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poraneous agreement entered into when the land was sold by the predecessor in title of the plaintiff to the predecessor in title of the defendants, the vendee did or did not covenant to pay in a certain event a proportionate amount of the Government revenue. I cannot hold that the determination of this issue one way or another was a determination of the proprietary title to land.

For the above reasons I hold that no appeal lay to the District Judge. I allow the appeal to this Court, and, setting aside the decree of the Court below, restore the decree of the Collector of the District. As the plea upon which the appellants have now succeeded was not taken in the Court below, parties will bear their costs in this Court and in the Court below.

Appeal decreed.

1896
March 11.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Burkitt.

KALIAN RAI AND ANOTHER (PLAINTIFFS) *v* RAM RATAN AND OTHERS (DEFENDANTS).*

Civil Procedure Code, section 32—*Parties to a suit—Improper addition of a defendant.*

An order for sale was made in execution of a decree. A party claiming the property objected. His objection was overruled by the Court of first instance. He appealed to the High Court. The High Court held that the property ordered to be sold was not the property included in the mortgage on which the decree for sale was made and was not property which could be sold under that decree. In the meantime the sale had taken place. Thereupon the owner of the property, which the High Court had held on appeal was not saleable, brought a suit and made the decree-holders and auction-purchaser parties to it, and claimed as against them his property.

Held that it was not competent to the Court acting under section 32 of the Code of Civil Procedure to introduce into this suit as a defendant a person who claimed the property in suit by a title quite distinct from that under which any of the parties to the suit claimed.

THE plaintiffs sued for possession of certain zamíndári property, alleging that it had been wrongfully sold in execution of a decree, in execution of which decree the High Court had subsequently, by its order of the 9th of August 1893, declared the said property not liable to be sold.

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*First Appeal No. 172 of 1894 from a decree of Pandit Raj Nath, Sahib, Subordinate Judge of Moradabad, dated the 30th April 1894.

The original defendants, who were the decree-holders and the auction-purchaser, pleaded that the property claimed was not in fact a portion of the share to which it was alleged by the plaintiffs to belong; but was part of certain property which had been sold to satisfy a long antecedent decree of 1859 to one Salig Ram, whose present representative was his son Badri Prasad. Badri Prasad was made by the Court on his own application a party defendant to the suit and supported the allegation that the property in suit had been sold to Salig Ram.

Upon this defence the Court of first instance (Subordinate Judge of Moradabad) dismissed the plaintiff's suit, holding that the finding of the High Court in its order of the 9th August 1893 as to the ownership of the property was not binding as between the plaintiffs and Badri Prasad.

The plaintiffs appealed to the High Court.

Pandit *Sundar Lal* for the appellants.

Messrs. *T. Conlan* and *D. N. Banerji* for the respondents.

EDGE, C. J., and BURKITT, J.—An order for sale was made in execution of a decree. A party claiming the property objected. His objection was overruled by the Court of first instance. He appealed to the High Court. The High Court held that the property ordered to be sold was not property included in the mortgage on which the decree for sale was made and was not property which could be sold under that decree. In the meantime the sale had taken place. Thereupon the owner of the property, which the High Court had held on appeal was not saleable, brought this suit and made the decree-holders and auction-purchaser defendants to the suit and claimed as against them his property. There was absolutely no defence to the suit. The point was *res judicata* and had been decided by the High Court. But a gentleman named Badri Prasad, possibly at the instance of the defendants, stepped into the legal arena and asked to be allowed to contest the suit as a defendant. The plaintiffs had made no claim against him. Whether he was concerned with the property or not, the suit did not affect him. The Subordinate Judge made

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Badri Prasad a defendant to the suit and went on and tried an issue between Badri Prasad and the plaintiffs which was not raised by the pleadings between the real parties to the suit and which could not be raised between them owing to section 13 of the Code of Civil Procedure. The Subordinate Judge devoted nearly the whole of his energy to this question, which had nothing to do with the issue between the parties to the suit originally. It has been contended here that the Subordinate Judge had power under section 32 of the Code of Civil Procedure to bring Badri Prasad in as a defendant. In our opinion section 32 does not enable a Court to go contrary to the ordinary procedure provided by the Code. It would not enable a Court, for instance, to override the effect of the second clause of section 31, and, because there might be a dozen claimants to a piece of property, all having different interests and all having different claims of title, to make them all parties to the suit as plaintiffs; nor does section 32 enable a Court to go contrary to section 45 of the Code, and to impose on the plaintiff to a suit persons as defendants whom he has made no claim against, and against whom he may never make any claim and who have no community of title with the real defendant to the suit. There is no section in the Code under which Badri Prasad ought to have been made a party to the suit, nor was it necessary to join him in order to enable the Court to adjudicate on and settle any question involved in the suit between the original parties. The position is this:—Badri Prasad finding a suit going on in which he was not concerned, steps into Court and asks the Judge to make him a defendant and settle a point which may or may not be subsequently in dispute between him and the plaintiffs. We should like to have known whether Badri Prasad at the time when the order for sale was made was sufficiently interested in the property to raise any objection to its being sold. We allow this appeal with costs, and we dismiss Badri Prasad from the suit: he should never have been joined in it. We give the plaintiffs a decree against the defendants other than Badri Prasad for possession, and we declare the sale to be invalid and set it

aside. We give the plaintiffs their costs against the parties to this suit.

Appeal decreed.

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1896. *March* 24.

Before Mr. Justice Knox and Mr. Justice Blair.

ALI MUHAMMAD KHAN (DEFENDANT) *v.* MUHAMMAD SAID HUSAIN (PLAINTIFF).

Pre-emption—Muhammadan Law—Talab-i-ishtishhad—Demand made to vendee not in possession—Demand made by agent of pre-emptor.

Held, that if the *talab-i-ishtishhad* is made in the presence of the vendee, it is not necessary that such vendee should at the time the demand is made be actually in possession of the property in respect of which pre-emption is claimed. *Chamroo Pasban* v. *Puhlwan Rai* (16 W. R., 3) explained. *Jhootee Singh* v. *Komul Roy* (10 W. R., 119), *Janger Mohamed* v. *Mohamed Arjad* (I. L. R., 5 Calc., 509), *Goluck Ram Deb* v. *Brindabun Deb* (14 W. R., 265) and *Shaikh Dayemoollah* v. *Kirtee Chunder Surmah* (18 W. R., 530) referred to.

Held, also that the ceremony of *talab-i-ishtishhad* need not necessarily be performed by the claimant for pre-emption in person, but may be performed by a duly constituted agent on his behalf. *Syed WajidAli Khan* v. *Lala Hanuman Prasad* (4 B. L. R., A. C. J., 139) and *Mussammut Ojheeonissa Begum* v *Sheikh Rustum Ali* (W. R., 1864, 219) referred to.

THE plaintiff sued for pre-emption, under the Muhammadan law, of a certain zanana house. The defendants pleaded *inter alia* that the plaintiff had not performed the necessary rites of pre-emption prescribed by the Muhammadan law. An issue was framed upon this point, which in argument resolved itself into two questions: first, whether the pre-emptor could make a valid demand from the purchaser when the latter was not in possession of the property sold, and secondly, whether the demand could be made otherwise than by the pre-emptor in person, the pre-emptor being under no physical disability. The court of first instance (Munsif of Moradabad) relying upon a ruling of the Calcutta High Court in *Chamroo Pasban* v. *Puhlwan Roy* (1) found against the plaintiff on this issue. The plaintiff appealed.

The Lower Appellate Court (District Judge of Moradabad), following the ruling in *Janger Mohamed* v. *Mohamed Arjad* (2) overruled the decision of the Munsif on this point, and finding that the requirements of the Muhammadan law as to both *Talab-i-ish-*

(1) 16 W. R. 3. (2) I. L. R., 5 Calc., 509.