

## APPELLATE CIVIL.

1881  
April 1.

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Before Mr. Justice Spankie and Mr. Justice Oldfield.

NAUBAT SINGH (DEFENDANT) v. KISHAN SINGH (PLAINTIFF).\*

*Pre-emption—Allegation by plaintiff that a certain sum is the actual price—Omission to allege readiness and willingness to pay actual price—Discretionary power of Court to grant decree.*

The Court of first instance dismissed a suit to enforce a right of pre-emption, although it found that the plaintiff had such right, on the ground that the actual price of the property was a larger amount than the amount which the plaintiff alleged it in his plaint to be, and the plaintiff had not in his plaint expressed his readiness and willingness to pay any amount which the Court might find to be the actual price. On appeal by the plaintiff the lower appellate Court gave him a decree conditional on the payment of such larger amount within a fixed time. *Held* that it was not necessary to interfere with the exercise of the lower appellate Court's discretion in the matter, particularly as the defendant had not objected to such exercise in his memorandum of second appeal. *Durga Prasad v. Nawazish Ali* (1) distinguished.

THE plaintiff in this suit claimed to enforce a right of pre-emption in respect of a share of a certain village, such right being founded on Muhammadan law, general usage, and the terms of the administration-paper of the village. It appeared that the property in suit had on the 14th September, 1864, been mortgaged, by way of conditional sale, to the defendant Naubat Singh to secure the repayment within six years of a sum of Rs. 700. The mortgagors, who retained possession of the property, stipulated in the instrument of mortgage that they should pay the mortgagee Rs. 105 annually from the profits of the property, that amount representing interest on the principal sum secured by the mortgage at the rate of Re. 1-4-0 per cent; that, in the event of default in payment of that amount annually or any part thereof, such amount should be regarded as principal and bear interest at the rate of Re. 1-4-0 per cent. per mensem; and that, if they failed to pay the amount of the mortgage-money in full at the end of the six years, the mortgage should be foreclosed. On the 9th November, 1871, the mortgagee, the defendant Naubat Singh, applied under

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\* Second Appeal, No. 1059 of 1880, from a decree of C. J. Daniell, Esq., Judge of Moradabad, dated the 19th July, 1880, reversing a decree of Munshi Percy Lal, Munsif of Belari, dated the 27th February, 1880.

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Regulation XVII of 1806 for the foreclosure of the mortgage, claiming a sum of Rs. 1,863-8-0. That sum represented the principal amount secured by the mortgage, Rs. 700, and interest computed according to the terms of the mortgage. In 1879, the mortgagors not having paid the amount claimed within the year of grace, the defendant Naubat Singh sued them for possession of the property. The mortgagors confessed judgment, and Naubat Singh obtained a decree for possession of the property, and obtained possession of it in execution of that decree on the 21st March, 1879. On the 7th January, 1880, the present suit was instituted against him and the mortgagors, in which the plaintiff preferred a right of pre-emption in respect of the property, claiming to take the same on payment of Rs. 700, the principal sum secured by the mortgage. The defendant Naubat Singh set up as a defence to the suit, *inter alia*, "that the property stood charged not only with the principal amount of the mortgage-money, but also for interest, and consequently the plaintiff's claim to enforce a right of pre-emption on payment of the principal only was not maintainable." The Court of first instance decided that the plaintiff had a right of pre-emption, but refused to allow him to exercise such right on the ground that the purchase-money was not, as alleged by him, represented by Rs. 700, the principal sum secured by the mortgage, but by Rs. 1,863-8-0, the sum, principal and interest, for which the mortgage had been foreclosed, and the plaintiff had only claimed the right on payment of the smaller sum, without expressing his willingness to pay any larger sum which might be found to be the purchase-money. On appeal by the plaintiff the lower appellate Court held, with reference to *Debi Parshad v. Abdul Ghani* (1), that inasmuch as the plaintiff's right of pre-emption had been established, the Court of first instance should have allowed him to exercise that right on payment of the sum found to be the price of the property notwithstanding that he had claimed the same for a smaller price; and it gave the plaintiff a decree conditional on the payment within three months from the date thereof of Rs. 1,863-8-0. The defendant Naubat Singh appealed to the High Court.

Pandits *Bishambar Nath* and *Nand Lal*, for the appellant.

(1) N.-W. P. S. D. A. Rep., 1863, vol. i, p. 446.

Mr. *Conlan* and *Shah Asad Ali*, for the respondent.

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The judgment of the High Court (SPANKIE, J. and OLDFIELD, J.), so far as it is material for the purposes of this report, was as follows :—

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OLDFIELD, J.—The appellant urges that the lower Court should not have given a decree for the property by pre-emption conditional on plaintiff's paying the full amount required within a certain time, as he claimed the property on payment of a smaller sum and did not allege in his plaint that he was ready to pay a price which the Court might find to be payable, and we are referred to a decision of this Court,—*Durga Prasad v. Nawazish Ali* (1). There is this distinction between that case and the one before us that in the former the Court below had refused in its discretion to permit plaintiff to obtain the property by paying a larger sum than he had expressed himself in his plaint willing to pay, and the High Court observed that they could not hold as a matter of law that the Court below was bound to allow the plaintiff to amend his plaint and to bring in the very much larger sum which he should have offered to pay when he brought his suit. In this case the Judge has acceded to the prayer of the plaintiff, and it is not necessary that we should interfere with the exercise of his discretion in the matter, particularly as the objection was not taken in the written memorandum of appeal. The objections urged by the respondent are without force. The appeal is dismissed but without costs.

*Appeal dismissed.*

Before *Mr. Justice Spankie* and *Mr. Justice Oldfield*.

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April 19.

SURAJ DIN (PLAINTIFF) v. CHATTAR (DEFENDANT)\*

*Disposal of suit on preliminary point—Reversal by Appellate Court of decree on such point and irregular remand of case under s. 562 of Act X of 1877 (Civil Procedure Code) for trial of a certain issue—Power of succeeding Judge of Appellate Court to re-try such point.*

A Court of first instance dismissed a suit upon a preliminary point. On appeal by the plaintiff against the decree of such Court the then Judge of the

\* Second Appeal, No. 1036 of 1880, from a decree of G. E. Knox, Esq., Judge of Banda, dated the 29th June, 1880, reversing a decree of H. M. Bird, Esq., Assistant Collector of the first class, Kirwi, dated the 13th May, 1880.

(1) I. L. R., 1 All. 591.