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Privy Council seemed to me to have held that time began to run against the plaintiff under article 145 of the second schedule to the Limitation Act of 1871, from the date on which the possession of Karan Singh began, because that possession was adverse to the plaintiff. What has since been put forward, as an explanation of the decision of this Court and of their Lordships of the Privy Council, does not seem to have occurred to any of the five Judges who dealt with the case in this Court, or to any of their Lordships who heard the appeal, and I must say that to my mind the explanation is neither sufficient nor satisfactory. But as some learned Judges of this Court and of the Madras High Court have recently expressed the opinion that the decision of their Lordships should not be regarded as covering a case of this kind, I defer to their opinion with a view to secure uniformity of decision. If the decision of the Privy Council is not applicable to the case then in my opinion the case is clear. On this ground I agree with the learned Chief Justice in dismissing the appeal.

BY THE COURT.—The order of the Court is that the appeal be dismissed with costs.

*Appeal dismissed.*

## APPELLATE CIVIL.

1914

*June*, 24.

*Before Sir Henry Richards, Knight, Chief Justice, and Mr. Justice Tudball.*

ABDUL HAMID (PLAINTIFF) *v.* MASIT-ULLAH AND OTHERS (DEFENDANTS).*

*Pre-emption—Pleadings—Muhammadan law—Custom—Amendment of plaint—Discretion of Court.*

The plaintiff in a suit for pre-emption based his claim upon the Muhammadan law. At a somewhat late stage in the case the plaintiff asked leave to amend his plaint by adding an alternative claim based on custom as evidenced by the wajib-ul-arz; but this was refused, and the Court, notwithstanding that it found that, according to the wajib-ul-arz, a custom of pre-emption existed, dismissed the suit. *Held* that the Court ought to have permitted the plaint to be amended, and, even without amending the plaint, was competent to decree the claim on the basis of the wajib-ul-arz.

* Second Appeal No. 1195 of 1913, from a decree of C. E. Guiterman, Additional Judge of Moradabad, dated the 21st of August, 1913, confirming a decree of Kunwar Sen, Additional Subordinate Judge of Moradabad, dated the 19th of May, 1913.

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ABDUL HAMID v. MASIT-ULLAH.

THIS was a suit for pre-emption. The sale dates back to the year 1910, and the present suit was instituted the same year. The plaintiff based his suit on Muhammadan law. When the suit had been pending for some time (apparently as a reply to paragraph 2 of the written statement), the plaintiff applied to the court for leave to amend the plaint by claiming pre-emption under Muhammadan law and in the alternative under the wajib-ul-arz. The Court refused to grant this amendment on the ground that it would alter the nature of the cause of action. The Court then proceeded to try the case as a case based on Muhammadan law. It found that the conditions of Muhammadan law had not been fulfilled and dismissed the plaintiff's suit. The plaintiff appealed. The learned District Judge held that an application for amendment might have been made, but it was made altogether too late. It seems to have assumed that a custom of pre-emption did prevail, and then dismissed the suit without deciding any other issues. It held that, inasmuch as a custom of pre-emption prevailed, a claim under the Muhammadan law could not be sustained. The plaintiff thereupon appealed to the High Court.

Dr. *Satish Chandra Banerji* and Maulvi *Muhammad Ishaq*, for the appellants.

Mr. *B. E. O'Conor* and The Hon'ble Dr. *Tej Bahadur Sapru*, for the respondents.

RICHARDS, C.J., and TUDBALL, J.—This appeal arises out of a suit for pre-emption. The sale dates back to the year 1910, and the present suit was instituted the same year. The plaintiff based his suit on Muhammadan law. When the suit had been pending for some time (apparently as a reply to paragraph 2 of the written statement), the plaintiff applied to the Court for leave to amend the plaint by claiming pre-emption under Muhammadan law and in the alternative under the wajib-ul-arz. The Court refused to grant this amendment on the ground that it would alter the nature of the cause of action. The Court then proceeded to try the case as a case based on Muhammadan law. It found that the conditions of Muhammadan law had not been fulfilled and dismissed the plaintiff's suit. The plaintiff appealed. The learned District Judge held that an application for amendment might have been made, but it was made altogether too late. It seems to have

assumed that a custom of pre-emption did prevail, and then dismissed the suit without deciding any other issues. It held that, inasmuch as a custom of pre-emption prevailed, a claim under the Muhammadan law could not be sustained.

In our opinion, where a plaintiff seeks pre-emption, he ought to be allowed to put his case in the alternative, and we think that in the present case the amendment should have been allowed, but even without an amendment the court could have decreed the plaintiff's claim under the custom if it found that such a custom prevailed and the plaintiff brought himself within it. The real object of the suit was to get possession by pre-emption, and such a course could not possibly have taken the other side by surprise, because it was the defendant who was setting up the existence of the custom in order to defeat the plaintiff's claim under the Muhammadan law. In effect, the judgement of the lower appellate court has refused the plaintiff a decree for pre-emption on the ground that a custom exists under which he has a right to get it. We wish it clearly to be understood that in the foregoing remarks we are in no way expressing any opinion on the merits of the case. For example, the court of first instance has held that the plaintiff was offered this property in the first instance and refused to take it. If this should turn out to be the fact, the plaintiff cannot possibly succeed either under the Muhammadan or customary law. Another point which has not been gone into by the courts is whether or not, assuming that there is a custom of pre-emption prevailing in the village, it applies to the property the subject matter of the present suit. We may point out that it does not follow that because there is a custom of pre-emption amongst the zamindars, there is also a custom of pre-emption prevailing between muafidars. An extract from the wajib-ul-arz might under certain circumstances be sufficient to prove the existence of the custom between the zamindars while it would be quite insufficient to prove the existence of the custom between muafidars.

Before finally deciding the appeal we think it desirable to send down certain issues to the court below. We accordingly refer the following issues :—

(1) Did the plaintiff refuse to purchase the property ?

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(2) Does any custom of pre-emption prevail which applies to the property the subject matter of the suit, and if so, is the plaintiff entitled under that custom to a decree in respect of the property which formed the subject matter of the two sale deeds?

(3) Did the plaintiff perform the conditions required by the Muhammadan law?

(4) What was the real price?

If the court finds it convenient without dislocating its business it will dispose of these issues as soon as possible. The parties may adduce further evidence relevant to the second issue but to no other issue. On return of the findings the usual ten days will be allowed for filing objections. The case will be put up early on return of the findings.

*Issues remitted.*

## FULL BENCH.

1914
*August*, 7

*Before Sir Henry Richards, Knight, Chief Justice, Justice Sir George Knox and Justice Sir Pramada Charan Banerji.*

EMPEROR *v.* CHIRANJI LAL.*

*Act No. III of 1907 (Provincial Insolvency Act), sections 43 and 46—Additional District Judge—Order punishing debtor for fraudulent dealings with account books—Appeal, whether appeal civil or criminal and to what court.*

*Held* by RICHARDS, C.J., and BANERJI, J., (KNOX, J., dissenting) that an appeal from an order of an Additional District Judge under section 43 (2) of the Provincial Insolvency Act, 1907, lies directly to the High Court and not to the Court of the District Judge. *Makhan Lal v. Sri Lal* (1) followed.

*Held* also, by RICHARDS, C.J., and KNOX and BANERJI, JJ., that such an appeal is an appeal on the civil side of the Court and not a criminal appeal.

THIS case first came up for hearing before a single Judge, who referred it to a Bench of two Judges, but was eventually on a recommendation by the Division Bench laid before a Full Bench.

The facts were as follows:—

On the application made by the applicant to be declared an insolvent he was asked by the Court to deposit his account books. He filed an affidavit showing that the books had been taken to another district to be used as evidence in a case pending there

* Criminal Appeal No. 600 of 1914 from an order of Pitambar Dat Joshi, Second Additional Judge of Aligarh, dated the 1st of July, 1914.

(1) (1912) I. L. R., 34 All., 382.