1886

HABIB-UN NISSA v. BARKAT ALI.

madan law, if the pre-emptor enters into a compromise with the vendee, or allows himself to take any benefit from him in respect of the property which is the subject of pre-emption, he by so doing is taken to have acquiesced in the sale, and to have relinquished his pre-emptive right. Mr. Baillie, in his celebrated *Digest of Muhammadan Law*, at page 499, which reproduces a passage of the Fatawa Alamgiri, states the law as follows :—"The right of pre-emption is rendered void by implication, when anything is found on the part of the pre-emptor that indicates acquiescence in the sale, as, for instance, when knowing the purchase, he has omitted, without a sufficient excuse, to claim his right (either by failing to demand it on the instant, or by rising from the meeting, or taking to some other occupation, without doing so, according to the different reports of what is necessary on the occasion); or, in like manner, when he has made an offer for the house to the purchaser ; or has asked him if he will give it up to him ; or has taken it from him on lease, or in *moozaraut*—all this with knowledge of the purchase."

This passage is conclusive, and leaves no doubt that by the very fact of their taking the agreement referred to above, the plaintiffs have relinquished their right of pre-emption and are precluded from enforcing it.

In this view of the question it is unnecessary to consider the first question. I would dismiss the appeal with costs.

TYRRELL, J.—I am quite of the same opinion.

Appeal dismissed.

Before Mr. Justice Brodhurst and Mr. Justice Tyrrell.

1886
April 27.

ZAINAB BEGAM (PLAINTIFF) *v.* MANAWAR HUSAIN KHAN AND ANOTHER (DEFENDANTS.)*

Civil Procedure Code, ss. 556, 558—*Non-attendance of appellant at hearing of appeal—Dismissal of appeal on the merits—Application for re-admission.*

In an appeal before an appellate Court, the appellant did not attend in person or by pleader, and the Court, instead of dismissing the appeal for default, tried and dismissed it upon the merits. Subsequently, the appellant applied to the Court, under s. 558 of the Civil Procedure Code, to re-admit the appeal, explaining her absence

* First Appeal No. 39 of 1886, from an order of Maulvi Zain-ul-Abdin Subordinate Judge of Moradabad, dated the 19th September, 1885.

1886

ZAINAB BEGAM v. MANAWAR HUSAIN KHAN.

when the appeal was called on for hearing. The Court rejected the application on the ground that the appeal had been decided on the merits, and reasons had been recorded for its dismissal which there were no apparent grounds for setting aside.

Held that the Court should have dismissed the appeal for default, and it was illegal to try it on the merits, and the judgment was consequently a nullity, the existence of which was no bar to the re-admission of the appeal.

THIS was a first appeal from an order passed by the Subordinate Judge of Moradabad, under s. 558 of the Civil Procedure Code, refusing to re-admit an appeal. The appellant, Musammat Zainab, was plaintiff in the suit which was dismissed by the Court of first instance (Munsif of Amroha). She appealed from the Munsif's decree to the District Judge of Moradabad, who transferred the appeal to the Subordinate Judge. The appellant failed to appear either on the day fixed by the Subordinate Judge for the hearing of the appeal, or on the subsequent days to which the hearing was adjourned. Instead, however, of dismissing the appeal for default under s. 556 of the Civil Procedure Code, the Subordinate Judge tried it and dismissed it upon the merits. Subsequently the appellant applied to the Subordinate Judge, under s. 558, to re-admit the appeal, explaining her absence when the appeal was called on for hearing. This application the Subordinate Judge rejected, on the ground that the appeal had been decided on the merits, and reasons had been recorded for its dismissal which there were no apparent grounds for setting aside.

On this appeal it was contended for the appellant that the Subordinate Judge was not justified in rejecting her application, without inquiry into the truth or otherwise of the allegations made therein regarding the cause of her absence at the hearing of the appeal.

Babu *Ratan Chand*, for the appellant.

Mr. *Abdul Majid*, for the respondents.

BRODHURST and TYRRELL, JJ.—The Subordinate Judge, as a first appellate Court, had the appellant's appeal before him. On the day fixed for hearing, and on adjourned dates, the appellant did not attend in person or by pleader. The Subordinate Judge then had but one legal course open to him—to dismiss the appeal in default (s. 556). It was illegal to try the appeal on the merits.

1886

ZAINAB BEGAM v. MANAWAR HUSAIN KHAN.

The judgment given in this way is a nullity, and must be cancelled; its existence therefore was and is no bar to the re-admission of the appellant's appeal (s. 558), if it was not barred by limitation or otherwise inadmissible. We must allow this appeal, and direct the restoration to the file of the application for re-admission under s. 558 on the merits, the costs of this appeal being costs in the cause.

Appeal allowed.

1886
April 28.

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

LAL SINGH AND ANOTHER (DEFENDANTS) *v.* DEO NARAIN SINGH AND OTHERS (PLAINTIFFS). *

Hindu Law—Joint Hindu family—Alienation by father—Suit by sons to set aside alienation—Duty of sons to pay father's debts—Burden of proof.

The rule enunciated by the Privy Council in *Muddun Thakoor* v. *Kantoo Lall* (1) and *Suraj Bunsi Koer* v. *Sheo Persad Singh* (2), "that where joint ancestral property has passed out of a joint family, either under a conveyance executed by a father in consideration of an antecedent debt, or in order to raise money to pay off an antecedent debt, or under a sale in execution of a decree for the father's debt, his sons, by reason of their duty to pay their father's debts, cannot recover that property, unless they show that the debts were contracted for immoral purposes to the knowledge of the vendee or mortgagee," is limited to antecedent debts, *i.e.*, to debts contracted before the sale or mortgage sought to be impeached by the sons; and it does not cover cases in which a sum in ready money has been paid over to the father by the vendee or mortgagee. The authorities seem to come to this, that in those cases where a person buys ancestral estate, or takes a mortgage of it from the father, whom he knows to have only a limited interest in it, for a sum of ready money paid down at the time of the transaction, such person, in a suit by the sons to avoid it, must establish that he made all reasonable and fair inquiry before effecting the sale or mortgage, and that he was satisfied by such inquiry, and believed, in paying his money, that it was required for the legal necessities of the joint family, in respect of which the father, as head and managing member, could deal with and bind the joint ancestral estate.

THE three plaintiffs in this case were the sons of Ram Dihal, the first defendant, and on the 3rd October, 1883, when the suit was instituted, they were, so it was stated, aged respectively as follows:—Deo Narain Singh, 23; Ram Narain Singh, 18 years and 2 months; Jagat Narain Singh, 15 years and 2 months. On the 12th December, 1864, Deo Narain alone having been born, Ram

* Second Appeal No. 286 of 1885, from a decree of E. B. Thornhill, Esq., District Judge of Jaunpur, dated the 30th January, 1885, reversing a decree of Maulvi Muhammad Nasir-ul-lah Khan, Subordinate Judge of Jaunpur, dated the 22nd December, 1883.

(1) 14 B. L. R. 187; L. R., 1 Ind. Ap. 333. (2) I. L. R., 3 Calc. 148.