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holder putting in a fresh application within the period allowed by the law of limitation: in the latter case, the order, if allowed to become final, puts an end to the decree-holder's rights under his decree.

For instance, in the case before us, I have no hesitation in holding that the order of the 3rd of April 1888, by which the application of the 21st of February 1888 was struck off the file of pending cases owing to the failure of the decree-holder to file a list of the property to be attached, merely put an end to that particular application and decided nothing on the merits.

But the order of the 9th of June 1891 was of a different nature. It held that the effect of the order of the 3rd of April 1888 was to bar any subsequent application to execute. Had this order of the 9th of June 1891 been allowed to become final instead of being impugned, as it now is, in appeal, it would have been fatal to any rights the decree-holder had under his decree.

Appeal decreed.

APPELLATE CIVIL.

1892.
December 7.

Before Mr. Justice Knox and Mr. Justice Burkitt.

ABDUL RAHIM KHAN (PLAINTIFF) *v.* KHARAG SINGH AND ANOTHER (DEFENDANTS).*

Pre-emption—Muhammadan law—Vicinage—Separate mahâls.

Where an estate, originally one, has been divided into two separate *mahâls*, no right of pre-emption under the Muhammadan law will subsist on behalf of one of such *mahâls* in respect of the other merely by reason of vicinage: nor will any right of pre-emption arise from the fact that certain appurtenances to the original *mahâl* are still enjoyed in common by the owners of the separated *mahâls*.

The facts of this case sufficiently appear from the judgment of the Court.

Pandit *Moti Lal*, for the appellant.

Pandit *Sundar Lal*, for the respondents.

* Second Appeal No. 949 of 1892, from a decree of A. M. Markham, Esq., District Judge of Meerut, dated the 12th August 1890, confirming a decree of Rai Piari Lal, Subordinate Judge of Meerut, dated the 29th August 1889.

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KNOX and BURKITT, JJ.—In the suit out of which this second appeal arises the appellant before us was the plaintiff, and the respondents, defendants. The plaintiff brought a claim to pre-empt a certain amount of land, and the claim was based both upon the *wájib-ul-arz* and also upon the general principles of the Muhammadan law. In order to understand the case it will be necessary to go into the following facts. The appellant and Musammat Sahira Bibi, who is one of the respondents, were brother and sister. They were children to and successors of one Ghulam Rasul Khan, who was the original and sole owner of the village Bahramand Nagar. In connection with that village a *wájib-ul-arz* had been prepared, and in that paper there were set out certain statements with reference to the question of pre-emption, should it ever arise. We had the extract bearing upon pre-emption read out to us, and we find that, so far from its being a recital of any existing custom of pre-emption, it contained merely a general expression of the wishes of Ghulam Rasul Khan in the event of the village being hereafter divided amongst his heirs. Ghulam Rasul Khan being the sole owner, there could of course be no special contract with reference to the custom. After Ghulam Rasul Khan's death the estate passed into the hands of Abdul Rahim Khan, the son, and his sister, Musammat Sahira Bibi. After it had devolved upon these two persons a partition took place. It was contended that we must look upon this partition as one which, though perfect, yet suffered certain portions of the original estate to remain in the common enjoyment of Abdul Rahim Khan and Musammat Sahira Bibi or their representatives. On looking further, however, into the papers it appears that the alleged community extended only to a common burying ground and a *chaupal*. We are not here concerned with the fact whether these two appendages to the estate were or were not divided. It is clear to us that perfect partition of the original estate did take place and that two separate *mahâls* as known to the Revenue law were created therefrom. For each of these separate *mahâls* a separate *wájib-ul-arz* was prepared. So far as the new papers relate to pre-emption both the parties are agreed that they are a *verbatim* repetition of the so-called conditions which had originally been entered when the whole estate

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remained one and undivided. As already pointed out, these so-called conditions were nothing more than an expression of the wishes of Ghulam Rasul Khan put into the mouths of his descendants, and it is both curious and disappointing to find that a paper to which such importance has been attached by law should have been prepared in this perfunctory way. Musammat Sahira Bibi parted with a portion of her estate to the father of Kharag Singh, who is now the respondent before us, and on her doing so, the appellant before us instituted the present claim for pre-emption. Both the Courts below have found, and found most properly, that the claim, so far as it rested on the *wájib-ul-arz*, could not prevail. As regards the claim based upon the Muhammadan law the Court of first instance, following the ruling in *Chatternath Jha* (1), disallowed the claim. The learned District Judge in appeal held that the ruling in *Chatternath Jha* (1) had been misunderstood by the Court of first instance, but dismissed the claim on the ground that the preliminaries required by the Muhammadan law had not been observed. In appeal before us an attempt was made at first to contend that the appellant's claim was good both on the basis of the *wájib-ul-arz* and of the Muhammadan law. The former basis was, however, abandoned and the only serious contention before us was that under the Muhammadan law the claim for pre-emption was in the present case a good one. The learned counsel for the appellant was compelled to admit that under the Muhammadan law vicinage would give no right of pre-emption whereby the proprietor of one separate *mahál* could claim to pre-empt property sold by the proprietor of another and adjoining *mahál*. But he attempted to maintain the proposition that where two *mahâls* had certain appurtenances in common, the fact of both the proprietors having common appurtenances would give to one of them as against the other a right of pre-emption. In support of his contention he referred us to *Mahtab Singh* v. *Ram Tahal Misser* (2) and *Jahangeer Buksh* v. *Bhickaree Lall* (3). We have examined both these cases, but in both these cases the parties concerned were not owners of separate *mahâls* but owners of separate *pattis*.

(1) 6 B. L. R. 41 F. B. (2) 10 W. R., 314.
(3) 11 W. R., 71.

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We were also referred to *Shaikh Karim Baksh* v. *Kamr-ul-deen Ahmad* (1). The precedent upon which the Court of first instance originally decided the case seems to us directly in point and conclusive upon the question. The head-note there runs as follows :—"According to the Muhammadan law a partner has a right of pre-emption in villages or large estates. But a neighbour cannot claim such right on the ground of vicinage." We have examined the judgment and find that it fully bears out the head-note cited to us. In the present instance the appellant was really no more than a neighbour, and we have not been referred to, nor have we ourselves found, any authority in the Muhammadan law which gives such a neighbour a right of pre-emption in a distinct and adjoining *mahál* solely on the ground of vicinage. Under these circumstances it is unnecessary for us to consider whether or not the preliminaries of the Muhammadan law were observed. We dismiss the appeal with costs.

Appeal dismissed.

Before Sir John Edge, Kt., Chief Justice, Mr. Justice Tyrrell and Mr. Justice Blair.

1892. *December* 2.

JWALA PRASAD (DECREE-HOLDER) *v.* RAM NARAIN (JUDGMENT-DEBTOR).*

Act 1 *of* 1879, *s.* 46; *sch. i art* 16—*Stamp—Sale Certificate—Sale subject to incumbrance.*

Where property subject to an incumbrance is sold by auction in execution of a decree, the sale certificate should be stamped according to the amount of the purchase money, and not according to the amount of the purchase money together with the incumbrance.

THIS was a reference to the High Court by the Board of Revenue, under s. 46 of the Indian Stamp Act, 1879.

In this case in execution of a decree between the above-named parties a house was sold by public auction for Rs. 550, subject to a lien of Rs. 3,909. The sale having been confirmed, a certificate was granted to the purchaser on a stamp of Rs. 6 calculated on the amount of the actual purchase money. This document was

* Miscellaneous Application No. 135 of 1892 being a Reference by the Board of Revenue under the Indian Stamp Act, 1879.

(1) 6 N.-W. P. H. C. Rep., 377.