between *khalit* and *sharik*. The word *sharik* does not occur in the original Arabic of the Hedaya: but *khalit* is used to signify both a partner in the substance and the owner of easements, as a right of way or of water. He referred to *Mahadeo Sing* v. *Mussamut Ziatannissa* (1), and to *Syed Wajid Ali Khan* v

(1) *Before Mr. Justice Kemp and Mr. Justice Glover.*

MAHADEO SING (PLAINTIFF) *v.* MUSST. ZIATANNISSA AND OTHERS (DEFENDANTS.)*

The 25th February 1869.

Baboo *Ramesh Chandra Mitter* for the appellant.

Mr. *R. E. Twidale* and *Munshi Mahomed Yusaff* for the respondents.

The facts are fully stated in the judgment of the Court which was delivered by.

GLOVER, J.—This was a suit by the plaintiff to enforce the right of pre-emption over a three-anna share in Manza Tikhowli, on the ground that the plaintiff possessed the right of *Shaffa* as being a part-owner of the thing sold, and likewise on the ground of vicinage. The plaintiff is admittedly the proprietor of one anna divided share in the estate. It appears that there was a batwara of the four annas under which three annas were measured off as belonging to the defendant, the vendor, and one anna as belonging to the plaintiff. The first Court decreed the suit in favour of the plaintiff, holding that he was entitled as a co-parcener in the estate to the right he sought; but the Judge on appeal held that, as the plaintiff by his own showing claimed as the owner of a separated share of one anna in the estate, he was no longer a co-parcener, and therefore not entitled as a "*Shafee khalit*" to the right of pre-emption in the remaining three annas; he decided the case therefore without taking into consideration the objection raised in the first Court as to whether there had or had not been any real sale of the property.

It is contended before us by the pleader for the special appellant that the plaintiff was not only the owner of this one anna divided share in the estate, but was likewise joint owner with the defendant of some four bigas six katas thirteen and a half dhurs of land which had been, at the time of the batwara, set apart for the joint use and employment of both the proprietors, and it was contended that, on this state of facts, the plaintiff would be entitled to the position of a "*shafee khalit*," inasmuch as he was a partner, if not in the land itself, in the appendages of that land, and therefore, under the Mahomedan law, entitled to pre-emption over a three annas share of the property. This objection, we say, was taken by the special appellant's pleader before us, but it is not to be found in the grounds of special appeal, which proceed simply on the fact that the plaintiff was a *shafee khalit*, inasmuch as his ownership in a one anna share of the estate gave him that position, nor do we find that this objection was ever taken in the lower Courts at any stage of the proceedings from first to

* Special Appeal, No. 2547 of 1868, from a decree of the Judge of Tirhoot, dated the 4th June 1868, reversing a decree of the Moonsiff of that district, dated the 26th December 1867.

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Lala Hanuman Prasad (1). 'It does not matter whether the term *khalit* or *sharik* is used so long as the plaintiff's meaning is clear, and can be gathered from the plaint or his written statement.

There can be no doubt that notwithstanding the batwara there are portions of the estate which the parties still hold, and derive profits from in common. He referred to *Mahatab Sing* v. *Ramtahal Mieser* (2). Hence, under the Mahomedan law, a co-proprietor has a right to come forward and claim pre-emption before an utter stranger with whom he does not wish to be a co-proprietor.

AINSLIE, J.—This is a suit founded on right of pre-emption. The plaintiff claims as "*shafee-khalit*," and has obtained a decree in the lower Appellate Court.

The first ground of appeal taken by the defendants, special appellants, is that, whereas the plaintiff claims as "*khalit*" or pre-

last. In the first Court, as well as before the Judge, the only grounds of the plaintiff's suit were, first, that he was a partner in the property to be sold, inasmuch as he was a share-holder of the entire patti, and, second, that if he was not a share-holder, he was at least a neighbour. It was never contended at any state of the case that there was any land left ijmali between the two proprietors, on the strength of which either one of them could claim, if necessary, the rights of a partner in the appendages of the land. No doubt, it has been shown to us, by the special appellant's pleader, that evidence as to the lands set aside for the joint enjoyment of both proprietors is to be found in the batwara papers on which it is stated that the plaintiff based his suit; but when the sole cause of the plaintiff's action, as detailed by him, was that he claimed priority of purchase in these lands as share-holder of one anna in the estate, and made no mention whatever of any right that he supposed himself to have had on the fact that a portion of the land was left ijmali, we do not think that, at this eleventh hour, and after the case has been decided upon entirely different grounds in both the lower Courts, and especially considering the nature of the case, we should be justified in allowing that objection to be taken now.

As the case was put before the Judge, that is, to say simply on the ground that the plaintiff was the owner of a divided one anna share, we think that the Judge was quite right in holding that that possession gave him no claim to the right of pre-emption over the remaining three annas.

The special appeal is therefore dismissed with costs.

(1) 4 B. L. R., A. C., 139.

(2) 6 B. L. R., 13.

emptor in the second degree, it was not open to the Judge to find that he was "*sharik*" or pre-emptor in the first degree.

This objection is founded on the opening words of Chapter II, on Pre-emption, in Baillie's Digest of Mahomedan Law, page 476. "A '*Sharik*' (or partner in the substance of a thing) is preferred to 'a *khâlit*' (or partner in its rights, as of water or way)." But it has been brought to our notice by the respondent's pleaders that in the original Arabic version of the Hedaya the word "*khalit*" is used in both places, and "*sharik*" does not appear at all; and from my personal experience, I incline to think that in the Behar districts "*khalit*" is habitually used to represent a pre-emptor of the first degree.

It certainly was so in Tirhoot, in the case of *Mahadeo Sing* v. *Mussamat Zaitannissa* (1), and in a Sarun case (this appeal also comes from this district) to be found in *Syed Wajid Ali Khan* v. *Lala Hanuman Prasad* (2).

And as it appears that the term "*khalit*" is used in the Hedaya to designate the person whom Baillie calls a "*sharik*," it cannot be said that it is improperly used in a plaint, as a designation of a partner in the substance. No doubt, it requires some addition to make clear what the foundation of the plaintiff's alleged title is, but this may be either shown by express words, or it may be inferred from the written statement. In this suit it seems clear that the plaintiff was claiming as partner in the substance.

It is therefore quite unnecessary to follow the appellant's pleader into a discussion of whether a pre-emptor by partnership in the appendages (one of the second degree) can enforce his claim in respect of anything but small parcels of land.

The respondent has attempted to set up an alternative case for the plaintiff that he is "*khalit*," either in respect of the substance or of the appendages.

In the first place I think a plaint that is ambiguous is bad in form. I do not mean to say that the plaintiff might not have claimed under two several rights; but if he intended to do so, he should have stated the fact distinctly, that the adversary might

(1) *Ante*, p. 45. (2) 4 B. L. R., A. C., 139.

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have due notice, and the Court be enabled to raise the proper issues; and in the second, I think that in this case the ambiguity really is non-existent, and is only an ingenious suggestion of the respondent's pleader. From the judgment of the first Court, it is quite clear that what the Court and the parties understood to be in issue, was simply the right by partnership in the substance, and that no claim by partnership in the appendages was advanced under cover of the ambiguous expression "*khalit*."

If it were possible at this stage to admit a claim as pre-emptor by right of way, it would be very simply disposed of by pointing out that public thoroughfares give no right of pre-emption, and that village roads are in the nature of thoroughfares.

It remains to enquire whether the Judge was right in holding the plaintiff to be a partner in the substance, The village was regularly partitioned by the Revenue authorities. The plaintiff's interest is one of the separated lots, and the defendants' in another: but it is urged that some 11 bigas were left undivided. The greater portion consisted of the aforesaid roads, and of land of mafidars and others over which the owners of the village exercised no rights of proprietorship; but the Judge finds that certain small portions, recorded in Nos. 248, 251, and 314 of the batwara khasra, were left the joint property of the owners of the village, and on the existence of these lands, he founds a title for the plaintiff by right of partnership in the substance. The Judge states that these lands are described in the partition proceedings as worthless and therefore not susceptible of being divided, but that one small plot of 6 katas, which was described as a hole, is now a fishery yielding rent, and that on another, which was then a road, a ryot has since erected a house.

It is on this joint ownership that the respondent relies; the decision in *Mahatab Sing* v. *Ramtahal Misser* (1) is brought forward in support. In that case the reservation of the *jalkar* and *namak sar* as common property after the division of the land was held to be sufficient foundation for the claim of the pre-emptor. I wish to offer no opinion on this point, this case is clearly distinguishable. In that case the parties by consent and

(1) 6 B. L. R., 43.

deliberately reserved a joint interest (if the subject-matter was capable of partition). In this case it is stated by the judge of the first Court that they divided *jalkar, namak sar, kayari,* &c.,—in short, everything which was worth dividing,—and only remained jointly interested in what was either utterly worthless, or (more probably) was treated as public property in the same way as the roads.

In short, the partition was as if two persons dividing a house and its curtilage carefully marked off each room and foot of ground, but forgot or neglected to sub-divide a worn and useless brick that had fallen from one of the walls, and was lying in a rubbish heap in some corner. Out of this brick, can we build a joint ownership of a portion of the thing sold, when one of the two sells his separated share to a stranger? Yet this is just what the plaintiff seeks to do in this case. It is said that the undivided property is now of some value. But it is manifest that the intention was to make a complete separation, and that the incompleteness, if such it can be called, was, at the utmost, the result of mere accident (as I have said above, I think it extremely probable that this land was treated as subject to the rights of the public at large, and not private property of the landlords); and I cannot conceive that the respondent can maintain that the oversight is to over-ride the express intention of the parties.

Mr. Tyvidale for the respondent has quoted the instances mentioned in page 478 of Baillie's Mahomedan Law; but in my opinion those cases in no way support his contention, but rather go against it. In the first instance, when two persons holding land in common divide it, but leave an existing wall and the land on which it stands undivided as their common boundary, they deliberately and intentionally maintain a community of interest for their mutual advantage; the wall is an integral part of the property of each at the time of partition, and consequently the right of pre-emption by partnership is held to attach. In the second case, no community of interest is maintained; a new common interest is created, but does not extend further than the intention of the parties at the time of creating it,—*i. e.*, beyond the wall. The previous intention to divide completely is not affected though the new wall becomes a source of com-

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mon profit. So in this case, the common profit which may have arisen since the separation, which was intended to be complete at the time it was made, cannot operate to defeat the original intention.

I would therefore reverse the decision of the lower Appellate Court, and dismiss the suit with costs in all Courts.

LOCH, J.—I concur in making an order, reversing the judgment of the lower Appellate Court, as proposed by my colleague. The cases which rule that a partner in the substance is entitled to exercise the right of pre-emption, presume that the party so claiming is a partner in the whole property, and those rulings are not applicable to a case like the present, where the original estate has been partitioned under the batwara law, and these separate estates formed out of the one original estate. The utmost that can be conceded to the plaintiff is a right of pre-emption to so much of the land as remains in the joint possession of him and the vendor, but nothing beyond it. The appeal is decreed with costs in this and the lower Appellate Court, and the decree of the first Court, dismissing the suit with costs, is restored.

Appeal allowed.

[ORIGINAL CIVIL.]

Before Mr. Justice Phear.

AGA MAHOMED ALI SHIRAJI *v.* S. E. JUDAH.

1871
June 5.

Execution creditor, Right of, against Official Assignee—Insolvency—Proceeds of sale in Court.

A. obtained a decree against B. on 15th August 1870, and an order for execution thereof on 8th September. In pursuance of such order, the Sheriff attached certain property belonging to B.; and by order of Court of 14th September, the Sheriff was directed to sell the property so attached, and the sale was fixed for 1st December. On 30th November, B. filed his petition in the Insolvent Court, and the usual vesting order was made. On 1st December the property was sold by the Sheriff under the order of 14th September, and