari* v. *Parkali Kunwar* (1) the same learned Judge interpreted the provisions of section 233(*k*) in a slightly different manner. In that case the parties were on the same side in partition proceedings and a separate mahal was formed in the name of the parties. Subsequently, the plaintiff brought a suit for a declaration that he alone was the owner of the entire mahal to the exclusion of the defendant and it was held that the suit was not a matter relating to the union or separation of mahals and clearly the provisions of section 233(*k*) of the Land Revenue Act were no bar. That, however, is clearly distinguishable from the present case. In the present case the parties had separate *kuras* allotted to them. It was also held in this ruling that the suit was not barred by the rule of *res judicata*.

There have also been two recent rulings of Benches of this Court, the first of which is *Data Din* v. *Nohra* (2). In that case it was held that where plaintiff's suit for declaration of title did not affect the partition or union of mahals and left the integrity of the partition proceedings absolutely unaffected, section 233(*k*) was no bar to the suit. The question of *res judicata* was not considered in that case.

The second recent ruling is in *Ram Sukh Pandey* v. *Pirthi Singh* (3) and the rule laid down is similar. In that ruling also the question of *res judicata* was not considered.

(1) (1920) I.L.R., 42 All., 309. (2) [1930] A. L. J., 1046.
(3) [1930] A. L. J., 1307.

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These rulings restrict the principle of section 233(*k*) to what we have called the narrow view, that is, that that section only bars suits which would alter the partition in regard to the amount of shares in any mahal or sub-division of a mahal, or suits which would transfer particular fields or holdings from any mahal or sub-division of a mahal. We consider that this view of section 233(*k*) is the correct view and that no advantage accrues from adding an additional interpretation of section 233(*k*) in the wider sense to make it co-extensive with the rule of *res judicata*. We consider that if the legislature had intended that section 233(*k*) was to take the place of the rule of *res judicata* in a partition suit, then the language in section 233(*k*) would have stated so plainly, and the language used in that section certainly does not indicate that there was any such intention. As the language stands, there must certainly be an interpretation which is altogether outside the rule of *res judicata*, for no extension of the rule of *res judicata* could be held to prevent suits to alter the position of field or holding numbers in mahals and sub-divisions of mahals in all cases. The rule of *res judicata* will only apply where the conditions laid down by section 11 of the Civil Procedure Code exist.

Now it has been argued that a revenue court in a partition case is not a court on whose decision *res judicata* for a subsequent civil suit of the present nature can be based. This argument has been put forward on the ground that the revenue court has not jurisdiction to try the subsequent civil suit. But the relief asked for in the present civil suit is for a declaration of title and, if necessary, possession. Now the revenue court under section 111 could have given a valid decision on the question of title if that question had been raised before it by the defendants in the present case. It was open to the defendants in the partition case to claim that the one pie share which they had purchased at an auction sale in the year 1909 previous to the partition

suit and of which they had obtained formal possession in 1911 should be allotted to the defendants in their *kura* which would have been enlarged from 13 pies to 14 pies, and that it should have been taken from the *kura* of the plaintiffs which would have been reduced from 4 pies to 3 pies. As regards possession, when the partition proceedings were confirmed the parties would then have held possession in accordance with the partition decree. The revenue court was therefore a court which was entitled to give a decision both as regards the question of title and also was a court which was entitled to award possession. We consider therefore that the decision of the revenue court is a decision on which the rule of *res judicata* can be based. Now under section 11 of the Civil Procedure Code, explanation 4, "any matter which might and ought to have been made a ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit". It was open to the defendants to raise this question of the title to the one pie share and the possession thereof in the partition case. We consider therefore that the defendants are barred by the principle of *res judicata* under explanation 4, section 11 of the Civil Procedure Code and that this question not having been raised by the defendants in the partition proceedings, it cannot be raised in the present suit.

Accordingly we reverse the decision of the lower appellate court and we set aside the order of remand. As there are a number of grounds raised in the appeal of the defendants which have not been considered by the lower appellate court we remand the case to the lower appellate court for decision on the grounds not already decided. Costs hitherto incurred in all courts will abide the result.

MUKERJI, J. :—My learned brother has exhaustively dealt with the appeal and I shall add just a few words. having regard to the importance of the point raised and having regard to the fact that some cases, at any rate,

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decided by this Court may be said to be in conflict with one another.

All partition proceedings must be preceded by a decision of title, when a party asks for partition of joint property. The first question that arises is a question of title. If no question of title is raised, that is to say, if there is no dispute, even then the court has to declare the title of the respective parties before it and, after it has declared the title, it has to proceed to divide and distribute the property. The same is the case whether partition proceedings are taken in the civil or the revenue court. Certain property belongs to several co-sharers and one of these co-sharers may take it into his head to apply for partition. The Land Revenue Act of 1901 provides that when such an application is made, notice would be given to the remaining co-sharers and a date would be fixed for their appearance. If any of the remaining co-sharers make an application that their shares also should be divided off, they have to come forward before the date fixed for the hearing of the application. In that case they also would be treated as being parties claiming partition and as if they joined in the original application. Then on the date fixed (I take it to be the meaning of section 111 of the Land Revenue Act), if any question of title be raised, the revenue court has three rules of procedure open to it, one of these being that it may decide the question of title itself. If no question of title be raised, the revenue court would declare, under section 114, the nature and extent of the interest of the several parties before it. This would amount to the making of a preliminary decree for partition in a civil court. After this preliminary decree has been passed, the property is to be divided and shares are to be allotted. If any party fails to raise any question of title, having had an opportunity to do so, surely he should not be allowed to contest, in a later proceeding, that he possessed a larger share than was declared for him in the proceedings under section 114 of the Land Revenue Act.

In my opinion, where, as in this case, independent lots have been given to different parties without any contest, it must be assumed that it was because none of these parties wanted to raise a question of title. If that be the case, any party who now wants a larger share must be deemed to be barred from doing so by reason of the principle incorporated in section 11, explanation 4, of the Civil Procedure Code. The true bar therefore that operates against the defence in this case is a bar of *res judicata* and not the bar of section 233(*k*) of the Land Revenue Act. As my learned brother has put it, there are two interpretations that have been put on section 233 (*k*) of the Land Revenue Act. The narrower interpretation is really the right one and the larger interpretation is only a paraphrase of the rule of *res judicata*. It is much safer and much more desirable that the true aspect of section 233(*k*) should be understood and it should not be mixed up with the rule of *res judicata*.

In the Full Bench case of *Muhammad Sadiq* v. *Laute Ram* (1) this view was clearly pointed out. The head-note runs as follows: "If a party to a partition which is being conducted by the revenue authorities . . . 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." This decision was given under the older Land Revenue Act of 1873. It contains the wider interpretation, though the reason behind the interpretation is one that would support an application of the principle of *res judicata*. Section 233(*k*) of the Act of 1901 corresponds to section 241 (*f*) of the Act of 1873.

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