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of opinion that the learned District Judge was wrong in making out an entirely new case which the defendant had no opportunity of meeting by giving the plaintiffs a decree on the basis of an alleged mortgage of 1868.

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A request was also made to me on behalf of the plaintiffs that they may be allowed to amend their plaint so as to convert the suit into a suit for redemption of the mortgage of 1868. It is admitted that if the plaintiffs have to institute a fresh suit it would be as much within limitation as the present suit. In the circumstances I think it would be proper that the plaintiffs institute a fresh suit in respect of the mortgage of 1868 so that all the pleadings with regard to it may be gone into afresh. There would be no advantage in ordering a fresh trial after allowing amendment of the plaint in this very suit.

I accordingly allow the appeal, set aside the decrees of the lower courts and dismiss the plaintiffs' suit with costs throughout.

*Appeal allowed.*

## APPELLATE CIVIL

*Before Mr. Justice Bisheshwar Nath Srivastava, Chief Judge and Mr. Justice H. G. Smith*

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*October, 27*

BAIJNATH AND OTHERS (PLAINTIFFS-APPELLANTS) *v.* PANDIT MAHABIR PRASAD AND ANOTHER (DEFENDANTS-RESPONDENTS)*

*Oudh Laws Act (XVIII of 1876), Chapter II—Pre-emption—Sale-deed conveying different kinds of properties—Tenancy groves also included in sale-deed which are not pre-emptable—Suit for pre-emption of other properties only—Pre-emption suit for only part of property sold, if maintainable.*

Under the Oudh Laws Act it is not possible to enforce pre-emption in respect of only a part of the property sold on payment of only a proportionate share of the price. Where,

*Second Civil Appeal No. 310 of 1935, against the decree of S. Abid Raza, Civil Judge of Partabgarh, dated the 10th of July, 1935, upholding the decree of Munir Uddin Ahmad Kirmani, Munsif of Partabgarh, dated the 28th of February, 1935.

therefore, proprietary and under-proprietary land in different villages as well as some tenancy groves, which are not pre-emptable, are conveyed under a sale-deed a suit for pre-emption by different persons entitled to pre-empt the proprietary and under-proprietary land on payment of a proportionate price is not maintainable, such a suit necessarily involving apportionment of price. *Birendra Bikram Singh* v. *Brij Mohan Pande* (1), followed. *Karam Husain* v. *Raghubar Dayal* (2), and *Mahabir Prasad* v. *Ram Jiawan Lal* (3), referred to.

Messrs. *Hyder Husain* and *H. H. Zaidi,* for the appellants.

Messrs. *Radha Krishna Srivastava, L. S. Misra* and *Jagdish Narain* for *Makund Behari Lall* for the respondents.

SRIVASTAVA, C. J. and SMITH, J.:—On the 19th of August, 1933, Ram Nath, defendant no. 2, executed a sale-deed in favour of Mahabir Prasad, defendant no. 1, in respect of three distinct properties, namely, (1) a fractional share of superior proprietary rights in village Bhanapur; (2) a fractional share of under-proprietary rights in village Paramnathpur; and (3) two tenancy groves in village Paramnathpur, for a lump sum of Rs.4,000. Baij Nath and Ram Kumar, who are the superior proprietors in village Bhanapur, instituted suit no. 182 of 1934 claiming pre-emption of the Bhanapur property. Another suit, no. 183 of 1934, was instituted by Daulat Singh and Sarnet Singh, superior proprietors in village Paramnathpur, for pre-emption of the under-proprietary rights in Paramnathpur. A third suit, no. 186 of 1934, was instituted for pre-emption of the same under-proprietary rights by one Bhola, who is an under-proprietor in village Paramnathpur, and has also been found to be a relation of the vendor. The respective plaintiffs in all the three suits asked for a decree for pre-emption of the property which they were entitled to pre-empt on payment of a proportionate amount of the price. Before the suits

(1) (1934) L.R., 61 I.A., 235, 3.C., (2) (1901) 4 O.C., 397. I.L.R., 9 Luck., 407.
(3) (1910) 13 O.C., 260.

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could reach the stage of trial. Baij Nath, Ram Kumar, Daulat Singh and Sarnet Singh instituted another suit, no. 190 of 1934, claiming a joint decree in favour of all the four plaintiffs in respect of the shares in Bhanapur and Paramnathpur, and in the alternative a decree in favour of plaintiffs 1 and 2 in respect of the property in village Bhanapur, and a decree in favour of plaintiffs 3 and 4 in respect of the property in village Paramnathpur, on payment of the proportionate amount of the real consideration of the sale-deed. After the institution of this suit they withdrew suits Nos. 182 and 183 of 1934. So only suits Nos. 186 and 190 of 1934 were tried, and the trial of these suits being consolidated, suit No. 190 of 1934 was treated as the leading suit. Of the various defences raised in the suit there is only one which is material for the purpose of these second appeals before us. It was based on the decision of their Lordships of the Judicial Committee in *Raja Birendra Bikram Singh* v. *Brij Mohan Pande* (1), and was to the effect that there could be no pre-emption of part of the property sold on payment of a proportionate price. It may be noted that the evident object of the four plaintiffs in suit No. 190 of 1934 in instituting that suit and in withdrawing the two separate suits previously instituted by them was to overcome the obstacle raised by the aforesaid Privy Council decision. However, both the lower courts came to the conclusion that the suits were not maintainable, as they offended against the principles enunciated by their Lordships of the Judicial Committee in the ruling referred to above. We should also note that all the parties before us are agreed that the two groves in Paramnathpur covered by the sale-deed, being held in tenancy right, could not be the subject of pre-emption.

The position therefore is that one of the items of property conveyed under the sale-deed is not pre-emptable, and one of the plaintiffs in the two suits has

(1) (1934) L.R., 61 I.A., 235: I.L.R., 9 Luck., 407.

a right of pre-emption in respect of both of the remaining two items of property included in the sale-deed. The question therefore is whether in such a case any of the plaintiffs can be given a decree for pre-emption in respect only of the property which he is entitled to pre-empt, on payment of a proportionate price. In other words, is it permissible under the provisions of the Oudh Laws Act to pass a decree for pre-emption of part of the property sold on payment of a proportionate share of the price?

Before addressing ourselves to this question, we might observe that it is altogether out of the question to pass a joint decree in favour of the four plaintiffs in the leading suit in respect of the properties both in Bhanapur and Paramnathpur, as admittedly plaintiffs 1 and 2 are strangers to village Paramnathpur, and plaintiffs 3 and 4 have no interest in village Bhanapur. In fact the claim for a joint decree was not seriously pressed before us. It is equally obvious that no decree for pre-emption can be passed in respect of the groves because admittedly the vendor did not possess any proprietary rights therein. In the circumstances, if a decree for pre-emption can be passed at all, there can be no escape from apportionment of the price, because if several persons are given decrees for different portions of the property, each of them cannot, obviously be made liable to pay the whole price, as it would involve the vendee being paid his price several times over.

Turning now to the main question in the case, the learned counsel for the appellants has relied on the decisions of the late Court of the Judicial Commissioner of Oudh in *Karam Husain* v. *Raghubar Dayal and others* (1), and *Mahabir Prasad* v. *Ram Jiawan Lal and others* (2), in support of their claim for pre-emption. These decisions no doubt support the plaintiffs' claim. In fact we have no hesitation in saying that it has been

(1) (1901) 4 O.C., 397. (2) (1910) 13 O.C., 260.

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the well-established law in this provice that where the plaintiff has a right as to a part only of the property conveyed by a deed, he can only obtain a decree for pre-emption of that part, and where the consideration for the whole is a lump sum, he is entitled to such decree on payment of a proportionate part of the consideration. However, we have to determine the effect of the pronouncement of their Lordships of the Judicial Committee in *Raja Birendra Bikram Singh* v. *Brij Mohan Pandey* (1) on this point. It is therefore necessary to closely examine the facts of that case, and the observations made by their Lordships in respect of the relevant provisions of the Oudh Laws Act. The sale-deed in that case related to a taluqdari estate consisting of 163 villages constituting a single proprietary mahal, for which the proprietor paid the land revenue although the villages were separately assessed. The under-proprietors in two of these villages filed two separate suits for pre-emption of the two villages in which the plaintiff or plaintiffs respectively had under-proprietary rights on payment of the proportionate price. Their Lordships considered the provisions of sections 6 to 13 of the Oudh Laws Act, and held that "the provisions of sections 10, 11 and 12 of the above mentioned Act tend to show that the claims of the plaintiffs in the two suits are not such as were contemplated by the Legislature". The following observations of their Lordships may be usefully quoted:

> "Under section 10 the person proposing to sell any property in respect of which any persons have a right of pre-emption is bound to give notice to the persons concerned of the price at which he is willing to sell such property, and section 11 provides that a person having a right of pre-emption in respect of the property proposed to be sold shall lose such right unless within three months from the date of such notice he or his agent pays or tenders 'the price aforesaid' to the person so proposing to sell."
>
> "How could the provisions of these sections apply to the facts of this case?".

(1) (1934) L.R., 61 I.A., 235: I.L.R., 9 Luck., 407.

"If they do apply, the vendor of the taluqdari mahal would have to give notice to the members of the under-proprietary village communities, if any, in all the 163 villages of the price at which he was willing to sell the taluqdari mahal, namely, Rs.5,50,000, and in order to comply with section 11 any member of an under-proprietary village community who claimed a right of pre-emption, would be bound to tender the 'the price aforesaid', although he desired to pre-empt one village only as in these suits, for there is no provision made in the Act for tendering part of the 'price aforesaid' or for per-empting part of the property proposed to be sold" . . .

"Section 13, which deals with the grounds on which a suit under the Act may be brought, points to the same conclusion; for section 13(*b*) refers to a tender having been made under section 11 or section 12 and refused. Such tender must be of the price at which the vendor is willing to sell the property in question or of the amount due in respect of the mortgage specified in the notice".

"In the cases now under consideration, the property sold by the vendor was the whole taluqdari mahal containing 163 villages."

"The plaintiffs in each suit claimed to pre-empt one of the said villages only. It would be absurd to suggest that they would be bound to tender the whole of the price, namely, Rs.5,50,000 which was the price at which the vendor was willing to sell, and yet there is no provision in the Act which would enable the plaintiffs to tender the amounts at which the plaintiffs valued the two villages respectively as stated in their plaints or any amount other than the said 5,50,000. These considerations, in their Lordships' opinion, are conclusive as showing that the claims of the plaintiffs as stated in their plaints are not within the above-mentioned Act and are therefore not maintainable."

We think that this aspect of the law as emphasised by their Lordships in the passage quoted above did not receive attention in the earlier cases decided in this province. Section 6, the opening section of Chapter II of the Oudh Laws Act, which deals with pre-emption, runs as follows:

"The right of pre-emption is a right of the persons hereinafter mentioned or referred to, to acquire, in the

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cases hereinafter specified, immovable property in preference to all other persons."

The words "in the cases hereinafter specified" used in this section show that the right of pre-emption is limited to the cases specified in the sections which follow section 6. Section 10 requires the vendor to give notice to the persons concerned of the price at which he is willing to sell the property. It may be pointed out that the notice need not be given individually to every person entitled to pre-empt, but may be stuck up on the *chaupal* or other public place of the village or city in which the property is situate. Section 11 makes it obligatory on a person having a right of pre-emption to pay or tender "the price aforesaid" to the person proposing to sell within three months from the date of such notice. Lastly, section 13 states the grounds on which a suit can be maintained for enforcing the right of pre-emption. Strict compliance with these provisions contained in Chapter II of the Oudh Laws Act is clearly impossible if a person seeks to enforce pre-emption in respect of only a part of the property sold on payment of only a proportionate share of the price. We therefore think that the courts below were right in holding that the present suits for pre-emption of part of the property, which necessarily involved apportionment of price, were not maintainable.

It has been forcibly argued by the learned counsel for the plaintiffs-appellants that the application of the decision of their Lordships of the Judicial Committee should be confined to the facts of that particular case, and that it should not be interpreted so as to have the effect of revolutionising the law in the province as it has been understood hitherto. Even if it is conceded that the case before their Lordships related to one single item of property, namely, the taluqdari mahal consisting of 163 villages, and that in that sense it is possible to distinguish it from the facts of this case, which show

that the sale-deed related to two, if not three, distinct items of property, yet the principle deduced by their Lordships from the provisions of sections 6 to 13 of the Oudh Laws Act that "there is no provision made in the Act for tendering part of the 'price aforesaid' or for pre-empting part of the property proposed to be sold" is fully applicable to the present case also. We venture to think that the Legislature in enacting these provisions did not take into consideration the case of a composite sale-deed like the one before us in which several distinct properties are sold together for a lump price. The view which has hitherto prevailed in this province, that in such a case, if the plaintiff is entitled to pre-empt only part of the property sold, he should be given a decree for pre-emption of that part on payment of the proportionate price, is no doubt a most equitable one. We are conscious that the effect of our decision in the present case would be to debar many persons from exercising their right of pre-emption, or even, as the learned counsel for the appellants put it, practically to nullify the right of pre-emption in those cases in which several properties are sold together, yet we think that this consideration cannot afford any justification for our circumventing the provisions of the Statute as authoritatively construed by their Lordships of the Judicial Committee. The proper remedy for the apprehended hardship to the rights of pre-emptors in such cases is for the Legislature to make the necessary amendment in the provisions of the law.

With these remarks we dismiss the appeals, with costs.

*Appeal dismissed.*