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a way as to prohibit routine zamindari operations, and this was in fact conceded by the learned Counsel, who could not suggest what the lessee was to do under the lease to a tenant who fell into arrears and against whom a *rent* decree or execution could not be obtained for some reason (as does happen sometimes). The lessee was a co-sharer landlord to the lessor's knowledge and it cannot be contended that the leases disentitled him to obtain or exercise rights accruing to him in the latter capacity under section 22(*2*).

Appeal allowed in part.

J. K.

Cross objection allowed in part.

APPELLATE CIVIL.

Before Dhavle and Varma, JJ.

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Nov., 10, 27, 30. *May*, 6.

PHUL MOHAMMAD KHAN

v.

QUAZI KUTUBUDDIN.*

Pre-emption—mukarrari and raiyati land, whether can be subject of pre-emption—maintainability of suit.

Held, that there could not be any right of pre-emption with regard to a mukarrari or raiyati interest.

Sheikh Mohammad Jamil v. *Khub Lal Raut*(1), *Musammat Bibi Saleha* v. *Haji Amiruddin*(2), *Dhirakshal Singh* v. *Tirloki Prashad Singh*(3), followed.

Charitra Dusadh v. *Bhagwati Pandey*(4), distinguished.

Appeal by the defendants.

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*Appeal from Appellate Decree no. 1302 of 1933, from a decision of Maulavi Saiyid Abul Fath, Subordinate Judge of Arrah, dated the 24th May, 1933, reversing a decision of Babu Jamini Mohan Mukharji, Munsif of Buxar, dated the 10th March, 1932.

(1) (1920) 5 Pat. L. J. 740.
(2) (1928) I. L. R. 8 Pat. 251.
(3) (1923) A. I. R. (Pat.) 217.
(4) (1934) 15 Pat. L. T. 796.

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The facts of the case material to this report are set out in the judgment of Varma, J.

Hassan Jan and *Syed Hassan*, for the appellants.

Khursaid Husnain and *Qazi Nazrul Hassan*, for the respondents.

VARMA, J.—This second appeal arises out of a suit for pre-emption filed by the plaintiff which was dismissed by the trial court but partly decreed by the lower appellate court. The defendants have come up in appeal before us. The facts out of which this appeal arises are as follows :—

The plaintiff's case is that he and defendant no. 3 are full brothers but they are on bad terms. Defendant no. 3 sold his properties to defendants 1 and 2 under a kebala, dated the 25th January, 1930 without the knowledge of the plaintiff. He learnt of this on the 26th of January, 1930 at 2 A.M. in the night at Gaya. As soon as he learnt of the sale he performed the ceremony of talab-i-mowasibat saying that he had a share and right of pre-emption in Kazipura, tauzi no. 1437 joint and separate account no. 1 and in Bhojpur Jadid tauzi no. 1296, he was claiming pre-emption and was ready to pay the price mentioned in the kebala in respect of the shares claimed. He started that very day and reached Dumraon that very noon. From there he went to Kazipura and in the presence of respectable persons performed the ceremony of talab-i-ishhad saying that he had a share in these two tauzies and so he had a right to pre-empt. He also informed the people there that he had already performed the ceremony of talab-i-mowasibat. From there he went to Bhojpur and performed the ceremony of talab-i-ishhad. After performing these ceremonies he offered the price of the shares to defendants nos. 1 and 2 but they refused and, therefore, the plaintiff filed the suit. It appears that along with the sale of these two tauzies some mokarrari as well as raiyati lands were transferred by the same transaction. The plaintiff claimed right to pre-empt in regard to the milkiat rights only.

Defendant no. 3 did not appear to contest the suit but defendants nos. 1 and 2 filed written statement. They denied many of the allegations made in the plaint and said that the two ceremonies of talab-i-mowasibat and talab-i-ishhad were never performed and also raised the question that the plaintiff was not entitled to pre-empt in regard to a part of the properties sold. These were their chief contentions apart from the usual questions of estoppel and limitation.

The trial court held that the ceremonies were not performed. It further held that as the ceremonies were not performed with regard to all the properties transferred, the plaintiff could not be said to have performed the ceremonies in accordance with law. On these findings the trial court dismissed the suit of the plaintiff. The lower appellate court, however, believed the evidence of the plaintiff and held that the ceremonies were performed as alleged by him.

The next question for determination was whether the plaintiff's suit was maintainable. In the course of argument it was stated before the lower appellate court that the plaintiff would have a right to pre-empt for the proprietary interest only if it was found that a right of pre-emption did not accrue on transfer of raiyati lands. The lower appellate court referred to Chapter XXVIII of Ameer Ali's Muhammedan Law, and *Mohammad Jamil* v. *Khub Lal Raut*(1) and *Dhirakshal Singh* v. *Tirloki Prashad Singh*(2) and held that the plaintiff was not entitled to pre-empt with regard to the raiyati lands. That being so, the plaintiff's suit was maintainable in respect of such properties only in respect of which the right of pre-emption accrued. The lower appellate court ordered that if the plaintiff deposited Rs. 1,700 with a period of three months to the credit of defendants nos. 1 and 2, a decree for possession of the property in suit would be finally passed in his favour; and if he deposited only Rs. 1,100 a decree declaring his right to possession would be passed but he would not be able to get

(1) (1920) 5 P. L. J. 740.
(2) (1923) A. I. R. (Pat.) 217.

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possession until he deposited Rs. 550 more and in case he made no deposit at all within the time allowed the plaintiff's suit would stand dismissed. I may note here that Rs. 550 represented the plaintiff's share of the encumbrances on the properties in suit after their purchase.

Mr. Hasan Jan appearing on behalf of the appellants attacks the judgment of the lower appellate court in the following manner. He urges that the pre-emptor must pre-empt with regard to the whole of the property transferred by the sale and as in this case the pre-emption was with regard to *milkiat* properties only and not with regard to the mokarrari and raiyati interests, the present suit must fail.

In this High Court it has been held in a number of decisions that there can be no pre-emption with regard to a mokarrari or raiyati interest, the earliest decision being the case of *Sheikh Mohammad Jamil* v. *Khub Lal Raut*(1), where it was held that the doctrine of pre-emption applies only to the sale of the proprietary interest and, therefore, does not apply to the sale of the mokarrari interest. One of the arguments advanced in that case was that the right of pre-emption extended even to the mokarrari lease that was vended in that case. Sultan Ahmed, J. relying upon the cases of *Moorooly Ram* v. *Huree Ram*(2), *Baboo Ram Golam Singh* v. *Nursingh Sahay*(3) and *Dewanutulla* v. *Kazemmolla*(4) held that this objection was untenable. Mr. Hasan Jan has taken us through these cases with the object of showing that there was no authority for the proposition of law laid down in *Sheikh Mohammad Jamil* v. *Khub Lal Raut*(1). The case of *Moorooly Ram* v. *Huree Ram*(2) was a case in which the question before the Court was whether a lease in perpetuity with a rent reserved amounted to a sale. Their Lordships held that it did not and, as

(1) (1920) 5 Pat. L. J. 740.
(2) (1867) 8 W. R. 106.
(3) (1875) 25 W. R. 43.
(4) (1887) I. L. R. 15 Cal. 184.

pre-emption applied only to sales, therefore, a lease in perpetuity could not be the subject of pre-emption.

In the case of *Baboo Ram Golam Singh* v. *Nursingh Sahay*(1) the plaintiffs sued the defendants to recover possession by determination of right and for registration of his name in the milkiat and malgoozar's column of the Government record jointly with the name of Khookum Singh, the recorded proprietor, in respect of a certain share in a particular tauzi on the ground of a right of pre-emption as a partner in the property sold. In the plaint it was alleged that the defendant no. 2 had without the plaintiff's knowledge, sold her mokarrari right and the defendant no. 1, his milkiat or proprietary right to the same defendant, that is, the defendant no. 4, who is a stranger to the parties under a deed of sale dated the 26th of January, 1874. Getting information of it he performed the various ceremonies connected with pre-emption. The defendants contested the suit and in his written statement defendant no. 4 alleged that he had purchased the mokarrari and milkiat rights of two different persons; that according to the law of pre-emption no claim for pre-emption could be valid in respect of a mokarrari property and therefore the claim of the plaintiff with reference to the mokarrari property must be dismissed. There were other points taken in the written statement with which we are not concerned. Of the points discussed before the lower court in that case, one was whether with regard to the mokarrari a claim for pre-emption could be allowed by the Muhammadan Law, and if not, whether the Court had jurisdiction. The lower court had held that there was no right of pre-emption with regard to a mokarrari interest. It was argued before the High Court that the learned Judge was wrong in holding that under the Muhammadan Law a claim to the mokarrari by right of pre-emption would not lie. The other points urged before it do not affect the case in hand. While dealing with the first point their Lordships observed:

(1) (1875) 25 W. R. 43.

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"Now the plaintiff comes into Court claiming the right of pre-emption on the ground that he is a partner in the property of the land sold. Can it be said that he is a partner in the mokurruree? And if the plaintiff, as a partner in the milkiat, can interfere in the sale of the mokarrari right by the mokarraridar, on the ground that he is a partner in the property sold, it follows that the mokurrureedar can also interfere in the exercise of his rights by the proprietor in selling his proprietary rights but this, the pleader for the appellant admits, the mokurrureedar cannot do."

They referred to the case reported in *Moorooly Ram* v. *Huree Ram*(1) with approval and finally agreed with the finding of the lower court that the plaintiff was not entitled to claim the right of pre-emption with regard to the mokarrari right.

Mr. Hasan Jan urges that the remarks of their Lordships at page 44 in *Baboo Ram Golam Singh* v. *Nursingh Sahay*(2), support the proposition of law laid down in the case of *Sheikh Mohammad Jamil* v. *Khub Lal Raut*(3). I cannot accept this contention. There also it appears from the facts that defendant no. 2 sold her mokarrari right and the plaintiff as a partner in the proprietary right wanted to claim pre-emption and this was, for the reasons given by their Lordships, held to be untenable.

In the case of *Dewanutulla* v. *Kazem Molla*(4) the facts were as follows: The plaintiff and defendant no. 1 were joint proprietors of a certain mokarrari tenure. Defendant no. 1 granted a sub-lease in perpetuity of his share. The plaintiff wanted to enforce his right of pre-emption. Their Lordships referring to the cases of *Moorooly Ram* v. *Huree*

(1) (1867) 8 W. R. 106.
(2) (1875) 25 W. R. 43.
(3) (1920) 5 Pat. L. J. 740.
(4) (1887) I. L. R. 15 Cal. 184.

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Ram(1) and *Ram Golam Singh* v. *Nursingh Sahay*(2) held that the grant of a permanent lease does not give rise to the right of pre-emption. Their Lordships did not express any opinion on the question whether the parties being merely lessees in perpetuity had such a milkiat in the property as would entitle either of them to claim the right of pre-emption.

Mr. Hasan Jan next refers to Volume III, Chapter III, Book XXXVIII at page 558 of Grady's edition of Hamilton's Hedaya and says that pre-emption relates to immovable property whether they are capable of division or not and from this he concludes that as the mokarrari land sold in this case is an immovable property the law of pre-emption applies. He further urges that the term "milkiat" may have a technical meaning now but it means landed property, revenue or rent free property. To this Mr. Khursaid Husnain replies that in early times only full ownership was contemplated by the Muhammadan legislators and the Hedaya refers to proprietary interest only. For the latter statement, Mr. Khursaid Husnain relied on the case of *Gobind Dayal* v. *Inayatullah*(3), where Mahmood, J. gives the definition of pre-emption in the following terms: "Pre-emption is a right which the owner of certain immovable property possesses, as such, for the quiet enjoyment of that immovable property, to obtain, in substitution for the buyer, proprietary possession of certain other immoveable property, not his own, on such terms as those on which such latter immovable property is sold to another person." He next relied on the case of *Sakina Bibi* v. *Amiran*(4), where Mahmood, J. says that in the pre-emptive tenement (the tenement by the ownership of which the pre-emptor wants to exercise his right of pre-emption), the pre-emptor should have vested ownership and not a mere expectancy of inheritance or a reversionary right, or any other kind of contingent right,

(1) (1867) 8 W. R. 106.
(2) (1875) 25 W. R. 43.
(3) (1885) I. L. R. 7 All. 775 (799).
(4) (1888) I. L. R. 10 All. 472 (477).

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or any interest which falls short of full ownership. The learned Advocate refers to another authority, viz., Baillie's Muhammadan Law, Book VII, Chapter I at page 478 and urges that "when it is said that *akar* are proper objects of the right of pre-emption it is by virtue of a right of *milk* or ownership, that they are so, and one of the conditions mentioned in the early parts of the chapter is that the thing sold must be *akar*, or what comes within the meaning of it, whether the *akar* be divisible or indivisible, as a bath or well or a small house or a mill or road". In Siv Saran Lal's book on the Law of Pre-emption, the various definitions of *akar* have been collected together in Chapter III at page 64. According to Fatwa Alamgiri (Volume III, page 605) the strict meaning of the word *akar* is "a space covered with buildings" so that properly speaking the term is not applicable to a *zuyut;* but according to the *Kifayah* (Volume IV, page 940) and the *Inayah* (Volume IV, page 263) *akar*, in the sense in which it is liable to pre-emption, includes *zuyut*. According to Freytag, *zuyut* is a field, whether arable or pasture (Baillie, Volume I, page 472).

In our own High Court in the case of *Musammat Bibi Saleha* v. *Haji Amiruddin*(1) it was held that a mukarraridar holding under a co-sharer had no right to pre-empt as against another co-sharer 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 case relied on the case of *Sheikh Mohamad Jamil* v. *Khub Lal Raut*(2) and explained the cases of *Katyayani Debi* v. *Uday Kumar Das*(3) and *Ram Bali Singh* v. *Jagdat Singh*(4).

In the case of *Dhirakshal Singh* v. *Triloki Prashad Singh*(5) Das, J. delivering the judgment of

(1) (1928) I. L. R. 8 Pat. 251.
(2) (1920) 5 Pat. L. J. 740.
(3) (1924) I. L. R. 52 Cal. 417 P. C.
(4) (1925) 89 Ind. Cas. 421.
(5) (1923) A. I. R. (Pat.) 217.

the Court held that there was no right of pre-emption with regard to the mokarrari land.

In the case of *Chariter Dusadh* v. *Bhagwati Pandey*(1) the question was whether the right of pre-emption could be exercised in respect of a birit land. It was held that the definition of proprietor in the Bengal Tenancy Act did not include all kinds of proprietorship and that the fact that the biritdar is treated as a tenant in the record-of-rights is not incompatible with the conception of his ownership of the land. From this it is clear that their Lordships relied upon the preposition that the full owner of a property has a right to pre-empt but not a person who is in the possession of a right falling short of it. Therefore, relying upon the various decisions of our own High Court, I am of opinion that the court below was right in holding that there could not be any right of pre-emption with regard to a mokarrari or raiyati interest. I would, therefore, dismiss the appeal with costs.

DHAVLE, J.—I agree.

Appeal dismissed.

J. K.

APPELLATE CIVIL.

Before Dhavle and Varma, JJ.

1937.

Nov., 18.
May, 6.

LADURAM MARWARI

v.

BANSIDHAR MARWARI.*

Handnote—suit on handnote found to be forged—decree whether can be passed to the extent of the amount admitted.

The plaintiff instituted a suit for the recovery of Rs. 1,950 on the basis of a handnote alleged to have been executed by the defendant. It was not the case of the plaintiff that there was a previous debt independent of the handnote. The

*Appeal from Appellate Decree no. 1370 of 1933, from a decision of Babu Anjani Kumar Sahay, Subordinate Judge at Monghyr, dated the 16th September 1933, modifying a decision of Mr. Muhammad Shamsuddin, Munsif of Monghyr, date the 24th February 1933.

(1) (1934) 15 Pat. L. T. 796.