Allahabad High Court
Debi Saran vs Ramjas And Ors. on 5 July, 1909
Equivalent citations: 2 Ind Cas 982
Bench: Banerji, Tudball
JUDGMENT

1. The only question raised in this appeal is whether the suit brought by the plaintiff-appellant is cognizable by the Civil Court. The suit was brought under the following circumstances. On the 4th of May 1904 the defendants first party applied for partition of the village Majhana Baikunth alleging that the whole village was joint. The plaintiff preferred an objection to the effect that an imperfect partition of the village had been made in 1846 under which kuras Nos. 1 and 3 were allotted to the defendants first party and kura No. 2 to the plaintiff and defendants second party, that khata No. 28 was common to the whole village; and that kura No. 2 was the exclusive property of the plaintiff and ought to be excluded from partition. The Revenue Court referred the plaintiff to the Civil Court and thereupon he brought a suit for a declaration that kura No. 2 was his exclusive property. On the 31st of March 1906 he obtained a decree from the Court of the Subordinate Judge declaring that kura No 2 belonged solely to him. After this the Revenue authorities proceeded to make a partition and in doing so directed that any deficiency in the share of the defendants first party should be made good out of the common land in khata No. 28. There-upon the suit out of which the appeal has arisen was brought by the plaintiff for a declaration that in khata No. 28, which is common to the entire 16 annas of the village, he owned and possessed lands in proportion.' to his 5 annas 4 pies share, and that the defendants first party had no right to have the deficiency in their share made good out of the share of the plaintiff. He also prayed for an injunction restraining the defendants first party from getting any deficiency in their share made good out of lands in khata No. 28 to the extent of the plaintiffs' 5 annas 4 pies share.

2. The Court of first instance decreed the plaintiff's claim but the lower appellate Court dismissed it, holding that under Section 233 (k) of Act No. III of 1901 the suit was not cognizable by the Civil Court.

3. This decision of the lower appellate Court having been affirmed by a learned Judge of this Court, the present appeal was preferred under the Letters Patent. We are of opinion that the suit is not cognizable by the Civil Court. It is clearly a suit relating to partition or union of mahals and unless it can be regarded as a suit brought under Sections 111 or 112 of the Act, the cognizance of it by the Civil Court is prohibited by Section 233. Section 112 is admittedly inapplicable. We are also of opinion that Section 111 does not apply. When an application was made for partition by the defendants first party, the plaintiffs did, as we have said above, prefer an objection and was thereupon referred to the Civil Court under Section 111 of the Act. He brought a suits in the Civil Court but he did not include in his claim any prayer for relief in respect of khata No. 28. Apparently he raised no objection in regard to that khata. In this plaint he admits that the khata is common to the whole village but he says that certain plots which represent his one-third share ought to be excluded from partition. If as he now alleges those plots were his exclusive property, he ought to have objected to their partition when notice was issued to him-" under Section 110. Not only did he not raise any such objection but when he brought a suit in the Civil Court he did not include in his

claim the khata No. 28. It is, therefore, too late for him now to institute the present suit, the object of which is to disturb the partition which the Revenue authorities have made. It is true that the suit was brought before the completion of the partition but as it is not a suit contemplated by Section 111, the plaintiff was not competent, in our opinion, to bring it in the Civil Court. What in reality he objects to is the mode in which the partition has been made. If he considered that the order of the Court of first instance in regard to the mode of partition was improper or incorrect his remedy was an appeal from that order. As he had an opportunity of raising the objection now brought forward and he did not avail himself of that opportunity he is not entitled to bring the present suit. This was held in Nathi Mal v. Tej Singh 29 A. 604 and in Khasay v. Jugla 28 A. 432. The learned vakil for the appellant has relied on the ruling in Muhammad Jan v. Sadanand Pande 23 A. 394. That case was decided with reference to its special circumstances and has, in our opinion, no bearing on the present case. In this view we deem it unnecessary to express any opinion as to whether or not we agree with the decision arrived at in that case. In our judgment having regard to the provisions of Section 233 (k) of Act III of 1901 this suit was not cognizable by the Civil Court and the appeal must fail. We, accordingly, dismiss it with costs.