MISCELLANEOUS CIVIL.

Before Mr. Justice Gokaran Nath Misra and Mr. Justice Bisheshwar Nath Srivastava.

SAIRA BIBI (DEFENDANT-APPELLANT) *v.* CHANDRAPAL PLAINTIFF AND OTHERS (DEFENDANTS-RESPONDENTS).* 1928 *Sep. 27.*

United Provinces Land Revenue Act (III of 1901), section 111 (1) (c)—Partition—Objection by one of the recorded co-sharers on a question of title—Revenue court not deciding the objection but dismissing it on the ground that the question had been already decided by a competent court—Remedy of the dissatisfied party—Appeal, whether to civil or revenue court—Party cannot be allowed to take up inconsistent positions—Appeal rightly filed in the revenue court—Objection by the respondent that the appeal cannot lie to revenue courts—Appeal filed in the civil court—Respondent whether can be allowed to object that the appeal does not lie to the civil court—Estoppel by conduct.

Where in a partition case an objection is raised by a recorded co-sharer to the partition on the ground that a certain question of title had already been decided by a competent court and the partition officer accepts the said objection, he cannot be deemed to have decided himself the question of title raised in the objection. If a party to the partition is dissatisfied with such an order of the partition officer his remedy lies by appealing to the higher revenue courts since a decision by the partition officer can be appealed against in the civil court only when the partition officer has decided to determine the question of title himself and has passed the said order in the course of such determination. An appeal if filed in the civil court in any other case would be incompetent.

A party in a litigation cannot be allowed to take up inconsistent positions. Where, therefore, an appeal is originally instituted by the appellant rightly in the revenue court but it is dismissed on an objection presumably raised by the respondent himself to the effect that the appeal did not lie in the

* Miscellaneous Appeal No. 30 of 1928, against the order of Gokul Narain Tandon; Assistant Collector, First Class of Partabgarh, dated the 1st of February, 1928, dismissing the objections of the appellant.

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revenue court it is no more open to the respondent to raise an objection that the appeal filed in the civil court is not maintainable and he is by his action, precluded from raising such an objection in the civil court.

Asghar Ali Shah v. *Jhanda Mal* (1), *Mohammad Shahamat Khan* v. *Musammat Aziz-un-nissa* (2), *Mohammad Mehdi Ali Khan* v. *Musammat Sharfun-nissa* (3) and *Basti Begam* v. *Sajjad Mirza* (4), followed.

Mr. *Ali Mohammad*, for the appellant.

Mr. *Radha Krishna*, for the respondents.

MISRA and SRIVASTAVA, JJ. :—This is an appeal arising out of an order passed by the Assistant Collector of Partabgarh on the 1st of February, 1928, during the course of partition proceedings.

The facts giving rise to this appeal are as follows :—

One Saira Bibi, the appellant before us, was the owner of eight annas of village Chak Adil, pargana Bihar, district Partabgarh. She gifted this property in favour of her second husband, one Salamat-ullah, but subsequently got that gift set aside. A moiety of that Chak consisting of four annas share was sold by her husband Salamat-ullah, in whose favour she had executed the alleged gift, to one Ram Jiawan, grandfather of Chandrapal, the plaintiff respondent before us. Mutation in respect of the said four annas share was also affected from the revenue courts in favour of the aforesaid Ram Jiawan.

Ram Jiawan had two sons, Ram Saran and Lachman Prasad. After his death the mutation of names in respect of the four annas share purchased by Ram Jiawan was effected in the name of his son Lachman Prasad. In 1918 Lachman Prasad applied for partition of the four annas share against Saira Bibi, the appellant. She objected to the partition challenging the validity of the sale executed by her husband Salamat-ullah in favour of

(1) (1880) I. L. R., 2 All., 839. (2) (1904) 7 O. C., 161.
(3) (1900) 3 O. C., 32. (4) (1918) 21 O. C., 188.

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Lachman Prasad's father Ram Jiawan. The revenue courts directed Saira Bibi to get this matter decided from the civil court. In pursuance to this order she instituted a suit in the civil court on the 1st of August, 1918, which was, however, dismissed on the 24th of August, 1921, on the ground that Saira Bibi should, instead of bringing a declaratory suit, sue for possession of the property also. In appeal, however, the said order of dismissal was set aside and the suit was remanded with a direction that Saira Bibi should be given a chance to amend her plaint by adding a relief as to possession. She was also directed to pay the necessary court fee. She failed to do so and her suit was dismissed by the Subordinate Judge of Partabgarh on the 18th of February, 1926.

While these proceedings for partition and the subsequent suit arising therefrom were going on, a suit was instituted by the present respondent, Chandrapal, for a declaration to the effect that though the property had been purchased by his grandfather Ram Jiwan in his own name yet the property was purchased out of the separate funds of his father Ram Saran and consequently he was exclusively entitled to the said property and his uncle Lachman Prasad had no interest in the same. This suit was decreed by the civil court on the 19th of December, 1922. It will thus appear that while the suit of Saira Bibi was proceeding against Lachman Prasad in the civil court, this decree was obtained by the respondent to the effect that Lachman Prasad had no interest in the property. We might also mention that after the respondent Lachman Prasad had obtained his decree in December, 1922, he applied to the civil court in Saira Bibi's case to be substituted in place of Lachman Prasad since the latter had, in accordance with the decision of the civil court, been left with no right in respect of the property in suit. His application was, however, rejected. He applied again but with no better result. He

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applied a third time and his application was accepted on the 31st of October, 1924, but on appeal the said order was set aside by a Bench of the late Court of the Judicial Commissioner of Oudh on the 27th of February, 1925. The court of appeal decided that the respondent Chandra pal could not be considered to be a representative of Lachman Prasad and could not therefore be substituted in a suit which had been brought by the appellant Saira Bibi against him.

On the 5th of September, 1927, Chandrapal armed with his decree of the civil court passed in his favour on the 19th of December, 1922, applied for partition of the four annas share originally purchased in the name of Ram Jiawan and which had now been declared to be the exclusive property of Chandrapal. We might also mention that in pursuance of the said decree the name of Chandrapal was also substituted in the village papers in place of Lachman Prasad who was declared by the civil court to have had no title to the property in suit. On the 27th of December, 1927, Saira Bibi the appellant again objected to the partition application filed by the respondent Chandrapal alleging that she was in possession of the property and that the respondent Chandrapal had no title to it. Her contention was that the sale-deed in favour of Ram Jiawan was inoperative since her husband Salamat-ullah had no title to sell the property, the gift in his favour having been obtained from her by improper means and which had already been set aside by the civil court. On the 1st of February, 1928, the learned Assistant Collector passed the following order:—

> "*Objection Nos.* 1 *and* 4.—It is evident from exhibits C and D (judgment of B. Ram Rai Saheb and Mr. N. C. Mehta, Deputy Commissioner) that the plaintiff Chandrapal had got share of four annas and according to that his name had already been

entered into the *khewat*. The objector did not produce any oral or documentary evidence to rebut it. The same objections were filed in the previous partition in 1918 in which the objector was directed to go to the civil court. She filed a civil suit but it was dismissed, vide exhibit 9, judgment of the Subordinate Judge. I, therefore, reject the objection."

It is this order against which the present appeal has been filed in this Court.

At this stage we should like to mention that the appellant Saira Bibi first appealed to the Deputy Commissioner of Partabgarh against the order passed by the Assistant Collector on the 1st of February, 1928. The respondent Chandrapal presumably objected in the Court of the Deputy Commissioner that an appeal against the aforesaid order did not lie in his court but would lie in the civil court. The objection was allowed by Mr. Bishop the Deputy Commissioner on the 4th of April, 1928. He directed that the appellant should file her appeal in the civil court. In pursuance of that order the present appeal was filed by the appellant in this Court on the 30th of April, 1928.

A preliminary objection has been taken before us on behalf of the respondent that the order of the learned Assistant Collector, dated the 1st of February, 1928, is not an order passed by him under section 111(1) (*c*) of the United Provinces Land Revenue Act, 1901, and which might be considered as one passed on the merits of an objection relating to the question of title and thus appealable to the civil court. There is no doubt that the contention raised on behalf of the respondent is correct.

Under section 111 of the United Provinces Land Revenue Act, 1901, it is provided that if on or before the

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day fixed for the purpose of receiving objections, any objection is made by a recorded co-sharer involving a question of proprietary title which has not been already determined by a court of competent jurisdiction, the Collector might either—

(*a*) decline to grant the application until the question in dispute has been determined by a competent court, or

(*b*) require any party to the case to institute within three months a suit in the civil court for determination of such question, or

(*c*) proceed to inquire into the merits of the objection.

It would thus appear that if an objection raising a question of title is raised by a recorded co-sharer before a court to which an application for partition has been made, the said court may adopt either of the two following courses :—*Firstly*, the partition court may reject the objection and may not entertain it at all if it finds that the question raised in the objection has already been decided by a court of competent jurisdiction; or *secondly* if this be not the case the partition officer may do one of the three following things :—Either he may decline to grant the application for partition until the question in dispute has been determined by a competent court or he may require any party to the partition case to institute within three months a suit in the civil court for the determination of such question or may himself proceed to inquire into the merits of the objection.

The contention raised on behalf of the respondent is to the effect that the learned Assistant Collector did not proceed to inquire into the merits of the objection himself but only rejected the objection of the appellant on the ground that it had been already decided by a court of competent jurisdiction. On his behalf reference was

made to a ruling of the Allahabad High Court reported in *Asghar Ali Shah* v. *Jhanda Mal* (1) and a decision of the late Court of the Judicial Commissioner of Oudh reported in *Mohammd Shahamat Khan* v. *Musammat Aziz-un-nissa* (2). We are in entire agreement with the view of law propounded in these cases. It appears to us to be clear from the wordings of the section quoted above that where in a partition case an objection is raised by a recorded co-sharer to the partition on the ground that a certain question has already been decided by a competent court and the partition officer accepts the said objection, he cannot be deemed to have decided himself the question of title raised in the objection. In our opinion if a party to the partition is dissatisfied with such an order of the partition officer his remedy lies by appealing to the higher revenue courts since a decision by the partition officer can be appealed against in the civil court only when the partition officer has decided to determine the question of title himself and has passed the said order in the course of such determination. An appeal if filed in the civil court in any other case would be incompetent.

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We now proceed to determine whether the order passed by the learned Assistant Collector on the 1st of February, 1928, was an order passed by him within the earlier portion of section 111 or whether it was an order passed by him under clause (*c*) of sub-section (1) of section 111, that is to say in the course of his inquiry into the merits of the objection. We have already quoted the order *in extenso* in the earlier portion of our judgment and it appears to us to be clear that the learned Assistant Collector first referred to the judgment of the Subordinate Judge passed in the civil suit under which it was dismissed (exhibit 9), and then on the basis of that judgment rejected the objection of the appellant

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Saira Bibi. The learned Assistant Collector never proceeded to inquire into the merits of the objection himself; the only thing which he did was that he referred to the mutation order in favour of Chandrapal and to the judgment of the civil court dismissing the appellant's suit and on the strength thereof rejected the appellant's objection. It, therefore, appears to us that the order, dated the 1st of February, 1928, was passed by the learned Assistant Collector under the first portion of subsection (1) of section 111 and not under clause (*c*) of subsection (1) of the said section. In that view of the case the appeal does not lie to us but ought to lie before the learned Collector of Partabgarh.

We do not, however, propose to give effect to this opinion of ours because the action of the respondent himself has precluded him, in our opinion, from raising such an objection before us. It was held by Mr. SPANKIE, A. J. C., in a decision reported in *Mohammad Mehdi Ali Khan* v. *Musammat Sharfun-nisa* (1) that a party in a litigation cannot be allowed to take up inconsistent positions. The same view was held by the same court in a case decided subsequently namely in *Basti Begam* v. *Sajjad Mirza* (2). In view of the position laid down in these cases it appears to us that it is no more open to the respondent Chandrapal to raise an objection now that the appeal filed by the appellant in this Court is not maintainable because we find that the appeal had originally been instituted by the appellant in the right court but was dismissed on the objection presumably raised by the respondent himself to the effect that the appeal did not lie in the revenue court. We, therefore, have to determine the present appeal as if it had been rightly brought in this Court.

In deciding this question we might at once state that the question dealt with in the objection of Saira

(1) (1900) 3 O. C., 32. (2) (1918) 21 O. C., 188.

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Bibi, the appellant, has not yet been decided by any competent court. The learned Advocate for the respondent contended that the effect of the decision of the Subordinate Judge, dated the 18th of February, 1926, by means of which he dismissed the appellant's suit for declaration was that the present question must be deemed to have been decided against the appellant by a competent court. We regret we are unable to take that view. The respondent was no party to the previous suit brought by the appellant Saira Bibi, nor can he be considered to be a representative of Lachman Prasad. The respondent himself tried to be substituted in place of Lachman Prasad in that suit but his request was refused right up to the court of appeal.

We are, therefore, of opinion that the order of the learned Assistant Collector, dated the 1st of February, 1928, by means of which he rejected the objection of the appellant must be set aside and he must be directed to act in accordance with the procedure laid down for him in section 111 of the United Provinces Land Revenue Act, 1901. He should in our opinion take up the objection again and either require either party to the case to institute within three months a suit in the civil court for the determination of the question of title involved or proceed to inquire into the merits of the objection himself. We must point out that if he decides to inquire into the merits of the objection himself he must follow the procedure laid down in the Code of Civil Procedure for the trial of original suits, that is to say, he must call upon the parties to state in writing their respective cases, should frame issues, receive such documentary and oral evidence as may be tendered by the parties and then decide the objection on the merits. After he has done so it will be open to the parties to appeal against his decision to the civil courts as if it were a decree passed by such court.

We, therefore, order accordingly, and direct that in the circumstances of the case the parties should bear their own costs in this Court.

Appeal allowed.

APPELLATE CIVIL.

Before Mr. Justice Gokaran Nath Misra and Mr. Justice Bisheshwar Nath Srivastava.

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MUSAMMAT FAKHRE JAHAN BEGAM (PLAINTIFF-APPELLANT) *v.* MUHAMMAD HAMIDULLAH KHAN (DEFENDANT-RESPONDENT).*

Muhammadan law—Shia law—Divorce—Adultery imputation of—Retraction of imputation of adultery by Muhammadan husband, effect of—Courts entitled to determine charge of adultery by Muhammadan husband against his wife—Locus poenitentiae, *whether available to a Muhammadan husband before decree for dissolution of marriage passed*—'La'an' *under Muhammadan law—Wife not entitled to maintain claim for divorce if accusation of adultery be true.*

There is no authority in support of the proposition that under the Shia law a retraction by a husband cannot under any circumstances nullify the effect of the imputation of adultery on the dissolution of the marriage-tie.

No doubt the truth or falsity of the charge of adultery has to be determined at the present day according to the rules of evidence and the procedure governing British courts of law, yet it is clear that when the wife appeals to the courts of law for dissolution of marriage the husband is allowed a *locus poenitentiae* before the marriage is dissolved. If he avails himself of this *locus poenitentiae* he may be liable to punishment for slander or defamation but the marriage cannot be dissolved.

* Second Civil Appeal No. 170 of 1928, against the decree of Shambhu Dayal, First Subordinate Judge of Kheri, dated the 15th of March, 1928, confirming the decree of Tribeni Prasad, Additional Munsif of Kheri, dated the 10th of December, 1927, dismissing the plaintiff's claim.