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are separately to enjoy, in the manner above indicated, their respective shares. Therefore their Lordships, guarding themselves against being supposed to affirm by their order that either widow has power to dispose of one-fourth of the estate allotted to her, or that they have any right to partition in the proper sense of the term, are not disposed to vary the form of the order under which one-fourth of the profits of the estate will go to each widow during their joint lives, their respective rights by survivorship and otherwise remaining unaffected."

It seems to me that these *dicta* of their Lordships of the Privy Council, both of which are expositions of the Mitakshara Law, negative the contentions of the learned pleader for the plaintiff, and support the contentions of the learned counsel for the defendant Ram Piyari.

I would therefore decree th^t appeal of the defendant Musammat Ram Piyari, and dismiss the appeal and the suit of the plaintiff with all costs in all the Courts.

MAHMOOD, J.—I concur.

Appeal allowed.

Before Mr. Justice Straight, Offg. Chief Justice, and Mr. Justice Brodthurst.

HARJAS (PLAINTIFF) v. KANHYA (DEFENDANT) *

Pre-emption—Joint purchase by co-sharers and stranger—Pre-emptor not compelled to pre-empt share purchased by co-sharers.

If a co-sharer associates a stranger with him in the purchase of a share, another co-sharer is entitled to pre-empt the whole of the property sold, but it is not obligatory upon him to impeach the sale, so far as the co-sharer vendee is concerned.

THE facts of this case are sufficiently stated for the purposes of this report in the judgment of the Court.

Pandit *Nand Lal*, for the appellant.

Munshi *Sundar Lal* and *Babu Ratan Chand*, for the respondent.

The Court (STRAIGHT, Offg. C. J., and BRODTHURST, J.) delivered the following judgment:—

STRAIGHT, Offg. C. J.—On the 22nd June, 1882, Musammat Sujano sold a moiety of her zamindari share in a village, consist-

* Second Appeal No. 1675 of 1883, from a decree of Rai Bakhtawar Singh, Subordinate Judge of Meerut, dated the 7th September, 1883, affirming a decree of Lala Baij Nath, Munsif of Meerut, dated the 21st July, 1883.

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ing of 17 bighas, 15 biswas, 10 biswansis of land, with all the rights pertaining thereto, to five persons, namely, Umrao, Ram Prasad, Sarjit, Kanhya, and Dalpet, in equal shares, for a consideration, so the sale-deed recites, of Rs. 1,300. The vendees Nos. 1, 2, 3, and 5 are co-sharers, but No. 4 is admittedly a stranger. The plaintiff-appellant's suit, which was instituted on the 15th June, 1883, was brought to establish his right of pre-emption as against Kanhya, in respect of the one-fifth share purchased by him, and to obtain possession thereof upon payment of what might be deemed to be the proportionate price of such fifth. Both the lower Courts dismissed the claim, following, as they considered, a ruling of this Court, in *Manna Singh v. Ramadhin Singh* (1). The plaintiff has preferred the special appeal before us, and the grounds taken by him substantially are—first, that the case relied on by the lower Courts is inapposite; and next, that it was competent for him to maintain his suit in the present form. There seems to be no doubt that the plaintiff is a co-sharer; that he has a right of pre-emption over the whole of the property passed by the sale-deed of the 22nd June, 1882, and consequently over the whole of the one-fifth of which Kanhya was the purchaser. In his plaint he has asked for the declaration of his pre-emptive right as to the whole of such one-fifth, and the only question is, whether he can do so. The lower Courts proceeded on the view that he is not entitled to impeach the sale of the 22nd June, 1882, except in its entirety, and they appear to have thought that the converse of the rule laid down by this Court in the case already adverted to was necessarily binding on them. This was an error, probably due to misapprehension of the principle upon which a co-sharer who has associated a stranger with him in the purchase of a share, is not allowed to assert his own pre-emptive right to defeat a suit by another co-sharer who impeaches the sale as a whole. The grounds upon which this rule rests are pointed out by Mahmood, J., in *Bhuvani Prasad v. Damru* (2). In the present case, the plaintiff-appellant might have attacked the entire sale in respect of all the five vendees, and have treated the four co-sharers as strangers, but there was no obligation on him to do so, for the right of pre-emption which gives a co-sharer the first call, so as to enable him to

(1) I. L. R., 4 All. 252. (2) I. L. R., 5 All. 197.

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exclude a stranger from the co-parcenary, does not compel him to exercise his right, and he may relinquish it if he thinks proper. If, however, he does exercise it, then the obligation rests upon him to do so as to all that the stranger has purchased.

Hence, if a co-sharer associates a stranger with him in the purchase of a share, another co-sharer is entitled to pre-empt the whole of the property sold, but it is not obligatory upon him to impeach the sale so far as the co-sharer-vendee is concerned, for it may well be that he has no desire to exclude such co-sharer. We think that the plaintiff-appellant was entitled to prefer his present claim in respect of the one-fifth purchased by Kanhya, upon payment of his proportion of the purchase-money. In this view of the case, we decree the appeal, and, reversing the decision of the lower appellate Court, remand the case for trial on its merits.

Appeal allowed.

Before Mr. Justice Straight, Offg. Chief Justice, and Mr. Justice Duthoit.

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MUHAMMAD ZAKI AND OTHERS (DEFENDANTS) v. CHATKU (PLAINTIFF).*

Act XV of 1877 (Limitation Act), sch. ii., No. 132—Suit for money charged upon rents and profits—Suit for money charged upon immoveable property.

K borrowed from *C* a sum of Rs. 571, and at the same time executed a bond whereby he mortgaged usufructually to his creditor his "entire right and share" in a particular estate, in lieu of the above-mentioned sum; and it was agreed that *C* might realise the debt from the rents and profits of two years, and that, as soon as it had been realised, his possession should cease.

Held that the money borrowed by *K* was "money charged upon immoveable property", it being charged upon rents and profits *in alieno solo* which, in English Law, would be classed as "incorporeal hereditaments," but which by the law of India are included in immoveable property; and that therefore the limitation applicable to a suit for the recovery of the money was that provided in No. 132, sch. ii of Act XV of 1877 (Limitation Act). *Dalli v. Bahadur* (1) and *Pestonji Bezonji v. Abdool Rahiman* (2) dissented from. *Maharana Futtehsangji Jaswantsangji v. Desai Kullianraji Hukoomutraji* (3) referred to. *Lallubhai v. Naran* (4) followed.

THE facts of this case are sufficiently stated for the purposes of this report in the judgment of the Court.

* Second Appeal No. 157 of 1884, from a decree of W. Barry, Esq., District Judge of Jaunpur, dated the 3rd October, 1883, reversing a decree of Maulvi Nasr-ulla Khan, Subordinate Judge of Jaunpur, dated the 14th June, 1883.

(1) N.-W. P. H. C. Rep., 1875, p. 55.

(3) 13 B. L. R. 254.

(2) I. L. R., 5 Bom. 468.

(4) I. L. R. 6 Bom. 719.