

1911

GANGA
SINGH
v.
CHEDI LAL.

custom (other than that of pre-emption) in which no instances are proved of the exercise thereof, the courts have hesitated to hold that a custom is proved by the bare production of one or more *wajib-ul-arzes*; and I can see no reason why the same rule should not apply to the very unusual and extraordinary custom which is now put forward in this case, under which a plaintiff who is not a co-sharer in the mahal and is not a co-owner with the vendor in anything, claims a right to prevent a man selling his property to whomsoever he pleases. The clear issue is the existence or non-existence of this unusual custom. Can the plaintiff be said to have proved it by a *wajib-ul-arz* drawn up when the state of the village was very different to what it now is, and when co-ownership in one unit, namely, the mahal, existed and all *pattidarans deh* were co-owners with each other which they now are not. In my opinion such evidence is not only insufficient but does not in the least go to establish the custom which is now put forward. I would, therefore, allow the appeal.

BY THE COURT:—The order of the Court is that we allow the appeal, set aside the decree of the court below, and dismiss the plaintiffs' claim with costs.

Appeal allowed.

1911
May, 2.

Before the Hon'ble Mr. H. G. Richards, Chief Justice, and Mr. Justice Tudball.
MUHAMMAD SADIQ (DEFENDANT) v. ABDUL MAJID (PLAINTIFF) AND
MUSAMMAT HAKIMAN (DEFENDANT).*

Act No. IX of 1908 (Indian Limitation Act), section 3—Limitation—Amendment of plaint after expiry of limitation—Suit for pre-emption—Zamindari property—Incorrect statement of extent of share claimed.

In a suit for pre-emption under the Muhammadan law of a zamindari share it was found that the necessary conditions of the Muhammadan law had been fulfilled; but, there being some doubt as to the exact share sold, the plaintiff had specified it in his plaint as 15 *biswansis*, when in fact it amounted to 17 *biswansis*. *Held* that it was within the competence of the court to allow the plaintiff to amend his plaint so as to claim the larger share, even after the period of limitation for the suit had expired.

THE facts of this case were as follows:—

One Musammat Hakiman sold certain zamindari property to Muhammad Sadiq on the 16th of December, 1907. The price

* See Indian Appeal No. 605 of 1910 from decree of A. W. R. Cole, District Judge of Moradabad, dated the 17th of April, 1910, confirming a decree of Muhammad Shamsuddin, Munsif of Nagina, dated the 14th of April, 1909.

settled was Rs. 1,800. The property sold consisted of a 17 biswansi share, 2 biswansis of which had come to the vendor by inheritance from her daughter. The plaintiff made the *talab* at the time, but made the demand with reference to 15 biswansis only which he believed at the time was the entire share that Hakiman could dispose of. He filed the suit on the last day allowed by the law of limitation, but having found out his mistake as to the extent of the share sold, he applied for amendment of the plaint. His application was allowed and he was granted leave to sue for the entire 17 biswansis, but when the application was granted the period of limitation for the suit had expired. The courts below however, decreed the claim. The defendant vendee appealed.

Mr. *Muhammad Ishaq Khan*, for the appellant :—

According to Muhammadan law the plaintiff ought to have claimed the entire property sold. His demand was ineffective. Disabilities which saved limitation in ordinary cases did not apply to pre-emption suits. Section 8 of the Limitation Act (IX of 1908) was clear on the point. See also *Durga Singh v. Bisheshar Dayal* (1). Even if the plaintiff did not know the exact amount of the share owned by the vendor that was no excuse.

Maulvi *Gulam Mujtaba*, for the respondents :—

The plaintiff purported to claim the entire share sold. The court to which application for amendment was made was the proper court to consider the question. It was too late to question it now. Section 107, clause 2 of the Civil Procedure Code gave new powers to appellate courts. The court exercised its discretion, and there was no reason to call it in question. *Rum Lal v. Harrison* (2), *Khem Karan v. Har Dayal* (3) and *The New Fleming Spinning & Weaving Co. v. Kessowji Naisi* (4) were referred to. The amendment having been granted related back to the time of filing the suit.

Mr. *Muhammad Ishaq Khan* replied.

RICHARDS, C. J. and TUDBALL J. :—This appeal arises out of a suit for pre-emption of certain zamindari property based on Muhammadan law. The defendant, Musammat Hakiman, sold

(1) (1898) I. L. R., 24 All., 218.

(2) (1880) I. L. R., 2 All., 832.

(3) (1881) I. L. R., 4 All., 87.

(4) (1885) I. L. R., 2 Fcm., 378.

1911

MUHAMMAD
SADIQ
v.
ABDUL
MAJID.

the property to the appellant, Muhammad Sadiq, on the 16th of December, 1907. The sale-deed was duly executed and registered, and it set forth that the share sold was in or about a 24 biswansi share. As a matter of fact, the share which the Musammât had was a 17 biswansi share, and this has been decided in the suit brought against her and her vendee by the other co-sharers. The plaintiff when he instituted his suit only claimed a 15 biswansi share, alleging that that was the share which the vendor had actually sold. The suit was instituted on the last day of limitation. Afterwards the plaintiff came to understand that the real share sold was, as we have said before, a 17 biswansi share, and accordingly he was allowed to amend the plaint by claiming a 17 biswansi share instead of a 15 biswansi share. The first court found that the formalities necessary under the Muhammadan law had been duly performed and the lower appellate court accepted the finding. The plaintiff's suit was accordingly decreed.

In appeal it has been urged that the amendment was an amendment which ought not and could not have been made having regard to the provisions of the Limitation Act, and, secondly, that the courts below were wrong in holding that the preliminaries required by the Muhammadan law had been fulfilled. The courts are allowed by the Code ample power to amend, and we are slow to interfere with any amendment which the lower courts have power to make, and which they in the exercise of discretion have made. We think, however, that no court would have power to allow a new cause of action to be introduced into a plaint after that cause of action had become barred by limitation. The real question in the present appeal is whether or not we are bound to regard the amendment which was made, namely, to allow the plaintiff to claim 17 biswansis instead of 15 biswansis, as the introduction of a new cause of action, or whether it may be regarded as a correction of the description of the property.

With regard to the due performance of the formalities of the Muhammadan law, the evidence, which was believed by both the courts below, was to the effect that the vendee informed the plaintiff in the present suit that he had purchased the "share of

Musammat Hakiman." There was no specification of exactly what the share was, and the plaintiff at once said without waiting to ask any questions that he claimed his right to pre-empt. We think that the courts below were entitled on this evidence to hold that the formalities had been fulfilled. Of course the demand was made in the presence of witnesses.

There was a great deal of confusion as to what was in fact the actual share of the Musammat. We have already pointed out that although she purported to sell a share equal to about 24 biswansis, her real share was 17 biswansis. After consideration we have come to the conclusion that the amendment in this case may be looked upon as a correction of the description of the property. Looked upon in this light it was an amendment which the court below was entitled to make ; and if it was an amendment which the court was entitled to make, we think that limitation must be reckoned as from the date of the presentation of the plaint, as explained by section 3. We accordingly dismiss the appeal with costs.

Appeal dismissed.

Before Mr. Justice Karamat Husain and Mr. Justice Chamier.
BALDEO SINGH AND OTHERS (PLAINTIFFS) v. JUGAL KISHORE
AND OTHERS (DEFENDANTS).*

1911

May, 3.

*Easement—Flow of water—Natural channel—Duty of owner
of land through which a natural channel runs.*

The owner of land through which a river or other natural channel flows is bound, within certain limits, as between himself and other riparian owners, not to do anything which shall obstruct the flow of the water or materially interfere with their rights. But such owner is not bound to keep the channel clear so that the amount of water that can pass down it may not be diminished.

THE facts of this case were as follows :—The parties were zamindars of adjoining villages. The drainage water from some neighbouring hills flowed through three natural channels which joined each other at a point situate within the plaintiffs' villages. From this point the water flowed through a natural channel running through the defendants' villages and on to a streamlet further down. At some previous time the water from the

* Second Appeal No. 68 of 1909 from a decree of Muhammad Ali, District Judge of Mirzapur, dated the 2nd of June, 1908, confirming a decree of Amjad-ul-lah, Subordinate Judge of Mirzapur, dated the 13th of March, 1906.