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 v.
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reluctant to interfere upon a merely technical ground with the proceedings resulting in the order of the 23rd of November, 1917, had I thought that everything which an accused person in a proceeding taken in respect of a continuing breach under section 307, clause (b), of the Local Municipalities Act, was entitled to have inquired into and considered had been as a matter of fact so inquired into and taken into consideration by the Magistrate, I think that this order of the 23rd of November, 1917 is open to objection in substance as well as in form. I set it aside accordingly. The sum of Rs. 102 required under the terms of this order to be paid by the accused Munshi Amir Hasan Khan, if paid, will be refunded.

It will be observed that, while accepting the rest of the reference made by the learned Sessions Judge, I have passed no order directing any refund in respect of the sum of Rs. 139 paid by Munshi Amir Hasan Khan prior to the order of the 23rd of November, 1917. No doubt that payment was actually made in compliance with that portion of the order of the 8th of January, 1917, which I have set aside as inoperative; but a liability to a fine for a continuing breach attached to Munshi Amir Hasan Khan under the provisions of the statute itself, independently altogether of the above order. He has virtually assessed his own liability at Rs. 139, and I can see no reason why this should not be accepted. At any rate I pass no order of re-payment in respect of this sum of Rs. 139. Let the record be returned.

Record returned.

APPELLATE CIVIL.

1918
 April, 19.

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

CHABRAJ SINGH AND OTHERS (PLAINTIFFS) v. MAHESHI NARAIN
 SINGH AND OTHERS (DEFENDANTS).*

Pre-emption—Purchases made by vendee on different dates—Suit to pre-empt first sale only—Vendee claiming to be co-sharer in virtue of second purchase—Suit not maintainable.

The defendant purchased shares in a village on two different dates. The plaintiff sued to pre-empt the earlier sale, but no suit was brought

* Second Appeal No. 1629 of 1917, from a decree of Shekhar Nath Banerji, Subordinate Judge of Jaunpur, dated the 31st of July, 1917, confirming a decree of the Munsif of Jaunpur, dated the 28th of April, 1916.

in respect of the second sale. *Held* that the suit was not maintainable.

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ONE Kuber Singh sold to Mahesh Narain Singh his share in a certain village by three sale-deeds, dated the 11th of November, 1913, the 27th of November, 1913, and the third in January, 1914. For the purposes of this report the third sale is not material. The sale of the 27th of November, 1913 related to the largest share. The plaintiffs claimed to pre-empt the share sold on the 11th of November, 1913, but not the share sold on the 27th of November, 1913. The suit relating to the first sale was filed on the 12th of December, 1913, in the court of the Munsif, who dismissed it on the 31st of August, 1914, on the ground that the plaintiffs could not prove either a custom or a contract of pre-emption. The plaintiffs appealed. The Additional Subordinate Judge, on the 24th of July, 1915, allowed the appeal and held that a contract of pre-emption had been proved and remanded the case for trial on the merits. The case came to the Munsif for trial who on the 28th of April, 1916, again decided against the plaintiffs on the ground that no suit having been filed about the second sale, and the time for filing such suit having expired, the defendant vendee became a co-sharer in the village and therefore the suit relating to the first sale must fail. This decree of the Munsif was confirmed in appeal. The plaintiffs appealed to the High Court.

Babu *Akhilnath Sanyal*, for the appellants :—

The vendor deliberately sold his share on different dates to put the plaintiffs off the track and prevent inquiry by them. The appellants had no knowledge of the second sale. The defendant vendee should have stated in his defence that he had become a co-sharer by the purchase of the 27th of November, 1913. The plaintiffs could then have known about this sale and could have brought a suit for pre-emption. According to the trend of rulings of this Court the defendant vendee could not be considered a co-sharer in the village. He had a defeasible right. On the 31st of August, 1914, when the Munsif decided against the plaintiffs, one year from the date of the second sale had not expired. A suit could have been brought to pre-empt that sale and therefore the title of the defendant vendee was not then complete. It

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follows therefore that on the 31st of August, 1914, when a decree ought to have been passed in plaintiffs' favour, their right to pre-empt could not have been defeated on the plea that the defendant vendee had become a co-sharer; *Rohan Singh v. Babu Lal* (1). This Court has all along held that, so long as the period for instituting a suit for pre-emption has not expired a vendee cannot be considered a co-sharer for the purpose of a pre-emption suit. In the present case on the 31st of August, 1914, the time to bring the pre-emption suit had not expired; *Kaleshar Rai v. Nabiban Bibi* (2).* The defendant vendee should have said in his defence that he had become a co-sharer as soon as he purchased, and, not having done so, he cannot take advantage of this plea.

RICHARDS, C.J., and TUDBALL, J.:—It appears from the finding of the court below that the vendee had become a co-sharer by purchase on the 27th of November, 1913, that is to say, before the present suit was instituted. No suit for pre-emption was ever instituted in respect of this second purchase. The result is that not only on the day upon which the court of first instance might have made its decree in favour of the plaintiff, but even before the institution of the suit, the defendant vendee had become a co-sharer. It may be unfortunate that this matter was not gone into by the court in the first instance, which might have had the effect of giving the plaintiff express notice of the sale of the 27th of November, 1913 (which the learned vakil says he was ignorant of). This may have been an unfortunate circumstance for the plaintiff and a lucky one for the defendant vendee, but the fact remains that when the case was tried the vendee was able to prove that he was a co-sharer with the vendor before the date of the institution of the suit. In this view the decree of the court below was correct. We dismiss the appeal.

Appeal dismissed.

*[*Note*.—The decision was affirmed in Letters Patent Appeal—See 4 A. L. J., 351—ED.]

(1) (1909) I.L.R., 31 All., 530.

(2) (1906) I.L.R., 28 All., 642.