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view of the authorities, I do not think that the mere fact that Umrao Mirza had intimated to Ram Rijpal that he would object to the latter's building upon any portion of that land is sufficient to warrant a conclusion that the accused were acting unlawfully when they remained on his plot of land in order to set up enclosure walls, or that their intention was to annoy Umrao Mirza. Accepting this application I set aside the conviction and the sentence in the case. The fine, if paid, will be refunded.

Conviction set aside.

APPELLATE CIVIL.

1914
May, 15.

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

BHAGWATI SARAN MAN TIWARI (PLAINTIFF) *v.* PARMESHAR DAS AND OTHERS (DEFENDANTS).*

Pre-emption—Practice—Alternative claims—Claim for possession as owner joined with alternative claim for pre-emption.

There is nothing in law to prevent a plaintiff in a suit for pre-emption also setting up a claim for posession of the property as owner and his suit ought not to be dismissed on the ground that he has put his case in the alternative.

THE facts of this case were as follows :—

One Janki Saran, the father of the plaintiff, purchased a certain share in the village from one Musammat Moti Rani, a Hindu widow. A further share was acquired by Janki Saran by auction purchase in a sale in execution of a decree against the same Musammat Moti Rani. After the death of Moti Rani a person claiming to be the reversioner (Dwarka Das) sold the property to one Parmeshar, ignoring the sale by the widow and the auction sale in execution of the decree. Then the plaintiff instituted the present suit, claiming first a declaration that he was entitled to possession by virtue of the sale by Moti Rani and the auction purchase and secondly to pre-empt the property by virtue of a custom of pre-emption.

The court of first instance dismissed the plaintiff's suit on the sole ground that the plaintiff could not maintain the suit for pre-emption because he claimed a right of possession as full owner.

The plaintiff appealed to the High Court.

Munshi *Haribans Sahai*, for the appellant.

* First Appeal No. 356 of 1913 from a decree of Brish Chandra Basu, Additional Judge of Gorakhpur, dated the 6th of August, 1913.

Munshi *Iswar Saran* and Munshi *Benode Bihari*, for the respondents

RICHARDS, C. J., and TUDBALL, J.—This appeal arises out of a suit for pre-emption. It appears that Janki Saran, the father of the plaintiff, purchased a certain share in the village from one Musammat Moti Rani, a Hindu widow. A further share was acquired by Janki Saran by auction purchase in a sale in execution of a decree against the same Musammat Moti Rani. After the death of Moti Rani a person claiming to be the reversioner (Dwarka Das) sold the property to one Parmeshar ignoring the sale by the widow and the auction sale in execution of the decree. Then the plaintiff instituted the present suit, claiming, first, a declaration that he was entitled to possession by virtue of the sale by Moti Rani and the auction purchase and, secondly, to pre-empt the property by virtue of a custom of pre-emption. Janki Saran is the father of the plaintiff and they apparently are members of a joint Hindu family. Another suit for pre-emption was brought by Sheobaran alleging himself to be a co-sharer having a right of pre-emption under the custom. Each of the two pre-emptors was made a defendant to the suit by his rival. In the meanwhile Parmeshar Das brought a suit for possession of the property against Janki Saran and his sons, and that suit has been decreed. But the question of pre-emption was not decided.

The court below has dismissed the plaintiff's suit on the sole ground that the plaintiff cannot maintain the suit for pre-emption because he claimed a right of possession as full owner.

In our opinion this decision was wrong. There was no reason why the plaintiff should not put his case in the alternative. Had he not done so, it might strongly be urged that he was bound to put forward every ground of attack available. In *Gandharp Singh* v. *Sahib Singh* (1) a sale was made to certain members of a joint Hindu family some of whom were not recorded as co-sharers. A suit for pre-emption was brought by a person claiming to be a co-sharer who alleged that the vendees were strangers. A full Bench held that the vendors (being members of a joint Hindu family, which joint Hindu family was entitled

(1) (1884) I. L. R., 7 All., 184.

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to a share in the village) must be regarded as co-sharers, and not as strangers, and the suit of the plaintiff was dismissed. In the present case it is admitted that the family to which the plaintiff belongs owned a three anna share. Consequently, if we apply the principle laid down in the case referred to above, the plaintiff is a co-sharer, and would be entitled to pre-empt the property, provided that no one else has a prefential right. If his right of pre-emption is equal, he would be entitled to a decree in part. All these matters must be decided by the court below. We accordingly set aside the decree of the learned Additional District Judge and remand the case with directions to re-admit the appeal and proceed to hear and determine the same according to law, having regard to what we have stated above. The costs here and heretofore will be costs in the cause.

Appeal decreed and cause remanded.

1914
May, 15.

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

BABBU AND ANOTHER (DEFENDANTS) *v.* SITA RAM (PLAINTIFF) AND DRIG PAL SINGH AND OTHERS (DEFENDANTS).*

Mortgage—Consideration—Recital in mortgage deed of receipt of consideration—Evidence—Burden of proof.

Where a mortgage deed is proved to have been executed and the document contains an acknowledgment of the receipt of the consideration, this is strong *primâ facie* evidence that the consideration has been actually received and is evidence not only against the mortgagors but also against persons claiming under them subsequent to the date of the mortgage. The mere fact that a court was not satisfied with the evidence which the plaintiff adduced in addition to the acknowledgment would not absolve the defendants from producing evidence that, notwithstanding the acknowledgment in the body of the deed, there was no consideration in fact.

THIS was an appeal under section 10 of the Letters Patent from the judgement of a single Judge of the Court. The facts of the case appear from the judgement under appeal, which was as follows :—

"This was a suit for sale upon a mortgage made on the 23rd of September, 1898, by the defendants Drigpal Singh and Bhagwan Singh in favour of the plaintiff and the defendant Manni Lal. The fifth defendant is a subsequent mortgagee. Defendants 4 to 6 are subsequent transferees of part of the mortgaged property. The defendants other than the mortgagors alleged that they had no knowledge of the mortgage. The mortgagors admitted execution of the bond, but denied receipt of consideration. The court of first instance found that the mortgage bond, which was a registered document, had been duly

* Appeal No. 511 of 1912 under section 10 of the Letters Patent.