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reference to the appellant, out of which sprung his title to sue, was created. It is impossible therefore to say that the contract itself was not a material portion or part of his cause of action, for without it his right to relief against the appellant would not exist. It must be admitted that the decisions of the several High Courts upon this point have not been uniform, and that *De Souza v. Coles* (1) and *Jumoonah Pershad v. Zaibunissa* (2) are authorities against our view. In the former case, however, Holloway, J., seems to have proceeded under a misapprehension of a ruling of the Privy Council in *Luckmee Chund v. Zorawur Mull* (3), and his proposition, that "the making of the contract is a matter perfectly indifferent, and is no part of the cause of action," is one we should hesitate to adopt. We think, in accordance with the judgments of Birch and Markby, JJ., in *Gopikrishnagossami v. Nlkomul Banerjee* (4), that a suit like the present may be brought either at the place where the contract was made, and the defendant's obligation established, or where performance was to be had and breach took place. The respondent was therefore in his right in going to the Cawnpore Court, and the Judge's decision is correct.

*Appeal dismissed.*

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January 13.

*Before Mr. Justice Tyrrell and Mr. Justice Brodhurst.*

BATESHAR NATH (DEFENDANT) v. FAIZ-UL-HASAN (PLAINTIFF) \*

*Partition—Objection raising question of title—Determination of question—Appeal—Res judicata—Act XIX of 1873 (N.-W. P. Land-Revenue Act), ss. 113, 114.*

Where in proceedings for partition under Act XIX of 1873, a question of title to land is raised between the parties to the partition, and there is an adjudication of such question, such adjudication will operate as a bar to a suit between the same parties in the Civil Courts to contest the title to such land, notwithstanding that in some respects such adjudication may have been irregular or defective. *Har Sahai Mal v. Maharaj Singh* (5) and S. A. No. 129 of 1881, decided the 27th July 1881 (6), followed.

*Held* in this case, on consideration of the partition proceedings, that the question of title raised therein had been adjudicated on and therefore the rule mentioned above applied.

\* First Appeal No. 90 of 1882, from an order of F. E. Elliot, Esq., Judge of Mainpuri, dated the 6th June, 1882, reversing an order of Babu Anant Ram, Munsif of Mainpuri, dated the 15th February, 1882.

(1) 3 Mad. H. C. Rep. 384.

(2) 5 Calc. L. R., 268.

(3) 8 Moo. I. A., 291.

(4) 13 B. L. R. 461.

(5) I. L. R., 2 All. 294.

(6) Not reported.

THIS was a suit in which the plaintiff claimed possession of a third share of 20 bighas and 17 biswas of land in a village called Shahpur. It appeared that there had been an imperfect partition of the village in question. Two pattis had been formed, one known as the patti of Ghulam Hamdani, the other as Mithu Lal's. The "abadi" (inhabited portion) of the village and 98 bighas 9 biswas of arable land were not partitioned. On the 30th July, 1879, the plaintiff in this case, who had acquired by purchase the patti of Ghulam Hamdani, applied for partition of the "abadi" and the 98 bighas 9 biswas of undivided or "shamilat" land. The defendant in this case, Mithu Lal's brother and heir, the proprietor of Mithu Lal's patti, made an objection to the effect that possession of 20 bighas and 17 biswas of the "shamilat" land had been transferred to Mithu Lal, at the time of settlement, some ten years before, under a private arrangement between him and Ghulam Hamdani, certain land in another village being transferred to the latter, and consequently the plaintiff had no interest in these 20 bighas and 17 biswas, and partition should only be effected of the remaining 77 bighas and 12 biswas. The plaintiff replied to this objection that the land in dispute was recorded as included in the "shamilat" land, and that no such transaction as set up by the defendant had taken place in respect of such land. The Assistant Collector making the partition, by an order dated the 29th April, 1879, decided, on oral and documentary evidence, "that the 20 bighas and 17 biswas of land, regarding which objection had been raised, was proved to be in the objector's possession; that the plea raised by Bateshar Nath objector was fit to be allowed; and that the land in question should be excluded from the partition." He therefore ordered "that the objector's objection be allowed; that the 20 bighas and 17 biswas of land, regarding which objection had been taken, and which was in the objector's possession, should be excluded from the partition; and that partition proceedings should be taken in regard to the remaining land." The plaintiff appealed from the Assistant Collector's order to the Collector. The latter dismissed the appeal, observing that the decision appealed related to the question as to whether the defendant was entitled to "khas (special) possession" of the 20 bighas and 17 biswas of land in question, and this question was virtually one of proprietary right, and under s. 114 of the North-

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Western Provinces Land-Revenue Act, 1873, should be tried in the Civil Courts. The plaintiff subsequently brought the present suit against the defendant in the Civil Court, in which he claimed his share of the land in question, and the cancelment of the Assistant Collector's order excluding it from partition. The defendant set up as a defence to the suit that it was not maintainable, as the order in question had been made under s. 113 of Act XIX. of 1873, and was equivalent to the decision of a Civil Court, and could be questioned only by appeal, as provided in s. 114 of that Act, and not by a separate suit. The Court of first instance allowed this defence, observing as follows :—“ It is admitted by both parties that the application for partition presented to the Revenue Court on the 30th July, 1879, was under s. 111, Act XIX. of 1873, and the defendant's objection to it was made under s. 112 of the said Act. Now the only question in this case is, whether the Assistant Collector's order, excepting the 20 bighas 17 biswas of land, was under ss. 113 and 114, or any other section of the Act. S. 113 runs thus :—“ If the objection raises any question of title or of proprietary right, which has not already been determined by a Court of competent jurisdiction, the Collector of the District or Assistant Collector may either decline to grant the application, until the question in dispute has been determined by a competent Court, or he may proceed to inquire into the merits of the objection.” In the latter case, under s. 113, he ought to proceed like a Civil Court. Hence the Revenue Court has no alternative, but the two aforesaid, in matters of objections under s. 112. Now it is to be seen in this case which of the two modes was adopted by the Assistant Collector, *viz.*, whether he refused to grant the application for partition until the question of title or proprietary right was decided, or proceeded himself to decide the question. The finding of the Assistant Collector, dated the 29th April, 1880, distinctly shows that he did not refer the party praying for partition to the Civil Court. Hence he did not adopt the first course mentioned in s. 113. The Court cannot but consider that the Assistant Collector adopted the second course, and excepted the disputed land from partition. Though the Assistant Collector did not exactly observe the procedure prescribed for a civil suit in deciding upon the defendant's objection, yet the object and result of the finding is the same, as it would have been in case that pro-

cedure had been observed. The defendant clearly raised the question of title and proprietary right by his objection, and it having been allowed, the land in dispute was excepted from partition. Hence I consider the decision of the Assistant Collector as the decision of a Civil Court within the meaning of s. 114, Act XIX. of 1873. The plaintiff's appeal to the Collector against the order of the Assistant Collector, dated the 29th April, 1880, was, in my opinion, altogether irregular: Act XIX. does not probably allow that any such appeal should be preferred."

On appeal by the plaintiff the lower appellate Court disallowed the defence, holding that the suit was maintainable. It observed as follows:—"The question whether the Revenue Court having before it a dispute involving proprietary right arising in the course of partition proceedings, and having disposed of the matter itself instead of referring the objector to the Civil Court, but having failed to observe the procedure enjoined by law for the trial of original civil suits, its order is only open to appeal to the District Court or may be set aside by regular suit, has been authoritatively settled—*Kishun Sahai v. Raghoo Singh* (1). If the Revenue Court has adjudicated on the question of title, its order is only open to revision on appeal, though its procedure may have been irregular, but if not, then a regular suit may still be instituted to establish the title in dispute. In the present instance it is admitted on both sides that there was a question of title, and that the Revenue Court disposed of the objection giving rise to it itself, but did not follow the prescribed procedure. It remains to be considered whether there was any definite adjudication upon the question of title or not. It is clear that there was not. The Revenue Court allowed the objection, but on the ground solely of possession. The objector claimed as his own a certain portion of the land of which partition was sought. The Revenue Court did not decide whether this portion was in fact the separate property of the objector, or whether the petitioner for partition had a share in it. It merely found summarily that the objector was in possession and therefore excluded it from partition. Under these circumstances the appellants' suit was admissible." The lower appellate Court accordingly remanded the suit for re-trial.

(1) N.-W. P. H. C. R., 1870, p. 64.

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On appeal from this order the defendant contended that the decision of the Revenue Court was a bar to a fresh adjudication of the question of title.

Pandits *Bishambhar Nath* and *Nand Lal*, for the appellant.

The *Junior Government Pleader* (*Babu Dwarka Nath Banarji*) and *Munshi Hanuman Prasad*, for the respondent.

The Court (BRODHURST and TYRRELL, JJ.) delivered the following judgment :

TYRRELL, J.—Having carefully considered the proceedings of the Assistant Collector, terminating with his decision and order of the 29th April, 1880, we must allow the pleas of this appeal. The Assistant Collector indubitably proceeded under the provisions of s. 113 of Act XIX. of 1873 : he made an official inquiry, and took evidence on the issue as to the validity or invalidity of the objection that a portion of the land, partition whereof was claimed as being joint land, was the exclusive “share” of, and as such possessed as his property by, one of the parties to the partition case. The Assistant Collector determined this question on oral and documentary evidence in favour of the objector before him, finding that an equivalent for the land in question had been given to the other side in another village. The Assistant Collector found judicially that “the lands in question for ten years had been the *share* of Mithu Lal under a private partition, which took place between Ghulam Hamdani and Mithu Lal, and are still in the objector’s separate possession.” The other side had denied the consideration by way of exchange, had negatived the objector’s title, and alleged his own title to have the land in question treated as *shamilat* land, and brought into partition in his favour. The Assistant Collector decided this question against the petitioner seeking for partition ; and in doing so he did much more than merely find the objector to be in possession. It may be true that the Assistant Collector’s proceedings were in some respects irregular or defective ; but they must nevertheless be regarded as held under s. 113 of the Revenue Act ; and they were therefore questionable under the following sections of the Act, and not by a separate suit. The cases of *Har Sahai Mal v. Maharaj Singh* (1) and S. A. No. 129 of 1881, decided

(1) I. L. R., 2 All. 294.

the 27th July, 1881 (1), are in point, and are properly applicable to the case before us. We must restore the decree of the first Court, setting aside the order of remand. This appeal is decreed with costs.

*Appeal allowed.*

*Before Mr. Justice Straight and Mr. Justice Ollifield.*

KASIM HUSAIN AND ANOTHER (DEFENDANTS) v. SHARIF-UN-NISSA  
(PLAINTIFF.)\*

*Muhammadan Law—Gift—Reservation of income—Condition against alienation—Undivided property—Indivisible property.*

B owned a one-twelfth share of a *muafi* estate and a dwelling-house. As owner of the dwelling-house, she owned a share in a stair-case, privy, and door, which were held by her jointly with the owners of adjoining dwelling-houses. She made a gift of her property, transferring the dominion over it to the donees, but reserving the income of the share of the *muafi* estate for life, and stipulating against its alienation.

*Held* that the gift of the one-twelfth share of the *muafi* estate, being a gift of a specific share, was not open to objection under Muhammadan Law, and such gift was not vitiated by the mere reservation of the income of the share, or by the condition against alienation. *Nawab Umjad Ally Khan v. Mohumdee Begum* (2) followed.

*Held* also that the gift was not invalid under Muhammadan Law, so far as it related to the stair-case, privy, and door, as these things, though undivided property, were incapable of division, and a gift of part of an indivisible thing was valid under that law.

THE plaintiff in this suit claimed, as an heir to one Bechi deceased, possession of two thirds of a one-twelfth share of a certain *muafi* estate, and two-thirds of a certain dwelling-house and appurtenances, by cancelment of an instrument dated the 1st July, 1879, executed by Bechi, transferring the property to the defendants. The material portion of this instrument, which was described in the proceedings as a “*tamluk-nama*”, was as follows:—

“I, Bechi,.....do hereby declare that a one-twelfth *muafi* share .....and a dwelling-house containing a room facing north and east and five yards of land in front thereof, two halls (*dulan*) facing the east, a door, a privy, a court-yard, and a stair-case.....constitute my ancestral property and are held by me under a partition

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\* Second Appeal No. 693 of 1882, from a decree of Maulvi Nasir Ali Khan, Subordinate Judge of Moradabad, dated the 13th February, 1882, modifying a decree of Maulvi Ahmad Hasan, Munsif of Amroha, dated the 31st October, 1881.

(1) Not reported.

(2) 11 Moo. I. A. 517.

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