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matter of the appeal before us. The last clause of section 588 provides that orders passed in appeal under that section shall be final. The order appealed from is an order passed under section 588, and therefore it is final according to the provision referred to above. It is true that section 588 allows an appeal from an order passed under section 562. But the order of remand from which an appeal is allowable must be an order which was not passed under section 588. The last paragraph of the section must be read as controlling the whole section and as barring a second appeal, where an appellate Court has made an order, whether for dismissing the appeal or decreeing the appeal or remanding the case before it. This view is supported by the ruling of the Calcutta High Court in *Mathura Nath Ghose* v. *Nobin Chandra Kundu Biswas* (1), with which we entirely agree. We dismiss the appeal with costs.

Appeal dismissed.

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April 6.

Before Mr. Justice Banerji and Mr. Justice Aikman.

ABDULLAH (DEFENDANT) *v.* AMANAT-ULLAH AND OTHERS (PLAINTIFFS).*

Muhammadan law—Pre-emption—Suit by pre-emptor not entitled to claim the whole of the property sold—Plaintiff not obliged to frame his suit as a suit for the whole.

Held, that where a pre-emptor by reason of the claim of other persons entitled equally with himself to claim pre-emption is only entitled to a certain portion of the property in respect of which he claims pre-emption, and not to the whole of it, he is not bound to frame his suit as a suit for the whole of the property sold, but only for so much as he would be entitled to having regard to the claims of the other pre-emptors. *Amir Hasan* v. *Rahim Bakhsh* (2), and *Durga Prasad* v. *Munsi* (3) referred to. *Kashi Nath* v. *Mukhta Prasad* (4) and *Hulasi* v. *Sheo Prasad* (5) distinguished.

THE plaintiffs, five in number, claimed to pre-empt five-sixths of certain property which had been sold to the defendant by one Balua. They did not sue for the whole of the property,

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* First Appeal No. 7 of 1899, from an order of Babu Jai Lal, Subordinate Judge of Azamgarh, dated the 22nd December 1898.

(1) (1897) I. L. R., 24 Calc., 774.
(2) (1884) I. L. R., 6 All., 423.
(3) (1897) I. L. R., 19 All., 466.
(4) (1884) I. L. R., 6 All., 370.
(5) (1884) I. L. R., 6 All., 455.

because, as stated in the plaint, the defendant vendee was himself possessed of equal rights of pre-emption with the plaintiff. The Court of first instance (Munsif of Azamgarh) dismissed the suit upon the ground that the plaintiffs were bound to have sued for the whole. The plaintiffs appealed. The lower appellate Court (Subordinate Judge of Azamgarh) decreed the appeal and remanded the case to the Munsif under section 562 of the Code of Civil Procedure. That Court held that as the plaintiffs were not entitled to pre-emption in respect of more than five-sixths of the property sold, they were under no obligation to claim the whole in their plaint. Against this order of remand the defendant appealed to the High Court.

Mr. *Abdul Raoof* and Maulvi *Ghulam Mujtaba*, for the appellant.

Mr. *Abdul Majid*, Mr. *Karamat Husain* and Maulvi *Muhammad Ishaq*, for the respondents.

BANERJI and AIKMAN, JJ.—This is an appeal from an order of remand under section 562 of the Code of Civil Procedure in a suit for pre-emption based on Muhammadan law. The appellant before us is the vendee and the respondents are the claimants for pre-emption. The vendee is admittedly a person who has the right of pre-emption as against a stranger. The plaintiffs, who are five in number, claimed five-sixths of the property sold to the defendant. The contention before us is that such a claim is opposed to Muhammadan law and should have been dismissed, that the plaintiffs were bound to claim the whole of the property sold, and that not having done so, they were not entitled to the decree which has been granted to them. It is not disputed that according to Muhammadan law, as explained in the ruling of this Court in *Amir Hasan* v. *Rahim Bakhsh* (1), when the purchaser is a person who would as against a stranger have the right of pre-emption, other persons entitled to pre-emption are entitled to get the property divided *per capita* between all the persons possessing the right of pre-emption and claiming such right. Upon this

(1) (1897) I. L. R., 19 All., 466.

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authority, which is not questioned on behalf of the appellant, it is conceded that the plaintiffs could not obtain a decree for more than a five-sixths share of the property sold. It is, however, contended that the plaintiffs were nevertheless bound to claim the whole of the property, although the Court could not decree to them more than a five-sixths share. In support of this contention the learned counsel for the appellant has referred us to the rule of Muhammadan law, which requires that a claimant for pre-emption should not split up the bargain and claim a portion only of the property sold, but should claim the whole of it. He relies on the rulings of this Court in *Kashi Nath* v. *Mukhta Prasad* (1) and *Hulasi* v. *Sheo Prasad* (2). In our opinion these rulings do not support the contention of the learned counsel that in a suit like the present the whole of the property ought to have been claimed. They go no further than to lay down that a plaintiff claiming pre-emption must in his suit include the whole of that portion of the property sold to which his right of pre-emption extends. That this was the intention of the learned Judges who decided the two cases to which we have referred, is evident from the case of *Durga Prasad* v. *Munsi* (3). In his judgment in that case Mr. Justice Mahmood, who was a party to the decisions relied on, observes:—"I have no hesitation in laying down the general rule that every suit for pre-emption must include the whole of the property subject to the plaintiff's pre-emption, conveyed by one bargain of sale to one stranger, and that a suit by a plaintiff pre-emptor, which does not include within its scope the whole of such pre-emptional property, is unmaintainable as being inconsistent with the very nature and essence of the pre-emptive right." As we have said above, it is conceded in the present case that even if the plaintiffs had claimed the whole of the property they could not have obtained a decree for a larger share than the five-sixths which they claimed in the plaint.

(1) (1884) I. L. R., 6 All., 370. (2) (1884) I. L. R., 6 All., 455.
(3) (1884) I. L. R., 6 All., 423.

On the authority of the ruling in *Amir Hasan* v. *Rahim Bakhsh* referred to above, their right of pre-emption extended to a five-sixths share only, and as they have claimed that share we are unable to hold that in doing so they have transgressed any rule of Muhammadan law. The learned counsel on both sides have referred us to original authorities of Muhammadan law which have been translated and laid before us, and we are indebted to the learned counsel for the help they have thereby rendered to us. But we are unable to find anything in the authorities cited which requires that, whatever may be the extent of the share to which the pre-emptor may be entitled by virtue of his right of pre-emption, he is bound in his suit to claim the whole of the property sold to the vendee when the vendee is himself a pre-emptor. It is true that every person having the right of pre-emption is entitled to pre-empt the whole property sold, but when more persons than one have equal rights of pre-emption, there exists what the authorities of the Muhammadan law call an *impediment* to pre-emption, and unless the impediment is removed by the rival pre-emptor "relinquishing the right before the establishment of his ownership," the remaining pre-emptor is not entitled to the whole. "It is mentioned in Nihaya that when one of them surrenders his right the only alternative for the other is either to take the whole or relinquish it." (Radd-ul-Muhtar, Egyptian edition, p. 216.) It follows that where the purchaser is himself a pre-emptor, one of several pre-emptors is entitled to the whole only when the purchaser surrenders the purchase. Where no such surrender has been made the several persons entitled to pre-emption who claim their right of pre-emption have only the right to get the property equally divided *per capita*. The passage from the Fatawa Alamgiri cited on page 472 of I. L. R., 19 All., establishes this proposition. That passage is as follows:—"If a person purchases a house of which he is a pre-emptor, and then appears another pre-emptor having an equal right with him, the Qazi (Judge) will pass a decree for one half." It is urged that

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as a purchaser has the option of surrendering the property at any time before decree, it is the duty of a person claiming pre-emption to claim the whole property. The authorities on this point are somewhat conflicting, but we think that the conflict has been well reconciled by the author of the Radd-ul-Muhtar in the work called Tankih Hamidia, Vol. ii, Egyptian edition, page 182, in the following passage, which has been translated for us:—"It seems that the meaning is this, that when he (pre-emptor) wishes to take a portion after having made the immediate demand and the demand with invocation of witnesses, the right is not extinguished, but if he demands a portion in the beginning, his right of pre-emption falls to the ground." This passage shows that what the Muhammadan law requires is that the immediate demand and the demand by invocation of witnesses should be made in respect of the whole property sold which the pre-emptor would have been entitled to claim had it been sold to a stranger instead of to one having an equal right of pre-emption with him. But this does not require that when a claimant for pre-emption who has complied with the above rule has to resort to a Court to enforce his right against a purchaser who is himself a pre-emptor within the meaning of the Muhammadan law, he is bound to claim anything beyond what he is entitled to obtain. We have not been referred to any authority which goes the length of directing that in such a case the suit must relate to the whole of the property sold, although the plaintiffs might be entitled to a decree for a portion of it only. The purchaser, who is himself a pre-emptor, is given the option of surrendering the whole upon the immediate demand and the demand by invocation of witnesses being made. When he makes such a surrender there is no occasion for resorting to a Court to enforce any right. When, however, a surrender has not been made, but, as in this case, the plantiff's right of pre-emption is denied before suit and his demand is resisted, there is no obligation upon the plaintiff to claim anything in excess of what he is legally entitled to. This is consistent with the rule of

justice, equity and good conscience which is the rule applicable to cases of pre-emption, and there is nothing in the Muhammadan law, as far as we are aware, which militates against it. This appeal must fail. We dismiss it with costs.

Appeal dismissed.

Before Sir Arthur Strachey, Knight Chief Justice and Mr. Justice Knox.

KAUSALIA AND OTHERS (DEFENDANTS) *v.* GULAB KUAR AND OTHERS (PLAINTIFFS).*

Land-holder and tenants—Trees—Property in trees growing on tenant's holding—Burden of proof—Civil Procedure Code, section 561—*Appeal—Objections by respondents—Letters Patent, section* 10.

Held, that the property in trees growing on a tenant's holding is, by the general law, vested in the zamindar, and a tenant is not entitled, in the absence of special custom, the burden of proving which is on him, to cut down and sell such trees. *Indad Khan* v. *Bhagirath* (1) *Nafar Chandra Pal Chowdhuri* v. *Ram Lal Pal* (2) and *Ruttonji Edulji Shet* v. *The Collector of Tanna* (3) referred to.

Held also, that section 561 of the Code of Civil Procedure is not applicable to appeals under section 10 of the Letters Patent.

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

Babu *Jogindro Nath Chaudhri* and Pandit *Moti Lal*, for the appellants.

Babu *Devendro Nath Ohdedar*, for the respondents.

KNOX, J. (STRACHEY, C. J. concurring).—The respondents to this appeal (plaintiffs in the Court of first instance) came into Court as zamindars or landholders of certain land, situate within which was a grove of trees. Their position as zamindars was expressly admitted by all the defendants who now appear as appellants in the appeal before us. Their claim was for an injunction to restrain the defendants from cutting and selling the trees in this grove and for the recovery of damages or compensation on account of certain trees, which, according to them, some of the

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* Appeal No. 24 of 1898, under section 10 of the Letters Patent.

(1) (1888) I. L. R., 10 All., 159. (2) (1894) I. L. R., 22 Calc., 742.
(3) (1867) 11 Moo. I. A., 295.