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allowed the suit to proceed; and it is from this last order that the present appeal is brought. It is contended that the order falls within the second paragraph of s. 366 of the Code of Civil Procedure, and is therefore appealable under clause 18 of s. 588. We cannot allow this contention. The application of the defendants was not an application contemplated by the second paragraph of s. 366. No appeal lies; and, without pronouncing on the first preliminary objection and acting upon the second, we dismiss this appeal with costs.

Appeal dismissed.

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February 25.

Before Mr. Justice Knox and Mr. Justice Aikman.

BARKAT-UN-NISSA (DEFENDANT) *v.* MUHAMMAD ASAD ALI (PLAINTIFF).*

Civil Procedure Code, s. 53—*Amendment of plaint—Pre-emption—Area of property claimed in suit for pre-emption described as less than true area—Limitation.*

A Court is not precluded from returning a plaint for amendment because at the time it is returned for amendment the period of limitation for the suit may have expired.

The plaintiff in a suit for pre-emption after filing his plaint discovered that the property in suit had been described by mistake as being of a slightly less area than it was in reality. *Held* that the Court had power and ought to have allowed the plaint to be amended and that the amendment was not precluded by the fact that the limitation for the suit had expired. *Held* also that such misdescription would not render the suit liable to the objection that the plaintiff had sought to pre-empt only a part of the property sold.

This was a suit for possession of a 2 biswas, 9 biswansis share of a certain village, by right of pre-emption, on the allegations that the plaintiff was entitled to pre-emption under the *wajib-ul-arz*, that the defendant-vendor sold the property in suit on the 22nd of October 1892, at a price of Rs. 1,400 to the defendant-vendee, the price being falsely stated in the sale-deed at Rs. 2,000, and that the

*First Appeal No. 120 of 1894, from an order of H. B. Finlay, Esq., District Judge of Sháhjahánpur, dated the 8th August 1894.

plaintiff on coming to know of the sale made a demand of pre-emption but was refused.

The defendant vendee pleaded that she had an equal right of pre-emption with the plaintiff, that the wajib-ul-arz was not applicable, that no demand was made by the plaintiff, that the price was Rs. 2,000, that the plaintiff had refused to purchase, and that the claim of the plaintiff was for a part only of property sold. The other defendant did not oppose the suit.

The Court of first instance (Subordinate Judge of Sháhjahánpur) held that the plaintiff had omitted to claim for a small fraction of the share sold and that the plaint could not, more than a year having elapsed since the cause of action accrued, be amended, and dismissed the suit.

On appeal by the plaintiff the lower appellate Court (District Judge of Sháhjahánpur) held that the omission in the plaint was not intentional, but due to a clerical error merely, and that the Court below had power, and ought to have exercised it, to allow the plaintiff to amend. It accordingly remanded the case under s. 562 of the Code of Civil Procedure for trial upon the merits.

From this order of remand the vendee defendant appealed to the High Court.

Mr. *Abdul Majid* for the appellant.

Maulvi *Ghulam Mujtaba* for the respondent.

KNOX and AIKMAN, JJ.—This is a first appeal from an order passed by the District Judge of Sháhjahánpur whereby that Judge remanded the suit out of which the appeal before him arose under s. 562 of the Code of Civil Procedure for decision upon its merits. The suit is what is known as a pre-emption suit. Muhammad Asad Ali, the respondent here, was plaintiff: he sued to enforce a right of pre-emption which he claimed over certain property which had been sold by one Muazziz Ali, one of the defendants to the suit, to Musammat Barkat-un-nissa, a second defendant and appellant here. In the plaint under which the suit was instituted the respondent set out in the recital of facts that the share sold by Muazziz Ali to the

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appellant was a 2 biswas 9 biswansis share. In his prayer for relief he also stated the share as being a 2 biswas 9 biswansis share. In point of fact, as admitted by both parties to this appeal, the property which was sold was not a 2 biswas 9 biswansis share, but a share amounting 2 biswas, 9 biswansis, 15 kachwansis, 11 nanwasis and 2 tanwansis. The portion which was omitted was thus but a small fraction of the whole amount of the property which formed the subject-matter of the bargain between Muazziz Ali and the appellant. The learned Judge held that in the interests of justice permission should have been given to the respondent to amend his plaint so as to include along with the property claimed the fractional share which had been omitted. It appears that the respondent on discovering that he had omitted to claim the whole of the property asked for leave to amend his plaint so as to include the whole bargain, but his prayer was refused. In appeal before us it is contended that the Court of first instance was, and is, precluded from permitting the plaint to be amended, because by so doing it would virtually extend the period allowed by law within which a pre-emption suit can be instituted, and that the omission by the respondent to claim a portion of the property which was sold prevents him from enforcing his right over any part of the property and renders his suit liable to dismissal. In support of the first contention we were referred to the case of *Jainti Prasad* v. *Bachu Singh* (1). That case, however, was of an entirely different character, and the point which arose for decision there is in no way connected with that which we are called upon to decide in the present appeal. The case of *Jainti Prasad* was one in which the plaint presented before a Court of first instance was written upon paper insufficiently stamped and permission was given by the Court before which the plaint was filed to make up the deficiency. The period of grace allowed by the Court extended beyond the time within which the suit could have been instituted. It was held (*vide* p. 70) that " a plaint is a document within the meaning of the Court-fees Act and within the meaning of s. 28, and as a suit can only be instituted by the presentation of a plaint, the presentation

(1) I. L. R., 15 All., 65.

of an insufficiently stamped document, which if sufficiently stamped could be treated as a plaint, cannot be regarded in law as the institution of a suit within the meaning of the explanation to s. 4 of the Indian Limitation Act, 1877, or of s. 48 of the Code of Civil Procedure. Section 28 of the Court-fees Act prohibits the Court from regarding any document which ought to be stamped under that Act as of any validity unless and until it is properly stamped."

In the case before us the suit as brought was undoubtedly instituted within time and no question of sufficiency of stamp arises. The whole tenor of the plaint, and we have examined it carefully, satisfies us that the intention of the respondent was to institute a claim for the whole of the property sold to the appellant: it was merely from inadvertence or some other similar cause that he left out of his plaint the small fractional share which has been set out above. The question before us is—is a Court precluded from returning a plaint for amendment if at the time when it is returned for amendment the period of limitation of the suit may have expired?

The section of the Code which authorizes a Court to return plaints for amendment is s. 53. That section empowers a Court at any time before judgment to let a plaint be amended upon such terms as to the payment of costs as the Court thinks fit. Only one circumstance is set out as being a circumstance under which a plaint should not be amended either by a party or by a Court, and that is when the amendment would convert a suit of one character into a suit of another and inconsistent character. Does that circumstance arise in the present case? The suit as instituted was a suit to enforce a right of pre-emption over a 2 biswas 9 biswansis share: the suit as amended would be to enforce the same right of pre-emption over the same 2 biswas 9 biswansis share *plus* a small fraction. It cannot be said with any show of reason that by the addition of this fractional share the suit brought will be converted into a suit of another and inconsistent character.

As regards the second contention, the case before us is not one in which the pre-emptor is seeking to break up the bargain, or to

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pick and choose out of the property which has been sold. The learned pleader for the appellant referred us to the case of *Muhammad Vilayat Ali Khan* v. *Abdul Rab* (1). That was a case not at all in accord with the present case. The reason why the would-be pre-emptor in that suit lost his suit for pre-emption was that he had by his conduct acted in such a way as to lead the parties to the bargain to conclude that he would not be the purchaser of any portion of the property sold. We are satisfied that in the present case, and from the very first, the respondent wished to purchase the whole of the property which was for sale Both the pleas taken in appeal fail and the appeal before us is dismissed with costs.

Appeal dismissed.

Before Mr. Justice Knox and Mr. Justice Aikman.

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February 27

GHULAM MUHAMMAD (DEFENDANT) *v.* THE HIMALAYA BANK, "LIMITED," IN LIQUIDATION, THROUGH THE OFFICIAL LIQUIDATOR (PLAINTIFF).*

Plaint—Form of plaint in suit by Company in liquidation - Amendment Civil Procedure Code, s. 53—Act No. VI of 1882, *(Indian Companies' Act), s* 144.

Held that a plaint in a suit by a Bank in liquidation in which the plaintiff was described as "the Official Liquidator, Himalaya Bank, Limited, in liquidation," and which was also subscribed and verified in the same terms was not a valid plaint having regard to the terms of s. 144 of the Indian Companies' Act, 1882, and that the defect could not be cured by amendment. *In re Winterbottom* (2) referred to.

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

Mr. *Roshan Lal* and Mr. *J. Simeon* for appellant.

The respondent was not represented.

KNOX and AIKMAN JJ.—This is a first appeal from an order passed by the District Judge of Saharánpur whereby he set aside a

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First Appeal No. 146 of 1894, from an order of H. Bateman, Esq., District Judge of Saháranpur, dated 10th September 1894.

(1) I. L. R., 11 All. 108. (2) L. R. 18 Q. B. D. 446.