

APPELLATE CIVIL.

Before Mr. Justice Sulaiman and Mr. Justice Banerji.

AZIZ AHMAD (DEFENDANT) v. NAZIR AHMAD (PLAINTIFF) AND NAJIB-ULLAH KHAN AND OTHERS (DEFENDANTS).*

1927
June, 20.

Muhammadian law—Pre-emption—Shafi khalit—Ownership of tree with overhanging branches—Plot divided by kachcha road over which the public had a mere right of way without ownership of the soil.

In a suit for pre-emption under the Muhammadian law the property sold consisted of undivided shares in a plot of land adjoining the plaintiff's house. This plot was divided by a *kachcha* road over which the public had a right of passage, but the land of the road was not public property.

Held that the plaintiff was entitled to pre-empt the whole plot, and not merely the portion on his side of the *kachcha* road.

Held also that the fact that the branches of a tree project over the land of a neighbour does not give the owner of the tree any right as a *shafi khalit*.

Hari Krishna Joshi v. Shankar Vithal (1), and *Abdul Shakur v. Abdul Ghafur* (2), referred to.

THE facts of this case, so far as they are necessary for the purposes of this report, appear from the judgment of the Court.

Maulvi Mukhtar Ahmad, for the appellant.

Pandit Uma Shankar Bajpai, for the respondent.

SULAIMAN and BANERJI, JJ. :—This is a defendant's appeal arising out of a suit for pre-emption on the basis of Muhammadian law. The plaintiff's claim is based on an alleged right as a *shafi khalit*. The property sold

*Second Appeal No. 1157 of 1926, from a decree of L. Johnston, District Judge of Pilibhit, dated the 6th of January, 1926, confirming a decree of Lal Bhagwati Dayal Singh, Munsif of Pilibhit, dated the 6th of October, 1925.

(1) (1894) I.L.R., 19 Bom., 420.

(2) (1910) 7 A.L.J., 641.

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consists of undivided shares in a plot of land adjacent to the house of Nazir Ahmad, plaintiff. There is also a tamarind tree standing in the compound of Nazir Ahmad which overhangs its branches on the spot in question. This plot is divided into two portions by what is called a *kachcha* public road, but the plot appears to be one plot and there has been no partition of the shares of the co-sharers.

The learned Judge has held that Nazir Ahmad has no right to claim to be a *shafi khalit*, because his tree spreads branches over the neighbouring land. He has relied on the case of *Hari Krishna Joshi v. Shankar Vithal* (1) as authority for the proposition that the overhanging branches confer no right of easement to the owner of the tree. It also appears to us that this circumstance does not give the plaintiff rights as a *shafi khalit*. In the foot-note to chapter II, page 481 of Baillie's Muhammadan Law, volume I, it is noted that

“though rights of water and way are given as examples, it does not appear that a *khalit* in any other right than this has the right of pre-emption.”

We must, therefore, reject this claim.

As regards the further claim that Nazir Ahmad's drain flows through this plot, the learned Judge has found that this drain in reality did not exist, but was a temporary arrangement invented for the purposes of this litigation. This claim must also be rejected.

The defendants, however, contend that inasmuch as the *kachcha* public road passes through the plot, the portion which lies away from the house should not be allowed to be pre-empted. It does not, however, appear that the land covered by this road belongs to the public. The land is in reality a part of this plot, though the public have a right to pass through it. Under these circumstances, the finding of the court below that the whole area

(1) (1894) I.L.R., 19 Bom., 420.

is a compact one must be accepted and the plaintiff is entitled to pre-empt the whole of that plot: *Abdul Shakur v. Abdul Ghafur* (1).

We accordingly dismiss the appeal with costs.

Appeal dismissed.

Before Mr. Justice Mukerji and Mr. Justice Ashworth.

PEARE MOHAN PRASAD (DECREE-HOLDER) v. RAGHU-NATH LAL AND ANOTHER (JUDGEMENT-DEBTORS).*

1927
June, 22.

Civil Procedure Code, order XXI, rule 2, sub-rule (3)—Act No. IX of 1908 (Indian Limitation Act), section 20—Execution of decree—Limitation—Certification of previous payments.

If a decree-holder's application for execution is barred by limitation, he cannot save the situation by pleading a previous payment of interest alleged to have been made before limitation had expired and asking the court to certify such payment then and there, i.e., when execution was already time-barred. *Bajinath v. Panna Lal* (2), *Gokul Chand v. Bhika* (3), *Chattar Singh v. Amir Singh* (4), *Eusuffzeman Sarkar v. Sanchia Lal Nahata* (5), *Pandurang v. Jagya* (6), *Masilamani Mudaliar v. Sethuswami Ayyar* (7), and *Sheikh Elahi Bux v. Nawab Lall* (8), referred to.

THE facts of this case were, briefly, as follows:—

The decree-holder obtained the decree in question on the 29th of October, 1919. The first application for execution was made on the 18th of March, 1922. The second application was made on the 12th of October, 1925, that is to say, more than three years after the date of the first application. On the face of it, the application would be time-barred. The decree-holder however, alleged in the application for execution that between the

*Second Appeal No. 1321 of 1926, from a decree of Ali Ausat, District Judge of Ghazipur, dated the 8th of April, 1926, confirming a decree of S. Zillur Rahman, Munsif of Ballia, dated the 19th of December, 1925.

(1) (1910) 7 A.L.J., 641.

(2) (1924) I.L.R., 46 All., 635.

(3) (1914) 12 A.L.J., 387.

(4) (1916) I.L.R., 38 All., 204.

(5) (1915) I.L.R., 43 Calc., 207.

(6) (1920) I.L.R., 45 Bom., 91.

(7) (1917) I.L.R., 41 Mad., 251.

(8) (1919) 4 Pat. L.J., 159.