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more reasonable? The refusal to accept the office of guardian *ad litem* of the minors in question was based upon no sufficient ground, and was palpably made to delay the proceedings. I consider that a mortgagor has done all that has to be done by him when he deposits the sum due on the date of the deposit, when he presents a duly verified petition and when he states to the best of his knowledge and ability the correct address of an adult mortgagee, and I would only superadd as a duty in the case of a minor mortgagee, the proposing of a suitable person as a guardian *ad litem*. To ask him to see that the guardian *ad litem* is appointed is to ask him to do something which it is not in his power to do.

For the above reasons I consider that the deposit made on the 24th day of September, 1913, was sufficient. I do not understand it to be seriously argued in this Court that the deposit was not sufficient on that date. I should take the view which was taken by the trial court and allow the plaintiffs to sell the mortgaged property and the prior mortgagees to take the deposit out of court. As, however, this view is not the view taken by my learned senior brother the order on the appeal will stand as laid down in his judgment.

BY THE COURT:—The appeal is dismissed with costs, subject to the modification noted in the judgment.

Appeal dismissed.

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Before Mr. Justice Tudball and Mr. Justice Sulaiman.

SAID-UD-DIN (DEFENDANT) *v.* LATIF-UN-NISSA BIBI (PLAINTIFF) AND SHAFI-UN-NISSA BIBI (DEFENDANT).*

Pre-emption—Muhammadan law—Shafi-shariq—Basis of right of pre-emption—Imperfectly partitioned mahal.

In the case of zamindari property, where the Muhammadan law of pre-emption applies, the basis of the right of pre-emption as a shafi-shariq is the common liability for payment of Government revenue. Where, therefore, the property sold is part of an imperfectly partitioned mahal, it does not make any difference whether the pre-emptors own shares within the same sub-division of the mahal as the share sold or not. *Jadu Lal Sahu* v. *Janki Koer* (1 referred to.

*Second Appeal No. 696 of 1920, from a decree of Murari Lal, Additional Judge of Moradabad, dated the 12th of February, 1920, confirming a decree of Mohsin Ali Khan, Munsif of Nagina, dated the 20th of May, 1919.

(1) (1912) I. L. R., 39 Calc., 915.

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THE facts of this case are fully stated in the judgment of the Court.

Babu *Piari Lal Banerji*, for the appellant.

Maulvi *Iqbal Ahmad*, for the respondents.

TUDBALL and SULAIMAN, JJ.:—Second Appeals Nos 696 and 697 are two appeals arising out of a pre-emption suit. Admittedly the rules of the Muhammadan Law apply to the case. The property in question consisted of zamindari shares in 5 khatas in one mahal. The 5 khatas are Nos. 17, 25, 49, 29 and 48. The plaintiff, the vendee, and the vendor at the date of sale were all co-sharers in the mahal. The plaintiff, however, owned shares in khatas nos. 17, 25 and 49. The vendee had no shares in any of the 5 khatas. The plaintiff claimed that he was entitled as being a co-sharer in khatas 17, 25 and 49 to a decree for pre-emption in respect to the whole of the shares sold in those 3 khatas.

In regard to Nos. 29 and 48 he claimed that he stood on the same footing as the vendee and, therefore, under the law as administered in these Provinces, he was entitled to a half of the property sold in these two khatas. The court of first instance gave the plaintiff a decree for half of the property sold in each of the 5 khatas, relying on the ruling in *Jadu Lal Sahu* v. *Janki Koer* (1). Both parties appealed to the lower appellate court. The plaintiff claimed that he was entitled to the whole of the shares sold in khatas 17, 25 and 49. The defendant appealed in respect to all the property sold. The lower appellate court dismissed the defendant's appeal completely, but allowed the plaintiff's appeal and gave the plaintiff a decree for the whole of the shares sold in khatas Nos. 17, 25 and 49 and upheld the first court's decree in respect to the half shares in Nos. 29 and 48. The defendant has come here in second appeal, and reliance is placed on the ruling of the Privy Council in the abovementioned case, and it is urged before us that the plaintiff and the vendee are both co-sharers in the mahal, that they, therefore, stand upon the same footing and that the utmost that the plaintiff is entitled to recover is a half share of the property sold in each of the khatas. The learned vakil for the appellant has to admit that, in face of

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the rulings in *Amir Hasan* v. *Rahim Bakhsh* (1) and *Abdullah* v. *Amanat-ul-lah* (2), the plaintiff is entitled as a pre-emptor, if he stands on the same footing with the defendant vendee, to recover a half share in the properties sold. On behalf of the respondents it has to be also admitted that there is no difference really between the circumstances of the case now before us and those of *Jadu Lal Sahu* v. *Janki Koer* (3). In that case it was laid down by their Lordships of the Privy Council "that the claim to co-parcenary on which the plaintiff's right of pre-emption was based arose out of the fact that the vendor and pre-emptor were jointly liable to the payment of the Government revenue assessed on the villages in the mahal and that this joint liability does constitute the co-parcenary contemplated by the Muhammadan law."

Towards the end of the paragraph on page 533 of the report it is remarked as follows:—

"A mahal is a unit of property; it may consist of one village or of several villages; it may be owned by one or several proprietors who may have an interest in all or some of the villages comprised in the estate. Their joint liability for the Government revenue arises from the fact that they own undivided interests in the property, and that joint liability does not cease in the case of any co-sharer until his particular share has been partitioned by the revenue authorities, when the share so partitioned becomes a separate unit of property."

We must assume that this is a correct proposition of law, and if it is, then all the co-sharers in a mahal, though they may not own rights in various portions of the mahal, stand upon the same footing so far as the right of pre-emption under Muhammadan law is concerned. We would like to point out that there are many cases of imperfect partition, where the interests of the co-sharers in the mahal are divided completely from one another and that all that remains joint is the liability for the Government revenue. Still it is this liability which has been laid down by the Privy Council as a test of the co-parcenary contemplated by the Muhammadan law. No authority has been cited before us which lays down that the Muhammadan law recognizes

(1) (1897) I. L. R., 19 All., 466. (2) (1899) I. L. R., 21 All., 292.

(3) (1912) I. L. R., 39 Calc., 915.

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degrees of nearness in the same class of pre-emptors. For instance, all who come within the definition of *shafi shariq* stand on the same footing. In this view the plaintiff and the vendee are both *shafi shariq* and are entitled to share the property which has been sold.

The result is that S. A. No. 696 of 1920 will stand decreed. The decree of the court below will be set aside and that of the court of first instance re-instated. S. A. No. 697 of 1920 will stand dismissed. We think that in view of the circumstances the parties should pay their own costs in this Court and in the lower appellate court. The actual result of the two appeals is that the decree of the court of first instance is restored in its entirety.

Appeal No. 696 *decreed.*
Appeal No. 697 *dismissed.*

Before Mr Justice Tudball and Mr. Justice Sulaiman.

PARBHU DAYAL (PLAINTIFF) *v.* JAMIL AHMAD AND ANOTHER (DEFENDANTS)*

1921
August, 4.

Act No. X of 1873 (*Indian Oaths Act*), *section* 11—*Pre-emption—Custom—Offer by guardian of minor defendant to be bound by oath of plaintiff—Extent to which minor is bound thereby—Wajib-ul-arz—Perfect partition—Survival of custom of pre-emption.*

In a suit for pre-emption the guardian *ad litem* of one of the defendants, who was a minor, agreed that if the plaintiff, holding Ganges water in his hands, took an oath that he had not refused to take the property in suit before the sale-deed was executed, then his suit should be decreed. The plaintiff took the oath and swore that no offer had ever been made to him and that had not refused to purchase the property. *Held* that so far as the statement of fact—that the plaintiff had not refused to purchase the property—was concerned the minor defendant was bound; but not with regard to the agreement that the suit should be decreed. *Chengal Reddi* v. *Venkata Reddi* (1) and *Sheo Nath Saran* v. *Sukh Lal Singh* (2) referred to.

A *wajib-ul-arz* of 1875 mentioned the existence of a custom of pre-emption relating to two categories of pre-emptors, viz., *shariq patti qaribi* and *shariq patti digar*. In 1894 there was a perfect partition and in the *wajib-ul-arz* then framed a third class of pre-emptors was added, namely,

* Second Appeal No. 1434 of 1919, from a decree of Shibendra Nath Banerji, Officiating Subordinate Judge of Allahabad, dated the 27th of August, 1919, reversing a decree of Sidheshwar Maitra, Munsif of Allahabad, dated the 15th of March, 1919.

(1) 1889) I. L. R., 12 Mad., 483. (2) (1899) I. L. R., 27 Calc., 229.