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British India. The management and expenditure of those endowments are continually the subject of arrangement and contract between the various parties who conduct the management of the shrines. To say that the Court, in whose local jurisdiction the money is received and expended and the parties reside, has no power to determine questions as to the management of the funds quite apart from the title to the grant, which may not be in dispute, seems to me to amount to a denial of justice.

In the view which I take of the facts, this is not a suit in respect of immoveable property, and, therefore, section 16 of the Civil Procedure Code does not apply.

I would reverse the decision of the lower Appellate Court and remand the case for decision by the District Court on the merits. Costs to abide the result.

Decree reversed and case remanded.

APPELLATE CIVIL.

Before Mr. Justice Parsons and Mr. Justice Ranade.

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RANCHODDAS AND ANOTHER (ORIGINAL PLAINTIFFS), APPELLANTS, *v.* JUGALDAS AND ANOTHER (ORIGINAL DEFENDANTS), RESPONDENTS.*

Mahomedan law—Shaffa—Pre-emption—Right of support, "appendages of property"—Easement—"Participator in the appendages of property."

The right of *shaffa* (or pre-emption) belongs first to a partner in the property sold, secondly to a participator in its appendages, and thirdly to a neighbour.

The right of support is not an appendage to property; it is merely included in the incident of neighbourhood.

A's house adjoined the house in dispute towards the east. B's house adjoined the house in dispute towards the south, and was separated from it only by a wall. B's house was subject to the easement of support in favour of the house in dispute. A's house was subject to the easement of receiving and carrying off the rain-water falling from the roof of the disputed house.

Held that A as owner of the servient tenement was a "participator in the appendages" of the house in dispute, and, as such, had a preferential right to purchase the house in dispute over B, who was a mere neighbour.

* Second Appeal, No. 492 of 1899.

SECOND appeal from the decision of R. G. C. Lord, Assistant Judge, F. P., at Broach.

Suit for pre-emption. The house in dispute belonged to defendant No. 1. Plaintiffs' house adjoined the house in dispute towards the east. Defendant No. 2's house adjoined it towards the south. The roof of the house in dispute projected over the terrace of the plaintiffs' house, so that the rain-water from the roof fell into the terrace.

On 18th August, 1897, defendant No. 1 sold the house in dispute to defendant No. 2.

Thereupon the plaintiffs filed the present suit to enforce their right of pre-emption.

The Court of first instance rejected the plaintiffs' claim, holding that plaintiffs were mortgagees, and not owners of their house, and as such had no right of pre-emption, and that even if they were owners, defendant No. 2 had a preferential right to purchase the house (1) because he was a next door neighbour, and (2) because the wall between his house and that in dispute was the common property of both. On these grounds the suit was dismissed.

On appeal, the Assistant Judge confirmed the first Court's decree. His reasons were as follows: –

"Defendant's house is beside the house in dispute, and separated from it only by a wall, while plaintiff's house is behind and is subject to an easement of receiving the water from the roof of the house in dispute; so much is admitted. The Subordinate Judge presumes the wall between defendant's house and that in dispute (which we shall call A for shortness, plaintiff's being P and defendant's D) is a party wall, and then rejects plaintiff's claim on the ground of the superior claim of defendant as co-owner of the party wall. But the wall is described in defendant's sale-deed (the only evidence on the point in the suit) as the property of defendant, which, as an admission, should defeat the presumption. However, it is clear that the house D is then subject to an easement of support in favour of house A, even though the wall is only fifteen years old, as the easement necessary to give

rise to the right of pre-emption would appear to be another thing from the perfected easement of the Easement Act. Macnaghten describes that class of pre-emptors as 'participators in appendages,' thus indicating a difference from an easement as known to Indian law.

"Both defendant and plaintiff, then, are in the second class of pre-emptors, and are also in the third as neighbours, but Amir Alli, p. 549, indicates a preference for the man in the same street over the owner of the house behind; thus defendant is any how a preferable pre-emptor to plaintiff, and the latter's right is not valid as against the former."

Against this decision plaintiff preferred a second appeal to the High Court.

Kallabhai Lallubhai for appellants.

N. G. Chandavarker for respondents.

PARSONS, J.:—This is a suit for pre-emption. The Subordinate Judge dismissed it, holding that the plaintiffs had no right of pre-emption, first, because they were not owners, but mortgagees only, of the house in respect of which the right was claimed, and second, because the right of the defendant No. 2 to pre-emption was better than the plaintiffs'; he was a next door neighbour, and the wall between his house and that in dispute was a party wall, the common property of the owners, whereas the plaintiffs were merely owners of a servient tenement. The Assistant Judge summarily dismissed the appeal filed by the plaintiffs; he was of opinion that the wall between the house in dispute and the house of defendant No. 2 was not a party wall, but he thought that the house of the defendant No. 2 was bound to support the disputed house, and hence that both the defendant No. 2 and the plaintiffs were participators in appendages and also neighbours, and that as the house of the defendant No. 2 was in the same street as the disputed house, the latter had a preferential right to purchase the house. It appears to me that this is not a correct decision. In their plaint the plaintiffs based their right upon the allegations that originally their house and the disputed house formed one house, and that the roof of the disputed house projected over

their house which had to receive and carry off the water from its roof. In addition to these allegations, Mr. Kalabhai argued in this Court that there was a right of way through the disputed house to the house of the plaintiffs as described in the Exhibits 33, 34 and 35. There is no finding by the Judges of the Courts below as to anything more than that the plaintiffs' house is subject to the easement of receiving and carrying off the water which may fall from the roof of the disputed house; therefore, as they rightly say, the plaintiffs' house is a servient tenement and the disputed house is a dominant tenement. Their finding as to the defendant's house is conflicting. The Subordinate Judge found that there was a party-wall between them, the Assistant Judge, F. P., did not accept that finding, but thought that the defendant's house was subject to an easement of support in favour of the disputed house. No evidence whatever is pointed out to justify this opinion. Assuming, however, that it is correct, the fact that his house had to support the disputed house would not make the defendant a participator in appendages entitling him to rank above the plaintiffs. The right of *shaffa* belongs first to a partner in the property sold, secondly, to a participator in its appendages, and thirdly, to a neighbour. It is admitted that the plaintiffs come within the second class, and as such they will rank above a neighbour—see *Chand Khan* v. *Naimat Khan* [1]. I can find no authority for holding that the right of support is an appendage to the property; it seems to be merely included in the incident of neighbourhood. Thus, it is said in the Hedaya [2], "the laying of beams on the wall of a house gives a right of *shaffa* from neighbourhood, but not from partnership, since this act does not constitute a partnership in the property of the house. In the same manner, also, a person who is a partner in a beam laid on the top of the wall is only held in the light of a neighbour."

In Baillie's Mahomedan Law, page 476, a *khalit* is defined as a partner in its rights, as of water or way, and in the note it is stated that "though rights of water and way are given as examples, it does not appear that a *khalit* in any other right than

(1) (1869) 3 B. L. R., 296. (2) Hamilton, 549.

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these has the right of pre-emption. Amir Ali says the claim of a person who has a right of way is stronger than that of the person who has a right to discharge water over the land sold. In no work on Mahomedan Law can I find the right of support specifically mentioned, and yet it is one that would exist in almost every case where premises adjoin each other as regards at any rate the land itself. I conclude, therefore, that it does not give a neighbour any greater right of pre-emption than he would have as being a neighbour. For this reason I would reverse the decree of the Assistant Judge summarily dismissing the appeal of the plaintiffs. I cannot, in this second appeal, finally determine the first issue, because this Court is not a judge of fact, and there have been no findings of fact arrived at by the lower Appellate Court which dismissed the appeal without hearing the defendant. All I would decide is that the plaintiffs, if they are found to be owners of a servient tenement, will have a right of pre-emption preferable to that of the defendant, if the claim of the latter is found to rest upon no higher title than that of neighbourhood (including support). There has, however, been no determination by the lower Appellate Court of any of the rights of the parties, and so I purposely leave them open.

We reverse the decree of the lower Appellate Court and remand the appeal to it for trial and decision on the merits after due notice to the defendants under the provisions of section 552 and following sections of the Civil Procedure Code. All costs to be costs in the cause.

RANADE, J.:—The Assistant Judge has disposed of this appeal under section 551. Such a summary disposal of a case, in which the points in issue related to the rather complicated law of preemption, can hardly be regarded as satisfactory. The appellant-plaintiffs claimed pre-emption on the ground, first, of their own house and the disputed house having belonged to the same owner, and secondly, on the ground that their house received the rainwater from the eaves of the disputed house. On this double ground they claimed that their rights were superior to those of the respondent, whose claim was based on the ground that his house was on the back side of the disputed house. The respondent on his side contended that his house had a right of support from

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the party-wall between the house in dispute and his own house. The Court of first instance dismissed the appellant-plaintiffs' claim on the ground (1) that they were not the owners of the house in which they lived, but only mortgagees, and (2) on the ground that respondent was a next door neighbour, and the party-wall was common to both houses. On this double ground, respondent's right was held to be superior to that of the appellants, whose right was founded only on the easement claimed about the rain-water, In appeal, the Assistant Judge raised only one general issue. He did not agree with the first Court as regards the party-wall, which he held was not common, but notwithstanding this, he held that appellants' claim was not superior to that of the respondent, as though both were participators in appendages, and neighbours, yet respondent's house was in the same street, while appellants' house was behind the disputed house.

It is clear that the single general issue does not cover the several points in dispute, especially the one on which the lower Appellate Court based its judgment. There is nothing to show whether the house in dispute is in the same street with that of the appellants' house, or whether the house in dispute and respondent's house are in the same street. The appellants' contention all along was that the house they live in and the house in dispute belong to the same owner. The house in dispute is in the corner of two streets, the appellants' house being to the east of it, and respondent's house being to the south of it. The question of the street neighbourhood cannot, therefore, be settled unless a separate issue is laid down and inquired into. Similarly, it must be considered whether the owner of a party-wall, supposing respondent was owner of the wall which is distinctly found against respondent by the Assistant Judge, stands in the same position as a participator in appendages with an owner of a servient tenement, which receives rain-water from the disputed house. The owner of an easement of irrigation channel has a superior claim to a mere neighbour—*Chand Khan* v. *Naimat Khan*(1). A part owner of the substance of the estate has a superior claim to the participator in appendages—*Golam Ali Khan* v. *Agurjeet Roy*(2). The whole chapter on pre-emption in Baillie's work, pages 476—81, and the Precedents

(1) (1869) 3 Beng. L. R., 296. (2) (1872) 17 Cal. W. R., 343.

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of Macnaghten, show clearly that the whole subject of pre-emption is very complicated, and a dispute such as this cannot be disposed of in a summary way by laying down a single general issue. I agree, therefore, with Mr. Justice Parsons in reversing the decree of the Assistant Judge and remanding the case for further inquiry after giving notice to both sides and laying down the proper issues.

Decree reversed and case remanded.

APPELLATE CIVIL.

Before Mr. Justice Parsons and Mr. Justice Ranade.

1899.
December

CHUNILAL (ORIGINAL DEFENDANT No. 1), APPELLANT, v. BAI MULI (ORIGINAL PLAINTIFF), RESPONDENT.*

Will—Hindu will—Construction—Vested remainder—Words "málak and wáras."

A Hindu died, leaving a will which provided (*inter alia*) as follows :—

"After my death, my wife, if she be alive, is the rightful heir, and if she be not alive, and after the death of my wife, my daughter Bai Nathi is my rightful heir (*hakdár wáras*)" .... "As to my daughter Nathi, whom I have, after the life-time of myself and of my wife, appointed heir to my property, and as to the surplus the heir to the same is my daughter Nathi."

The testator died in 1894; Nathi in 1895; and the wife in 1897. Thereupon the testator's step-mother claimed the property as his reversionary heir.

Held, that under the will Nathi took an estate vested in interest from the testator's death, which would pass to *her* heirs on her death, and the step-mother would have no title.

There is no real difference in the meaning of the words "*wáras*" (heirs) and "*málak*" (owner).

SECOND appeal from the decision of Ráo Bahádur Chunilal D. Kaveshvar, First Class Subordinate Judge of Ahmedabad.

One Bogaldas Girdhar died in 1894, leaving him surviving a widow Fulkore, a daughter Bai Nathi, and a step-mother (the plaintiff).

He left a will, which provided (*inter alia*) as follows :—

"As to the money, ornaments, and immoveable property and sundry sums of money which may remain after deducting the said

* Second Appeal, No. 451 of 1899.