PATNA HIGH COURT

Hare Krishna Sen

Vs

Umesh Chandra Dutt

(Dawson Miller, C.J., B.K. Mullick and John Bucknill, JJ.)

26.04.1921

JUDGMENT

Dawson Miller, C.J.

1. This appeal has been referred to a Full Bench for a decision upon two points, (1) whether the plaintiff's suit is barred by Order 2, Rule 2 of the Civil Procedure Code, and (2) whether it is barred by Section 11 of the Santhal Parganas Regulation III of 1872.

2. The suit was instituted by the appellant on the 23rd January 1918 before the Subordinate Judge of Pater, claiming a declaration of title to the entire 16-annas share in 107 bighas and come odd cottahs of land in certain mauzos situate in the Santhal Parganas and for recovery of possession of an 8 annas share in the same properly formerly in the possession of the late Brajeswari Dasi, the plaintiff's step-mother, and now in the possession of the defendants, and for a declaration that neither the said Brajeswari Dasi nor the defendants have any right or title to the same.

3. The property in suit originally belonged to the plaintiff's father Sonatan Sen, who died in the year 1900. Sonatan had two wives. The first, Brajeswari Dasi, survived him and subsequently died in the year 1913 leaving the defendants, her daughter's sons, as her heirs and successors in interest. The second wife Nritiya Sakhi Dasi predeceased her husband leaving a son, the present plaintiff, who was a small child at the time of his father's death. After the death of Sonatan the settlement operations of 1904 5 took place in the district and the property in suit was receded in the Survey Shatian in the joint names of Brajeswari and the plaintiff. It is alleged by the plaintiff in his plaint that after his father's death he, being a child of tender years, was brought up by Brajeswari, living in the same house with her, and that she acted as his de facto guardian but in betrayal of her position of trust fraudulently and dishonestly caused the land in suit to be entered in the Survey Record as their joint property when in fact the plaintiff along was entitled to the property as his father's heir. In the year 1909 the plaintiff's father in law, Kunja Behari Laha, applied to the Court of the Deputy Commissioner and was appointed guardian of the plaintiff's person and pro-party, he being still a minor. At that time his step-mother Brajeswari was openly

claiming a half interest in the property as her own and disputes arose between them; and in January 1911 a Title Suit No. 1 of 1911 was instituted before the Subordinate Judge of Pakur in the plaintiff's name through his next friend and guardian, Kunja Behari, against Brajeswari, claiming title to and confirmation of possession over the lands now in suit. In that suit Brajeswari relied on the Record of Rights and further impugned the legitimacy of the plaintiff who, according to her case, had not been brought up under her care but under that of his maternal uncle with whom he lived and in collusion with whom he fraudulently caused his name to be entered in the Record of Rights as jointly interested in the property, although she was the sole heir of her husband Sonatan. In that suit the Subordinate Judge who tried the case and the Deputy Commissioner of Dumka before whom it came on appeal held that the jurisdiction of the Civil Courts was barred by Section 11 of Regulation III of 1872 and that they could not question the entry in the khatian recorded by the Settlement Officer, which wan final and binding on the parties, but that the plaintiff's remedy, if any, was to petition the Lieutenant Governor to re open the Settlement Record under Sections 10 and 25(3) of the Regulation. The plaintiff then appealed to the High Court at Calcutta and pending that appeal instituted a partition suit (No. 3 of 1911) against Brajeswari Dasi before the Subordinate Judge of Pakur. In that suit the plaintiff suing through his guardian and nest friend, Kunja Behar Laha, again alleged in his plaint that Brajeswari had fraudulently brought about the entry in the Record of Rights above mentioned and referred to the suit (No. 1 of 1911) which was then pending in the High Court at Calcutta on appeal. He then alleged that there was no dispute that he was entitled to at least half of the property and that for the peaceful enjoyment of both parties it was necessary that a temporary partition should be made in equal moieties pending the decision of the High Court in Suit No. 1 of 1911, and praying that such partition should be made upon the terms that it should be annulled if the High Court should decide in his favour, but should become permanent if his appeal should be dismissed. Brajeswari in that suit set up a new case and disputed the plaintiff's title to any portion of the lands in suit, on the ground that they originally belonged, not to Sonatan Sen, her husband, but to her father, one Nafar Moddi, who gave them to her son Akrur and that the latter having died many years ago, she as his heir was solely entitled to the same. This plea however, was rejected by the learned Subordinate Judge, who found that the estate had belonged to Sonatan Sen and as the plaintiff was admittedly recorded at the Settlement as entitled to a moiety of the property, he decreed the suit for partition. It does not appear from the judgment whether the partition granted was intended to be merely a temporary arrangement pending the decision of the High Court in the previous suit or whether it was intended to be permanent in any event, The decree in that suit has not been put in evidence and in its absence, as there is nothing in the judgment to indicate one way or the other whether the partition was intended to be a temporary or a permanent arrangement, I think it must be assumed, until the contrary is proved, that the intention of the learned Subordinate Judge was to order a partition in accordance with the terms of the prayer in the plaint, that is, a partition liable to be annulled if the High Court in Suit No. 1 of 1911 should come to a decision in favour of the plaintiff's title to the whole estate, Eight issues were framed in the Partition suit, the first four being issues of law which were decided at a preliminary hearing. The first related to the Court fee payable by the plaintiff and, as his

possession of the half share claimed was not admitted, the Court decided that a ten-rupee stamp was not sufficient and that he must pay an ad valorem fee on the value of the half share, The second issue related to the application of Section 10 of the Civil Procedure Code to the suit, seeing that Suit No. 1 of 1911 was still pending. The issue was decided in favour of the plaintiff. The third and fourth issues, which were also issues of law, were given up by the defendant and decided in the plaintiff's favour. There is nothing to indicate what these issues were, and for ought we know they may have related to the plaintiff's right to maintain a suit for a temporary partition such as that which was claimed. The fifth issue decided that the plaintiff was in fact in possession of the half share claimed, the decision being based upon the ground that the Record of Rights was in his favour at least to that extent. By the sixth issue it was decided that the lands formed part of the estate of Sonatan Sen. By the seventh it was determined that the plaintiff had admittedly under the Survey Record a right to half the lands in suit. The eighth issue related to the relief, if any, that the plaintiff was entitled to. It was found that the moiety claimed should be partitioned and the plaintiff installed in possession. The judgment in that suit was delivered on the 21st November 1911.

3A. The appeal to the High Court at Calcutta in Suit No. 1 of 1911 came up for hearing on the 26th August 1914. As it had already been decided in the partition fait between the seme parties that the land in suit bed be longed to the estate of Sonatan Sen, the plaintiff contended that even if the Record of Rights should he binding and final, be would succeed to the 8 annas share recorded in the name of Brajeswari upon her death as the heir of his father Sonatan Sen and that the question in dispute in that appeal had ceased to he of vital importance. In these circumstances the learned Judges of the Calcutta High Court disposed of the appeal by the following order:

> Under the circumstances of this ease we think that the best course is to allow the plaintiff to withdraw the suit with liberty to bring a fresh suit on the same cause of action or any further cause of action which may have accrued in his favour or upon both. The respondents have been brought on the record at the instance of the appellant and they are entitled to their costs, one gold mohur. Let Umesh Chandra Dutta and Suchand Dutta be substituted in place of the deceased respondent for the purpose of this appeal without deciding whether they are or are not the legal heirs of the deceased.

4. The present suit was subsequently instituted in 1918, by the plaintiff, who was then of age, against Umesh Chandra Dutta and Suchand Dutta, who are still in possession of the half share formerly held by Brajeswari. I have referred at some length above to the decision in the partition suit, because it is contended by the defendants in the first place that in view of the decision there given the present suit is barred under the provisions of Order 2, Rule 2. It is contended that the plaintiff, having elected to sue for partition of a moiety of the property, intentionally relinquished a portion of his claim and should not afterwards be entitled to sue in respect of the portion so relinquished and further that as the plaintiff's cause of action entitled him to a wider relief than that claimed in the partition suit, be should not afterwards be allowed to sue for the relief not

claimed. The answer to the first point appears to me to be that in the partition suit the plaintiff, so far from relinquishing any portion of his claim, expressly asserted a claim to the whole 16 annas of the estate and as a suit was already pending on appeal before the Calcutta High Court, he could tot at that time sue for the same relief in another suit. What he asked for in the partition suit was merely a temporary arrangement as a modus (sic)ivendi pending the decision of the High Court as to his title to the remaining 8 annas of the property and he could not claim the whole property. There can be no question, therefore, as to his intentionally relinquishing any portion of the claim which he might assert and was then asserting in a different proceeding. It was contended further that by Order 2, Rule 2(1), the suit should have included the whole claim which he was entitled to make in respect to the cause of action and that his cause of action was his right to succeed to the whole property and that having omitted to sue for the whole relief to which he was entitled, be should not be allowed afterwards to bring a suit claiming that which he had omitted, unless be had obtained the leave of the Court under Rule 2(3) of Order 2. In the peculiar circumstances of this case I do not think it can be successfully contended that Order 2, Rule 2, has any application, and, even if it should be held that the rule applies in a case where a suit for partition is brought and a subsequent claim is put forward in another suit claiming the whole of the property, nevertheless having regard to the manner in which the partition suit was framed and the relief there claimed, I think it must be assumed, in the absence of any evidence to the contrary, that the Court treated the case as one in which all questions relating to the plaintiff's claim for a declaration of title to the whole properly were to be decided hereafter, and that what was done was done by the leave of the Court under Clause 3 of Rule 2.

5. It was incidentally contended that the effect of the withdrawal of Suit No. 1 of 1911 was to place the parties in the same position as if no such suit had been brought and that the plaintiff could not now contend that he had not relinquished the claim which he had asserted in that suit, and having sued for partition in respect to a half of the property, ought not now to be allowed to claim the whole. I agree that the effect of the withdrawal of the suit is to leave the rights of the parties undetermined in so far as they were asserted in that suit, but in order to determine the real effect of the partition suit, one must look at the state of affairs which actually existed in 1911 when a suit was pending as to the plaintiff's claim to the other 8 annas share of the property, and the subsequent withdrawal of the title suit with leave to institute fresh proceedings cannot, in my opinion, alter the effect of the partition suit in so far as it determined the rights of the parties.

6. It was also urged that the effect of the partition suit was to determine that the plaintiff was entitled only to an 8-annas share in the property and as that decision operated as res judicata, the matter could not again be re agitated between the same parties. On looking at what was claimed in the partition suit and the decision there arrived at, it is clear to my mind that no question was raised or determined as to the plaintiff's title to the remaining 8-annas share in the property. All that was there determined on the question of title was that the plaintiff was entitled to at least an 8 annas share. It is true the plaintiff's title was questioned by Brajeswari on the ground that the properly was not part of the estate of Sonatan Sen, but this point was decided against her and the

question of the plaintiff's title to the remaining half share was left to be determined in the suit then pending. In my opinion the answer to the first question submitted must be in the negative.

6A. Regulation III of 1872 provides for making a settlement of the whole or any part of the Santhal Parganas for the purpose of ascertaining and recording the various interests and rights in the lands and gives the Lieutenant Governor power to appoint officers to carry out the settlement and to invest them with powers of appeal and revision and to make rules for their procedure. Section 11 provides that except as provided in Section 25(a), no suit shall lie in any Civil Court regarding any matter decided by any Settlement Court under these rules; but the decisions and orders of the Settlement Courts made under these rules regarding the interests and rights above mentioned shall have the force of a decree of a Court. Section 24 provides means for publishing the Record of Rights to the persons interested after it is made by the Settlement Officer, and allows any person interested therein to bring forward any objection he may desire to make in the Settlement Courts within a period of six months from the date of publication, and such objection shall be enquired into and disposed of by a decision in writing by the officer presiding in Court. By Section 25 after the expiration of six months from the date of publication, the record shall be conclusive proof of the rights and customs therein recorded except in so far as concerns entries in the record regarding which objections already taken are still pending or open to appeal. Clause 3 of Section 25 provides that when a Record of Rights has become final or any objection to any entry in the Record of Rights has been finally disposed of in the Settlement Courts and when all final decisions and orders, including such as may have been passed on revision, as provided in Sub-section 2, have been correctly embodied therein such record ball not, until a fresh Settlement is made or a new table of rates an i rent Roll is prepared, be re opened without the previous sanction of the Lieutenant-Governor, but in ease of the discovery of a material error it shall be lawful for the Lieutenant-Governor to direst that the record of any village shall be revised. There can be no doubt, in my opinion, that a record properly made under the rules provided in the Regulation was meant to be final and conclusive, except as therein provided and that the jurisdiction of the Civil Courts regarding any matters decided by the Settlement Courts should be birred, the entry in the finally published record having the force and effect of a decree of Court. The result, therefore, is that the appellant's claim is met by the plea that the averment that he is entitled to the whole 16 annas upon which the claim is based is no longer open to him, the contrary having been declared by the Record of Rights which has the effect of a decree of Court. The plea is in substance a plea of res judicata. It is nevertheless open to the plaintiff to reply in answer to this plea that the Settlement Record was obtained by fraud and if this can be proved, there can be no question of res judicata. If the Settlement Record was in fact obtained by a fraud practised upon the Settlement Court, there was in the eye of the law no Settlement Record at all upon the matter in question and it can be treated as a nullity. Section 44 of the Evidence Act specially provides for such a case, and is is not necessary that the appellant should first institute a separate suit to set aside the record on the ground of fraud. This is in accordance with the view of the Calcutta High Court in *Mozuffar Ali v. Kali Prosad Saha*[1] and of this Court in *Sib Saran Shah v. Rameswar De 60 Ind. Cas*[2]. in both of which cases the effect of Regulation III of 1872 was

considered. It is also established by a long series of English decisions that a "judgment or decree obtained by fraud upon a Court binds not such Court nor any other; and its nullity upon this ground, though it was not been set aside or reversed, may be alleged in a collateral proceeding." [See Per Willes, J., in *Rg v. Saddlers' Co*[3]. and the cases there cited.] The fraud alleged in the present instance is that Brajeswari, being in a position of trust
towards the plaintiff, then a minor under her de facto guardianship, fraudulently and dishonestly took advantage of her position by causing her own name to be entered in the Record of Rights as jointly interested with the plaintiff in the land in suit, when in fact the plaintiff alone was the lawluf heir. In my opinion the question of fraud or no fraud was one upon which the appellant was entitled to have an adjudication and the judgment and decree of the Deputy Commissioner should be set aside and the ease remanded under the provisions of Order 41, Rule 23 of the Code of Civil Procedure, to the lower Appellate Court with instructions to direct the Subordinate Judge to hear the evidence upon the issues of fraud left undecided and to determine the suit. It is unfortunate in this particular case that the evidence on that issue was not taken at the trial stage and the issue determined. I should like to add that the onus is upon the plaintiff to make out that a fraud was committed which resulted in an incorrect entry being made in the Settlement Record. It is not sufficient merely to prove that Brajeswari was instrumental in procuring the entry in the record. It must also be proved that what was done by her was done with the fraudulent intention of defeating the rights of the plaintiff and that the Settlement Officer was misled by her act and induced thereby to make an incorrect entry in the record.

Mullick, J.

7. The facts which appear to me to be established are as follows:

8. The Settlement Officer, acting under Regulation III of 1872, had recorded the plaintiff and Brajeswari in equal shares as maurasi (sic)otedars in respect of the lands in suit. On 29th January 1911 the plaintiff, then a boy of about 15, brought through his certificated guardian in the Court of Mr. Heard, Subordinate Judge, a suit, namely, No. 1 of 1911 for declaration of title to the whole 16 annas and recovery of possession of that half share which was in the possession of Brajeswari. On the 12th April 1911 Mr. Heard dismissed the suit, on the ground that by reason of Section 11 of the Regulation the suit could not be entertained by a Civil Court. The District Judge was of the same opinion and the plaintiff eventually preferred a second appeal to the High Court.

9. Meanwhile on the 15th August 1911 the plaintiff again through his guardian filed Suit No. 3 of 1911 before the same Subordinate Judge, praying for a temporary separation by metes and bounds of that half share of which the Settlement Officer had found him in possession. Brajeswari resisted the plaintiff's title and the Court, after compelling the plaintiff to pay Court-fees as on a suit for recovery of possession and partition of a half, gave judgment on the 21st November 1911 that the plaintiff was entitled to partition of a half share; on 2nd January 1912

the Civil Court Amin reported that the partition had been effected.

10. On or about 24th August 1913 Brajeswari died and on the 26th August 1914 the plaintiff withdrew the second appeal which was pending in the High Court, with leave to sue again on the same cause of action.

11. The present suit was accordingly brought in 1918 for declaration of title to and recovery of possession of half of the property.

12. In these circumstances it seems to me that the plaintiff cannot bring another suit for the recovery of the half share which formed the subject-matter of his appeal to the High Court. A proprietor who asks a Civil Court to partition his share in joint property must state the extent of his share in such property and there must be an adjudication between him and his co-sharers as to the extent of such share He cannot say: "Give ma a partition of my half share and leave my right to the remaining half share undetermined for the, present." The Civil Procedure Code does not authorise a temporary adjudication of this kind, which is the very mischief against which Order 2 is designed to operate and if a plaintiff asks for the temporary partition of his half share and the Court grants his prayer the law will assume that the plaintiff has relinquished his claim in respect of the remaining half. It will avail nothing to the plaintiff to say: "I expressly asked the Court to leave my right in respect of the other half undetermined." A plaintiff suing for partition can no more do this than a landlord suing upon a part only of his claim for rent, and upon the same principle it was held in *Maksud Ali v. Nargis Dye*[4] that in a suit for recovery of land failure to sue for relief in respect of trees standing on the land will operate as relinquishment, notwithstanding an expressed intention to ask for such relief in a future suit.

11. There is also another reason why the plaintiff cannot claim a larger share now than he claimed in the partition suit. He accepted the Record of Rights and he cannot approbate and reprobate at the same time. The contention that he only provisionally accepted the Record of Rights cannot be accepted.

12. I next proceed to consider the effect of Section 11 of Regulation III of 1872.
13. It is clear that the plaintiff not being entitled to sue under Section 25A of the Regulation, the Civil Court by reason of Section 11 would ordinarily be debarred from entertaining the suit [*Ram Churn Singh v. Dhaturi*(*SUPRA)*The plaintiff, however, seeks to avoid the bar by impeaching the Settlement Officer's decree on the ground of fraud. Now Section 9, Civil Procedure Code, shows that a suit will always lie in a Civil Court to set aside a decree on the ground of fraud, provided there is no express or implied bar. The question is whether such a bar is contained in Section 11 of the Regulation. In my opinion the answer is clearly in the affirmative, and I think that when an enactment says that no suit shall lie in any Civil Court, it means that no suit shall lie on any ground what soever, including the ground of fraud. It is difficult to see why the Legislature, having for its object that questions regarding the rights of tenants in backward tracts of country,

such as the Santhal Parganas, should be decided by officers who have better acquaintance with the people and in accordance with a procedure designed to secure greater speed and finality, should have by saving the jurisdiction of the Civil Court in matters of fraud frustrated that very object. The whole scheme of the Act seems to me to lead to the conclusion that the plaintiff's proper remedy was to apply to the Revenue Authorities within the time prescribed by the Regulation, and I think that he may still apply to the Lieutenant-Governor for a revision of the entry either on the ground of fraud or any other ground. It has been held that a suit to set aside a Probate on the ground of fraud

lies in a Civil Court. So again has it been held that the proceedings of a Commissioner appointed to ascertain Chaukidari Chakran lands under Section 58, Act VI (B. C), 1876, are notwithstanding the provisions of Section 61 of the Act revicable by a Civil Court when fraud is alleged [*Nobo-krista Mukheri v. Secretary of Stats for India*[6] But it is always open to the Legislature to exclude the jurisdiction of the Civil Courts, and in this country the power is freely exercised. In my opinion the plain meaning of Section 11 of the Regulation is that except as provided in Section 25A, no jurisdiction whatsoever is left in the Civil Courts. But the plaintiff goes further. He contends that not only does a suit lie but that as there was fraud, he can regard the decision of the Settlement Officer as a nullity and can bring a suit for possession without seeking to set aside the decision. In my opinion be cannot ignore the decision. It is a decree and must be formally avoided. It is true that fraud vitiates the most solemn proceedings of a Court, but that maxim is subject to the condition that if it is necessary to do so, you must bring a properly constituted suit for the purpose of proving the fraud. You cannot ignore a Civil Court decree which denies your title and sue for possession upon the basis of that title so long as that decree subsists, and the authorities show that wherever a document or a decree or an adoption is immediately operative and restricts the title of the plaintiff, he roust sue to set aside the obstruction before he can succeed in a suit for possession.

14. In *Raghubar Dyal Sahu v. Bhikya Lal Misser*[7] it was held that if a Hindu widow adopts a son and makes over the property to the adopted son, the reversioner of her husband must first sue to set aside the adoption, but where she does not complete the proceedings of adoption by delivery of the property but merely executes a deed under which the adopted son is to take after her death, the reversioner may at once sue for possession as the instrument executed by the widow in no way affects his rights in the property. To the same effect is the case of *Annada Pershad Panja v. Prasannamoyi Dasi*[8] where a patnidar, in execution of a decree for dur-patni rent against the bsnamidar of the true dur-patnidar, having purchased the dur patni interest himself, and the true dur-patnidar having sued for possession of the dur-patni interest, it was held that as nothing more than the interest of the benamidar himself was sold, the rights of the true owner were not affected and that he need not sue to set aside rent sale. It was assumed by their Lordships of the Privy Council in this case that it would have been otherwise if the true owner had been affected by the sale. In *Petherpermal Chetty v. Muniandy Servai*[9] a benami deed of sale was executed by a proprietor in order to defeat an equitable mortgagee. The proprietor subsequently sued the

benamidar for the recovery of his property, and it was held that the deed, being collusive was inoperative against the plaintiff, that it was not necessary for him to bring a suit to set aside the deed and that Article 141 and not Article 95 of the Limitation Act of 1877 was applicable to the suit. These cases merely re-assert the rule accepted in *Jagadamba Chaodhrani v. Dakhina Mohun Roy 18 C. 308 : 13 I.A. 84 : 10 Ind. Jur. 307 : 4 Sar. P.C.J. 715 : 6 Ind. Dec. (N.S.) 705* . There it was held that it was open to the plaintiff to sue for possession if he could do so without in any way disturbing the adoption set up by the defendant, but that it was otherwise in the case of an heir who could not get at his ancestor's property without disturbance of title and possession founded on an alleged adoption to that ancestor. It is true that in *Chunder Nath Chowdhury v. Tirthanund Thakoor*[10] it was observed by their Lordships of the Calcutta High Court that Article 95, Schedule II of Act IX of 1871, is not intended to apply to suits for possession of Immovable property, when fraud is merely a part of the machinery by, which the defendant has kept the plaintiff out of possession and that that Article has reference only to cases where a party has been fraudulently induced to enter into some transaction, execute some deed or do some other act and desires to be relieved from the consequences of such act. But in that case the defendant, who was a joint proprietor with the plaintiff, purposely defaulted it. payment of Government revenue and then bought the property himself through a benamidar; the plaintiff sought to have the property reconveyed; and it was not necessary for him to ask to set aside the sale on the ground of fraud. Article 95 of the Limitation Act, therefore, did not apply and he was allowed the usual period of limitation for recovery of possession, namely, 12 years from the date upon which his right accrued.

15. In *Kusum Kumari Roy v. Satya Ranjan Das*[11] the plaintiff brought a suit for administration and for the construction of a Will, In his plaint he stated that he had been informed that the widow of the testator had purported to take in adoption a son, bat that he had been advised that such adoption was absolutely invalid and did not operate to pass any title to the adopted son. The Court held that it was neseesary for the plaintiff to dispute both the fact and the validity of the adoption and that she could not proceed with the suit without a mending her plaint. To the same effect is *Malkarjun v. Narhari*[12] where their Lordships of the Privy Council held that a party seeking relief inconsistent with a sale previously held with jurisdiction must first pray to set it aside and that Article 12A of the Act of 1877 is not confined only to suits which seek no relief other than a declaration that a sale ought to be set aside, but applies also to suits where other relief is sought which can only be granted on an annulment of the sale. The authority of this case is in no way questioned by their Lordships in the later case of Khiararmal v, Daim 32 C. 296 : 1 C.L.J. 584 : 32 I.A. 23 : 8 Sar. P.C.J. 734 : 9 C.W.N. 201 : 2 A.L.J. 71 : 7 Bom. L.R. 1 . There it was held that where a mortgagee's property was sold, he being a party neither to the decree nor the sale proceedings, he was entitled to redeem without seeking to set aside the decree and the sale, because these proceedings were held without jurisdiction and were nullities; but where, as in the case before us, a decree was passed with jurisdiction and in the presence of the plaintiff, the decree is voidable upon proof of fraud and can only be avoided by a suit brought for that purpose. If the plaintiff were allowed to ignore the decree, it is difficult to see with what object

Article 95 of the Limitation Act of 1908 could have been enacted.

15A. But then the plaintiff refers to *Rajib Panda v. Lakhan Sendh Mahapatra 27 C. 11 : 3 C.W.N. 660 : 14 Ind. Dec. (N.S.) 8.* In that case the plaintiff brought a suit for khas possession on the basis of a decree made on compromise in a previous suit between him and the defendant. The defendant pleaded that the decree was a
fraudulent one. It was held that under Section 44 of the Indian Evidence Act he was entitled to adduce evidence of fraud. I agree that it was not necessary under the circumstances for the defendant to bring a suit to set aside the decree, for the Limitation Act does not affect defendants. It would have been otherwise if the plaintiff had been the party whose rights had been restricted by the decree. Section 44 of the Evidence Act is merely a rule of evidence; it cannot absolve the plaintiff from obedience to the rules of pleading and of the Limitation Act. The defendant is entitled to say to the plaintiff: " the decree may be void after you have proved fraud, but in Order to prove it you must bring a properly constituted suit."

16. The plaintiff next relies on *Kangal Chandra Mundal v. Madhu Sudan Mandal*[13] In that case the plaintiff, a reversioner to his maternal grandfather, sued for declaration of title and recovery of possession of certain property in respect of which the Settlement Officer acting under Regulation III of 1872 had recorded the defendant No. 1 as the proprietor of these lands. The defendant pleaded Sections 11 and 26 of the Regulation in bar, but their Lordships of the Calcutta High Court decided against that plea, on the ground that at the time the entry was made the plaintiff had no more than a contingent interest, and that as he was not claiming through any person who was bound by the decree of the Settlement Officer, the decree was not operative against him.

16A. This case, therefore, does not conflict with the views expressed in the cases above cited.

17. There are three cases, however, which are direct authority in favour of the plaintiff. The first is *Naidar Chand Singh v. Chunder Sikhur Sadhu*[14] the second is *Mozuffar Ali v. Kali Prosad Saha*[15] and the third is *Sib Saran Shah v. Rameswar De*[16] of this Court.

18. As to the first it is to be observed that it was decided in the year 1888 and that Section 25 of the Santhal Parganas Regulation at that time differed materially from Sections 25 and 25A of the present Regulat on which were enacted in the year 1908. Both the first and the second cases, however, decide that it is open to a plaintiff to ignore the settlement and to sue for possession. The third case decides that when fraud is alleged, the Civil Court has jurisdiction to entertain a suit to set aside the Record of Rights.

19. With the greatest respect I venture to think that Section 11 bars a suit altogether and that, in any ease, if a suit does lie, it must be framed as a suit to set aside a decree.

20. It is to be noted that in the second of these cases it was decided by their Lordships that the onus of proving that the entry was made after due publication was upon the defendant, but it is now admitted before us that this view cannot be supported and that the ordinary presumption that everything hat been done correctly by the Settlement Officer must apply. Indeed, it was held in *Shankar Prasad jha (Januki Persad) v. Babu Lal Jha 28 Ind. Cas. 241 : C.W.N. 499* that the Santhal Parganas Regn lation
makes the Record of Rights con clusive proof of the rights and interests therein recorded and that a party relying upon it cannot be called upon to prove in the first instance the service of the required notices. The learned Vakil for the appellant before us now admits that he cannot take this objection to the Record.

21. There is yet another defect in the suit. Order 6, Rule 4 of the Civil Procedure Code, requires that particulars of fraud shall be given in the plaint. A general averment that the Survey entry was obtained by fraud will not suffice, and if authorities are needed, I would refer only to *Gunga Narain Gupta v. Tiluckram Chowdkry*[17] The plaintiff must state whether the fraud was committed by the Settlement Officer or by the predecessor of the defendants and in either case he must give further and better particulars. We do not know whether Brajeswari adduced and evidence before the Settlement Officer and for all that we know, it may be that not withstanding anything that was said or done by Brajeswari, the Settlement Officer came to an honest and independent conclusion that Brajeswari was entitled in her own right to half the property as absolute owner. The plaint, therefore, is defective and should have been rejected.

22. Before the learned District Judge a further point was argued, namely, whether assuming that Brajeswari was only in possession of a Hindu widow's estate, the plain tiff was the preferential heir as against the defendants. Upon this point it is now admitted that the learned Judge's decision in favor of the defendants, who are the daughter's sons of Brajeswari, must prevail as against the plaintiff, who is the son by another wife of her husband, Moreover, this point, as was observed by the learned Subordinate Judge, does not arise out of the pleadings and the plaintiff ought not to have been allowed to take it before the District Judge.

23. The result is that the appeal should, in my opinion, be dismissed with costs.

Buoknill, J.

24. This matter, which in the first instance came up for hearing before Mullick, J and myself, was an appeal from the decision of the District Judge of Dumka, dated the 14th September 1918, affirming a decision of the Subordinate Judge of Pakur given on the 25th June of the same year.

25. The facts, so far as they were material, did not appear to be complicated, but two somewhat difficult questions of law were raised which it was thought advisable to refer to a Full Bench. What these two points are can at once be appreciated from the following short statement of the

position.

26. A man called Sonatan Sen, a resident in the District of Sonthal Parganas, died in the year 1900, he had had two wives, namely, Brajeswari Dassaya who was his first wife and Nritya Sakhi Dassya who was his second wife. By his first wife Brajeswari, Sonatan Sen had issue, namely, one son and one daughter both of whom predeceased their father, the former leaving a widow and a daughter and the latter two sons. These two sons are the defendants. By his second wife Sonatan Sen had issue one son who
is the plaintiff. The second wife Nritya predeceased Sonatan Sen, but the first wife Brajeswari survived him. When Sonatan Sen died the plaintiff was a child of, it is said, about five or six years old; there is no evidence as to hie exact age, but it seems to have been accepted that he was about 15 in 1911. Sonatan Sen died, owned and possessed of certain properties rather more than 100 bighas in extent, which were after his death brought under the settlement operations applicable to the Sonthal Parganas District. The Settlement was not actually effected until the year 1904 5, when the plaintiff was, of course, still a small boy, and this is what is the origin of this litigation. Brajeswari's name was entered in the Record of Rights jointly with that of the plaintiff in connection with the properties of her deceased husband. It may incidentally be mentioned that she was also, so it is stated by the plaintiff, granted by the Settlement Officer 20 bighas of land out of her deceased husband's estate for her maintenance during her lifetime. She died in 1918.

27. The plaintiff in this suit alleges that after his father's death he was as a child brought up by his step-mother Brajeswari, wish whom he lived and that she, who was in 1904 5 the date of the settlement operations, then (to use the phrasing of the plaint) "acting as his de facto guardian and managing the properties on his behalf fraudulently and dishonestly and in betrayal of her position of trust and confidence and taking advantage of her position, caused the land to be entered in the Abstract Khatian Jamabandi in the joint names of herself and the plaintiff, which she had no right to do; that the entry of her name was illegal, fraudulent and improper; that the sole name of the plaintiff was fit to be entered in, and that Brajeswari, the widow of Sonatan Sen, was not the heir and had no right of ownership in the presence of the plaintiff."

28. The defendants contend that in view of certain portions of the Regulation governing settlement proceedings in the Sonthal Parganas District, the plaintiff's suit is barred and cannot be entertained at all. This is one of the points referred for decision to this Full Bench.

29. In order to explain (the second point referred, it is necessary to trace somewhat closely what took place after the name of Brajeswari had in 1904-5 been entered in the Record of Rights.

30. The plaintiff was, no doubt, married at according to custom, an early age. In 1909 his father-in law, whose name was Kunja Behari Laha, applied to the Deputy Commissioner of the Sonthal Parganas to be appointed the plaintiff's guardian and his application Was granted. Disputes,

apparently at once, arose between the guardian and Brajeswari, for in the same year litigation between them took place in the Court of the Sub-Divisional Officer of Pakur relating to the cutting of crops on the land, to half of which it would seem that Brajeswari was even then asserting her personal right. At any rate in January 1911 the guardian commenced in the name and on behalf of the plaintiff a suit (No. 1 of 1911) against Brajeswari in the Court of the Subordinate Judge of Pakur for a declaration of the plaintiff's title to the whole of his deceased father's land and for possession of that moiety which was in her possession. In that action Brajeswari, besides calling in aid the entry in her favour in the Record of Rights, raised various defences, claiming to be the sole heir of her husband and averring that the plaintiff was illegitimate, but on these details it is not necessary here to dilate, as the Subordinate Judge in April 1911 dismissed the action on the ground that it was not open to the plaintiff to b,ring such, a suit, having regard to the provisions of Section 18 of Santhal Parganas Regulation III of 1872, An appeal to the District Judge of Dumka was dismissed in June of the same year. An appeal was then preferred to the High Court of Calcutta, which did not give its decision (to which I will refer presently) until August 1914; during this interval, however, two other circumstances had taken plane.

31. Firstly, the guardian had in August 1911 commenced a curious suit (No. 3 of 1911) before the Court of the Subordinate Judge at Pakur against Brajeswari. In this suit whilst Brajeswari's alleged fraud was again recited and the plaintiff's claim to the whole property re-asserted, it was prayed on the plaintiff's behalf that, as in view of the decisions of the Subordinate Judge of Pakur and of the District Judge of Damka in Suit No. 1 of 1911, the Record of Rights was binding, he was clearly entitled to half of the property, a partition of the property into equal shares might at once be made in order that, until the decision in the appeal pending in the High Court of Calcutta, the parties might enjoy the amenities of the land without disturbance or breach of the pease; it was indicated that the request for such partition was based upon the idea that it should be temporary and should as a natural corollary be of no effect in the event of the Calcutta High Court allowing the appeal, but that it should be permanent in the event of that Court upholding the decisions of the lower Courts Brajeswari in this action set up a, defence not, in part, similar to that which she had put forward in her defence in Suit No. 1 of 1911; she now alleged that the property never belonged to her deceased husband Sonatan Sen at all, but in fact was the property of her dead father named Nafar Maddi, who gave it to her son Akrur, from whom at his (Akrur's her son's) death she had inherited it. The Subordinate Judge did not believe this story but found that the property had belonged to Sonatan Sen; and on November 1911 he granted what was asked for on behalf of the plaintiff. I need not at this stage refer further to the finding of the Subordinate Judge in that Suit No. 3 of 1911, though I shall have to do so later; but I may here mention that there was no appeal by Brajeswari from it and the property was officially divided in 1912.

32. The second important occurrence which took place before the Calcutta High Court gave its decision was that Brajeswri died in August 1913.

33. When the matter came before the Calcutta High Court in the following year, the Court made an order substituting the names of the two grandsons of Brajeswari, who are the defendants in the present suit, for Brajeswari in that appeal and allowing the suit to he withdrawn with liberty to the plaintiff to bring a fresh suit on the same cause of action or any further cause of action which may have accrued in his favour or upon both.

34. This latter part of the order was made because it was contended on behalf of the plaintiff that as it had now been decided in Suit No. 3 of 1911 that all the property belonged to Sonatan Sen and as Brajeswari was dead, the plaintiff would in any event be her heir.

35. In January 1918 the plaintiff, no longer being a minor, commented his present suit against the two defendants, Brajeswari's daughter's sons, who were in possession of the moiety held till her death by their grandmother; he re-iterated the charges of fraud already made by him in Suits Nos. 1 and 3 of 1911 and his claim to the whole of Sonatan's estate. To this the defendants replied that his suit was barred by Section 11 of the Sonthal Parganas Regulation III of 1872; alleged that he was illegitimate and contended, inter alia that the suit was not maintainable.

(a) In view of Title Suit No. 3 of 1911, he being thus barred by Order 2, Rule 2 of the Civil Procedure Code.
(b) In view of Title Suit No. 1 of 1911 acting as res judicata.

36. It is with regard to the question as to whether the previous Suit No. 3 of 1911 prevents the present suit from being entertained that the second point has been referred for consideration to this Full Bench.

37. This point was not considered either by the Subordinate Judge of Pakur or by the District Judge of Dumka: all that they decided may be, for all material purposes here stated, as being that the plaintiff was barred from bringing his suit by Section 11 of the Sonthal Perganas Regulation III of 1872.

38. It having been now explained what is the nature of the points upon which reference has been made to this Full Bench, it is necessary to examine them more closely; and I will deal first with the question as to whether the plaintiff's suit was not maintainable in view of the Santhal Parganas Regulation, III of 1672.

39. I may preface my observations upon this point by stating that it has been strongly urged upon this Court that the obvious intention of the Legislature when dealing with, to quote the phrasing of the preamble of Act XXXVII of 1855, "the uncivilized rase of people called Sonthals" was to remove them from the operation of the general laws and to place them under legal incidences suitable to their somewhat primitive degree of culture. I fully appreciate this undoubted fast, but

need hardly say that the function of a Court of law is to construe an enactment according to its phraseology.

40. Now the Regulation of 1872 is a comprehensive Code of Procedure; by Section 11 it lays down that: "Except as provided in Section 23A no suit shall lie in any Civil Court regarding any matter decided by any Settlement Court under these rules; but the decisions and orders of the Settlement Courts made under these rules, regarding the interests and rights above mentioned, shall have the force of a decree of Court."

41. Section 24 is also not unimportant: It provides that, after the making of the Record of Rights and its publication in the manner prescribed, a period of six months is given during which any person interest ad may bring forward any objection which he may desire to make to any part of the record.

42. Section 25A, which is referred to in Section 11, gives power to certain proprietors in certain circumstances to bring a civil suit in certain Courts to contest the finding or record of the Settlement Officer within three years from the date of the publication of the Record of Rights; but this section is not in this case material, as the parties here do not fall within those categories of persons to whom alone the section is applicable.

43. Section 25 prescribes that after the expiration of the period of six months contemplated in Section 24, the record shall be conclusive proof of the rights and customs therein recorded with the exception of certain eases and subject to certain investigations which are not here applicable, but in Sub-section (3) there is a proviso that in the case of the discovery of "material error" (whatever that may mean) it shall be lawful for the Lieutenant-Governor to direct that the record of any village shall be revised.

44. No question arises in this case as to the finality of the Record of Rights in which the plaintiff and Brajeswari were recorded as joint owners of the property, except as to whether in view of Section 11 it is still open to the plaintiff to bring a suit for a declaration of title and recovery of possession on the ground that the Settlement Officer's decision was obtained by Brajeswari's fraud. Section 11 says: "No suit shall lie in any Civil Court regarding any matter decided by any Settlement Court under these rules." Now what does that mean? The next sentence shows. The Regulation goes on; But the decisions and orders of the Settlement Courts...shall have the force of a decree of Court." That is all, and it seems to me that what is meant is simply that the decision of the Settlement Officer is to be regarded as a decree of a Civil Court. If, subject to what I have to say with regard to fraud, an attempt were to be made to open in a Civil Court a matter already decided in a Settlement Court, the plea of res judicata would be at once an effective answer. Bat it is interesting to observe the aspect with which this section was regarded in the subordinate Courts. In Suit No. 1 of 1911 Mr. Heard, the Subordinate Judge of Pakur, says: "Really the whole thing is an oft told tale here, and the present suit seems to me yet another

attempt to get a Civil Court to meddle with a settlement finding and entry, ...this suit... is clearly shut out by Sections 11, 25 and 25A. No ordinary Civil Court can meddle with the matter at all or touch the burden with ore of its fingers. A mere averment of fraud obviously cannot confer on a Subordinate Judge a jurisdiction he does not otherwise possess to intrude in matters already decided in Settlement Courts."

45. The District Judge, Mr. Allanson, wrote "It is extraordinary how, despite the very clear provisions of Sections 11 and 25 ...litigants again and again institute oases to contest the correctness of the Settlement Record. This Court has again and again held that such suits do not lie. Section 25(3) clearly provides a means of redress if there has been a material error (e.g., due to fraud) in the Settlement Record." In this suit the Subordinate Judge Shahabuddin Khan thought that the only proceeding open to the plaintiff was through Section 25, Sub-section (3); and the Deputy Commissioner Mr. Tanner was of the same opinion.

47. But if, as I read Section 11, it does no more than give the decision of the Settlement Court the force of a Civil Court decree, such decision owns only such legal incidences as are attached to a Civil Court decree, and one of those incidences is that if a decree has been obtained by fraud it is a nullity; or, in other words, the decree has no existence. Nor is the position of the decision of a Settlement Court materially strengthened intrinsically by any declaration such as is found in Section 25, to the effect that it is "conclusive proof" of the rights and customs therein recorded; for so too in the same sense is a decree of a Civil Court. It is suggested, however, that, as by Section 25, Sub-section 3, an avenue is still held open for a rectification of a material error, that provision in some way, I am not very clear how, prevents the ordinary legal incidences being attached to the decision of a Settlement Court, but although it is true that this path might be followed in many cases where Section 11 would undoubtedly bar a civil suit, I do not understand how beyond offering a greater scope for alteration than would be possible in the case of a Civil Court decree and perhaps in the case of fraud a choice of remedy not available to the ordinary litigant, it can be contemplated that a permission to approach the Chief Executive Officer can in any way be regarded as per se ousting the jurisdiction of the Civil Courts. If then the decision of the Settlement Court is to be recognised as a decree of a Civil Court there is no question but that if obtained by fraud it is a nullity, nor is it open to doubt that it is not necessary where fraud is alleged to bring any action to set aside the decision before commencing a suit in claim of rights wrongfully affected by the fraudulently obtained decision.

48. For these propositions I think the ease of *Reg. v. Sadddlers' Co (1863) 10 H.L.C. 494 : 32 L.J.Q.B. 337 : 3 Jur. (N.S.) 1081 : 9 L.T. (N.S.) 60 : 11 W.R. 1004 : 138 R.R. 217 : 11 E.R. 1083(Supra)* is alone ample authority, where it is clearly stated, as acted by the learned Chief Justice in his decision on this case, "a judgment or decree obtained by fraud upon a Court binds not such Court nor any other, and its nullity upon this ground, thought has not been set aside or reversed may, be alleged in a collateral proceeding."

49. But indeed this very question as to the effect of Section 11 of the Santhal Parganas Regulation, 1872, has already been considered on more than one occasion and I find that the view which I hold is supported by a no means negligible series of decisions.

50. In the case of *Kangal Chandra Mandal v. Madhu Sudan Mandal 20 Ind. Cas. 417 : 17 C.L.J. 587(supra)* heard in Calcutta on appeal before Stephen and Mookerjee, JJ., Section 11 of the Santhal Parganas Settlement Regulation came under consideration.

51. In that case it was held that a person, who at the date of the Settlement had no more interest than that of a contingent reversioner, is not, when his interest matures, debarred from questioning the validity of the Settlement Record on the ground that owing to collusion between other parties (through whom he does not claim) at the date of the Settlement the party from whom his reversionary interest came was excluded wrongfully from being recorded on the Settlement Record. The fasts alleged were simple enough. One Gobardhone Mandal owned the property in question; he had two wives Gobinda and Durgamoni; the former had three daughters Raimoni, Brajomoni and Mandakini; the plaintiff was the son of Raimoni, the first three defendants were sons of Mandakini and the fourth defendant the son of Brajomoni.

52. The Settlement took place in 1877, presumably after Gobardhone Mandal's death. The plaintiff alleged that by collusion between the widow Durgamoni and the first defendant the latter got himself recorded on the record as proprietor. The plaintiff brought a suit for declaration of title and recovery of possession of a certain share in the property and it was held that he could do so.

53. It is, however, appositely pointed out that in that action the plaintiff, who at the date of the entry in the Record of Rights had merely a contingent interest, was not a party to the settlement proceedings and, therefore, not bound by them; but it may be recollected that in the matter now before us the plaintiff was at the date of the alleged fraud at the time of the Settlement a mere child and was there only represented by the person who is alleged to have acted fraudulently and that as soon as he received an independent guardian, the question of fraud was immediately raised on his behalf; but see as to the effect of minority in normal oases *Shanker Prosad Jha (Januki Persad) v. Babu Lal Jha 28 Ind. Cas. 241 : C.W.N. 499(Supra)*. However, the matter was taken further in the case of *Mozuffar Ali v. Kali Prasad Saha 22 Ind. Cas. 789 : 18 C.W.N. 271 : 19 C.L.J. 29(Supra)*, heard on appeal in Calcutta before Moo kerjee and Beachcroft, JJ., when Section 11 of the Santhal Parganas Regulation again same under consideration.

54. The plaintiffs in this case alleged (they were suing the defendants for rent) that they were not aware, until the suit, of the entry to their detriment in the Settlement Record and that this absence of knowledge was due to the fraudulent action of the defendants who had concealed from them (the plaintiffs) the fact of the record having been made in their (the defendants') favor.

55. The Court in its judgment referred to decisions (quoted on page 273) which established the view that if a defendant in a suit pleads the Record of Rights as a bar to the suit, he raises in essence a plea of res judicata and that it is obligatory upon him to show the circumstances under which the decree was made and to prove that it does operate as res judicata. This was probably not altogether correct, but the Court then proceeded to state that when the defendant has thus proved that the requirements of the Statute have been fulfilled, it then becomes open to the plaintiffs to urge under Section 44 of the Indian Evidence Act that the entry was obtained by fraud.

56. The Court, therefore, held that there must be a full enquiry into the matter, one of the subjects of such enquiry being as to whether the entry in the Record of Rights was in fact obtained by fraud as alleged by the plaintiffs.

57. In other words, the Court held that in a case where fraud is alleged, Section 11 of the Regulation does not bar a civil suit which would or might have the effect of disputing the accuracy of the Record of Rights.

58. In the case of *Sib Saran Shah v. Bameswar De 60 Ind. Cas. 640 : (1920) Pat. 363 : 2 P.L.T. 40(supra)* decided in 1920 in this Court on second appeal by Adami and Das, JJ., the matter was once more dealt with. In that case the defendants had mortgaged in 1908 a part of their interest in certain property to one Golab Marwari; he obtained a mortgage decree and at the sale the plaintiff purchased the property. The Record of the Settlement was published in 1901 and in the record the defendants were entered as exclusive owners.

59. On the plaintiff endeavouring to take possession he was resisted by the defendants, who alleged that the Record of Rights showed them as exclusive owners; the plaintiff in 1909 instituted a suit to obtain possession of the property and the defense was based on Section 11 of the Regulation.

60. The plaintiff, of course, alleged fraud on the part of the defendants.

61. In the course of the judgment of the Court delivered by Adami, J., he says:

> It is argued that the general law as to the competency of a suit to set aside a decree on the ground of fraud will not apply to an entry in the Record of Rights under the Regulation. In my opinion this contention cannot be upheld. Proof of fraud is sufficient to nullify a decree or order whether under the Civil Procedure Code or otherwise, and if the plaintiff in the present suit succeeds in proving that the entry was obtained by fraud he will be entitled to have the decree declared null.

62. The matter was, therefore, referred back Even if my own opinion had not been in accord with

the trend of the above cases, I should have felt reluctant to come to a decision contrary to their tenor. It is, however, suggested here that where fraud is alleged, particulars must be given in the plaint and that in this case the particulars given are inadequate. I am not prepared to say that they are insufficient. If in fact, as is alleged, Brajeswari did, whilst in a fiduciary position towards the plaintiff and with a view of depriving him in favour of herself and her own children of his rights, persuade the Settlement Officer, by some such false story as has already been exposed as to the property or rather part of it coming to her through her father, to place her name on the record, she was undoubtedly guilty of fraud and I think that the particulars given in Section 7 of the plaint are sufficient to justify the enquiry sought.

63. I now pass to the second point referred for the consideration of this Bench. It is how far, if at all, the previous Suit No. 3 of 1911 acts as a bar to the maintenance of the present action.

64. What is contended by the defendants is that, in view of the provisions of Order 2, Rule 2 of the First Schedule to the Civil Procedure Code, the plaintiff's partition Suit No. 3 of 1911 prevents him from bringing the present action.

65. I think that it is desirable here to look at the terms of the order passed by the High Court of Calcutta in the appeal in the first suit brought by the plaintiff, No. 1 of 1911. It was made on August 26th, 1914, and reads:

> Under the circumstances of the case we think that the best course is to allow the plaintiff to withdraw the suit, with liberty to bring a fresh suit on the same cause of action or any further cause of action that may have accrued in his favour or upon both. The respondents (i.e., the present defendants in this suit) have been brought on the record at the instance of the appellant and they are entitled to their costs, one gold mohur. Let Umesh Chandra Dutt and Suchand Dutt be substituted in place of the deceased respondent for the purpose of this appeal without deciding whether they are or are not the legal heirs of the deceased.

66. Now what were the "circumstances" mentioned? One was the death of Brajeswari and the other was the decision (not appealed from) of the Subordinate Judge of Pakur in Suit No. 3 of 1911 that the property all had belonged to Sonatan Sen; as a result of that decision, plaintiff considered himself in law the heir to half of the property held by Brajeswari in preference to her daughter's sons.

67. But though plaintiff was thus definitely given leave to bring a fresh action and though no doubt, and it was not contended to the contrary before this Court, in view of such permission Suit No. 1 of 1911 could not be regarded as forming any bar by way of res judicata to the present suit, I do not think that that order of the High Court of Calcutta affected materially the effect, if any, on the present suit of the proceedings in Suit No. 3 of 1911, and this notwithstanding the fact that what had taken place in Suit No. 3 of 1911 must have been placed before the High Court. The

bearing of Suit No. 3 of 1911 on the present suit must, therefore, be considered separately, though its effect is not strengthened by the withdrawal of Suit No. 1 of 1911 in view of the permission granted to start anew.

68. The provisions of Order 2, Rule 2, prescribe as follows:

> (1) Every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action; but a plaintiff may relinquish any portion of his claim in order to bring the suit within the jurisdiction of any Court.
> (2). Where a person omits to sue in respect of or intentionally relinquishes any portion of his claim he shall not afterwards sue in respect of the portion so omitted or relinquished.
> (3). A person entitled to more than one relief in respect of the same cause of action may sue for all or any of such reliefs; but if he omits, except with the leave of the Court, to sue for all such reliefs he shall not afterwards sue for any relief so omitted.

69. Now the circumstances under which Suit No. 3 of 1911 was brought were peculiar. The plaintiff's guardian had brought Suit No. 1 of 1911 in which he had claimed the whole of the property. The Subordinate Judge, in dismissing his claim to the whole on technical grounds of the bar by the Santhal Parganas Regulation, expressed the view that plaintiff was dearly under the Record of Rights entitled to half the property. So too did the District Judge. The plaintiff had appealed.

70. But the guardian apprehended that even with a clear statement of his right to the undivided moiety of the property, he would not have any pea cable enjoyment of any of it. There had already in 1909 been serious difficulties between himself and Brajeswari, which had culminated in a miscellaneous judicial proceeding in that year before the Court of the Sub-Divisional Officer of Pakur (Case No. 48 of 1909), as a result of which Brajeswari was, in order to avoid a breach of the peace, permitted to out the crops on condition of giving substantial security.

71. Realising, I assume, that a lengthy period must elapse before his appeal could be disposed of, the plaintiff's guardian commenced Suit No. 8 of 1911. Now it is very clear from the plaint how the plaintiff framed his suit and for what he asked. It was a suit for what I must call an interim partition. The plaint recites what the plaintiff alleged that Brajeswari had done and then in clear and unmistakable language why, pending the result of the appeal in Suit No. 1 of 1911, it was necessary for the convenience and peaceful enjoyment of both the parties that the property should be divided up into two equal shares, one for the plaintiff and one for the defendant; each party would quietly occupy their allotted moiety until the result of the appeal; if the appeal was decided in favour of the defendant, then this temporary partition would become a permanent one. Nothing could have been more explicit. Now it is said that there is no such thing known as a temporary partition of land. I do not know why there should not be, and no authority was produced for such a proposition. It seems to me easy to imagine cases in which, such as this, a

temporary partition might well be of great utility. It may have been unusual, and it is possible that it was unnecessary and that the plaintiffs' rights could have been safeguarded ad interim better in other ways, but at any rate what the plaintiff asked for was apparently granted. The order of the Court is not before us but the plaint and decision are.

72. It may well be that as Brajeswari in the suit claimed all the property as her own devolving upon her through her father, the plaintiff, therefore, had to fight again on new ground a battle for his half share, but that in no way affects the character of his claim. No question of res judicata can arise from the litigation having assumed that form.

73. I cannot myself see how Order 2, Rule 2, can have any application in this case. The claim in Suit No. 3 of 1911 included the whole of the claim made by the plaintiff, which was for a temporary partition of the land pending the appeal in the other action. He certainly did not omit to sue for any portion of his claim, as be had already done so in Suit No. 1 of 1911; he most certainly never intentionally relinquished any part of his claim, but on the other hand he was at the utmost pains to show that he desired not to do so; he placed his position most clearly before the Court. Whatever was done must at the worst be taken to have been done with the Court's leave.

74. For the above reasons, therefore, I am of the opinion that the appeal should be allowed and I agree with the order as to remand indicated by the learned Chief Justice.

Cases Referred.

[1]22 Ind. Cas. 789 : 18 C.W.N. 271 : 19 C.L.J. 29
[2]640 : (1920) Pat. 363 : 2 P.L.T. 40
[3](1863) 10 H.L.C. 494 at p 431 : 32 L.J.Q.B. 337 : 3 Jur. N.S. 1081 : 9 L.T. (N.S.) 60 : 11 W.R. 1004 : 138 R.R. 217 : 11 E.R. 1083
[4]20 C. 322 : 10 Ind. Dec. (N.S.) 218
513 C. 146 : 9 Ind. Dec. (N.S.) 98
[6]11 C. 632 : 5 Ind. Dec. (N.S.) 1180
[7]12 C. 69 : 6 Ind. Dec. (N.S.) 48
[8]834 C. 711 : 4 A.L.J. 467 : 9 Bom. L.R. 743 ; 6 C.L.J. 17 : 11 C.W.N. 817 : 17 M.L.J. 358 : 34 I. A. 138
[9]36 C. 651 : 16 Bom, L.R. 590 : 12 C.W.N. 562 : 5 A.L.J. 290 : 7 C.L.J. 528 : 14 Bur. L.R. 108 : 35 I.A 98 : 18 M.L.J. 277 : 4 M.L.T. 12 : 4 L.B.R. 266
[10]3 C. 504 : 2 C.L.R. 147 : 1 Ind. Dec. (N.S.) 905
[11]7 C.W.N. 784 : 30 C. 999
[12]5 C.W.N. 10 : 2 Bom. L.R. 927 : 27 I.a. 216 : 25 B. 337 : 10 M.L.J. 368 : 7 Sar. P.C.J. 789 (P.C)
[13]20 Ind. Cas. 417 : 17 C.L.J. 587
[14]15 C. 765 : 7 Ind. Dec. (N.S.) 1094
[15]22 Ind. Cas. 789 : 18 C.W.N. 271 : 19 C.L.J. 29
[16]60 Ind. Cas. 640 : (1920) Pat. 363 : 2 P.L.T. 40
[17]16 C. 533 : 16 I.A. 119 : 12 Ind. Jur. 254 : 5 Sar. P.C.J. 168 : 7 Ind. Dec. (N.S.) 939