

if the defence of Mathura Das is kept out. We, therefore, allow both the appeals of Jai Ram Das and Mathura Das and set aside the orders of the learned Subordinate Judge, dated the 12th of August and the 28th of August, 1919, respectively, striking off the defence of Jai Ram Das and Mathura Das. The result, therefore, is that we set aside the *ex parte* decree in the connected appeal No. 319 of 1919 and also direct that the case be restored to the file of the court below, defences from Jai Ram Das and Mathura Das received, and the case tried according to law. As to costs, we direct that they should be costs in the cause.

*Appeals allowed.*

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

BASDEO RAI AND ANOTHER (DEFENDANTS) v. JHAGRU RAI (PLAINTIFF.) \*

*Pre-emption—Pleadings—Suit based on custom dismissed on finding of want of proof—Case of contract set up in appeal—Remand—Form of order.*

In a suit for pre-emption based on an alleged custom the court of first instance found that the custom was not proved, and accordingly dismissed the suit. On appeal the plaintiff raised an oral plea that the village papers afforded evidence of a subsisting contract which would support a decree in the plaintiff's favour. With reference to this plea the lower appellate court set aside the decree of the first court and remanded the case for trial on the merits.

*Held*, that the proper course for the lower appellate court was to remand the case with permission to the plaintiff to amend his plaint, basing his case on the ground of contract, the defendants being allowed to put in their defence to the new plea and to produce evidence, if necessary. *Ram Gharib Tewari v. Shankar Tewari* (1) referred to.

THE facts of this case sufficiently appear from the judgment of the Court.

Babu Piari Lal Banerji, for the appellants.

The respondent was not represented.

RAFIQ and PIGGOTT, JJ.:—This appeal is from an order of remand made by the lower appellate court under order XLI, rule 23. It appears that Munna Rai executed a deed of sale in favour of Basdeo Rai and Sat Narain Rai in respect of certain immovable

\* First Appeal No. 212 of 1921, from an order of Piari Lal Rastogi, Additional Subordinate Judge of Basti, dated the 2nd of June, 1921.

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SUGAR  
MILLS Co.  
LD.,  
v.  
RAM  
GHANDRA  
GUR SAHAI  
COTTON  
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property. Jhagru Rai sued to recover the said property by right of pre-emption. Jhagru alleged in his plaint that a custom of pre-emption obtained in the village in which the property in dispute was situate and that he, being a co-sharer, had a preferential right over the vendees, who were strangers. The court of first instance found that the custom alleged in the plaint had not been proved. The claim was accordingly dismissed. On appeal by the pre-emptor, it was contended on his behalf, though no such ground was taken in the memorandum of appeal, that inasmuch as there was a mention of pre-emption in the *zamima khewat*, the pre-emptor was still entitled to succeed, if not on the ground of custom, at least on the ground of contract. The lower appellate court acceded to the contention and, setting aside the decree, remanded the case for trial on the merits. The vendees in appeal to this Court challenge the order of remand and contend that the lower appellate court should not have accepted the contention of the pre-emptor, and if it did, it should have remanded the case to the court of first instance, directing the amendment of the plaint and the framing of an issue with regard to the alleged contract of pre-emption, and then the case should have been disposed of. In support of his contention the learned counsel for the vendees refers us to the case of *Ram Gharib Tewari v. Shankar Tewari* (1). The case relied upon by the appellants before us does bear out the contention for them to a certain extent. In that case the first appellate court had decreed the claim of the pre-emptor, holding that though he had failed to prove the alleged custom of pre-emption yet the *wajib-ul-arz* could be construed to contain a contract of custom and, as the period of the *wajib-ul-arz* had not expired, the contract would be considered to be still in force. The facts of the present case are slightly different. In the present case, the lower appellate court has not decreed the claim of the pre-emptor on the basis of contract, but has only remanded the case to the first court for trial on the merits. We, however, think that the contention of the appellants is so far correct that the lower appellate court should not have recorded a finding to the effect that the contract of pre-emption stood proved as between

(1) (1921) 20 A. L. J., 15.

the parties. If the lower appellate court was inclined to think that the paper upon which the plaintiff pre-emptor relied evidenced a contract, and that that contract was still in force at the time that the disputed sale was made and the present suit instituted, the plaintiff pre-emptor should have been allowed to amend his plaint and the case should have been remanded for trial on the amended plaint. We, therefore, allow the appeal and modify the order of the court below to this extent that the case will go back to the first court for trial with permission to the plaintiff pre-emptor to amend his plaint, basing his claim on the ground of contract. The defendants vendees would, of course, be allowed to urge their defence to the new plea and to give evidence if they think it necessary. With this modification the order of the court below is affirmed. As to costs, we think the costs should abide the event.

*Order modified.*

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

PANCHAYATI AKHARA MAHA NIRBANI (PLAINTIFF) v. THE  
SECRETARY OF STATE FOR INDIA IN COUNCIL (DEPENDANT).\*

*Suit against Secretary of State for India in Council—Cause of action—  
Plaintiff deprived of goods by erroneous order of Magistrate.*

The plaintiff came into court on the following allegations: that he, being in lawful possession as pawnee of certain ornaments, had made over the same to the Court Inspector of Fyzabad, as they were required to be produced in a criminal case. Subsequently, however, the ornaments, instead of being returned to him, were made over by the court of the Pargana Officer at Fyzabad to the original owner, one Pashpat Nath. The plaintiff, therefore, sued the Secretary of State for India in Council for damages.

*Held* that the plaint disclosed no cause of action against the Secretary of State. *The Secretary of State for India in Council v. Sukhdeo* (1) followed.

THE facts of the case sufficiently appear from the judgment of the Court.

*Dr. Kailas Nath Katju and Pandit Kashi Narain Malaviya, for the appellants.*

*Babu Lalit Mohan Banerji, for the respondent.*

\* Second Appeal No. 1086 of 1920, from a decree of B. J. Dalal, District Judge of Allahabad, dated the 1st of June, 1920, confirming a decree of Gauri Shankar Tewari, Officiating Subordinate Judge of Allahabad, dated the 19th of December, 1919.

(1) (1899) I. L. R., 21 All., 341.

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