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June 22.

*Before Mr. Justice Oldfield and Mr. Justice Mahmood.*

DEO DAT (DEFENDANT) v. RAM AUTAR (PLAINTIFF).\*

*Mortgage—Usufructuary Mortgage—Pre-emption—Redemption—Interest—Act IV of 1882 (Transfer of Property Act), ss 51, 83, 84.*

Although a successful pre-emptor becomes substituted for the original transferee, and thus becomes entitled to the benefits of the transfer, those benefits cannot be claimed by him for any period antecedent to such substitution itself, and a pre-emptor, before his pre-emption is actually enforced, possesses no such right in the subject of pre-emption as would entitle him to any benefits arising out of the property which he is entitled to take but has not yet taken. The original vendee cannot, whilst he is in possession, be regarded as a trespasser, who would have no right to enjoy the usufruct of the property which he has purchased.

*Uodan Singh v. Muneri Khan* (1) dissented from, *Manik Chaul v. Rameshwar Rae* (2), *Bulleo Pershad v. Mohan* (3), and *Ajudhia v. Baldeo Singh* (4) followed.

In February, 1883, a decree for pre-emption was obtained in respect of a mortgage by conditional sale executed in August, 1882. On the 23rd August, 1883, the decree-holder executed his decree by depositing the principal amount of the mortgage money, and obtained possession of the property in substitution for the original mortgagee. In June, 1884, the mortgagor, proceeding under s. 83 of the Transfer of Property Act, deposited in Court the sum of Rs 699, claiming the same to be adequate for redemption. The case was, however, struck off in consequence of the pre-emptor's objection to receiving the deposit on the ground that it did not include the interest due on the mortgage. The deposit remained in Court, and on the 21st August, 1884, the mortgagor deposited a further sum on account of interest, but this also the pre-emptor refused to receive, for the same reason as before. In a suit by the mortgagor for redemption of the mortgage, it was found that the amount deposited was all that was due on the mortgage on the 21st August, 1884.

*Held* that until the 23rd August, 1883, when the defendant enforced his pre-emptive decree by depositing the consideration for the conditional sale of August, 1882, he had no such interest in the subject of pre-emption as would entitle him to any benefits arising therefrom, and that the defendant was not entitled to claim any interest on the mortgage-money for the period antecedent to the 23rd August, 1883.

*Seemle* that the proper person entitled to receive the interest for that period was the original conditional vendee, and the Court which passed the decree for pre-emption should have allowed him the amount of such interest in addition to the principal mortgage money. *Ashik Ali v. Mathura Kandu* (5) referred to.

\*Second appeal No. 1755 of 1885, from a decree of J. M. C. Steinbelt, Esq., District Judge of Azamgarh, dated the 7th August, 1885, confirming a decree of Babu Nihala Chander, Munsif of Azamgarh, dated the 21st March, 1885.

(1) 2 Calc. S. D. A. Rep. 85.

(3) N.-W. P. H. C. Rep., 1866, Rev. Ap. 30.

(2) N.-W. P. S. D. A. Rep., 1865, vol. ii, 171.

(4) I. L. R., 7 All. 674.

(5) I. L. R., 5 All. 187.

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*Held*, with reference to s. 84 of the Transfer of Property (Act IV of 1882), that the Courts below were right in not allowing interest to the defendant after the 21st August, 1884, when the plaintiff, to his knowledge, deposited the whole money due on the mortgage.

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*Held*, with reference to the last paragraph of s. 51 of the same Act, that the Courts below were wrong in subjecting their decrees in favour of the plaintiff to the condition that the defendant should not be evicted till the crops he had sown were cut.

The plaintiff in this case sued to recover possession of certain mortgaged property. The property, a share in mauza Chak Chaube, was mortgaged by the plaintiff on the 30th August, 1882, by way of conditional sale, to one Har Prasad for Rs. 699, for a term of two years ending on Jaith sudi 15th, 1291 fasli. Under the terms of the mortgage, the mortgagor delivered possession to the mortgagee and authorized him to receive the profits, which amounted to Rs. 40 per annum, in lieu of a part of the interest, which was fixed at one per cent. per annum; and in respect of the balance of interest, namely, Rs. 44, it was agreed that the mortgagor would pay the same in cash along with the principal on taking an account at the time of the redemption.

Under the terms of the *wajib-ul-arz* of the mauza the defendant Deo Dat brought a pre-emptive suit in respect of the conditional sale, and obtained a decree on the 5th February, 1883, which was finally upheld in appeal on the 14th February, 1884. In the meantime, on the 23rd August, 1883, the defendant executed his decree by depositing Rs. 699, the principal amount of the mortgage-money, and obtained possession of the property, being thus substituted for the original mortgagee. Matters stood thus, when the plaintiff, proceeding apparently under the provisions of s. 83 of the Transfer of Property Act (IV of 1882), deposited in Court on the 6th June, 1884, the sum of Rs. 699, being the principal sum of the mortgage-money, claiming the same to be adequate for redemption. Upon the objection of the defendant to accept the money on the ground that the deposit fell short of the amount of interest due on the mortgage, the plaintiff's case was struck off on the 15th August, 1884, the deposit remaining in Court. Subsequently the plaintiff made a further deposit of Rs. 44 on account of interest on the 21st August, 1884, thus making the whole deposit amount to Rs. 743. The defendant again, by an application made on the

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16th September, 1884, refused to accept the deposited money, on the ground that it fell short of the entire sum due on the mortgage. The proceedings under s. 83 of the Transfer of Property Act came to an end on the 28th November, 1884, when the Court rejected the plaintiff's application for summary redemption, but allowed the sum of Rs. 743 to remain a deposit in Court.

The present suit was instituted on the 26th January, 1885, having for its object recovery of possession of the property by redemption of the mortgage, on the ground that the deposited sum of Rs. 743 was all that was due on the mortgage. The suit was resisted upon the ground that the plaintiff did not properly tender the mortgage-money to the defendant, nor did he make an adequate deposit in Court, and that the defendant having cultivated the land, he could not be ejected till the crops were cut and taken away.

The Court of first instance held that the sum of Rs. 743, to which the deposit amounted on the 21st August, 1884, was all that was due to defendant on the mortgage on that date; and that the defendant, having executed his pre-emptive decree, by depositing Rs. 699, the consideration of the conditional sale, on the 23rd August, 1883, was entitled to remain in possession till he had gathered and carried away the crops which he had sown.

The defendant appealed, contending that he was entitled to an additional sum of Rs 61-10-0 as interest on the mortgage money, and to Rs. 37-15-0 as costs, making a total sum of Rs. 99-9-0, which had been disallowed by the first Court. The lower appellate Court dismissed the appeal.

The defendant appealed to the High Court.

Mr. *J. Simeon*, for the appellant.

Munshi *Hanuman Prasad* and Munshi *Mudho Prasad*, for the respondent.

MAHMOOD, J.—The contention urged before us on the defendant's behalf raises three main points for determination :—

1. Whether the defendant was entitled to claim interest on the mortgage-money for the period between 30th August, 1882, the date of the mortgage, and the 23rd August, 1883, when he enforced his pre-emptive decree by depositing Rs. 699, the prin-

cipal consideration-money of the conditional sale in respect of which he enforced his pre-emption.

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2. Whether the defendant was entitled to claim any interest after the 21st August, 1884, when the deposit by the plaintiff, under s. 83 of the Transfer of Property Act, amounted to Rs 743.

3. Whether, under the circumstances of this case, the defendant was entitled to costs.

I will dispose of each of these points in the order in which I have mentioned them. The first of these questions depends upon the determination of a very important point of the law of pre-emption. That a successful pre-emptor stands in the shoes of the original vendee in respect of all the rights and obligations arising from the sale under which he has derived his title, is a question which stands upon an undoubted basis, for the right of pre-emption is nothing more or less than the right of substitution. This was pointed out by me at considerable length in *Gobind Dayal v. Inayatullah* (1), where the Full Bench of this Court generally accepted my conclusions as to the nature of the pre-emptive right. This, however, is not a point which is contested on either side in the argument of the learned pleaders for the parties. All that the learned pleader for the appellant contends for here is, that his client, having succeeded to, or rather been substituted for, the original conditional vendee, Har Prasad, is entitled to claim the benefit of all the conditions of the mortgage, and is, therefore, entitled to claim interest even for the period antecedent to the 23rd August, 1883, when he enforced his pre-emptive decree, by deposit of the consideration of the conditional sale under the decree of the 5th February, 1883. I am of opinion that this contention is wholly unsound. It is perfectly true that a successful pre-emptor becomes substituted for the original transferee, and thus becomes entitled to the benefits of the transfer. But it is equally true, and stands to reason, that those benefits cannot be claimed for any period antecedent to such substitution itself. The right of pre-emption as based upon the *wajib-ul-arz* partakes of the nature of those obligations which fall short of an interest in immoveable property, though they

(1) I. L. R., 7 All. 775.

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are annexed to the ownership of such property. The nature of such obligations is well described in s. 40 of the Transfer of Property Act, which I refer to only by way of analogical comparison. A pre-emptor, therefore, before his pre-emption is *actually* enforced, possesses no such right in the subject of pre-emption as would entitle him to any benefits arising out of the property, which he is only entitled to take by substitution, but has not yet actually taken. On the other hand, the original vendee cannot, whilst he is in possession, be regarded as a trespasser, who would have no right to enjoy the usufruct of the property which he has purchased, nor would it be equitable to hold that the pre-emptor, before he has actually paid the price, should be entitled to the profits of the property, which he can take only upon duly making such payment.

This view of the law is supported by some cases to be found in the reports. There is a very old ruling—*Uodan Singh v. Muneri Khan* (1), where it was held that if *A* transfer lands to *B* by sale, and *C* afterwards come forward and establish his right of *shufa* or pre-emption, he will be entitled to the lands at the price paid for them by *B*, who will be compelled to refund the profit accrued during the period of his possession to *C*, receiving himself the purchase-money back from *A*. That was a case decided so long ago as 1813, and seems to have depended entirely upon the Muhammadan law of pre-emption. The judgment, however, contains no authority for the rule there laid down; and there can be no doubt that the ruling was erroneous, being opposed to the most authoritative texts of the Muhammadan law itself. Such indeed seems to be the view taken by the Sudder Court of these Provinces in *Manik Chand v. Rameshur Rae* (2), which was a suit based upon the *wajib-ul-arz*, and where the learned Judges held that the “pre-emptor could have no preferential right till he had tendered the full price, and therefore the defendant’s intermediate possession could not be regarded as illegal.” This ruling was followed by this Court in *Buldeo Pershad v. Mohun* (3), where the learned Judges, after referring to the rule of Muhammadan law of pre-emption, held it to be equitable, and then went on to say:—“The purchaser has in most instances paid the purchase-money; is he

(1) 2 Calc. S. D. A. Rep., 85.

(2) N.-W. P. S. D. A. Rep., 1865, vol. ii., 171.

(3) N.-W. P. H. C. Rep., 1866, Rev. Ap., 30.

to lose all interest and profits because, at some subsequent time, the contingency occurs that a pre-emptor claims and exercises his right of pre-emption? and is the pre-emptor, who has kept his money in his pocket till it suited his purpose to exercise his right, to obtain profit, which will be the greater in proportion to his delay?"

The same rule was laid down by Straight, J., in *Ajudhia v. Baldeo Singh* (1), which is the latest case upon the subject. I entirely concur in the principle upon which these rulings proceed; and if the exigencies of this case needed it, I would, by reference to the original texts of the Muhammadan law, have shown that the principle is a necessary consequence of the very nature and incidents of the right of pre-emption itself.

Applying the principle to this case, it seems to me perfectly clear that till the 23rd August, 1883, when the defendant enforced his pre-emptive decree by depositing Rs. 699—the consideration of the conditional sale of the 30th August, 1882—he had no such interest in the subject of pre-emption as would entitle him to any benefits arising therefrom. And it follows that my answer to the first question in the case must be that the defendant is not entitled to claim any interest on the mortgage-money for the period antecedent to the 23rd August, 1883. This view, however, raises a subsidiary question, namely, that if the defendant is not entitled to interest for that period, who else is entitled to it? This is a question which we are not bound to determine in this case, but I think I may safely say, as a necessary consequence of the *ratio decidendi* adopted by me, that the proper person entitled to receive the interest for that period was Har Prasad, in whose favour the *bye-bit-wafa* mortgage of the 30th August, 1882, was originally executed, and who was dispossessed under the defendant's pre-emptive decree; and I think I may add that in passing that decree, the Court should have allowed the amount of interest above mentioned in addition to the principal mortgage-money. This view is based upon the same principle as my ruling in *Ashik Ali v. Mathura Kandu* (2), where it was held that the pre-emptor, in the case of a mortgage by conditional sale which has become absolute, is bound to pay as the price of the property the entire amount due on such

(1) I. L. R., 7 All. 674. (2) I. L. R., 5 All. 187.

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mortgage at the time it became absolute. Here the "price" which should have been allowed to Har Prasad under the decree of the 5th February, 1883, should have been the principal mortgage-money *plus* such amount of interest as might have been due on the mortgage up to the period fixed by the Court for enforcement of the pre-emptive decree. That decree, having now become final, cannot of course be interfered with in this case: but its effect was to enable the defendant to pre-empt on payment of less money than he was entitled to. And I have no doubt that his present claim for interest antecedent to the 23rd August, 1883, when he executed the decree, is wholly unconscionable and opposed to equity.

The next question in the case is a very simple one, because the rule contained in s. 84 of the Transfer of Property Act (IV of 1882) furnishes a clear guidance. The section says that when a mortgagor has duly made deposit under the preceding section of all that is due on the mortgage, the interest on the mortgage money is to cease. Here the plaintiff deposited the principal sum of the mortgage-money on the 6th June, 1884, but that deposit was clearly inadequate and would scarcely entitle him to the benefit of s. 84 of the Act, even *pro tanto*. I will, however, not determine this point, because it is not raised here, and the plaintiff himself made a further deposit of Rs. 44 on account of interest on the 21st August, 1884, thus making the whole deposit amount to Rs. 743, which has been found by the Court below to be all that was due on the mortgage on that date, and of which the defendant had due notice. The amount so deposited of course left out of account the interest for the period antecedent to the 23rd August, 1883, and to which, as I have already shown, the defendant was not entitled. The Courts below were, therefore, in my opinion, right in not allowing interest to the defendant after the plaintiff had, with due knowledge of the defendant, deposited the whole money due on the mortgage to the defendant. And I may also add, with reference to a subsidiary question in the case, that the Courts below did not act rightly in rendering the decree subject to the condition that the defendant was not to be evicted till the crops he had sown were cut. The rule applicable to such cases is clearly enunciated in the last paragraph of s. 51 of the Transfer of Property Act, which creates no bar to eviction in such a case, but only lays down that the transferee

is entitled to the crops sown by him, and to free ingress and egress to gather and carry them. The decree in this case should have been framed accordingly, but I need say nothing more about the matter, because that part of the decree has not been made the subject of complaint before us by the plaintiff-respondent.

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Then as to the question of costs, which has been made the subject of a separate ground of appeal by the defendant-appellant before us. S. 220 of the Civil Procedure Code gives ample power and discretion to the Court in connection with costs, and in the present case the defendant, having all along acted wrongly in declining to accept the plaintiff's deposit, and in giving up possession to him, was properly made liable for the plaintiff's costs by the Courts below.

I would dismiss this appeal with costs.

OLDFIELD, J.—I concur in the proposed order.

*Appeal dismissed.*

## APPELLATE CRIMINAL.

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June 28.

*Before Mr. Justice Straight, Offg. Chief Justice.*

QUEEN-EMPRESS v. BALDEO AND OTHERS.

*A accomplice—Corroboration—Dacoity—Possession of stolen property.*

Criminal Courts dealing with an approver's evidence in a case where several persons are charged should require corroboration of his statements in respect of the identity of each of the individuals accused. *Queen-Empress v. Ram Saran* (1), *Queen-Empress v. Kure* (2) and *Reg. v. Mullins* (3) referred to.

*A, B, M, R* and *N* were tried together on a charge under s. 460 of the Penal Code. The principal evidence against all of them was that of an approver. Against *A, B,* and *M* there was the further evidence that they produced certain portions of the property stolen on the night of the crime from the house where the crime was committed. With regard to *R,* it was proved that he was present when *B* pointed out the place where some of the property was dug up, but he did not appear to have said anything or given any directions about it.

*Held,* with reference to *A, B* and *M,* that it could not be said that their recent possession of part of the stolen property, so soon after it had been stolen, was not such corroboration of the approver's evidence of their participation in the crime as entitled the Court to act upon his story in regard to those particular persons.

(1) *Ante*, p. 306. (2) *Weekly Notes*, 1886, p. 65.  
(3) 3 Cox C. C. 526.