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DAS, J.

I would accordingly allow the appeal, set aside the judgment and the decree passed by the Court below. The plaintiff-company is entitled to a declaration of title in its favour and to a permanent injunction restraining the defendants and their agents and servants from working and appropriating the minerals in Pargana Barabhum. The plaintiff-company is also entitled to its costs in this Court and in the Court below.

ADAMI, J.—I entirely agree.

APPELLATE CIVIL.

Before Dawson Miller, C. J., and Macpherson, J.

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June, 18, 19, 23.

MAHANTH TOKH NARAYAN PURI

v.

RAM RACHHYA SINGH.*

Pre-emption, suit for—joinder of co-plaintiffs not entitled to pre-empt, effect of—shafi-i-khalit, meaning of—talab-i-ishhad, performance of, after ascertaining amount of purchase-money—reasonable delay—finding of fact.

If a person entitled to claim pre-emption joins with himself as co-plaintiff a person who has no such right, he forfeits his own pre-emptive right and the suit must be dismissed as against both; but the mere joining by a person having a right of pre-emption of persons who have an actual right of pre-emption, but who have not qualified themselves according to the Muhammadan law to enforce it and who are not strangers, will not disentitle the person entitled to maintain a suit for pre-emption, if he had sued alone, from maintaining a suit brought by him so far as he himself is concerned.

Chotu v. *Husain Baksh*(1), followed.

* Second Appeal no. 1500 of 1922, from a decision of G. J. Monahan, Esq., I.C.S., District Judge of Monghyr, dated the 8th September, 1923, reversing a decision of M. Saiyid Nasiruddin Ahmad, Subordinate Judge of Monghyr, dated the 15th April, 1920.

(1) (1893) 13 A. W. N. 25.

Where an ahar adjoining certain vended property was within the plaintiffs' patti and the title to it belonged to them alone, but the proprietors of the vended property had a right of easement over the ahar, *held*, that the plaintiffs came within the second class of pre-emptors, namely shafi-i-khalit.

Keshub Singh v. *Bansi Singh*(1), distinguished.

Where, after performing the talab-i-mowasibat, the pre-emptor waited until he had ascertained the amount of the purchase money and then performed the second ceremony of talab-i-ish-had, *held*, that the delay was excusable and did not operate as a forfeiture of the right of pre-emption.

Held, further, that the due and sufficient observance of the formality as to time, is a question to be decided in each case by the Court which has to deal with the facts and the High Court should not interfere with a finding of fact on such question in second appeal.

Abadi Begam v. *Inam Begum*(2), *Musammat Jumeelun* v. *Lateef Hossein*(3) and *Baijnath Goenka* v. *Ramdhari Chowdhury*(4), referred to.

Appeal by the defendant.

The facts of the case material to this report are stated in the judgment of Dawson Miller, C. J.

P. Dayal and *T. N. Sahay*, for the appellant.

Sultan Ahmed (with him *S. N. Ray*), for the respondents.

DAWSON MILLER, C. J.—This is an appeal from a decision of the District Judge of Monghyr, dated the 8th September, 1922. The appellant, Mahanth Tokh Narayan Puri, is the defendant first party in a pre-emption suit instituted by some of the respondents as plaintiffs against the appellant as purchaser of the defendants second party, also respondents as vendors of an estate in mauza Beiman bearing Tauzi no. 7094 on the rolls of the Collector of Monghyr. Some years ago by a Collectorate batwara mauza Beiman was partitioned amongst the co-sharers and divided into several separate revenue-paying estates bearing separate tauzi

(1) (1919) 4 Pat. L. J. 420.
(2) (1876-78) I. L. R. 1 All. 525.
(3) (1871) 16 W. R. 13, F. B.
(4) (1908) I. L. R. 35 Cal. 402; L. R. 35 I. A. 60.

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numbers. Tauzi no. 7094 which constitutes the property in dispute in this case fell to the patti of certain co-sharers now represented by Jagdip Narain Singh and others, the second party defendants in the suit. Tauzi no. 3814 and Tauzi no. 7093 fell to the patti of those who are now represented by the plaintiffs. These two estates are contiguous with the estate in suit lying immediately to the south and east thereof respectively. The appellant (defendant first party) is the proprietor of mauza Bindaban which lies immediately to the west of the estate in suit. On the 13th December, 1918, the defendants second party, who may be conveniently referred to as the vendors, sold their interest in Tauzi no. 7094 to the appellant, who may be referred to as the purchaser, for Rs. 3,775 and a further sum of Rs. 125 to cover the arrears of rent then due. The plaintiffs as proprietors of Tauzi nos. 3814 and 7093 claim the right of pre-emption on payment of the price agreed between the vendors and purchaser and instituted the present suit to enforce their claim.

The Muhammadan Law relating to pre-emption applies also to Hindus in Bihar. The right of pre-emption applies in the case of three classes of persons. The first class are the co-sharers in the vended property known as shafi-i-sharik. The second class are sharers in the appendages or appurtenances of the vended property, shafi-i-khalit. The third class derive their right from vicinage and the right applies in favour of neighbouring proprietors holding contiguous property. They are known as shafi-i-jar. The plaintiffs claimed originally as the owners of the adjoining property but by an amendment of their plaint they alleged that the pattis of the plaintiffs and the vendors had all along been irrigated from water of the same ahar and pynes and they also claim as sharers in the appurtenances common to both properties (shafi-i-khalit).

The purchaser resisted the suit on various grounds. He contended that the plaintiffs were not

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entitled to pre-emption on the ground of vicinage as he also was a neighbouring proprietor; that the plaintiffs were not entitled to the right of shafi-i-khalit as they were not in fact sharers in appurtenances common to the two estates, and, further, that such a right had not been properly claimed in the plaint; that the ceremonies necessary to be performed in order to found a right of pre-emption had not been properly performed, and that such ceremonies, if performed, had been performed by the plaintiff no. 4 alone, and by adding other plaintiffs in the suit who were strangers having no claim to pre-emption he had forfeited his right.

The learned Subordinate Judge before whom the case came for trial appears to have found all the facts in favour of the plaintiffs but considered that although the plaintiffs were entitled to pre-emption as shafi-i-jar and shafi-i-khalit they could not enforce their right as they were not actual co-sharers in the vended property.

On appeal the learned District Judge of Monghyr, without considering the questions of fact which had been determined by the trial Court, upheld the decision of the Subordinate Judge.

An appeal was preferred to the High Court, but as the facts had not been found by the lower appellate Court the same was remanded to that Court for rehearing and for decision after coming to a finding as to what the facts were.

The learned District Judge on remand has found that the ceremonies were properly performed by the plaintiff no. 4; that the plaintiffs other than the plaintiff no. 4 were not strangers and were entitled to be added; that they could not succeed merely as shafi-i-jar because the purchaser was also a neighbouring proprietor but that they had established their right as shafi-i-khalit, sharers in appendages, a right which the purchaser did not enjoy, and he passed a decree for pre-emption in favour of the plaintiffs.

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The purchaser has appealed from that decision which he challenges upon three grounds, (*1*) that the plaintiff no. 4 who performed the ceremonies has lost his right to claim pre-emption by joining as plaintiffs other persons who had not joined in the ceremonies and who were strangers as that expression is understood in Muhammadan Law, (*2*) that the plaintiffs having claimed on the ground of vicinage only should not have been given a decree as sharers in the appendages and, (*3*) that delay in performing the talab-i-ish-had was fatal to the validity of that ceremony without which the right could not be asserted.

As to the first point it is well settled that if a person entitled to claim pre-emption joins with himself as co-plaintiff a person who has no such right he forfeits his own pre-emptive right and the suit must be dismissed as against both. [*See* Wilson's Anglo-Muhammadan Law, 5th Ed. 388.] The basis of this rule appears to be that as the right of pre-emption only exists in favour of those who are co-sharers either in the vended property or in the appurtenances, or who are proprietors of adjoining property, as against persons who are not so qualified it would be manifestly unjust as against the vendee to allow persons who do not possess the necessary qualifications to assert a right of pre-emption. In the present case the plaintiffs are all members of the same family and are all proprietors in tauzi nos. 3814 and 7903. They do not therefore come under the category of strangers as understood for this purpose in Muhammadan Law. It was contended, however, on behalf of the appellant that nobody could be joined as a plaintiff who, although otherwise qualified, had not himself performed the preliminary ceremonies of talab-mowasibat and talab-i-ish-had, but no authority was produced in support of this proposition. As pointed out by Banerji, J., in *Wajid Ali* v. *Shaban*(1), in almost all the cases in

(1) (1909) I. L. R. 31 All. 623.

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which it has been held that a person possessing the right of pre-emption forfeits it by joining a stranger, the person joined was a stranger to the co-parcenership body and a total outsider, and reference is made to the case of *Chotu* v. *Hussain Boksh* (1) in which it was held that the mere joining by a person having a right of pre-emption of persons who have an equal right of pre-emption, but have not qualified themselves according to the Muhammadan Law to enforce it, and who are not strangers, will not disentitle the person entitled to maintain a suit for pre-emption, if he had sued alone, from maintaining a suit brought by him so far as he himself was concerned. In that case pre-emption was claimed by several persons one of whom, Chotu, only had performed the preliminary demands and it was held that Chotu had not forfeited his right of pre-emption by joining with him the other plaintiffs in bringing the suit. The point appears to have been settled by that decision. Moreover, the learned Judge whose judgment is under appeal states that this point was not pressed before him by the purchaser and I do not think we should in the circumstances allow the appellant to raise the point afresh. In any case were it necessary to do so I should hold that the suit is not bad for misjoinder of parties.

With regard to the second point it is true that in the relief portion of the claim the plaintiffs ask for a declaration that they have the right of pre-emption as they are proprietors of the adjoining pattis. But by the amendment of paragraph 15 in the body of their plaint they do allege that the pattis of themselves and the vendors have all along been irrigated from water of the same ahar and pynes and at the trial as well as in the lower appellate Court, the question whether the plaintiffs were entitled to come in under the second class of pre-emptors was raised and decided. The facts with regard to this part of the case are found by the learned District Judge on remand. There

(1) (1893) 13 A. W. N. 25.

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is an ahar of considerable extent in the plaintiffs' patti, tauzi no. 3814, and the vendors as proprietors of tauzi no. 7094 have rights of taking water for the irrigation of their own land from this ahar. The learned Judge finds that the proprietors of the two pattis have joint rights over this ahar and that in fact the owners of the vended patti have a right of easement over the ahars and water-courses situated in the plaintiffs' patti. The result is that the plaintiff's patti is a servient tenement. Such a case has always, so far as I am aware, been treated as bringing the owner of the servient tenement within the right of shafi-i-khalit. It was contended, however, that the ahar in question had been left ijmal at the time of the batwara and that it was not an appendage or appurtenance to either of the two pattis over which the parties had common rights and the case of *Keshub Singh* v. *Bansi Singh*(1) was referred to. In that case an estate had been partitioned into several mahals but certain roads and a well and a tank and other properties had been left undivided and remained the joint property of the proprietors of the different estates. It was found that the fact that this joint property remained enjoyable by the proprietors of each of the separate mahals was not sufficient to give any of them a right of pre-emption in the second degree or khalit, as the joint property was not an appurtenance of any of the estates but a separate property owned by the proprietors jointly. In the present case the facts appear to be different. The ahar in question is within the plaintiffs' patti and the title to it belongs to the plaintiffs alone. It is not shewn to be joint property and it is found by the learned District Judge that the right which the proprietors of the vended property have was merely a right of easement in the ahar. This being so I think the plaintiffs come within the second class of pre-emptors, namely, shafi-i-khalit.

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(1) (1919) 4 Pat. L. J. 420.

With regard to the third point it may be stated that the Muhammadan Law requires that the pre-emptor immediately on hearing of the sale should make known his intention of exercising his option of purchase. He should rise and declare his intention there and then whether witnesses are present or not. The ceremony is known as talab-i-mowasibat. Having done this he must also with the least practicable delay make a formal declaration claiming his right of pre-emption before witnesses in the presence of either the vendor or the vendee or on the premises sold. The ceremony is known as talab-i-ish-had. It is not disputed that the first demand was properly made by the plaintiff no. 4. It is contended, however, that there was a delay of four days in performing the second demand and that this delay is fatal to the plaintiffs' right. The facts found are that the property was sold on the 13th December, 1918. The plaintiff no. 4 came to hear of it on the 16th December and immediately declared his intention of exercising his right of pre-emption in the presence of several witnesses. He was not aware, however, of the amount of the purchase price paid for the property and in order to ascertain this he sent his servant Munshi Gajadhar Lal by train on the evening of the same day to Shaikhpura to obtain a copy of the sale deed. There was some delay in obtaining the copy of the sale deed owing to the registration office being closed. Eventually Gajadhar Lal obtained a copy of the sale deed on the 19th December and took it to his master at Mauza Parhi who, as soon as he received it on the 20th, proceeded to the house of the vendors who lived in the same village and there performed the second ceremony of talab-i-ish-had in the presence of some of the vendors and other witnesses. The same ceremony was performed by him on the vended property on the following day and in the presence of the purchaser on the 22nd, but these last two ceremonies were not necessary in order to complete his right. The question is whether by waiting until he

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had ascertained the amount of the purchase money the plaintiff no. 4 forfeited his right. The learned District Judge considered that the delay was satisfactorily explained and that the plaintiff was justified in waiting until he ascertained the purchase price before performing the second ceremony. It seems to me on general principles that unless the purchase price is known to the person entitled to pre-emption he has not all the facts before him to enable him to decide whether he will exercise his right. The price when ascertained may be higher than that which he is inclined to pay. There can be no doubt, however, that he would be bound to take immediate steps to ascertain the price and any unreasonable delay in doing so would, in my opinion, operate as a forfeiture of his claim. In the case of *Abadi Begam* v. *Inam Begam*(1), the opinion was expressed that a claim relinquished upon misinformation of the amount of the sale consideration, or of the property sold, may be resumed when the real facts became apparent. This opinion, however, upon the facts of that case, would appear to be merely obiter. It is referred to apparently with approval by Sir Roland Wilson who states

> " but a person who refrains from pre-empting when he first hears of the sale, owing to being misinformed of the price, is not estopped from reviving his right on becoming subsequently aware of the true price." (*See* Anglo-Muhammadan Law, 5th Ed. 401.)

The rule laid down by Sir William Macnaghten and referred to with approval in the case of *Musammat Jumeelun* v. *Luteef Hossein*(2) is that the talab-i-ishhad should be made with the least practicable delay and it was further laid down in that case by a full bench of the Calcutta High Court that the due and sufficient observance of that formality, as to time, is a question to be decided in each case by the Court which has to deal with the facts and I do not think that in second appeal we should interfere with the

(1) (1876) I. L. R. 1 All. 521.

(2) (1871) 16 W. R. 13, F. B.

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finding of fact on a question of this sort unless the ascertained facts clearly shew that there was no evidence to support the finding. In the case of *Baijnath Gaonka* v. *Ramdhari Chowdhry*(1) there was a considerable delay between the date (the 20th December, 1897), when the pre-emptor first heard of the sale and the 7th January following when he performed the second ceremony of talab-i-ish-had. The delay between the 20th December and the 7th January was due to the fact that the pre-emptor was during that time endeavouring to procure from the registration office a copy of the sale deed, the office being closed for the Christmas vacation. Their Lordships of the Judicial Committee appear to have assumed that the circumstances were adequate to excuse that delay. The trial Court had held that the delay was not fatal to the claim. The High Court on appeal had reversed that decision. Their Lordships observed, " There is no question of law in the case. It is clear that the right of pre-emption must be exercised, and the claims necessary to give effect to it must be made, with the utmost promptitude, and that any unreasonable or unnecessary delay is to be construed as an election not to pre-empt. And whether there has been such a delay is a question to be determined upon the facts of each particular case. It is enough for their Lordships to say that, in their opinion, the grounds stated by the learned Judges of the High Court for overruling the decision of the first Court on a pure question of fact were insufficient ". In my opinion the delay in the present case has been amply explained and I do not think that any sufficient reason has been made out why we should differ from the learned District Judge on a pure question of fact. Indeed had the case come before us in the first instance I should have taken the same view. In my opinion the third objection also fails and this appeal must be dismissed with costs.

MACPHERSON, J.—I agree.

Appeal dismissed.

(1) (1908) I. L. R. 35 Cal. 402; I. L. R. 35 I. A. 60.