The question whether the defendant no. 2 was a purchaser with notice of such a covenant is a question of fact which has been decided by both the Courts below against the defendant no. 2 and I am bound by the finding.

The result is that the appeal will have to be dismissed. The plaintiff, however, will not be entitled to any costs in this Court, because it appears that the property was mortgaged twice in contravention of one of the conditions in the deed and yet the plaintiff did not raise any objection.

FAZL ALI, J.

ADAMI, J.—I agree.

S. A. K. *Appeal dismissed.*

APPELLATE CIVIL.

Before Das and Wort, JJ.

MUSSAMMAT BIBI SALEHA

v.

HAJI AMIRUDDIN.*

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July, 24.

Muhammadan Law—Pre-emption—Mukarraridar whether can pre-empt.

A mukarraridar holding under a co-sharer has no right to pre-empt as against another co-sharer.

Sheikh Mohammad Jamil v. *Khub Lal Raut*,(1) followed.

Katyayani Debi v. *Udoy Kumar Das*(2) and *Ram Bali Singh* v. *Jaglal Singh*(3), distinguished.

Kally Dass Ahiri v. *Monmohini Dassee*(4) and *Surama Musalmani* v. *Munsi Danesh Mohamed*(5), referred to.

*Appeal from Appellate Decree no. 1158 of 1926, from a decision of H. Ll. L. Allanson, Esq., I.C.S., District Judge of Gaya, dated the 24th April, 1926, reversing a decision of M. Shaikh Ahmad Hussain Khan, Munsif of Gaya, dated the 7th December, 1925.

(1) (1920) 5 Pat. L. J. 740.
(2) (1925) I. L. R. 52 Cal. 417, P. C.
(3) (1925) 89 Ind. Cas. 421.
(4) (1897) I. L. R. 24 Cal. 440.
(5) (1907-08) 12 Cal. W. N. ccxliv (Notes)

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Appeal by the plaintiff.

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

Sir Sultan Ahmad, with him *K. Husnain*, *Rai T. N. Sahay* and *Sultanuddin Hussain*, for the appellant.

S. M. Mullick and *Kailashpati*, for the respondents.

DAS, J.—This was a suit for pre-emption, and the lower appellate Court has dismissed it. The plaintiff has appealed to this Court.

Shortly stated the facts are as follows. One Musammat Dhano Bibi had a 3 pies 10 karants milkiat interest in a certain village. Subsequently she acquired a two annas *mukarrari* interest in the same village. Partition proceedings took place in 1910, and a takhta was allotted to Musammat Dhano Bibi consisting of her two annas three pies ten karants share which comprised both her mukarrari interest and her milkiat interest. On the 12th of February, 1919, Dhano sold 1 anna 1 pie 15 karants of her interest to Melur and Ladowan, and one of the questions raised before us turns on the interpretation of the conveyance executed by Musammat Dhano in favour of the two persons whose names I have just mentioned. On the 2nd of July, 1922, Malur and Ladowan conveyed the share purchased by them to the plaintiff. The remaining interest remained in Musammat Dhano Bibi, who conveyed it on the 8th of December, 1923, to the defendants. The plaintiff claims that in the events which have happened she is entitled to a decree for pre-emption as against the defandants. The Courts below have concurrently found that the ceremonies were duly performed, so that we are not embarrassed by any of those questions in the appeal before us. The lower appellate Courts has, however, dismissed the suit substantially on the ground that what passed to Malur and Ladowan

under the conveyance of the 12th of February, 1919, was the mukarrari interest of Dhano Bibi, and following a decision of this Court the learned Judge of the Court of appeal below has come to the conclusion that a mukarraridar is not entitled to a decree for pre-emption.

Sir Sultan Ahmed appearing before us contends in the first place that on the interpretation of the conveyance of the 12th of February, 1919, it should be held that what passed to Malur and Ladowan was not only the mukarrari interest of Dhano Bibi but also a portion of her milkiat interests. Now if this argument be well founded, then there is no doubt whatever that the plaintiff is entitled to a decree for pre-emption. In the alternative Sir Sultan Ahmed contends before us that even if his interpretation of the conveyance of the 12th of February, 1919, be not accepted by this Court, still it should be held that as a mukarridar the plaintiff is entitled to a decree for pre-emption and in this connection Sir Sultan Ahmed relies upon two decisions: one of the Oudh Judicial Commissioner's Court and another of the Calcutta High Court. I shall have to consider both these decisions.

I will first consider the question as to what passed to Malur and Ladowan under the conveyance of the 12th of February, 1919. I have already stated that Dhano Bibi had 2 annas mukarrari and 3 pies 10 karants milkiat and that a takhta comprising 2 annas 3 pies 10 karants was allotted to her in the course of the partition proceedings which took place in 1919. Now, the critical passage in the deed of conveyance runs as follows:—

"I hereby sell 1 anna 1 pie and 15 karant perpetual Mokarrari interest descendible from generation to generation out of 2 annas out of total 2 annas 3 pies proprietary and Mokarrari interest belonging to me for which a separate takhta formed by partition in mauza Mirchak Mirchahar well-known as Urjun Bigha, pargana Sherghatty, district Gaya, different details of which are given below, which is my perpetual Mokarrari right descendible from generation to generation,

and then follow certain words which it is not necessary for me to set out in this judgment. There seems to be an error in so far as the total of the mukarrari and the

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milkiat is stated to be 2 annas 3 pies. There is no doubt whatever from the subsequent portion of the document that the takhta, which was allotted to Dhano Bibi, was a takhta comprising 2 annas 3 pies 10 karants share in the mauza. Sir Sultan Ahmed's contention is that what was conveyed to Malur and Ladowan was an interest of 1 anna 1 pie 15 karants, which is exactly half of 2 annas 3 pies 10 karants and that accordingly it should be held on the words employed by Musammat Dhano Bibi that what she intended to convey and what she did convey to Malur and Ladowan was half the interest in the takhta which was allotted to her, namely, 1 anna mukarrari and 1 pie 15 karants milkiat. In my opinion, this argument is unsustainable. Musammat Dhano Bibi definitely states that what she was selling was the perpetual mukarrari interest descendible from generation to generation. She says first of all that she is selling 1 anna 1 pie and 15 karants perpetual mukarrari interest and she repeats it later on in the document and to put the matter beyond doubt she provides in a still later part of the document as follows:—

"Be it known that the property sold is the proprietary interest of Babu Lachmi Narayan, Pleader, son of Babu Nathun Lal, deceased, resident of mahalla old Jail, one of the quarters of Kasba Sahebgunj, pargana and district Gaya, for which Mokarrari rent of Rs. 87 is payable for the whole share and the proportionate share of the Mokarrari rent for the share sold is Rs. 22-4-11.

In other words, she is stipulating that the purchaser would be bound to pay the proportionate share of rent, namely, Rs. 22-4-11 to the proprietor of the share sold, Babu Lachmi Narain. Now, the argument which has been advanced by Sir Sultan Ahmed is explainable on the hypothesis that what was actually sold was mathematically half the entire interest which Dhano Bibi had in the mauza. But this does not lead to the inference that what was sold was half the mukarrari interest and half the milkiat interest which the lady had in the mauza, since she definitely states that what she was selling was her mukarrari interest in the mauza. I hold, therefore, that the lower appellate Court is right in the interpretation which it placed upon the conveyance of the 12th of February, 1919,

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Then arises the question whether as a mukarraridar the plaintiff is entitled to a decree for pre-emption. Now on this point Mr. S. M. Mullick relies on a decision of Sultan Ahmed, J., in *Sheikh Mohammad Jamil* v. *Khub Lal Raut*(1). Sir Sultan Ahmed appearing on behalf of the plaintiff does not contend that the decision of Sultan Ahmed, J., to which I have referred is erroneous, but he does contend that there are certain passages in that judgment which are obiter dicta and that indeed the decision itself needs reconsideration having regard to what the Judicial Committee has recently held in *Katyayani Debi* v. *Udoy Kumar Das*(2). The decision upon which Mr. S. M. Mullick relies decided that a co-sharer cannot pre-empt against a mukarraridar of another co-sharer, but in arriving at that decision Sultan Ahmed, J., reviewed the whole law of pre-emption very critically and had no difficulty in coming to the conclusion to which he did come on the ground that a mukarraridar himself could not claim pre-emption and as a mukarraridar could not claim pre-emption the co-sharer on the doctrine of reciprocity, which is well understood in the Muhammadan Law, could not claim pre-emption against the mukarraridar. This decision has been constantly followed in this Court. Speaking for myself I must say that I prefer the decision of Sultan Ahmed, J., to the arguments which have been advanced before us to-day by Sir Sultan Ahmed.

But Sir Sultan Ahmed contends that the decision need re-consideration having regard to what the Judicial Committee has recently held in *Katyayani Debi* v. *Udoy Kumar Das*(2). Now that was a very simple case. What happened was this. A person having a permanent mukarrari in certain lands was dispossessed of a portion of the land by a person who was the husband of the appellant in the Privy Council. The landlord brought a suit for rent against the permanent mukarraridar and in due course the mukarrari

(1) (1920) 5 Pat. L. J. 740. (2) (1925) I. L. R. 52 Cal. 417 (421); P. C.

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interest was put up for sale and was actually purchased by the appellant. It was conceded that at the date of the purchase by the appellant her husband was in unlawful possession of a portion of the disputed land for six years, so that it was open to the appellant to bring a suit to protect her interest as against the trespasser her husband. She took no action as against her husband and in course of time her husband acquired a title by adverse possession as against her. Now this being the position, the appellant, when a suit for rent was brought against her by the landlord, claimed that she was entitled to abatement of rent in regard to the portion of land of which she had been dispossessed by her husband. This was the whole case before the Judicial Committee, and the only point which the Judicial Committee had to consider was whether the appellant as having succeeded to the interest of the permanent mukarraridar was entitled to bring a suit to eject her husband, the trespasser, from the portion of the demised land. In dealing with this point the Judicial Committee says as follows:—

"The tenant under such a lease virtually becomes the proprietor of the surface of the lands subject only to the payment of the stipulated rent, and the lessor and succeeding landlords have no interest in the lands except in so far as they form a security for payment of the rent. When the rent falls into arrear the landlord's only remedy is to bring the tenure to sale by public auction on the execution of a decree for payment of rent. The purchaser of the tenure, as has now been settled by a long series of authorities in the Indian Courts, which are enumerated in the learned and exhaustive judgment of Mr. Justice Mookerjee, acquires title to the lands on the terms of the original lease unaffected by any incumbrances created by previous tenants. An incumbrance is defined by section 161 of the Bengal Tenancy Act, 1885, as 'any right or interest created by the tenant on his tenure or holding or in limitation of his own interest therein, and not being a protected interest.' There is no question in this case of any protected interest but only of such right as the appellant's late husband may have acquired in respect of his possession of a portion of the lands embraced in the lease for a period exceeding 12 years."

The Judicial Committee then proceeds to point out that at the date when the appellant acquired the lease by purchase only six years of adverse possession by her husband had run against the former tenant

and that it was admitted that she could immediately have put an end to this tortious possession by her husband on her purchasing the tenure. The Judicial Committee came to the conclusion that it was her duty under a perpetual tenure to protect herself against illegal encroachments and, as she failed in her duty, she was not entitled to claim abatement of rent as against the landlord. Now this is the whole of the decision of the Judicial Committee. But Sir Sultan Ahmed contends that the expression used by their Lordships of the Judicial Committee in describing the perpetual mukarraridar as virtually a proprietor has in some mysterious way affected the decision of Sultan Ahmed, J., in the case to which I have referred. I am unable to agree with this contention. If authority be needed for the proposition that a mukarraridar is a lease-holder, it will be found in the celebrated decision of Sir Lawrence Jenkins in *Kally Dass Ahiri* v. *Monmohini Dassee*(1) where his Lordship pointed out that "A man who being owner of land grants a lease in perpetuity carves a subordinate interest out of his own and does not annihilate his own interest." A perpetual mukarraridar upon the express decision of Sir Lawrence Jenkins, which has been affirmed in a very conspicuous manner by their Lordships of the Judicial Committee, is a leaseholder, and not a proprietor. The expression which has been used by their Lordships of the Judicial Committee in the case to which Sir Sultan Ahmed has referred must be read and understood in connection with the facts of that case. I am, therefore, of opinion that that case has no application to the facts of this case.

Sir Sultan Ahmed relies upon two decisions: one of the Oudh Judicial Commissioner's Court and the other of the Calcutta High Court. In the case of the Oudh Chief Court [*Ram Bali Singh* v. *Jagdal Singh*(2)] an under-proprietary right was sold, and the question was whether the under-proprietor was entitled to claim pre-emption. It was held that he

(1) (1897) I. L. R. 24 Cal. 440. (447). (2) (1925) 89 Ind. Cas. 421.

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was entitled and the basis of the decision in the words of Mr. Daniels, Judicial Commissioner, is that "the transaction amounted to a sale of under-proprietary right and gave rise to a right of pre-emption." Whether that learned Judge was right in the view which he took that the transaction amounted to a sale I am unable to say. But the decision itself is not an authority for the proposition that a mukarraridar is entitled to claim pre-emption. The only other case to which we have been referred is the decision of the Calcutta High Court in *Surama Musalmani* v. *Munsi Danes Mahomed*(1). It is impossible from the report to say what the facts in that case were, and in any event I am not willing to differ from the decision of Sultan Ahmed, J., in the case to which I have referred.

In my opinion, the case has been correctly decided by the lower appellate Court, and I must dismiss this appeal with costs.

WORT, J.—I entirely agree.

APPELLATE CIVIL.

Before Das and Wort, JJ.

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July, 25.

THAKUR RAGHUNANDAN SAHAY SINGH

v.

THAKUR DRIPA NATH SAHAI SINGH.*

Co-sharer, settlement by—land allotted to another co-sharer on partition—settlement, whether binding.

A co-sharer landlord to whom a parcel of land has been allotted on partition does not take it subject to a settlement made by his co-sharer without his concurrence when the land was the joint property of all the co-sharers.

*Second Appeals nos. 748, 805, 904 and 1028 of 1926, from a decision of G. Rowland, Esq., I.C.S., Judicial Commissioner of Chota Nagpur, dated the 20th March, 1926, reversing a decision of Babu Ramesh Chandra Sur, Munsif of Palamau, dated the 15th May, 1924.

(1) (1907-08) 12 Cal. W. N. ccxliv (Notes).