

do so, it has become binding upon him, and that he is precluded from bringing this suit. Accordingly we set aside the decrees passed by the lower Courts in this suit, and remand it to the Court of first instance under ss. 562 and 587 of Act X of 1877 for disposal on the merits, with a direction that the costs of the parties in all the Courts shall follow the result.

1878

ALI SHAH
v.
HUSAIN
BAKHSI.

Cause remanded.

APPELLATE CIVIL.

1878
February 6.

Before Mr. Justice Pearson and Mr. Justice Turner.

DURGA PRASAD AND ANOTHER (PLAINTIFFS) v. NAWAZISH ALI AND ANOTHER (DEFENDANTS).*

Pre-emption—Conditional Decree.

Where the plaintiff in a suit to enforce the right of pre-emption sued alleging that the actual price of the property was not the price entered in the sale-deed but a smaller price, and claimed the property on payment of such smaller price, and did not allege in his plaint that he was ready and willing to pay any price which the Court might find to be the actual price, and on the day that his suit was finally disposed of presented an application to the Court stating that he was ready and willing to do so, *held* that the Court was not bound to allow him to amend his plaint and bring into Court the larger sum (1).

THIS was a suit to enforce the plaintiffs' right of pre-emption in respect of a share in a certain village, the suit being founded upon a special agreement contained in the village administration paper. The plaintiffs claimed the right on payment of Rs. 1,800, which sum they alleged was the actual price paid for the property, and not Rs. 2,790, the price entered in the deed of sale. They did

* Second Appeal, No. 1212 of 1877, from a decree of C. J. Daniell, Esq., Judge of Mainpuri, dated the 15th September, 1877, affirming a decree of Maulvi Hamid Hasan Khan, Subordinate Judge of Mainpuri, dated the 13th July, 1876.

(1) See also *Kudhara v. Khuman Singh*, H. C. R., N.-W. P., 1866, p. 265, and *Achurbur Panday v. Buchshee Ram*, 2 W. R. 38. In the first case the person claiming the right of pre-emption refused to give a certain sum for the property on the ground that a certain smaller sum was the actual price, and sued to enforce his right on payment of such smaller sum. It was held that, it having been found that the larger sum was the actual price, the plaintiff's suit was properly

dismissed. In the second case the plaintiff not only sued to enforce his right of pre-emption on payment of a specific sum but in respect also of a specific property. The right alleged being found to have no existence, his suit was properly dismissed. See also *Madhub Chunder v. Tomee Bewah*, 7 W. R. 210, in which case also the principle, that a person claiming the right of pre-emption must take the bargain as it was made or not at all, is recognised.

1878

DURGA
PRASAD
v.
NAWAZISH
ALL.

not state in their plaint that they were willing to pay any sum that might be found to be the actual price of the property. The suit was instituted on the 20th November, 1875. On the 13th July, 1876, the date on which the Court of first instance finally disposed of the suit, they made an application to that Court offering to pay whatever sum the Court might adjudge to be the actual price. The Court refused to entertain this application; and finding that the actual price of the property was Rs. 2,790, dismissed the suit. On appeal by the plaintiffs the lower appellate Court affirmed the decision of the Court of first instance.

On second appeal by the plaintiffs to the High Court they contended that they were entitled to a conditional decree, having offered before the suit was decided to pay any sum that might be adjudged to be the actual price of the property.

Mr. *Mahmood* and Pandit *Ajudhia Nath*, for the appellants.

Mr. *Colvin*, Pandit *Bishambhar Nath*, and *Lala Ram Prasad*, for the respondents.

The judgment of the Court was delivered by

TURNER, J.—We cannot hold as a matter of law that the Court of first instance was bound to allow the plaintiff to amend his plaint, and to bring in the very much larger sum which he should have offered to pay when he brought his suit. The appeal fails and is dismissed with costs.

Appeal dismissed.

APPELLATE CIVIL.

Before Mr. Justice Turner and Mr. Justice Oldfield.

BIJAI RAM (DEFENDANT) v. KALJU (PLAINTIFF).*

Pre-emption—Limitation—Act IX of 1871 (Limitation Act), sch. ii, art. 10

In 1861 *B* purchased conditionally certain immoveable property, which in 1865 was attached in execution of a decree. In 1874, the conditional sale having been foreclosed, *B* obtained a decree for possession of such property. In February, 1875, he obtained mutation of names in respect of such property. In Novem-

* Second Appeal, No. 1145 of 1877, from a decree of C. A. Daniell, Esq., Commissioner of Jhānsi, dated the 20th July, 1877, affirming a decree of J. S. Porter, Esq., Deputy Commissioner of Jhānsi, dated the 7th April, 1877.

1878

February 11.