APPELLATE CIVIL.

Before Mr. Justice Wazir Hasan, Chief Judge and Mr. Justice A. G. P. Pullan.

BASDEO AND OTHERS (PLAINTIFFS-APPELLANTS) *v.* RAJA BIR INDAR BIKRAM SINGH AND OTHERS (DEFENDANTS-RESPONDENTS.)* 1930 *July*, 21.

Pre-emption—Oudh Laws Act (XVIII of 1876), section 9—Taluqdari mahal—Sale of a proprietary mahal consisting of several villages—Pre-emption suit by under-proprietors with respect only to a few villages—Vendee acquiring an indefeasible title with respect to villages not pre-empted, whether can defeat the claim for pre-emption by the title thus acquired—Cause of action for a suit of pre-emption, when arises—Village community—Suit for pre-emption by member of village community with respect to his own village out of the mahal sold, maintainability of.

Under-proprietors have a right under the Oudh Laws Act to pre-empt the sale of proprietary tenure even where the sale deed relates to an estate which may be considered to be a single mahal consisting of a large number of villages each of which is separately assessed to revenue and may be regarded as an inferior mahal. It is true that they come only in the third class as being members of the village community, and their right comes subsequent to that of co-sharers in the mahal. But where there are no co-sharers which must be the case where the whole mahal has been sold, the under-proprietors have a right of pre-emption as being members of the village community.

A purchaser cannot use a title acquired by him subsequent to the origin of the cause of action in a pre-emption suit as a defence against a pre-emption suit instituted after his acquisition of the said title. The Oudh Laws Act appears to consider only the state of affairs at the time of the proposed sale and does not contemplate a constantly changing situation brought about by subsequent purchases or transfers by which the pre-emptor or the vendee may improve their relative positions during the suit. The date of sale is the point in time on which the right of pre-emption comes into existence and

*First Civil Appeal No. 81 of 1929, against the decree of M. Mahmud Hasan, Subordinate Judge of Gonda, dated the 15th of July, 1929.

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if it were held that a purchaser by including in his sale-deed some property which for some reason or another could not be the subject of pre-emption, or even by securing the consent of the existing of pre-emptors to his retention without challenge of a small portion of the property purchased, could defeat the right of all other pre-emptors in other portions of the property, it would be merely pointing out a new means of evading the statute. *Gaya Prasad* v. *Faiyaz Husain*, (1), relied on. *Mohammad Sher Khan* v. *Lal Bahadur Khan* (2), dissented from. *Pateshwari Partab Narain Singh* v. *Sita Ram*, (3) referred to.

A suit for pre-emption is not vitiated by the fact that the plaintiffs have claimed no more than their own villages. Indeed they could not as members of the village community sue for more than their own village. It cannot be said that in the case of a mahal which comprises a great number of villages all the inhabitants of that mahal become members of one village community within the meaning of the third clause of section 9. On the other hand there may be many village communities comprised in such a mahal, but the members of such village communities are given no right of pre-emption outside the villages to which they belong.

Messrs. *Bindeshwari Prasad*, *Ali Jawad* and *Kashi Prasad* for the appellants.

Messrs. *M. Wasim* and *Karta Krishna* for the respondents.

HASAN, C. J. and PULLAN J. :—These are consolidated appeals arising out of five suits for pre-emption of certain properties transferred by means of a sale-deed executed by Babu Bishun Narain Bhargawa in favour of the Payagpur estate on the 27th of August, 1927. The property transferred had come into the possession of the vendor's father between the years 1890 and 1905 and we are satisfied that it represents an estate known as the Bamhnipur taluqa which was settled both in the first Summary Settlement of 1858 and in the subsequent regular Settlement with Rani Sarfaraz Kuar, widow of Raja Inderjit Singh. It is immaterial in our opinion

(1) (1929) 7 O.W.N., 622. (2) (1929) 6 O.W.N., 437.
(3) (1929) L.R., 56 I.A., 356.

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that the estate has from time to time received different names. It has all along been treated as a taluqdari mahal and the rights now purchased by the Payagpur estate are those of the superior proprietor in a group of villages forming a revenue paying mahal. The mahal contains 163 villages and these suits for pre-emption relate to three only and they are filed not by co-sharers but by persons who own under-proprietary rights in the villages which they seek to acquire by pre-emption. Suits Nos. 86 and 91 of 1928 represented by appeals Nos. 81 and 102 of 1929 are suits brought by different plaintiffs for pre-emption of four complete hamlets appertaining to the villages Bakhrauli, namely, Maduapur, Bakhrauli Khas and two mahals of Bhoingaon, namely. Mahal Suraj Bali and Mahal Ram Harakh. Suit No. 89 of 1928 represented by appeal No. 115 of 1929 was brought by another under-proprietor or birtdar for the village of Patijia Buzurg only. Suits Nos. 146 and 145 of 1928 represented by appeals Nos. 124 and 125 of 1929 are brought by different plaintiffs for pre-emption of the village of Kusmi. All the suits have been dismissed by the learned Subordinate Judge of Gonda on the same grounds. He finds in the first place that the property purchased constitutes a single taluqdari mahal, secondly, that the vendee has now acquired unassailable rights in the remaining 160 villages in respect of which no suit is now being maintained and "he therefore falls under clause 1 or 2 of section 9 of Act XVIII of 1876 and the plaintiffs in all the suits fall under clause 3 of the said section. The plaintiffs therefore have no right to pre-empt as against the defendant No. 1." Thirdly he finds that the plaintiffs are debarred from maintaining the present suits because they failed to apply for pre-emption of the whole mahal. All these findings have been challenged in appeal. As to the first finding we have no doubt that the decision of the lower court is correct. It is amply proved that the property con-

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veyed by the sale deed is a single proprietary mahal for which the proprietor has contracted to pay a definite sum by way of land revenue to the Government. It is true that each village is separately assessed to land revenue, and we have been referred to a document exhibit X printed at page 78 of part III of the paper book which is described as an agreement executed by the lambardars of this mahal. Even if this is taken to be an agreement with the under-proprietors as well as with the proprietors-in-chief it only means that the estate should be regarded on the same lines as the estate which was considered by their Lordships of the Judicial Committee in the case of *Thakurain Sheoraj Kuar* v. *Thakur Harihar Bakhsh Singh* (1). But as a matter of fact we have seen that the original of this document is a printed form in which the words "*ham lambardaran*" and "*dastkhat lambardaran*" have not been deleted, but the only person signing on behalf of the lambardar or lambardars is the agent of B. Prag Narain the superior proprietor. Thus all that is proved is that each individual village has been separately assessed to revenue and the estate may be considered to be a single mahal consisting of a large number of villages each of which is separately assessed to revenue and may be regarded as an inferior mahal. This finding is in no way fatal to the plaintiffs' suits. As under-proprietors they have a right under the Oudh Laws Act to pre-empt a sale of proprietary tenure. It is true that they come only in the third class as being members of the village community, and their right comes subsequent to that of co-sharers in the mahal. But where there are no co-sharers, which must be the case where the whole mahal has been sold, the under-proprietors have a right of pre-emption as being members of the village community. It is on the other two findings that the learned Subordinate Judge has dismissed the plaintiffs'

(1) (1910) L.R., 37 I.A., 124.

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claims. The view taken by the court below that a purchaser may use a title acquired by him subsequent to the origin of the cause of action in a pre-emption suit as a defence against a pre-emption suit instituted after his acquisition of the said title finds support in certain rulings of the late Court of the Judicial Commissioner of Oudh and in one judgment of a single Judge of this Court referred to in the judgment under appeal: *Mohammad Sher Khan* v. *Lal Bahadur Khan* (1), but this is not the view which has been taken by a Full Bench of this Court in a more recent case: *Gaya Prasad* v. *Faiyaz Husain* (2). The Full Bench found in that case that a co-sharer cannot defeat the suit brought by a pre-emptor by acquiring the position of a co-sharer during the pendency of the suit. The decision was based on a strict interpretation of the Oudh Laws Act and it was pointed out that the judgments of the Judicial Commissioners Court allowing the opposing parties to alter their relative positions after the execution of the sale deed are based upon certain decisions of the Allahabad High Court which were unfettered by any such statute as the Oudh Laws Act. The view taken in the Allahabad High Court was that the main object of a custom of pre-emption was to exclude a stranger from acquiring land in the village, where there was any village co-sharer or a member of the village community willing to purchase the property. There is nothing in the Oudh Laws Act which suggests that the object of the law of pre-emption is to exclude a stranger. The Act lays down that the right of pre-emption is a right of "the persons, hereinafter mentioned or referred to, to acquire, in the cases hereinafter specified, immoveable property in preference to all other persons." It goes on to confine the presumption of the existence of the right to a village community and it gives the order in which certain classes of persons may claim a right

(1) (1929) 6 O.W.N., 437. (2) (1929) 7 O.W.N., 622.

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of pre-emption. The first right goes to persons intimately connected with the estate namely co-sharers in the sub-division, if any, of the tenure in which the property is comprised and these have a preference *inter se* based on the nearness of their relationship to the vendor or the mortgagor. The second class comprises the co-sharers of the whole mahal in the same order and the third class consists of the members of the village community. The whole chapter appears to us to consider only the state of affairs at the time of the proposed sale. The Act does not contemplate a constantly changing situation brought about by subsequent purchases or transfers by which the pre-emptor or the vendee may improve their relative positions during the suit. In the case of co-sharers who are entitled to a notice of any proposed sale the fact that they have obtained no such notice is the first ground on which they may base a suit for pre-emption, and the other causes of action given are refusal of a tender and a lack of good faith in the proposed transaction. The statute never suggests that any person who had the right of pre-emption on the grounds given therein can subsequently in the course of a suit lose those rights on proof of some act of another which he could not in any manner prevent. In the present case the sale in favour of the respondent gave rise in our opinion to a claim for pre-emption on the part of 'the members of the village community' for prior to the sale the vendee had no share in the mahal and he was not a member of the village community. As we have stated above the property comprises 163 villages, and as there is now no chance that any portion of the property, except the three villages with which we are concerned, can be taken from the vendee by pre-emption he has no doubt acquired an indefeasible right in those villages. We are unable to see how by so doing he can meet the claim for pre-emption which arose on the date of the sale when he had no such indefeasible right and

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was neither a co-sharer in the mahal nor even a member of the village community. Even now he is not a co-sharer. He is a proprietor of an undivided share. The persons who challenge his title are not co-sharers and there is no one in that class who can challenge his title. But this does not protect him from the suits brought by the under-proprietors whose relative position towards himself in respect of the villages which they claim is entirely unchanged by the fact that his sole possession of the remaining villages has now been placed beyond dispute. It is true that in the Full Bench ruling to which we have referred we were concerned with a case where a vendee acquired a right after the sale and it is urged that in this case the right on which the vendee relies came into existence simultaneously with the sale of the villages which is challenged by the plaintiffs, but we consider that this is not a material difference. The judgment of the Full Bench lays down the date of the sale as the point in time on which the right of pre-emption comes into existence and if we were to hold that a purchaser, by including in his sale-deed some property which for some reason or another could not be the subject of pre-emption, or even by securing the consent of the existing pre-emptors to his retention without challenge of a small portion of the property purchased, could defeat the right of all other pre-emptors in other portions of the property, it would be merely pointing out a new means of evading the statute. We have not been asked by the learned Counsel for the vendee to consider his possible claim to be regarded as a member of the village community by means of his purchase. In our opinion the claim, if it were raised, can be answered partly in the same manner as the claim set forward that he should be regarded as a co-sharer. He was not at the time of the sale a member of the village community and we are far from certain whether mere purchase of the rights of the superior proprietor *ipso*

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facto makes the purchaser a member of the village community. Vide the judgment of their Lordships of the Privy Council in *Pateshwari Partab Narain Singh* v. *Sita Ram* (1).

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The last point found by the learned Subordinate Judge against the plaintiffs is that they should have sued for pre-emption of the whole mahal. In our opinion the reasoning of the learned Subordinate Judge on this point is faulty. A perusal of section 9 of the Oudh Laws Act shows that the circle of pre-emptors is gradually widened from co-sharers in a sub-division to co-sharers of a mahal and then to members of the village community. This presupposes in our opinion that the village community is regarded as something wider than the co-sharers in a mahal. The ordinary meaning of the term "mahal" is a revenue paying area and several mahals may be included in a single village. We are not prepared to say that in the case of a mahal which comprises a great number of villages all the inhabitants of that mahal become members of one village community within the meaning of the third clause of section 9. On the other hand (we consider that) there may be many village communities comprised in such a mahal, but the members of such village communities are given no right of pre-emption outside the villages to which they belong. Thus these suits are not vitiated by the fact that the plaintiffs have claimed no more than their own villages. Indeed they could not as members of the village community sue for more than their own village. In our opinion the vendee failed to meet these suits for pre-emption and the plaintiffs were entitled to succeed. The plaintiffs in suits Nos. 86 and 91 of 1928 (appeals Nos. 81 and 102 of 1929) have agreed that in the event of success they should decide the matter by lot. The plaintiffs in suits Nos. 146 and 145 of 1928 (appeals Nos. 124 and 125 of 1929) have agreed to divide the

(1) (1929) L.R., 56 I. A., 356.

village half and half, and effect to these agreements will be given in the decree to be prepared. We allow these appeals with costs. The sums to be paid in each case have been decided by the court below and no objection has been taken to his decision on this matter. The vendee has asked that in the event of the plaintiff Kulman succeeding in the lot in respect of the hamlets of Bakhrauli (appeal No. 102 of 1929) he should be required to pay a sum of Rs. 40,000 as that was the sum offered by him in his suit. We find however that Kulman's offer was to pay Rs. 40,000 or whatever sum the court should decide and as the court decided that the proper value of these villages is Rs. 25,736 we do not consider that he should be required to pay more than that. We therefore decree suits Nos. 86 and 91 of 1928 for pre-emption on payment of a sum of Rs. 25,736 by whichever of the rival plaintiffs is successful in the drawing of lots, within six months of this date, failing which the suits will be dismissed with costs. If the money is paid the vendee contesting respondent will pay one set of costs to these persons based on the value of the property given in our judgment. Suit No. 89 of 1928 for pre-emption of village Patijia Buzurg is decreed on payment of Rs. 10,542-8-0 within six months. Otherwise the suit will be dismissed with costs. If the money is paid the plaintiff will receive his costs from the contesting respondent. In suits Nos. 145 and 146 of 1928 a decree for pre-emption will be passed on payment of Rs. 1,461 within six months. The sum will be paid half and half by the plaintiffs in the respective suits who will each be entitled to a one half share of the village Kusmi. If the money is not paid within six months these suits will be dismissed with costs. If the money is paid the plaintiffs in each suit will be entitled to recover half the costs from the contesting respondent.

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