a right construction. Following that decision we hold that the vendee has a right of succession to the vendors and that the suit for pre-emption has been rightly dismissed. We accordingly dismiss the appeal with costs.

Appeal dismissed.

APPEAL FROM ORIGINAL CIVIL.

Before Mr. Justice Shadi Lal and Mr. Justice Martineau.

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Feb. 28

JAI KISHEN DAS AND OTHERS (PLAINTIFFS)—*Appellants*,

v.

ARYA PRITI NIDHI SABHA AND OTHERS (DEFENDANTS)—*Respondents.*

Civil Appeal No. 1947 of 1915.

Vendor and Purchaser—sale of specific area of land—vendees evicted from part of this area—vendor's liability—Transfer of Property Act, IV of 1882, *section* 55—*measure of damages—Indian Contract Act, IX of* 1872, *section* 73.

On the 16th September 1907 C. D. and his son M. B., the predecessors of defendants 3 to 8 sold to the plaintiffs 79 *kanals* and 4 *marlas* of land. The property comprised several plots of land which formed part of different *khasra* numbers specified in the sale-deed. The price paid by the vendees was Rs. 83,160 and was calculated, as expressly stated in the deed, at the rate of Rs. 1,050 per *kanal*. The plaintiffs asserted that they got possession of the 79 *kanals* and 4 *marlas*, but were subsequently evicted by the defendants 1 and 2 from an area measuring 4 *kanals* 4 *marlas*. It was found that defendants 1 and 2 were as a matter of fact the owners of the latter area.

Held, that as under the terms of the deed of conveyance the vendors sold 79 *kanals* and 4 *marlas* at so much per *kanal* to the plaintiffs, it was the duty of the vendors either to make good the deficiency or to pay damages for the loss caused to the vendees, having regard to the admission by the defendants that there was a guarantee of title and to the provisions of section 55 of the Transfer of Property Act.

Held further, that the measure of damages is the price of the land at the time of eviction, *vide* section 73 of the Indian Contract Act.

Nagardas Saubhagyadas v. *Ahmed Khan* (1), *Ranchhod Bhawan* v. *Manmohandas* (2), and *Nabinchandra Saha* v. *Krishna Barana* (3), followed.

(1) (1895) I.L.R. 21 Bom. 175. (2) (1907) I.L.R. 32 Bom. 165.
(3) (1911) I L.R. 38 Cal. 458.

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The facts of the case are given in the judgment.

First appeal from the decree of H. F. Forbes, Esquire, Senior Subordinate Judge, Lahore, dated 19th April 1915, dismissing plaintiff's suit.

MANOHAR LAL, B. N. KAPUR and BALWANT RAI, for *Appellants.*

OERTEL and AZIMULLAH for Fazl Elahi and Durga Das, and DHARM CHAND for the Arya Priti Nidhi Sabha, *Respondents.*

The judgment of the Court was delivered by—

SHADI LAL J.—This appeal arises out of an action brought by the plaintiffs, who are appellants before us, for possession of 4 *kanals* and 4 *marlas* of land against defendants 1 and 2, and, in the event of the plaintiffs' failure to recover possession, for damages against the remaining defendants. The Subordinate Judge has dismissed the suit *in toto*, and on this appeal preferred by the plaintiffs the main question on the merits is whether the plaintiffs are entitled to damages, as the finding of the Subordinate Judge in favour of defendants 1 and 2 has not been seriously contested in this Court.

The facts bearing upon the dispute between the parties are briefly as follows:—On the 16th September 1907 Chiragh Din and his son Muhammad Bakhsh, the predecessors of defendants 3 to 8, sold to the plaintiffs 79 *kanals* and 4 *marlas* of land situate at Naulakha near the railway station, Lahore. The property sold comprised several plots of land contiguous to one another which formed part of different *khasra* numbers specified in the sale-deed. The price paid by the vendees to the vendors was Rs. 83,160, and was calculated, as expressly stated in the deed, at the rate of Rs. 1,050 per *kanal*. It is alleged in the plaint that the vendors put the plaintiffs in possession of the entire area sold to them, and that it was on a subsequent date that the plaintiffs were evicted from 4 *kanals* and 4 *marlas* by defendants 1 and 2 claiming to be the owners thereof on the ground of their prior title. The plaintiffs further asserted in paragraph 3 of the plaint, and this assertion was expressly admitted in the written statement on behalf of the vendors' successors-in-interest who contested the

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suit, that the vendors had assured the vendees "that they were the sole owners of the land sold and that there was no defect in their title." The defendants, however, pleaded that the plaintiffs were at the time of the suit in possession of the entire property sold to them; and that, at any rate, the measure of damages should be the price paid by the vendees for the area in question.

Before dealing with the merits of the case, we must refer to a preliminary objection raised by Mr. Oertel on behalf of the respondents that the appeal has abated and should fail on that ground. It appears that of the six defendants who were sued as the representatives of the deceased vendors, four died during the pendency of the appeal; and that no application to implead their legal representatives has been made by the appellants. They, however, contend that these persons were not necessary parties to the litigation; and that there was, therefore, no need to implead their legal representatives It is common ground that these four persons were the two widows and two daughters of the deceased Muhammad Bakhsh, and the plaint shows that they were impleaded as defendants simply because it was said that they stated themselves to be the deceased's heirs. We find that three of them, though duly served, did not appear in the trial Court at any stage of the case, and the proceedings were consequently *ex-parte* against them; and that the fourth person was the mother of Fazal Ilahi (defendant 8) who as the son of Muhammad Bakhsh claimed to be the sole heir of the vendors and repudiated the assertion as to defendants 3 to 7 being their heirs. It is to be observed that this lady on whose behalf there was an appearance in the trial Court, identified herself with the defence put forward by Fazal Ilahi, and that both of them were defended by the same pleader. Considering that the plaintiffs impleaded all the relatives of the vendors *ex majori cautela* without making any definite assertion that all of them were entitled to be regarded as their heirs; that Fazal Ilahi, the only male member of the family, claimed to be the sole heir; that this claim was endorsed by one of the four persons who died during the pendency of the appeal and was not demurred to by the remaining three; and that Fazal Ilahi has

since succeeded in establishing in a Court of Justice his right to succeed to the estate left by the deceased to the exclusion of the female members of the family (though we are told that an appeal is pending against that judgment) ; we hold that so far as the present litigation is concerned, the deceased persons were not necessary parties, and that the appeal can proceed without impleading their representatives.

It is to be observed that the representatives of the vendors were, *qua* the claim for damages, joint debtors of the plaintiffs, an the latter could, according to the law declared by section 43 of the Contract Act, have sued any one or more of them to recover the whole of the damages. It is, however, urged that the option given by the aforesaid section should be exercised before the institution of the suit, and that it is now too late for the plaintiffs to elect the debtor or debtors from whom they should recover the money. It is true that the judgment in *Rao Ghulam Muhammad Khan*, v. *Nahar Ali* (1), supports this contention, but the learned Judges, who decided that case, did not consider the question whether the right to sue survived against the surviving defendant or defendants alone within the meaning of Order XXII, rule 2, Civil Procedure Code. It is, however, unnecessary to pursue the subject any further, because on the special facts set out above we consider that Fazal Ilahi alone should be treated for the purpose of this litigation as the representative of the vendors.

Coming now to the merits, we find that one Mirza Asad Beg was the original proprietor of a large estate comprising the land in dispute, and that he proceeded to sell his property in parcels. It appears that in 1905 the defendants 1 and 2 purchased from him a certain area, and similarly Chiragh Din and Muhammad Bakhsh purchased another plot of land out of that estate a portion of which was sold by them to the plaintiffs in 1907. It is claimed on behalf of defendants 1 and 2 that the land in dispute formed part of the property sold to them by Mirza Asad Beg, and this claim has not been resisted before us. It may be that the boundaries of the estate purchased by the aforesaid defendants were not clearly demarcated, the result being

(1) 53 P. R. 1895.

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that the plot in dispute was treated as part of the land sold to the plaintiffs. It appears that the latter took possession thereof soon after the sale in their favour. When they, however, proceeded to parcel out their estate into small plots for building purposes and to sell them to different persons, the said defendants, discovering that the land in dispute belonged to them, successfully asserted their right and recovered possession of the land.

Mr. Manohar Lal for the plaintiffs has not been able to show that his clients are entitled to the land in dispute as against defendants 1 and 2. Indeed, the learned counsel has made no real attempt to impeach the finding of the Subordinate Judge on the subject, and it is, therefore, unnecessary to discuss the matter any further. Suffice it to say that the plaintiffs have not established their title to the land, and cannot consequently recover possession from defendants 1 and 2.

As regards damages, the Subordinate Judge finds that in field No 951 the plaintiffs hold 5 *kanals* and 1 *marla* short of the area specified in the sale-deed, but that in field No. 955 they possess 18 *marlas* in excess of what they are entitled to under the conveyance. According to this finding, which is supported by evidence, the plaintiffs would require 4 *kanals* and 3 *marlas* in order to make up the entire area sold to them; but Mr. Oertel contends that just as they have some area in excess in field No. 955, so they possess a larger area in other fields than that awarded to them by the sale deed; and that this excess would be sufficient to compensate them for the above deficiency. This contention was not put forward in the trial Court, but it is clear that the plaintiffs are not entitled to any damages, if they have received, irrespective of the plot in dispute, 79 *kanals* and 4 *marlas*, the area sold to them. The matter can easily be settled by measurements to be made on the spot.

The terms of the conveyance make it absolutely clear that the vendors sold 79 *kanals* and 4 *marlas* to the plaintiffs, and calculated the price at the rate of Rs. 1,050 per *kanal*. It, therefore, follows that if the vendees got less than that area, it is the duty of the vendors either to make good the deficiency, or to pay damages for the loss thus caused to the vendees. It

appears that field No. 951 was wrongly shown in the revenue record as having a larger area than it really contained, and the learned Subordinate Judge holds that the result of this wrong measurement is "that out of 41 *kanals* plaintiffs are only 4 *kanals* short, whereas defendants 1 and 2 are 3 *kanals* short in 20 *kanals*, and defendants 3 to 8 are 15 *marlas* short in 5 *kanals*." The learned Judge, therefore, finding that the plaintiffs have suffered least of all by reason of the deficiency in the area of field No. 951, has disallowed their claim for damages.

We are unable to concur in this conclusion. As stated above, the vendors expressly sold a certain area and realised as price, not a round sum, but a sum arrived at after calculating the price at Rs. 1,050 per *kanal*. It is obviously their duty to deliver that area free from any defect in title. It is no answer to the vendees' claim that the vendors got from their transferrer less than what they bargained for. If they have suffered, they can adopt such remedy against their transferrer as is open to them; but the plea *ad misericordiam* cannot furnish a valid defence to the plaintiffs' claim. It is to be observed that after making the sale in favour of the plaintiffs the vendors still kept some land with them, and it cannot, therefore, be said that they were not in a position to deliver to the vendees the entire area mentioned in the deed.

In view of the terms of the deed, the admission as to the guarantee of title contained in the written statement, and the law on the subject declared by section 55 of the Transfer of Property Act, we must hold that the plaintiffs are entitled to damages for any deficiency in the area sold to them. Following the rule laid down in section 73 of the Indian Contract Act, which does not exclude from its operation the case of damages for the breach of a contract relating to immoveable property, we are of opinion that the measure of damages is the price of the land at the time of eviction. This is the rule laid down in *Nagardas Saubhagyadas* v. *Ahmed Khan* (1) and has since been affirmed in *Ranchhod Bhawan* v. *Manmohandas* (2), and *Nabinchandra Saha* v. *Krishna Barana* (3).

(1) (1895) I. L. R. 21 Bom. 175. (2) (1907) I. L. R. 32 Bom. 165.
(3) (1911) I. L. R. 38 Cal. 458.

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Upon the record as it stands we are unable to determine the date on which the eviction took place, nor is there any evidence to show what the price of the property was on that date. The learned Subordinate Judge having dismissed the claim as to damages on a preliminary point has not recorded any finding on issue No. 5 which dealt with the amount of damages. We are, therefore, constrained to remand the case for determination of the amount of damages, if any, sustained by the plaintiffs.

Accordingly, while dismissing the appeal against defendants Nos. 1 and 2 with costs, we set aside the decree dismissing the claim for damages, and remit the case for redecision with reference to the foregoing remarks. The costs as between the plaintiffs and the defendants other than defendants 1 and 2 shall abide the event.

Appeal accepted—case remanded.