for the defendants-appellants' ejectment. The parties will bear their own costs throughout these proceedings.

Appeal allowed.

1929

MUSAMMAT MAHARAJ KUNWAR v. COURT OF WARDS DEARA.

APPELLATE CIVIL.

Before Mr. Justice Bisheshwar Nath Srivastava and Mr. Justice A. G. P. Pullan.

1929 November, 4.

NAWAB KHAN (DEAD AND ON HIS DEATH) MOHAMMAD SHARIF KHAN AND ANOTHER (PLAINTIFFS-APPELLANTS) *v.* ACHHAIBAR DUBEY AND ANOTHER (DEFENDANTS-RESPONDENTS).*

Pre-emption—Oudh Laws Act (XVIII of 1876), section 9, clauses (2) and (3)—Sale of under-proprietary land—Superior proprietors and under-proprietors both have equal rights of pre-emption as members of village community—"Village community" under section 9, clause (3) Oudh Laws Act—"Under-proprietary mahal", meaning of—Onus of proof to establish preferential right of pre-emption under clause (2), section 9.

In a suit for pre-emption by a plaintiff, who held under-proprietary rights in one khata of a village, on a sale of another under-proprietary khata in the same village, if the plaintiff claims preferential right under clause 2 of section 9 of the Oudh Laws Act the onus lies on him to establish that there was an under-proprietary mahal of which he was a co-sharer. The necessary elements for the purpose of making out the existence of a mahal are the existence of a separate record of rights and the joint liability for rent. *Sheoraj Kunwar* v. *Harihar Bakhsh Singh* (1), relied on.

In the case of a sale of under-proprietary land a superior proprietor and an under-proprietor in the same village are both members of the village community within the meaning of clause 3 of section 9 of the Oudh Laws Act and both have an equal right of pre-emption. *Drigbijae Singh* v. *Court of Wards, Ramnagar Estate* (2), *Hon'ble Raja Ali Mohammad*

*First Civil Appeal No. 5 of 1929, against the decree of M. Ziauddin Ahmad, Officiating Subordinate Judge of Gonda, dated the 24th of September, 1928, dismissing the plaintiffs' suit.

(1) (1910) I. L. R., 32 All., 351. (2) (1901) 5 O. C., 266.

1929

NAWAB KHAN v. ACHHAIBAR DUBEY.

Khan v. *Ram Bilas* (1) and *Masihuddin Ahmad* v. *Munir Ahmad* (2), followed. *Ashraf-un-nisa* v. *Parbhu Narain* (3), referred to.

Messrs. *S. N. Roy* and *S. C. Banerji*, for the appellants.

Messrs. *M. Wasim* and *Khaliq-uz-zaman*, for the respondents.

1929 *October*, 30.

SRIVASTAVA, J. :—This is a first appeal arising out of a pre-emption suit.

Ishtiaq Ali and Ashfaq Ali two under-proprietors in village Rajpur sold by a sale-deed, dated the 30th of June, 1927, the entire under-proprietary khata No. 4 of village Rajpur and a share in one other khata in another village with which we are not concerned in this litigation, in favour of Achhaibar Dubey and Sheo Ram Dubey, defendants Nos. 1 and 2, for Rs. 11,500. The plaintiff Nawab Khan who holds under-proprietary rights in khata No. 5 of village Rajpur instituted the suit which has given rise to the present appeal claiming a preferential right of pre-emption. He also pleaded that the price entered in the sale-deed was fictitious, the sale having actually been made for a sum of Rs. 8,500 only. He, therefore, asked for a decree in respect of khata No. 4 of Rajpur on payment of a proportionate share of the price. The defendants vendees are admittedly co-sharers in the superior proprietary right comprising the under-proprietary share sold. They denied that the plaintiff had any preferential right or that any portion of the sale consideration was fictitious.

The learned Subordinate Judge has found that the plaintiff can neither be considered to be a co-sharer of a sub-division of the tenure in which the property is comprised within the meaning of clause (1) of section 9 of the Oudh Laws Act nor a co-sharer of the mahal under clause (2) of that section. He held that the plaintiff as well as the defendants vendee both were members of the

(1) (1906) 9 O. C., 271. (2) (1925) 13 O. L. J., 166.
(3) (1888) Select Case No. 140.

village community under clause (3) of section 9 and as such had an equal right of pre-emption. Lots were drawn and the plaintiff being unsuccessful in the drawing of lots, his suit has been dismissed. On the question of the price not being fixed in good faith the learned Subordinate Judge held that no portion of the consideration was proved to be fictitious. As regards the comparative values of the two items of property which formed the subject of the sale-deed he held that the proportionate value of sixteen annas of khata No. 4 of Rajpur which alone formed the subject of pre-emption would, in case the plaintiff be found entitled to a decree, amount to Rs. 8,640. The learned counsel for the plaintiff-appellant has accepted the correctness of this finding before us. The only question urged by him in this appeal is that the plaintiff has a preferential right of pre-emption as against the defendants. He has conceded that as the plaintiff holds under-proprietary rights in khata No. 5 whereas the property forming the subject of pre-emption is khata No. 4, therefore the plaintiff cannot claim any right of pre-emption on the ground of his being a co-sharer of the sub-division of the tenure in which the property is comprised within the meaning of clause (1) of section 9 of the Oudh Laws Act. His contention is that the plaintiff has a preferential right under clause (2) as a co-sharer of the mahal and failing this under clause (3) as a member of the village community.

As regards the first point, namely, the application of clause (2) of section 9, the argument is based upon two khewats exhibit 3 and exhibit 6. Exhibit 3 is a copy of register No. 5, under-proprietary khewat of village Rajpur for 1307 Fasli. This khewat shows that there are five khatas of which the first one is rent-free and the other four have rents assessed in respect of each of them. At the end there is a note to the effect that under an order passed by the Settlement Deputy Collector, Rs. 87

1929

NAWAB KHAN v. ACHHALBAR DUBEY.

Srivastava, J.

was entered as rent of khatas Nos. 2 to 5. It may be mentioned that this sum of Rs. 87 is the total amount of the rents noted separately against each of the four khatas. Exhibit 6 is the under-proprietary khewat for the year 1335 Fasli. This is practically the same as exhibit 3 except for the fact that the note at the end of exhibit 3 does not find pace in this khewat and that the rents entered against each khata are slightly in excess of the rents entered in exhibit 3 and the total of the rents of the four khatas amounts to Rs. 98-2-0 instead of Rs. 87-4-0. It has been argued on behalf of the plaintiff that the reference to the sum of Rs. 87 as a lump rent in the note entered at the foot of exhibit 3 shows that all the under-proprietors are jointly liable for payment of the entire rent. I am not prepared to accept this contention. The plaintiff in paragraph 3 of his plaint admitted that there had been a partition in the village and that as a result of it the under-proprietary lands had been divided into five khatas. They never suggested in the pleadings that in spite of the partition there was any joint liability amongst the under-proprietors for payment of rent. They have not produced any copy of the order of the settlement court referred to in the footnote in exhibit 3. For anything we know the Settlement Deputy Collector may have fixed rents separately for each of the khatas as shown in the body of exhibit 3 and the official responsible for the footnote may have only put down the total of all the khatas. If the plaintiff claimed a preferential right under clause (2), the onus lay upon him to establish that there was an under-proprietary mahal of which he was a co-sharer. The necessary elements for the purpose of making out the existence of a mahal are, as held in *Sheoraj Kunwar* v. *Harihar Bakhsh Singh* (1), the existence of a separate record of rights and the joint liability for rent. The plaintiff has absolutely failed to prove that there was any such joint liability. I, therefore, agree with the learned Subordinate Judge that the plaintiff

(1) (1910) I. L. R., 32 All., 351.

has failed to prove the existence of any under-proprietary mahal and cannot therefore claim any right as a co-sharer of the mahal under clause (2) of section 9.

Next as regards the plaintiff's claim as a member of the village community. The plaintiff's argument is that the village community should in each case be determined by reference to the nature of the tenure which forms the subject of pre-emption. In other words the learned counsel for the plaintiff argues that if the property which forms the subject of pre-emption is an under-proprietary tenure then it is only the members of the under-proprietary body who can constitute members of the village community within the meaning of clause (3) and similarly in the case of a pre-emption relating to a superior proprietary tenure it is only the body of superior proprietors and not the under-proprietors who can be regarded as constituting the village community under clause (3) of that section. Reliance has been placed upon a decision of Mr. YOUNG, Judicial Commissioner, in *Ashraf-un-nisa* v. *Parbhu Narain* (1). This case no doubt supports the appellant's contention. Mr. YOUNG was of opinion that the Oudh Laws Act makes a distinction between the proprietary village community and the under-proprietary village community. The same view was taken by Mr. SPANKIE, Additional Judicial Commissioner in *Drigbijae Singh* v. *Court of Wards, Ramnagar Estate* (2). Speaking for myself I think a good deal can be said in support of this view. One thing which appeals to me strongly in favour of it is that it does not make clause (4) of section 9 redundant. But the matter is by no means free from difficulty. It is not easy to reconcile clauses 3 and 4 or to construe them without making one more or less overlap the other. I find it, therefore, difficult to put an interpretation upon this clause with any degree of confidence. Under the circumstances I think I must follow the view which has

Srivastava, J.

(1) (1888) Select Case No. 140. (2) (1901) 5 O. C., 266.

1929

NAWAB KHAN v. ACHHAIBAR DUBEY.

Srivastava, J.

held sway in this province for about the last twenty-eight years. It will be enough to make a brief reference to the course of decisions on this point. In *Drigbijae Singh* v. *Court of Wards* (1) Mr. SCOTT, J. C., disagreed with the opinion of Mr. STANKIE, A. J. C. to which reference has been made above. The case was referred to the High Court of Judicature, North-Western Provinces and a full Bench of the High Court consisting of STANLEY, C. J., and BLAIR and BURKETT, JJ., agreed with the opinion of Mr. SCOTT and held that in the case of a sale of a proprietary mahal a person holding an under-proprietary interest in a portion of the mahal was entitled to pre-emption under clause (3) of section 9 as a member of the village community. This view has been consistently followed in this province ever since. In the *Hon'ble Raja Ali Mohammad Khan* v. *Ram Bilas* (2) a Bench of the late Court of the Judicial Commissioner of Oudh consisting of Messrs. CHAMIER and GRIFFIN held that where in the case of a sale of an under-proprietary interest in the village there was competition between the vendee who held under-proprietary rights and a plaintiff pre-emptor who was the superior proprietor, the plaintiff and the vendee were both members of the village community and were equally entitled to claim the property In *Masih Uddin Ahmad* v. *Munir Ahmad* (3) my learned brother Mr. Justice RAZA took the same view and held that in the case of the sale of an under-proprietary plot, a superior proprietor and a person holding other under-proprietary plots have both an equal right of pre-emption.

The decisions referred to by me above fully support the view taken by the learned Subordinate Judge. I must therefore on the principle of *stare decisis* hold in agreement with the lower court that the plaintiff and the vendees are both members of the village community and have therefore an equal right under clause 3 of section 9.

(1) (1901) 5 O. C., 266. (2) (1906) 9 O. C., 271.
(3) (1925) 13 O. L. J., 166.

1929

NAWAB KHAN v. ACHHAIBAR DUBEY

It follows that the lower court was right in drawing lots between them.

The appeal therefore fails and I would dismiss it with costs.

1929 October, 30.

PULLAN, J. :—In this appeal the plaintiff-appellant claims a right of pre-emption over a proprietor in the village on the ground that he, the plaintiff-appellant, is an under-proprietor, and, in the first instance, he attempted to show that he came under clause (1) of section 9 of the Oudh Laws Act as being a co-sharer of the sub-division of the tenure in which the property is comprised, but the court below held that the under-proprietary land in this village had been divided by partition among the under-proprietors in the year 1879 into separate khatas. The land in suit is in khata No. 4 and the plaintiff-appellant is an under-proprietor in khata No. 5. These khatas have a separate rent assessed to them and cannot be held to be separate sub-divisions of a single tenure, and in appeal the learned counsel for the plaintiff appellant has not pressed this point. He has fallen back upon the second clause of section 9 and argued that the plaintiff-appellant and the vendor are co-sharers in one mahal. It is not clear whether clause (2) of section 9 of the Oudh Laws Act contemplates any mahal except a proprietary mahal but undoubtedly the term "under-proprietary mahal" is recognized by the Land Revenue Act, and I see no reason why an under-proprietor in an under-proprietary mahal cannot claim pre-emption in respect of a share of that under-proprietary mahal under clause (2) of section 9, but the plaintiff-appellant in order to succeed had to prove that this land was situated in an under-proprietary mahal. In 1910 their Lordships of the Privy Council decided the case of *Sheoraj Kuar* v. *Harihar Bakhsh Singh* (1), and they accepted the definition given by Mr. CHAMIER, Judicial

(1) (1910) I. L. R., 32 All., 351.

1929

NAWAB KHAN v. ACHHAIBAR DUBEY.

Commissioner, of the term "mahal" and also, presumably, of the term "under-proprietary mahal". This opinion appears on page 356 of the report. Mr. CHAMIER, said :—

Pullan, J.

> "When the Act speaks of an under-proprietary mahal it must, I think, mean a parcel or parcels of land separately assessed to revenue, the holder or holders of which is, or are, liable for the rent as a whole."

Now in the present case the under-proprietary khatas are all contained in the *shamilat patti* of the village, they do not form a separate entity and they are not assessed to revenue. Even if the word "revenue" is used by Mr. CHAMIER to mean rent, I cannot find that there is any assessment to rent of these under-proprietary holdings as a whole. On the contrary each khata is separately assessed and the mere fact that a total is given in the revenue papers of the separate amounts due on each khata, does not render the holder or holders liable for the rent as a whole. The rent of each khata is due only from the under-proprietors in that khata and not from the whole body of under-proprietors in the other khatas. Thus the property in suit is not an under-proprietary mahal and the plaintiff-appellant cannot claim pre-emption under the second clause of section 9. The lower court has decided that the case falls under the third clause which enacts that the "third class of pre-emptors are members of the village community." The vendee is a proprietor in the village and there is authority to the effect, that as residence is not an essential qualification for membership of a village community, all proprietors may be included in clause (3). It is not necessary to consider that aspect of the case in the present appeal, because the plaintiff contended before the lower court that the vendee was a member of the village community and, as such, came under clause (3). He, therefore, conceded this point and, as he himself has

1929

NAWAL KHAN v. ACHHAIBAR DUBEY.

failed to establish that he has a right of pre-emption either under clause (1) or clause (2), it follows that he also comes under clause (3), that he and the vendee had equal rights of pre-emption, and that the only course open to the court below was to decide their respective claims by drawing lots. This is the course adopted by the lower court and in my opinion this appeal should be dismissed.

1929 November, 4.

BY THE COURT :—This appeal is dismissed with costs.

Appeal dismissed.

APPELLATE CIVIL.

Before Sir Louis Stuart, Knight, Chief Judge and Mr. Justice Bisheshwar Nath Srivastava.

1929 November 6

INDAR (DEFENDANT-APPELLANT) *v.* RAGHUBIR SINGH AND TWO OTHERS PLAINTIFFS AND OTHERS (DEFENDANTS-RESPONDENTS).*

Transfer of Property Act (IV of 1882), section 3 and section 6(e)—Transfer of unpaid balance of a mortgage consideration together with interest claimed thereon by way of damages—Actionable claim—Interest, whether an "actionable claim" or "a mere right to sue"—Claim for interest, whether can be transferred—Contract Act (IX of 1872), section 73—Interest, whether recoverable under the Interest Act.

In a mortgage a portion of the consideration money was left with the mortgagee to be paid to the mortgagor when required but it was not paid when demanded and the plaintiff purchased the mortgagor's right to realize the unpaid balance together with a sum claimed to be payable as interest by way of damages and brought a suit for its recovery.

Held, that the defendant was under no contractual liability for the payment of the interest nor can it be said to be payable under the Interest Act; so it could be claimed only

*Second Civil Appeal No. 126 of 1929, against the decree of Pandit Gulab Chand Joshi, Subordinate Judge of Partabgarh, dated the 8th of January, 1929, upholding the decree of Pandit Dwarka Prasad Shukla, Munsif of Partabgarh, dated the 12th of October, 1928.