PRIVY COUNCIL

1938
May, 27

RAI BAJRANG BAHADUR SINGH AND ANOTHER (APPELLANT) *v.* RAI BENI MADHO BAKSH SINGH AND OTHERS (RESPONDENTS)*

[On Appeal from the Chief Court of Oudh at Lucknow.]

United Provinces Land Revenue Act (III of 1901), section 233 (k)—Partition of mahal—Question of title not raised at partition—Subsequent suit in Civil Court for declaration of title, whether barred.

If a question of title affecting the partition of a mahal which might have been raised in the partition proceedings is not raised and the partition is completed, section 233(*k*) of the United Provinces Land Revenue Act debars the parties to the partition from raising the question subsequently in a Civil Court.

The word "partition" is not used in the Act in the narrow sense of mere arrangement into units of area. It imports and includes the distribution of rights in the units among the sharers.

Ram Rikha Misra v. *Lallu Misra* (1), *Muhammad Sadiq* v. *Lauti Ram*, (2) *Bijai Misir* v. *Kali Prasad* (3) and *Kalka Prasad* v. *Manmohan Lal* (4), referred to.

The material facts are stated in the judgment of the Judicial Committee.

1938, *May* 2 *and* 3: Williams, for the appellants.
Wallach, for the 3rd respondent.

The other respondents were not represented.

In addition to the cases referred to in the judgment, *Shambu Singh* v. *Daljit Singh* (5) was cited by counsel for the appellants.

The judgment of the Judicial Committee was delivered by Sir GEORGE RANKIN:

The question for determination in this case relates to partition proceedings which from 3rd October, 1903,

---

**Present*: Lord THANKERTON, Lord ROCHE, Lord ROMER, Sir SHADI LAL and Sir GEORGE RANKIN.

(1) (1931) I. L. R. 53 All., 568. (2) (1901) I. L. R. 23 All., 291.
(3) (1917) I. L. R. 39 All., 469. (4) (1916) I. L. R. 38 All., 302.
(5) (1916) I.L.R. 38 All., 243.

to 1st July, 1907, took place under the United Provinces Land Revenue Act (U. P. Act III of 1901) in respect of a village called Nain situate in pargana Salon in the district of Rae Bareli in Oudh. The question has been described by the Chief Court of Oudh as of importance, and judicial opinion in the United Provinces has for many years been divided upon the principle to be applied.

The suit out of which the present appeal arises was brought in the Court of the Subordinate Judge of Rae Bareli by the two appellants together with two other persons on 20th February, 1930, against 68 persons interested in the lands of the village: defendant no. 69 being joined *pro forma* as a person having the same interest as the plaintiffs. The relief claimed by the plaint was a declaration that the plaintiffs and defendant no. 69 were superior proprietors as distinct from under-proprietors of various plots of land specified in list A attached to the plaint. The aggregate area of these plots is about 71 bighas: they are not contiguous but are scattered throughout the various parts of the village. By reason of certain compromises entered into pending this appeal to His Majesty, there remain in controversy only five plots with a total area of 5 bighas, 7 biswas, 16 biswansis and the respondent no. 3, Thakurain Chhabinath Kuar (the third defendant), is the only contesting respondent. She is one of the two widows of one Rai Chait Narain Singh, her co-widow being Musammat Seot Raj Kuar. At the time when partition proceedings as already mentioned were begun in 1903 the plaintiffs were recorded as having only under-proprietary right in these five plots. As a result of the partition, these plots were included in the revenue-paying unit or "mahal," comprising 164 bighas which was given the name of Rai Chait Narain Singh and assessed as at annual revenue of Rs.51. The plaintiffs were recorded as having an under-proprietary interest therein but as holding them rent-free. The superior

1938

RAI BAJRANG BAHADUR SINGH v. RAI BENI MADHO BAKSH SINGH

P.C.

interest was recorded as belonging to Rai Chait Narain Singh and another. It now stands in the names of his two widows who hold as limited owners under the Hindu law. Musammat Seot Raj Kuar, by registered deed dated 20th September, 1933, has compromised with the appellants on terms which purport to agree that the latter be recorded as the superior proprietors, that they shall get revenue thereon separately assessed and that she shall not be liable for the payment of such revenue.

At the trial of the suit the learned Subordinate Judge found against the plaintiffs on the issue as to their title to the superior right in the suit lands. He also held that their suit was bad as being one to disturb the partition of 1906 and as contrary to section 233 (*k*) of the Act of 1901. The Division Bench of the Chief Court on appeal referred to a Full Bench two questions:

1. Is the relief of declaration prayed for by the plaintiffs in the present suit barred by the provisions of clause (*k*) of section 233 of the Land Revenue Act, 1901, by virtue of partitions of 1906 and 1910?

2. Is the jurisdiction of the Collector to act under clause (*c*) of section 111(1) of the Land Revenue Act, 1901, ousted when the question of proprietary title alleged to have been decided by him in the partition proceedings mentioned above had already been determined by a Court of competent jurisdiction?

The Full Bench (10th March, 1932), having answered the first question in the affirmative and the second in the negative, the Division Bench on 7th April, 1932, dismissed the appeal. From this decree the present appeal has been brought pursuant to a certificate granted on 21st September, 1932, by the Chief Court that the case complies with the requirements of section 110 and is also fit for appeal to His Majesty under clause (*c*) of section 109 of the Civil Procedure Code.

It has been contended for respondent no. 3 (hereinafter called the respondent) that the amount or value of the subject-matter in dispute on this appeal had been

reduced to less than Rs.10,000 by compromise with certain of the defendants effected after the date of the certificate but before 12th December, 1932, when the appeal was finally admitted, and that the appeal had become incompetent accordingly. Their Lordships are far from holding that this contention would have prevailed apart from the certificate as to fitness under clause (*c*) of section 109, but in view of the express reference to that clause in the judgment of the Chief Court they think that the objection must clearly be overruled.

The second of the two questions referred to the Full Bench was apparently propounded in the interest of the plaintiffs. Before their Lordships the negative answer given to it by the Full Bench has not been contested in argument but it is in any view unnecessary that their Lordships should give any decision thereupon.

As the sole question for decision on this appeal is whether the suit is barred by clause (*k*) of section 233 of the Act of 1901, it is necessary to consider in relation to that clause the nature and effect of partition proceedings taken under chapter VII of the Act, to examine the circumstances in which the plaintiffs claim to be entitled to relief, and to ascertain the results which would follow from the grant of the relief claimed.

Section 233, upon which the present case turns, constitutes Part B of chapter XI of the Act. The subject-matter of the chapter is described as "Miscellaneous," and that of Part B as "Jurisdiction of Civil Courts" or as given in the margin of the section "Matters excepted from the cognizance of Civil Court." These matters are stated in thirteen clauses (*a*) to (*m*), of which the most important for the present case is (*k*).

233. No person shall institute any suit or other proceeding in the Civil Court with respect to any of the following matters:

(*k*) partition or union of mahals except as provided in sections 111 and 112.

Other matters excepted from the cognizance of Civil Courts by the section are the liability of any land, not excepted under section 58, to be assessed to revenue;

1938

RAI BAJRANG BAHADUR SINGH v. RAI BENI MADHO BAKSH SINGH

P.C.

the claim of any person to engage for the payment of revenue; the amount of revenue assessed on any mahal or portion of a mahal; the amount to be paid to a proprietor by an inferior proprietor when that amount has been fixed by the Settlement Officer; claims connected with or arising out of the collection of revenue.

The words "partition and union of mahals" which appear in clause (*k*) appear earlier in the Act as the heading to chapter VII. They had stood at the head of the corresponding provisions of the previous Acts (XIX of 1873 and XVII of 1876). The usual meaning of mahal is that given in clause (*a*) of section 4—"any local area held under a separate engagement for the payment of land revenue." Though the definition includes "any revenue-free area for which a separate record of rights has been framed" and certain other cases mentioned in the section, the root idea is unit of area for revenue purposes. In chapter VII the Act does not provide any special definition of "union of mahals" which is a simple matter dealt with by sections 139 and 140. But it is otherwise with "partition" which is defined by section 106:

> 106. "Partition" means the division of a mahal or of a part of a mahal into two or more portions, each consisting of one or more shares.
>
> In "imperfect partition" the several portions remain jointly responsible for the revenue assessed on the whole mahal.
>
> In "perfect partition" the whole mahal is divided and the several portions become separate mahals, each severally responsible for the revenue distributed thereon.
>
> The procedure prescribed in this chapter shall be followed in all partitions, whether imperfect or perfect, except where it is otherwise expressly declared.

The chapter provides that an application for partition may be presented by one or jointly by two or more of the recorded co-sharers of a mahal (section 108) but that the Collector may at any stage stay the partition and order the proceedings to be quashed (section 109).

On receiving an application the Collector is to issue a proclamation to all the other recorded co-sharers to appear and state their objections if any to the partition: any other recorded co-sharer may join in applying for partition (section 110). If the partition is not to be made by the parties themselves or by arbitrators but by the Collector or an Assistant Collector a partition proceeding (*tarz-i-taqsim*) is to be drawn up declaring the nature and extent of the interest of the persons applying for the partition and of any other persons who may be affected thereby, detailing how partition is to be made, and deciding all disputed questions that may have arisen in connection therewith (section 114). This proceeding bears some analogy to what in a suit before a Civil Court would be called a preliminary decree for partition. It is prior to this stage that sections 111 and 112—both of which are mentioned in clause (*k*) of section 233—apply to the case and enable an objection by a recorded co-sharer involving a question of proprietary title to come before a Civil Court at first instance or on appeal if it has not already done so.

> 111.—(1) If, on or before the day so fixed, 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 may 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 the determination of such question, or
>
> (*c*) proceed to inquire into the merits of the objection.
>
> (2) When the proceedings have been postponed under clause (*b*), if such party fails to comply with the requisition the Collector shall decide the question against him. If he institutes the suit, the Collector shall deal with the case in accordance with the decision of the Civil Court.

1938

RAI BAJRANG BAHADUR SINGH v. RAI BENI MADHO BAKSH SINGH

P.C.

(3) If the Collector decides to inquire into the merits of the objection, he shall follow the procedure laid down in the Code of Civil Procedure for the trial of original suits.

112. All decrees passed under sub-section (3) of the preceding section shall be held to be decrees of a Court of Civil Judicature of the first instance, and shall be open to appeal to the District Judge or High Court or the Judicial Commissioner, as the case may be, under the rules applicable to appeals to those courts, and the Appellate Court may issue a precept to the Collector, desiring him to stay the partition pending the decision of the appeal.

The remaining sections of chapter VII contain many provisions as to the principles to govern the division of the land into different portions to be allotted to the various sharers—a matter which in cases of perfect partition affects the revenue directly. These sections cover such matters as lands already held by a co-sharer in severalty, buildings of one sharer on the land allotted to another, garden lands, wells and so forth. They provide that if the holding of any tenant is divided the rent is to be apportioned, and in all cases the revenue of the mahal is to be distributed over the several portions (129, 130). There is provision for appeals from the Assistant Collector to the Collector, and for appeals to the Commissioner from the Collector's orders on a partition proceeding or disallowing partition. Section 131 is important:

113. A partition shall not be complete until the Collector has passed an order confirming it.

When the partition has been confirmed, the Collector shall issue a proclamation thereof, and the partition shall take effect from the first day of July next following the date of such proclamation.

In the present case the provisions of chapter VII were applied to the village of Nain. They began with an application (section 107) on 3rd October, 1903, by certain co-sharers of the village for a perfect partition to be made of the lands of the village which at that time was a single mahal. Proclamation was duly made calling upon the other co-sharers to appear and state

1938

Rai Bajrang Bahadur Singh v. Rai Beni Madho Baksh Singh

P.C.

objections if any (section 110). The plaintiffs-appellants were recorded as co-sharers of the village apart altogether from their interest in any of the plots in suit. As such they received due notice of the application for partition and on 12th March, 1904, they filed an application in respect of their recorded interest as superior proprietors agreeing to partition [section 110 (2)] but asking that their interest be included in a particular mahal. With reference to the plots in suit the plaintiffs were recorded as under-proprietors and not as having the superior right; though their claim now is that they were entitled to the superior interest and that the record was erroneous. They say that in 1876 their right had been established by the decree of a Civil Court but they have to admit that in 1903 the record was against them. They made no claim to the superior interest in these plots or any of them in the course of the partition proceedings. Their interest in the plots in suit was treated as a rent-free but under-proprietary interest with the result that by the partition their interest in the village lands as superior proprietors was included in one mahal while the five plots now in dispute were included in another, the plaintiffs being shown as under-proprietors in the khewat of under-proprietors of that mahal. The village was divided into five mahals, the fifth being a residuary mahal comprising the lands of those who did not seek partition. The partition proceeding (section 114) was approved by the Collector on 16th September, 1904, and the partition was confirmed on the 28th September, 1906, with effect from 1st July, 1907, (section 131). The various plots originally claimed by the plaint were distributed over all five of the new mahals: the five plots still in controversy were included in the second which was given the name of Rai Chait Narain Singh. As representing a 1 anna 5 pie share in the village this mahal included 164 bighas and was assessed to revenue at Rs.51. No objection or

1938

RAI BAJRANG BAHADUR SINGH *v.* RAI BENI MADHO BAKSH SINGH

P.C.

appeal was taken by the plaintiffs at any time between 1903 and 1907. In 1909 an imperfect partition of the residuary mahal was carried out, but as the five plots now in dispute were not in that mahal it need not be further referred to. The plaintiffs remained in possession of the suit lands as of old, paying neither revenue nor rent till 1929. In that year proceedings under section 107 of the Oudh Rent Act (Act XXII of 1886) were taken against them before the Assistant Record Officer by the proprietors of different mahals including the mahal Rai Chait Narain Singh. On 25th June, 1929, the Assistant Record Officer assessed them to rent notwithstanding their claim to be proprietors—a claim then set up, so far as appears, for the first time since some date before 1903. The plaintiffs on 20th February, 1930, filed the present suit for a declaration that they are the superior proprietors of the lands specified in the plaint and not inferior proprietors.

If the plaintiffs be granted the relief claimed it is plain that the result of the partition of 1903-7 will be substantially altered. All the Courts in India are agreed as to this. It is no answer to say that the plaintiffs could be declared to be joint proprietors of a mahal along with the persons to whom it was allotted at the partition. Such a declaration would produce a result contrary to the very purpose of the applicants for partition (viz. to separate their shares) and a highly unjust result, in respect that failure by the plaintiffs to pay their share of revenue would compel the present proprietors to pay it in order to avoid a sale of the entire mahal. That alone would convert the partition of 1906 into something which was not intended by the Collector or by any party thereto and which might well be intolerable. But the declaration would also mean a reduction in the assets of the mahal and a disturbance of the arrangements for the payment of the revenue, and indeed an extensive disturbance if the original plaint with its 68 defendants be regarded.

1938

RAI BAJRANG BAHADUR SINGH v. RAI BENI MADHO BAKSH SINGH

P.C.

All the Courts in India—the Assistant Record Officer in the rent case, and the judges in the trial Court and Chief Court—have been satisfied that the plaintiffs' suit is in these circumstances barred by virtue of the partition of 1906, but the judgments in the Chief Court disclose a difference of opinion as to the principle applicable under the Act of 1901 to the case. Though the first question referred to the Full Bench had reference to clause (*k*) of section 233 the learned Chief Judge answered it by saying that the suit was barred by virtue of the previous partitions but not by the provisions of clause (*k*). He considered that it was barred by the general principle of *res judicata*, the Collector being regarded by him as a Court of exclusive judisdiction. The other members of the Full Bench held that the suit was barred by clause (*k*) but that the principle of *res judicata* did not apply. This difference of opinion is but the reflection of a divergence in the previous authorities: the matter seems indeed to have been constantly before the Courts in Agra and in Oudh: from time to time it has appeared to be settled, only to become unsettled by subsequent decisions.

With all respect to the learned judges in *Ram Rikha Misra* v. *Lallu Misra* (1) their Lordships think that to approach the construction of section 233 of the Act by first forming a view upon the disputable question of *res judicata* is a mistake in method. Upon an independent examination of the provisions of the Act of 1901 their Lordships have arrived at the same construction as was put upon the previous Act (XIX of 1873) by the Full Bench of the High Court at Allahabad in *Muhammad Sadiq* v. *Lauti Ram* (2) and upon the present Act by Banerji and Tudball, JJ. in *Bijai Misir* v. *Kali Prasad* (3). If a question of title affecting the partition which might have been raised in the partition proceedings is not so raised and the partition is completed, section 233 (*k*) in their Lordships' opinion debars parties

(1) (1931) I. L. R. 53, All., 568. (2) (1901) I. L. R. 23 All., 291.
(3) (1917) I. L. R. 39 All., 469.

1938

RAI BAJRANG BAHADUR SINGH v. RAI BENI MADHO BAKSH SINGH

P.C.

to the partition from raising the question subsequently in a Civil Court. This proposition is wide enough to cover the present case and it is unnecessary to consider whether it might not be framed more widely.

As was well said by Strachey, C.J. in the former case:

"The Legislature intended to give to co-sharers raising questions of title a limited opportunity and a limited time for having such questions determined by a Civil court, and in effect provided that such questions might only be so determined if raised at such a time as to avoid the inconvenience . . . arising where interference with an actually completed distribution is sought." (p. 300.)

As against this view of section 233, clause (*k*), there is the narrower interpretation to be collected from the dissenting judgment of Richards C. J. in *Bijai Misir* v. *Kali Prasad* (*supra*) and the judgment of Bennet J. in *Ram Rikha Misra* v. *Lallu Misra* (*supra*). Proceeding upon the basis that partition means the opposite of union of mahals, Richards C.J. considered that these words refer to units of area which the revenue authorities create in the course of partition proceedings. He did not agree that the expression partition means or includes the actual division as between the parties and the determination of their title.

"If the plaintiff in this suit was successful the property would remain in the same unit in which it was placed by the Revenue Court notwithstanding the plaintiff's decree for possession. The unit would not be affected though the ownership of the property in it would be . . . . If the Legislature intended to prevent questions of title being re-opened after partition it would have been simpler, fairer and less calculated to do injustice if the rules of *res judicata* as laid down in the Code of Civil Procedure had been incorporated."

The narrower view of section 233 (*k*) was thus expressed by Bennet J.:

"The section only bars suits which would alter the partition in regard to the amount of shares in any mahal or subdivision 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*."

1938

RAI BAJRANG BAHADUR SINGH *v.* RAI BENI MADHO BAKSH SINGH

In the present case the learned Chief Judge presiding over the Full Bench rested his view that clause (*k*) did not bar the plaintiffs' suit upon the definition of "partition" contained in section 106 of the Act.

P.C.

"As already stated, partition, according to section 106, means the division of a mahal or part of a mahal into two or more portions each consisting of one or more shares. I feel no difficulty in saying that having regard to the defined sense of the word 'partition' the present suit is not a suit with respect to partition."

Their Lordships think this line of reasoning to be unsound, and that the phrase "partition and union of mahals" refers to a process regulated by chapter VII of the Act and the result thereof which is given statutory effect. The words occur at the head of the chapter as a statement of its subject-matter. Definitions may be more or less successful and it is not always safe to take an abstract word in its most abstract sense. For the purposes of the Act it is not possible to say on the strength of the definition that "partition" means nothing more than the re-arrangement of the land into units of area. It imports and includes that rights in these units are distributed among the sharers. This indeed in the case of imperfect partition is the main feature and almost the whole of the operation. The amount of revenue imposed depends upon the "unit"—that is, the amount of land brought under one assessment: this depends mainly upon the person or persons interested and their relations with one another. When section 106 states that a mahal is divided into two or more portions each consisting of one or more shares, it refers to distribution among the sharers according to their rights—not merely to a division of the land into units of area. An "application for partition" (section 107), is surely an application

1938

RAI BAJRANG BAHADUR SINGH v. RAI BENI MADHO BAKSH SINGH

P.C.

for a change to be made in the form or method in which the applicant's interest is held: to have a certain amount of land allotted to the applicant in severalty and in such wise that he shall be responsible for such revenue only as is attributable to his own land. When section 114 speaks of the partition proceeding "detailing how the partition is to be made and deciding all disputed questions that may have arisen in connection therewith," it surely refers to the principles upon which the various portions are to be allotted—not merely the principles on which their size and position is to be determined. Section 118 and the following sections are clear to this effect. But section 233, clause (*k*), itself contains words which show that partition is not used in that clause in the narrow sense of mere arrangement into units of area. The words "except as provided in sections 111 and 112" are inconsistent with the construction contended for. These sections provide means whereby objections involving a question of proprietay title can be brought before the Civil Courts. The exception is made in their favour by clause (*k*) because otherwise the sections would conflict with the clause—that is because suits raising questions of proprietary title are hit by the prohibition against instituting suits with respect to partition of mahals. The exception makes it exceedingly difficult to maintain that the only thing excluded from the cognizance of the Civil Court by clause (*k*) is the schematic arrangement of the land into units of area and that no question of proprietary right comes within the prohibition of access to the Civil Court. This is not a new point: it was before the Court in *Bijai Misir* v. *Kali Prasad* (1) and is referred to by RICHARDS, C.J.

> It is said that the words "except as provided by sections 111 and 112" show that the expression "partition" means or at least includes the actual division as between the parties and the determination of their title. It may

(1) (1917) I.L.R. 39 All., 469(476.)

possibly be that the framers of the section hoped the introduction of these words would prevent subsequent questions of title being raised. Another explanation might be to obviate some contradiction or inconsistency between sections 111-112, and section 233(*k*).

This passage shows that the argument was appreciated: but in their Lordships' opinion it was not answered. Moreover in order to provide that a Civil Court dealing in the ordinary course with titles to land should not make any order which would alter the "units of area," it seems to be at once ineffective and excessive to enact that no person shall institute in the Civil Court any suit *with respect to* partition. In order to divide a mahal into shares, which is the meaning of partition as defined by section 106, a number of important steps have to be taken to arrive at a result effective in accordance with section 131. These steps are detailed in the intervening sections. A suit is brought with respect to the partition if it is brought to impugn the distribution which by partition has been effected under the Act.

The question of *res judicata* has been much considered in conection with section 233 (*k*) and in the present case though no question was referred to the Full Bench as to *res judicata* the learned Chief Judge based his decision entirely upon that ground. What the position would be in such a case as the present apart from any special statutory provision is a question difficult and not to be lightly decided, but their Lordships agree with SRIVASTAVA and RAZA, JJ., the other members of the Full Bench, in holding that the principle of *res judicata* would not apply where, as in the present case, no objection was made under section 111 with the result that sections 111 and 112 did not come into operation. In such a case the partition proceeds upon the entries in the khewat: the Collector does not function as a Civil Court, and does not have in that or any other capacity to decide as to its correctness expressly or implicitly. To hold that the right to a decision from the Civil Court

1938

Rai Bajrang Bahadur Singh v. Rai Beni Madho Baksh Singh

P.C.

is ousted by the mere fact that the Collector proceeded upon the footing of the record is not in their Lordships' view sound doctrine so far as regards the principle of *res judicata*. Their Lordships on this point are in agreement both with RICHARDS C.J. in *Kalka Prasad* v. *Manmohan Lal* (1) and with BANERJI J. in *Bijai Misir's* case (*supra*).

The facts of the present case raise no question as to the rights of anyone to bring a civil suit pending the partition proceedings, or as to the rights of a person who is not a recorded co-sharer or was not a party to the proceedings, or as to any case between persons whose interest were not opposed for the purpose of the partition. A considerable number of decisions have been given upon such cases but their Lordships have not had occasion to hear argument upon them and do not deal them—more especially as their Lordships consider that their decision upon the point arising in the present case is in confirmation of the main current of authority in India.

Since this appeal to His Majesty was brought, agreements of compromise have been entered into between the appellants and three sets of respondents. While entitled to assume that these respondents are competent to deal with their own interests in the land of the village, their Lordships are not in a position to make certain that the agreements as they stand are unobjectionable from the standpoint of the revenue authorities and (in the case of the agreement with Musammat Soet Raj Kuar) compatible with all the rights of the contesting respondent Thakurain Chhabinath Kuar. They will humbly advise His Majesty that the appeal should be dismissed and that the order to be made on this appeal should record that as against the respondents other than Thakurain Chhabinath Kuar the dismissal is directed by reason of the said agreements, but they are not prepared to advise that there should be any direction that the said agreements should be carried into effect. If any

(1) (1916) I.L.R., 38 All., 302, 310.

question should arise as to the carrying out of any of the compromises it must be dealt with in proceedings to be instituted in India in accordance with law. The appellants must pay to Thakurain Chhabinath Kuar her costs of this appeal.

1938

Rai Bajrang Bahadur Singh v. Rai Beni Madho Baksh Singh

Solicitors for the appellants: *Nehra* & *Co.*

Solicitors for the respondents: *Hy. S. L. Polak* & *Co.*

REVISIONAL CIVIL

Before Mr. Justice G. H. Thomas and Mr. Justice Ziaul Hasan

NAWAB MIRZA ABUL HASAN KHAN AND ANOTHER (DEFENDANTS-APPLICANTS) *v.* HAKIM MIRZA JAFAR HUSAIN AND OTHERS, PLAINTIFFS AND OTHERS (DEFENDANTS-RESPONDENTS)*

1937 *April*, 16

Civil Procedure Code (Act V of 1908), *sections* 92 *and* 96—*Mahomedan Law—Waqf—Mutawallis appointed under deed of waqf—Persons not legally appointed mutawallis in possession of waqf properties and managing as mutawallis—Application for appointment as mutawallis by others—Applications, if barred by section* 92, *Civil Procedure Code—Court entertaining application in capacity of Qazi under Mahomedan Law—Appeal against order on such application, if lies—Revision against order, when maintainable.*

It can be said that section 92 of the Code of Civil Procedure does not show that its provisions are exhaustive or that beyond a suit of the description prescribed in that section, no other remedy is open to a person for the purposes mentioned in that section. The section does not expressly bar applications brought in the Civil court as a Qazi under the Mahomedan Law even for the purposes mentioned in section 92(1). But though this is so section 92, Civil Procedure Code, bars, by necessary implication, applications for appointment of mutawalli of waqf property where certain persons though not lawfully appointed trustees are in possession of the waqf properties and managing it as mutawallis. It is hardly conceivable that when the Legislature deemed it necessary that a suit brought for the purposes mentioned in the section should be incompetent unless brought with the consent in writing of the Advocate

*Section 115 Application no. 57 of 1937, against the orders of Pandit Braj Krishna Topa, Civil Judge of Malihabad at Lucknow, dated the 31st of May, 1933, 21st of March, 1934, and 29th of May, 1935.