conditions of the auction the bid could not be taken as accepted unless the Government expressly confirmed it.

(6) Clause (2) of section 64 of the Sale of Goods Act states :

"64. In the case of a sale by auction—

(1) * * * * *

* * * * *

(2) the sale is complete when the auctioneer announces its completion by the fall of the hammer or in other customary manner; and, until such announcement is made, any bidder may retract his bid ;

* * * * * *

* * * * * *."

This provision has no application to the present case which is admittedly governed by the Rules and the Act under which they had been made. Ground (iii) is, therefore, without substance.

(7) With regard to grounds (iv) and (v), it is sufficient to say that the petitioner has no *locus standi* to challenge the notification in annexure 'B' and the auction held in pursuance of it, in view of the fact that his bid was never confirmed by the Government and consequently he acquired no vested right under the first auction.

(8) For the reasons stated, the petition fails and is dismissed. The parties are, however, left to bear their own costs.

N. K. S.

APPELLATE CIVIL

Before A. D. Koshal, J.

JAGAT SINGH,—*Appellant.*

versus

GURMINDER SINGH, ETC.,—*Respondents.*

R. S. A. No. 66 of 1970.

May 7, 1970.

Limitation Act (XXXVI of 1963)—Section 15(5) and Article 97—Punjab Pre-emption Act (I of 1913)—Section 30—Suit for pre-emption of undivided share of joint holding—Period of limitation for—Whether governed

*by Article 97, Limitation Act—Defendant to the suit spending some time outside India—Such time—Whether can be excluded in computing the period of limitation for the suit—Code of Civil Procedure (Act V of 1908)—Order 3 Rule 1 and Order 9 Rule 12—Party to a suit—Whether can be summoned under Order 3 Rule 1—Defendant disobeying such an order—*Ex-parte *proceedings—Whether can be taken.*

Held, that an undivided share in a joint holding is not capable of physical possession and hence a suit to pre-empt the sale of such a share will be governed by second part of the third column of Article 97 in the Schedule to Limitation Act, 1963 and not by section 30 of Punjab Pre-emption Act, 1913. If the defendant in such a suit has spent some time outside India, the time so spent will be excluded from the period of limitation under section 15(5) of the Limitation Act. Sub-section 5 of section 15 is all embracing and if the intention of the Legislature was to take the suits for pre-emption out of the purview of the sub-section it would have specifically said so, as it did while enacting sections 8 and 16 of the Act.

Held, that proviso to Rule 1 of Order 3 of the Code of Civil Procedure clearly places no limitation on the power of the Court to direct a party to a suit to appear so that his statement on oath can be recorded in order to save unnecessary expense to the parties in the matter of producing evidence which would otherwise be voluminous. Where a defendant disobeys the direction of the Court to appear in person, *ex parte* proceedings being taken against him in pursuance of the provisions of Rule 12 of Order 9 of the Code will not be lacking in justification.

Regular Second Appeal from the decree of the Court of Shri Dev Raj Saini, Additional District Judge, Jullundur, dated the 7th day of January, 1970, affirming with costs that of Smt. Harmohinder Kaur, Sub-Judge, 1st Class, Phillaur, dated the 22nd June, 1968, granting the plaintiffs a decree for possession by pre-emption of the land in suit on payment of Rs. 27,000 and further ordering that the plaintiffs would deposit the amount in Court by 22nd August, 1968, failing which their suit would stand dismissed and leaving the parties to bear their own costs.

B. R. Bahl, Advocate, for the appellant.

H. L. Mittal, Advocate, for respondents 1 and 2.

JUDGMENT

A. D. Koshal, J.—This Regular Second Appeal has arisen in the following circumstances. Avtar Singh, defendant No. 2, being entitled to a half share in 52 Kanals 14 Marlas of land situated in village Mithra, Tehsil Phillaur, District Jullundur, sold the same to Jagat Singh, defendant No. 1, for Rs. 27,000 through a sale deed which

was executed on the 1st of April, 1965, and is Exhibit D.1 on the record. Two of his sons, both minors, filed the usual declaratory suit challenging the sale in accordance with the general custom prevailing amongst agriculturists in the Punjab on the ground that the land was ancestral and was sold without consideration and legal necessity. An alternative prayer was made for possession of the land by pre-emption and that is the relief with which we are now concerned.

(2) The suit was instituted on the 10th of July, 1967, and in paragraph 10 of the plaint it was pleaded that defendant No. 1, who had left India for a foreign country in the month of December, 1965, had not returned till then and that the suit was, therefore, within limitation. The case of defendant No. 1 on this point was that he had left India more than a year after the 1st of April, 1965. He controverted the plea that the suit was within limitation. The issue framed in this connection was—

"3. Whether the suit for pre-emption is within time?"

Immediately after the issues were framed, the case was adjourned for the plaintiffs' evidence to the 20th of December, 1967. For that date the witnesses summoned by the plaintiffs were not served and they were resummoned for the 17th of February, 1968, and defendant No. 1 was also directed to produce his evidence on the date last mentioned. When the case was taken up on the 17th of February, 1968, an adjournment of the case to the 13th of March, 1968, was granted at the request of the plaintiffs and a direction was also issued to the *Mukhtiar* of defendant No. 1 to produce the latter on that date along with his passport. At the hearing on the 13th of March, 1968, the trial Judge recorded a statement of learned counsel for the plaintiffs that he would produce only an excerpt from the revenue records and put his client in the witness-box in support of his case. Thereafter the learned trial Judge adjourned the case for the evidence of defendant No. 1 to the 18th of May, 1968, and on that date the depositions of three witnesses for the defendant were recorded. The defendant himself was not present and a direction was again issued (this time to his counsel) that he be produced on the 22nd of June, 1968. The direction was again not complied with and when the learned Subordinate Judge (Shrimati Harminder Kaur) again took up the case, she passed an order under Rule 12 of Order 9 of the Code of Civil Procedure for proceedings to be taken against defendant No. 1 *ex parte*. The *Mukhtiar* and the counsel for defendant

No. 1, thereupon withdrew from the conduct of the case and the learned trial Judge took down the testimony of Harinder Pal Singh, next friend of the plaintiffs, as their sole witness, who stated:

"* * * * * *

Jagat Singh left (India) for a foreign country in November/ December, 1965. He has now returned. He returned in November, 1967. He was in England at the time of the institution of the suit. During the period from 1965 to November, 1967, he did not come this side. Plaintiffs are the sons of the vendor. The excerpt has not been received, and, therefore, I gave up the suit in so far as it seeks a declaration.'

(3) The learned trial Judge then delivered her judgment on the same day holding that defendant No. 1 left for England a few months after the sale, that he returned to India after the institution of the suit, that the period of his absence from India was to be excluded in computing the period of limitation and that the suit was, therefore, within time. She accordingly passed a decree for possession of the disputed land by pre-emption in favour of the plaintiffs, subject to payment by them of the amount of Rs. 27,000 by the 2nd of August, 1968, and directed that if the amount was not deposited by the stipulated date the suit would stand dismissed.

(4) Defendant No. 1 took an appeal to the District Judge which was dismissed with costs by Shri Dev Raj Saini, Additional District Judge, Jullundur, on the 7th of January, 1970. The only point agitated before him was the one covered by issue No. 3, in relation to which he confirmed the finding given by the trial Court. It is against the order passed by Shri Saini that defendant No. 1 has filed this Regular Second Appeal.

(5) The contentions of Mr. Bahl, learned counsel for the appellant, before me are:—

(a) The trial Court had directed the appellant to appear before it in pursuance of the provisions of Rule 1 of Order 3 of the Code of Civil Procedure (hereinafter referred to as the Code), which provisions were misused as a Court could not have recourse to them, for the purpose of calling in a party as a witness.

(b) The burden of proof of issue No. 3 was on the plaintiffs and defendant No. 1 could not be called upon to lead evidence before the palintiffs had produced their own evidence on the issues the burden of which was upon them. All the proceedings subsequent to the order calling upon defendant No. 1 to produce his witnesses were bad in law.

(c) The provisions of sub-section (5) of section 15 of the Limitation Act, 1963 (hereinafter called the Act), which excluded the period spent by a defendant out of India for the purpose of computing the period of limitation prescribed for any suit, did not apply to a suit for pre-emption in view of the provisions of sections 8 and 16(3) of the Act.

(d) Sub-section (5) abovementioned did not in particular apply to the present suit inasmuch as that suit was not one covered by the Schedule to the Act, but was governed, on the other hand, by section 30 of the Punjab Pre-emption Act, and was, therefore, out of the ambit of the sub-section.

(e) No cogent evidence is available on the record in proof of the allegation made by the plaintiffs that defendant No. 1 left India at any time before the institution of the suit.

(6) I shall take up these contentions *ad seriatim.*

(7) Rule 1 of Order 3 of the Code states :

"Any appearance, application or act in or to any Court, required or authorized by law to be made or done by a party in such Court, may, except where otherwise expressly provided by any law for the time being in force, be made or done by the party in person, or by his recognized agent, or by a pleader, appearing, applying or acting, as the case may be, on his behalf ;

Provided that any such appearance shall, if the Court so directs, be made by the party in person."

(8) The proviso clearly places no limitation on the power of the Court to direct appearance of a party, but it goes without saying, as

has been contended on behalf of the appellant, that that power has to be judicially exercised and not to be abused. I do not, however, see how the trial Judge can be said to have abused the power by directing the appearance before her of defendant No. 1 along with his passport. It was his own case that he had left India some time after the sale and had returned to it after the institution of the suit. He was, therefore, the best person to disclose the details of the period of his absence and the passport may have furnished the best documentary evidence in that behalf. The trial Court was, therefore, fully justified in directing him to appear so that his statement on oath could be recorded in order to save unnecessary expense to the parties in the matter of producing evidence which would otherwise perhaps have been voluminous. The justification for the trial Court adopting the course that it did is to my mind ample.

(9) Mr. Bahl has drawn my attention to *Appavoo Asary* v. *Sornammal Fernandez* (1) and *Bhupathiraju Suryanarayanaraju* v. *Bantupalli Appanna* (2), in support of contention (A). These two authorities, however, I find to be clearly distinguishable. In the Madras case a party desired the presence of his opponent in Court for the purpose of examining him as a witness. Without pursuing his application for the purpose, however, he made another under Rule 1 of Order 3 of the Code, which was accepted and the said opponent directed to appear in Court. The first appellate Court held:

> "The lower Court was, therefore, wrong in recording that it had no other alternative than to proceed under Order 9, Rule 12, Civil Procedure Code."

This remark was upheld by Walsh, J., who decided the Madras case, but there what he observed was :

> "While the remark is correct, it carries us no further because, assuming that the Court did issue an order for appearance under Order 3, Rule 1, which was disobeyed, the learned District Munsif was perfectly entitled to strike out the defence. The power of a Court to strike out defence when an order is disobeyed, is recognized in *Vaiguntathamal* v.

(1) A.I.R. 1933 Mad. 821.
(2) A.I.R. 1959 A.P. 645.

Valliamma Ammal (3), and *Venkatacharyulu* v. *Manchala Yesobu* (4) and it is a matter within the power and discretion of the trial Court which it is not for the appellate Court to canvass."

(10) Far from supporting the position taken by Mr. Bahl, the authority is practically a clincher against him.

(11) In the *Andhra Pradesh* Case (2), also the party directed to appear under Order 3, Rule 1 of the Code had been earlier summoned by his opponent and it was held by Kamarayya, J., that the direction was not proper, especially as it had been given without the Court satisfyng itself that there was no sufficient cause for the failure of the party concerned to appear in person when that party had made an application supported by an affidavit that he was in the same state of health as before which had warranted on a previous occasion condonation of his personal absence. Neither of these factors is available in the present case. Here the learned trial Judge directed the appearance of defendant No. 1 on her own and not because the plaintiffs wanted him to appear as a witness. It is not denied before me that defendant No. 1 disobeyed the direction of the Court to appear in person and it is not his case that there was any cause, sufficient or otherwise, for his failure to obey the direction. The order for *ex parte* proceedings being taken against him in pursuance of the provisions of Rule 12 of Order 9 of the Code after he had persisted in not complying with the directions for personal appearance is thus not shown to be lacking in justification.

(12) Contention (b) is also without merit. Even though I am of the opinion that the learned trial Judge fell into a serious irregularity of procedure in calling upon the appellant to produce his evidence before the plaintiffs, on whom was placed the onus of proving issue No. 3, had opened their case, I am quite clear in my mind that he could not take advantage of the situation unless he could show that he was prejudiced by the irregularity. It is to be noted that he did not produce (and he was not bound to) any evidence in rebuttal of issue No. 3 when no material in support of that issue had been placed on the record by the plaintiffs. He could have reserved, as he appears to

(3) A.I.R. 1918 Mad. 1256.
(4) A.I.R. 1932 Mad. 263.

have done, his right of producing rebutting evidence in relation to the issue till after the plaintiffs had closed their case thereon, and, if the trial Judge refused to give him that right, then he could certainly say that he had been prejudiced by the procedure adopted, so that the trial was vitiated. However, what actually happened in the case was that by the time it became ripe for the production of plaintiffs' evidence, the defence of the appellant had already been struck out, with the result that he was proceeded against *ex parte*. If for this state of affairs he was himself to blame (and I have held above that he was by reason of his disobedience of the trial Judge's direction for his personal appearance) he cannot make a grouse of it and say that if the irregularity in procedure had not been there, the fate of the case might perhaps have been different. The striking out of his defence, it is to be noted, has nothing to do with the irregularity above-mentioned, but is, on the other hand, wholly independent thereof, inasmuch as *ex parte* proceedings were taken against the appellant for the sole reason that he disobeyed a direction of the Court. The consequence of his failure to appear having been justifiably visited on him, he cannot challenge what duly transpired thereunder. In these circumstances, contention (b) is also repelled.

(13) The provisions of the Act, in so far as they relate to contention (c), may now be set out :

Section 8. "Nothing in section 6 or in section 7 applies to suits to enforce rights of pre-emption, or shall be deemed to extend, for more than three years from the cessation of the disability or the death of the person affected thereby, the period of limitation for any suit or application."

Section 15(5). "In computing the period of limitation for any suit the time during which the defendant has been absent from India and from the territories outside India under the administration of the Central Government shall be excluded."

Section 16. "(1) Where a person who would, if he were living, have a right to institute a suit or make an application, dies before the right accrues, or where a right to institute a suit or make an application accrues only on the death of

a person, the period of limitation shall be computed from the time when there is a legal representative of the deceased capable of instituting such suit or making such application.

(2) Where a person against whom, if he were living, a right to institute a suit or make an application would have accrued, dies before the right accrues, or where a right to institute a suit or make an application against any person accrues on the death of such person, the period of limitation shall be computed from the time when there is a legal representative of the deceased against whom the plaintiff may institute such suit or make such application.

(3) Nothing in sub-section (1) or sub-section (2) applies to suits to enforce rights of pre-emption or to suits for the possession of immovable property or of a hereditary office."

The basis of the contention is that suits for pre-emption are founded on an unusual, artificial and piratical right and it is on that account that the benefits which are conferred by sections 8 and 16 of the Act to plaintiffs in suits of other types, are not made available to pre-emptor-plaintiffs, and that on the same foundation sub-section (5) of section 15 should be held to be inapplicable to them. The contention needs no elaborate discussion for its rejection. Sections 8 and 16 of the Act make specific provisions with regard to pre-emption suits and similar provisions do not appear in sub-section (5) of section 15, which is all embracing. If the intention of the Legislature was to take the suits for pre-emption out of the purview of sub-section (5) of section 15, it would have specifically said so, as it did while enacting sections 8 and 16.

(14) In support of contention (d), Shri Bahl has drawn my attention to the fact that the expression 'period of limitation' is defined in section 2(j) of the Act as 'period of limitation prescribed for any suit, appeal or application by the Schedule,' and has enunciated the proposition that by reason of this definition the period of defendant No. 1's stay abroad would be excluded for the purpose of computing the period of limitation for the suit in the present case only if that suit was governed by any of the provisions of the Schedule to the Act. The proposition is unexceptionable, but it does not advance the appellant's case inasmuch as the suit in the present case

is clearly governed by the second part of the third column of article 97 in the Schedule to the Act. That article states:

"97. To enforce a right of pre-emption whether the right is founded on law, or general usage, or on special contract	One year.	When the purchaser takes under the sale sought to be impeached, physical possession of the whole or part of the property sold, or, where the subject matter of the sale does not admit of physical possession of the whole or part of the property, when the instrument of sale is registered."

(15) Inasmuch as the property sold was an undivided share in a holding, it was not capable of physical possession at all as has been laid down in a chain of authorities of which *Karm* v. *Fazl* (*Seller*), *and Haji* (*Purchaser*) (5), *Jowala Singh* v. *Tek Chand* (6), *Sardar Ali and others* v. *Fazil* (7), *Wasakha Singh* v. *Mohammad Hussain* (8), and *Marella Veerabrahmacharyulu* v. *Konduru Venkata Subbamma and others* (9), may be cited. Mr. Bahl, however, relies upon certain observations in *Sardar Ali and others* v. *Fazil* (7) (*supra*) in support of his contention that an undivided holding is capable of physical possession. Those observations are—

> "Now, I take it that inasmuch as a co-sharer in a joint undivided property has a right to every part of that property until partition, what he sells is his share or a fraction of his share in the whole of that undivided property; in other words, he sells (to the extent of his interest or a portion of his interest therein) the whole property, and if his assignee takes possession under the sale of any portion of that joint property, time begins to run under the second clause of section 30 of the Pre-emption Act from the time of such assumption of possession."

(5) 10 P.R. 1881.
(6) 23 P.R. 1882.
(7) A.I.R. 1923 Lah. 75.
(8) A.I.R. 1942 Lah. 118.
(9) A.I.R. 1961 A.P. 31.

(16) These observations are really of no help to the case of the appellant as would be clear from the observations immediately preceding them, which are to the following effect :—

> "Whether an unascertained share in an undivided property is capable of physical possession is a matter on which the High Courts have dissented, but the balance of opinion appears to favour the view that a mere share in an undivided joint property is not capable of physical possession. For that reason Article 10 of the Limitation Act is inapplicable to cases such as these".

(17) Le-Rossignol, J., who decided the case must, therefore, be held to have adopted in clear terms the view that an undivided share in joint property was not capable of physical possession for the purposes of article 10 of the Indian Limitation Act, 1908 (which was replaced by article 97 of the Act) and the observations relied upon by Mr. Bahl were not concerned with the application of the said article 10, but of section 30 of the Punjab Pre-emption Act.

(18) Following the authorities above cited and respectfully agreeing with the view expressed therein, I hold that the present case, being a case of a sale of an undivided share in a holding, is covered by the second part of column 3 of article 97 of the Act.

(19) Another ingenious argument put forward by Mr. Bahl is that article 97 of the Schedule to the Act does not govern the case at all, for the period of limitation prescribed in relation to which one must refer only to section 30 of the Punjab Pre-emption Act which runs thus:

> "30. In any case not provided for by article 10 of the second Schedule of the Indian Limitation Act, 1908 (IX of 1908), the period of limitation in a suit to enforce a right of pre-emption under the provisions of this Act, shall, notwithstanding anything in article 120 of the said schedule, be one year—
>
> (1) in the case of a sale of agricultural land or of village immovable property ;
>
> from the date of the attestation (if any) of the sale by a Revenue Officer having jurisdiction in the register of

mutations maintained under Punjab Land Revenue Act, 1887 (XVII of 1887), or

from the date on which the vendee takes under the sale physical possession of any part of such land or property;

whichever date shall be the earlier;

(2) in the case of a foreclosure of the right to redeem village immovable property or urban immovable property,

from the date on which the title of the mortgagee to the property becomes absolute:

(3) in the case of an urban immovable property,

from the date on which the vendee takes under the sale physical possession of any part of the property."

(20) Emphasis is laid on the words "article 10 of the second Schedule of the Indian Limitation Act, 1908", and it is urged that the reference is to article 10 of the 1908 Act and that resort cannot be had in any suit for pre-emption in the Punjab to the provisions of the Act. The argument must be rejected for the simple reason that it takes no note of sub-section (1) of section 8 of the General Clauses Act, 1897, which lays down—

"8(1) Where this Act, or any Central Act or Regulation made after the commencement of this Act, repeals and re-enacts, with or without modification, any provision of a former enactment, then references in any other enactment or in any instrument to the provision so repealed shall, unless a different intention appears, be construed as references to the provision so re-enacted."

(21) It is idle to argue that after the enforcement of the Act references to the provisions of the Indian Limitation Act, 1908, in any other enactment will not be governed by section 8(1) of the General Clauses Act even if no "different intention" appears, when it is borne in mind that article 10 and, for that matter, the whole of the Indian Limitation Act, 1908, has been repealed and re-enacted by the Act, so that after the commencement of the Act the reference in section 30 of the Punjab Pre-emption Act to article 10 in the second Schedule to the Indian Limitation Act, 1908, must be construed as a reference to article 97 of the Schedule to the Act.

(22) I must accordingly hold that the suit in the present case was governed by the second part of the 3rd column of article 97 in the Schedule to the Act and that the provisions of section 30 of the Punjab Pre-emption Act never came into play with regard to it. It is conceded that if this be so, the period for which defendant No. 1 remained absent from India must be excluded in computing the period of limitation for the suit in pursuance of the provisions of sub-section (5) of section 15 of the Act. Contention (d) is, therefore, over-ruled.

(23) Contention (e) is easily disposed of. According to the deposition of the next friend of the plaintiffs, which stands wholly unrebutted, defendant No. 1 left India in November/December, 1965, and remained absent therefrom till after the suit was instituted. The objection taken by Mr. Bahl is that the words "November/December, 1965" make the deposition vague and, therefore, unacceptable in proof of the fact that defendant No. 1 really left India in December, 1965, as was claimed in the plaint. The objection has no merit. The next friend of the plaintiffs could not be expected to have remembered with precision the time of departure from India of defendant No. 1 after a period of about two years and a half thereof, and his testimony cannot be construed as indicative of that departure having taken place after the suit was instituted. In my opinion the Courts below were fully justified in relying upon that testimony or coming to the conclusion that defendant No. 1 left India some time in December, 1965, and that he returned to it after the suit was instituted.

(24) No other point has been urged before me and for the reasons stated, I dismiss the appeal with costs.

B. S. G.

INCOME TAX REFERENCE

Before D. K. Mahajan and Bhopinder Singh Dhillon, JJ.

THE COMMISSIONER OF INCOME-TAX,—*Petitioner*

versus

M/S. GOYAL OIL MILLS, LUDHIANA,—*Respondent.*

Income Tax Reference No. 48 of 1965.

May 7, 1970.

Income Tax Act (XI of 1922)—Sections 10(2(ii) and 10(2)(XV)—Assessee taking factory on lease and undertaking to bear expenses of repairs to