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In our opinion the cause of action in the present case arose at Lahore, where also the defendant appellant resides, and under section 17 of the Code of Civil Procedure, 1882, which was in force when the suit was brought, the suit should have been instituted in Lahore. We therefore allow this appeal, set aside the decree of the court below, and direct that the plaint be returned to the respondent in order that he may present it to the proper court. The respondent will pay the appellant's costs in this Court. The parties will have their own costs in the court below.

Appeal allowed.

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June 22.

Before Mr. Justice Tudball and Mr. Justice Chamier.

MUNNA LAL AND ANOTHER (DEFENDANTS) *v.* HAJIRA JAN (PLAINTIFF) AND ZOBAIDA JAN (DEFENDANT).*

Pre-emption—Muhammadan law—Shafi-i-sharik—Shafi-i-khalit—Shafi-i-jar—Effect of perfect partition.

When a mahal has been perfectly partitioned, no right of pre-emption under the Muhammadan law subsists in favour of the owner of one of the new mahals in respect of the other new mahal or any portion of it on the ground of vicinage alone. *Mahadeo Singh* v. *Mussamut Zeenut-un-nissa* (1), *Sheikh Mahomed Hossein* v. *Shaw Mohsin Ali* (2) and *Abdul Rahim Khan* v. *Kharag Singh* (3) referred to. Nor will the fact that a village chaupal has remained undivided give the owner of either of the new mahals a right of pre-emption against the owner of the other as a *shafi-i-khalit*. *Rahtab Singh* v. *Tahal Misser* (4) and *Shaikh Karim Buksh* v. *Kamr-ud-deen Ahmad* (5) distinguished. *Abdul Rahim Khan* v. *Kharag Singh* (3) and *Lalla Puriag Dutt* v. *Shaikh Bundeh Hossein* (6) referred to.

But a right of pre-emption as *shafi-i-sharik* may subsist in relation to villages in large estates equally with houses, gardens and small plots of ground. *Sheikh Mahomed Hossein* v. *Shaw Mohsin Ali* (2) and *Shaikh Karim Buksh* v. *Kamr-ud-deen Ahmad* (5) referred to.

THE facts of this case are fully stated in the judgement of the Court.

The Hon'ble Pandit *Moti Lal Nehru*, Maulvi *Ghulam Mujtaba* and Dr. *Satish Chandra Banerji*, for the appellants.

The Hon'ble Pandit *Sundar Lal* and the Hon'ble Nawab *Muhammad Abdul Majid*, for the respondents.

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* First Appeal No. 193 of 1908, from a decree of Muhammad Shafi, Subordinate Judge of Aligarh, dated the 21st of April, 1908.

(1) (1869) 11 W. R., C. R., 169.
(2) (1870) 6 B. L. R., 41.
(3) (1893) I. L. R., 15 All., 104.
(4) (1868) 10 W. R., C. R., 314.
(5) (1874) 6 N-W. P., H. C. Rep., 377.
(6) (1871) 15 W. R., C. R., 225.

TUDBALL and CHAMIER, JJ.—This appeal arises out of a suit for pre-emption in respect to three separate mahals, being portions of three villages, Jarthal, Rasulpur-Gadhouli and Bidhuni, in the district of Etah. The plaintiff respondent, Musammat Hajira Jan, is the own sister of Musammat Zobaida Jan, defendant No. 3.

The claim is based on Muhammadan Law. The plaintiff, while admitting that the shares of her sister and herself had in each village been partitioned and separate mahals had been formed, pleaded that the partitions had been made "*khetbat*" and not "*chakbat*"; that the village site of Jarthal had not been divided; that the mahals were contiguous to each other and that certain rights of way, watercourses and other rights had been left common to the mahals in each village. She therefore claimed the right of pre-emption.

(1) As a *shafi-i-sharik*, or co-sharer in the thing sold.

(2) As a *shafi-i-khalit*, or co-sharer in the appurtenant rights.

(3) As a *shafi-i-jar*, or contiguous neighbour.

The sale-deed which has given rise to this suit was executed on the 19th June, 1906, by Zobaida Jan in favour of the first two defendants, Munna Lal and Gulzari Lal, who are Hindus, in lieu of Rs. 17,900. The 6th and 7th grounds entered in the memorandum of appeal, relating to the preliminary demands, not having been pressed in this Court, the defence, so far as we are concerned within this appeal was:—

(1) That the mahals of the vendor and the pre-emptor had been perfectly partitioned and that nothing was left joint, and therefore that the plaintiff could not claim pre-emption as a *shafi-i-sharik*.

(2) That the plaintiff was not a *shafi-i-khalit*, in that there were no common rights appurtenant to each of the mahals.

(3) That the "appurtenances" relied upon by the plaintiff were rights of a public nature and not of a private nature and could not give rise to a right of pre-emption.

(4) That the rule of vicinage or contiguity did not apply to large estates like separate mahals.

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(5) That under the Muhammadan law there was no right of pre-emption except in regard to small plots of land and houses.

The lower court decreed the claim. It held that though the partition in each village was a perfect partition "there was no doubt that wells, passages and water courses and the village site of Jarthal (*abadi*) were 'joint.'" The word "passage" is the lower court's interpretation of the word "*rasta*" or "roadway." The so-called watercourses are the small channels which cultivators make to conduct water from their wells to the fields they seek to irrigate. They are usually made annually, along the edges of their fields and sometimes across them. The lower court therefore, held that the plaintiff was both a *shafi-i-sharik* and a *shafi-i-khalit*. In respect to the latter capacity it also remarked that the tanks do not appear to have been divided by metes and bounds. In regard to the claim on the basis of "vicinage," it held that though ordinarily when mahals had been separated no right of pre-emption on this basis could be allowed, still in the present case, as the partition had been made "*khetbat*" and the various plots constituting the two mahals in question were so intermixed that most of the plots allotted to one co-sharer were surrounded by those allotted to the other or adjoined them, their right could be claimed on the basis of vicinage also; for to decide otherwise would be to hold contrary to the principles on which the law of pre-emption is based.

It also held that in the case of large estates the rights of pre-emption could be claimed on the grounds of partnership in the estate and partnership in the common appurtenances.

The defendants vendees appeal, and the points pressed before us and which call for our decision are:—

(1) That the partition in each case was perfect, nothing was left joint;

(2) That no "appurtenances" or common rights of a private nature are in existence and those of a public nature give no rise to a right of pre-emption;

(3) That in the case of large separate estates like those in question there can be no right of pre-emption on the basis of vicinage or contiguity.

(4) That the Muhammadan law of pre-emption only applies to houses, gardens and small plots of land and not to large estates. This last ground of appeal was but feebly pressed.

In the case of *Shaikh Mahomed Hossein* v. *Shaw Mohsin Ali* (1) it was held by a Full Bench of the Calcutta High Court that a partner *(shafi-i-sharik)* has a right of pre-emption in villages of large estates.

In 1874, in the case of *Shaikh Karim Buksh* v. *Kamr-ud-deen Ahmad* (2), it was held that pre-emption extends to agricultural estates and is not confined to urban properties or small plots. There are numerous other decisions on the point to be found in the Law Reports, *e.g.*, 10 W. R., 314; 15 W. R., 223; 12 W. R., 484, in which pre-emption was allowed in the case of large estates. In nearly all these instances it was allowed on the ground of partnership in the thing sold. There is therefore no force in this plea.

The next question for decision relates to the nature and extent of the partition, and we have to see whether any portion of the original mahals were left undivided and whether any rights or appurtenances were left common to the two mahals into which each of the original ones was sub-divided and the nature of these common rights if any.

The Subordinate Judge, while stating that the partition (which admittedly was made by the Revenue Courts under the Land Revenue Act) was "perfect," held that "wells, passages and watercourses and the village site of Jarthal" were left joint. He sets forth the oral evidence on the point given by the parties, but omits to state what he accepts or rejects of that evidence, and fails even to mention the documentary evidence on the record. It is not possible to extract from his judgement the grounds on which he held the above to be joint.

The plaintiff in her plaint admitted that separate mahals had been formed. Separate mahals are only formed in partitions by the Revenue Court where the partition is "perfect."

* * * * * *

After discussing the evidence as to the nature of the partition which had taken place, the judgement then proceeded :—

This evidence shows clearly that the partitions were perfect.

(1) (1870) 6 B. L. R., 41. (2) (1874) 6 N-W. P., H. C. R., 377.

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in every way, and there was nothing left to be jointly held or used by the zamindars. The latter do not reside in any of these three villages and have no *sir* lands. They have a collection house or *chaupal* in mauza Jarthal: that house was not within the scope of a partition by a Revenue Court, but the land on which it stood has been divided.

The patwari's evidence, even if it stood alone, would be amply sufficient to rebut the vague and bald statements of the plaintiff's witnesses; but it receives corroboration and support from the partition proceeding of mauza Jarthal, and the settlement records filed by the defendant. The settlement took place after the partition, and each mahal was recorded as a separate 20 biswa mahal with a separate record of rights, and the various plots in the separate mahals were separately numbered.

The defendant produced at a late stage of the case the partition proceeding of the other two villages, but the lower court refused to accept them. They have been tendered here again, but there is no adequate reason put forward for their non-production at the proper time, and we have refused to accept them.

The essence of a perfect partition is the division of every thing that is divisible. Burial grounds and places of worship are usually not divided. In the present case there are none. In some cases wells, tanks, watercourses and embankments are of necessity left to joint property of the co-sharers, but the court has to determine the extent to which the proprietors may use them, the proportions in which repair charges have to be borne and the manner in which the profits, if any, have to be divided.

In the present case, as the patwari shows, everything has been divided.

His evidence as to the result of the partition is worthy of all belief. It is highly improbable that he would testify falsely on points in regard to which, to his own knowledge, there existed public documents which could prove the truth. The defendants have been negligent in not having called for the partition record. We, however, accept the evidence of the patwari and hold that nothing was left, after partition, as the joint property of the

co-sharers. The village *chaupal* in Jarthal is apparently still the joint property of the parties. But the land on which it stands has been divided. The roadway and watercourses have even been divided, and the soil thereof is the property of the owners of the various mahals, but all public and private rights of way remain as before. The co-sharers are not shown to have any private rights of way or water. Public rights remain unaffected; so also do the rights of the tenants in respect to irrigation. The co-sharers own no wells and having no *sir* lands have no private rights of irrigation over each other's lands.

The *abadi* of Jarthal, *i. e.*, the soil, has been divided. The residents remain the owners of their houses as before, with all rights which they had acquired. The co-sharers do not reside in these villages.

As to *khalyans* and sugarcane presses, there are no lands specially set apart for these, and neither party is shown to have any rights in respect thereto over the separate mahals of the other. In our opinion the plaintiff has completely failed to establish her position as a *shafi-i-sharik* in the zamindari mahal which she seeks to pre-empt.

She has equally failed, in our opinion, to establish her position as a *shafi-i-khalit*. The fact that a tenant irrigates his field in one mahal from his well situated in another mahal does not constitute the plaintiff a *shafi-i-khalit*. Nor does the fact that she and the vendor are tenants in common of the *chaupal* put her into that position. The ownership of the house is distinct and separate from that of the zamindari. A sale of the latter does not necessarily include a sale of the former.

Reliance is placed on the ruling in *Mahtab Singh* v. *Ram Tahal Misser* (1). It was therein held that the plaintiff as a partner in the *Julkur* and *Neemuksaher* was a *shaf-i-khalit*. An examination of the judgement will show that there had been in that case an imperfect partition into *pattis*, and the *Julkur* and *Neemuksaher* had been reserved and not divided. These are rights from which part of the income of a mahal is derived. In the present case no such rights have been reserved and left undivided. There has been a complete separation of all

(1) (1868) 10 W. R. C. R., 314.

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zamindari right. A *chaupal* is but a house and may be adapted to any other use to which a house may be put.

The case of *Shaikh Karim Buksh* v. *Kamr-ud-deen Ahmad* (1) does not help the plaintiff. That also was a case of imperfect partition in which some land and tanks and trees were left joint and undivided between the co-sharers. In the case of *Abdul Rahim Khan* v. *Kharag Singh* (2) it was held, in a case similar in many ways to the present, that no right of pre-emption arose from the fact that a burial ground and a *chaupal* had remained undivided. There had been a perfect partition, as here, and a burial ground and a *chaupal* were left common property. See also the case of *Lalla Puriag Datt* v. *Shaikh Bundeh Hossein* (3). In our opinion the plaintiff is not a *shafi-i-khalit*. She has no rights of easement over the defendant's mahal, nor do the owners of the two mahals share any rights or appurtenances.

There remains the question of "vicinage." The right of pre-emption has been allowed in the case of zamindaris and large estates in many cases on the ground of partnership and in a few cases on the ground of partnership in the rights and appurtenances by the Indian Courts, and our attention has been called to the various rulings. Not a single case has been quoted (nor have we been able to find one) in which in such a case as this pre-emption has been allowed on the ground of vicinage. On the contrary there are several reported decisions in which the claim in such cases on this ground has been repelled and disallowed.

In *Mahtab Singh* v. *Ram Tahal Misser* (4) the claim was made both as *shafi-i-khalit* and *shafi-i-jar*. It was decreed to the plaintiff only in the former capacity.

In *Mahadeo Singh* v. *Mussamut Zeenut-un-nisa* (5) it was ruled that after perfect partition of a zamindari share, no claim on the ground of vicinage would remain. In *Sheikh Mahomed Hossein* v. *Shaw Mohsin Ali* (6) a Full Bench of the Calcutta High Court held that in the case of villages and large estates no right of pre-emption could be claimed on the ground of vicinage, and that such a right based on vicinage was restricted to the case of houses, gardens and small plots or land.

(1) (1874) 6 N-W. P., H. C. Rep., 377.
(2) (1893) I. L. R., 15 All., 104.
(3) (1871) 15 W. R., C. R., 225.
(4) (1868) 10 W. R., C. R., 314.
(5) (1869) 11 W. R., C. R., 169.
(6) (1870) 6 B. L. R., 41.

In the case of *Abdul Rahim Khan* v. *Kharag Singh*, mentioned above, it was held by a Bench of this Court that where an estate had been divided into two separate mahals no right of pre-emption under the Muhammadan law would subsist on behalf of one of such mahals in respect of the other, merely by reason of vicinage. The Subordinate Judge has tried to distinguish the present case from all these rulings on the ground that the partition of the villages in suit was "*khetbat*" and not "*chakbat*" and the fields which constitute the two mahals are all intermixed. The same plea has been raised before us, and it is urged that if the vendor had sold each field separately by a separate sale-deed, the plaintiff would have been entitled to pre-emption on the ground of vicinage if one of her plots adjoined it. The argument is specious, but has no force. The vendor has not sold each plot separately, but the mahal as a whole. In very few partitions is it possible to divide a mahal into large blocks of equal value. Where possible this is always done, but it is seldom possible. The rights of the tenants have to be considered in assessing the value of the land to the zamindar. Many have occupancy rights and many pay favourable rates of rent by reason of their caste or for other causes.

In the large majority of partitioned mahals, the fields of the resultant mahals will be found intermixed, and we do not think that this is a sufficient reason for holding that vicinage will give the plaintiff a right to pre-empt.

We would point out that there are many villages in these provinces which have fields standing right in the midst of the fields of other villages. As between such villages or between adjacent villages the right of pre-emption has never been allowed by (and probably never claimed in) the courts of this country. When a mahal is perfectly partitioned into two parts, these two new mahals stand to each other in the same relation as two separate villages. Many villages, or mauzas, have no inhabited site.

We do not deem it right to extend the right of pre-emption beyond the bounds which have been set to it by the courts in India in a long course of decisions. In our opinion when a mahal has been perfectly partitioned, no right of pre-emption

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under the Muhammadan law subsists in favour of the owner of one of the new *mahals in respect to the other new mahal* or any portion of it, on the ground of vicinage alone. In this view we allow the appeal and set aside the decree of the lower court. The suit will stand dismissed with costs in both courts. The costs incurred by the respondent in the matter of printing and translating in this Court are costs in the cause and will fall on the respondent herself. The costs incurred by the appellants in the translating and printing of the rejected fresh evidence will not be the costs in the cause and must be borne by the appellants themselves.

Appeal allowed.

REVISIONAL CRIMINAL.

1910
June 29.

Before Mr. Justice Tudball and Mr. Justice Chamier.

EMPEROR *v.* IBRAHIM KHAN.*

Act No. XLV of 1860 (*Indian Penal Code*), *section* 409—*Criminal breach of trust—Charge—Criminal Procedure Code, section* 222 (2).

An accused person was charged under section 409 of the Indian Penal Code with having embezzled an aggregate sum of Rs. 208-12-0 on various dates between the 1st July and the 1st November, 1909. *Held* that the charge so framed was not open to objection, notwithstanding that evidence was available as to the various items of which the aggregate sum charged was composed. *Emperor* v. *Gulzari Lal* (1), *Emperor* v. *Ishtiaq Ahmad* (2), *Samiruddin Sarkar* v. *Nibaran Chandra Ghose* (3), *Sat Narain Tewari* v. *Emperor* (4) and *Thomas* v. *Emperor* (5) followed. *Subramania Ayyar* v. *King Emperor* (6) distinguished.

ONE Ibrahim Khan, a naib darogha employed in the Meerut Cantonments was charged with having embezzled a sum of money amounting to Rs. 208-12-0, which he had received as grazing fees from various persons who grazed cattle on the cantonment grass lands on various dates between the 1st of July and the 1st of November, 1909. This aggregate sum of Rs. 208-12-0 consisted of various items, some eighteen in all, which the accused was alleged to have received at various times between the dates mentioned

* Criminal Revision No. 285 of 1910 by the Local Government from an order of L. Johnston, Sessions Judge of Meerut, dated the 12th of February, 1910.

(1) (1902) I. L. R., 24 All., 254.
(2) (1904) I. L. R., 26 All., 69.
(3) (1904) I. L. R., 31 Calc., 928.
(4) (1905) I. L. R., 32 Calc., 1085.
(5) (1906) I. L. R., 29 Mad., 558.
(6) (1901) I. L. R., 25 Mad., 61.