

onus upon the defendants, was negatived, yet the Judge has acted as if such presumption were in full force. No doubt the Munsif permitted an irregularity of procedure in allowing the plaintiff's pleader to begin, but having done so, and the witnesses having proved that the consideration had not been paid as admitted by defendants in the bond, a new case was opened up, in which the *onus* was shifted back to the plaintiff to establish that he had, not at the time alleged in the bond, but at some subsequent date, paid to the defendants the money alleged to have been lent. Having failed to do this, his suit was properly dismissed by the Munsif. We much doubt whether, having regard to the terms of s. 578 of the Civil Procedure, it was competent for the Judge to reverse the decision of the first Court, but even if it was, he should not have ignored what had taken place there, and should have dealt with the case in appeal in the shape it came to him. We cannot maintain his decision. The plaintiff was rightly held by the Munsif to have failed to prove his case, and the Judge should not have discarded the evidence of the three witnesses called on his behalf. The appeal must therefore be decreed with costs, the decision of the lower appellate Court reversed, and that of the Munsif restored.

Appeal allowed.

Before Mr. Justice Straight and Mr. Justice Tyrrell.

HIRA (PLAINTIFF) v. UNAS ALI KHAN (DEFENDANT)*

Pre-emption—Act X of 1877 (Civil Procedure Code), s. 310.

The requirements of s. 310 of Act X of 1877 are not satisfied by the co-sharer preferring his claim to the right of pre-emption before the property is knocked down, and offering to pay a sum equal to that bid by the highest bidder. That section contemplates a distinct bid by the co-sharer in the ordinary manner of offering bids. *Tej Singh v. Gobind Singh* (1) followed.

A SHARE of certain undivided immoveable property was put up for sale in execution of a decree, and was knocked down to the plaintiff in this suit. Immediately before the hammer fell to the plaintiff's bid, the defendant in this suit, a co-sharer of such share,

* Second Appeal, No. 1201 of 1880, from a decree of W. Duthoit, Esq., Judge of Shahjahanpur, dated the 3rd September, 1880, reversing a decree of Said Muhammad Munsif of West Budaun, dated the 20th July, 1880.

(1) I. L. R. 2 All. 850.

1881

MAKUMD
v.
BAHORI Ld

1881
May 30.

1881

 HIRA
 v.
 MAS ALI
 KHAN.

who had not been bidding for the property, presented an application in writing to the officer conducting the sale in which he asserted his right of pre-emption as a co-sharer, and offered a sum for the property equal to that bid by the plaintiff. The Court executing the decree having made an order confirming the sale in favour of the defendant, the plaintiff brought the present suit for possession of the property, and to have such order set aside, and the sale confirmed in his own favour, contending that the defendant had not complied with the provisions of s. 310 of Act X. of 1877, not having made a bid for the property, and in consequence the sale had been improperly confirmed in his favour. The Court of first instance allowed this contention, and gave the plaintiff a decree. On appeal by the defendant the lower appellate Court held that the tender by the defendant, before the hammer fell, of a sum equal to that offered by the highest bidder should be treated as a sufficient compliance with the provisions of s. 310 of Act X. of 1877, and dismissed the suit. The plaintiff appealed to the High Court, again contending that the defendant had not complied with the provisions of that section, and the sale should not have been confirmed in his favour.

Mr. *Simeon* and Babu *Beni Prasad*, for the appellant.

Pandit *Nand Lal*, for the respondent.

The judgment of the Court (STRAIGHT, J., and TYRRELL, J.,) was delivered by

STRAIGHT, J.—We think that the Judge was in error in holding that the defendant-respondent satisfied the requirements of s. 310 of the Civil Procedure Code. The words are clear that the co-sharer and the other person must respectively “advance the same sum” at the bidding, and thus contemplates a distinct bid by the co-sharer in the ordinary manner of offering bids. This point has already been considered on more than one occasion by Benches of this Court, and in thus deciding it in the present case it is sufficient to say that we recognise the authority of *Tej Singh v. Gobind Singh* (1). The appeal must be decreed with costs.

Appeal allowed.