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the Code of Civil Procedure that the suit, out of which this appeal has arisen, be restored to its original number in the register of suits pending in the court of first instance and tried and decided according to law. The plaintiff's costs hitherto incurred will be paid by the defendant. Future costs will abide the event.

Appeal allowed.

APPELLATE CIVIL.

Before Mr. Justice Bisheshwar Nath Srivastava.

MUHAMMAD YAHYA KHAN (DEFENDANT-APPELLANT) v.
MUSAMMAT ALIA BIBI (PLAINTIFF-RESPONDENT).*

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United Provinces Land Revenue Act (III of 1901), sections 111 and 233(k)—Partition—Plaintiff not having an opportunity of raising his title before revenue courts carrying on partition—Plaintiff's right to raise the question of his title in a subsequent suit, whether barred—Oudh Rent Act (XXII of 1886), section 127—Transferee of a fractional share, rights of—Transferee, whether entitled to eject the proprietor from his sir plots.

Where a person had no opportunity of raising an objection on a question of proprietary title under section 111 of the Land Revenue Act in the course of partition proceedings pending in revenue courts, section 233(k) is no bar to his setting up such a title in a subsequent suit. One essential condition for the rights of any person to be barred by reason of section 111 is that the person concerned should have had an opportunity of raising an objection regarding the question of title and should have failed to avail himself of the said opportunity. The terms of section 111 are clear and can apply only to those cases in which the objection could have been raised "on or before the day so fixed" in the proclamation issued under chapter VII of the Land Revenue Act and was not raised. A person who had no such opportunity for the simple reason that his title came into existence long after the time fixed in the proclamation cannot lose his right to establish his title. *Mahbub v. Mohammad Husain* (1), relied on.

The transferee of a fractional share has a right to get his share separated by partition and to have specified plots apper-

*Second Rent Appeal No. 44 of 1929 against the decree of W. V. Madeley, District Judge of Rae Bareilly, dated the 25th of April, 1929 upholding the decree of Muhammad Usman Khan, Assistant Collector, 1st Class, Partabgarh, dated the 31st of July, 1928.

(1) (1920) 23 O.C., 125.

taining to the said share specified and demarcated but he cannot in the meantime dispossess the proprietor from any particular plots of land which are in his exclusive possession as his *sir*. *Baldeo Pal v. Chikku Ahir* (1); relied on.

Mr. *Ali Mohammad*, for the appellants.

Mr. *Zahur Ahmad*, for the respondents.

SRIVASTAVA, J. :—This is a second rent appeal by the defendant who has been unsuccessful in both the courts below. It arises out of a suit under section 127 of the Oudh Rent Act relating to one plot No. 592 with an area of 17 biswas 10 dhurs. The plaintiff's case was that at a revenue partition which took place in this village, a *patti* was formed in the name of the plaintiff and that the plot in suit was allotted to her *patti* as her *sir*, and that the defendant's possession of the plot in question was wrongful. The defendant's reply was that he had purchased a three-pies share from one Ahmad Ali who had purchased the said share at a court sale and that by virtue of this purchase he had become a co-sharer in the plaintiff's *patti* and so his possession of the plot in dispute was as a co-sharer and could not be wrongful.

Both the courts below have, relying upon the provisions of section 233(k) of Act III of 1901, rejected the defendant's contention and have decreed the plaintiff's suit. The only contention urged on behalf of the defendant in support of the appeal is that the rights acquired by him in respect of the three-pies share came into existence for the first time after the partition proceedings had been framed and therefore his rights could not be barred by reason of the partition and his possession in relation to the plot in suit must be considered to be that of a co-sharer. In order to determine this question it is necessary to state a few facts. It appears that Karam Maula, father of both the plaintiff and the defendant, made a mortgage of a three-pies share in the year 1918. The mortgagee obtained a decree for sale on foot of this mortgage in the year 1920 and in execution of the decree,

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the aforesaid share was put to sale and purchased by Ahmad Ali on the 21st of May, 1924. Ahmad Ali obtained formal delivery of possession through court in respect of the share purchased by him on the 15th of December, 1924. He also obtained mutation in his favour from the revenue court on the 18th of March, 1925, and shortly after on the 24th of July, 1925, he sold the said share to the defendant, Mohammad Yahya Khan. While the execution proceedings under the decree for sale obtained on foot of the mortgage executed by Karam Maula were going on, the plaintiff on the 28th of March, 1922, made an application for imperfect partition of the share held by the family, described as khata No. 2. On the 12th of March, 1923, a partition proceeding was framed. The partition dragged on for several years and was ultimately confirmed on the 26th of August, 1925. It was to take effect from the July following. It might be mentioned that Ahmad Ali, the original purchaser at the auction sale, as well as Mohammad Yahya defendant, were parties to the partition by reason of shares possessed by them in khata No. 2 which formed the subject of partition. It should also be noted that on the 25th of August, 1924, Ahmad Ali made an application asking that the three-pies share which had been purchased by him should be allotted to his share, but this application was rejected by the partition court as the applicant had not obtained mutation in his favour and was not a recorded co-sharer in respect of it.

On the facts stated above, two questions require determination in this appeal. The first question is whether the title set up by the defendant in respect of the three-pies share is barred by the provisions of section 233(k) read with section 111 of the Land Revenue Act (III of 1901), and the second question is whether assuming that the defendant is a co-sharer in the plaintiff's *patti*, the present suit in respect of the *sir* plot No. 592 is or is not maintainable under section 127 of the Oudh Rent Act.

As regards the first question I am of opinion that the title of the defendant cannot be barred by section 233(k) read with section 111 of the Land Revenue Act. The scheme for partition as laid down in chapter VII of the Land Revenue Act is that on receipt of an application for partition, the Collector is required to issue a proclamation calling upon the recorded co-sharers who have not joined in the application to state their objections to the partition, within a time to be fixed in the proclamation. The duty has been laid down upon recorded co-sharers to file objections raising questions of title on or before the date so fixed. The object of this provision of section 111 of the Land Revenue Act is perfectly clear. It is intended to avoid any clash between the jurisdiction of the revenue court and the civil court. The object is that after the revenue courts have become seized of the partition all questions relating to title should be determined by or under the directions of the revenue court. If no objection has been raised or if such objection has been raised and it has been decided in accordance with the rules laid down in section 111, the Collector is to proceed with the framing of the partition proceeding. In the present case it is clear that Ahmad Ali acquired the three-pies share at the auction sale more than a year after the partition proceeding had been framed. It is, therefore, obvious that no objection based upon the title acquired by Ahmad Ali under the auction sale could possibly be raised within the time fixed in the proclamation. The fact that at a late stage of the partition, Ahmad Ali did as a matter of fact raise such an objection and that the objection was decided against him, seems to me to be of no consequence. One essential condition for the rights of any person to be barred by reason of section 111 is that the person concerned should have had an opportunity of raising an objection regarding the question of title and should have failed to avail himself of the said opportunity. I am supported in this view by the decision of Mr. LINDSAY

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(afterwards Sir BENJAMIN LINDSAY) in *Mahbub v. Mosammad Husain* (1) in which it was held that section 233(k) of the Land Revenue Act is no bar to a suit in cases where the plaintiff had no opportunity of raising an objection on a question of proprietary title in the revenue court which effected partition. In the present case it is quite clear that the defendant or his predecessor had no such opportunity for the simple reason that the title came into existence long after the time fixed in the proclamation. Mr. *Zahur Ahmad*, the learned counsel for the plaintiff-respondent, drew my attention to rule 9 of Board's Circulars, 21-II, which provide that for special reasons objections raising questions of title may be entertained at a period subsequent to the date fixed for lodging the objections. Assuming that the rules framed by the Board of Revenue allow a discretion to the partition court, in special cases, to entertain objections even beyond the time fixed in the proclamation, yet I am not prepared to hold that the bar of section 111 can be invoked against a party because he has failed to seek the assistance of the revenue courts to entertain the objection, under the discretion allowed to them by the aforesaid rule. It seems to me that the terms of section 111 are quite clear and can apply only to those cases in which the objection could have been raised "on or before the day so fixed" and was not raised. It might further be pointed out that in this case, *Ahmad Ali* did as a matter of fact move the revenue court though long after the date fixed in the proclamation, but his attempt was unsuccessful. I am, therefore, of opinion that the respondent's objection based on the provisions of section 233(k) must fail.

As regards the second question it is admitted that the plot in suit was the *sir* of *Karam Maula* and was allotted to the plaintiff as her *sir* at the revenue partition. The position therefore is, that the defendant is a transferee of the three-pies fractional share. He has a right

to get the share separated by partition and to have specific plots appertaining to the said share specified and demarcated. The question arises whether he can in the meantime dispossess the plaintiff from any particular plots of land which are in her exclusive possession as *sir*. I am of opinion that the lower courts are right in holding that the defendant by reason of his purchase of the three-pies share is not justified in ousting the plaintiff from the plot in suit which has been allotted to her as her *sir*. The terms of section 127 are that "a person taking or retaining possession of land without being entitled to such possession may, at the option of the person entitled to eject him as a trespasser, be treated as a tenant, etc." The question, therefore, reduces itself to this: whether the defendant can be regarded as a person not entitled to possession of the plot in suit. I agree with the courts below that the defendant's purchase of the three-pies share, does not entitle him to possession of this specific plot. The decision of the Board of Revenue in *Baldeo Pal v. Chillu Ahir* (1) is quite apposite to the present case. The Board of Revenue in this case held that where a part only of the share of a proprietor is transferred, the proprietor is entitled to retain the whole of his *sir* land as his *sir* until the transferee gets the transferred part specified and demarcated.

The appeal therefore fails and is dismissed with costs.

Appeal dismissed.

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