

is correct. Ram Raj Tewari not having any preferential right as against Sheoraj and others at the time of the decree is only entitled to share the property equally, and not to claim the whole. We therefore dismiss this appeal.

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RAM RAJ
TEWARI
v.
SHEORAJ
SAITHWAR.

Before Mr. Justice Sulaiman and Mr. Justice Pullan.

SAKINA BEGAM AND OTHERS (DEFENDANTS) v. HARNAM SINGH (PLAINTIFF) AND TEJ SINGH (DEFENDANT).*

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May, 3.

Act (Local) No. XI of 1922 (Agra Pre-emption Act), sections 4 and 11—Superior and Inferior proprietors—“Co-sharers” —Sale of rights of superior proprietor in entire mahal—Not capable of being pre-empted by an inferior proprietor of a share in mahal.

The entire rights of the superior proprietor in respect of the whole 20 biswas of a village being sold, an inferior proprietor of a share in the 20 biswas sued for pre-emption. In this village the Government revenue was settled with the inferior proprietors, who alone could let out the lands to tenants and collect rents, and who were bound to pay a fixed sum to the superior proprietor as malikana allowance. *Held* that the rights of the superior proprietor and the rights of the body of inferior proprietors were quite different and distinct in character, and the plaintiff was in no sense a co-sharer of the vendor in the right transferred by him.

The vendor could not be called a person entitled as proprietor to a share or part in the mahal as referred to in section 4 of the Agra Pre-emption Act; the mere right to receive malikana allowance was not an interest of a co-sharer in a part of the mahal. The sale was, therefore, not pre-emptible. *Abdul Wahid v. Halima Khatun* (1), applied.

Messrs. S. Abu Ali and Shiam Krishna Dar, for the appellants.

Mr. Narain Prasad Asthana, for the respondents.

*First Appeal No. 270 of 1927, from a decree of Lakshmi Narain Tandon, Subordinate Judge of Agra, dated the 15th of May, 1926.

(1) (1920) I. L. R., 42 All., 262.

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SULAIMAN and PULLAN, JJ. :—This is a defendants' appeal arising out of a suit for pre-emption. The rights and interest of Balbir Singh in mahals called 10 biswa mahal and $7\frac{1}{2}$ biswa mahal were sold under a sale deed dated the 10th of February, 1925, to Dr. Masha Ullah Khan whose heirs are the appellants before us. Balbir Singh was recorded in the khewat as the superior proprietor (*malik ala*) in respect of the entire 20 biswas. The plaintiff Harnam Singh is recorded as an inferior proprietor (*malik adna*) of a share out of the 20 biswas. The vendee denied the plaintiff's right to sue for pre-emption. The learned Subordinate Judge has held that the plaintiff is a co-sharer and therefore entitled to maintain the suit. He has not separately considered the question whether the interest transferred is pre-emptible.

The constitution of this village is very peculiar but there is no dispute about its characteristic features. The village is divided at least into two mahals called the 10 biswa mahal and the $7\frac{1}{2}$ biswa mahal. The counsel for the parties admit that the settlement for the payment of Government revenue has been made by the Government with the proprietors called the inferior proprietors, among whom the plaintiff's name appears. But these inferior proprietors are bound to pay not only the Government revenue and the cesses, but also a fixed sum of *malikana dues* amounting to Rs. 190 to the superior proprietor who is also described as the *lambardar*.

It is quite clear that Balbir Singh cannot be treated as a co-sharer of the plaintiff Harnam Singh. The rights of Balbir Singh and Harnam Singh were quite different, distinct and independent. Balbir Singh is not a proprietor of "any *share* or *part* in a mahal," as referred to in section 4. His rights, whatever they

may be, extended to the entire 20 biswas. He has transferred his entire rights. The present plaintiff is in no sense a co-sharer of Balbir Singh in the right so transferred by him.

Section 4 of the Pre-emption Act defines a co-sharer as any person, other than a petty proprietor, entitled as a proprietor to any share or part in a mahal or a village. Balbir Singh undoubtedly was not a petty proprietor. He cannot be called a person entitled as proprietor to a share or part in this mahal. The Government revenue was not settled with him. Both Balbir Singh and the body of inferior proprietors cannot be called co-sharers in this mahal at one and the same time. The right of Balbir Singh was confined to a realization of the malikana dues from the inferior proprietors who alone could let out the lands to tenants and collect rents. In a somewhat analogous case arising under the old law a Bench of this Court held in the case of *Abdul Wahid v. Halima Khatun* (1) that the right to receive malikana allowance could not be the subject of a suit for pre-emption. On the analogy of that case we hold that the mere right to receive malikana dues is not an interest of a co-sharer in a part of the mahal.

It is therefore quite obvious that the present plaintiff cannot be allowed to pre-empt this interest. The interest transferred is a right in the entire 20 biswas and in that right the plaintiff is not a coparcener. Under section 11 of the Act a right of pre-emption accrues when a co-sharer or a petty proprietor sells any proprietary interest in land forming part of any mahal or village. Thus before a suit for pre-emption can be maintained it is necessary to find that the interest transferred is not only a proprietary interest but also that of a co-sharer or a petty proprietor. This

(1) (1920) I. L. R., 42 All., 262

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is not so in the present case. The sale accordingly is not pre-emptible.

We should not be understood to decide that no right of pre-emption would accrue *inter se* if co-sharers in the inferior proprietary interest were claiming pre-emption on account of a sale of an inferior proprietary right.

We accordingly allow the appeal and setting aside the decree of the court below dismiss the plaintiff's suit with costs in both courts.

Before Mr. Justice Banerji and Mr. Justice King.

LALTA PRASAD (DEFENDANT) v. PURAN LAL
(PLAINTIFF).*

1929

May, 8.

Civil Procedure Code, order II, rule 2 and order XXXIV, rule 14—Mortgage—First suit for interest only—Second suit for principal—Whether suit maintainable.

In a simple mortgage the condition was that the mortgagor would pay the principal with interest in five years, that the interest was to be paid every six months and that the creditor was entitled to recover the interest by a separate suit. After the principal money had become payable the mortgagee sued for the interest alone, claiming only a personal relief, and the suit was decreed. While the suit was pending the mortgagee filed another suit for recovery of the principal by sale of the mortgaged property. *Held* that the second suit was not barred by order II, rule 2 of the Code of Civil Procedure by reason of the provisions of order XXXIV, rule 14. *Muhammad Hafiz v. Muhammad Zakariya* (1), and *Kishen Narain v. Pa'a Mal* (2), distinguished. *Indarpal Singh v. Mewa Lal* (3), referred to.

*Second Appeal No. 1131 of 1926, from a decree of Shankar Lal, Additional Subordinate Judge of Farukhabad, dated the 19th of March, 1923, confirming a decree of Banwari Lal Mathur, Munsif of Kaimganj, dated the 7th of November, 1925.

(1) (1921) I. L. R., 44 All., 121. (2) (1922) I. L. R., 4 Lah., 32.

(3) (1914) I. L. R., 36 All., 264.