1886
May 25.

Before Mr. Justice Oldfield and Mr. Justice Mahmood.

SHEOBHAROS RAI AND OTHERS (DEFENDANTS) *v.* JIACH RAI AND OTHERS (PLAINTIFFS).*

Pre-emption—Sale to a co-sharer and stranger—Specification of interest sold to stranger and of price—Right of pre-emption of vendee-co-sharer.

The principle of denying the right of pre-emption except as to the whole of the property sold, is that by breaking up the bargain the pre-emptor would be at liberty to take the best portion of the property and leave the worst part of it with the vendee. The rule applies only to those transactions which, while contained in one deed, cannot be broken up or separated. It should be limited to such transactions, and the reason of it does not exist where the shares sold are separately specified, and the sale to the stranger is distinct and divisible, though contained in the same deed as the sale to the co-sharers.

The *ratio decidendi* of *Bhawani Prasad* v. *Damru* (1) explained. *Sheodyal Ram* v. *Bhyro Ram* (2) distinguished. *Ganeshee Lal* v *Zurani Ali* (3) and *Manna Singh* v. *Ramadhin Singh* (4) dissented from.

A co-sharer in a village conveyed by deed of sale certain land to four persons, three of whom were co-sharers in the same *patti* as the vendor. The deed contained a specification of the interests purchased and the considerations paid by the co-sharers and the stranger vendees respectively. In a suit for pre-emption by certain co-sharers of the same *patti* as the vendor, the lower appellate Court held that although the co-sharers vendees had a pre-emptive right of the same degree as the plaintiff, nevertheless they, having joined a stranger with them in purchasing the property, had forfeited their right, and could not resist the claim even in respect of such portions as they had purchased under the sale-deed.

Held that this view was erroneous, and that inasmuch as the deed of sale contained an exact specification of the shares purchased by the co-sharers-vendees, who had an equal right of purchase to that of the plaintiffs in respect of such shares, and as the shares purchased and the consideration paid by the stranger vendee were also exactly specified, the lower Court should not have decreed the claim for pre-emption as to that portion of the property which had been purchased by the co-sharers.

The facts of this case are stated in the judgment of the Court.

Munshis *Hanuman Prasad* and *Madho Prasad*, for the appellants.

Munshi *Sukh Ram*, for the respondents.

* Second Appeal No. 1568 of 1885, from a decree of J. M. C. Steinbelt, Esq., District Judge of Azamgarh, dated the 1st July, 1885, confirming a decree of Munshi Sheo Sahai, Munsif of Muhamadabad Gohna, dated the 12th January, 1885.

(1) I. L. R., 5 All. 197.
(2) N.-W. P. S. D. A. Rep., 1860, p. 53.
(3) N.-W. P. H. C. Rep., 1870, p. 343.
(4) I. L. R., 4 All. 252.

1886

SHEOBHAROS RAI v. JIACH RAI.

MAHMOOD, J.—The facts of this case may be recapitulated here in order to indicate the point of law which has to be determined.

Tilak Rai (defendant No. 5) executed a deed of sale on the 2nd October, 1884, whereby he conveyed certain specific plots of land constituting an area of 15 bighas 14 biswas and 18 dhurs to—(i) Sheobharos, (ii) Sheo Bhik, (iii) Parkash, (iv) Bali, in lieu of Rs. 250 mentioned in the deed. The deed also conveyed a house No. 1044, which belonged to the vendor, but the covenant of sale expressly states that the conveyance was made according to the specification contained in a schedule at the foot of the deed. That schedule shows that out of the area of cultivated land, plots Nos. 707, 1001 and 1002, constituting 2 bighas 5 biswas and 13 dhurs, was sold to Bali, and the rest of the plots to the other three vendees. As to the house, there is no express mention; but the schedule shows that the price paid by Bali in lieu of all that he purchased under the deed was Rs. 49, whilst the remaining sum of Rs. 201 was the amount of the consideration paid by the other three vendees for what they took under the sale.

The suit from which this appeal has arisen was instituted by Jiach Rai and others, co-sharers of the same *patti* as the vendor Tilak Rai, and as such entitled to pre-emption under the terms of the *wajib-ul-arz* in respect of the sale above-mentioned. The lower appellate Court has found that, with the exception of Bali, the other three vendees are sharers in the same *thok* as the vendor Tilak, and therefore entitled to a pre-emptive right of the same degree as the plaintiffs. But notwithstanding this finding, the learned Judge has upheld the decree of the Court of first instance, decreeing the claim in respect of the whole property covered by the sale-deed, on the ground that the three co-sharers of the *thok* having joined Bali, a stranger, in purchasing the property, they had forfeited their pre-emptive right, and could not resist the plaintiffs' suit, even in respect of such portion as they had bought under the sale.

From this decree the three vendees, Sheobharos and others, who have been found to be co-sharers of the *thok*, have preferred this appeal, and the learned Munshi, who has appeared on behalf of the appellant, has confined his argument to the contention that

1886

SHEOBHAROS RAI v. JIAGH RAI.

upon the findings of the lower appellate Court itself the suit should have been dismissed, so far as the portion of the property purchased by the appellants is concerned. On the other hand, the learned pleader for the respondent has relied upon certain rulings which I shall presently deal with.

I am of opinion that the contention pressed upon us by the learned pleader for the appellants has force, and that this appeal must prevail. In the case of *Sheodyal Ram* v. *Bhyro Ram* (1) it was held by three learned Judges of the late Sudder Dewany Adalat of these provinces, that the sale of a share of an estate to a stranger jointly with a co-sharer of the village was in violation of the terms of the *wajib-ul-arz*, the express object of which was to prevent the intrusion of strangers, and that as the sale was one and indivisible, the claimant of pre-emption was entitled to a decree in respect of the whole property sold. Then in the case of *Guneshee Lal* v. *Zarawt Ali* (2), a Division Bench of this Court carried the rule further by applying it even to a sale-deed in which the shares purchased by the strangers were separately specified, and the latter ruling was again followed in *Manna Singh* v. *Ramadhin Singh* (3), where it was held that even an express specification of the shares purchased by each vendee could not alter the joint nature of the sale transaction, or permit of its being broken up and treated as involving separate contracts, so as to entitle the co-sharer who has purchased along with a stranger to resist the pre-emptive suit, even in respect of his own specific share.

The first two of these rulings were referred to by me in *Bhawani Prasad* v. *Damru* (4), not with the object of agreeing or dissenting from the rule therein laid down, but simply to point out the analogy with the point which was then before me. The exact question with which I had to deal in that case was that a plaintiff-pre-emptor who, in claiming pre-emption, joins a stranger in the suit, cannot succeed, because the very nature of his claim violates the fundamental principle of the pre-emptive right. And because the lower Courts in this case have misunderstood a portion of what I said in that case in giving expression to my *ratio decidendi*, I wish to explain my meaning in saying that a pre-emptor

(1) N.-W. P. S. D. A. Rep., 1860, p. 53.
(2) N-W. P. H. C. Rep., 1870, p. 343.
(3) I. L. R., 4 All. 252.
(4) I. L. R., 5 All. 197.

1886

SHROBHAROS RAI v. JIACH RAI.

"who, in purchasing property himself, *joins a stranger in such purchase*," could not subsequently "resist the claim of other pre-emptors, who in suing for pre-emption vindicate the policy of the right." All that I meant by the words which I have emphasized was, that the nature of the joint purchase should be such as to make it as impossible to ascertain the interests acquired by each of the joint purchasers as it would be in the case then before me to ascertain how much the pre-emptor was claiming, and how much of the pre-emptive interests he had made over to the stranger whom he had joined in instituting the joint suit. That in such cases the sale, on the one hand, and the suit on the other, cannot be subjected to a division of interests, is obvious ; and an illustration of this is to be found in the recent case of *Karan Singh* v. *Muhammad Ismail Khan* (1), in which Petheram, C.J., laid down a rule which, in the result, has the same effect as the rule laid down by me in *Bhawani Prasad* v. *Damru* (2). And I wish to add that nothing which I said in the latter case should be so understood as to lay down the broad rule that in every case, regardless of the nature and incidents of the transaction of sale, the mere fact of a stranger having acquired rights under the same sale-deed as a co-sharer entitled to pre-emption under the *wajib-ul-arz*, would entitle the other co-sharers to pre-empt even the separately specified portion of property purchased by a co-sharer entitled to an equal pre-emptive right.

In the present case the sale-deed contains an exact specification of the shares purchased and the price paid by the vendees-appellants, and it contains also an exact specification of the shares purchased and the price paid by the vendee-defendant Bali. The case of *Sheodyal Ram* v. *Bhyro Ram* (3) is not in point, because the three learned Judges who decided that case adopted as their *ratio decidendi* that the shares sold and sought to be pre-empted were not capable of division, and were not separately specified. In the case of *Guneshee Lal* v. *Zarant Ali* (4) I respectfully think the rule was carried too far, and so also in *Munna Singh* v. *Ramadhin Singh* (5). With neither of these rulings am I prepared to agree, because the principle or *ratio decidendi* of denying the right of

(1) I. L. R., 7 All. 860.
(2) I. L. R., 5 All. 197.
(3) N.-W. P. S. D. A. Rep., 1860, p. 53.
(4) N.-W. P. H. C. Rep., 1870, p. 343.
(5) I. L. R., 4 All. 252.

1886

SHEOBHAROS RAI v. JIACH RAI.

pre-emption, except as to the whole of the property sold, is that by breaking up the bargain the pre-emptor would be at liberty to take the best portion of the property and leave the worst part of it with the vendee. In the two last-mentioned cases, the shares are separately specified, and where such shares are separately specified and the sale to the stranger is distinct and divisible, although contained in one deed, the reason of the rule does not exist. The rule applies only to those transactions which, while contained in one deed, cannot be broken up or separated; and the rule should be so limited, for it would be a very great hardship if the vendee, by the association of a stranger in respect of a small but specified portion of the property purchased, should have to forfeit his entire right of purchase in favour of a sharer having equal but not preferential rights. Indeed, where the share of each purchaser and the price which he had paid for it are distinctly specified in the sale-deed, there is really no breaking up of the bargain, as understood in the law of pre-emption, if the purchaser is ousted from the specific share which he has individually purchased along with others under the same deed of sale. Moreover, even under the strict rule of the Muhammadan law of pre-emption, the pre-emptor, in dealing with a sale under which more persons than one have purchased, is entitled to say that he objects to the intrusion of only one of the purchasers, and wishes to exclude him by pre-empting the specific share which such purchaser has individually acquired. And the principle in its application to the present case shows that the exclusion of the purchaser Bali is all that the pre-emptive terms of the *wajib-ul-arz* necessitate, and he would be subjected to no hardship, such as the breaking up of a single bargain implies, if he has to give up all that he has purchased, and receives the price which he individually paid for his specific share of the property.

For these reasons I hold that the lower appellate Court in dealing with this case should not have decreed the claim for pre-emption against the present appellants, who are co-sharers in the same *thok* as the vendor, and as such had an equal right of purchase to that of plaintiffs in respect of the shares specified in the deed of the 2nd October, 1884, as purchased by them.

I would decree this appeal and set aside the decrees of both the lower Courts, so far as they decree the claim of the plaintiffs-

1886

SHEOBHAROS RAI v. JIACH RAI.

respondents to that portion of the property which was purchased by the appellants, and to the extent of the claim which has been successfully resisted by defendants, the plaintiffs will pay costs in all the Courts. The plaintiffs will be entitled to a decree in respect of the share purchased by Bali against the vendor-defendant and Bali, defendant, with costs, to that extent, incurred in the Court of first instance, on condition of the plaintiffs depositing in that Court the sum of Rs. 45 for payment to Bali, defendant, within one month from the date when this decision reaches that Court, otherwise the suit in this respect also will stand dismissed with costs.

The decree will be prepared in the above terms with reference to s. 214 of the Civil Procedure Code.

OLDFIELD, J.—I concur.

Appeal allowed.

Before Mr. Justice Straight, Offg. Chief Justice, and Mr. Justice Mahmood.

1886 *May* 26.

DEOKI NANDAN (DEFENDANT) *v.* DHIAN SINGH (PLAINTIFF). *

Sir land—Ex-proprietary tenant—Nature of the right of occupancy—Act XII of 1881 *(N.-W. P. Rent Act), s. 7—Trees.*

In a suit for recovery of possession of zamindari property conveyed by a sale deed, including certain plots of land which were the defendant-vendor's *sir*, the lower Courts held, with reference to s. 7 of the North-West Provinces Rent Act (XII of 1881), that the defendant was entitled to hold possession of the said plots as ex-proprietary tenant, but as it appeared that they had fruit and other trees upon them, the Courts awarded the plaintiff possession of these trees on the ground that the nature of an ex-proprietary tenure did not entitle the holder to resist a claim of this kind as to the trees upon the land forming the area of such tenure.

Held that this decision was erroneous, and that the plaintiff's claim to possession of the trees upon the plots in question must be dismissed.

Per MAHMOOD, J., that the principle of the maxim *cujus est solum ejus est usque ad cœlum* was applicable to the case by way of analogy, and that an ex-proprietary tenant had all the rights and incidents assigned by jurisprudence to the ownership of land, subject only to the restriction imposed upon the occupancy-tenure by the statute which created it, and that hence he would be entitled to the trees on the land, and to use them as long as the tenure existed. *Bibee Sohodwa* v. *Smith* (1), *Narendra Narain Roy Chowdhry* v. *Ishan Chandra Sen* (2), *Gopal Pandey* v.

* Second Appeal No. 1632 of 1885, from a decree of F. E. Elliot, Esq., District Judge of Allahabad, dated the 12th June, 1885, confirming a decree of Pandit Indar Narain, Munsif of Allahabad, dated the 5th November, 1884.

(1) 12 B. L. R. 82. (2) 13 B. L. R. 274.