Privy Council Appeal No. 15 *of* 1919.

Charan Das and others - - - - - - *Appellants*

v.

Amir Khan and others - - - - - - *Respondents*

Amir Khan and others - - - - - - *Appellants*

v.

Charan Das and others - - - - - - *Respondents*

(*Consolidated Appeals*)

FROM

THE COURT OF THE JUDICIAL COMMISSIONER, NORTH-WEST FRONTIER PROVINCE, AT PESHAWAR.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 6TH JULY, 1920.

Present at the Hearing :

LORD BUCKMASTER.
LORD ATKINSON.
SIR JOHN EDGE.
MR. AMEER ALI.

[*Delivered by* LORD BUCKMASTER.]

Two questions arise upon this appeal—the first as to whether the Judicial Commissioner of the North-West Frontier Province was right (*a*) in permitting the three first respondents to amend their pleadings, and (*b*) in dismissing certain appeals that had been wrongly entered in his Court. The two points are distinct, but they both arise in connection with litigation set on foot by six distinct suits which have all been consolidated and dealt with as one. These suits were instituted by the three first respondents claiming a declaration that they were entitled to certain rights of pre-emption against the several defendants, who were vendees of different shares and interests in some 6,813 kanals in the village of Tazagram.

The following table will show at once the dates of the conveyances which gave rise to the rights of pre-emption and the dates and numbers of the suits brought in connection with those rights.

Date of Conveyance.	No. of Suit.	Date of Suit.
15th October, 1913	88 of 1914	15th October, 1914.
24th ,, ,, ...	96 of 1914	22nd ,, ,,
24th November, 1913	97 of 1914	22nd ,, ,,
23rd January, 1914	100 of 1914	26th ,, ,,
1st December, 1913	101 of 1914	26th ,, ,,
2nd ,, ,, ...	102 of 1914	26th ,, ,,

The vendees were not all the same. The first two appellants were vendees under the deed of the 24th October, 1913, the next three under the head of the 15th October, 1913, and the remaining three under the four remaining deeds.

The suits so commenced all asked for a declaration of pre-emption rights in respect of the respective properties to which they related, but they did not in plain language claim possession of the property sold and the usual consequential relief. It is not easy to ascertain why this course was taken. It is true that it enabled the plaints to be stamped on a lower scale than they would have been had they asked for the definite assertion of the rights, but that is not an adequate explanation. The real reason appears to be that the title to the property was in some confusion, that the vendees were not in actual possession nor in receipt of the rents, for the rents had not been paid, and as to part, the plaintiffs, themselves appear to claim that they were already in possession on their own account. It may, therefore, be that they regarded the peculiar conditions of the case as rendering the claim for possession inapplicable, and they possibly thought that all difficulty had been avoided by the simple process of claiming declarations of right. The defendants in their defence admitted the plaintiffs' right to pre-emption, but pointed out that a mere claim to such a right was not a claim to any right to property within the meaning of Section 42 of the Specific Relief Act, and that the right of pre-emption could not be enforced by a mere declaratory decree.

So far as the technical objection is concerned, it would appear to be well founded. The claim for a declaration would necessarily require to be followed by further consequential relief, if the order were to be effectual. They, therefore, could not have proceeded under Section 42 of the Specific Relief Act, nor is a claim for a bare declaration of right to pre-empt the right way of asserting the right to pre-emption ; and when the difficulties in the plaintiffs' way were pointed out, it would obviously have been wiser for them to have applied at once to have their claim amended by asking the substantive relief instead of a mere declaration that it existed. The difficulty may have been that in suits Nos. 1 and 2 more than a year had elapsed from the date of the deeds, and if, therefore, the defence was well founded, they would have

been met on application for leave to amend with the same objection that confronts them now. They accordingly determined to fight upon the pleadings, and with unfortunate consequences.

The first judgment was delivered in the Court of the Subordinate Judge of Mardan on the 18th January, 1915. He held that the claim for a declaration of right to pre-emption and the claim for pre-emption itself were distinct, and he declined to give leave to amend. The Divisional Judge, on the 18th June, 1915, supported this judgment. The Judicial Commissioner, however, on the 12th December, 1915, allowed the amendment to be made, and from his judgment this appeal has been brought.

But for the unfortunate division of judicial opinion upon the point the present appeal would not be entertained, for the power exercised is undoubtedly one within the discretion of the Judge, and all that can be urged is that his discretion was exercised upon a wrong principle and that it ought, therefore, to be reversed. It may be that in some statements contained in the judgment of the Judicial Commissioner their Lordships would find it difficult to agree. In a case such as the present, where the right sought is one involving the dispossession of a perfectly lawful purchaser of property, it is not, in their Lordships' opinion, quite accurate to say that a plea that such a suit has not been brought within the proper period of time limited by the Act is a technical plea, if by a technical plea is meant a plea which asserts rights which have no merits for their support. But their Lordships are in full agreement with the statement made by the Judicial Commissioner that, "however defective the frame of the suit may be, the plaintiffs' object was to pre-empt the land; their cause of action was one and the same whether they sued for possession or not." If this be so, all that happened was that the plaintiffs, through some clumsy blundering, attempted to assert rights that they undoubtedly possessed under the statute in a form which the statute did not permit. But if once it be accepted that they were attempting to establish those rights, there is no sufficient reason shown for disturbing the judgment of the Judicial Commissioner, who thinks they should be at liberty to express their intention in a plainer and less ambiguous manner. It may be noticed that in the claim the relief sought is so awkwardly set out that it would be quite open to the interpretation that they had in fact claimed pre-emption and not a declaration of the right, were it not for the fact that the plaintiffs themselves appear for foolish reasons stoutly to have maintained that that was not their object. That there was full power to make the amendment cannot be disputed, and though such a power should not as a rule be exercised where its effect is to take away from a defendant a legal right which has accrued to him by lapse of time, yet there are cases (see for example *Mohummed Zahoor Ali Khan v. Mussumut Thakooranee Rutta Koer*, Moo. Ind. App. at 11 p. 485) where such considerations are outweighed by the special circumstances of the case, and their Lordships are not prepared to differ from the Judicial Commissioner in thinking that the present case is one.

The plaints were accordingly amended and on the 10th July, 1916, judgment was given by the learned Subordinate Judge, who assessed the value of the lands sold. Appeals were taken from these decrees, some to the Court of the Divisional Judge, others to the Court of the Judicial Commissioner of the North-West Frontier Province, according to value. Those lodged in the Court of the Divisional Judge were subsequently transferred to the Court of the Judicial Commissioner, who heard all the appeals together. He then decided that four of the appeals were out of time, as they ought to have been filed in the Court of the Divisional Judge and not in his Court, and he refused to return these appeals for presentation to the Divisional Judge's Court in order that the latter might consider the question as to whether the time could be extended, and he himself declined to grant an extension of time. It is this order against which the appellants appeal. The reasons given by the learned Judicial Commissioner are stated, by him in these words :—

> " The appeals were barred so far as the Divisional Court was concerned at the time they were instituted in this Court, and it would be unfair to all concerned to prolong the litigation by returning the appeals with a view to obtaining a decision by the Divisional Court whether or not they should be allowed to proceed. The position involved would be little short of farcical. The appellants make an obvious mistake without any apparent excuse, and they wish to delay proceedings in this Court while a subordinate Court decides a preliminary issue, the appeals to be again transferred to this Court if the decision proves favourable. It can scarcely be contended that such proceedings would not involve an abuse of the functions of the Court, and I consider that that ground alone is ample justification for a refusal to take the course suggested. *Primâ facie* there was no good ground for the action taken in filing the appeals in this Court. These four appeals must accordingly fail."

It is plain that his judgment was prompted by the desire to avoid unnecessary expense and the hope that thereby he would cause satisfaction, but the only result is that he has caused this appeal.

There is no reason whatever shown for disturbing the Judicial Commissioner's judgment. The four appeals were in the wrong Court, and being brought on he was entitled to dismiss them. So far, therefore, as all the appeals are concerned, they fail, and their Lordships will humbly advise His Majesty that they should be dismissed with costs.

The respondents have, however, instituted a cross-appeal, and this is an appeal against the valuation which has been made of the property sold. Now this Board will not interfere with any question of valuation unless it can be shown that some item has improperly been made the subject of valuation or excluded therefrom, or that there is some fundamental principle affecting the valuation which renders it unsound. On the mere question of value of admitted items their Lordships will not interfere. Now in the present instance the case lodged by the respondents complains only of the character of the valuation as a valuation and does not attempt to impeach it on any of the grounds to

which reference has been made. It is quite true that Counsel for the respondents, recognising the difficulty in which he is thus placed, has attempted to raise an argument based upon an assertion that the valuation has proceeded upon an erroneous footing. Their Lordships are not prepared to allow such a point to be now raised. If, as appears to be the case, it was not raised before the Judicial Commissioner it could not be opened now, and if it were so raised, the fact that it is not referred to in the written statement of the appellants' case forms, to their Lordships' minds, a good and sufficient reason why it should not be introduced at this late stage of the proceedings.

For these reasons their Lordships will humbly advise His Majesty that the cross-appeal equally with the appeal should be dismissed. There will be no order as to costs.

In the Privy Council.

CHARAN DAS AND OTHERS

v.

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DELIVERED BY LORD BUCKMASTER.

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