

his share in the holding would not pass to *B* and *C* but lapse to the landlord.

A. N. C.

FULL BENCH.

Before Addison, Tek Chand and Hilton JJ.

SHEO NATH AND OTHERS (PLAINTIFFS) Appellants
versus
 GIANI AND OTHERS (DEFENDANTS) Respondents.

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April 22.

Civil Appeal No. 2500 of 1928.

Punjab Land Revenue Act, XVII of 1887, section 158 (2) (XVII)—Partition of Shamilat—ordered by Collector, notwithstanding agreement in wajib-ul-arz that it shall continue joint—Question of title—Jurisdiction of Civil Court.

In the last settlement on an agreement between all the village proprietors and with the approval of the Settlement Officer, a certain area out of the village *shamilat* was set apart for pasture which was to continue to be joint and impartial. This agreement was duly recorded in the *wajib-ul-arz*. A few years later some of the proprietors applied for partition of the area and the Revenue officer ordered partition, overruling the objection raised by some of the other proprietors that the land was not liable to partition in accordance with the aforesaid entry in the *wajib-ul-arz*. Thereupon the objectors instituted a suit in the Civil Court for a declaration that the land could not be partitioned. The defendants pleaded that the Civil Court had no jurisdiction to entertain the suit and this plea was given effect to by the two lower Courts.

Held, that the question involved is one of title, a determination of which is not excluded from the jurisdiction of Civil Courts by section 158 (2) (*xvii*) of the Punjab Land Revenue Act, and that the decision of the lower Courts to the contrary was erroneous.

Khubi v. Ast Khan (1), followed.

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Singh Ram v. Data Ram (1), overruled.

Dewa Singh v. Mst. Jawali (2), *Nandu v. Jaimal* (3), *Malang v. Mst. Namitti* (4), *Prabhu v. Maya* (5), and *Gul-dad Khan v. Gul Khan* (6), referred to.

Lakhi v. Malik Dost Mohammad Khan (7), distinguished.

Second appeal from the decree of Rai Sahib Lala Shibbu Mal, District Judge, Karnal, dated the 11th July 1928, affirming that of Sardar Kartar Singh, Subordinate Judge, 1st class, Rohtak, dated the 31st January 1928, dismissing the suit.

SHAMAIR CHAND, QABUL CHAND, MUHAMMAD AMIN, and AMAR NATH CHONA, for Appellants.

ZAFRULLA KHAN for Respondents.

The order of Tek Chand and Hilton JJ., dated 16th July 1929, referring the case to a Full Bench.

The parties to this litigation are proprietors of *Mauza Murthal* in the *Sonepat Tahsil* of the *Rohtak District*, which is divided into four *panas*, named *Gilan, Mandhra, Silan* and *Pilpilan*. The plaintiffs are representatives of the first two *panas* and the defendants of the last two. In the Settlement of 1909-10 an agreement was entered into by the proprietors of all the four *panas* that a certain plot of land out of the village *shamilat*, measuring 5,008 *bighas* and 11 *biswas* be reserved for pasture and should continue to be joint and impartible. This agreement was approved by the Settlement Officer and duly recorded in the *wajib-ul-arz*.

(1) (1922) I. L. R. 3 Lah. 4.

(4) 4 P. R. (Rev.) 1898.

(2) 39 P. R. 1892.

(5) 104 P. R. 1906.

(3) 1928 A. I. R. (Lah.) 150.

(6) 44 P. R. 1907.

(7) 1 P. R. (Rev.) 1915.

In 1925-26 the defendants applied to the Revenue Officer for partition of this area among the *panas*. The plaintiffs objected urging that the land was impartible, and in support of this objection relied upon the entry in the *wajib-ul-arz*. The Revenue Officer overruled the objection and ordered partition. Thereupon the plaintiffs instituted the present suit in the Civil Court, claiming a declaration that the land was joint of the whole village having been reserved for pasture and that it could not be partitioned. The defendants pleaded, *inter alia*, that the suit was not cognizable by the Civil Courts. Both the Courts below relying on a Division Bench ruling of this Court reported as *Singh Ram v. Data Ram* (1), have upheld the plea and dismissed the suit.

The plaintiffs have preferred a second appeal and it has been urged on their behalf that the question whether the land in question is liable to partition or not is a question of title, which under section 158 (2) (*xviii*) of the Punjab Land Revenue Act, is not exempt from the jurisdiction of Civil Courts. The facts of the case are on all fours with those of *Singh Ram v. Data Ram* (1), and if that case was correctly decided there can be no doubt that the suit is not cognisable by the Civil Courts. A contrary view was, however, taken by Sir Meredyth Plowden S.J., and Roe J. in *Khubi v. Ast Khan* (2), wherein it was held that the question was one of title and that "the Civil Courts were both competent and bound to determine it."

So far as I am aware this ruling was accepted as good law in this province for over thirty years and consistently followed by both Civil and Revenue Courts,

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until the contrary was laid down by Abdul Racof and Martineau JJ., in *Singh Ram's* case (1). It is, however, unfortunate that the earlier ruling was not brought to the notice of the learned Judges, who decided that case. In the last mentioned case the question is not discussed in any detail and it appears to have been taken for granted on the authority of *Lakhi v. Malik Dust Mohammad Khan* (2), that the question was not one of title. In that case, however, the question of jurisdiction had not been raised before the Financial Commissioner nor decided by him, though there are certain observations which might be interpreted as lending support to the view adopted by the Division Bench in *Singh Ram's* case (1).

Mr. Shamair Chand for the appellants has cited *Dewa Singh v. Mst. Jawali* (3), *Prabhu v. Maya* (4), *Sundar v. Wazira* (5) and *Nandu v. Jaimal* (6). Of these the first ruling is certainly in point and takes the same view as that taken in *Khubi v. Ast Khan* (7). The other cases are distinguishable, though their reasoning indirectly supports the appellants' contention. No ruling has been cited by Mr. Zafrullah Khan in which the view taken in *Singh Ram's* case has been adopted.

As at present advised I am inclined to the view that *Khubi v. Ast Khan* (7) laid down the law correctly. But in view of the conflict of authority noticed above and having regard to the fact that the question is frequently arising, I think, it should be authoritatively settled by a larger Bench.

(1) 1922 I. L. R. 3 Lah. 4.

(2) 1 P. R. (Rev.) 1915.

(3) 39 P. R. 1892.

(4) 104 P. R. 1906.

(5) 144 P. R. 1907.

(6) 1928 A. I. R. (Lah.) 150

(7) 82 P. R. 1893.

I would accordingly, if my learned brother agrees, refer the following question to the Full Bench :—

“ In the last settlement, on an agreement between all the village proprietors and with the approval of the Settlement Officer, a certain area out of the village *shamilat* was set apart for pasture, which was to continue to be joint and impartible. This agreement was duly recorded in the *wajib-ul-arz*. A few years later, some of the proprietors applied for partition of the area, and the Revenue Officer ordered partition, overruling the objection raised by some of the other proprietors that the land was not liable to partition in accordance with the aforesaid entry in the *wajib-ul-arz*. Thereupon the objectors instituted a suit in the Civil Court for a declaration that the land could not be partitioned. Is the question involved one of title and can it be determined by Civil Courts, or is it exempt from their jurisdiction under section 158 (2) (*xvii*)? ”

The papers will be laid before the learned Chief Justice for constituting a Full Bench.

JUDGMENT OF THE FULL BENCH.

The material facts of the case, which has given rise to this reference, are given in the referring order, dated the 16th of July 1929, and it is not necessary to recapitulate them here. On those facts the following question of law arose, and the Full Bench has been invited to pronounce its opinion on it :—

“ In the last Settlement, on an agreement between all the village proprietors and with the approval of the Settlement Officer, a certain area out of the village *shamilat* was set apart for pasture, which was

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to continue to be joint and impartible. This agreement was duly recorded in the *wajib-ul-arz*. A few years later some of the proprietors applied for partition of the area, and the revenue officer ordered partition, overruling the objection raised by some of the other proprietors that the land was not liable to partition in accordance with the aforesaid entry in the *wajib-ul-arz*. Thereupon the objectors instituted a suit in the Civil Court for a declaration that the land could not be partitioned. Is the question involved one of title and can it be determined by Civil Courts, or is it exempt from their jurisdiction under section 158 (2) (*xvii*) of the Land Revenue Act?"

As pointed out in the referring order the decisions of the Chief Court and the High Court on the point are not uniform. In *Khubi v. Ast Khan* (1), it was held by Plowden S.J. and Roe J., that the question was one of 'title' and that the Civil Courts were 'both competent and bound to determine it.' A contrary view was, however, taken in *Singh Ram v. Data Ram* (2) by Abdul Raof and Martineau JJ., who, without referring to the previous ruling of the Chief Court, laid down that the question was not one of 'title' and its consideration by the Civil Courts was barred by the provisions of section 158 (2) (*xvii*).

That section runs as follows:—

" 158 (2). A civil Court shall not exercise jurisdiction over any of the following matters, namely

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*	*	*	*	*	*

(*xvii*) any claim for partition of an estate, holding, or tenancy, or any question connected with, or arising out of proceedings for partition, *not being a question*

(1) 82 P. R. 1893.

(2) (1922) I. L. R. 3 Lah. 4.

as to title, in any of the property of which partition is sought."

The procedure before Revenue Officers for dealing with applications for partition of joint land is prescribed in section 111 *et seq.* of the Punjab Land Revenue Act. In section 115 it is provided that after examining such of the co-sharers and other persons as may be present on the date fixed for the hearing, the Revenue Officer may, if he is of opinion that there is good and sufficient cause why partition should be absolutely disallowed, refuse the application, recording the grounds of his refusal. It will be seen that this section gives the Revenue Officer a very wide discretion which is subject to control by the higher revenue authorities only, and it is beyond dispute that Civil Courts have no jurisdiction to question the reasons given by the Revenue Officer disallowing partition under this section.

Section 116 lays down that if the Revenue Officer does not refuse the application under section 115, he shall ascertain the questions, if any, in dispute between any of the persons interested distinguishing between:—

(a) questions *as to title in the property* of which partition is sought; and

(b) questions *as to the property to be divided*, or the mode of making the partition.

Finally, we have section 117 which provides that if a question as to title is involved the Revenue Officer may either stay the proceedings until it has been determined by a Civil Court, or may himself proceed to determine the question as though he himself were such a court, and in that event any decision given by him will be subject to appeal to the Civil Appellate

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Courts in the same manner as if the order passed by him was a decree of a Civil Court of original jurisdiction.

It will thus be seen that sections 116 and 117 recognize a sharp distinction between a "question as to the property to be divided," and a "question as to *title* in the property" of which partition is sought. It follows, therefore, that the expression "question as to the property to be divided" as used in section 116, really means "a question, *other than that of title*, as to the property to be divided." Now a question whether a certain prior agreement between two or more co-owners to keep their property joint is still operative or has ceased to be so, is essentially one of title, involving a determination of the civil rights of the parties and would be triable exclusively by a Civil Court or by a Revenue Officer acting as such under section 117; though even after it has been decided in favour of the party seeking the declaration that the property is *partible*, the Revenue Officer may still, for good and sufficient cause, disallow the partition at any particular time under section 115. In other words the question as to the *partibility* of joint property is one for adjudication by the Civil Courts, but whether at a given moment partition is or is not to be allowed is one within the discretion of Revenue Officers.

The distinction has been brought out very clearly by Plowden J. in *Khubi v. Ast Khan* (1), and reference may be made to the following passages in his luminous judgment:—

"Now it seems to us clear that this is (1) a question as to *title* in the property of which partition

(1) 82 P. R. 1893.

is sought; and (2) is not a question as to the property to be divided, or of the mode of making partition. These two descriptions of the questions which can possibly arise are given in Section 116 of the Land Revenue Act and are intended to be exhaustive, that is, mutually exclusive, so that a question falling under one does not fall under the other. This view has been clearly expressed by the Financial Commissioner in *Chanda Singh v. Fateh Singh* (1), and is in accord with a previous ruling of this Court *Radhu v. Mst. Nando* (2).

“When *A, B, C, D* are admittedly owners of land *X* and admittedly owners of equal shares, the question whether *A* is entitled to separation of his one-fourth share without the consent of *B, C, D* is neither a question as to the land to be divided, nor as to the mode of partition. The question is not what land is to be divided, nor in what manner is land *X* to be divided, but is the consent of *B, C, D* necessary to complete *A*'s title to a separate share of one-fourth of *X*. It is, in our opinion, a question of title and of nothing else, and if it arose and was decided by a Revenue Officer upon an application for partition by *A*, would have to be decided by him under section 117 of the Act as a Court and be appealable to the superior Civil Court. When the question is raised by *A*—and this is actually the present case—in a Civil Court, we are of opinion that the Civil Court is both competent and bound to determine it.

“What the effect of a decision in *A*'s favour may be in a subsequent proceeding by *A* for partition before a Revenue Officer, we need not decide in anticipation of orders not yet in existence. It is

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(1) 15 P. R. (Rev.) 1890.

(2) 150 P. R. 1890.

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enough to say that section 115 of the Act gives a Revenue Officer power to disallow a partition absolutely for good and sufficient cause recorded by him."

TEK CHAND J. The same view appears to have been taken in *Dewa Singh v. Mussammat Jawali* (1), where it was held that a question whether a joint holding was liable to partition in spite of a prior agreement between two co-owners, whereby one of them had agreed not to claim partition, provided a certain quantity of grain was given to her at stated intervals, was one of title and in the absence of a decision by the Revenue Officer under section 117 could be agitated in a Civil Court. Similarly in the recent decision of *Nandu v. Jaimal* (2), the learned Chief Justice and Bhide J. have laid down that a suit for a declaration that a plot of land was reserved for grazing purposes and was not liable to partition in accordance with an agreement recorded in the earlier *wajib-ul-arz* which had not been repeated in the recent settlement, was one of title, and was not excluded from the jurisdiction of Civil Courts under section 158 (2) (*xvii*) of the Land Revenue Act.

Numerous other cases will be found in the reports in which several analogous questions have been held to be those of title, cognizable by Civil Courts, but it does not seem necessary to discuss them in detail here. It may, however, be mentioned in passing, that a claim to partition land where its liability to partition is denied, because of a prior private division, [*Malang v. Mst. Namiti* (3)]; the question whether a person holds such an interest in a plot of land as entitles him to ask for its partition, *Prabhu v. Maya* (4)

(1) 39 P. R. 1892.

(3) 4 P. R. (Rev.) 1898.

(2) 1928 A. I. R. (Lah.) 150.

(4) 104 P. R. 1906.

and a suit for a declaration that the land in suit is not liable to partition but is subject in its entirety to user for grazing purposes, *Guldad Khan v. Gul Khan* (1); have all been held to be questions of title.

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So far as I am aware *Khubi v. Ast Khan* (2) has been considered to be good law by Civil and Revenue Courts in the province and its authority has never been directly questioned. The only ruling in which a contrary decision appears to have been arrived at is *Singh Ram v. Data Ram* (3), where, on facts almost similar to those of the present case, it was held that the question was not one of title and that the suit came within the bar laid down in section 158 (2) (*xvii*). In that case, however, the matter was not discussed in any detail nor does it appear that *Khubi v. Ast Khan* (2), which was directly in point was brought to the notice of the learned Judges. It seems to have been taken for granted that the question was not one of title, and it was observed that "the proposition was so clear that it was hardly necessary to cite any authority in support of it." Reference was made to a remark of the Financial Commissioner in *Lakhi v. Malik Dost Muhammad Khan* (4), that an entry in the *wajib-ul-arz* prohibiting the partition of *shamilat* was not necessarily a bar to partition and the Revenue Officer dealing with the partition should himself decide whether under the circumstances of the case, the prohibition should prevail or not. In that case, however, the question of the jurisdiction of Civil Courts was not considered or decided, and that case is obviously no authority for the proposition for which it was cited.

(1) 44 P. R. 1907.

(3) (1922) I. L. R. 3 Lah. 4.

(2) 82 P. R. 1893.

(4) 1 P. R. (Rev.) 1915.

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After giving the matter my best consideration, I venture to think, that *Singh Ram v. Data Ram* (1) was wrongly decided and must be overruled. In my opinion the law had been correctly laid down in *Khubi v. Ast Khan* (2), and its authority remains unaffected by any later decision.

My answer to the reference is that the question involved is one of title and is not excluded from the jurisdiction of Civil Courts by section 158 (2) (*vii*) of the Punjab Land Revenue Act.

ADDISON J.

ADDISON J.—I agree.

HILTON J.

HILTON J.—I agree.

N. F. E.

APPELLATE CRIMINAL.

Before Jai Lal and Bhide JJ.

GOPI CHAND—Appellant

versus

THE CROWN—Respondent.

Criminal Appeal No. 109 of 1930.

Indian Evidence Act, I of 1872, sections 145, 155—Witness—contradiction of—by previous inconsistent statements—Procedure—Criminal Procedure Code, Act V of 1898, section 162—Statements before investigating officer—use of.

Held, that under section 162 of the Criminal Procedure Code, a statement before the investigating officer by a witness can be used for the purpose of contradicting such witness when produced at the trial, but only after strict compliance with the provisions of section 145 of the Indian Evidence Act.

The proper procedure therefore is to ask the witness first whether he made such and such a statement before the

(1) (1922) I. L. R. 3 Lah. 4.

(2) 82 P. R. 1893.