of the mortgagor Pitambur. The Judge says that the plaintiff was put in possession by the defendant of certain lands as security for a certain loan; that a part of this land turns out not to have been the property of the defendant who pledged it, and the plaintiff consequently has to stand a suit by the rightful owner, in which he is cast in costs, and has to make good the mesne-profits, and also to give up the land; that all this has been brought upon the plaintiff by no fault of his own, but solely by the fraud of the first defendant, and, in addition to all this, the Judge remarks that the plaintiff is left in possession of 11 cottahs of land less than he is entitled to as security for his loan. Further, the Judge says that he sees no fairer way of arriving at the amount which the plaintiff is entitled to recover than by dividing the amount lent on the land pledged equally, having regard to the area of that land, and that, dividing it in that way, the plaintiff is entitled to the sum claimed by him in proportion to the 11 cottahs of land from which he has been dispossessed.

The main points taken in special appeal are, first, that the plaintiff's suit in its present shape ought not to have been entertained, inasmuch as this being an usufructuary mortgage, if the plaintiff has been deprived of any of the lands, subject of the mortgage, and which represented the security for the amount advanced by him, he is at liberty, at the end of the lease which does not expire until 1281, if that sum is not satisfied, to hold on until he is satisfied from the profits of the mortgaged property. The next objection taken is that the principle of calculation adopted by the Judge is not a sound one, inasmuch as it has been held in the former suit that the lands are not all of the same description, but that they vary both in quality and value. With reference to the last objection, which is a specious one, I may observe that it is not taken in the grounds of appeal, and it cannot therefore be entertained now. With reference to the first contention, I think it is very clear that the plaintiff is entitled to recover the sum claimed by him. The land which was mortgaged to him was the only security which he had for the repayment of the money advanced; it is admitted that Rs. 143 were advanced upon 7 beeghas 5 cottahs of land; it is also admitted that the plaintiff has been deprived by the acts of the mortgagor of a portion of the land which represents the security he has for his loan, and he is entitled to recover from the mortgagor, special appellant, a sum in proportion to the lands of which he has thus been deprived by the wrongful act of the said defendant, special appellant.

The special appeal is, therefore, dismissed with costs.

The 1st December 1875.

Present:

The Hon'ble A. G. Macpherson and G. G. Morris, *Judges.*

Voluntary Payments in Excess of Rent—Exactions—Act X. of 1859, s. 10.

Case No. 3156 of 1874.

Special Appeal from a decision passed by the Officiating Judge of Rungpore, dated the 21st August 1874, affirming a decision of the Subordinate Judge of that District, dated the 5th May 1873.

Nobin Chunder Roy Chowdhry (Plaintiff), *Appellant,*

versus

Gooroo Gobind Mojoomdar and others (Defendants), *Respondents.*

Baboos Mohinee Mohun Roy and *Girja Sunkur Mojoomdar* for Appellant.

Baboos Kishen Dyal Roy and *Tarinee Kant Bhuttacharjee* for Respondents.

A tehsildar is bound to account to the landlord for payments made to him by tenants in excess of the rents due from them, if made voluntarily. Sums "exacted" by the tehsildar within the meaning of Act X. of 1859, s. 10, could not be recovered by the landlord in a civil suit.

Macpherson, J.—This case must be remanded to the first Court to be tried *de novo* on its merits.

It seems to us that the question in issue was not decided in the case instituted under Act X. of 1859 which came up in appeal to this Court in 1870 (reported in 14

Weekly Reporter, page 447). What the Court decided then was that, as, upon the face of the plaint, certain sums of money were claimed as *bhika*, and not as rent, the Revenue Court had no jurisdiction to entertain the suit as regards those sums. The Court did not decide whether the *bhika* claimed was in fact an illegal cess, and therefore could not be recovered, or whether the money said to have been received by the tehsildar under the head of *bhika* was in fact received by him. It went no further than to say that, inasmuch as it was claimed *not as rent*, the point could not be dealt with in a suit brought under section 24 of Act X. of 1859.

The first suit, having been dismissed for want of jurisdiction, is no bar to the present suit.

The question then arises whether the plaintiff can prove such facts as will entitle him to a decree. The lower Courts must not take it for granted that there was any such illegality in the receipt of the moneys claimed (if, in fact, they were received by the tehsildar) as necessarily prevents the plaintiff from succeeding now. If the tenants really did make any payments to the tehsildar in excess of the rents due from them, and those payments were made voluntarily, then the tehsildar, having received them for the plaintiff, was clearly bound to account for them. No doubt, if these sums were received by the tehsildar as *bhika*, and were "exacted" (within the meaning of section 10 of Act X. of 1859) by the tehsildar, they would come under the head of illegal cesses; and in that case the present action would not lie to recover them. But everything depends upon the circumstances under which the payments were made.

It is for the plaintiff to prove that the sums which he says were received by the tehsildar were in fact received, and also to prove that the payments were made voluntarily, and were not exacted in excess of the specified rent so as to be recoverable under section 10, Act X. of 1859, from the person who received them. There must be an inquiry as to the circumstances under which the several sums were paid, and whether they were voluntarily paid. If any sums were voluntarily paid to the tehsildar, the plaintiff will get a decree for them; but if they were "exacted," then the plaintiff's suit as to them must fail.

The case is remanded to the first Court for re-trial. Costs will abide the result.

The 2nd December 1875.

Present:

The Hon'ble F. B. Kemp, *Judge.*

Mahomedan Law—Pre-emption.

Case No. 2970 of 1874.

Special Appeal from a decision passed by the Subordinate Judge of Patna, dated the 23rd September 1874, affirming a decision of the Additional Moonsiff of that District, dated the 11th September 1873.

Shaikh Elahee Buksh (Plaintiff), *Appellant,*

versus

Mussamut Bibee Mohan and another (Defendants), *Respondents.*

Moonshee Abdool Baree for Appellant.

Mr. J. Younan for Respondents.

A claim of pre-emption by vicinage (tulub-i-mowasibut) was rejected, because the claimant, though aware of the sale of the property three or four days after execution of the deed of sale, did not make his claim until the lapse of a month and two days after the deed was registered.

THE plaintiff is the special appellant in this case. He claimed a right of pre-emption by vicinage in a house which was sold by Ali Jan Shaha to Elahee Buksh. Both Courts have found that the plaintiff, although he has made out that he is, in right of vicinage, entitled to claim pre-emption, has not proved that he performed the necessary ceremonies required by the Mahomedan Law. It has always been held by our Courts that the performance of these ceremonies must be strictly proved. Both Courts have found on the evidence, and particularly on the evidence of a party who was cited by both parties, namely, Hajee Abdoolla, who was a near neighbour of the plaintiff, and also a neighbour of the vendor, that the plaintiff was aware of the sale to Elahee Buksh within three or four days after the execution of the deed. Moreover, it may also be said that the deed was publicly registered on the 4th of February, and the plaintiff does not profess to have made his claim of tulub-i-mowasibut until the 6th of March.

On the whole case, I concur with the Courts below, and dismiss the special appeal with costs.