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proceeds upon an error of law. Assuming that point, however, in his favour, it seems to me that the reasoning of the District Judge is correct. For the sake of argument, take the case of an ordinary creditor of an occupancy tenant. That creditor is pressing for payment and is willing to take in satisfaction of his claim such profits as he may be able to make out of one-half of the occupancy holding. The tenant is forbidden by law to transfer his interests as such tenant; but he can sub-let, or he can make an assignment of the profits from year to year. Suppose that he gives his creditor the right to occupy and cultivate for his own benefit certain specific plots, forming part of his holding, and agrees only to take in the way of rent the same sum which he will himself have to pay to the landlord on account of those plots. The transaction amounts virtually to a sub-letting in favour of the creditor. The creditor thereby acquires no rights as against the zamindar, and his rights as against the occupancy tenant are limited by the terms of the contract between them. I think therefore that the finding of the District Judge on the fourth issue remitted to him is correct in law and is decisive of the appeal now before us. I would therefore dismiss the appeal with costs.

WALSH, J.—I agree.

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

Appeal dismissed.

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January, 16.

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

MUHAMMAD NIAZ KHAN, AND OTHERS (PLAINTIFFS) *v.* MUHAMMAD IDRIS KHAN AND ANOTHER (DEFENDANTS)*

Muhammadan law—Pre-emption—Sale disguised as a lease in order to defeat pre-emption—Device not permissible under the Muhammadan law.

In a suit for pre-emption, whether the right is claimed under the Muhammadan law or by virtue of a custom of pre-emption, it is the duty of the Court, if the question is raised, to consider and decide whether the transaction in respect of which the claim is brought is or is not in substance a sale, though it may be disguised in some other form, as for instance, in that of a lease.

There is no rule of Muhammadan law which renders it permissible for a transaction of sale to be framed as a lease so as to avoid claims for pre-emption.

THIS was a suit for pre-emption under the Muhammadan law. A plot of land in the town of Zamania in the district of Ghazipur

* Second Appeal No. 1280 of 1915, from a decree of Ram Prasad, District Judge of Ghazipur, dated the 4th of May, 1915, reversing a decree of Muhammad Muzaffar Imam, Munsif of Ghazipur, dated the 17th of December, 1914.

was transferred by a deed, dated the 21st of July, 1913, purporting to be a perpetual lease, under the terms of which Rs. 250 was paid as a premium and annas two was reserved as rent per year. The plaintiffs sued for pre-emption, alleging that the transaction was in fact a sale. The court of first instance decided in favour of the plaintiffs' contentions. The lower appellate court was of opinion that, even if it were taken for granted that the real object was to sell the land and that the lease was executed to avoid a pre-emption suit, the point for determination was whether or not the execution of a lease could be held to be a legal device (*heelah sharai*) under the Muhammadan law to defeat the right of pre-emption. The court held that under the Muhammadan law such a device could defeat the right of pre-emption, and dismissed the suit without deciding any other point.

The plaintiffs appealed.

Mr. *Ishaq Khan*, for the appellants:—

The court below is wrong in holding that such a device is allowed under the Muhammadan law for the purpose of defeating a right of pre-emption. In the following cases pre-emption was allowed, notwithstanding the adoption of such or similar devices; for example, where no sale deed was executed, or where the deed was ostensibly a mortgage or a perpetual lease reserving a nominal rent:—*Janki* v. *Girjadat* (1). *Begam* v. *Muhammad Yaqub* (2), *Tara Chand* v. *Baldeo* (3), *Parma Nand* v. *Airapat Ram*, (4), *Muhammad Umar* v. *Kirpal* (5), *Anwar Hasan* v. *Umatul Karim* (6), *Amar Singh* v. *Sadhu Singh* (7) and *Lalji Misr* v. *Jaggu Tiwari* (8).

Dr. *S. M. Sulaiman*, (with him Maulvi *Iqbal Ahmad*), for the repondents:—

The lower appellate court has in effect found that the transaction was not a sale but really a perpetual lease. Upon that finding the claim for pre-emption must fail. It has been held that under the Muhammadan law no right of pre-emption arises in respect of perpetual leases, however small the rent reserved may be; *Moorooly Ram* v. *Baboo Huree Ram* (9), *Babu*

(1) (1885) I. L. R., 7 All., 482.
(2) (1894) I. L. R., 16 All., 344.
(3) (1890) Punj. Rec., p. 371.
(4) (1899) Punj. Rec., p. 118.
(5) (1904) Punj. Rec., p. 263.
(6) (1906) Punj. Rec., p. 618.
(7) (1914) 23 Indian Cases, 970.
(8) (1910) I. L. R., 33 All., 104.
(9) (1867) 8 W. R., 106.

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MUHAMMAD NIAZ KHAN v. MUHAMMAD IDRIS KHAN.

Ram Golam Singh v. *Nursing Sahoy* (1) and *Dewanutulla* v. *Kazem Molla* (2).

RICHARDS, C. J., and TUDBALL, J.:—This appeal arises out of a suit brought for pre-emption under the Muhammadan law. The property transferred is a small piece of land in the town of Zamania. The transfer was made in the form of a perpetual lease. The amount paid down was the sum of Rs. 250 and a nominal rent of two annas per annum was reserved. The court of first instance decreed the suit, holding that there was a sale, and that the plaintiff had a right. The lower appellate court held that pre-emption under the Muhammadan law did not apply to the case of leases. Accordingly, without deciding the other issues, the lower appellate court reversed the decree of the court of first instance and dismissed the suit. We think, reading the judgement of the lower appellate court, that the learned District Judge never intended to overrule the finding of the court of first instance that the transaction, though carried out in the form of a lease, was in reality a sale. We think that he intended to decide that a Muhammadan could make a transfer *in the form of a lease*, notwithstanding that the real intention of the parties was a sale, and so defeat pre-emption, in other words, that such devices are not unknown in the Muhammadan law and are legitimate. In our opinion the court was entitled and bound on the issue being raised to consider at the instance of the plaintiff claiming pre-emption, what was the real nature of the transaction. It was entitled to consider the sum which was paid down, the smallness of the rent, and the value of the property; and if, after considering all these matters, it came to the conclusion that the transaction was in truth and fact a sale, it should hold that the right of pre-emption arose, and proceed to consider whether the plaintiff by due observance of the requirements of the Muhammadan law was entitled to get the property. If the court came to the conclusion that in the truth and substance and not merely in form the transaction was a lease then the suit should be dismissed on the ground that the Muhammadan law does not apply to transfers by way of leases. It has been more than once decided in this Court that where a custom of pre-emption prevails upon sale the

(1) (1875) 25 W. R., 48. (2) (1887) I. L. R., 15 Calc., 184.

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.

1918
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.