

APPELLATE CIVIL

*Before Mr. Justice A. H. deB. Hamilton, and Mr. Justice
Radha Krishna Srivastava*

KAZIM HUSAIN AND ANOTHER (APPELLANTS) *v.* SAIYID
MAHFUZ ALI AND ANOTHER (RESPONDENTS)*

1940
April 1

Pre-emption—Superior proprietor creating under-proprietary right and also selling it to a person already under proprietor—Pre-emption by a co-sharer having only proprietary right, validity of.

A transaction involving the creation and also the sale of an under-proprietary right would be the sale of an under-proprietary right and in such a case a proprietor cannot pre-empt against a vendee who being already an under-proprietor has a prior right to pre-empt an under-proprietary right.

Mr. *Naimullah*, for the appellants.

Mr. *H. H. Zaidi*, holding brief of Mr. *Hyder Husain*, for respondents.

HAMILTON, and RADHA KRISHNA, JJ.:—This is an appeal against a decision of a single Judge of this Court under section 12(2) of the Oudh Courts Act.

The admitted facts are that a superior proprietor created an under-proprietary right which he sold to a person who was already a proprietor and also an under-proprietor.

A pre-emption suit was brought by Syed Mahfuz Ali on the ground that he was a co-sharer in the mohal concerned and the defence of the vendees was that under the Oudh Laws Act being under-proprietors they came before a superior proprietor and he could not therefore pre-empt a sale of under-proprietary rights made in their favour. All the courts decreed the suit including the learned single Judge of this Court. He held that this was not a sale of an already existing under-proprietary right but a transaction by which an under-proprietary right was created and since the property in

*Section 12(2) Oudh Courts Act Appeal No. 22 of 1937, against the order of Hon'ble Mr. Justice H. G. Smith, Judge of the Chief Court of Oudh, Lucknow, dated the 24th August, 1937.

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suit was held before the transaction in proprietary tenure the transaction must be held to have involved also a sale of a share of a proprietary tenure, although the effect of the transaction was to create an under-proprietary tenure. We are unable to agree with the learned Judge that the transaction could be called a sale of a superior proprietary right. The vendor's share in the proprietary khewat would in no way be modified by the fact that he had created an under-proprietary right. The only change in the khewat would be in the under-proprietary khewat. It seems to us then that there can be only two possible views: the first that there was no sale of an under-proprietary right because it was not already in existence in which case no one could pre-empt or else that a transaction involving the creation and also the sale of an under-proprietary right would be the sale of an under-proprietary right and if so a proprietor cannot pre-empt against a vendee who being already an under-proprietary has a prior right to pre-empt an under-proprietary right. Speaking generally, we might say that the object of pre-emption is to prevent the introduction of a stranger in a particular community, be it an under-proprietary or a proprietary community. If this transaction could not be pre-empted, then a new under-proprietary who was formerly a stranger would be introduced and he could pre-empt subsequent sales of under-proprietary rights as much as any other pre-existing under-proprietary and the object of keeping strangers out of the under-proprietary body would not be achieved. We think that cases like the present one cannot be distinguished from sales of a prior existing under-proprietary right and consequently the vendees had a preferential right to the would-be pre-emptor and his suit must fail.

We, therefore, allow the appeal and dismiss the suit with costs in all courts.

Appeal allowed.