

Sahib Khatun had become full owner of the property in suit and could validly gift it to *Mussammatt Nur Bhari* (See *Surajmani v. Rabi Nath Ojha* (1), and *Mohan Lal v. Niranjan Das* (2)).

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Mr. Saunders has laid stress on the opinion expressed by the Assistant Collector on appeal that the gift to *Mussammatt Sahib Khatun* was merely in lieu of maintenance. But his opinion is not relevant and cannot be taken into consideration in ascertaining the real nature of the transaction.

The appeal fails and is dismissed with costs.

A. N. C.

*Appeal dismissed.*

### APPELLATE CIVIL.

*Before Mr. Justice Tek Chand and Mr. Justice Bhide.*

JALMEJA SINGH (PLAINTIFF) Appellant

*versus*

SARDARNI ASKAUR AND OTHERS (DEFENDANTS)

Respondents.

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Jan. 7.

Civil Appeal No. 389 of 1923.

*Civil Procedure Code, Act V of 1908, Order II, rule 2—Same "cause of action"—meaning of—sale of land by co-sharers including plaintiff's share without any authority—Suit by plaintiff to pre-empt sale of the shares of the other co-sharers—Subsequent suit by plaintiff for redemption of a mortgage on the land—whether barred by previous suit.*

J. S. mortgaged his land in favour of defendant 1, and on the death of J. S. it was duly mutated in favour of his five reversioners, *i.e.*, the plaintiff and defendants 2—5. Subsequently defendants 2—5 sold the whole land (including the share of the plaintiff) to defendant 1 whereupon plaintiff instituted a suit for pre-emption of the land sold, except his

(1) (1908) I. L. R. 30 All. 84 (P.C.). (2) (1921) I. L. R. 2 Lah. 175.

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own share which he excluded on the specific allegation that the other four co-sharers had no authority to transfer it. This suit was decreed. Subsequently plaintiff brought the present suit for redemption of a mortgage on the land. Defendant No. 1, the mortgagee, pleaded that the suit was barred under Order II, rule 2 of the Code of Civil Procedure.

*Held*, that the provisions of Order II, rule 2 only require that a suit shall include the whole of the claim with respect to one and the same cause of action and not that every suit shall include every claim or every cause of action which the plaintiff may have against the defendant at the time.

*Raja of Pittapur v. Sri Rajah Venkata Mahipatisurya* (1), and *Payana Reena Saminathan v. Pana Lana Palaniappa* (2), followed.

*Musa Yakub v. Manilal* (3), referred to.

*Held further*, that it was not necessary for the plaintiff when suing for pre-emption to sue for cancellation of the admittedly unauthorised sale by the co-sharers of his (plaintiff's) own share and for redemption of the mortgage.

*And* that therefore the present suit was not barred by the previous suit for pre-emption.

*Second appeal from the decree of Lt.-Col. F. C. Nicolas, District Judge, Amritsar, dated the 23rd January 1923, affirming that of Lala Durga Parshad, Subordinate Judge, 2nd class, Amritsar, dated the 19th April 1921, dismissing the plaintiff's suit.*

MOOL CHAND, for Appellant.

G. C. NARANG, for Respondent.

The judgment of the Court was delivered by—

BHIDE J.—This second appeal arises out of a suit for redemption of a mortgage which has been dismissed by the lower Courts as barred by the provisions of Order II, rule 2 of the Civil Procedure Code. The land in dispute formed a portion of a holding of about 221 *kanals* of land which belonged

(1) (1885) 12 I. A. 116.

(2) (1913) 41 I. A. 142.

(3) (1895) I. L. R. 29 Bom. 368.

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to one Jawala Singh and was mortgaged by him to *Sardarni* Basant Kaur by a registered deed, dated the 19th of May 1888. On the death of Jawala Singh the land was jointly mutated in favour of the plaintiff and defendants Nos. 2—5 as the reversioners of Jawala Singh. Subsequently defendants Nos. 2—5 sold the whole of the land including the plaintiff's share to defendant No. 1. The plaintiff instituted a pre-emption suit with respect to the shares of the co-sharers, namely, defendants Nos. 2 to 5 but excluded his own share from the suit on the specific allegation that the co-sharers had no authority to transfer his share and the sale with respect to his share was, therefore, void. The pre-emption suit succeeded. The present suit for redemption was instituted on the 23rd of February, 1920. The contention of defendant No. 1 in the present suit was that the suit was barred by the provisions of Order II, rule 2 of the Civil Procedure Code, inasmuch as at the time when the plaintiff instituted the pre-emption suit he had a right to sue for cancellation of the sale with respect to his own share and sue for redemption of the mortgage. This contention appears to us to be wholly erroneous. The sale of the plaintiff's share by defendants Nos. 2 to 5 being unauthorised (a fact which was not disputed in the pre-emption suit) we do not see why it was necessary at all for the plaintiff to sue for cancellation of the sale of his own share at that time. The cause of action, moreover, on which the present suit is based, is distinct from that in the pre-emption suit. "Cause of action" has been defined as a 'bundle of essential facts' which a plaintiff has to prove in order to establish his claim, *cf. Musa Yakub v. Manilal* (1). Now, the essential facts which a plaintiff has to prove in a pre-emption suit are obviously different to those which he has to

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establish in a suit for redemption of a mortgage. The provisions of Order II, rule 2 of the Civil Procedure Code only require that a suit shall include the whole of the claim with respect to one and the same cause of action and not that every suit shall include every claim or every cause of action which the plaintiff may have against the defendant at the time. see *Raja of Pittapur v. Sri Rajah Venkata Mahipatisurya* (1), and *Payana Reena Saminathan v. Pana Lana Palaniappa* (2).

The learned counsel for the respondents has cited *Subodra Bibi v. Bageshwari Singh* (3) and attempted to support the decision of the lower Courts on the ground that the plaintiff was bound to sue for pre-emption of the whole of the property sold, although he alleged that the sale with respect to his own share was void. The present case is distinguishable from the ruling cited as it was not disputed by the defendants in the previous suit therein that the sale of the plaintiff's share was unauthorised and, therefore, void; but even apart from this the contention seems to have no bearing on the issue now before us. The plea that the plaintiff ought to have sued for pre-emption of the whole of the land sold, might have been at best a good defence to the pre-emption suit but it cannot bar the present suit for redemption of a mortgage which, as pointed out above, is based on a different cause of action.

We accordingly accept the appeal and setting aside the orders of the lower Courts remand the case for decision of the remaining issues. The stamp on appeal will be refunded. Costs will follow the final decision.

N. F. E.

*Appeal accepted,  
Case remanded.*

(1) (1885) 12 I. A. 116.

(2) (1913) 41 I. A. 142.

(3) (1915) I. L. R. 37 All. 529.