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DOST MUHAMMAD KHAN v. SAID BEGAM.

left by the Sardar Bahadur at his death, and *not* to the same fractional shares out of that property diminished by payment of the dower debt, is, we think, just as much a *res judicata* in favour of those defendants as we have held it to be in the case of the plaintiffs in the former suit. For the above reasons we are of opinion that the present suit is barred by the principle of *res judicata* as against all the persons impleaded as defendants in the former suit, and that it should have been dismissed as against them also.

Some arguments were addressed to us for the appellants on other points arising in the appeal, but, as in our opinion the suit fails, we consider it unnecessary to discuss them.

We allow this appeal. We set aside the decree of the lower Court and, as we hold that the suit was barred *ab initio*, we, under the provisions of section 544 of the Code of Civil Procedure, direct that it stand dismissed as against all the persons impleaded as defendants. The respondents will pay appellants' costs in both Courts.

Appeal decreed.

1897
July 30.

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

MUHAMMAD HUSAIN (DEFENDANT) *v.* NIAMAT-UN-NISSA AND OTHERS (PLAINTIFFS.)*

Pre-emption—Muhammadan Law—Right of pre-emption not surviving to heir of pre-emptor.

According to the Muhammadan law applicable to the Sunni sect if a plaintiff in a suit for pre-emption has not obtained his decree for pre-emption in his life-time the right to sue does not survive to his heirs.

THIS was a suit for pre-emption under the Muhammadan law. One Maqsud Hasan sold his house in Shamsabad to Muhammad Husain. The plaintiff, Muhammad Hasan, thereupon brought a suit for pre-emption against the vendor and the vendee. That suit was dismissed on the 7th of October 1896, on the ground that the plaintiff had not proved his compliance with the Muhammadan law in the matter of the necessary preliminary

* First Appeal No. 6 of 1897, from an order of Maulvi Muhammad Anwar Husain Khan, Subordinate Judge of Farrukhabad, dated the 23rd December 1896.

demands. On the 13th of October 1896 the plaintiff pre-emptor Muhammad Hasan died. On the 10th of November 1896 two of his heirs appealed, and on the 8th of December 1896 the remaining heir was joined as a party to the appeal. The lower appellate Court (Subordinate Judge of Farrukhabad) found that the necessary demands had been made, and passed an order of remand under section 562 of the Code of Civil Procedure. From this order the defendant appealed to the High Court on the main ground that "the right of pre-emption being personal, the cause of action" did not survive to the heirs of the deceased plaintiff, and they could not therefore have appealed from the decree of the Court of first instance.

Maulvi *Ghulam Mujtaba*, for the appellant.

Pandit *Baldeo Ram Dave*, for the respondents.

EDGE, C. J. and BLAIR J:—One Maqsud Hasan sold his house in Shamsabad to Muhammad Husain. One Muhammad Hasan, thereupon, claiming under the Muhammadan law of pre-emption applicable to Sunnis of the Hanifi sect, brought his suit for pre-emption. That suit was dismissed on the 7th of October, 1896, on the ground that Muhammad Hasan, the then pre-emptor, had failed to prove that he had made the necessary demands. On the 13th of October, 1896, Muhammad Hasan the pre-emptor died. On the 10th of November, 1896, two of his heirs appealed and on the 8th of December, 1896, the remaining heir was joined as a party to the appeal. The Court below found that the necessary demands had been made, and passed an order under section 562 of the Code of Civil Procedure remanding the case for trial on its merits. From that order this appeal has been brought.

The short point which we have to decide is—did the right of pre-emption determine upon the death of Muhammad Hasan? All the authorities of which we are aware show that it did; that the right of pre-emption is gone when the pre-emptor is a Sunni of the Hanifi sect, and has not obtained his decree during his life-time, and that the right to sue does not survive to his heirs,

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MUHAMMAD HUSAIN v. NIAMAT-UN-NISSA.

The authorities will be found at page 505 of Baillie's Moohummudan Law, Hanifeea (2nd edition); Hamilton's Hedaya by Grady, 2nd edition, p. 560); Tagore Law Lectures 1873 (Shama Charan Sarcar) p. 534; Tagore Law Lectures, 1884. (Ameer Ali) 2nd edition, Vol. I, p. 603.

In this case Muhammad Hasan had not obtained possession. We allow the appeal, and, setting aside the order of remand, we restore the decree of the first Court, but upon different grounds. There will be no costs of the appeal to the Court below or of the appeal to this Court.

Appeal decreed.

1897
July 30.

Before Mr. Justice Knox and Mr. Justice Burkitt.

SHEORANIA (PLAINTIFF) *v.* BHARAT SINGH (DEFENDANT).*

Minor—Suit on behalf of a person alleged to be, but not in fact, a minor—Procedure on discovery that the plaintiff was of full age at the commencement of the suit.

A suit was instituted on behalf of a person alleged to be a minor, through her next friend. The plaintiff obtained a decree. The defendant appealed, and on this appeal the alleged minor applied to be placed on the record in her own right as respondent, stating that she had attained her majority since the institution of the suit. The affidavits, however, by which this application was supported, showed that she had been of full age at the time when the plaint was filed. *Held* that the suit must be dismissed. *Taqui Jan* v. *Obaid-ulla* (1), dissented from.

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

Mr. *D. N. Banerji* for the appellant.

Pandit *Moti Lal* and *Kunwar Parmanand* for the respondent.

KNOX and BURKITT JJ.—The suit out of which this second appeal arises was instituted on a plaint signed and verified by one Lachmi Narain, calling himself the next friend of Musammat Sheorania, whom he described to be a minor.

* Second Appeal No. 650 of 1895, from a decree of W. Blennerhassett, Esq., District Judge of Allahabad, dated the 20th March 1895, reversing a decree of H. David, Esq., Munsif of Allahabad, dated the 24th September 1894.

(1) I. L. R., 21 Calc., 866.