1888

MUHAMMAD HUSAIN v. AJUDHIA PRASAD.

either party to the litigation the order which I think is necessary to make in the case is, to set aside the order of the learned Judge of the lower Court, to require him to deal with the question of pauperism with reference to the definition contained in the *Explanation* to s. 401 and, in deciding the question, to ascertain the exact property, its market value, and the title thereto, and then to deal with the case under s. 407, irrespective of any surmises as to the reason why the plaintiff has valued his claim at such a high figure. In dealing with the case under that section the learned Subordinate Judge will, of course, be at liberty to decide whether, even if the petitioner's pauperism is established, his case falls under any of the other clauses of the enactment.

I have considered it necessary to go into the matter so fully because, whilst I hold that pauper suits when frivolously brought should not be encouraged, I also hold that enough has already been done by the Legislature in the Code of Civil Procedure, not only in s. 407 but also in later sections, to provide checks upon such litigation. But it is equally clear that if these checks are too severely administered, in the sense of the various requirements of the law not being duly carried out before a pauper is kept out of Court, the effect will be far from what the Legislature aims at. Courts of Justice should be open alike to the rich and the poor. This is a revision case, and all that I am required to do is to allow the petition, and setting aside the order of the learned Judge of the lower Court to require him to dispose of the case again with reference to the observations which I have made.

Costs will abide the result.

Cause remanded.

APPELLATE CIVIL.

1888
April 6.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Mahmood.

SAKINA BIBI (PLAINTIFF) *v.* AMIRAN AND OTHERS (DEFENDANTS).*

Pre-emption—Wajib-ul-arz—Pre-emptor out of possession of his own share—His own share lost by him pending appeal—Muhammadan Law.

The plaintiff instituted this suit to enforce her right of pre-emption in respect of a share in a village of which she alleged to be a co-sharer with the vendors. The

* Second appeal No. 51 of 1887 from a decree of J. M. C. Steinbelt, Esq., District Judge of Azamgarh, dated the 22nd December, 1886, modifying a decree of Lala Manmohan Lal, Subordinate Judge of Azamgarh, dated the 12th June, 1886.

defendants to the suit were the vendors, the vendees, and others who were rival claimants for pre-emption in the share sold. The rival pre-emptors alone defended the action on the ground, among others, that plaintiff was not in possession of her own share in the village out of which she alleged that her right to claim pre-emption arose. The Court of first instance dismissed her suit. In appeal the District Judge in effect dismissed her claim as against the defendants who were the rival pre-emptors, but gave the plaintiff a right to obtain the share if the other pre-emptors did not avail themselves of the decree which they had obtained in their action. On the 12th of January, 1887, plaintiff's second appeal was admitted, and on the 20th January plaintiff's share in the village out of which her claim to pre-emption in respect of the share sold arose, was sold in execution of a decree in another suit. Respondent contended that, as since the appeal the share out of which plaintiff alleged that her right arose was sold, she could not get any decree now in her favor.

Held, that this Court as a Court of Appeal have only got to see what was the decree which the Court of first instance should have passed, and if the Court of first instance had wrongly dismissed the claim, the plaintiff cannot be prejudiced by her share having been subsequently sold in execution in another suit; such a sale could not have affected her right to maintain the decree, if she had obtained a decree in her favor in the Court of first instance, either on review or on appeal, nor could it have been made the ground of appeal. Further, plaintiff being out of possession of her share at the time she instituted the suit for pre-emption was immaterial, the Court should have ascertained whether the plaintiff was at the date of suit entitled in law to the share out of which her right of pre-emption was alleged to have arisen.

Held, by Mahmood, J., that the passage from Hamilton's Heydaya by Grady, p. 562, means that in the pre-emptive tenement the pre-emptor should have a vested ownership and not a mere expectancy of inheritance or a reversionary or any kind of contingent right, or any interest falling short of full ownership.

Azima Bibi, Wasiha Bibi, and Yusaf Ali, three Muhammadan co-sharers, sold their three-pie share in village Khatauli Khurd to Rahim Ali and Assid Ali for the sum of Rupees three hundred. As regards Muhammadan co-sharers, the Wajib-ul-arz of the village provided that sales of shares of co-sharers should be governed by the Muhammadan law of pre-emption. On the sale taking place, Amiran and Karim Bakhsh instituted a suit for pre-emption in respect of the share, and obtained a decree. Plaintiff (Sakina Bibi) instituted this suit on 1st April, 1886, against the above-named vendors, vendees and the pre-emptors to enforce her right of pre-emption, on the ground that she and the vendors are co-sharers and partners in the property sold which was their paternal estate, while the vendees were stangers, and the pre-emptors were sharers in a thoke of the village other than that in which the property sold was situated. On the same day that she filed this suit

1888

SAKINA BIBI v. AMIRAN.

she also instituted a suit for possession of her share in the estate left by her father.

The vendors-defendants did not defend the action; the vendees contended that the sale to them was made with the knowledge of the plaintiff, who did not offer to buy; and the pre-emptors (defendants) urged that, inasmuch as plaintiff was not in possession of her share in the paternal estate in respect of which she claimed the right of pre-emption, she could not maintain the suit.

The Subordinate Judge finding that the plaintiff was not in possession of her share in the estate left by her father dismissed the suit. On the 9th July, 1886, plaintiff appealed to the District Judge, and that officer, agreeing with the Subordinate Judge, dismissed the appeal as against the rival pre-emptors, but directed that if they did not avail themselves of the decree they had obtained, then plaintiff should obtain the property on payment of the purchase-money.

On the 12th January, 1887, plaintiff preferred this second appeal, contending that whether she was or was not in possession of her share in the paternal estate, she was still a co-sharer in the village and entitled to maintain the suit.

On the 20th of January, 1887, the plaintiff's share in the village out of which she alleged that her right arose was sold in execution of a decree against her in some other case.

The appeal came on to be heard before Mahmood, J., who referred it to a Bench of two Judges with reference to the contention on behalf of the respondents that the plaintiff's own share in the village and out of which alone her claim to pre-emption in respect of the share sold had arisen, having been sold by auction and so lost to her, she was no more entitled to a decree in the suit. In support of their contention the respondents cited the case of *Khuda Bakhsh* v. *Ramlautan Lal* (1).

The appeal was then heard before EDGE, C. J., and MAHMOOD, J.

Mr. G. T. *Spankie*, for the appellant.

Mr. *Abdul Majid*, for the respondents.

(1) Weekly Notes, 1884, p. 169.

EDGE, C. J.—This was an action for pre-emption. The defendants Amiran and Karim Bakhsh were also claimants for pre-emption in the share sold. The Subordinate Judge dismissed the claim. The District Judge in effect dismissed the action as against Amiran and Karim Bakhsh, but gave the plaintiff a right to obtain the share if Amiran and Karim Bakhsh did not avail themselves of the decree which they had obtained in the action. From that decree this appeal has been brought.

Mr. *Abdul Majid* for the respondents has raised a preliminary objection. The objection is this :—He says, and it is not denied on behalf of the appellant, that pending the appeal to this Court, that is to say, since the appeal to this Court was filed, the share out of which the plaintiff alleged that her right arose was sold in the execution of a decree in some other case. He contends that under these circumstances we cannot pass a decree in her favour. He bases his contention on a passage cited to us from Shama Churun Sircar's Muhammadan Law (1) in which it is stated that "if the *shuffi* previous to the decree of the *kazi* sell the house from which he derives his right of *shuffa*, the reasons or grounds of his right being thereby extinguished, the right itself is invalidated, notwithstanding he be ignorant of the sale of the house to which it related."

I do not accede to Mr. *Abdul Majid's* contention. It appears to me that sitting here as a Court of Appeal, we have got to see what was the decree which the Court of first instance should have passed, and if the Court of first instance wrongly dismissed the claim, the plaintiff cannot be prejudiced by her share having been subsequently sold in execution of a decree in another suit. It could not be contended, I think, if the plaintiff had obtained a decree in the Court of first instance, that her right to maintain the decree either on review or appeal could possibly be affected by a subsequent sale of the share out of which her right of pre-emption arose. The subsequent sale could not have been alleged as a ground of appeal for instance. It was not a matter which could have made the decree of the Court of first instance, in such a case, wrong in law or in fact; and I can see no distinction between the case in which the plaintiff obtains a decree for pre-emption in the Court of first

(1) Tagore Law Lectures, 1873, p. 535.

1888

SAKINA BIBI v. AMIRAN.

instance, and a case in which she proves to a Court of appeal that she was entitled to a decree in the Court of first instance which she did not obtain. In consequence of this view the preliminary objection fails.

Now, as to the actual appeal before us, it appears that the plaintiff, at the date of the institution of the suit, was not in physical possession of the share out of which the right of pre-emption arose, and that she continued dispossessed up to the time of the judgment in the lower appellate Court. The lower appellate Court appears to have considered her case as one in which she had not proved her right against the other pre-emptive claimants on the ground that she was not in possession of the share out of which her right was alleged to have arisen. Now as to these circumstances, I think it was the duty of the lower appellate Court to ascertain whether the plaintiff was, at the date of the suit, entitled in law to the share out of which her right of pre-emption was alleged to have arisen. The mere fact of her not being in possession of it was immaterial except in so far as that fact might be urged as showing that she was not entitled to it. Now this is the question which the lower appellate Court has not tried. There is another material question in the case which has not been tried, and it is as to whether, assuming that the plaintiff is entitled to the share out of which the right is alleged to have arisen, she has only an equal right of pre-emption with Amiran and Karim Bakhsh or whether she has an inferior or superior right. The nature of the decree, if the plaintiff is entitled to one, will depend upon the findings on those points. I merely refer to these issues not as expressing exhaustively the issues that have not been tried, because the lower appellate Court has not tried any issues at all.

The decree of the lower appellate Court is set aside, the appeal decreed, and the case remanded under s. 562 of the Civil Procedure Code.

Costs to abide the event.

MAHMOOD, J.—I am of the same opinion, but as the Judge who referred the case to a Bench, I wish to say that the reasons and the facts which rendered it necessary for me to refer the case are stated in my order of the 1st February, 1888. The central

1888

SAKINA BIBI v. AMIRAN.

reason of the reference was, whether the sale of the pre-emptive share, that is to say, of the rights and interests of Musammat Sakina Bibi during the pendency of the appeal would render the dismissal of the appeal a necessary result. The appeal was admitted on the 12th January, 1887, and its aim and object of course was to have it decreed by this Court that, in respect of the sale of the 25th July, 1885, the plaintiff should have, on the 12th June, 1886, when the first Court dismissed her suit, had her suit decreed instead.

Mr. *Abdul Majid* argued that the sale of Musammat Sakina's rights and interests, which sale took place exactly eight days after the admission of this second appeal, namely, on the 20th January, 1887, was sufficient to deprive her of her pre-emptive right, and for this contention he relied upon the passage to which the learned Chief Justice has referred, namely, the passage at page 535 of the Tagore Law Lectures for 1873, and the passage from the Hedaya to be found at page 562 of Grady's edition of Hamilton's Hedaya, which runs as follows :—

"Besides, it is an express condition of *shuffa*, that a man be firmly possessed of the property from which he derives his right of *shuffa* at the time when the subject of it is sold—a condition which does not hold on the part of the heirs. It is, moreover, a condition that the property of the *shuffi* remain firm until the decree of the *kazi* be passed, and as this does not hold on the part of the deceased *shuffi*, the *shuffa* is therefore not established with respect to any one of his descendants, because of the failure of its conditions."

The learned counsel argued that the passage in the Hedaya meant that actual physical possession of a share, that is to say, of the pre-emptive share, was a condition precedent to the exercise of the right of pre-emption. The translation as made by Mr. Hamilton is somewhat loose, but it is clear that what is intended to be conveyed by the author of the Hedaya was, that, in what I may call the pre-emptive tenement, the pre-emptor should have vested ownership and not a mere expectancy of inheritance or a reversionary right, or any other kind of contingent right, or any interest which falls short of full ownership. For instance, in the

1888

SAKINA BIBI v. AMIRAN.

case of a usufructuary mortgagee who is in possession, the application of the passage would require holding that no right is possessed by such a mortgagee. I do not think that any other interpretation can be placed upon the passage, and I hold also that such is the case-law as shown by some of the reported cases.

Then as to the question, whether a sale such as the sale of the 20th January, 1887, falls within the rule contended for by Mr. *Abdul Majid*, I agree with the learned Chief Justice in holding that we, as a Court of Appeal, are concerned with the question what the decree of the first Court should have been, and not with the matters which have happened since the decree was passed, other than those relating to the array of parties which occurred subsequent to the decree of the Court of first instance. I may say, as I understand the text of the Hedaya, namely, the text at pages 601 and 602, that I have no doubt that although the Muhammadan Law requires that, if by reason of a voluntary sale or other circumstance the pre-emptor before the passing of the decree of the first Court ceases to be the owner of the pre-emptive tenement, then the decree cannot be given in his favour; yet the rule cannot be carried to Courts of Appeal, or Courts of Error, as the Courts concerned with rectification of the decrees of the Courts below. There is also some doubt in my mind whether the passage so far as it relates to sale by a pre-emptor of his pre-emptive tenement before the decree of the *kazi*, is applicable to compulsory sales such as the sale of the 20th January, 1887. The sale may or may not have been validly made. It may possibly be the subject of a separate litigation in the execution department to which execution proceedings the present defendants, Mr. *Abdul Majid's* clients, would possibly be no parties, and the fate of the litigation may be in favour of Musammat Sakina Bibi or against her. Such facts cannot be taken notice of at this stage in a litigation, which, if the pre-emptor's case is established, was rightly commenced and should have ended in the decretal of her claim.

In connection with the latter point I think it my duty to refer to the case of *Khuda Bakhsh* v. *Ramlautan Lal* (1) in which a Division Bench of this Court held that, because subsequent to a

(1) *Weekly Notes*, 1884, p. 169

1888

SAHINA BIBI v. AMIRAN.

decree for pre-emption, and during the pendency of the appeal, in a totally separate litigation a decree had been passed which directed that the pre-emptor was not entitled to the pre-emptive tenement, namely, the tenement which gave him the right to sue, therefore such adjudication deprived such pre-emptor of his pre-emptive right and rendered the decree for pre-emption null and void. The case is not on all fours with the present case. If the case were applicable to this case I should have very great hesitation in holding that it was correct law. The rule of *lis pendens* is a broad doctrine, and the maxim *pendente lite nihil innovetur* is sufficiently broad to invest this question with some difficulty.

This case has not been tried upon the merits, and there are other questions in the case to which I have not referred, because I agree in the order of the learned Chief Justice that the case should go back under s. 562, of the Civil Procedure Code and be tried on the merits by the lower appellate Court, which Court should frame a decree such as the findings may require.

Costs to abide the result.

Cause remanded.

Before Mr. Justice Straight and Mr. Justice Mahmood.

1888
May 2.

ANGAN LAL (PLAINTIFF) *v.* GUDAR MAL AND ANOTHER (DEFENDANTS).*

Execution of decree—Deceased Judgment-debtor—Execution against a person not the legal representative.

The defendants, along with one *N* and *C*, had brought a suit against one *A* in the Civil Court at Peshâwar in the Panjâb and obtained a decree on the 23rd July, 1878, for Rs. 30,545-12-0. In 1881 application for transfer of the decree to the Court at Moradabad for execution was made, and it was granted, but no steps were taken thereupon. On the 12th June, 1883, *A* died. On the 30th April, 1884, the defendants again applied to the Court at Peshâwar treating their judgment-debtor as being then alive, for a fresh certificate to execute their decree in the Moradabad district, and obtained it. On the 20th of August, 1885, they made an application to the District Judge of Moradabad for execution of their decree, and in it, it was stated that the application was "for execution against Ajudhia Prasad and after his death against Angan Lal, the own brother, and Durga Kuar, widow, and Luchman Prasad and others, sons of Ajudhya Prasad, residents of Kundarkhi and the said Angan Lal at present residing at Umballa and employed in the Commissariat Transport Department, judgment-debtors." It was further stated that "the judgment-debtor was dead, and his heirs are living and in possession of his estate, and Angan Lal

* First Appeal No. 198 of 1886, from a decree of Maulvi Zain-ul-abdin, Subordinate Judge of Moradabad, dated the 16th September, 1886.