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specific amount was proved, which comes to the same thing. This is a finding of fact by which we are bound in second appeal.

The suit was, therefore, rightly decreed; but as the defendants were held to have had assets and to have wrongly applied them, the decree should have been a *personal* decree against them, jointly and severally, as they all admit a share of the assets excluding the debt claimed: *Nathuram Siriji Sett* v. *Kutti Haji* (1) and *Mihi Lal* v. *Babu Lal* (2). The decree as it stands is wrong as it restricts the plaintiffs to execution against the assets of Abdul Qayum; but as no appeal has been filed by the plaintiffs it must be deemed that they are satisfied with the decree against the assets. I, therefore, concur in dismissing the appeal with costs.

BY THE COURT.—The appeal is dismissed with costs.

Appeal dismissed.

Before Mr. Justice Lindsay and Mr. Justice Sulaiman.

JADUNANDAN RAI (PLAINTIFF) *v.* BINDESHRI RAI AND ANOTHER (DEFENDANTS).*

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Act (Local) No. XI of 1922 *(Agra Pre-emption Act), section* 12, *sub-section* (3)—*Pre-emption—Right based on relationship—Method of computation.*

Held, on a construction of sub-section (3) of section 12 of the Agra Pre-emption Act, 1922, that a person who claims pre-emption by virtue of propinquity must not be more than four degrees removed from the ancestor common to himself and the vendor, counting that ancestor as the first degree. The measure of four degrees could not, on the language of sub-section (3), be applied to the relationship existing between the pre-emptor and the vendor.

*Second Appeal No. 1509 of 1925, from a decree of Jogindro Nath Chaudhri, Subordinate Judge of Gorakhpur, dated the 30th of May, 1925, confirming a decree of Muhammad Zamir-ud-din, Munsif of Bansgaon, dated the 16th of December, 1924.

(1) (1897) I.L.R., 20 Mad., 446. (2) (1922) 77 Indian Cases, 306.

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

Dr. *M. Wali-ullah* and Munshi *Shiva Prasad Sinha*, for the appellant.

Babu *Piari Lal Banerji* and Pandit *Narmadeshwar Prasad Upadhiya*, for the respondents.

LINDSAY and SULAIMAN, JJ. :—The plaintiff is the appellant in this case and his suit for pre-emption has been dismissed. It is not denied that the plaintiff, Jadunandan, is related to the vendor, Musammat Sundra, for they are both descended from a common ancestor named Ram Dat.

The plaintiff's case, however, has failed in the courts below on the ground that he is more than four degrees removed from the common ancestor according to the rule which is laid down in section 12(3) of the Agra Pre-emption Act. A reference to the pedigree, which is set out in the judgement of the trial court, shows that the plaintiff is the great-great-grandson of Ram Dat and Musammat Sundra, the vendor, is the great-great-grand-daughter of Ram Dat.

It is by no means easy to interpret sub-section (3) of section 12 of the Pre-emption Act. But after giving the matter our best consideration, we are of opinion that in this case the plaintiff's claim for pre-emption must fail.

It appears to us that sub-section (3) of section 12 provides for a scheme of preference in favour of relations of the vendor, that is to say, those connected with him by descent from a common ancestor. Any relation who claims preference on this ground must, in the first place, show that he and the vendor are descended from a common ancestor.

But all descendants from the common ancestor are not given a right of preference. Under sub-section (3) the right is limited : it is provided clearly

that no one "removed by more than four degrees including the common ancestor" shall be entitled to pre-emption as against other persons of the same class. It seems to follow, therefore, from this that the right of preference on the basis of relationship consisting in descent from a common ancestor is strictly confined within the limits indicated and, therefore, any person who wishes to establish a right of preference under sub-section (3) must show that he is not further removed than four degrees from the common ancestor and in counting the degrees it is necessary that the common ancestor himself should be counted as the first degree. Ordinarily, perhaps, that would not be so, but we have to give effect to the words which we find in sub-section (3) "including the common ancestor" and, therefore, we think that in estimating the distance of four degrees the common ancestor himself is reckoned as the first degree. Applying this principle to the pedigree now before us, the calculation works out as follows:— Ram Dat first degree, Mulho second degree, Purbhu Rai third degree, Musammat Phulehra fourth degree and Jadunandan plaintiff fifth degree. Jadunandan is, therefore, more than four degrees removed from Ram Dat according to the scheme of counting laid down in sub-section (3) of section 12.

It has been argued that the measure of four degrees mentioned in sub-section (3) of section 12 should be applied to the relationship between the vendor and the pre-emptor. That argument was put forward in an earlier case heard by the Pre-emption Bench (1). It was held in that case that the measure of four degrees could not, on the language of sub-section (3), be applied to any relationship existing between the pre-emptor and the vendor; and obviously

(1) S. A. No. 141 of 1925, decided on the 30th of June, 1926.

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if that argument were accepted, the right of preference which sub-section (3) was intended to secure would be very much restricted. It is further to be noticed that in counting the degrees of relationship between the plaintiff pre-emptor and the vendor the common ancestor would necessarily be included and in that case there would have been no need for the words "including the common ancestor" which are to be found in sub-section (3).

The plaintiff, therefore, was not entitled to pre-emption and the appeal fails and is dismissed with costs.

Appeal dismissed.

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February, 24.

Before Mr. Justice Mukerji and Mr. Justice Ashworth.

KARAMAT ALI KHAN (PLAINTIFF) *v.* GANESHI LAL AND ANOTHER (DEFENDANTS).*

Mortgage—Usufructuary mortgage—Lease by mortgagee to mortgagor—Suit by mortgagee for arrears of rent—Res judicata—*Civil Procedure Code, section* 11.

A usufructuary mortgagee can undoubtedly lease the mortgaged property to a third party, and there is equally no reason why he should not lease it to the mortgagor. If he does so and thereafter sues the mortgagor for rent and obtains a decree, that decree will be a *res judicata* as to the subsistence of the relation of landlord and tenant between the parties. *Baghelin* v. *Mathura Prasad* (1) and *Altaf Ali Khan* v. *Lalta Prasad* (2), distinguished.

This was an appeal arising out of a suit for arrears of rent for the years 1328 to 1330F. under the following circumstances.

The defendants respondents are father and son. The defendant No. 1 as the father of two minor sons of his and the defendant No. 2 as an adult son mortgaged their zamindari property to the appellant's

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* First Appeal No. 139 of 1924, from a decree of Mahendra Pal Singh, Assistant Collector, first class, of Muttra, dated the 15th of January, 1924.

(1) (1882) I.L.R., 4 All., 430. (2) (1897) I.L.R., 19 All., 496.