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can have the same benefit for the purpose of saving the limitation prescribed by clause (*c*) of sub-section (1) of section 9 of the Provincial Insolvency Act. In the other case quoted, *Sathappa Chettyar* v. *A. S. Chettyar Firm* (1), the point raised in this appeal has been definitely raised and decided against the appellant.

In the wording of section 16 of the Provincial Insolvency Act, moreover, the legislature have definitely laid down one condition for the substitution of a creditor and one only, viz., that his debt shall be not less than "the amount required by this Act". But the amount referred to is required not only by the Act, but by section 9 of the Act, and it would be indeed remarkable if the legislature had intended to prescribe all the conditions set forth in section 9 and yet mentioned only this one. In fact the wording of this section is definitely in favour of the respondent and against the appellant, and the two Indian decisions to which we have referred above are to the same effect. In these circumstances we do not think that it would be safe to have recourse to the view of the law that has been taken in the English courts, though the English statute does not differ in any material way from the Provincial Insolvency Act. We therefore dismiss this appeal with costs.

Before Sir Shah Muhammad Sulaiman, Acting Chief Justice and Mr. Justice Banerji.

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GAURI SHANKAR PRASAD (DEFENDANT) *v.* SITA RAM SAH (PLAINTIFF) AND KUNWAR NAND LAL (DEFENDANT).*

Custom—Pre-emption—Muhammadan law—Sale of house site—Building sites covered by ruins or by sheds erected by lessees of the land—Whether pre-emptible.

In the matter of pre-emption the same rule which applies to houses has been applied to building sites and small parcels

* First Appeal No. 125 of 1929, from a decree of J. N. Kaul, Additional Subordinate Judge of Benares, dated the 18th of February, 1929.

(1) A.I.R., 1929 Rang., 291.

of land which can be used as such. Where a custom of pre-emption with regard to houses is established, the custom of pre-emption with regard to building sites and small parcels of land is quite common, and slight evidence ought to be sufficient for establishing that the same custom applies to such building sites.

A custom of pre-emption with regard to the sale of house sites and building plots in the city of Benares was held to be established.

Mr. *B. E. O'Conor*, Sir *Tej Bahadur Sapru*, Dr. *K. N. Katju*, and Messrs. *B. Malik*, *Nanak Chand* and *Govind Das*, for the appellant.

Messrs. *P. L. Banerji* and *N. Upadhiya*, for the respondents.

SULAIMAN, A. C. J., and BANERJI, J. :—This is a defendant's appeal arising out of a suit for pre-emption, based on an alleged custom, of the sale of a building site in the city of Benares. The plaintiff alleged that there was a custom in Benares, applying to all residents, under which any person wishing to transfer any house or building site or land was bound to offer it to his co-sharers in the property, to sharers in the appendages and to adjoining neighbours. The plaintiff also alleged that he had performed the two demands which were in accordance with the rules of the Muhammadan law. The contesting defendant admitted that there were certain customs prevailing within the said part of the city of Benares, but pleaded that "the custom of pre-emption that prevails in Benares relates to residential houses only, and there is no custom of pre-emption regarding house sites and lands in Benares." It was further pleaded that the plaintiff had not in fact made the necessary demands. The allegation of the plaintiff that the property sold consisted of a house was also repudiated. Under the sale deed in dispute the defendant purports to have purchased the site of this plot only, without the

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materials of the structure which stands upon it. It is admitted that this is a *parjotdari* plot, the ownership of the land vests in the proprietor who is the vendor. There was some dispute as to whether there was any structure upon it which could be called a house and as to whether this structure belonged to the vendor and was actually sold by him. A photograph of the shed standing upon it is on the record and it shows that it is a fairly large shed of which the roof is of tiles and corrugated iron sheets. There is evidence to show that certain coolies and workmen live in it and cook their food. There is also a sort of almirah which serves the purpose of a storeroom. We do not think that it can be said that this structure is not a place of human habitation so as to make the custom relating to houses inapplicable to it.

At the same time we are of opinion that the evidence on the record falls short of establishing that the materials of this structure belonged to the vendor. The plaintiff led practically no evidence to show that the vendor owned the materials of this construction. On the other hand the defendant produced the occupier, Govind, who stated that he was the owner of the materials and had put up the *chhappar* himself. There was also the evidence of the witness Ali Jawwad to the effect that the shed had been put up by the tenant of the land some years ago. The evidence being uncontradicted we must assume in favour of the defendant that the materials of the structure do not belong to the vendor and that they have obviously not been acquired by the vendee. We may therefore take it that the plot is a building site on which admittedly many many years ago a pucca house stood, which was subsequently replaced by a tiled house which stood for some years. Later on this was pulled down by the occupier who proceeded to build a pucca construction upon it.

He laid the foundation, but a suit by the proprietor was promptly instituted which continued for several years, with the result that the construction was stopped. This suit was decreed and the occupier was ejected. Since then it has been let out to other people who have put up another structure upon it. The land is undoubtedly in the nature of a building site, on which a structure stands even now. It is not merely a plot of waste land or an agricultural plot.

The court below has held that the custom of pre-emption even with regard to building sites has been established by the evidence in the case. The learned advocate for the appellant rightly argues that the burden of proving the existence of the custom is on the plaintiff and that he cannot succeed by merely establishing that the custom of pre-emption applies to houses in the city of Benares. The learned advocate for the respondent replies that the custom of pre-emption with regard to building sites and small parcels of land, where a custom of pre-emption with regard to houses is admittedly proved, is quite common and that slight evidence ought to be sufficient for establishing that the same custom applies to such building sites. Our attention has been drawn to several cases where the same rule has been applied to small parcels of land as applied to houses. We may refer to the cases of *Ejnash Kooer* v. *Sheikh Amzudally* (1), *Nunkoo Dobe* v. *Narain Dass* (2), *Chowdhry Joogul Kishore* v. *Poocha Singh* (3), *Nusrut Reza* v. *Umbul Khyr Bibee* (4), *Abdool Azim* v. *Khondkar Hamid Ali* (5), *Shah Mahomed Hossein* v. *Shah Mohsun Ali* (6) and *Shaikh Mahomed Hossein* v. *Shah Mohsun Ali* (7), as also to a recent case of the Patna High Court, *Sheoratni* v. *Munshi Lall* (8).

(1) (1865) 2 W.R., 261.
(2) (1866) 2 S.D.A., (N.W.P.), 419.
(3) (1867) 8 W.R., 413.
(4) (1867) 8 W.R., 309.
(5) (1868) 10 W.R., 356.
(6) (1870) 14 W.R., (F.B.), 1.
(7) (1870) 14 W.R., 266.
(8) (1926) 97 Indian Cases, 618.

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It seems to us that ordinarily the same principle of exclusion of strangers would apply to building sites as applies to houses.

The learned advocate for the appellant has relied strongly upon the case of *Ram Chand Khanna* v. *Goswami Ram Puri* (1), where a Division Bench of this Court held that the custom of pre-emption for a piece of land which was an orchard or a fruit garden in Benares had not been established in that case. The learned Judges pointed out that the custom of pre-emption was based upon the idea of preventing the intrusion of strangers into the coparcenary body and in their opinion no such consideration applied to a case like the one before them, where people congregated together in cities. The plot in dispute in that case was not a residential plot of land and obviously the question of excluding strangers was not of the same paramount importance as in cases where a house or building site has been sold. There is no doubt that the cases quoted before us do show that the same rule which applies to houses has been applied to building sites and small parcels of land which can be used as such. The question before us is whether there is any evidence in this case and whether that evidence is sufficient to prove that the same rule applies to building sites in Benares.

It cannot be disputed that the right of pre-emption as regards the houses is established and extends to the sites covered by the houses. This was expressly held in a judgment, dated the 16th of May, 1887. The learned Munsif in that case went so far as to suggest that the right of pre-emption was really derived from the ancient Hindu custom and applied to immovable properties in general, including gardens. In a judgment, dated the 8th of January, 1894, the learned Munsif referred to an earlier case of pre-emption which had

(1) (1923) I.L.R., 45 All., 501.

been decreed with regard to a grove in Ramapura. The value of this judgment, however, must be discounted in view of the pronouncement of this Court in *Ram Chand Khanna's* case. But a judgment of the Munsif of Benares, dated the 23rd of December, 1908, in a case in which the defendants were absent, shows that the suit related to a portion of land in Benares. The judgment does not show that it was a house at all. The claim does not appear to have been contested and it was decreed. The mere fact that the defendants did not choose to contest the suit would not necessarily destroy the value of the judgment, for the custom might be so well established that the defendants might not think it worth while to resist the suit. This judgment does show that the custom was in force with regard to a mere piece of land though it was not absolutely covered by structure. There was another litigation which resulted in a decree, dated the 22nd of March, 1919. The defendants in their written statement had pleaded that the plaintiff's share in the so-called house was a mere piece of waste land. The learned Subordinate Judge found that the plaintiff's house was nothing but a house in ruins which had fallen down and that only the gateway of the house remained standing. The case was a converse one, because the point was whether the plaintiff who did not own any house could claim pre-emption on the ground of vicinage. As the right of pre-emption is a reciprocal right the same rule would apply to that case as would apply to a case where the property in dispute is a house in ruins. The learned Judge came to the conclusion that "the right is founded on vicinage and it matters little whether there is a good house or a falling house or a fallen house standing." He held that the plaintiff was entitled to pre-empt.

It seems to us that the common usage extending to building sites the right applicable to houses was

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adhered to in the cases referred to above, which are clear instances of the exercise of the right of pre-emption based on custom with regard to mere building sites as distinct from houses. There was also some oral evidence of a general nature in the case. The learned Subordinate Judge on a consideration of the entire evidence came to the conclusion that even if the house had not been transferred to the vendee, the custom relating to *khandhars* (ruined house sites) and house sites had been established. We think that we should not differ from this finding.

The next question is whether the plaintiff made the necessary demands as are required by the rules of the Muhammadan law which are applicable to such a custom in Benares. [The judgment then discussed the evidence on this point and agreed with the lower court that the two demands were duly made.]

The appeal is dismissed with costs.

Before Mr. Justice Boys and Mr. Justice Smith.

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GANGA KALWAR (DEFENDANT) *v.* BENI MADHO PRASAD (PLAINTIFF).*

Custom—Landlord and tenant—Transfer of sites of houses by agricultural tenants—Nature of evidence to establish custom.

On the question whether a custom is established in an agricultural village by which agricultural tenants are entitled to transfer their houses together with the sites thereof, a distinction must be made between cases of transfer to another agricultural tenant in the village and cases of transfer to a non-agricultural tenant or to a total stranger to the village. In the former case the zamindar, even if he knows of it, may not feel it worth instituting a suit about it; in the latter case it may be a very serious matter for the zamindar, for if such

* Second Appeal No. 918 of 1930, from a decree of B. S. Kisch, District Judge of Allahabad, dated the 17th of March, 1930, confirming a decree of Muhammad Taqi Khan, Additional Subordinate Judge of Mirzapur, dated the 5th of April, 1929.