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In our opinion the decision of the lower appellate Court which gave effect to that contention is wrong. We are unable to perceive any variance between the decree and the judgment which the appellants could have asked the Munsif to remedy. The decree as it stands does, in our opinion, fully and necessarily imply a finding that the appellants' assignment had become void, inasmuch as, but for the existence of such a finding, a decree could not have been given in favour of the plaintiffs, who admittedly were but subsequent assignees of the debt originally assigned to the appellants.

Under these circumstances we think the decree of the lower appellate Court was wrong. We allow this appeal. We set aside the decree of the Subordinate Judge, and, as his decree proceeded upon a preliminary point and as we have overruled his decision upon that point, we remand the case for trial upon the merits under section 562 of the Code of Civil Procedure. The appellants will have their costs of this appeal in any event.

Appeal decreed and cause remanded.

1898
November 12.

Before Mr. Justice Burkitt and Mr. Justice Dillon.

MUJIB-ULLAH (PLAINTIFF) v. UMED BIBI AND ANOTHER (DEFENDANTS)*.

Pre-emption—Muhammadan Law—Wajib-ul-arz—Pre-emptor disentitled by his own conduct to pre-empt part of the property sold—Pre-emptor not entitled to pre-empt any portion thereof.

Where a pre-emptor sued for possession by right of pre-emption of certain property sold by one and the same sale deed, claiming as to one portion of the property sold under the Muhammadan law and as to another under the *wajib-ul-arz*, and it was found that he had by his own acts or omissions disentitled himself from claiming that portion of the property to which the Muhammadan law applied, it was *held* that the pre-emptor was not entitled to pre-emption in respect of any portion of the property covered by the said sale deed. *Muhammad Wilayat Ali Khan* v. *Abdul Rab* (1) followed.

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* Second Appeal No. 806 of 1896, from a decree of V. A. Smith, Esq., District Judge of Gorakhpur, dated the 18th June 1896, confirming a decree of Pandit Bansidhar, Subordinate Judge of Gorakhpur, dated the 30th March 1896.

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

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

Pandit *Sundar Lal* and Pandit *Moti Lal* for the respondents.

BURKITT and DILLON, JJ.—This is an appeal brought by a plaintiff in a pre-emption suit. The sale deed, in respect of which the suit has arisen, was dated the 7th of May 1894, and purported to convey to the vendee shares in some 47 villages, 3 pacca houses and a mortgage deed. In the Court of first instance (Subordinate Judge of Gorakhpur) the suit was dismissed on the ground that the document upon which the suit was founded was not a sale deed, but was a deed of gift. On the appeal on that point to the District Judge it is not easy to say what the opinion of the lower appellate Court was. The learned Judge disagreed with the finding of the Court of first instance, that the document was a deed of gift, but at the same time seems to have held that it was not a sale, that it was only a "family arrangement," and finally affirmed the decree of the Court of first instance, on the ground that there were "no materials for determining the plaintiff's share of the Rs. 15,500 set forth in the sale deed, and it passes the wit of man to devise a decree which should assign to the plaintiff his proper share of the contingent liabilities imposed on the transferee." With respect to the judgment of the lower appellate Court we desire it to be understood that we do not concur in any proposition of law laid down therein, but as the question as to the nature of the deed and the manner in which the sum payable by the pre-emptor should be calculated have not been fully discussed on both sides in this case, we refrain from saying any more on that matter. On behalf of the respondent Pandit *Moti Lal* contended that this case was exactly on all fours with the case of *Muhammad Wilayat Ali Khan* v. *Abdul Rab* (1). In that case, as in the present case, two properties were claimed by right of pre-emption, one property being claimed under the Muhammadan law and the other by virtue of the provisions of the *wajib-ul-arz*.

(1) (1888) I. L. R., 11 All., 108.

Such is also the case here, the three houses being claimed under the Muhammadan law, and 8 out of the 47 shares sold being claimed under the provisions of the *wajib-ul-arz*. In the case just cited the plaintiff pre-emptor failed to prove that he had fulfilled the conditions required by Muhammadan law as preliminaries to the institution of a claim for pre-emption. So here also it has been found as a fact by both the lower Courts that the plaintiff here failed to perform these preliminaries. The result is that the plaintiff appellant, being shown to be disqualified from claiming to pre-empt these houses under the Muhammadan law, cannot possibly get a decree for the whole of that which by law, but for his own laches, he would be entitled to pre-empt. In the case of *Muhammad Wilayat Ali Khan* v. *Abdul Rab*, (1) cited above, the late Chief Justice of this Court, whose opinion on such a matter is entitled to every weight and respect, remarked as follows:—"The question then arises, can there be any difference between the case of the plaintiff coming into Court and claiming a portion of the property sold, and the case of a plaintiff coming into Court and claiming the whole, he being at the time disentitled by his own act or laches to maintain a claim as to a part? It appears to us that there can be no difference in principle, and that exactly the same result must follow in this case as would have followed if the plaintiff had come into Court and had abstained from claiming the property in Moradabad. A person who claims to be a pre-emptor and has disqualified himself from claiming the whole, cannot be in a better position than a person who has come into Court and has claimed a part only when he was entitled to claim the whole." The case now before us and the case just cited are admittedly on all fours. No attempt has been made, or indeed could be made, to show any distinction between them. It is contended that we should not follow the rule laid down in that case. We, however, fully concur in the rule laid down therein and in the reason given for it. We agree with the learned Judges who decided that case, that an intending

(1) (1888) I. L. R., 11 All., 108.

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pre-emptor who has placed himself in the position occupied by the plaintiff here and by the pre-emptor in the case of *Muhammad Wilayat Ali Khan* v. *Abdul Rab* (1) must be considered to have, by his own act as a matter of law, forfeited his right to pre-empt any portion of the property. We follow the rule of law laid down in that case and for the reasons given above, and not because we agree with the lower appellate Court, with whose judgment, as a matter of fact, we disagree, we dismiss this appeal with costs.

Appeal dismissed.

1898
November 18.

APPELLATE CRIMINAL.

Before Mr. Justice Knox, Acting Chief Justice and Mr. Justice Banerji.

QUEEN-EMPRESS *v.* TIMMAL AND OTHERS.*

Act No. XLV of 1860 *(Indian Penal Code), Sections* 96 *et seqq.—Right of private defence—Act No. I of* 1872 *(Indian Evidence Act), Section* 105 *—Presumption—Pleadings.*

Held that an accused person who at his trial has not pleaded the right of private defence, but has raised other pleas inconsistent with such a defence, cannot in appeal set up a case, founded upon the evidence taken at his trial, that he acted in the exercise of the right of private defence; neither is the Court competent to raise such a plea on behalf of the appellant. *Queen-Empress* v. *Prag Dat* (2) referred to.

THE facts of this case are fully discussed in the judgment of the Court.

The Officiating Government Advocate (Mr. *A. E. Ryves*), for the appellant.

Babu *Bishnu Chandar*, for the respondents.

KNOX, ACTING C. J. and BANERJI, J.—This is an appeal presented under directions of the Local Government from an appellate order of acquittal passed by the Sessions Court of Mirzapur. The Magistrate of the 1st class at Mirzapur, before whom the case originally came, had found five persons guilty of offences under sections 147 and 325 read with section 149 of the

* Criminal Appeal No. 1007 of 1898.

(1) (1888) I. L. R., 11 All., 108.

(2) (1898) I. L. R., 20 All., 459.