ready for instant use near the confined space arises as soon as a person is about to enter it, obviously with the permission of the occupier. So far as the second part is concerned, it is the duty of the occupier to see that the apparatus is always available in the factory and is periodically examined and certified fit for use and a sufficient number of persons are trained in its use. The view taken by the magistrate of the effect of this section is not correct and the view taken by the High Court is right except that it is not necessary to keep the apparatus all the time near the confined space. The High Court has ordered retrial with respect to the contravention of sub-s. (4) also and the magistrate who now retries the case will do so in accordance with the construction of the sub-section given by us. We have carefully refrained from saying anything on the facts of this case as there is going to be a retrial and it will be for the magistrate to consider all the facts and circumstances before coming to a decision one way or the other. The appeal is hereby dismissed.

Appeal dismissed.

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v.

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(S. R. DAS, C.J., M. HIDAYATULLAH and K. C. DAS GUPTA, JJ.)

Appellate Court, power of—Reversal of finding of fact arrived at by trial Court—Question of credibility of witness—Rule.

Although it is well-settled that a court of appeal should not lightly disturb a finding of fact arrived at by the trial Judge who had the opportunity of observing the demeanour of the witnesses and hearing them, that does not mean that an appellate court hearing an appeal on facts can never reverse such a finding. Where the decision on a question of fact depends on a fair consideration of matters on record, and it appears to the Appeal Court that important considerations have not been taken into account and properly weighed by the trial Judge, and such considerations clearly indicate that the view taken by the trial Judge is wrong, it is its duty to reverse the finding even if it involves the disbelieving of witnesses believed by the trial court. Where again the trial Judge omits to properly weigh or take into account

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important considerations bearing on the credibility of witnesses or the probability of their version, which point the other way, it is the duty of the court of appeal to reverse the findings of the trial Court.

If the question of fact does not solely depend on the credibility of witnesses for its determination, but is one of inference from proved facts, on a consideration of probabilities, the court of appeal stands in the same position as the trial court and is free to reverse its findings.

Shunmugaroya Mudaliar v. *Manikka Mudaliar*, (1909) L.R. 36 I.A. 185; *Coghlan* v. *Cumberland*, (1898) 1 Ch. 704; *Watt (Thomas)* v. *Thomas*, (1947) 1 All E.R. 582; *Bonmax* v. *Austin Motor Co. Ltd.* (1955) 1 All E.R. 326; *Sarju Pershad* v. *Raja Jwaleshwari Pratap Narain Singh*, (1951) I.L.R. 43 Cal. 833 and *Laljee Mohomet* v. *Girlder*, [1950] S.C.R. 781, referred to.

Consequently, where, as in the present case, the plaintiff brought a suit for pre-emption and the question for determination was one of fact, namely, whether the plaintiff had performed the essential ceremonies of Talab-E-Mowasibat and Talab-E-Ishtashad, and the trial court believed his witnesses, not because it had been impressed by their demeanour, and the High Court in appeal disbelieved them in the light of the probabilities of the case and reversed the decision of the trial court.

Held, that it was not correct to contend that the way in which the High Court had approached the case was wrong or that its decision was not justified.

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 19 of 1954.

Appeal from the judgment and decree dated April 8, 1949 of the Patna High Court, in Appeal from Original Decree No. 116 of 1947, arising out of the judgment and decree dated the February 28, 1947, of the Sub-Judge at Begusarai in Title Suit No. 14/14 of 1944/45.

L. K. Jha and *B. K. Sinha*, for the appellant.

G. S. Pathak, *B. Sen*, *B. K. Saran* and *R. C. Prasad*, for respondent No. 1.

S. D. Sekhri, for respondents Nos. 3 and 4.

1959. September 7. The Judgment of the Court was delivered by

Das Gupta J.

DAS GUPTA J.—Though a member of questions, some of fact and some of law were originally raised in this suit for pre-emption, the main question for consideration in this appeal from the judgment of the

High Court of Patna, reversing the decree for pre-emption granted by the Trial Court, the Subordinate Judge of Monghyr, is the question on which the High Court based its decision of reversal. That question is whether the ceremonies essential for exercising the right of pre-emption were properly performed. Issue No. 9 in which this question was raised is in these words :—

"Did the plaintiff perform the ceremonies of Talab-E-Mowasibat and Talab-E-Ishtashad as required by law ?"

The plaintiff Radha Prasad Singh brought this suit for pre-emption in respect af 5 items of property described in Schedule B of the plaint which along with certain other properties were sold by the Defendant 2nd Party Mst. Jogeshwari Kumari alias Jageshwari Kumari widow of Babu Ganga Prasad Singh deceased and daughter of Babu Narsingh Prasad Singh by a deed executed on November 18, 1943, at Moghra and registered on November 23, 1943, at Monghyr.

The Trial Court held that the plaintiff had failed to prove that he was a co-sharer in respect of Item 2 of Schedule B. As regards the other 4 Items of properties he held that the plaintiff was a co-sharer and as already indicated he gave the plaintiff a decree for pre-emption in respect of these 4 Items.

The sale-deed is in favour of the defendant first party, Gajadhar Singh. It is no longer disputed, however, that Gajadhar Singh was a mere Benamidar and the real purchaser by this deed was Babu Lakshmi Prasad Singh, his son Satya Narayan Singh and others.

A dispute was raised as to whether 4 annas 5 gandas odd share of Mauza, Majhaul Kilan Shri Ram, was sold or the entire 8 annas odd share of the vendor was sold. It has been held by both the Courts below that the plaintiff's original case that the 4 annas 5 gandas odd share of Majhaul Kilan Shri Ram was sold is not correct and that really 8 annas odd share, the entire interest of the vendor in this property was sold by the deed, but that after the registration of the sale deed it was tampered with and by an act of forgery the

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8 annas odd share was altered fraudulently to 4 annas 5 gandas. It was after the defendant's pleading in the written-statement that 8 annas odd gandas of this Mauza was sold and not 4 annas odd gandas as mentioned in Schedule B, that the plaintiff prayed for and obtained an amendment of the plaint by which an alternative prayer for pre-emption in respect of 8 annas odd share of this Mauza was made. But for this amendment it is obvious the prayer for pre-emption could not be granted as being only for a partial pre-emption, once it has been found that 8 annas odd gandas were sold and not 4 annas odd gandas. One question which was therefore raised whether the amendment was rightly granted by the Trial Court. The question that the suit as brought was for partial pre-emption was also raised from another aspect, viz., that though the sale of this Mauza, Majhaul Kilan Shri Ram, was of all villages Asli Mai Dakhili, i.e., original with dependencies, there is no prayer for pre-emption in this suit in respect of Dakhili villages. As already indicated, however, the main question in controversy was whether the essential ceremonies required in law, i.e., Talab-E-Mowasibat and Talab-E-Ishtashad, were performed in accordance with law.

A regards this the plaintiff's case is that he came to know of this sale by his co-sharer Jogeshwari for the first time on January 2, 1944, at about 11 a.m. when Jadunath Singh, a resident of Majhaul, informed him of this and that he at once completed the formality of Talab-E-Mowasibat in the presence of some persons and that shortly after this he went to the properties of Tauzis 1130, 4201, and 1136, and also Mauza Bugurgabad and performed Talab-E-Ishtashad, that he went then to the residence of the purchaser Gajadhar Singh at Matihani on January 3, 1944, and again performed the Talab-E-Ishtashad ; and that that very day he started for the residence of the vendor and performed the Talab-E-Ishtashad there on January 4, 1944.

The defence was that the story of any such ceremonies having been performed is wholly untrue and that, in fact, the plaintiff had knowledge of the sale

from long before January 2, 1944, he having been a rival bidder for the purcease of those very properties. A detailed story of a proclamation by beat of drums of the proposed sale by Bindeshwary and the plaintiff's attempt to secure the property at the sale was set out by the defendant in the written-statement and was sought to be proved by his witnesses. The Trial Court disbelieved the defendant's story on this point. He also rejected the defence allegation that the plaintiff was himself responsible for the forgery that was committed in respect of the deed of sale by altering the statement of the share in Majhaul Kilan Shri Ram that was sold, from 8 annas odd gandas to 4 annas odd gondas. On these findings he held the plaintiff's suit was not barred by estoppel.

Proceeding then to the consideration of the question whether the plaintiff came to know of the sale in favour of the first defendant for the first time on January 2, 1944, from Jadunath as alleged, the learned Judge has accepted the evidence given by the plaintiff and Jadunath on this point and held that the plaintiff's case that he received information for the first time on that day was true. He also accepted the evidence of the plaintiff as regards the requisite ceremonies having been duly performed.

The very important question that arose for the decision of the Court was whether the plaintiff's story that he came to know of the sale for the first time from Jadunath on January 2, 1944, is true. The Trial Court held that it was true. On this point the High Court came to a contrary conclusion. The learned judges of the High Court were of opinion that the evidence of witness Jadunath was wholly unacceptable and that the plaintiff's evidence that he came to know of the alleged sale on January 2, 1944, could not be accepted. After pointing out that the whole basis of the plaintiff's claim that he performed the ceremonies of Talab-E-Mowashibat and Talab-E-Ishtashad was without substance, they examined the evidence as regards the performance of the ceremonies and held that this evidence was also not acceptable.

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The question in dispute before us is thus a pure question of fact, viz., whether the plaintiff came to know of the sale for the first time on January 2, 1944, and thereupon performed the ceremonies of Talab-E-Mowasibat and Talab-E-Ishtashad. The main contention raised by Mr. Jha, who appeared in support of the appeal is that in considering this question of fact the High Court approached the question from a wrong point altogether and was not justified in reversing the judgment of the Trial Court on that point.

The question as to what should be the right approach for a Court of Appeal in deciding a question of fact already decided in one way by the Judge in the Court of the first instance has often engaged the attention of the courts, though the views expressed have not been uniform. Emphasis has been laid in some cases on the importance of the Court of Appeal deciding for itself the question of fact when the appeal is on facts, though remembering that it should not lightly do so not having had the advantage which the Trial Judge had of seeing the witnesses. More emphasis has been laid in other cases on the importance of not reversing the the Trial Judge's findings of fact without compelling reasons. All the Courts in all the cases have stressed the rule which the courts of appeal should observe for themselves: that a Judge sitting on appeal not having had the opportunity of seeing and hearing the witnesses should think twice and more than twice before reversing the findings of fact arrived at by the Trial Court who has had that opportunity. To say that however is not to say that the Court of Appeal will never reverse a finding of fact of the Trial Court. In *Shunmugaroya Mudaliar* v. *Manikka Mudaliar* (1), Lord Collins pointed out that:

> "It is always difficult for judges who have not seen and heard the witnesses to refuse to adopt the conclusions of fact of those who have; but that difficulty is greatly aggravated where the Judge who heard them has formed the opinion, not only that their inferences are unsound on the balance

(1) (1909) L.R. 36 I.A. 185.

of probability against their story, but they are not witnesses of truth."

In the same judgment Lord Collins referred approvingly to the judgment delivered by Lindley, Master of the Rolls, in the Court of Appeal in the case of *Coghlan* v. *Cumberland* (1) which set out the limitations of the rule :—

"even where the appeal turns on a question of fact, the Court of appeal has to bear in mind that its duty is to rehear the case, and the Court must reconsider the materials before the Judge with such other materials as it may have decided to admit. The Court must then make up its own mind, not disregarding the judgment appealed from, but carefully weighing and considering it; and not shrinking from overruling it if on full consideration the Court comes to the conclusion that the judgment is wrong. When, as often happens, much turns on the relative credibility of witnesses who have been examined and cross-examined before the Judge, the Court is sensible of the great advantage he has had in seeing and hearing them. It is often very difficult to estimate correctly the relative credibility of witnesses from written depositions and when the question arises which witness is to be believed rather than another; and that question turns on manner and demeanour, the Court of Appeal always is, and must be, guided by the impression made on the Judge who saw the witnesses. But there may obviously be other circumstances, quite apart from manner and demeanour, which may shew whether a statement is credible or not; and these circumstances may warrant the Court in differing from the Judge, even on a question of fact turning on the credibility of witnesses whom the Court has not seen."

Almost the same view was expressed by Lord Thankerton in *Watt (or Thomas)* v. *Thomas* (2):—

"I. Where a question of the fact has been tried by a Judge without a jury and there is no question of misdirection of himself by the Judge, an appellate

(1) (1898) 1 Ch. 704.

(2) (1947) 1 All E.R. 582, 587.

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court which is disposed to come to a different conclusion on the printed evidence should not do so unless it is satisfied that any advantage enjoyed by the Trial Judge by reason of having seen and heard the witnesses could not be sufficient to explain or justifiy the trial judge's conclusions. II. The appellate Court may take the view that, without having seen or heard the witnesses, it is not in a position to come to any satisfactory conclusion on the printed evidence. III. The appellate Court, either because the reasons given by the Trial Judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court. It is obvious that the value and importance of having seen and heard the witnesses will vary according to the class of case, and, it may be, the individiual case in question."

These observations were cited with approval by Lord Reid in *Bonmax* v. *Austin Motor Co., Ltd.*, (1). (See also the observations of Mokerjee, J., in *Laljee Mahomed* v. *Girlder* (2).

This question of the proper approach of the Court of Appeal to decisions on questions of fact arrived at by the Trial Court was considered by this Court in *Sarju Pershad* v. *Raja Jwaleshwari Pratap Narain Singh* (3). Mukherjea, J., while delivering the judgment of the Court observed :—

"In such cases, the appellate court has got to bear in mind that it has not the advantage which the trial Judge had in having the witnesses before him and observing the manner in which they deposed in Court. This certainly does not mean that when an appeal lies on facts, the appellate court is not competent to reverse a finding of fact arrived at by the trial judge. The rule is—and it is nothing more than a rule of practice—that when there is conflict of oral evidence of the parties on any matter in issue and the decision hinges upon the credibility of

(1) (1955) I All E.R. 326. (2) (1915) I.L.R. 43 Cal. 833.
(3) [1950] S.C.R. 781, 784.

the witnesses, then unless there is some special feature about the evidence of a particular witness which has escaped the trial judge's notice or there is a sufficient balance of improbability to displace his opinion as to where the credibility lies, the appellate court should not interfere with the finding of the trial Judge on a question of fact."

The position in law, in our opinion, is that when an appeal lies on facts it is the right and the duty of the Appeal Court to consider what its decision on the question of facts should be; but in coming to its own decision it should bear in mind that it is looking at the printed record and has not the opportunity of seeing the witnesses and that it should not lightly reject the Trial Judge's conclusion that the evidence of a particular witness should be believed or should not be believed particularly when such conclusion is based on the observation of the demeanour of the witness in Court. But, this does not mean that merely because an appeal court has not heard or seen the witness it will in no case reverse the findings of a Trial Judge even on the question of credibility, if such question depends on a fair consideration of matters on record. When it appears to the Appeal Court that important considerations bearing on the question of credibility have not been taken into account or properly weighed by the Trial Judge and such considerations including the question of probability of the story given by the witnesses clearly indicate that the view taken by the Trial Judge is wrong, the Appeal Court should have no hesitation in reversing the findings of the Trial Judge on such questions. Where the question is not of credibility based entirely on the demeanour of witnesses observed in Court but a question of inference of one fact from proved primary facts the Court of Appeal is in as good a position as the Trial Judge and is free to reverse the findings if it thinks that the inference made by the Trial Judge is not justified.

Turning now to the instant case we find that the Trial Judge having seen and heard Jadunath and the plaintiff, believed their evidence on the point of information being given to plaintiff by Jadunath about the

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sale on January 2, 1944, at about 11 a.m. It does not, however, appear that the learned Trial Judge arrived at his conclusion on the basis of the demeanour of these witnesses having created a favourable impression on his mind as to their credibility.

In scrutinising the evidence of the plaintiff and of Jadunath it must be borne in mind that the case of the plaintiff is that on January 2, 1944, certain information having been received by him, he performed the formalities. There is no case that the formalities were performed on any other date. Therefore, if the story of the communication of information on January 2, 1944, is not established then the whole case of the plaintiff must fail.

Jadunath's evidence on this point was :—

"On 2-1-44 I told Radha Babu at his house in Manjhaul that Maghrawalli Jugeshwari Kumari had sold away her Milkiat to Gajadhar Rai of Matihani, this was about 11 a.m. Radha was startled to hear this and standing up said :

"Jo jo jaidad Babu Gajadhar Singh hath (then says Maghrawalli Mussammat Jageshwari Kumari ne jo jo jaidad Babu Gajadhar Singh ka hath becha hai uske kharidne ka haq mera. Ham Kharida, Ham Kharida, Ham Kharida. Talab Mowashibat karte hain. Babu Jagdamba Prasad aur Babu Narayan Prasad gabah rahie. . . . I came to know from a man of Chitral, 1 kos from Matihani that Gajadhar had a marriageable grandson."

Mention should be made in this connection also of the evidence of Jagdambi Prasad :—

"On 2-1-44 I had been to plaintiff's house at 10-30 a.m. Babu Narayan Prasad Singh, a pleader of Samastipur was at plaintiff's house at the time . . . Jadunath Singh told Radha Prasad that Musammat Jageshwari Kumari of Maghra had sold away her property in Manjhaul to Gajadhar Singh of Matihani. As soon as Jadunath Singh said this Radha Prasad Singh was startled, stood up and said :

I have a right to purchase this property. I have purchased; I have purchased; I have purchased.

You Jagdamba Prasad Singh, you Narayan Prasad Singh and you Jadunath Singh, bear witness to this fact. He uttered these words thrice."

In deciding the question whether the information from Jadunath was the first information received by the plaintiff the Trial Judge had necessarily to consider whether the story that Jadunath came to know of the sale and brought this information on to the plaintiff on January 2, 1944, at about 11 a.m. was true or not. In arriving at a decision on the point it was necessary for him to consider the probabilities of the story, of Jadunath having gone to Gajadhar's house in search of a bride-groom and that there Gajadhar Singh informed him of the sale and then of the probability of the story that he would be taking upon himself the task of going to the plaintiff's house immediately on return to his village to convey this information, the probability of the story as to how the plaintiff reacted to the account and also the question of discrepancy. It does not appear that the learned Trial Judge took any of these matters into consideration. All that he says about Jadunath's credibility is that his evidence had been criticised on the ground that he was one of plaintiff's witnesses in the previous suit brought by him against Satya Narain Singh's ancestors and that is in his opinion was not a valid ground for discarding the evidence of Jadunath Singh. We agree with the learned Judge that the mere fact that Jadunath was one of the plaintiff's witnesses in the previous suit brought by him against Satya Narain Singh's ancestors about 33 years ago would not by itself be a valid reason for discarding his testimony. The fact that this was not a valid reason for discarding his testimony does not, however, absolve the Court of the duty of testing the witness's testimony on the touch-stone of probability. The learned judges of the High Court applied that touch-stone and came to the conclusion that Jadunath was not a witness of truth.

It is clearly a case where the words used by Lord Thankerton that the Trial Judge had not taken proper advantage of his having seen and heard the witnesses, and the matter would become at large for the appellate

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court, should apply. Here was a witness who could not be considered to be wholly independent. For, on his own showing he took the trouble of going to plaintiff's house after what may be taken to be an arduous journey in an unsuccessful search for a bridegroom, to inform the plaintiff of a matter in which he himself had no interest—a witness who had figured, though many years ago, in a pre-emption suit brought by the same person. These facts made close scrutiny of the witness's account necessary before the Judge could say just by looking at him that he was a witness of truth. That scrutiny is conspicuous by its absence. Taking his evidence as a whole we find that his story that after coming to know of the sale in question he went to the house of Gajadhar, the first defendant, at village Matihani to make enquiries about a marriage proposal in respect of his daughter with his grandson and that it was in that connection that Gajadhar spoke to him about his purchase. But it is curious that in his examination-in-chief this witness came straight to his account of coming to the plaintiff's house on January 2, 1944, and informing him about the sale by Jogeshwari of her Milkiat to Gajadhar without saying a word as to his visit to Gajadhar's house, to the purpose of his visit and the manner in which Gajadhar gave him the information or even the detailed nature of the information. It was in cross-examination that he disclosed that he went to Gajadhar's house for "barthuari". It is in vain that we look into his evidence, whether in examination-in-chief or in cross-examination, for the exact information given by Gajadhar.

It has to be remembered in this connection that it is no longer disputed that Gajadhar himself had no interest in these properties and was a mere Benamidar. Even if Gajadhar's own account that he was completely in the dark about these transactions be left out of account it was necessary for the Court to consider how far it was probable that Gajadhar would put on Jadunath a false story of purchase by himself of properties. It was urged that this Gajadhar did with a view to raise the Tilak which he could thus obtain.

Jadunath himself has not said anything about the negotiations about Tilak but one Mahabir Ray has said that when he was going to the fields Gajadhar called him and there he heard Gajadhar demanding a higher Tilak stating that he had recently purchased properties at Majhaul from Mussammat. Jadunath himself does not mention having seen this Mahabir at Gajadhar's house. Jadunath claims to have gone to his house with a servant. Mahabir has not mentioned the presence of this servant. The question whether a man like Mahabir who was a total stranger to the plaintiff would be called by Gajadhar to hear such talks also requires the serious consideration of the Court. The Trial Judge does not appear to have given the slightest consideration to this aspect of the matter. The learned judges of the High Court thought that there was no reason that Gajadhar would go out of his way to convey the information to Jadunath that he had purchased the Milkiat of Jogeshwari, the defendant No. 2. It is difficult not to agree to this estimate of probability.

Even more important was the question of probability as regards the story of the plaintiff's reaction when the information is said to have been given to him. Both Jadunath and Jagdambi say that the plaintiff was startled on getting information of the sale and at once uttered the words which have been set out already of the Talab-E-Mowsibat. What would a man of ordinary prudence—not to speak of the man of property and with experience of previous litigation like the plaintiff—would do under such circumstances? There cannot be any two opinions on this question. He may consider it unwise to ask his informant any further question before making the first Talab, i.e., Talab-E-Mowasibat. Once that was completed he would ply his informant with questions as to where he got this information, what the information exactly was, what properties had been sold, what the consideration was, and other connected questions. In this case, according to the evidence of Jadunath no such questions were asked by the plaintiff. In his examination-in-chief, Jadunath says :—

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"He (plaintiff) asked his syce to bring his tandom. He told Jagdamba Babu that he would go to make talab-e-isthashad and asked him to accompany him. While they were boarding the tandom Jai Prakash Narayan came that way. Radha Babu asked him also to accompany him. The same night Radha Babu met us at my house at 8 p.m. He asked me where I had obtained the information about the sale."

From this evidence it is clear that though Jadunath was at the place until the Tandom bad been brought and the plaintiff and Jagdamba got into the Tandom and Jai Prakash Narayan also arrived, no question was put by the plaintiff to Jadunath in this behalf. It has to be noted that the plaintiff went to Jadunath's house the same night at 8 p.m. and the only question which was asked was: Where he had obtained the information about the sale and nothing was asked about what properties had been sold or for how much had they been sold. In cross-examination Jadunath made the further statement in these words:—

"When I broke the news Radha Prasad did not ask me where I had received the information, or who had purchased the properties; what properties had been purchased or what the consideration was."

Such conduct on the part of Jadunath is incredible and any Judge of facts with experience of normal human conduct could have no hesitation in coming to the conclusion that things could not have happened in the way Jadunath has described. Mr. Jha, the learned Counsel for the appellant, urged that it would be unfair to base any conclusion on the supposed improbability or unnaturalness of such silence on the part of the plaintiff without having given him an opportunity to explain why he acted in this peculiar manner. It has to be noticed, however, that Jadunath had been examined and cross-examined on January 9, 1947, and when the plaintiff was put in the Witness-Box on the following day, i.e., January 10, 1947, the lawyer who examined him had before him the fact that Jadunath's evidence had brought out this strange silence on the part of the plaintiff after he had been informed of the

sale. It was his duty to obtain from Radha Prasad an explanation of such conduct. But he put no questions to Radha Prasad about this. The obvious reason is that Radha Prasad had no explanation to offer and the lawyer knowing this kept quiet. It appears to us that the learned judges of the High Court of Patna were right in attaching great importance to this conduct of the plaintiff and were justified when they thought that this was an improbable story and rejected, in disagreement with the Trial Judge Jadunath's evidence altogether.

Mention has to be made of another circumstance which was noticed in the High Court judgment. That is as regards the exact information which is said to have been given by Jadunath. Jadunath's own account in the examination-in-chief is that he "told Radha Babu at his house in Majhaul that Maghrawalli Jugeshwari Kumari had sold away her Milkiat to Gajadhar Rai of Motihani." In his cross-examination he first said :—

> "The information I gave was in these terms: Maghrawali Musammat apni Jaidad Babu Gajadhar Singh Motihani wale ke chan bech dia." and then correcting himself said : "Babu Gajadhar Singh ne kaha ki Maghrawali Musammat ki jaidad kharid kia."

It is not possible for anybody to remember exactly the words used by himself many years ago and it is reasonable to say that there was no substantial difference between the account given by him of this matter in his examination-in-chief and in cross-examination. It is interesting to remember, however, that in paragraph 4 of the plaint, it was stated that the information that Jadunath gave was :

> "That the defendants 2nd and 3rd parties had sold the properties entered in Schedule B of this plaint, along with other properties to the defendant 1st party, under a registered deed of sale."

According to Jadunath's evidence he does not appear to have mentioned the defendant 3rd parties as the sellers nor gave any details to show that the properties

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entered in Schedule B were covered by the sale nor that there was a registered deed of sale.

Turning to the evidence on the plaintiff and Jagdamba as regards the information said to have been given by Jadunath we find that Jagdamba says: "Jadunath Singh told Radha Prasad that Musammat Jogeshwari Kumari of Maghra had sold away her property in Majhaul to Gajadhar Singh of Motihani." According to the plaintiff himself the information which Jadunath gave was that Gajadhar Singh had purchased the Majhaul properties from the Maghrawali Musammat. An examination of Schedule B shows that while the first 3 items were properties in Mauza Majhaul, the 4th item is a property in Buzurgabad while the 5th item is a property in Mauza Dundit. There appears to be no reason to think that these properties 4 and 5 could be even loosely be considered to be properties in Majhaul or Majhaul Properties. Commenting on Jagdamba's evidence on this point Mr. Justice Sinha, who delivered the leading judgment stated:

> "Plaintiff's witness No. 2 has stated that Jadunath told the plaintiff that the second defendant had sold her property in Majhaul to the first defendant. If that is so, it is a little difficult to understand how they went to Bugurgabad or to the other items of property to perform the ceremonies, if they ever did so."

It is strange that there should be such discrepancy between the evidence of Jadunath himself and the plaintiff and Jagdamba as to what actually was said. But if Jagdamba's account such as is supported by the plaintiff himself, is true then there is no acceptable explanation as to why the plaintiff could think of going to Bugurgabad at all as he and his witnesses say, he did.

It was the duty of the Trial Judge to take into account these several considerations in testing the credibility of the account given by Jadunath, the plaintiff and Jagdambi that Jadunath informed the plaintiff on January 2, 1944 about the sale. He did not do so. The learned judges of the High Court as a

Court of Appeal were in duty bound to consider these questions before accepting the decision of the learned Trial Judge. The criticism that the approach of the learned judges of the High Court was wrong is therefore wholly without foundation. The learned judges of the High Court rightly took these matters into consideration and the decision they arrived at on these considerations that the Trial Judge's assessment of the evidence was wrong and that Jadunath was not a witness of truth and that the account given by the plaintiff that the information was conveyed to him by Jadunath on January 2, 1944, should not be accepted is clearly right.

Once this decision is reached it is unnecessary to consider the further question whether any ceremonies were performed at all on 2nd, 3rd or 4th January, 1944, as stated by the plaintiff and his witnesses. Even if they were, they would be of no assistance to the plaintiff as the plaintiff had failed to show that it was on January 2, 1944, that he received the information about the same.

It is unnecessary for us therefore to decide the further question that appears to have been raised, viz., that even if the evidence as regards the performance of the two Talabs i. e., Talab-E-Mowashibat and Talab-E-Ishtashad is accepted at its face value the requirements of the law have not been fulfilled. The High Court held that the plaintiff had failed to prove that the words used by him at the time of the making of the second demand of Talab-E-Ishtashad were sufficient to draw the attention of the witnesses to the specific properties in respect of which he was demanding his right of pre-emption. We express no opinion whether this view of the learned judges of the High Court is correct or not. We also express no opinion on the two other questions, viz., whether the Trial Court acted in accordance with law in granting leave to the plaintiff to amend his plaint so as to include the alternative prayer for pre-emption in respect of 8 annas odd share of Tauza No. 1130 instead of 4 annas odd share as originally claimed and also whether the suit was bound to fail because there was

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no prayer for pre-emption for the Dakhili villages of Tauza No. 1130.

In our opinion the plaintiff having failed to prove that the information of the sale was conveyed to him by Jadunath on January 2, 1944, the suit was rightly dismissed by the High Court. This appeal is, therefore, also dismissed with costs.

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REHMAN SHAGOO AND OTHERS

v.

STATE OF JAMMU AND KASHMIR

(S. R. DAS, C.J., S. K. DAS, A. K. SARKAR, K. N. WANCHOO and M. HIDAYATULLAH, JJ.)

Constitution—Legislative competence of Ruler of Jammu and Kashmir—Ordinance promulgated creating new offence of aiding the enemy and prescribing trial by special Judges following special procedure—If discriminatory—Whether Ordinance was legislation with respect to defence—Defence, meaning of—Repeal of law empowering Ruler to legislate—Whether Ordinance survives—Cessation of emergency—If Ordinance occasioned by emergency also lapses—Jammu and Kashmir Constitution Act, S. 1996, s. 5—Enemy Agents Ordinance, S. 2005 (J. K. Ordinance VIII of S. 2005)—Jammu and Kashmir Constitution (Amendment) Act, S. 2005 (J. K. XVII of S. 2005)—Jammu and Kashmir General Clauses Act, s. 1977 (J. K. XX of S. 1977), s. 16(b)—Constitution of India, Art. 14; Part XVIII.

Under the Jammu and Kashmir Constitution Act all powers, legislative, executive and judicial vested in the Ruler. On the accession of the State to India on October 22, 1947, the powers in respect of defence, external affairs and communications were ceded to India. Under s. 5 of the Constitution Act, the Ruler promulgated the Enemy Agents Ordinance, S. 2005, which provided for the trial and punishment of enemy agents and other persons siding the enemy. The Ordinance provided for trial of offences by Special Judges and prescribed a procedure materially different from that followed in the criminal Courts. Section 5 of the Constitution Act was repealed on November 17, 1951. The appellants were prosecuted under the Ordinance for offences alleged to have been committed on June 27 and 28, 1957. They contended (i) that the Ordinance violated Art. 14 of the Constitution of India, (ii) that the Ruler had no legislative competence to issue the Ordinance as it dealt with defence, (iii) that s. 5 of the