

The Court remanded the case to the lower appellate Court in the following terms :

It having been found that the plaintiffs and Duliman were all co-sharers, a right of pre-emption accrued to all of them, and equitably they will be entitled each to have the sale made to him to the extent of one-third of the property sold. We have not to decide whether such a right is to be divided in proportion to the extent of the shares or in proportion to the number of persons entitled to pre-emption (1), for in this case three persons assert their right to pre-emption and the shares to which the right is appurtenant are equal. We cannot, however, pass a final decree until the lower appellate Court has determined what was the price actually paid for the share. This issue we remit under s. 354 for trial.

The lower appellate Court found that the price actually paid for the share was Rs. 300.

The case having been returned to the High Court, judgment was delivered as follows :

We accept the finding on the issue remitted, and the decree will be modified accordingly. The appellants are entitled to pay into court within one month from this decree Rs. 200 and obtain a two-thirds share, and Duliman will pay into court within the same period Rs. 100 and obtain a one-third share ; and if either the appellants or Duliman fail to pay in the amounts within the month, the other of them making the further deposit within the time shall be entitled to the share of the defaulter.

APPELLATE CIVIL.

(*Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Oldfield.*)

HINGAN KHAN AND OTHERS (DEGREE-HOLDERS)^b, GANGA PARSHAD AND OTHERS (JUDGMENT-DEBTORS).*

Pre-emption—Conditional Decree—“Final” Judgment and Decree—Execution of Decree.

Where the plaintiff in a suit for pre-emption was granted a decree subject to the payment of the purchase-money within a fixed period, and failed to comply

* Miscellaneous Special Appeal, No. 81 of 1875, against an order of the Judge of Azamgarh, dated the 4th September, 1875, reversing an order of the Munsif of Muhamadabad, dated the 15th July, 1875.

(1) Where two persons had, by vicinage, an equal right to pre-emption, the property was equally divided between them—*Misir Khem Kurun v. Misir Seeta Ram*, II. C. B., N.-W. P., 1870, p. 257.

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with the condition imposed on him by the decree, held that he had lost the benefit of the same (1).

When a direction contained in a decree referred to the time at which such decree should become *final*, held that such decree became final on being affirmed by the lower appellate Court where, although a special appeal was preferred by the plaintiff against the decree of the lower appellate Court, the same was subsequently allowed to be withdrawn.

Shaikh Ewaz v. Mohuna Bibi (2) distinguished.

THE plaintiffs in a suit to establish the right of pre-emption of a share in a certain village, such suit being founded upon custom, obtained a decree in the Court of first instance on the 1st April, 1874, the material portion of which decree was as follows: "That the plaintiffs' claim for a declaration of right to, and possession of, the property in suit be decreed, and the delivery of possession be duly effected, and if the plaintiffs deposit in this Court the whole amount of the purchase-money within one month from the date this decision becomes final, this decree will be executed, otherwise it will be held null and void." Both parties to the suit appealed against this decree. It was affirmed by the lower appellate Court on the 19th May, 1874. On the 26th August, 1874, the plaintiffs preferred a special appeal to the High Court against the decree of the lower appellate Court. On the 9th December, 1874, the High Court allowed this appeal to be withdrawn, its order being as follows: "The pleader for the appellant does not support this appeal, and it is withdrawn. Costs to be paid by the appellant." On the 7th January, 1875, the plaintiffs deposited in court the amount of the purchase-money. On the 21st June, 1875, they applied for possession of the property in execution of decree.

The judgment-debtors, vendees, objected to execution on the ground that the purchase-money had not been deposited within time. This objection was disallowed by the Court of first instance, but allowed by the lower appellate Court.

The decree-holders appealed to the High Court on the ground that the right of pre-emption decreed in their favour was not lost by reason of their failing to deposit the purchase-money within

(1) So held in *Shaikh Ewaz v. Mohuna Bibi*, I. L. R., 1 All. 132; *Hameed-oon-nissa v. Buksha*, S. D. A. Rep., N.-W. P., 1864, vol. ii, 612; and *Petition of Shah*

Ahmed Ali, S. D. A., L. P., Summary Cases, 36.

(2) I. L. R., 1 All. 132.

time, and that the decree did not become final till the date of the order of the High Court.

Mr. *Mahmood* (with him *Babu Sital Parshad*), for the appellants.

Munshi *Hanuman Parshad*, for the respondent.

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The judgment of the Court (after setting out the facts of the case) was as follows :

The first plea fails. No absolute right of pre-emption was established by the decree ; the decree made the right conditional on payment of the purchase-money within a certain period. Failing fulfilment of this condition, the right under the decree became null and void and the decree incapable of execution. Whether or not such a conditional decree could be legally made (and the counsel for the appellant denies that it can) is not a question for us to consider in execution of the decree ; if there is force in the objection it is one which applies to the decree, and should have been taken by review of judgment.

The next objection raises the question as to when the judgment of the Court of first instance is to be held as having become final. It is alleged by the appellant that it ought to be held as becoming final on the 9th December, 1874, when this Court gave its order allowing the appellant to withdraw the special appeal. We are, however, of opinion that, under the circumstances of this particular case, the judgment became final on the 19th May, 1874, when the Judge affirmed the decree of the Court of first instance. What took place in the special appeal did not and could not affect the finality of the Judge's decree. There was no decision after a hearing but only a withdrawal, by which course the plaintiffs showed the judgment to be not open to revision. So far as affecting the finality of the judgment of the Judge in regular appeal, we must look on the proceedings in special appeal as though non-existent, and in consequence hold that the judgment of the Court of first instance became final when affirmed by the Judge in regular appeal, and that therefore the order of the lower appellate Court should be affirmed and this appeal should be dismissed, and we dismiss it with costs.

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Our attention has been drawn to a case decided by a Bench of this Court (1), where a somewhat similar question was before the Court, but there is this distinction between the two cases, that in the one referred to the special appeal had been decided after trial, whereas in the case before us the appeal was withdrawn without trial.

STUART, C. J.—I have signed this judgment because I think that, under the circumstances of this case, it is right. But I wish to add that I am not to be understood as approving the practice of inserting conditions into decrees as to the time of payment or otherwise, notwithstanding the rulings of this Court to the contrary referred to.

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CIVIL JURISDICTION.

(*Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Turner.*)

IN THE MATTER OF THE PETITION OF MATHRA PARSHAD.*

Stat. 24 and 25 Vic., c. 104 (High Courts' Act), s. 15—Powers of Superintendence of High Court—Act VIII of 1859, s. 378—Review of Judgment.

Where a Court subordinate to the High Court rejected an application for a review of judgment, refusing to consider the grounds of the same because the decree of which a review was sought was given by its predecessor, the High Court, in the exercise of its powers of superintendence under s. 15 of the High Courts' Act, directed such Court to consider the grounds (2).

This was an application to the High Court for the exercise of its powers under s. 15 of the High Courts' Act. The petitioner applied on the 13th September, 1875, to the Subordinate Judge of Mainpuri for the review of a judgment which that officer's predecessor had given on the 18th December, 1874. The Subordinate Judge rejected the application in the following terms: "Upon a perusal of the petition with the record of the case, it appeared that the judgment of the former Subordinate Judge is not correct, but I have no right to interfere with his judgment, nor has the peti-

* Miscellaneous Application, No. 25B of 1876, against an order of the Subordinate Judge of Mainpuri, dated the 5th January, 1876.

(1) *Shaikh Ewaz v. Mokuna Bibi*, I. L. R., 1 All. 132.

(2) For other cases in which the High Court interfered under that section, and directed the exercise of a power or jurisdiction disclaimed by a subordinate

Court, see note to *Tej Ram v. Harsukh*, I. R. L., 1 All. 104. For cases in which it refused to interfere, see the same note and *Petition of Luhhykant Bose*, I L. R., 1 Calc., 180; S. C., 24 W. R. 440.