mortgages in dispute, this is tantamount to a partial recognition of the mortgages in question, and the rule of estoppel between the mortgagor and the mortgagee should therefore apply to the present suit. In our opinion the argument is fallacious. The suit is undoubedly one for ejectment of the defendants by avoidance of the mortgages. The plaintiff has not been required to pay any portion of the consideration of the mortgages as such, but she has been ordered to pay certain sums on the principle that a minor is bound to refund any amount which has been utilised for his or her benefit. The correctness of the decision of Mr. Justice NANAVUTTY that the rule of estoppel invoked on behalf of the plaintiff cannot be invoked in a case where the suit is not based on the mortgage, but is one in repudiation of the mortgage, has not been questioned before us. We are therefore of opinion that he is right in holding that no question of estoppel arises. The result therefore is that the appeals fail, and are dismissed with costs.

Appeal dismissed.

APPELLATE CIVIL

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

1937
January, 15

DALMIR KHAN (DEFENDANT-APPELLANT) *v.* SHAMSHER KHAN AND ANOTHER (PLAINTIFFS-RESPONDENTS)

Pre-emption—Village community—Lessee, if member of village community—Sale of leasehold right—Co-sharer in the same right, if can pre-empt—Pleader's fee, taxation of—Fees to be taxed on value for purposes of jurisdiction and not value for court-fee.

A village community under the Oudh Laws Act includes heritable lessees in village lands. Where, therefore, a person who possesses a share in a heritable and transferable lessees interest in certain lands sells his share to a stranger, a co-sharer in the lease-hold right who is a member of the same

*Second Civil Appeal No. 46 of 1935, against the decree of S. Abid Raza, Civil Judge of Partabgarh, dated the 14th of November, 1934, confirming the decree of Babu Kali Charan Agarwala, Munsif of Partabgarh, dated the 6th of August, 1934.

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village community is entitled to pre-empt the sale. *Birendra Bikram Singh v. Brijmohan Pande* (1), distinguished. *Asghar Husain* v. *Sardar Husain* (2), *Bhagwati Prasad* v. *Balgobind* (3), and *Bindeshwari Prasad Upadhyaya* v. *Krishna Murari* (4), relied on.

Pleader's fee should be taxed on the value for the purpose of jurisdiction, and not on the amount on which court-fee had to be paid.

Messrs. *M. Wasim* and *Ali Hasan,* for the appellant.

Mr. *Radha Krishna Srivastava,* for the respondents.

SRIVASTAVA, C.J., and SMITH, J.:—This is a second appeal arising out of a suit for pre-emption. Defendants 2 to 4, who possessed a 2 annas share in a heritable and transferable lessee's interest in the lands in suit, executed a lease in respect of their share in favour of defendant No. 1. The plaintiffs, who possessed a 6 annas share in the same tenure, brought a suit for pre-emption alleging that the lease executed by defendants 2 to 4 in favour of defendant No. 1 was in reality a sale, and that defendant No. 1 being a stranger to the village, the plaintiffs were entitled to a decree for pre-emption. Both the lower courts have held that the lease in question is, in fact, a sale. They have also held that the transferors and the plaintiffs being members of the same village community, and the defendant No. 1 being a stranger, the plaintiffs were entitled to exercise the right of pre-emption in respect of the transfer, and have accordingly decreed the suit. Mr. Mohammad Wasim, the learned counsel for the defendant No. 1, appellant, has frankly conceded that the decision of the courts below is in accordance with the decisions of this Court in *Asghar Husain, Saiyid* v. *Sardar Husain, Saiyid and another* (2), *Bhagwati Prasad and others* v. *Balgovind, Pandit and others* (3) and *Bindeshwari Prasad Upadhyay, Pandit* v. *Krishna Murari, Pandit and another* (4), in which it has been held that a village

(1) (1934) I.L.R., 10 Luck., 407.
(2) (1928) 5 O.W.N., 947.
(3) (1933) I.L.R., 8 Luck., 377
(4) (1934) I.L.R., 9 Luck., 670.

community under the Oudh Laws Act (XVIII of 1876), consists of the whole body of persons possessing rights as proprietors, under-proprietors or heritable lessees in village lands. In fact in a later case decided by a Bench of this Court consisting of Sir CARLETON KING and Justice ZIAUL HASAN—*Jagdamba Prasad* v. *Mata Prasad* (1), the principle of these cases seems to have been extended to *"qabzadari"* land, which has been held liable to pre-emption by a *"qabzadar"* who is a co-sharer in the tenure. However, Mr. Wasim has strongly contended that the view taken in the cases above referred to can no longer be accepted as good law in view of the decision of their Lordships of the Judicial Committee in *Birendra Bikram Singh, Raja* v. *Brij Mohan Pande* (2). It may be mentioned that the decision of their Lordships of the Judicial Committee in the case just mentioned was considered by the Bench which decided *Jagdamba Prasad* v. *Mata Prasad and another* (1) and appears to have been distinguished. Having given our careful consideration to the facts of the case and the observations of their Lordships, we are of opinion that that case must be regarded as an authority only for the point which was actually raised for decision in that case. This point has been stated by their Lordships in the following words:

> "That the right of a member of a village community to pre-empt extends only to the property of those proprietors (or under-proprietors) whose rights are of the same nature as his own, and therefore that the plaintiffs as under-proprietors had no right of pre-emption over the superior rights."

There was no question in that case about the exercise of the right of pre-emption in respect of lease-hold tenures, and the controversy in the appeal, so far as it related to the question of village community, was confined to the right of under-proprietors to pre-empt superior proprietary rights. It may be pointed out that it has been expressly laid down in section 7(*a*) of the Oudh

(1) (1935) I.L.R., 11 Luck., 289. (2) (1934) I.L.R., 10 Luck., 407.

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Srivastava, C. J. and Smith, J.

Laws Act that a right of pre-emption shall be presumed, amongst others, "in the cases referred to in section 40 of the Oudh Land Revenue Act." One of the cases referred to in this section is the case of a class of lessees. Further, clause (*b*) of the same section lays down that the right shall be presumed to extend "to all transferable rights affecting such lands". Surely a right like the one in question in the present case, that of a heritable and transferable lessee, is such a transferable right. It was not necessary for their Lordships to make reference to these provisions of the Oudh Laws Act because there was no question about the rights of lessees in the case before them. In the circumstances we think that the observations made by their Lordships must be confined in their application to the particular facts of the case before them. One particular observation on which strong reliance has been placed on behalf of the appellant is as follows:

> "In the first place, it appears clear to their Lordships that having regard to the words 'whether proprietary or under-proprietary', the village community contemplated by section 7(*a*) must refer to persons having proprietary or under-proprietary rights in the village, and that it was not intended to include anyone who happened to reside in the village and who had no proprietary interest therein".

It will be noticed that the latter portion of clause (*a*), which refers to the cases mentioned in section 40 of the Oudh Land Revenue Act. has been entirely omitted from consideration, for the obvious reason that their Lordships were not called upon to decide any question with regard to lessees. As regards the last few words in the passage quoted above, namely, "who had no proprietary interest therein", the words, if literally construed, no doubt lend some support to the appellant's contention that lessees should not be treated as members of the community, but we are inclined to think that these words were used only to exclude persons like mere tenants. We think that bearing the facts of the case in mind, and in view of the question as regards the rights of lessees as

members of the village community not having at all been raised in the case, it would not be right to construe these words very strictly so as to exclude even lessees. We are therefore of opinion that there being a long course of decision of this Court in which the rights of lessees as members of the village community have been recognized, we should not be justified in going behind this long course of decisions, in the absence of a clear pronouncement to the contrary by their Lordships of the Judicial Committee. The decision is no doubt an authority for the proposition that a member of a village community can exercise the right of pre-emption only in regard to property belonging to persons whose rights are of the same nature as his own. In the present case, as already stated, the plaintiffs are co-sharers in the lease-hold right a portion of which has been sold The decision of the courts below is, therefore, in consonance with the principle laid down by their Lordships of the Judicial Committee.

We accordingly can see no reason for interference, and dismiss the appeal with costs.

The plaintiffs-respondents have filed certain cross-objections, of which only one, relating to the taxation of pleader's fee, has been pressed. It is not seriously disputed that pleader's fee should have been taxed on the value for the purpose of jurisdiction, and not on the amount on which court-fee had to be paid. The pleader's fee taxed in the decree of the lower appellate court should be corrected accordingly. We make no order as to the costs of the cross-objections.

Appeal dismissed.