1880
*May 7.*

# APPELLATE CIVIL.

*Before Mr. Justice Pearson, Mr. Justice Spankie, and Mr. Justice Straight.*

LACHMAN PRASAD (DEFENDANT) *v.* BAHADUR SINGH AND OTHERS (PLAINTIFFS.) *

*Pre-emption—Cause of Action—Conditional sale—Second appeal—Act X of 1877 (Civil Procedure Code), ss. 542, 584, 587.*

*Per* PEARSON, J. and STRAIGHT, J. (SPANKIE, J. dissenting)—That in disposing of a second appeal the High Court is competent, under s. 542 of Act X of 1877, to consider the question whether the plaintiff has any cause of action or not, although such question has not been raised by the defendant-appellant in the Courts below or in his memorandum of second appeal, but is raised for the first time at the hearing of such appeal.

Also *per* PEARSON, J. and STRAIGHT, J. (SPANKIE, J. dissenting).—That the cause of action of a person claiming the right of pre-emption in the case of a conditional sale arises when the conditional sale takes place and not when it becomes absolute; and therefore, where a conditional sale took place in 1867, and after it had become absolute a person sued to enforce his right of pre-emption in respect of the property sold, basing his claim upon a special agreement made in the interval between the date of the conditional sale and the date that it became absolute, and alleging that his cause of action arose on the latter date, that the suit was not maintainable, the plaintiff having no right of pre-emption at the time of the conditional sale.

ONE Umeda Singh on the 3rd May, 1867, executed a deed of conditional sale in respect of a two-anna share in mauza Tikarbhan in favour of Lachman Prasad, the defendant in this suit, who was not a co-sharer of the village, but a stranger. Application was made under Regulation XVII of 1806 for foreclosure, and on the 12th August, 1875, the year of grace having previously expired on the 13th February 1875, the conditional sale was declared absolute. Lachman Prasad subsequently preferred a suit against Umeda Singh for the possession of the property, and obtained a decree in execution of which on the 26th September, 1875, possession of the property was delivered to him. On the 11th December, 1875, one Jagraj Singh, a shareholder of mauza Tikarbhan, instituted the present suit against Lachman Prasad to establish his right of pre-emption in respect of the property, founding such right upon a special agreement recorded in the administra-

* Second Appeal, No. 716 of 1879, from a decree of J. H. Prinsep, Esq., Judge of Cawnpore, dated the 4th April, 1879, reversing a decree of Babu Ram Kali Chaudhri, Subordinate Judge of Cawnpore, dated the 20th March, 1878.

tion-paper of mauza Tikarbhan which was dated the 6th February, 1873. The terms of that document relating to the right of pre-emption were that the custom in the neighbourhood was that when any sharer sells his share, first his co-sharers, next his sharers in the patti, afterwards his sharers in the thoke, then a stranger, may get it, and that the proprietors of mauza Tikarbhan also approve of the aforesaid custom. While the suit was pending Jagraj Singh died and his sons were made plaintiffs in his stead. The Court of first instance dismissed the suit. On appeal by the plaintiffs the lower appellate Court gave them a decree. On second appeal by the defendant to the High Court the learned Judges of the Division Bench (PEARSON, J., and SPANKIE, J.,) before which such appeal came differed in opinion on the point whether the question whether the plaintiffs had any cause of action or not could be considered on second appeal, such question not having been raised by the defendant in the Courts below or in his memorandum of second appeal, but having been raised at the hearing of such appeal ; and on the point whether the plaintiffs had any cause of action or not.

The *Senior Government Pleader* (Lala *Juala Prasad*) and Munshi *Hanuman Prasad*, for the appellant.

Pandits *Ajudhia Nath* and *Bishambhar Nath*, for the respondents.

The material portions of the judgments of the Judges of the Division Bench were as follows:

PEARSON, J.—But the material point for determination in my opinion is whether a valid cause and right of action accrued to Jagraj Singh on the 13th February, 1875, and that question I am free and competent to consider under s. 542 of the Procedure Code. I observe that the sale of Umeda Singh's share to the defendant did not take place on that date. His share had been sold conditionally, it is true, so long before as the 3rd of May, 1867. What happened on the 13th February, 1875, was merely that the sale became absolute. No fresh transfer was made, but the character of the transferee's possession was modified by the operation of the terms on which the original transfer had been made. The transaction commenced on the earlier and came to an end on the latter date. No new transaction was effected on the latter. The clause

1880

LCHMAN RASAD v. BAHADUR SINGH.

in the *wajib-ul-arz* dated 6th February, 1873, must, I conceive, be held to refer to future not to past transactions. Umeda Singh did not sell his share after the date of the *wajib-ul-arz*, but only failed to redeem it from mortgage. He was not when the year of grace was expiring in a position to offer the property to Jagraj Singh. He could not have impowered Jagraj Singh to redeem it as his substitute. At the time of conditional sale it is not shown that any right of pre-emption was possessed by the proprietors of mauza Tikarbhan. I conclude, therefore, that the present suit is unmaintainable, and I would decree the appeal without costs, reversing the lower appellate Court's decree and restoring that of the Court of first instance.

SPANKIE, J.—I regret that I cannot agree with Mr. Justice Pearson in the latter part of his judgment. The objection taken by my honorable colleague is not one taken by appellant in the Court below, nor indeed in this Court. I admit that under s. 542 the Court is not confined to the grounds set forth in the memorandum of appeal. But the chapter in which the section is found refers to appeals from original decrees. I am aware that s. 587 of Act X of 1877 provides that the provisions of Chapter XII should apply as far as may be to appeals from appellate decrees. But the words "as far as may be" are of importance, and they should be considered with reference to s. 584, clauses (*a*), (*b*) and (*c*). On no other grounds than those allowed by the section does a second appeal lie. The objection on which my honorable colleague relies was not, as we have seen, raised below, and I doubt whether we can now set aside the Judge's decision solely upon the objection taken by my colleague. I certainly think it was for the appellant to urge that there was no valid cause and right of action on the grounds taken by my honorable colleague, and it was not for the Court to make the objection in second appeal. But, however this may be, I go further, and would say that there was no sale without power of redemption until the foreclosure had been completed, and defendant had obtained a decree for possession as owner. Until these conditions had been fulfilled the transaction was one of mortgage and a power of redemption remained. After these conditions had been fulfilled and rendered valid by decree of Court, the transaction once partaking of

a double character became a single one, and an absolute sale and possession was given under the sale-deed. On this the plaintiff's cause of action arose, and under the terms of the administration-paper, he was at liberty to bring or continue this suit.

I would remand the appeal to enable the Judge to determine the amount of the sale-consideration on payment of which the plaintiffs would be entitled to obtain the property in suit, and to fix a period within which that amount should be paid. When the lower appellate Court returns the finding on this point, one week may be allowed for objection, and on its expiration I would dispose of the appeal.

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The case, in consequence of the difference of opinion between Pearson, J. and Spankie, J. was referred, under s. 575, Act X of 1877, to Straight, J. who delivered the following judgment:

STRAIGHT, J.—This appeal has been referred to me by order of the learned Chief Justice under s. 575 of the Civil Procedure Code, in consequence of a difference of opinion on points of law between Pearson, J. and Spankie, J. composing the Division Bench before whom the case originally came.

The two questions properly arising out of this reference appear to be as follows:—(i) Was it competent for Pearson, J. to dispose of the appeal on a point of law not taken in the Courts below nor raised by the appellant's pleas? (ii) If it was competent for him so to do, has he held rightly in decreeing the appeal, on the ground that no cause of action ever accrued to the plaintiffs-respondents, upon which they were entitled to maintain a suit for pre-emption?

Upon the first of these two points I think it was competent for Pearson, J. to entertain the objection that the suit could not be sustained, in the absence of any cause of action having arisen to the plaintiffs, even though such objection had not been taken in the lower Courts, and was not urged in the grounds of appeal. It is argued for the appellant that both in his original statement of defence and in the second of his pleas to this Court he substantially, if not specifically, called the plaintiff's title to sue in question. But whether this be so or not, I

1880

LACHMAN PRASAD v. BAHADUR SINGH.

think that the terms of s. 542 of the Civil Procedure Code, so far as they are applicable to second appeals, allow the appellate Court a discretion, of which Pearson, J. was in my opinion fully justified in availing himself. The point upon which his judgment is based is purely one of law, and it arises directly upon the facts which are admitted and about which there can be no contradiction or controversy. Many cases might occur in which a careless and unreflecting use of s. 542 would cause hardship and injustice, but in the present instance the objection is simply a legal one, aiming directly at the status of the plaintiff to come into Court at all. Such an objection it seems impossible for the Court to avoid taking cognizance of in special appeal, even though it be raised for the first time at the hearing, any more than it could disregard a new point as to limitation or want of jurisdiction.

The second question for my consideration is not without difficulty, though the equities are clearly in favour of the view taken by Pearson, J. The mortgage or conditional sale-deed of the 3rd May, 1867, executed by Umeda Singh to the defendant-appellant, Lachman Prasad, for Rs. 700, charges his two-anna share in mauza Tikarbhan for three years on condition that the principal sum and interest shall be paid "within the said term, on the last day of the said term: if I fail to do so and do not get the mortgaged property freed from the mortgage, this mortgage-deed shall be considered as a conditional sale-deed and the mortgage-money a consideration therefor, and the mortgagee shall take proprietary possession of the property." From this it will be seen that the Rs. 7 0 with interest was to be repaid on or before the 3rd May, 1870, and then, if the mortgagor made default, the mortgagee was competent at once to take foreclosure proceedings to convert the conditional sale into an absolute one. No doubt Umeda Singh remained in possession until he was ousted by Lachman Prasad under process of law, and till the final order in the foreclosure proceedings was passed he still had his equity of redemption, but all this same time Lachman Prasad had his equitable rights and interests over the property pledged with him as security, and after the three years had expired and default had been made by the borrower, the only alternative open to Umeda Singh

1880

LACHMAN PRASAD v. BAHADUR SINGH.

was to pay the money within one year from the date of receiving notice of foreclosure, otherwise Lachman Prasad's proprietary title would by efflux of time become completely established. At the time Umeda Singh signed the *wajib-ul-arz* he could not put the land, in which Lachman Prasad was jointly interested with him, under disabilities and conditions, so to speak, of which the mortgagee had neither notice nor knowledge, nor could he make any contract which could have the retrospective effect of rendering an agreement he had already entered into incapable of fulfilment, in that other persons were to have a priority of right to purchase over the head of his conditional vendee. Whether the plaintiffs lay their cause of action as having arisen on the 13th February, 1875, when the foreclosure proceedings became final, or on the 26th September, 1875, when the defendant-appellant obtained possession, can make no difference. Umeda Singh had "no share" to offer for sale, pursuant to the terms of the *wajib-ul-arz*, and he was not in a position to fulfil its conditions, for all that remained to him till the 13th February, 1875, was his equity of redemption, which then became irretrievably lost. There was in effect no sale on that date in respect of which the plaintiffs could set up a right of pre-emption; all that took place was that the conditional vendee by operation of law became an absolute proprietor.

I am, therefore, of opinion that the view of Pearson, J. is correct upon both points referred to me, and I concur in his order that the appeal should be decreed and the decision of the first Court restored without costs.

*Appeal allowed.*

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

1880
*May* 7.

MEHDI HUSAIN (PLAINTIFF) *v.* MADAR BAKHSH AND OTHERS (DEFENDANTS).*

*Error or irregularity—Court-fees—Appeal—Act X of 1877 (Civil Procedure Code), s. 578.*

The refusal of a plaintiff-respondent to make good a deficiency in court-fees in respect of his plaint when called upon to do so by the Appellate Court is not a

* Second Appeal, No. 14 of 1880 from a decree of H. D. Willock, Esq., Judge of Azamgarh, dated the 1st October, 1879, reversing a decree of Maulvi Kamar-ud-din Ahmad, Munsif of Azamgarh, dated the 23rd June, 1879.