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by thus exceptionally exempting a Court of Session from the operation of the provisions of s. 471, shows what the general effect and aim of those provisions was intended to be.

To permit the Court in the present case to charge and try for the offence committed before it would be interpreting s. 471 as giving the Court a higher power than is allowed to a Sessions Court. A similar view of the effect of s. 471 was taken by the Calcutta High Court in *Safatollah* (1).

The convictions and sentences passed on Bhikam Singh and Kultaran Singh are annulled, and the Court is directed either to commit them for trial or to send the case to another competent Magistrate for disposal.

APPELLATE CIVIL

1876
February 11

(Mr. Justice Spankie and Mr. Justice Oldfield)

SHAIKH EWAZ AND ANOTHER (DECREE-HOLDERS) v. MOKUNA BIBI AND OTHERS
(JUDGMENT-DEBTORS)*

Pre-emption—Conditional Decree—"Final" Judgment and Decree

THE Court granting a decree to the plaintiff in a pre-emption suit is competent to grant the decree subject to the payment of the purchase-money within a fixed period (2), and if the decree-holder fails to comply with the condition imposed on him by the decree, he loses the benefit of the decree. *Sheo Pershad Lall v. Thakoor Rai* (3) approved.

When a direction contained in a decree referred to the time at which such decree should become *final, held* (the case being one in which a special appeal lay) that such decree does not become final on being affirmed by the lower appellate Court, but on the expiry of the period of special appeal, or, where such an appeal was instituted, when the decision of the lower appellate Court was affirmed by the High Court.

THE plaintiffs in a suit to establish a right of pre-emption in respect of a share in a certain village, under and by virtue of a clause in the village administration-paper to the effect that no

(1) 22 W. R. Cr. 49. (2) *Contra* see *Syud Ahsun Ali v. Sabokee Beebee*, 10 W. R. 53. (3) H. C. R., N.-W. P., 1868, p. 254.

* Miscellaneous Special Appeal, No. 66 of 1875, from an order of the Judge of Azamgarh, dated the 24th July, 1875, affirming an order of the Munsif, dated the 1st May, 1875.

share in the village should be sold or transferred in any way to a stranger unless it had been previously offered to and been refused by all the co-sharers, obtained a decree in the first Court on the 5th January, 1875, which declared their right to the possession of the share on the payment of Rs. 300 within 31 days from the date of the decree becoming final. An appeal to the lower appellate Court by the vendees, defendants, was dismissed on the 18th March, 1875, the decision of the first Court being affirmed, and a special appeal by them to the High Court was dismissed on the 27th August following, the lower appellate Court's decision being affirmed.

The decree-holders paid the amount of the purchase-money into court on the 1st May, 1875, and prayed that possession of the property might be given them in execution of the decree.

Both the lower Courts refused execution of the decree on the ground that the decree-holders had failed to deposit the purchase-money within the time specified in the first Court's decree, holding that that decree became final on the 18th March, 1875, the date of the judgment and decree passed in appeal.

On special appeal to the High Court the decree-holders contended that the right of pre-emption decreed in their favour was not lost to them by reason of their failing to deposit the purchase-money within the time specified in the decree, and that the decree did not become final till the date of the decision of the special appeal.

Mr. *Mahmood* for the appellants.

Lala *Lalta Parshad* for the respondents.

The judgment of the Court was as follows:—

The first plea hardly arises in the shape in which it has been thrown. But it has always been the practice of our Courts in these Provinces to insist upon the payment of purchase-money in cases of the nature within the period prescribed by the Court. We are understood to follow the ruling of this Court marginally noted. There a pre-emptor obtained a decree from the first Court which provided a certain time within which the sum ascertained to be the purchase-money was to be deposited. The pre-emptor appealed against the amount fixed by

(1) H. C. R., N.-W. P., 1868, p. 264.

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the Court but failed. He did not deposit the money within the fixed time, and the Judge declined to enlarge the time. It was held by this Court that the plaintiff, in appealing from the original decree, could not escape from the obligation which it imposed, and the lower appellate Court was not bound by law to insert in its decree any special direction concerning such deposit unless occasion called for it, although it was important to have done so. This ruling is not one exactly in point. But the principle laid down is the same. The Court was competent to make the direction it did as to the payment of the money, and if the decree-holder failed to comply with the obligation imposed on him by the decree, he would lose the benefit of it.

As to the second plea, the decision referred to by the lower appellate Court (1) is not one in point, for the ruling there related to the question whether a plea of limitation could be heard for the first time after a remand-order on the merits had been carried out, when it had not been made the subject-matter of appeal at a previous stage. The words in the decision—"it appears to us that the judgment and decree, from which the ninety days are intended to be reckoned, are the final judgment and decree in the suit between the parties" (2)—might perhaps be misleading as to what is to be considered the final decision of the case in the suit before us. The words of the decree of the first Court are that the plaintiffs "shall make a deposit of Rs. 300 within 31 days from the date this (the Munsiff's) decision becomes final." In our opinion a decision cannot be said to become final until the time for the last appeal allowed has expired, or, if appealed, it has become final by the decree of the High Court, as the ultimate Court in the country. In the suit before us there was a special appeal allowable under certain circumstances, and the Rs. 300 were deposited before the time fixed for the presentation of a special appeal had expired. Indeed, the special appeal was subsequently admitted and ultimately dismissed on trial on the 27th August, 1875.

Under this view of the case the order of both the Courts below is wrong. The appeal is decreed and the decision of the lower appellate Court reversed, and the case remanded to it under s. 351, Act VIII of 1859, for trial on the merits. Costs will abide the result,

(1) *Mirza Himmat Bahadoor v. Gobindo Panday*, 5 W. R. 91.

(2) At p. 98.