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HARI PRASAD SINGH v. SOURENDRA MOHAN SINGH.

amount if such accrual increases the amount of interest to a sum greater than the principal advanced.

(4) I am not prepared to disagree with the views expressed by the Subordinate Judge as to the amounts of the debt which he considers to have been incurred on account of legal necessity or family benefit or with regard to that amount for which he has given a personal decree.

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(5) I do not consider that the personal decree is in any way barred by the previous proceedings.

(6) I do not think that the suit is barred in any way by limitation.

(7) I think that the 4th bond is an antecedent debt upon which that part of the 5th bond which relates to it can be entirely supported, subject to the question of interest.

(8) In all other respects I agree with the judgment of my Lord the Chief Justice.

Appeal decreed in part.

APPELLATE CIVIL.

Before Coutts and Bucknill, J.J.

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March, 7.

ACHUTANANDA PASAIT

v.

BIKI BIBI.*

Pre-emption—right of, when vendee is a Hindu.

Where a Mahomedan is entitled to exercise a right of pre-emption, the Mahomedan law of pre-emption applies even when the vendee is a Hindu.

Shaikh Koodrutoolah v. *Mohinee Mohun Shaha*(1), not followed.

Gobind Dayal v. *Inayatullah*(2), followed.

* Circuit Court, Cuttack, Appeal from Appellate Decree No. 71 of 1921, from a decision of D. H. Kingsford, Esq., District Judge of Cuttack, dated the 13th August 1921, reversing a decision of Babu Lakhsmi Narayan Patnaik, Additional Munsif of Cuttack, dated the 28th September 1920.

(1) (1870) 13 W. R. 21, F. B. (2) (1885) I. L. R. 7 All. 75, F. B.

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The facts of the case material to this report were as follows :—

In 1891 one Rahimullah died. leaving him surviving as his heirs Biki Bibi (his widow), Sultan Muhammad and Faizulla (his sons) and Kariman Bibi, Ajiman Bibi and Haliman Bibi (his daughters). These heirs of Rahimullah succeeded to his property which consisted of four items in the following shares, the widow 2-annas, the sons, 4-annas each; and the daughters 2 annas each. The heirs held the property jointly and Sultan Muhammad acted as manager. The latter executed a simple mortgage of the properties in favour of Achutanand Pasayet. The mortgagee obtained a decree on the mortgage and in execution thereof brought a 4-annas share in one of the items of property and the whole of the other three items to sale, and purchased them himself. He obtained delivery of possession on the 14th December 1918.

The plaintiffs who were Biki Bibi, Ajiman Bibi and the representatives of the other two daughters of Rahimullah claimed to pre-empt the share of Sultan Muhammad in the property. The suit was contested by the mortgagee auction-purchaser who denied that the properties had belonged to Rahimullah.

The trial court held that it had not been proved that these properties had belonged to Rahimullah and also held that the right of pre-emption was not enforceable against a Hindu vendee.

The lower appellate court reversed the decision on both these points.

Defendant No. 1, the mortgagee auction-purchaser, appealed to the High Court.

Subodh Chandra Chatterji, for the appellant.

Durga Prasanna Das Gupta, for the respondents.

COUTTS, J.—The facts of this case have been fully stated in the judgment of the Courts below. The plaintiffs are the widow, daughter and representatives of other daughters of one Rahimullah. It appears that

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defendant No. 2, the son of Rahimullah, mortgaged certain property to defendant No. 1, obtained a decree upon that mortgage and in execution thereof put the property to sale and purchased it himself. The plaintiffs in this suit sought for a declaration that they have a 2-anna share in one portion of the property and an 8-anna share in another portion of the property and that the defendant No. 2 had no right to mortgage the plaintiff's share. They also asserted a right of pre-emption in respect of a certain portion of the land. The suit was contested by the defendant No. 1 who denied the title of Rahimullah.

The suit was dismissed in the Court of first instance but on appeal to the District Judge this decision has been reversed and the plaintiffs have been given a decree. So far as the plaintiffs' title through Rahimullah is concerned the finding of the District Judge is a finding of fact with which we cannot interfere in second appeal. But the defendant No. 1 is a Hindu and the principal question for decision in this appeal is whether the plaintiff has a right of pre-emption in respect of property which has been sold to a Hindu. The learned Vakil for the appellant relies for the proposition which he puts forward, namely, that the Muhammadan law of pre-emption does not apply where the vendee is a Hindu, on the case of *Shaikh Koodrutoolah* v. *Mohinee Mohun Shaha*(1). This decision is a Full Bench decision of the Calcutta High Court and ordinarily we would follow such a decision in this Court but the whole law on the point was subsequently elaborately discussed by Mahmood, J. in the Full Bench case of *Gobind Dayal* v. *Inayat-ullah*(2) where the decision in *Shaikh Koodrutoollah* v. *Mohinee Mohun Shaha*(1) was considered, and it was held by him, four other Judges of the Court concurring, that in such a case the Muhammadan law of pre-emption did apply. I have very carefully considered these decisions and, in my opinion, the view which has

(1) (1870) 13 W. R. 21, F. B. (2) (1885) I. L. R. 7 All. 75, F. B.

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been taken by the Allahabad Court is the correct view of the law.

The only other point which arises is the question of limitation. Under Article 10 of the Limitation Act, the period of limitation in cases of pre-emption is one year from the date when the purchaser takes physical possession of the property sold. Now in the present case it has been found by the learned District Judge that the defendant, although symbolical possession was given to him, has never obtained physical possession. This being so, no question of limitation can arise.

COUTTS, J.

In the result then I would dismiss this appeal with costs.

BUCKNILL, J.—I agree.

PRIVY COUNCIL.

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April, 3.

MAHARAJA SIR MANINDRA CHANDRA NANDI

v.

RAM LAL BHAGAT.*

Code of Civil Procedure, 1908 (V of 1908) section 47; Order XXII, rule 10—Mesne Profits—Joining tenant—Tenancy created pending suit—Profit received by tenant.

Where a decree for possession and mesne profits has been obtained there is not power under Order XXII, rule 10, or section 47 of the Code of Civil Procedure, 1908, to join as a defendant to the suit a tenant to whom during the pendency of the suit the defendant has let the property, so as to compel the tenant to account for profits which he has received from the land. The tenant not claiming to remain in possession it was not necessary to consider whether he could have been joined for the purpose of obtaining his removal.

Judgment of the High Court reversed.

Appeal (No. 109 of 1919) from an order of the High Court at Patna (November 16, 1916) reversing an

* PRESENT: Lord Shaw, Lord Phillimore, Sir John Edge, and Mr. Ameer Ali.