MISCELLANEOUS CIVIL

Before Mr. Justice A. H. deB. Hamilton and Mr. Justice R. L. Yorke

1939 *January*, 11

RAM PRASAD (DEFENDANT APPELLANT) *v.* RAM BHAROSEY AND OTHERS (PLAINTIFF RESPONDENTS)*

Oudh Laws Act (XVIII of 1876), section 7—Village community, meaning of—Single proprietor at passing of Act in 1876—No under-proprietor till 1922 when plaintiff created under-proprietor—Transfer creating another under-proprietary right in 1935—Plaintiff if entitled to pre-empt—Presumption under section 7, when applicable.

The proprietary village community in any given village is something quite separate from the under-proprietary village community of the same village. An under-proprietor has no right to pre-empt a transfer of proprietary tenure. He can pre-empt a transfer of under-proprietary tenure only if he is a member of an under-proprietary village community within the meaning of section 7 of the Oudh Laws Act.

Where there was a single proprietor in a village at the time of the passing of the Oudh Laws Act in 1876 and for the first time in 1922 the plaintiff was given under-proprietary rights and after that in 1935 the Taluqdar made another transfer creating under-proprietary rights, *held*, that in view of the fact that there was no under-proprietary village community in existence in 1876, section 7 of the Oudh Laws Act did not create a presumption that there was any right of pre-emption in respect of a transfer of under-proprietary tenure in the village at that time. The Act does not create for the first time a right of pre-emption irrespective of former custom and section 7 cannot be considered to give rise to a presumption of a right of pre-emption in case at any future date an under-proprietary village community should come into existence. The plaintiff being the sole under-proprietor it cannot be said that there was an under-proprietary village community in the village and in consequence there cannot ever have been any custom of pre-emption and the plaintiff cannot fall back on the presumption provided by section 7 of the Oudh Laws Act, and cannot claim any right of pre-emption in respect of the transfer. *Pateshwari Partab Narain Singh, Raja* v. *Muhammad Mumtaz Ali Khan, Raja (Cookenagar case)* (1), and *Birendra Bikram Singh, Raja* v. *Brij Mohan Pande* (2), relied on.

*Misc. Appeal No. 98 of 1936, against the order of Pt. Pearey Lal Bhargava Saheb, Civil Judge of Partabgarh, dated the 19th October, 1936.

(1) (1927) I Luck., Cases, 10. (2) (1934) I.L.R., 9 Luck., 407, P.C.

Pateshwari Partab Narain Singh v. *Sita Ram* (1), and *Bindeshwari Prasad Upadhyay, Pandit* v. *Krishna Murari, Pandit and another* (2), referred to.

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

Mr. *B. K. Dhaon,* for the respondents.

HAMILTON and YORKE, JJ.—This is an appeal from an order of remand under the provisions of Order XLIII, rule 1, clause (*u*) of the Code of Civil Procedure in a suit for pre-emption.

The plaintiff respondent Ram Bharose is admittedly an under-proprietor in village Mahdaiya in the Partabgarh District, and it is not disputed that he obtained his rights as such in or about the year 1922. This was stated in the written statement filed by the defendants nos. 1, 2 and 3, one of whom was the present appellant Ram Prasad, and has not been contested by the filing of any replication. The plaintiff's case was that on the 5th March, 1935, the defendant no. 3 Thakurain Gajraj Kuar, who is the taluqdar and superior proprietor of village Mahdaiya, made a transfer of under-proprietary rights in favour of the defendants nos. 1 and 2, Ram Prasad appellant and Ram Dular, without issuing any notice to him as provided by section 10 of the Oudh Laws Act (Act XVIII of 1876). This he alleged to have been done in order to deprive him of his preferential right to purchase this property. He further alleged that the deed of transfer had been framed in the form of a perpetual lease in order to defeat his right of pre-emption. The learned Munsif framed a number of issues in regard to the nature of the deed of transfer, the price paid and certain other points, but decided only issue no. 3, which was in the following terms:

> "Can plaintiff not pre-empt because he is an under-proprietor of 14 years' standing only, and hence is not a member of the village community?"

This issue was based on paragraph 12 of the written statement in which it was stated that "the plaintiff has

(1) (1929) I.L.R., 4 Luck., 421 P.C. (2) (1934) 11 O.W.N., 430.

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got under-proprietary rights in certain plots in the same village for about 12 years. Prior to it no one had any under-proprietary right of any sort in village Mahdaiya, rather the defendant no. 3, and her ancestors alone remained in possession and occupation of the said village as Taluqdars during the British rule as well as from the Shahi times. In the said village there was no village community 'ala ya adna' as provided in Act XVIII of 1876, and so no person can have any right of pre-emption in the village regarding any transfer." The learned Munsif after considering the decision of this Court reported in the *Pateshwari Partab Narain Singh Raja* v. *Muhammad Mumtaz Ali Khan, Raja* (*Cookenagar case*) (1), and the judgment of the Privy Council in the same case reported in *Pateshwari Partab Narain Singh* v. *Sita Ram* (2), held as follows:

> "From the documentary evidence on the record it is perfectly clear that the village in dispute has been owned by a single proprietor, and the first under-proprietor, who came on the scene, was the plaintiff and he came in only 14 years ago. Plaintiff has not given any evidence, documentary of course," (because the learned Munsif had not taken any oral evidence and indeed oral evidence would not in the circumstances have had any real value), "which may have shown that there was any other proprietor or under-proprietor in the village so as to constitute any village community. That being so, it is clear that in the village in suit there was no village community in 1876, or for the matter of that till recently when the plaintiff acquired the right of an under-proprietor. Consequently there could be no right of pre-emption possible in this village when the Act XVIII of 1876 was passed."

He went on to hold that as there could be no village community, and hence no right or custom of pre-emption was possible in 1876, in consequence the plaintiff could not claim any such right, and he accordingly dismissed the suit with costs.

The learned Civil Judge of Partabgarh took a different view. He remarked that in the present case it was not disputed that at the time of transfer the appellant,

(1) (1927) 1 Luck., Cases, 10. (2) (1929) I.L.R., 4 Luck., 421 P.C.

being an under-proprietor in the village, was a member of the village community; and he was entitled to pre-empt the transfer, if it could be pre-empted at all, and if he could avail of the presumption permissible under section 7 of the Oudh Laws Act. He referred to two rulings of this Court and held that section 7 raised a presumption of law that the right of pre-emption exists in all village communities, and that it arises in favour of the persons named in clause (*a*) of section 7 which includes all the members of village communities. He went on to say that the right having accrued at the date of the transfer in question and the appellant being a member of village community at the time of the transfer, the appellant could rely on the presumption arising in his favour under section 7 of the Oudh Laws Act. He therefore took the view that the existence of the right of pre-emption should be presumed in favour of the plaintiff who was a member of a village community at the time of the transfer in question, and he accordingly remanded the suit to the trial Court for disposal according to law.

It is to be noted in considering the present appeal that there is no dispute in regard to the findings of fact of the trial court to which we have referred earlier, namely that at the time of the passing of the Act in 1876 there was only a single proprietor in the village, the village being a taluqdari village, and there was never any under-proprietor in the village until some 12 years prior to the date of suit. What the taluqdar had done according to the plaintiff pre-emptor was to create a further under-proprietary right and transfer it to the defendants in derogation of his preferential right to purchase the under-proprietary estate so transferred. The relevant sections of the Oudh Laws Act are sections 6, 7 and 9. Section 6 defines the right of pre-emption 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."

By section 7:

"Unless the existence of any custom or contract to the contrary is proved, such right shall, whether recorded in the settlement-record or not, be presumed—

(*a*) to exist in all village-communities, however constituted, and whether proprietary or under-proprietary, and in the cases referred to in section 40 of the Oudh Land Revenue Act, and

(*b*) to extend to the village-site, to the houses built upon it, to all lands and shares of lands within the village-boundary, and to all transferable rights affecting such lands."

Section 9 lays down the order in which various persons are entitled to claim the right in the following terms:

"If the property to be sold or foreclosed is proprietary or under-proprietary tenure, or a share of such a tenure, the right to redeem such property belongs, in the absence of a custom to the contrary—

First, to co-sharers of the sub-division (if any) of the tenure in which the property is comprised, in order of their relationship to the vendor or mortgagor;

Secondly, to co-sharers of the whole mahal in the same order;

Thirdly, to any member of the village community; and

Fourthly, if the property be an under-proprietary tenure to the proprietor.

Where two or more persons are equally entitled to such right, the person to exercise the same shall be determined by lot."

The interpretation of these sections has been discussed in numerous rulings. Both the courts below have referred at length to the decision in the *Cookenagar case* (1) in which a division Bench of this Court remarked:

"An examination of Chapter II of Act XVIII of 1876 appears to us to disclose that the Act did no more than declare what its framers believed to be the custom prevailing in certain village communities in Oudh. We do

(1) (1927) 1 Luck., Cases 10.

not understand that the Act in any sense purported to create a right of pre-emption. We understand section 7 to mean that a right of pre-emption in the opinion of the legislature existed by custom in a large number of the village communities in Oudh . . . . but such right of pre-emption could only exist where there was a village community . . . . The first essential was that there would be a village community."

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In that particular case they went on to say that they considered that there was no village community in 1876 in Cookenagar and that there was no custom of pre-emption possible. . . . . Mr. Cooke could certainly not be considered a village community. As to who are members of a village community it was said that it is clear that in Oudh all persons who have an interest in the village estate, whether as proprietors or under-proprietors were members of the village community and that they would not be the less members of the village community because they did not reside in the village.

The question of the interpretation of this section has come up more than once since the decision of the *Cookenagar case* (1). The matter was not dealt with by their Lordships of the Privy Council who decided the case on the view that there had been a waiver of the right of pre-emption, if any such right did indeed exist. An attempt was made at a later date to treat the provisions of section 7 in a somewhat unrestrictive manner, and as a result it was held by a Bench of this Court in *Bindeshwari Prasad's case* (2) that a person having rights even inferior to the rights of an under-proprietor might be allowed to pre-empt a transfer of proprietary rights. The implications of this decision were, however, clearly overruled by the ruling of their Lordships of the Privy Council in *Birendra Bikram Singh, Raja* v. *Brij Mohan Pande* (3) in which their Lordships expressly considered the meaning of the phrase "the village community". They remarked:

"There is no definition of 'the village community' in the Act, and consequently the meaning of those words

(1) (1927) 1 Luck., Cases 10. (2) (1934) 11 O.W.N., 430.
(3) (1934) I.L.R., 9 Luck., 407 P.C.

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must depend upon the true construction of the terms of section 7(*a*), having regard to any light which may be thrown upon that section by the terms of the following sections.

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.

In the second place, their Lordships are of opinion that the section contemplates a proprietary village community as distinguished from an under-proprietary village community."

They went on to point out further on—

"Further if the construction of the sections on which the plaintiff respondents rely were to be adopted, it seems clear that the provision contained in the fourth clause of section 9, would be redundant, because if the property to be sold or foreclosed were an under-proprietary tenure, and if, as contended on behalf of the plaintiff respondents, a proprieter would be entitled to buy or redeem the under-proprietary tenure in his capacity of a member of the village community, there would be no necessity for the provision contained in the fourth clause."

We have to take it then that it is now the view of their Lordships of the Privy Council that the proprietary village community in any given village is something quite separate from the under-proprietary village community of the same village. An under-proprietor has no right to pre-empt a transfer of proprietary tenure and the right of a proprietor to pre-empt a transfer of under-proprietary tenure arises not because of the provisions of section 7, but because of the provision 'fourthly' in section 9. In the present case therefore the plaintiff pre-emptor could only succeed if it were to be held that he was a member of an under-proprietary village community within the meaning of section 7 of the Oudh Laws Act.

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Now as regards the effect of the presumption laid down by section 7, the first clause with reference to proof of the existence of any custom or contract to the contrary, that is negativing the existence of a right of pre-emption, has no application to the present case. The section therefore may be taken to provide that such a right shall, whether recorded in the settlement record or not, be presumed to exist in all village communities, however constituted, and whether proprietary or under-proprietary. It is obvious first of all that in view of the fact that there was no under-proprietary village community in existence in 1876, this section did not create a presumption that there was any right of pre-emption in respect of a transfer of under-proprietary tenure in the village at that time.

The next question is whether the section, as it stands, can be considered to create a presumption of a right of pre-emption in case at any future date an under-proprietary village community should come into existence. The learned Judges, who decided the *Cookenagar case,* (1) were of opinion that the Act did not create for the first time a right of pre-emption irrespective of former custom, and we are not disposed to disagree with that view; but even if we felt any doubt upon that point, we should find it impossible to hold in the present case that there was even now in existence any village community. In our view a single person cannot constitute a community. Learned counsel for the respondent has sought to argue in answer to this contention on behalf of the appellant that the pre-emptor is a member of a village community because he does not stand by himself, but is a member of a Joint Hindu family, and he asks us to remit an issue to the trial Court on this point, but a reference to the pleadings shows that the plaintiff's case has never been rested upon this footing. He claims that he himself has got under-proprietary rights and not that he has those rights as a member of a joint Hindu family.

(1) (1927) 1 Luck., Cases 10.

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In these circumstances we are clearly of opinion that there never has been up to the present day an under-proprietary village community in village Mahdaiya, and in consequence there cannot ever have been any such custom as is alleged by the plaintiff, nor can the plaintiff be allowed to fall back on the presumption provided by section 7 of the Oudh Laws Act.

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In our view the learned Munsif rightly held that there was no right of pre-emption in the village and the plaintiff could not claim any right of pre-emption. The learned Civil Judge has accordingly erred in remanding the case to the trial court for decision of the remaining issues. We, therefore, allow this appeal with costs, set aside the order of the lower appellate court and restore the decision of the trial court.

Appeal allowed.

APPELLATE CIVIL

Before Mr. Justice G. H. Thomas, Chief Judge and Mr. Justice Ziaul Hasan

1939 *January*, 16

SUNDER LAL AND OTHERS (APPELLANTS) *v* MST. KANIZ ZOHRA BEGUM (RESPONDENT)*

U. P. Encumbered Estates Act (XXV of 1934), section 14(5)—"Contract made in the course of the transaction before December 31, 1916", meaning of—Compound interest accumulating up to 31st December, 1916, if to be treated as principal—Section whether deals with renovations of contract or with original contract.

Sub-section 5 of section 14 of the Encumbered Estates Act contemplates not only a statement or settlement of account but also a contract subsequent to the original transaction provided that the statement of account or contract is made before the 31st December, 1916. The expression "any contract made in the course of the transaction" does not mean a contract made at the time of the transaction, but the use of the word "course" shows that what was intended was that the contract

*First Civil Appeal No. 124 of 1936, against the order of P. Kaul Esq., Special Judge of 1st Grade, Bara Banki, dated the 3rd September, 1936.