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For these reasons I decree the appeal, and as the amount due for costs is a matter relating to accounts, the proper course is to set aside the order of the lower appellate Court and remand the case under s. 562 of the Civil Procedure Code to be dealt with according to law as stated in this judgment. I order accordingly. Costs will abide the result.

Cause remanded.

1888
January 9.

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

ARJUN SINGH (OPPOSITE PARTY) *v.* SARFARAZ SINGH (PETITIONER).*

Pre-emption—Wajib-ul-arz—Rival suits—Decree not to allow either claimant to pre-empt part only of the property over which he has a pre-emptive right.

Where two rival pre-emptors, each having an equal right to claim pre-emption under a *wajib-ul-arz*, bring suits to enforce their rights, in the absence of anything in the *wajib-ul-arz* to the contrary, the rule of Muhammadan law must be observed, and however the property may be divided by the decree of the Court between the successful pre-emptors, the Court must take care that the whole share must be purchased by both pre-emptors, or on the default of one by the other, or that neither of them should obtain any interest in the property in respect of which the suits were brought.

In two rival suits for pre-emption, the Court gave one claimant a decree in respect of a three annas share, and the other a decree in respect of a two annas six pies share of certain property, each decree being conditional on payment of the price within thirty days. The Court further directed that in case of either pre-emptor making default of payment within the thirty days, the other should be entitled to pre-empt his share on payment of the price thereof within fifteen days of such default. Both pre-emptors made default of payment within the thirty days. One of them, within the further period of fifteen days, paid into Court the price of the share decreed in favour of the other and claimed to pre-empt such share.

Held (affirming the judgment of MAHMOOD, J.) that the claim was inadmissible, since to allow it would have the effect of defeating the rule of law that a pre-emptor must buy the whole and not part only of the property which he is entitled to pre-empt.

THIS was an appeal under s. 10 of the Letters Patent from a decision of Mahmood, J., sitting as a single Judge. The facts of the case are fully stated in the judgments of the Court.

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

Munshi *Ram Prasad*, for the respondents.

MAHMOOD, J.—The facts of this case are these:—One Ram Kant Misr was the owner of a 5 annas 6 pies share, which he sold under a sale-deed dated Pus badi 12, 1290 fasli (1883) to Ganga

*Appeal No. 13 of 1887 under s. 10, Letters Patent.

Mahton and Har Bakhsh Mahton. Upon this sale two pre-emptive suits were instituted, one by Arjun and the other by Sarfaraz. Both suits were decreed on the 16th August, 1884, which decrees were upheld in appeal on the 31st October, 1885. The effect of those decrees was that whilst the pre-emptor Arjun was held entitled to pre-empt a three annas share in lieu of Rs. 1,308-9-0, the rival pre-emptor Sarfaraz was held entitled to pre-empt the remaining 2 annas 6 pies share on payment of Rs. 1,090-7-0. But it was provided in both the decrees that in case of default of either of the pre-emptors to pay in the amount above specified within a period of thirty days, the other pre-emptor would be entitled to pre-empt the remaining portion of the share decreed to the other pre-emptor on payment of the price thereof within fifteen days of such default.

It is therefore clear that the decrees of Arjun and Sarfaraz related to the entire 5 annas 6 pies share, subject to the restriction therein contained as I have mentioned. Such decrees were in full accord with the rule which applies to decrees for pre-emption in cases of rival pre-emptors, as fully stated in the case of *Kashi Nath* v. *Mukhta Prasad* (1), which was approved in *Hulasi* v. *Sheo Prasad* (2). It is also clear that each decree awarded pre-emption in respect of the whole subject of sale. Nor can these decrees be understood to have infringed the fundamental rule of pre-emption, namely, that the bargain of sale cannot be split up with reference to the subject-matter of the sale. This latter proposition is the effect of the ruling in *Durga Prasad* v. *Munsi* (3) and the cases referred to therein.

What appears to have happened here is that neither Arjun nor Sarfaraz deposited their respective sums of money within the thirty days specified in their respective decrees. The present dispute, however, has arisen because Arjun, the present respondent, having lost the benefit of his decree, is seeking to obtain the benefit of the decree obtained by Sarfaraz by depositing within fifteen days from the date of the default the sum of Rs. 1,090-7-0 as the purchase-money of the 2 annas 6 pies share which had been decreed in favour of Sarfaraz, and in respect of which the decree provided

(1) I. L. R. 6 All. 370. (2) I. L. R. 6 All. 455.
(3) I. L. R. 6 All. 423.

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that Arjun, the rival pre-emptor, might enforce pre-emption on default of payment by Sarfaraz.

The Court of first instance held that the decree obtained by Sarfaraz could not be executed in this manner in favour of Arjun, who was judgment-debtor of that decree, and that such a partial execution of a pre-emption decree could not be allowed. Upon this ground that Court disallowed the application for execution, which, I may add, was opposed by Sarfaraz also, the holder of the decree under which Arjun claimed. The lower appellate Court, however, has reversed that order, and from that order this second appeal is preferred.

It seems to me clear that the lower appellate Court has misapprehended the case and the rule of law applicable to it. It is admitted that in the decree obtained by Arjun, the vendor and the vendee as well as the rival pre-emptor Sarfaraz were defendants and became judgment-debtors when the claim was decreed. Similarly in the decree obtained by Sarfaraz the vendor and the vendee were defendants, as also Arjun, the rival pre-emptor. Now this being so, the decree of which the decree-holder could avail himself was the decree which he himself obtained, and not the decree which had been passed against him, whatever its terms may have been. The present respondent Arjun allowed his decree for pre-emption to lapse by reason of not having deposited Rs. 1,308-9, which that decree required him to do within thirty days, and that decree could not therefore be of any further use to him. Having thus foregone the benefit of his decree, I do not think he is entitled to execute the decree which Sarfaraz had obtained, simply because that decree, with reference to the other decree, allowed Arjun to pre-empt the remaning 2 annas 6 pies share within fifteen days of the default of payment of the purchase-money by Sarfaraz. The effect of the ruling of the lower appellate Court would be to split up the bargain of sale, because if Arjun could pre empt only the 2 annas 6 pies share as he is seeking to do here, the remaining 3 annas would still be left in the hands of the vendees. The view of the law taken by the lower appellate Court is erroneous, because it is opposed, as I have already said, to the very fundamental principles of the law of pre-emption. Mr. *Ram Prasad*, on behalf of the respondent, has

indeed argued that in dealing with this case as a Court executing the decree, I am bound by the terms of the decrees, and thus I am precluded from applying the general principles of pre-emption at this stage. As to this contention, it is enough to say that, in the first place, the decrees themselves have for their sole aim and end the exclusion of such a splitting up of the bargain of sale as would result from the order of the lower appellate Court, and in the next place that in interpreting those decrees I cannot disregard the general principles of the law of pre-emption.

I hold, therefore, that the respondent Arjun, by foregoing his own decree by default of payment, is precluded from availing himself of the decree obtained by the rival pre-emptor Sarfaraz. In this view of this case this appeal is decreed, and the order of the lower appellate Court being set aside, that of the Court of first instance is restored. The respondent will pay costs in all the Courts.

From this decree Arjun appealed under s. 10 of the Letters Patent.

Munshi *Ram Prasad*, for the appellant.

Mr *J. Simeon*, for the respondent.

EDGE, C. J.—This appeal has arisen in the execution of a decree in a pre-emption suit. The share-holder in the village sold to a stranger, so far as is material, a 5 annas 6 pies share. Upon that Arjun Singh, the present appellant, brought his action for pre-emption of the whole share. Sarfaraz Singh, who was equally entitled with Arjun to pre-emption, brought his action claiming to pre-empt the whole. These two actions were tried together by the then Judge of Gorakhpur, and he dealt with them in this way: he passed a decree in Arjun Singh's favour in respect of 3 annas out of the 5 annas 6 pies on payment within thirty days of the date of the decree of Rs. 1,308-9-0, and in favour of Sarfaraz Singh in respect of the remaining 2 annas 6 pies on payment within a like period of Rs. 1,090-7-0, and by both of the decrees it was provided that in case of default on the part of either of the pre-emptors to pay the amount above specified within a period of thirty days, the other pre-emptor would be entitled

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to pre-empt the remaining portion of the share decreed to the other pre-emptor on payment of the price thereof within fifteen days of such default. What has taken place is this: the two pre-emptors made default of payment within thirty days. Arjun Singh after the expiration of thirty days, and within the further period of fifteen days, paid into the Court the Rs. 1,090-7-0, the pre-emption price decreed in respect of the 2½ annas share, and he now claims in execution to have possession of that 2½ annas share. It appears that by some arrangement to which Arjun Singh was no party, and which is not necessary for me to consider, Sarfaraz Singh, although he made default, got possession of the 2½ annas share. For the purposes of my judgment it is immaterial whether Sarfaraz Singh got possession of the 2½ annas share or not. The Subordinate Judge dismissed Arjun Singh's claim to have execution in respect of the 2½ annas share. The District Judge on appeal allowed that claim. My brother Mahmood, on appeal to this Court, for the reasons given in his judgment, confirmed the order of the Subordinate Judge and set aside the order of the District Judge with costs. From that decree of my brother Mahmood this appeal is brought under s. 10 of the Letters Patent. The case of *Kashi Nath* v. *Mukhta Prasad* (1), that of *Durga Prasad* v. *Munsi* (2), and that of *Hulasi* v. *Sheo Prasad* (3) are clear authorities in this Court, if any such authority was required, to show that the rule of the Muhammadan law which applies in pre-emption cases is that the person claiming pre-emption must claim the whole property sold and not part only if he has, as against the vendee, a pre-emptive right to the whole. Indeed, the case of *Hulasi* v. *Sheo Prasad* (3) shows that that rule applies even to the case of a pre-emptor who brings his action after another pre-emptor has already brought an action in respect of the same share. It is contended before us on behalf of Arjun Singh that we should construe the decree in these pre-emption suits as if they gave Arjun Singh a right to get the 2 annas 6 pies share even if he made default in paying the Rs. 1,308-9-0, the decreed pre-emption price in respect of the 3 annas share which was decreed to him. It is contended that such a decree would have been a good one according to the rulings of this Court. For that proposition three cases have been cited.

(1) I. L. R. 6 All. 370. (2) I. L. R. 6 All. 423.
(3) I. L. R., 6 All. 455.

The first of those cases is that of *Salig Ram* v. *Debi Parshad* (1), a Full Bench case of this Court. That case is no authority for that proposition. That case simply decided that by the settlement administration papers of the village a sharer was entitled to maintain an action for less than the whole share sold. The next case was that of *Mahabir Parshad* v. *Debi Dial* (2). In that case this Court held that the appellants there, on payment of Rs. 200, were entitled to obtain a two-thirds share, and that one Duliman should pay into Court within the same time, that was one month, Rs. 100 and obtain a one-third share, and that if either of the appellants in that case or Duliman should fail to pay the amount within one month, "the other of them making the further deposit within the time shall be entitled to the share of the defaulter." It is perfectly plain from that judgment that the Court meant that the price of the whole share should be paid, and that not a part only of the price should be paid by some or one of the parties. The last case relied on is unreported. It is Second Appeal from Order No. 4 of 1886 (3). That case is very different from the present case. In that case the person before the Court was not a defaulter; he had in fact paid into Court the amount of money for which, in the result of his appeal, it had been decreed he should obtain a moiety of the share. Now I take it to be the law that in a case such as this, where two rival pre-emptors having each and equal right to claim pre-emption bring their pre-emption suits, and there is nothing in the *wajib-ul-arz* to the contrary, the rule of Muhammadan law must still be observed, and however the share may be divided by the decree of the Court between such successful pre-emptors, the Court must take care that the whole share must be purchased by both pre-emptors, or on the default of one by the other, or that neither of them should obtain any interest in the share in respect of which the pre-emption suits arose. To hold otherwise would be to enable the shareholders in a village who did not wish to comply with the rule of Muhammadan law to which I have referred, where it applies, as in this case, to obtain possession of a portion of the share and leave the other portion of the share in the hands of the vendor or vendee. I must apply a reasonable construction to the decree of the Judge of Gorakhpur, and I hold that that decree meant, to take the case

(1) N.-W. P. H. C. 1875, p. 38. (2) I. L. R. 1 All. 291.
(3) Not reported.

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of Arjun Singh, that if he within a specified time paid the Rs. 1,308-9 in respect of the 3 annas share, he would be entitled, on default made by Sarfaraz Singh, to obtain Sarfaraz Singh's share on payment within the further period of fifteen days of the Rs. 1,090-7-0. I am of opinion that the judgment of my brother Mahmood is a right judgment in law, and that this appeal must be dismissed with costs.

BRODHURST, J.—I concur with the learned Chief Justice in dismissing the appeal with costs.

Appeal dismissed.

1888
January 31.

Before Mr. Justice Straight and Mr. Justice Brodhurst.

MATADIN AND OTHERS (JUDGMENT-DEBTORS) *v.* CHANDI DIN AND OTHERS (DECREE-HOLDERS). *

Execution of decree—Civil Procedure Code, ss. 246, 247—Cross-decrees—Set-off—Limitation.

Under two decrees of the Sadr Diwani Adalat passed in 1864, *A* was entitled to two-thirds and *B* to one-third of certain immoveable property, with mesne profits in proportion. Each obtained possession of the immoveable property decreed to him. *B* appealed to the Privy Council from both decrees in respect of the two-thirds awarded to *A*. In April, 1866, pending the appeal, *A* applied for an account of the mesne profits due to him after setting off the mesne profits due to *B*, but as he failed to comply with a condition requiring him to give security for the amount claimed, in case the Privy Council should allow *B's* appeal, the application was struck off. In January 1867 *B* applied for the mesne profits of the one-third decreed to him, and the Court found Rs. 18,000 to be the amount so due, but, on application by *A*, stayed further execution pending the Privy Council's decision. In 1873 the Privy Council dismissed *B's* appeal. In 1885, *A*, in execution of the Privy Council's decree, applied for Rs. 50,000 as mesne profits in respect of the two-thirds. *B* at the same time applied that the Rs. 18,000 declared in 1867 to be due to him in respect of the one-third might be set-off against the amount claimed by *A*.

Held that the question of the amount due to *A* up to the date when he acquired possession of the two-thirds and which had never yet been decided should be re-opened from the point at which it was left in 1866; that if this amount exceeded the Rs. 18,000 declared in 1867 to be due to *B*, satisfaction of *A's* claim to that extent should be entered up and the balance recovered from *B*; and that this course, if not strictly in accordance with the letter, was in accordance with the spirit, of ss. 246, 247 of the Civil Procedure Code, and at all events should be allowed on principles of natural equity.

Held also that until the amount due to *A* had been definitely ascertained in the execution department, *B's* right to maintain his set-off did not arise; that the set-off

* First Appeal No. 103 of 1887 from a decree of Pandit Ratan Lal, Subordinate Judge of Bánda, dated the 30th April, 1887.