result in the discharge of the debtor if in custody, and in the release of any property attached under the decree; and we cannot see that the property of a surety is more stringently bound than that of the debtor himself, unless it be expressly so provided in the bond. We think, therefore, that the dismissal of the decree-holder's application on the 21st of February, 1885, operated as a discharge of the surety.

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The Munsiff speaks of this proceeding as if it had merely temporarily "struck off" the execution proceeding, keeping it *in statu quo* and by no means disposing of it; but the order in the order sheet is a distinct dismissal of the case, and it necessitated an entirely fresh application for execution. That fresh application could not, we think, for the reasons above stated, be enforced against the surety in the previous case.

We, therefore, set aside the order of the lower Appellate Court, and so far as the appellant is concerned we reverse the order of the Munsiff with costs in all the Courts.

Appeal allowed.

H. T. H.

Before Mr. Justice Tottenham and Mr. Justice Norris.

DIGAMBUR MISSER AND OTHERS (DEFENDANTS NOS. 1 & 2) *v.* RAM LAL ROY (PLAINTIFF.)*

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Mahomedan law—Pre-emption—Conditional sale—Right of pre-emption among coparceners—Private partition of puttidari estate—Limitation Act (XV of 1877), Sch. II, Arts. 10, 120.

A and *B* had certain proprietary rights in an 8 annas putti of a certain mehal. *C* and *D* had no rights in that putti, but *D* had a small share in the remaining 8 annas putti. A private partition between the puttis having taken place, *C* and *D*'s brother lent to *B* two sums of Rs. 200 and Rs. 199 by deeds of *bai-bil-wufa*, dated the 12th and 21st June, 1876. *C* and *D* subsequently instituted foreclosure proceedings, and on the 5th May, 1884, were put into possession of *B*'s share in the first mentioned putti in execution of a decree which they had obtained. On the 18th April, 1885, *A* sued *C* and *D* to enforce his right of pre-emption.

* Appeal from Appellate Decree No. 2382 of 1886, against the decree of Baboo Amrito Lall Chatterji, Subordinate Judge of Sarun, dated the 20th of August, 1886, reversing the decree of Moulvie Muzharul Anwar, Munsiff of Sewan, dated the 25th of January, 1886.

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Held, that though the coparcenery could not be said to have ceased to exist, or those who were copareeners be said to have become strangers to one another, yet, there being a finding that the puttis were separate, it was not necessary, in order to establish *A's* preferential right, that a partition by metes and bounds should be shewn to have taken place; but that a private partition, if full and final between the parties, would have the same effect as the most formal partition on the right of pre-emption, and that *A's* claim must, therefore, succeed.

Held, also, that the suit was not barred by limitation, it being governed by either Art 10, Sch. II of the Limitation Act (Act XV of 1877), which gave the plaintiff a year from the 5th May, 1884, the date on which the mortgagee obtained possession, or by Art. 120, under which his right to sue accrued upon the expiry of the six months' grace allowed to the mortgagor after the decree for foreclosure, and there would be six years allowed from that time.

THE plaintiff in this case alleged that there was a certain mehal called Keotolia, consisting of four mouzahs, in an 8 annas putti, of which he held a 15-krant share; that the defendant No. 3 had a 6-pie share on the same 8 annas putti; that the 8 annas putti was held jointly by all the co-sharers therein, the zerait lands only having been privately partitioned, and being held separately by each co-sharer; that defendants Nos. 1 and 2 had no interest in the 8 annas putti in which he and defendant No. 3 were co-sharers; that defendant No. 2 had a small share in the other 8 annas putti; that the two puttis had been separated for a long time; that on 25th Bysack 1291, corresponding to the 5th May, 1884, he first learned that defendants Nos. 1 and 2 had got possession of the 6-pie share of defendant No. 3 in the 8 annas putti in which he, plaintiff, and defendant No. 3 were co-sharers; that this possession had been obtained through the Court in execution of a decree which defendant No. 1 and one Ram Pergash Roy, the brother of defendant No. 2, had obtained against defendant No. 3 in a suit brought by them against him on two deeds of *bai-bil-wufa*, one for Rs. 199 dated 12th June, 1876, and one for Rs. 200 dated 21st June, 1876, executed by him in their favor; that he, plaintiff, was a co-sharer in the property sold, and had a right of pre-emption in respect thereof; that as against him the defendants Nos. 1 and 2 had no right to purchase the property sold; that immediately on learning the facts he performed the

preliminary ceremonies of *talab-i-mawasibut* and *talab-i-istishhad*, and subsequently tendered the amount of the two deeds of *bai-bil-wufa* to the defendants Nos. 1 and 2 who declined to accept it.

The defendants Nos. 1 and 2 alleged that the whole 16 annas of mehal Keotolia were held ijmali; that the defendant No. 2 was a co-sharer in the mehal, and, therefore, the plaintiff had no right of pre-emption as against him; that plaintiff knew all about the deeds of *bai-bil-wufa* and the proceedings had thereupon, and that he had wrongly stated the date of his cause of action; that his claim was barred by limitation; and that he had not performed the necessary preliminary ceremonies.

The first Court framed the following issues:—

1st.—Whether the village is still ijmali or divided? Has defendant No. 2 any share in it? Can a pre-emption suit lie against him?

2nd.—When does plaintiff's cause of action arise? Is the suit barred by limitation?

3rd.—Has the plaintiff properly observed the ceremonies of *talab-i-mawasibut* and *istishhad*?

4th.—Can the plaintiff afford to purchase the share?

The Munsiff held that the case was governed by Art. 10, Sch. II of the Limitation Act; he found as a fact that defendants Nos. 1 and 2 were put into possession of the disputed property on 25th Bysack 1291=5th May, 1884; and as the suit was commenced on 18th April, 1885, he held that it was not barred. On the third issue he found against the plaintiff and, therefore, dismissed his suit. The first and fourth issues were not tried.

The plaintiff appealed. On the hearing of the appeal the question of limitation was not pressed, but the Subordinate Judge held that he must consider it. He held that the Munsiff was in error in applying Art. 10 of Sch. II of the Limitation Act; that Art. 120 applied, and that the suit was not barred. The Subordinate Judge then considered the two following questions, namely:—

1st.—Whether the preliminary ceremonies were duly performed by the plaintiff? and

2nd.—Whether he has a right of pre-emption against defendants Nos. 1 and 2?

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Upon the first question he came to the conclusion "that the preliminary ceremonies were duly performed by the plaintiff, and that the plaintiff was not aware of the sale before he was informed of it in Bysack 1291." Upon the second question he found "that the share of the defendant No. 2 is in a separate putti from that within which the disputed share and the plaintiff's share are included, and that the two puttis are separate." He, therefore, reversed the Munsiff's decision and decreed the plaintiff's suit.

Against that decree the defendants now preferred this second appeal to the High Court.

Mr. *Amir Ali*, Mr. *Caspersz*, and Baboo *Karuna Sindhu Mukerji* for the appellants.

Baboo *Mohesh Chunder Chowdhry* for the respondent.

Mr. *Caspersz*.—We have priority of purchase, and, this being a case of "competitive pre-emption," there is no preferential title among co-parceners. The fact that our share is in a different putti does not make us strangers. "Shaffa" is "but a feeble right, being the disseizing of another of his property merely in order to prevent apprehended inconveniences" (Hamilton's Hedaya, Vol. III, pp. 566-8), and may be defeated by various legal devices. We submit the true test is whether the inconvenience to which we are subjected by being deprived of our right of property which we have acquired after delay and expense, and which is a fair compensation for the money we lent eight years before, is not far greater than the pre-emptor's supposed hardship. This is not the case of a stranger being introduced, because we are already a co-parcener. We submit that limitation runs from the date of the conditional sale, of which the plaintiff must be taken to have been aware. Art. 120 of Sch. II will then apply which gives six years. The pre-emptor's cause of action arose when the sale took place and not when it became absolute. This being a case among Hindus, we submit the plaintiff's right should be strictly construed by the light of "justice, equity and good conscience," and not so as to strengthen an antiquated and unreasonable custom. We are, at least, entitled to interest on the sums advanced. The following authorities were referred to—*Farzand Ali* v.

Alimullah (1) ; *Lalla Nowbut Lall* v. *Lalla Jewan Lall* (2) ; *Kudratulla* v. *Mahini Mohan Shaha* (3) ; *Tara Kunwar* v. *Mangri Meea* (4) ; Macnaghten's Principles, p. 49 ; Macpherson on Mortgages, pp. 15-20 ; *Nath Prasad* v. *Ram Paltan Ram* (5) ; *Lachman Prasad* v. *Bahadur Singh* (6.)

Baboo *Mohesh Chunder Chowdhry* for the respondent.—*Gopal Sahai* v. *Ojoodheapershad* (7) is identical with the present case. The fact of the appellant's share being in a different putti removes their only defence.

Mr. *Caspersz* in reply.—The partition should be by metes and bounds in order to make us strangers. For purposes of revenue there has been no partition at all. We are still a member of the coparcenery, and the general rule will therefore apply.

The judgment of the High Court (TOTTENHAM and NORRIS, JJ.) after stating the facts set out above, proceeded as follows :—

On second appeal the defendants Nos. 1 and 2 urged that the parties to the suit being all Hindus the Court below ought to have held that the present suit to enforce the right of pre-emption is not maintainable. As to this it is sufficient to say that the point was not raised in either of the lower Courts, and is not such an one as we can allow to be raised now for the first time.

Another point urged by the Counsel for the appellants was that, as there had been no actual partition of the disputed properties by metes and bounds, the lower Appellate Court ought not to have held that there was such a separation as to entitle the plaintiff to maintain the suit. In support of this contention two cases were relied upon, *viz.*, *Farzand Ali* v. *Alimullah* (1) ; and *Lalla Nowbut Khan* v. *Lalla Jewan Lall* (2). In the first case the facts were these : The plaintiff brought his suit for a declaration of right to, and to obtain possession of, a certain share in a puttidari estate ; he had purchased the share at a sale held in execution of a decree ; he was a co-sharer in the estate but not in the putti in which the share in suit was situated. The defendant, who was a co-sharer in that putti, had claimed to take the share sold

(1) I. L. R., 1 All., 272.
(2) I. L. R., 4 Calc. 831.
(3) 4 B. L. R. (F. B.) 134.
(4) 6 B. L. R., Ap., 114
(5) I. L. R., 4 All., 218.
(6) I. L. R., 2 All., 884.
(7) 2 W. R., 47.

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under the provisions of s. 14, Act XXIII of 1861 (which gave a co-sharer in a puttidari estate, paying revenue to Government as defined in Act II of 1841, not being the judgment-debtor, a right of pre-emption, and enabled him to come in after the property had been knocked down to a stranger and claim it at the price he bid, provided he made the claim on the day of the sale and fulfilled the conditions of the sale). The officer conducting the sale had allowed the defendant's claim, and the Court executing the decree had confirmed the sale in his favor. The Court of first instance held that the plaintiff was a "stranger" within the meaning of the section, and that defendant was, therefore, entitled to take the share, and dismissed the suit. The lower Appellate Court reversed this decision, and holding that plaintiff was not a "stranger" gave him a decree. On second appeal the High Court held that plaintiff was not a "stranger." Oldfield, J., says, the plaintiff is himself a member of the co-parcenery, being a sharer in another putti of the estate. The right of pre-emption can only be asserted against a stranger, *i.e.*, one who is not a sharer or member of the co-parcenery. A sharer in one of the puttis in a puttidari estate cannot be said to be a stranger, with reference to the co-sharers in another putti, and the section gives no preferential rights of pre-emption among themselves between co-sharers in the same putti and sharers in other puttis, who come under the denomination of members of the co-parcenery." This case does not afford us much assistance, for there was no finding, as in this case, "that the two puttis are separate." The second case cited does not carry the matter further; it simply held "that by the Mahomedan law one co-parcener has no right of pre-emption against another co-parcener." The question we have to decide is whether before a co-parcenery can be said to have ceased to exist, and those who were co-parceners have become "strangers" to one another, something more than a private partition, *viz.*, partition by metes and bounds, is necessary.

We are of opinion that no partition by metes and bounds is necessary. Lord Westbury, in the case of *Appovier* v. *Rama Subba Aiyan* (1), says: "When the members of an undivided

(1) 11 Moore's I. A., 75.

family agree among themselves with regard to particular property, that it shall thenceforth be the subject of ownership, in certain defined shares, then the character of undivided property and joint enjoyment is taken away from the subject-matter so agreed to be dealt with; and in the estate each member has thenceforth a definite and certain share, which he may claim the right to receive and to enjoy in severalty, although the property itself has not been actually severed and divided." And at page 92 his Lordship says: "Then, if there be a conversion of the joint tenancy of an undivided family into a tenancy in common of the members of that undivided family, the undivided family becomes a divided family with reference to the property that is the subject of that agreement, and that is a separation in interest and in right, although not immediately followed by a *de facto* actual division of the subject-matter. This may, at any time, be claimed by virtue of the separate right."

In *Gopal Saha* v. *Ojoodheapershad* (1) it was held that a private partition, though not sanctioned by official authority, if full and final, as among the parties to it, will have the same effect as the most formal partition on the right of pre-emption. We think these two cases establish the view we hold.

The next point raised by Counsel for the appellants was that plaintiff's claim was barred by limitation. It was urged that the District Judge was right in holding on the authority of *Nath Prasad* v. *Ram Paltan Ram* (2) that Art. 120 of Sch. II of the Limitation Act, and not Article 10, governed the case; but it was argued that the District Judge had erred in fixing the time from which the period of limitation allowed by Art. 120 began to run: it was contended that it began to run from the date of the conditional sale, and in support of this view the case of *Lachman Prasad* v. *Bahadur Singh* (3) was relied upon.

We are of opinion that the suit is not barred, and that it is immaterial whether Art. 10 or Art. 120 be applied to it, for the deeds of conditional sale of 1876 did not operate to transfer the property from the owner to the mortgagee. The

(1) 2 W. R., 47. (2) I. L. R., 4 All., 218.

(3) I. L. R., 2 All., 884.

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latter did not become owner of the property until after he had obtained a decree for foreclosure, and until the right of redemption in the vendor had been extinguished. On the 5th of May, 1884, the mortgagee obtained possession, and under Art. 10 the plaintiff would have a year from that date to bring his suit. We do not see why Art. 10 should not govern it, for the sale became absolute by the foreclosure proceedings, and possession was subsequently obtained.

On the other hand, if Art. 120 applies, we think that plaintiff's right to sue accrued upon the expiry of the six months grace allowed to the mortgagor after the decree for foreclosure, and there would be six years allowed from that time.

Thus we come to the conclusion that the plaintiff was entitled to succeed in his suit, and that the appeal fails on each point.

It was also contended that, at any rate, the defendants are entitled to interest upon Rs. 399, the amount covered by the two deeds of *bai-bil-wufa*. We think that that contention must prevail, and it was admitted by Baboo Mohesh Chunder Chowdhry for the respondent to be a good one.

The decree of the lower Appellate Court, therefore, will be modified to the extent of directing interest to be paid upon the Rs. 399, at the rate of six per cent. per annum from the date of foreclosure till possession.

The appeal is dismissed with costs.

H. T. H. *Appeal dismissed.*

Before Mr. Justice Tottenham and Mr. Justice Norris.

1887
July 2.

DHAPI (DEFENDANT) *v.* RAM PERSHAD, MINOR, REPRESENTED BY HIS UNCLE AND GUARDIAN AD LITEM DUNGUR MULL (PLAINTIFF).*

Practice—Production of Documents—Discovery—Revision of interlocutory order when appeal lies from final decree—Civil Procedure Code (Act XIV of 1882), *ss.* 131—136 *and* 622.

If a notice under s. 131 of the Civil Procedure Code be not answered as provided by s. 132, the party seeking the inspection of documents may apply for an order under s. 133, and his application must be supported by an affidavit. The Court has no jurisdiction to pass an order under s. 136 unless the provisions of s. 134 are strictly complied with.

* Civil Rule No. 794 of 1887 made against the order of Baboo Upendro Chunder Mullick, Subordinate Judge of Monghyr, dated the 13th of May, 1887.