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that such a suit only lies in the Civil Court, that it is one within the spirit of s. 9, and, as such, is saved from the prohibition of s. 4, and that the learned Judge's view was erroneous, and that the suit to which the ruling of the Bombay Court in *Babaji Hari v. Rajaram Ballab* (1), upon which he relied applies, is distinguishable from the present in the particulars to which we have referred.

We decree the appeal and, reversing the decree of the Judge, restore that of the first Court. The plaintiffs to have their costs in all Courts.

Appeal decreed.

Before Mr. Justice Straight and Mr. Justice Tyrrell.

BALMUKAND (DECREE-HOLDER), v. PANCHAM (JUDGMENT-DEBTOR).*

Pre-emption—Conditional decree—Appeal—Purchase-money—Costs—Civil Procedure Code, ss. 214, 583.

A court of first instance decreed a claim for pre-emption conditionally, on the pre-emptor paying into Court Rs. 125 within a specified period, and also awarded the pre-emptor Rs. 39-9-0 as his costs in the suit. Within the specified period the pre-emptor paid into Court the Rs. 125, and subsequently executed his decree for costs, by drawing out therefrom the Rs. 39-9-0. After this the decree was modified on appeal, the appellate Court raising the Rs. 125 payable as the condition of pre-emption to Rs. 200, and reversing the first Court's order as to costs. Within the period specified in the appellate Court's decree the pre-emptor paid into court the further sum of Rs. 75. Subsequently the vendee, defendant, applied to the Court under s. 583 of the Code of Civil Procedure to have the property in suit restored to him, contending that the pre-emptor had failed to pay the full Rs. 200 within the prescribed period.

Held by Straight, J., affirming the judgment of Mahmood, J., that this contention must fail; that the payment of Rs. 125 due under the first Court's decree could not be said to have been reduced by the pre-emptor subsequently executing against the amount so paid the order of that Court in his favor for costs, and that the subsequent payment of Rs. 75 within the period prescribed by the appellate Court satisfied the requirements of that Court's decree, subject to the judgment-debtor's right to recover the costs realised in execution of the first Court's decree.

Held by Tyrrell, J., *contra*, that although the pre-emptor had once made a payment, which for a few days was a compliance with the first Court's decree, such compliance became immaterial when that decree was modified on appeal, and as he had never had in any Court a credit for Rs. 200, as required by the appellate Court's decree, which alone was the decree in the cause, he had failed to fulfil the condition essential to pre-emption, and therefore the defendant's application should be allowed.

* Appeal No 7 of 1887 under s. 10, Letters Patent.

(1) I. L. R., 1 Bom., 75.

This was an appeal, under s. 10 of the Letters Patent, from a judgment of Mahmood, J.

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The facts are sufficiently stated in the judgments of the Court.

Lala Moti Lal Nehru, for the appellant.

Lala Jokhu Lal, for the respondent.

MAHMOOD, J.—The facts necessary for the disposal of this appeal may be briefly recapitulated as follows :—

One Musammat Umedi Kuar, by a sale-deed, executed on the 10th July, 1883, sold the property now in suit in favor of Balmukand, the appellant before me. That sale appears to have been made in contravention of the pre-emptive right possessed by Pancham, the respondent before me, and he sued for the enforcement of that right, and on the 20th December, 1883, obtained a decree awarding him the pre-emptive right and possession of the property on payment of a sum of Rs. 125, together with costs. From that decree an appeal was preferred by the purchaser, Balmukand, and the lower appellate Court, which had to deal with that case, decreed the appeal so far as to increase the sum of Rs. 125 to Rs. 200 as consideration of the sale, and in regard to costs that Court decreed that the parties should pay their own costs. The decree specified that the sum of Rs. 200 was to be deposited by the pre-emptor within a month of the time when that Court's decree would become final, by which it must be understood, as has been held in more than one ruling, to be the date upon which the period of limitation for an appeal would expire.

In the meantime it appears that Pancham, respondent, having obtained the decree of the first Court dated the 20th December, 1883, went with Rs. 125 to the Court which passed that decree, on the 15th January, 1884, and on that date deposited the sum of Rs. 125 which that decree directed. The deposit was undoubtedly within the time allowed by that decree, and there is no question that it was a valid deposit of the purchase-money. But the decree under which the deposit was made also awarded costs amounting to Rs. 39-9-0 to Pancham, and it appears that subsequently, by executing that decree, he realized the sum last mentioned from the Court on the 5th March, 1884. Both these facts

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are antecedent, of course, to the appellate Court's decree of the 18th April, 1884. It then appears that, in obedience to the latter decree, the said Pancham deposited a sum of Rs. 75 on the 14th May, 1884, in order to make up the earlier deposit of Rs. 125 up to the sum of Rs. 200 as required by the appellate Court's decree.

Certain proceedings then appear to have taken place in the Court of first instance, to which it is not necessary to refer beyond saying that they led to an application for review of judgment preferred by Balmukand, the present appellant, to the lower appellate Court, praying for review of that Court's decree of the 18th April, 1884. The application appears to have been granted, and the decree of the 18th April, 1884, was considerably modified in respect of the order as to costs, and such modification is indicated in the order passed upon review dated the 3rd February, 1885.

It is the decree as modified by this last-mentioned order in respect of which Balmukand presented the application from which this appeal has arisen. The application was made on the 6th June, 1885, praying that the property in respect of which Pancham had succeeded in enforcing pre-emption might be restored to the applicant, because Pancham had not deposited the whole amount of Rs. 200 within the period limited either by the decree of the 18th April, 1884, or by the amended decree of the 3rd February, 1885, inasmuch as he had taken away the sum of Rs. 39-9-0 as costs under the decree of the first Court dated the 20th December, 1883, which decree, as I have already mentioned, had been modified by the lower appellate Court as to costs.

Both the Courts have rejected this contention upon the ground that, under the circumstances of the case, Pancham, the pre-emptor, had fulfilled the conditions of the lower appellate Court's decree in respect of the deposit of Rs. 200.

I am of opinion that the conclusion at which the lower Courts have arrived is sound under the circumstances of this case. In the first place, the first Court's decree of the 20th December, 1883 was duly obeyed by the pre-emptor Pancham when he made the deposit of Rs. 125 on the 15th January, 1884, and it was in due obedience to that same decree that he realized the sum of Rs. 39-9-0 on the 5th March, 1884, as the costs of the litigation to which he

was declared entitled by that Court's decree. The lower appellate Court's decree of the 18th April, 1884, which increased the amount of Rs. 125 to the sum of Rs. 200, was also duly obeyed by Pancham, the pre-emptor, when he made the additional deposit of Rs. 75 on the 14th May, 1884. The effect of such deposit was that, as a matter of fact, Rs. 200 were deposited in obedience to the decree of the 18th April, 1884, which decree in this respect was not modified by the decree passed on review dated 3rd February, 1885.

What is argued now is simply the question that because on the 5th March, 1884, Pancham, the pre-emptor, took away the sum of Rs. 39-9, in execution of the decree of the 20th December, 1883, it was his duty, in obeying the decree of the appellate Court of the 18th April, 1884, to have deposited on the 14th May, 1884 not only the sum of Rs. 75 but also the sum of Rs. 39-9 which he had already taken away as I have mentioned. It appears to me that this contention involves a conclusion between two different matters which require consideration in this case. Whether or not the order whereunder Pancham took away Rs. 39-9 on the 5th March, 1884, was a legal and valid order is one question, and the question whether the deposit of Rs. 125 made on the 15th January, 1884, and the additional deposit of Rs. 75 made on the 14th May, 1884, did or did not amount to a deposit of Rs. 200 within the meaning of the appellate Court's decree, is another. It is only the last question I am called upon to consider. I hold that the lower appellate Court's decree being dated the 8th April, 1884, and the two deposits aggregating to Rs. 200, having been made within the time fixed, the pre-emptor did not forfeit the pre-emptive rights which had been declared in his favour by that decree. The terms of s. 214 of the Code which relate to such matters contain no provisions that under conditions of this character the right already established, proved, and decreed should be vitiated simply because by an order of the Court, erroneous or not, a portion of the price deposited was returned in execution of a decree. It is not necessary for me to decide any question as to the order whereunder Rs. 39-9 were taken by Pancham, but I think I may say, that in circumstances such as these, it is likely, there is still open to the present purchaser Balmu-

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kand, appellant, the remedy to obtain restitution of the sum of Rs. 39-9 which Pancham took away under the order of the Court, and that such remedy could be obtained by him under the appellate decree of the 18th April, 1884, amended as it was on the 3rd February, 1885. Upon the general principles relating to the doctrine of restitution, I need only refer to the case of *Jaswant Singh v. Dip Singh* (1). This being so, I do not think that the plea urged on behalf of the appellant is sustainable. I dismiss this appeal with costs.

The defendant appealed from this decision under s. 10 of the Letters Patent.

The parties were represented as before.

STRAIGHT, J.—I concur with my brother Mahmood's judgment in Single Bench. It seems to me that when the Munsif accepted the Rs. 125 on the 15th of January, 1884, as satisfying the condition contained in the decree of the 20th December, 1883, and put the pre-emptor in possession, the purchase price directed thereby to be paid must be taken to have been then and there *pro tanto* discharged, and the payment ought, in my opinion, to hold good, in any event, as and for the full amount of Rs. 125. The fact that upon another application and by way of executing the decree, which by the payment of the Rs. 125 had become absolute in favour of the pre-emptor and so capable of execution for his costs, a sum of Rs. 39-9 was on the 5th March, 1884, paid to the decree-holder in respect of such costs, does not appear to me to alter or qualify the nature of such payment any more than could be the case where a debtor who has paid a sum of money to his creditor for the liquidation of a specific debt, which is accordingly written off as specified, can be said to reduce such payment by the amount of any subsequent loan taken by him from the creditor. *Quá* the Munsif's Court which admitted the decree to execution on payment of the Rs. 125, the whole amount was held to the credit of the vendee from the 15th January, 1884 to the 1st of March, 1884, and he might have withdrawn it at any moment. On the 1st of March it stood as money belonging to the vendee, against which the pre-emptor was entitled to execute for his costs, and that the

(1) I. L. R., 7, All., 432.

Court so regarded it is evident by its first paying out the Rs. 39-9 and subsequently receiving the Rs. 75 on the 14th May, 1884, as sufficiently making up the Rs. 200, which the appellate Court had found to be the true price and had called upon the pre-emptor to deposit. The Court having accepted the Rs. 75 as satisfying the requirements of the appellate decree, it would, in my opinion, be most inequitable to hold that it did not, more particularly as the pre-emptor has in the proceedings the subject of the present appeal, expressed his willingness to refund the costs he realized, and for aught that appears to the contrary, has all along been ready to do so. In dealing with the appellate decree, I think the Courts were justified in regarding the Rs. 125, paid in compliance with the Munsif's decree, as a payment to that amount on account of the Rs. 200 subsequently ordered to be paid by the appellate Court, and as in no way involved in distinct questions arising between the parties in reference to costs. I am not prepared, therefore, to hold that the Courts below, whose orders my brother Mahmood has upheld, were wrong in taking the view that there had been no default on the part of the pre-emptor, and I therefore dismiss the appeal with costs.

TYRRELL, J.—On the 20th December, 1883, Pancham, respondent, got a decree under s. 214 of the Civil Procedure Code, enforcing his right of pre-emption as against Balmukand, appellant, on condition of his paying Rs. 125 as purchase-money within a specified time. This decree also awarded Rs. 39-9 as costs by Balmukand to Pancham.

On the 15th January, 1884, Pancham paid this purchase-money of Rs. 125 into Court and obtained from the Court possession of the estate in suit.

On the 5th March, 1884, Pancham drew out of the hands of the Court Rs. 39-9 from the purchase-money he had deposited, reducing it thus to a sum of Rs. 85-7.

On the 18th April, 1884, the appellate Court, on the appeal of the vendee Balmukand, decreed that the true purchase-money payable to the latter by Pancham was Rs. 200 instead of Rs. 125, and it cancelled the award of Rs. 39-9 as costs payable by Balmukand to Pancham. By this decree then, which is the only

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decree to be looked to in the execution of the case, Pancham's possession of the estate was made conditional on his putting the Court executing the decree in a position to pay over Rs. 200, and no less sum, to Balmukand. Now at the date of this decree Pancham had a credit by way of deposit in the Court of first instance, which was charged with executing the decree, to the amount of Rs. 85-7 only.

On the 13th May, 1884, he deposited Rs. 75 only, making a total deposit of Rs. 160-7 only as the purchase-money of the estate. On the 3rd February, 1885, it was brought to the notice of the appellate Court that its decree of the 18th April, 1884, had omitted to provide for the costs of the vendee on the contingency of the pre-emptor not paying the purchase-money. The Court amended its decree by declaring that the pre-emptor failing to pay the purchase-money decreed should pay the vendee Rs. 36-11 as his costs. It is obvious that the appellate Court would not have allowed this motion for review, which would have been futile and superfluous, if it had regarded Pancham as having complied with its order by depositing Rs. 75, only as mentioned above. On the 6th June, 1885, the vendee Balmukand applied to the Court, under s. 583 of the Civil Procedure Code, to have the property restored to him in consequence of Pancham's failure to pay the full purchase-money within the decretal period. Both the Courts below, and Mahmood, J., here, sitting in jurisdiction over second appeals of small value, have held that Pancham had complied with the decree ordering him to pay Rs. 200 as purchase-money to Balmukand. The main reason for this view seems to be that Pancham did actually once make a payment which at the moment, and for a few days, was a compliance with the decree of the Court of first instance. But it seems to me to be undeniable that Pancham has never complied with the decretal condition of the true decree in the case, the decree directing payment of Rs. 200. The decree of the Court of first instance passed out of existence on the 18th April, 1884, and we need not consider whether the pre-emptor may have complied with its terms or not. It seems to me to be undeniable that the pre-emptor has not at any moment of time from the date

of the institution of his suit, to the present hour, had a credit in any Court for Rs. 200, and that he has, therefore, failed to fulfil the condition essential to his possession of the vendee's estate under the decree in the suit. I fail to see how his profession of willingness now, to complete the payment long after the expiry of the decretal period, can alter his position for the better in this respect.

Under these circumstances, I think the Courts below were wrong, but as my brother Straight's decree is decisive of the appeal to the contrary, it is unnecessary to formulate the order which, from my point of view, should have been made in the case.

Appeal dismissed.

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

RAMADHIN AND ANOTHER (PLAINTIFFS) v. MATHURA SINGH AND OTHERS
(DEFENDANTS)*

Hindu Law—Hindu widow—Gift by Hindu widow of her own interest and that of consenting reversioner.

A Hindu widow in possession can, with the consent of a reversioner, make a valid gift which will operate so far as the interest of the widow and that of the consenting reversioner are concerned. *Rany Srimuty Dibeak v. Rany Koond Luta* (1) *Kooer Goolab Singh v. Rao Kurun Singh*, (2) *Sia Dasi v. Gur Sahai* (3) and *Raj Bullabh Sen v. Oomesh Chunder Roop*, (4) referred to.

Ramphal Rai v. Tula Kuari (5) distinguished.

One Lachman Singh died some years ago leaving a widow Dharm Kuar, and a daughter, Piari Kuar. He was possessed of an eight-anna share in mauza Kharsa and some houses and gardens. On his death his widow inherited the same, and her name was recorded in respect thereof. On 25th March, 1879, she executed a deed of gift of the property in favor of one Himmut Singh, a son of her daughter, Piari Kuar. It was stated in the deed that the gift was made with the consent of Piari Kuar. Dharm Kuar died in September, 1879, leaving her daughter and two sons by her, viz., the said Himmut Singh and Bhawani Singh.

* First Appeal, No. 110 of 1886, from a decree of Munshi Kulwant Prasad, Subordinate Judge of Cawnpore, dated the 10th February, 1886.

(1) 4 Moo. I. A. 292. (3) I. L. R., 3 All., 362.
(2) 14 Moo. I. A. 176. (4) I. L. R., 5 Cal., 44.
(5) I. L. R., 6 All., 116.