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was but for a small term, and mutation of names was not considered necessary, as it was thought that the mortgage would be redeemed from the income in two or three years. Even no attempt has been made to get back the property until this suit was entered.

I think that the appeal must be admitted, and that the suit as brought was, in the first instance, properly dismissed on appeal. Whether on the admission of defendants that they held as mortgagees of a portion of the property under a mortgage on which a large sum is still due to them, the plaintiffs can claim to redeem that portion after getting an account is another question. I do not think that they are entitled to ask for it in this suit, in which their claim as brought had not been established.

OLDFIELD, J.—I adhere to the view of this case which I have expressed at length in the previous judgments, and I would restore the judgment and decree of this Court, dated the 16th June, 1874, and dismiss the suit with costs in all Courts.

APPELLATE CIVIL.

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May 22.

(Mr. Justice Pearson and Mr. Justice Turner.)

RAJA RAM (PLAINTIFF) *v.* **BANSI** AND OTHERS (DEFENDANTS.)*

Pre-emption—Minor—Legal Disability—Limitation.—Act IX of 1871, *s.* 7 *and sch.* ii., 10.

The provisions of s. 7, Act IX of 1871, are applicable in computing the period of limitation in suits to enforce a right of pre-emption (1).

Where a condition for pre-emption contained in a record-of-rights was intended to take effect at the time of a sale and its language implied that the co-sharers in whose favour it was made were to be persons who were competent at that time to make a binding contract to accept or refuse an offer, no right of pre-emption accrued under the condition to a co-sharer who was a minor at the time of a sale and unrepresented by any person competent to conclude a binding contract on his behalf, whether it was assumed that the condition arose out of special contract or general usage.

Nanoo v. *Tirkha* (2) observed upon.

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* Special Appeal, No. 132 of 1876, from a decree of the Judge of Gorakhpur, dated the 26th January, 1876, reversing a decree of the Subordinate Judge, dated the 20th November, 1875.

(1) So held under Act XIV of 1859 in *Jungo Lal* v. *Lalla Alum Chund*, 7 W. R. 279.

(2) S. D. A. Rep., N.-W. P., 1865, p. 97.

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Remarks on the right of pre-emption existing in villages in the North-Western Provinces.

This was a suit by a co-sharer in a village to enforce his right of pre-emption in respect of a 2-anna share, under a condition for pre-emption contained in the village administration-paper.

The share was sold to the answering defendants, who were strangers, on the 17th January, 1870, while the plaintiff was a minor. The plaintiff had no legally constituted guardian at the time of the sale. His mother was alive and was managing his estate. The share was not offered to him or to any one on his behalf, nor did he or any one on his behalf assert his right of pre-emption at the time of the sale. He became of age in October, 1874, and instituted the present suit on the 23rd July, 1875.

The Court of first instance gave him a decree. The lower appellate Court, relying on the ruling of the Sudder Court in *Nanoo* v. *Tirkha* (1), held that his right of pre-emption had lapsed for want of its assertion within a reasonable period after the sale. The plaintiff appealed to the High Court against this decision.

Lala *Lalta Parshad*, for the appellant.

The *Senior Government Pleader* (Lala *Juala Parshad*), Munshi *Hanuman Parshad*, and Maulvi *Mehdi Hussein*, for the respondents.

The judgment of the Court was as follows:—

The *haqq-i-shuf'a* or right of pre-emption known to the Muhammadan law, and of which some of the expounders of that law declare the operation limited to houses and parcels of enclosed land, had in some instances become a village custom and attached to the alienation of shares in revenue-paying mahâls when the first settlement under Regulation IX of 1833 was made in these Provinces. These instances were, we believe, not numerous, but inasmuch as it was deemed conducive to the welfare and tranquillity of village communities that some such provision should be made to prevent the incursion into the community of strangers in race or religion, the officers engaged in the preparation of the record-of-rights induced the proprietors to consent to the introduction of a stipulation binding each co-sharer when transferring his share to give the first re-

(1) S. D. A. Rep., N.-W. P., 1865, p. 97.

fusal of it to one of his own family or to the other co-sharers in the patti or mahál. These stipulations vary in their terms, and while they are not clogged with the formalities which attach to the Muhammadan *haqq-i-shuf'a* they also differ from that right, in that while the latter is regarded by Muhammadan law as a feeble right, the former, arising out of contract, are enforced with the same rigour as contracts.

Unfortunately the introduction of these restrictions on the freedom of alienation have worked results wholly unexpected, and produced evils scarcely less than those they were designed to avert. So long as land possessed no great value in the market, the consequences were not plainly apparent. Now that land has acquired greater value, and that in some districts there is an active demand for it, the results of these restrictions cannot escape observation.

Except under the pressure of necessity, land-owners rarely part with their landed property. It is therefore of the utmost moment to them to obtain its fair value and without unreasonable delay. Now in a village held by a number of co-sharers it is almost impossible to obtain within a reasonable time from every co-sharer an explicit refusal of an offer of sale, or such evidence of the refusal as will thereafter be incontrovertible. Not unfrequently when a co-sharer desires to sell his share, and in fulfilment of the stipulation offers it to his co-sharers, some one or more of them will neither explicitly accept nor decline the offer, but haggle to obtain it at a price far below its value. When the patience of the seller is exhausted or the urgency of his need no longer permits delay, he is driven to effect a sale with a stranger, which is followed after the longest delay allowed by law by the institution of one or more suits to enforce the right of pre-emption. The stranger, aware of the risk to which his purchase is exposed, either at once takes account of it by offering less than the property ought to fetch if it could be sold freed from the risk, or retains a portion of the purchase-money until it be seen whether the sale is contested, or if contested the result be known. Fictitious considerations are entered in sale-deeds, fictitious payments made before the registering officers, fictitious receipts executed, and wholesale perjury committed on the one side or the other when the Courts come to inquire into the prices actually paid.

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In the case now before us a claim is made which, if allowed, will render the condition for pre-emption still more onerous, and impair still further the value of property to which it attaches. The plaintiff seeks to disturb sales made some years before suit at a time when he was a minor and unrepresented by any person competent on his behalf to conclude a purchase. Having brought a suit within a year from the date on which he attained his majority, he is not barred by limitation from enforcing his claim, and the main question is whether or not the right accrued to him. The Court of first instance assumed that the right accrued to the plaintiff, notwithstanding his minority, and decreed the claim. The Judge on appeal considered that, inasmuch as no claim had been advanced either by the minor or his mother, who managed her son's property, within a reasonable period after the sale, the right was lost. The Judge relied on the decision of the late Sudder Court, North-Western Provinces, in *Nanoo* v. *Tirkha* (1) in which it was held the nature of a pre-emptive right to be such as to require immediate assertion as a condition essential to its recognition, and that minority will not excuse laches in the assertion of the claim.

In special appeal the propriety of this ruling has been impugned. It does not appear from the report whether the claim which was before the Sudder Court was based on the Muhammadan *haqq i-shuf'a* or on a special condition in the record-of-rights. Under the Muhammadan law immediate demand is certainly essential, but, as we have said, the formalities which are requisite under that law do not apply to rights of pre-emption created by contract, unless it appear that it was the intention of the parties to attach to the exercise of the right the same formalities as are required by Muhammadan law.

In all cases in which the right is asserted as based on a stipulation entered in the record-of-rights, the terms of the stipulation must be regarded, and those conditions only imposed which the language of the stipulation warrants.

In the case before us the stipulation has been thus translated:—"Every co-sharer is to the extent of his possession at liberty to

(1) S. D. A. Rep., N.-W. P., 1865, p. 97.

alienate his share by sale or mortgage, but at the time of alienation there is this condition, that whoever desires to alienate his share, first of all the nearest co-sharer will be entitled to it, and in the event of his refusal it shall be transferred to the other co-sharers in the other thoke, and when all have refused or do not give the proper price, then a transfer may be made to another [*i. e.*, a stranger], and after that the right of alienation shall belong to no co-sharer."

There is nothing in the language of this stipulation to show that the formalities of the Muhammadan law were attached to the right of pre-emption, nor that the right, if it accrued, would be forfeited if it were asserted at any time within the period allowed by the law of limitation. But while we cannot support the decree of the Court below on the ground on which it proceeded, we see other grounds which in our judgment justify us in affirming it.

It could not have been the intention of those who framed or accepted the stipulation that no complete alienation should be made so long as there was a co-sharer in the village under a disability to make a binding contract; and the language of the stipulation so far from supporting militates with the suggestion that there could have been any such intention. The condition was clearly to take effect at the time of the sale, and its language implies that the co-sharers in whose favour the condition was created were to be persons who were competent at that time to make a binding contract to accept or refuse the offer. The generality of the reservation of the right to all the co-sharers of the several classes is controlled by other terms which imply that the option of purchase is to be exercised at the time of the sale, and that it is to be given to those who are competent to accept or refuse it. It is admitted that the plaintiff was at the time of the sale impugned a minor, and it is not alleged that there was at that time any person competent at that time to conclude a contract which would be binding on him.

It follows from the construction we put on the stipulation that the seller was not bound to make the offer to the plaintiff, and that the sales cannot be invalidated by reason of the absence of proof of refusal on his part. We have assumed the stipulation in the record-of-rights arose out of contract, because such we believe to have been the more general origin of these stipulations; but assuming the clause

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in the record-of-rights to be a record of custom, we are still at liberty to collect its incidents from the terms in which it is recorded. Indeed, were the clause merely a record of custom, and its language were ambiguous, a custom to be a good custom must be reasonable, and we could not hold a custom reasonable which allowed the validity of transfers of property to remain for an indefinite period in suspense.

For the reasons we have stated we affirm the decree of the lower appellate Court and dismiss the appeal with costs.

1876
April 24.

BEFORE A FULL BENCH.

(Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Pearson, Mr. Justice Turner, Mr. Justice Spankie, and Mr. Justice Oldfield.)

GHAZI AND OTHERS (DEFENDANTS) *v.* KADIR BAKSH AND ANOTHER (PLAINTIFFS).*

Execution of Decree—Irregularity—Sale in Execution—Act VIII of 1859, *s.* 257.

G and *M* obtained a money-decree against *K* in the Court of the Principal Sudder Amin on the 12th December, 1864. This decree was reversed by the District Judge, but on the 5th March, 1866, the Sudder Court set aside the Judge's decree and ordered a new trial. On the 5th May, 1866, the District Judge affirmed the decree of the Court of first instance. On the 3rd December, 1866, the High Court again set aside the Judge's decree and ordered a new trial. On the 14th January, 1867, the District Judge again affirmed the decree of the Court of first instance, and no appeal being preferred, the decree became final. The decree-holders had in the meantime taken proceedings to execute the decree dated the 5th May, 1866, and from time to time, and finally on the 7th November, 1870, they renewed these proceedings, in each instance referring to the decree dated the 5th May, 1866, even after it was set aside and the decree dated the 14th January, 1867, passed. On the last application a sale of certain immoveable property belonging to *K* was ordered, and took place on the 15th February, 1871. *K* objected to the confirmation of the sale on the ground of the irregularity in the application, but his objections were disallowed and the sale was confirmed. He brought a suit to recover possession of the property from the auction-purchaser on the ground that the sale was a nullity. *Held, per* STUART, C. J., and PEARSON, TURNER, and SPANKIE, JJ., that the sale ought not to be set aside, as the irregularity in applying for execution of the decree dated the 5th May, 1866, was an irregularity which did not prejudice the judgment-debtor.

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*Special Appeal, No. 1557 of 1874, from a decree of the Subordinate Judge of Allahabad, dated the 25th September, 1874, reversing a decree of the Munsif, dated the 24th December, 1873.