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by s. 38 of the Municipalities' Act the property in all public highways is vested in the Committee, and by s. 27 the Committee can, with the sanction of the Local Government, sell any portion of land referred to in that section which is not required for the purposes of the Act, and shall keep roads in repair and may do all acts and things necessary for purposes of general utility—s. 32. But there is nothing in the Act which debars the Civil Courts from entertaining suits and giving relief in respect of any civil right which may be shown to have been infringed through the exercise by the Municipality of its powers under the Act; on the contrary provision is made for such suits. Here the plaintiff has made out a case. He has shown that the drainage from his premises has been stopped, and that he has been isolated and shut off from access to the present highway. The Municipality could not have thus dealt with the highway to the special injury of the plaintiff. In closing a portion of it they would have been bound to provide adequately for his drainage and his access to the highway which they had substituted; indeed, it is not clear that they had any intention of doing otherwise, and the defendant can do no less.

The relief which plaintiff now seeks is very reasonable. He does not ask to set aside the sale of the land, but that a cart-road nine feet wide should be reserved communicating with the highway, and that the existing course of drainage be not interfered with.

We decree the appeal, and modifying the decrees of the lower Courts decree the claim with all costs.

Appeal allowed.

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APPELLATE CIVIL

Before Mr. Justice Pearson and Mr. Justice Oldfield.

RADHIA (DEFENDANT) v. BENI AND OTHERS (PLAINTIFFS).

Act VIII of 1859 (Civil Procedure Code), s. 2—Res judicata

The plaintiffs in the present suit claimed, as the heirs of *J*, certain property from *M*, the daughter of *R*, alleging that such property was the joint and undivided property of *R* and *J*, to which on *R*'s death *J* had succeeded. The plaintiffs

* Special Appeal, No. 866 of 1877, from a decree of Babu Ram Kali Chaudhri, Subordinate Judge of Cawnpore, dated the 30th April, 1877, affirming a decree of Munshi Man Mohan Lal, Munsif of Akbarpur, dated the 1st December, 1875.

had formerly, after the death of *J*, sued *M* for such property, alleging that it was the separate property of *R*, and that on the death of *R*'s widow they were entitled to succeed thereto. *Held* that the decision in the former suit that such property was the separate property of *R* to which *M* was entitled to succeed on the death of his widow was a bar to their present suit.

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THE facts of this case are sufficiently stated for the purposes of this report in the judgment of the High Court to which the defendant appealed against the decree of the lower appellate Court. That decree affirmed the decree given by the Court of first instance to the plaintiffs. The defendants contended that the matter in dispute was *res judicata*.

The *Senior Government Pleader* (*Lala Juala Prasad*), for the appellant.

Lala Latta Prasad and *Munshi Kashi Prasad*, for the respondents.

The judgment of the Court was delivered by

OLDFIELD, J.—It appears that one *Jai Ram* had four sons, *Basawan*, *Mata Din*, *Jhau*, and *Ram Bakhsh*. They are all deceased, *Jhau* having died in 1868, and *Ram Bakhsh* some sixteen years ago, leaving a widow *Dallo*, who died in 1871, and a daughter, the defendant in this suit. The plaintiffs represent *Mata Din*. On the death of *Dallo* they sued in 1874 this defendant, the daughter of *Ram Bakhsh*, for the property now in suit, alleging that they were the heirs of her deceased father, *Ram Bakhsh*, and of *Dallo*; that suit was dismissed. They now sue her for the same property, alleging that *Jhau* and *Ram Bakhsh* lived and held the property as joint property, and that *Jhau* succeeded to *Ram Bakhsh*, and they are his heirs. The defendant pleaded that the claim was barred with reference to the decision in the former suit, and that it was also barred by limitation, owing to the long adverse possession of *Dallo* and the defendant. Both Courts have decreed the claim; the lower appellate Court has held that there is no estoppel under the Evidence Act to bar the suit, and that *Ram Bakhsh* and *Jhau* held the property jointly, and this being so, it must be concluded that, at *Ram Bakhsh*'s death, *Jhau* succeeded to his share, and the possession of *Dallo* in a part of the premises was not adverse to him.

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It appears to us that this judgment of the lower appellate Court is inconsistent with the findings on facts made in the suit which the plaintiffs brought in 1874 against the defendant, and that the lower appellate Court has failed to properly consider the plea which was raised as to the effect of that judgment on this claim, and we consider that the suit cannot be maintained with reference to the former case. The plaintiffs brought the former suit on the ground that they were heirs of Ram Bakhsh and Dallo, that the property formed the estate left by Ram Bakhsh and Dallo, and they further alleged that Ram Bakhsh had lived separate in estate from all his brothers. When they brought that suit Jhau had been dead some years, and their present claim that he succeeded to the estate at Ram Bakhsh's death as his heir, and that he held it jointly with Ram Bakhsh, was never urged in the former suit, and is wholly inconsistent with their allegations in that suit. But it further appears to us that the question of the nature of the estate, whether held separately by Ram Bakhsh from all his brothers, and the nature of Dallo's and the defendant's title and possession were questions which properly fell to be decided in that suit, and were in our opinion decided in favour of the defendant, and that the effect of that decision is to bar the claim both under s. 2 of Act VIII of 1859 and the Limitation Act. It was distinctly pleaded by defendant in that suit that after Ram Bakhsh's death Dallo had possession of the house in suit, and that defendant was entitled to the house by inheritance and the finding was as follows: "It is therefore satisfactorily established that for a long period Ram Bakhsh and after his decease his widow, Dallo Kuar, had separate and adverse possession of the property in dispute, and under such circumstances the daughter, *i. e.*, the appellant, has according to Hindu law the right of inheritance to the estate in suit left by Ram Bakhsh and his widow as against respondents. We cannot reconcile the above with the present finding that Dallo's possession was not adverse to Jhau. Anyhow the judgment in that case appears to us to be final in respect of defendant's title as against the plaintiffs whether they claimed in that suit as heirs of Ram Bakhsh or of Jhau, for at that time any title they had as heirs of Jhau had already accrued, and as we have remarked the entire character of Dallo's and defendant's title and possession as against

them was opened out by the pleadings, and properly fell to be decided in that case, and cannot be raised again.

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We decree the appeal with all costs and reverse the decrees of the lower Courts and dismiss the suit.

Appeal allowed.

 APPELLATE CIVIL.

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Before Mr. Justice Pearson and Mr. Justice Oldfield.

CHADAMI LAL (PLAINTIFF) v. MUHAMMAD BAKHSH AND ANOTHER
(DEFENDANTS).*

Pre-emption—Contract—Wajiluarz—Custom—Appeal.

The plaintiff in a suit to enforce a right of pre-emption in respect of certain shares in certain villages founded his claim on a special agreement contained in the village administration-papers, and such claim was tried and determined in the lower Court as so founded. *Held* that the plaintiff could not in appeal set up a claim to enforce such right founded on custom (1).

THIS was a suit for pre-emption founded on special agreement. The facts of the case and the manner in which the Court of first instance dealt with the suit are sufficiently stated for the purposes of this report in the judgment of the High Court, to which the plaintiff appealed from the decree of the Court of first instance dismissing his suit.

The *Junior Government Pleader* (Babu Dwarka Nath Banarji) and Munshi *Hanuman Prasad*, for the appellant.

Pandits *Bishambhar Nath*, *Ajudhia Nath*, and *Nand Lal*, for the respondents.

The judgment of the Court was delivered by

OLDFIELD, J.—This suit has been brought to recover certain shares in mauza Saran Top and Mahal Bagh, pargana Kanauj, by right of pre-emption based on the village administration-papers of the current settlement. It was urged in defence by the purchaser

* Regular Appeal, No. 86 of 1877, from a decree of Pandit Har Sahai, Subordinate Judge of Farukhabad, dated the 28th April, 1877.

(1) See also *Koonj Behari Lal v. Girihari Lal*, 1 B. L. R. S. N. 12, S. C. 10 W. R. 189, and *Shiu Suhai v. Hari Suhai* 3 B. L. R. Ap 14^o, in which cases it was held that, where a plaintiff seeks to

enforce a right of pre-emption upon the ground of partnership, he cannot obtain a decree upon the ground of vicinage.