vendor and vendee cannot defeat the pre-emptor by dressing up the transaction in the garb of a lease. The same thing has been held in the Punjab, where apparently the right of pre-emption is regulated by Act. We can see no good reason why the same principle should not apply to cases where the right is one under the Muhammadan law. It is clear that the case must go back to the lower appellate court. We accordingly allow the appeal; set aside the decree of the lower appellate court, and remand the case to that court with directions to re-admit the appeal upon its original number in the file and proceed to hear and determine the same according to law, regard being had to what we have stated. Costs here and heretofore will be costs in the cause.

Appeal decreed and cause remanded.

Before Mr. Justice Muhammad Rafiq and Mr. Justice Piggott.

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January, 18.

GOKUL (PLAINTIFF) *v.* MOHRI BIBI (DEFENDANT)*

Civil Procedure Code (1908), *order XXI, rule* 58—*Execution of decree—Act No. IX of* 1908 (*Indian Limitation Act*), *schedule I, article* 11—*Limitation—Objection to attachment dismissed—Subsquent suit for possession—Investigation of objection by Court.*

Article 11 (1) of the first schedule to the Indian Limitation Act, 1908, applies only to those orders made under order XXI, rule 58, which are made after investigation of the claim or objection; but it does not follow that, merely because the claimant has not adduced evidence or has not appeared, there has been no investigation within the meaning of the rule. *Rahim Bux* v. *Abdul Kader* (1), *Shagun Chand* v. *Shibbi* (2), *Chandi Prasad* v. *Nand Kishore* (3), *Lachmi Narain* v. *Martindell* (4), and *Kunj Behari Lal* v. *Kandh Prasad Narain Singh* (5) referred to.

THE facts of the case are fully set forth in the judgement. Briefly stated, for the purpose of this report, they were as follows:—In execution of a simple money decree in favour of Basant Lal against Jageshar, a certain fixed-rate holding was attached as being the property of Jageshar. Thereupon an objection under section 278 of the Code of Civil Procedure of 1882 was

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* Second Appeal No. 51 of 1916, from a decree of E. Bennet, Subordinate Judge of Mirzapur, dated the 5th of August, 1915, confirming a decree of Shibendra Nath Banerji, Munsif of Mirzapur, dated the 29th of March, 1915.

(1) (1904) I. L. R., 32 Calc., 537.
(2) (1911) 8 A. L. J., 626.
(3) (1913) 20 Indian Cases, 369.
(4) (1897) I. L. R., 19 All., 253.
(5) (190) 6 C. L. J., 362.

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filed by Gokul, minor, through his next friend, his mother, claiming that a portion of the holding belonged to him and not to Jageshar and was, therefore, not liable to be attached and sold in execution of the decree. On the 15th of June, 1901, the date fixed for hearing of the objection, an application was made by the objector's pleader praying for an adjournment on the ground that information of the date of hearing had reached the minor's guardian too late to take steps for summoning witnesses. This application was rejected, and the objection was dismissed by the following order:—"This is an objection under section 278, Civil Procedure Code. The correctness of it is disputed by the decree holder. The objector has produced no evidence to make out the truth of his claim, and it is disallowed with costs." The attached property was thereafter put up to auction sale and purchased by the decree-holder, who obtained actual possession on the 23rd of February, 1904. On the 20th of June, 1914, Gokul instituted a suit against Basant Lal's widow for possession of his share of the holding. He stated that he had attained majority in June, 1912. The defendant pleaded, *inter alia*, that the suit having been brought more than a year after the dismissal of the objection under section 278 was barred by limitation under article 11 of the Limitation Act. This plea was upheld and the suit dismissed by both the lower courts. The plaintiff filed a second appeal in the High Court.

Mr. *S. A. Haidar* for the appellant:—

The cause of action for the suit is the dispossession of the plaintiff on the 23rd of February, 1904, and the suit being brought within 12 years thereof, is not barred by limitation. The lower courts have misapplied article 11 of the Limitation Act. The order of the 15th of June, 1901, dismissing the objection under section 278 of the former Code was not of such a character as to be conclusive on failure of the objector to bring a suit within one year. It has been laid down that unless the investigation which is clearly contemplated by section 278 has been made and the matter has been judicially determined by the court, the order passed by it cannot be regarded as one made under section 281. The only order upon which the character of finality is impressed by section 283 is an order properly made under section 281, i.e. after investigation and inquiry; *Kallar*

Singh v. *Toril Mahton* (1), *Kunj Behari Lal* v. *Kandh Prasad Narain Singh* (2), *Sarala Subba Rau* v. *Kamsala Timmayya* (3), *Sujan Ram* v. *Ram Rattan* (4). In these cases the order disallowing the claim was passed in default of appearance, and it was held that, as there had been no investigation whatever on the merits, the order was not conclusive, and article 11 of the Limitati Act was not applicable to the suit subsequently instituted by the claimant. In the present case, too, there was no inquiry into the merits. Although on the date fixed the pleader for the objector put in an application for adjournment on the ground that witnesses could not be summoned, still that fact alone would not make the dismissal other than a dismissal for default of appearance. *Lalta Prasad* v. *Nand Kishore* (5).

There are some cases of the Allahabad High Court which may be cited against me, but they are distinguishable. The case of *Lachmi Narain* v. *Martindell* (6) was decided under the former Rent Act XII of 1881 and not under the Code of Civil Procedure. Having regard to the fact that the scheme and object of that Act are different from those of the Code of Civil Procedure, that case has no bearing here. In the case of *Shagun Chand* v. *Shibbi* (7) the claimant's pleader stated, on the date fixed, that his client did not wish to adduce any evidence. That was practically an admission that he could not subtantiate his claim, and the order of dismissal under those circumstances was virtually a judgement that the claim was without merits; in a sense there was the best investigation possible under the circumstances. The matter is very different in the present case, in which the claimant was anxious to adduce evidence, and what he prayed for was an opportunity to produce that evidence. The refusal of the prayer for adjournment shut out the claimant from sustantiating his claim on the merits so that there was no investigation of those merits. A similar case was that of *Chandi Prasad* v. *Nand Kishore* (8), in which the claimant had summoned his witnesses but deliberately abstained from producing them. In the case of *Rahim Bux* v. *Abdul Kader* (9) a list of witnesses desired to be

(1) (1895) 1 C. W. N., 24.
(2) (1907) 6 C. L. J., 362.
(3) (1907) I. L. R., 31 Mad., 5.
(4) (1904) Punj. Rec., p. 818.
(5) (1899) I. L. R., 22 All., 66.
(6) (1897) I. L. R., 19 All., 253.
(7) (1911) 8 A. L. J., 626.
(8) (1913) 20 Indian Cases, 869.
(9) (1904) I. L. R., 32 Calc., 537.

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summoned had been put in, but the necessary process fees were not paid. By his own conduct the claimant had put it beyond his power to prove his case. The circumstances of the present case are quite different. The correctness of the decision in the last mentioned case was doubted in *Sarat Chandra Basu* v. *Tarini Prasad Pal Chowdhry* (1), which is entirely in my favour.

[The argument then proceeded to deal with another point] Dr. *Surendra Nath Sen*, for the respondent, was not called upon.

MUHAMMAD RAFIQ and PIGGOTT, JJ :—The facts which have given rise to this appeal are as follows :—

There were three brothers, Kauleshar, Chandu and Jageshar, who owned a fixed-rate holding of seven bighas and five biswas. According to the plaint the three brothers separated and the holding was privately divided amongst them. On the 9th of January, 1900, the name of Jageshar was entered in respect of two bighas and five biswas, and the rest, five bighas, stood in the name two of brothers, Kauleshar and Chandu. Kauleshar died leaving him surviving his son, Gokul. Chandu died leaving him surviving a widow only and no issue. One Basant Lal obtained a simple money decree against Jageshar, one of the brothers mentioned above, and against Govind, a third party. In execution of his decree Basant Lal attached the whole of the holding, namely, the fixed-rate holding of seven bighas and five biswas. At the time of the attachment the two widows of Kauleshar and Chandu were alive, as also the son of Kauleshar called Gokul, who was a minor at the time. On the 27th of March, 1901, Gokul filed an objection through his mother as guardian, objecting to the attachment, presumably on the ground that his father and uncle, Chandu, were separate from Jageshar and their property was not liable to sale and attachment in the decree of Basant. On the 5th of June, 1901, the date fixed for hearing the objections, an application was presented to the court on behalf of the guardian of the minor praying for an adjournment, on the ground that the information of the date of hearing had reached the guardian too late to take steps for production of evidence. The learned Subordinate Judge rejected the application for adjournment and proceeded to dispose of the objections. The order, made on the objections, is as follows :—" This is an

(1) (1907) I. L. R., 34 Calc., 491.

objection under section 278 of the Civil Procedure Code. The correctness of it is disputed by the defendants. The objector has produced no evidence to make out the truth of his claim and it is dismissed with costs." After the rejection of the objection the entire holding of seven bighas and five biswas was put up to auction and purchased by Basant Lal, the decree-holder. On the 21st of June, 1902, the amin, who was deputed to deliver possession to the purchaser, reported that the widows of Kauleshar and Chandu had obstructed him in his duties. The purchaser having taken no steps, his application for delivery of possession was rejected on the 5th of July, 1902. On the 19th of July, 1903, he again applied for delivery of possession and succeeded in getting it on the 23rd of February, 1904. On the 20th of June, 1914, Gokul, the plaintiff appellant, instituted the suit out of which this appeal has arisen, for possession of five bighas of the fixed-rate holding on the allegation that said the land was not liable to attachment and sale in execution of the decree of Basant Lal against Jageshar. Gokul further stated in his plaint that his father Kauleshar and his two uncles, Jageshar and Chandu, had separated long prior to the decree of Basant and had divided the holding equally amongst themselves. After the separation each brother was in possession of his own share. Basant Lal, the decree-holder, could only sell the share of Jageshar. At the time of the execution of the decree of Basant Lal he, the plaintiff, was a minor and was entitled to object as regards the share of the holding that belonged to his father only. Chandu's widow, Musammat Katwari, was alive at the time of the attachment and the sale of the holding. She died some years after. On her death the share of Chandu came to the plaintiff as the reversionery heir. He attained majority in June, 1912, hence the suit was brought for recovery of the possession of that portion of the holding which belonged to his father and his uncle, Chandu. The claim was resisted on various pleas. It was urged on behalf of the defendant that the three brothers were joint and had never separated and that the decree against Jageshar had been passed in the capacity of the *karta* of the family. It was therefore binding on all the three brothers and their legal representatives. The plea of limitation was urged in respect of the entire claim on the basis of the

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plaintiff's objections, dated the 27th of May, 1901. The learned Munsif in whose court the suit was filed held that the three brothers were joint and therefore the decree of Basant Lal was binding on the plaintiff. He further found that the objections, dated the 27th of May, 1901, made by the plaintiff through his mother related to the whole of five bighas, the alleged share of Chandu and Kauleshar, and the objections having been dismissed and the suit having been brought more than one year after the dismissal, the present claim was barred under article 11 of schedule I to the Limitation Act. The plaintiff preferred an appeal to the District Judge who disagreed with the first court as to the status of the family of the three brothers but agreed with it as to the plea of limitation. The learned District Judge held that the three brothers were separate but that the claim was obviously barred under article 11 of schedule I to the Limitation Act.

The plaintiff in his second appeal to this Court advances two contentions. He says that his claim is not barred under article 11 of schedule I of the Limitation Act, inasmuch as his objection was dismissed without any investigation, and, secondly, in any case his claim with regard to two bighas, ten biswas, of the holding which he inherited from his uncle, Chandu, after the death of the latter's widow, cannot be said to be barred by limitation as the lady died after the dismissal of the objections, and she had taken no objection to the attachment and sale of the holding. The second contention may be dismissed in a few words. There is a distinct finding of the learned Munsif that the objections of the plaintiff related to five bighas of the holding, that is, the share of his, i.e., plaintiff's, father and uncle. The plaintiff took no objection to this finding in his appeal to the District Judge. There is nothing on the record to make us come to a different conclusion and hold that the objection related only to the share of Kauleshar. In the plaint itself the plaintiff does not mention the fact of having made an objection in 1901 and there does not seem to be any replication or any statement by him in reply to the written statement that his claim was barred because it was brought a year after the order of the 5th of June, 1901. In support of the first contention a number of cases have been cited by the learned counsel for the plaintiff appellant. The following

cases have been relied upon by the plaintiff, namely, *Kallar Singh* v. *Toril Mahton* (1), *Kunj Behari Lal* v. *Kandh Prasad Narain Singh* (2), *Sarat Chandra Basu* v. *Tarini Prasad Pal Chowdhry* (3), *Sarala Subba Rau* v. *Kamsala Timmayya* (4) and *Sujan Ram* v. *Rattan* (5). According to these cases, an objection made under section 278 of the old Code of Civil Procedure, corresponding to order XXI, rule 58, of the present Code, if dismissed without investigation, would take the case of the objector out of the operation of one year's rule of limitation. But the question is what does the word "investigation" mean? There are cases which go to show that the circumstances under which the objections of the plaintiff were disposed of were not such as to warrant the conclusion that they were decided without investigation, *vide—Rahim Bux* v. *Abdul Kader* (6), *Shagun Chand* v. *Shibbi* (7) and *Chandi Prasad* v. *Nand Kishore* (8). We would also refer to *Lachmi Narain* v. *Martindell* (9), for the principle according to which the limitation of one year should be enforced. Most of the case-law has been discussed by Mr. Justice MUKERJI in the case of *Kunj Behari Lal* v. *Kandh Prasad Narain Singh* (2). After the consideration of the case-law the learned Judge concludes thus:—"It is manifest, therefore, from the language of the Code itself, that the only order upon which the character of finality is impressed is an order made upon inquiry." He also remarks:—"It does not follow, however, that merely because the claimant does not advance evidence or is absent, there are no materials before the court to enable it to inquire into the matter." In the present case the learned Subordinate Judge dismissed the objections of the plaintiff, not in default, nor without any investigation. It is true that the plaintiff produced no evidence in support of his objections, but it does not follow that there was no material on the record to enable the Judge to dispose of the objections. We think that the cases relied upon by the plaintiff appellant are distinguishable from the case before us.

The appeal therefore fails and is dismissed with costs.

Appeal dismissed.

(1) (1896) 1 C. W. N., 24.
(2) (1907) 6 C L. J., 362.
(3) (1907) I. L. R., 34 Calc., 491.
(4) (1906) I. L. R., 31 Mad., 5.
(5) (1904) Punj. Rec., p. 318
(6) (1905) I. L. R., 32 Calc., 537.
(7) (1911) 8 A. L. J., 626.
(8) (1903) 20 Indian Cases, 369.
(9) (1897) I. L. R., 19 All., 253.