1904
June 29.
July 12.

PRIVY COUNCIL.

MUNNU LAL AND ANOTHER (TWO OF THE DEFENDANTS) *v.* MUHAMMAD ISMAIL (PLAINTIFF) AND OTHERS (DEFENDANTS).

[On appeal from the Court of the Judicial Commissioner of Oudh.]

Act No. XVIII of 1876 *(Oudh Laws Act), section* 9, *clause* (2)—*Co-sharer in mahal—Proprietor—Right of pre-emption—Act No. XVII of* 1876 *(Oudh Land Revenue Act) chapter VII, sections* 108, 112, 121—*Share in mahal consisting of separate chak—Non-residence in village.*

The plaintiff was owner of a chak of 33 acres in a village which for revenue purposes constituted a mahal, and by the settlement under which he held he paid Rs. 40 a year of the revenue, that amount being paid through the lambardar; but the plaintiff did not reside in the village. *Held* by the Judicial Committee that he was a co-sharer of the whole mahal within the meaning of section 9, clause (2) of the Oudh Laws Act (XVIII of 1876), and as such had a right of pre-emption under that section.

Under the provisions of Chapter VII of the Oudh Land Revenue Act (XVII of 1876) relating to the "Collection of Land Revenue" every "proprietor" liable for the revenue of the mahal is a co-sharer. The plaintiff was a "proprietor" in the sense of section 108, and the settlement of his land had been made with a lambardar in the sense of section 112, and he was liable just as much as every other proprietor in the mahal for the whole arrear of the mahal in case of default. The fact that his share in the mahal consisted of a separate chak did not make him the less a co-sharer in the sense of this legislation; and the circumstance that he was not a resident of the village was immaterial.

APPEAL from a decree (November 22nd, 1899) of the Court of the Judicial Commissioner of Oudh, which reversed a decree (June 24th, 1898) of the Subordinate Judge of Sitapur and decreed the suit of the first respondent for pre-emption.

The question in this appeal was as to the right of Muhammad Ismail, the plaintiff, and the first respondent in the appeal, to pre-emption of a village called Pahladpur which belonged to Siraj-ul-Haq and Sharif-un-nissa, the second and third respondents, and which in order to discharge their debts they conveyed, together with another village not now in dispute, to Munnu Lal and Chedi Lal, the appellants and to Mata Din and Sundari the fourth and fifth respondents for a total consideration of Rs. 64,000.

The plaintiff was related to the vendors as nephew. He was the owner of a chak comprising 33 acres of land in Pahladpur

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which had been held as a muafi or revenue-free holding by his father Rukn-ud-din until his death on 23rd September 1889, the right of Rukn-ud-din to the tenure having been recognized by the Revenue authorities on 13th September 1869. On Rukn-ud-din's death the chak was, under an order of the Deputy Commissioner of Sitapur, dated 11th April 1890, continued to the plaintiff as a revenue-paying holder, and he was directed to pay the revenue, which was settled at Rs. 40, together with certain cesses and 5 per cent. to the lambardar, who was responsible to Government for the entire revenue. For revenue purposes the whole village of Pahladpur constituted a mahal.

The plaintiff instituted his suit on 27th April 1897 making the vendors and vendees defendants. The plaint recited the sale of the villages, alleged that no notice had been given under section 10 of the Oudh Laws Act (XVIII of 1876); that the price mentioned in the sale deeds was fraudulent and excessive, and prayed for a decree for pre-emption of Pahladpur or both villages at the market value. After the decision of the first Court, however, no further claim was advanced to the other village, and the appeal only concerned Pahladpur, for which it was agreed Rs. 43,173 should be considered the price.

The defendants denied that notice was necessary and stated that the alleged consideration was *bonâ fide* fixed and paid. The main defence, however, was that the plaintiff had no right to pre-empt Pahladpur, and the only issue now material was as to whether the plaintiff was entitled to pre-emption as a co-sharer or as a member of the village community. Admittedly he was not resident in the village.

The question depends in the construction of section 9 of the Oudh Laws Act (XVIII of 1876) which is as follows:—

"Section 9. If the property to be sold or foreclosed is a proprietary or under-proprietary tenure or a share of such a tenure the right to buy or redeem such property belongs, in the absence of a custom to the contrary—

1st. To co-sharers of the Sub-Division (if any) of the tenure in which the property is comprised in order of their relationship to the vendor or mortgagor.

2nd. To co-sharers of the whole mahal in the same order.

3rd. To any member of the village community; and

4th. If the property be an under-proprietary tenure, to the proprietor."

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The Subordinate Judge found that the plaintiff had a proprietary and not an under-proprietary interest in the chak, but, nevertheless, he was of opinion that he was not a co-sharer in the mahal, nor a member of the village community. In the result he dismissed the suit with costs.

The plaintiff appealed from that decree to the Court of the Judicial Commissioner of Oudh, and on the appeal the defendants raised a plea that the right of pre-emption was governed by Muhammadan Law and that the plaintiff not having made the immediate demand and invocation of witnesses the suit should be dismissed, but the plea was overruled. The appeal was heard by Mr. Blennerhassett and Mr. Spankie, who on the main issue reversed the decision of the Subordinate Judge and gave the plaintiff a decree.

The material portions of the judgment were as follows :—

Mr. BLENNERHASSETT said :—

"On the question as to the exact position of the plaintiff it is unnecessary to adopt the extreme view put forward by the plaintiff's counsel that Rukn-ud-din was interested in the revenue-paying mahal even when his holding was revenue-free. It is sufficient to hold that when the lambardar entered into an agreement with Government to pay Rs. 40 revenue on account of Rukn-ud-din's land in addition to the revenue previously payable and when Rukn-ud-din agreed to pay that sum to the lambardar, he thereby became a co-sharer with the lambardar in a perfect *pattidari* mahal. In the Directions to Settlement Officers, a work of great authority in Revenue matters, the term 'co-sharer' is applied to the owner of a *patti* in a perfect *pattidari* tenure. I have no doubt that in section 110 of the Rent Act, clauses 16 and 17, the word 'co-sharer' is intended to cover the owner of a perfect *patti*. In construing section 9, Act XVIII of 1876, I hold that the existing legal position of the persons concerned is a sufficient guide to the meaning of the terms 'co-sharer' and 'member of the village community.' To call on the plaintiff in a pre-emption suit to prove his connection with the vendor, either by relationship or purchase, through many degrees of a long pedigree, would open a door to largely increased litigation, and probably in many cases defeat the intention of the Legislature. A co-sharer of the whole mahal is none the less a co-sharer, merely because he may have become so by agreement with Government and other individuals, instead of by inheritance or purchase from original owners. The plaintiff, undoubtedly, had a superior proprietary interest in this mahal. The tenure is imperfectly divided for the purpose only of allowing each co-sharer to severally realize his profits. The mahal is altogether undivided in respect of the liabilities for Government revenue. The plaintiff and the lambardar are jointly responsible to Government and the entire mahal is charged with the revenue payable to Government. I hold

that the plaintiff is a co-sharer of the whole mahal under clause (2) and a member of the village community under clause (3) of section 9, Act XVII of 1876. As such he is entitled to pre-empt Pahladpur."

Mr. SPANKIE said:—

"I agree, and only wish to add a few words on the main question in the appeal, namely, whether the plaintiff falls within clauses 2 and 3 of section 9, Oudh Laws Act, 1876.

"When two or more persons are the proprietors of the lands of a village, the tenure is usually either *zamindari*, perfect *pattidari*, or imperfect *pattidari*. In the first case the proprietors hold and manage the lands of the village in common; the rents with all other profits are thrown into a common stock, and after deduction of the Government demand and other expenses, the balance is divided between the proprietors. In the second case the lands of the village are divided and held in severalty by the different proprietors, each person managing his own land and paying his share of the Government demand, the whole being jointly responsible in the event of any one of them not fulfilling his engagement. In the third case the lands of the village are partly held in common and partly in severalty. The Government demand and other expenses are paid from the common stock, and any deficiency is made up by a rate on the several holdings. The contention for the respondents is that the body of persons holding the lands of the village as proprietors on any one of these tenures cannot be deemed to constitute a village community within the meaning of sections 7 and 9, Oudh Laws Act, 1876, unless the origin of the title to the lands is common to all the proprietors. I can see nothing in the Act which favours this contention. The circumstance that the devolution of the right of pre-emption is regulated by the Act by the order of relationship to the proprietor, selling or mortgaging his share in the tenure, does not, I think, do so. The provision is required for the purposes of regulating the devolution of the right. It seems to me that the circumstance that the proprietors hold the lands of the village under one tenure is quite sufficient to constitute them a village community.

"In the present case the plaintiff is the proprietor of lands in village and mahal Pahladpur. The lands which have been sold are in the same village and mahal. The plaintiff and the vendors were jointly liable in their persons and property for the land-revenue assessed on the mahal. They, therefore, held under one tenure and consequently were members of the village community. The lands held by the plaintiff represent his share in the tenure. I am of opinion, therefore, that the plaintiff is a co-sharer in the whole mahal, within the meaning of clause (2), section 9, Oudh Laws Act, 1876, and a member of the village community, within the meaning of clause (3) of that section."

From this decision Munnu Lal and Chedi Lal two of the vendees alone appealed to His Majesty in Council making the plaintiff, the vendors, and the other vendees respondents.

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Mr. *W. C. Bonnerjee* for the appellants contended that the plaintiff was neither a co-sharer in Pahladpur nor a member of the village community within the meaning of section 9, clauses (2) and (3) of the Oudh Laws Act (XVIII of 1876). The position of the plaintiff was that he held a small plot of land in the mahal, which plot belonged entirely to himself: such a holder could not be called a co-sharer in the mahal. A co-sharer was a person who derived some benefit from the holding in common with others. The Oudh Land Revenue Act (XVII of 1876), sections 40 and 108 were referred to. As to whether he was or not a member of the village community, it was submitted that there was a distinction between a proprietor and a member of a village community: for the latter the qualification of residence in the village was necessary, and he must be subject to the control of the general body of members of the community. Reference was made to *Rahim-ud din* v. *Rawal* (1) decided under the Punjab Laws Act (XII of 1878), and *Bhuder Singh* v. *Bhimma Singh* (2).

It was also contended that the Muhammadan Law allowed the right of pre-emption only to those between whom a community of interest existed, either by being original co-sharers in the same mahal or deriving title from such original co-sharers, or by being resident members of a village community, and that the Law in this respect had not been altered by the Oudh Laws Act 1876. According to these conditions the plaintiff was not entitled to a right of pre-emption. Where the Act of 1876 was silent, the Muhammadan Law, it was submitted, applied, and the plaintiff had not conformed to the requirements of the Muhammadan Law as to the mode of asserting the right of pre-emption, which were left unaltered by the Act of 1876. The Subordinate Judge, therefore, had rightly dismissed the suit, and that decree had been wrongly reversed by the Judicial Commissioner.

Mr. *Cave, K. C.*, and Mr. *L. DeGruyther* for the first respondent were not heard.

(1) (1903) L. R., 30 I. A. 89; I. L. R., 30 Calc., 635.

(2) (1887) Select Cases, Oudh, p. 84.

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1904, *July 12th.*—The judgment of their Lordships was delivered by LORD ROBERTSON :—

The sole question in this appeal is whether the respondent Maulvi Saiyid Muhammad Ismail, who may be more conveniently referred to as the plaintiff, is entitled to pre-empt the village of Pahladpur, which had been sold to the appellants and the fourth and fifth respondents.

The village is in Oudh; and the appeal is against a judgment of the Judicial Commissioners of Oudh, who, reversing a decree of the Subordinate Judge of Sitapur, have held that the plaintiff has a right of pre-emption under the Oudh Laws Act, XVIII of 1876. The facts are undisputed, and the question is entirely on the construction of the ninth section of the Act. Under that section, which admittedly applies to the sale of Pahladpur, the right of pre-emption is given to (among other persons) "co-sharers of the whole mahal" in order of their relationship to the vendor, and to "any member of the village-community."

There is no question about the relationship of the plaintiff, and the only dispute is whether his connection with the village is such as to give him the right of pre-emption. The material facts are that the plaintiff is owner of a chak, of 33 acres in in Pahladpur; and, by the settlement under which he holds, he pays Rs. 40 per annum of revenue, this being payable through the lambardars of the village; but he does not reside in the village.

The judgment of the Judicial Commissioner was that the plaintiff is a co-sharer of the whole mahal. This opinion is concurred in by the Additional Judicial Commissioner, who further held that the plaintiff is also a member of the village community.

In their Lordships' judgment, it is clear that the plaintiff is a co-sharer of the whole mahal, in the sense of the ninth section of the Oudh Laws Act, 1876; and, this being so, it is unnecessary to discuss the question whether he is also a "member of the village community."

The Oudh Land Revenue Act (No. XVII of 1876) is really decisive of the right of the plaintiff to be deemed a co-sharer

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of the whole mahal. In the case of every mahal, according to section 108, the entire mahal is to be charged with, and all the proprietors jointly and severally shall be responsible to Government for, the revenue for the time being assessed on the mahal. The term "proprietors," for the purposes of that chapter of the Act, includes all persons in possession for their own benefit, and the "chapter" is the whole of that relating to collection of the land revenue, and everything now to be referred to is in that chapter. The 112 section provides that, if the settlement of any land has been made with a lambardar, and if there be an arrear of revenue due in respect of such land, both the lambardar and the co-sharers of the mahal from which the arrear is due shall be deemed defaulters. By section 121 it is provided that, if an arrear of land revenue has become due in respect of the share of any member of a village-community, such community or any member thereof, may tender payment of such arrear or may offer to pay such arrear by instalments. And in case of conflicting tenders or offers under this section, the co-sharer who, in case the share were sold, would have a right of pre-emption under section 9 of the Oudh Laws Act, shall be preferred.

This last enactment is important because it expressly identifies "the co-sharer" of the ninth section of the Oudh Laws Act of the same year with every proprietor who, by the combined operation of sections 108 and 112 of the Oudh Land Revenue Act is liable for the revenue assessed on the whole mahal. If the various sections of this "chapter" of that Act be read together, it is plain that every "proprietor" liable for the revenue of the mahal is a "co-sharer." The plaintiff is exactly in this position. He is certainly a "proprietor" in the sense of section 108 of the Land Revenue Act; and the settlement of his land has been made (on the face of his title) with a lambardar in the sense of section 112. He is, therefore, liable, just as much as every other proprietor in the mahal, for the whole arrear of the mahal in case of default. Their Lordships, accordingly, consider that the fact that the share of the plaintiff in the mahal consists of a separate chak does not make him the less a co-sharer in the sense of this legislation, and the circumstance of his being non-resident does

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not seem to affect, or even bear upon, the language or theory of the enactment.

Their Lordships will humbly advise His Majesty that the appeal ought to be dismissed, and the appellants will pay the costs of the appeal.

Appeal dismissed.

Solicitors for the appellants: Messrs. *Young, Jackson, Beard and King.*

Solicitors for the first respondent: Messrs. *Watkins and Lempriere.*

J. V. W.

SHAFIQ-UN-NISSA (PLAINTIFF) *v.* SHABAN ALI KHAN (DEFENDANT).

P. C. 1904 *July* 7, 8.

[On appeal from the Court of the Judicial Commissioner of Oudh.]

Evidence Act (I of 1872) sections 4, 32, 90—*Practice of Privy Council with respect to decisions as to credibility of witnesses by lower Courts—Mode of dealing with hearsay evidence—Ancient document—Discretion of Court in calling for formal proof of—*

The Judicial Committee will not criticize with any strictness opinions as to the credibility of witnesses, which is eminently a question for the Courts in India.

Where the Courts below had rejected the evidence of certain witnesses on the ground that it was hearsay only and had not conformed with section 32 of the Evidence Act, and on the face of the evidence it was sometimes uncertain whether the witnesses were speaking from their own personal knowledge or from information derived from others, but the Courts had considered it from both points of view and held it inadmissible, the Judicial Committee saw no reason to differ from the estimate which the Courts had formed as to the credibility of the witnesses in the former case, nor, in the latter case, to question the manner in which the Courts had applied the provisions of section 32.

Notwithstanding a document was more than 30 years old and had been produced from proper custody, the Courts below, on the grounds that there were circumstances in the case and evidence as to the document itself which threw great doubt on its genuineness, exercised their discretion under section 90 of the Evidence Act by not admitting the document in evidence without formal proof, and rejected it when no such proof was given. The Judicial Committee considered that the discretion of the Court had been rightly exercised and declined to interfere with it.

APPEAL from a judgment and decree (April 6th 1899) of the Court of the Judicial Commissioner of Oudh, which

Present:—Lord DAVEY, Lord ROBERTSON, and SIR ARTHUR WILSON.