1888

DAYA v. PARAM SUKH.

Those two cases show, as I have always understood the law to be, that an action for damages is a purely personal action which can only be maintained by or on behalf of the person defamed. The same principle was applied, although not in an action for defamation, by this Court in *Oodai* v. *Bhowanee Pershad* (1). I am of opinion that so far as this suit is one to recover damages for the defamation of the defendant's daughter, it cannot be maintained. It is not necessary to consider whether the words are actionably defamatory, as we hold that the father has no cause of action in respect of them. So far, I am of opinion that the appeal should be allowed. As to the part of the suit for expenses incurred by the father thrown away by reason of the acts of the defendants, I am of opinion that the appeal should be dismissed. As I understand the finding of the District Judge, the expenses he has allowed have been reasonably incurred by the plaintiff in reliance on the agreement of the defendant-appellant that the *gauna* should be carried out. The appeal as to Rs. 200 for *gauna* will be dismissed with proportionate costs, and the appeal as to Rs. 200 awarded in respect of the alleged defamation will be decreed with proportionate costs.

TYRRELL, J.—I fully agree with the view expressed by the learned Chief Justice and in his order disposing of the appeal (2).

Appeal allowed in part.

1888
December 13.

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

MUHAMMAD WILAYAT ALI KHAN (PLAINTIFF), *v.* ABDUL RAB AND ANOTHER (DEFENDANTS),*

Pre-emption—Wajib-ul-arz—Muhammadan Law—Refusal by pre-emptor to purchase—Immediate demand—Pre-emptor claiming property as to part of which he has disqualified himself from suing.

The *wajib-ul-arz* of a village provided that a co-sharer wishing to sell his share must give notice to the other co-sharers, and that first a nearer co-sharer and next a more distant co-sharer should have a right of pre-emption. Where, such notice having

* First Appeal No. 49 of 1887 from a decree of D. T. Roberts, Esq., District Judge of Moradabad, dated the 23rd December, 1886.

(1) 1 Agra, 264.

(2) See *Ajudhia Parshad* v. *Shibbu Mal* (Panjab Record, 1889, No. 27) in which Rattigan and Roe, JJ., held that a Hindu husband could sue in his own right for damages for defamation of his wife.

been given, the co-sharer receiving notice took no action thereon within a reasonable time,—*held* that as his inaction would lead the vendor to conclude that he would not interfere or become a purchaser, it was equivalent to declining to purchase.

A sale of property, to which the Muhammadan law of pre-emption was applicable, took place in October, 1884. The plaintiff pre-emptor and his agent became aware of the sale shortly after it took place, and many months prior to July, 1885. He did *not* allege that he had given notice that he claimed to exercise his right of pre-emption before July, 1885. It was found as a fact that no such notice was given.

Held that even if such notice was given, it was too late, and was not a prompt demand in accordance with the Muhammadan law.

The principle of the rule that a pre-emptor must claim the whole of the property included in the sale-transaction, and for which one price was paid, if he is entitled to claim it, and cannot obtain a decree for part only of such property, applies to the case of a pre-emptor who claims the whole, but who is at the time disentitled by his own act or laches to maintain the claim as to a part. Such a disqualification prevents the pre-emptor from maintaining his suit for any portion of the property included in the sale.

Where therefore a pre-emptor was disqualified from claiming a portion of the property sold, by not having made a prompt demand in accordance with the Muhammadan law in respect of such portion,—*held* that he was thereby prevented from maintaining his suit for another portion claimed under the provisions of the *wajib-ul-arz* of a village, though he was willing to pay the full purchase-money and to leave in the vendee's hands the portion as to which he was disqualified.

THIS was a suit for pre-emption in respect of a sale, dated the 12th October, 1884, of a share in the village Muhra in the Moradabad district, and a piece of land in the city of Moradabad. The claim in regard to the share in the village Muhra was based on the *wajib-ul-arz*, the pre-emption clause in which was as follows :—

"A sharer wishing to sell or mortgage his share, or a mortgagee to sub-mortgage his mortgagee's rights, shall first communicate his intentions to the nearer sharer, and in the event of his refusal, to the one next to him, to sell or mortgage the share for a proper price, and if he also refuses to buy it or pay a proper price, then he shall be competent to transfer it to whomsoever he chooses. If a sharer, the transferor, through enmity or in collusion with the transferee, alleges or causes to be entered in the deed an excessive price, then the question shall be referred to and decided by the arbitrators chosen by the parties. If the parties do not come to a settlement as to price amongst themselves or by appointing an arbitrator, then the Court

1888

MUHAMMAD WILAYAT ALI KHAN v. ABDUL RAB.

shall settle it on its own authority according to the quality of the share or the average price paid before for shares transferred in this or other surrounding villages. If the co-sharers fail to pay the price determined by the arbitrators, then the transferor shall be competent to transfer his share to a stranger, and then no claim as to right of pre-emption shall be admissible. If a sharer, the transferor, makes a transfer in favour of his children or near relations, then no sharer shall have a claim for right of pre-emption, and the nearer relations possess a pre-emptive right as opposed to those more remote."

The claim in regard to the property in Moradabad was based on the Muhammadan law.

The Court of first instance (District Judge of Moradabad) dismissed the claim, and the plaintiff appealed to the High Court. The facts are fully stated in the judgment of the Court.

The Hon. Pandit *Ajudhia Nath* and Babu *Jogindro Nath Chaudhri* for the appellant.

Mr. *G. E. A. Ross*, Mr. *Abdul Majid*, Mr. *Hamid-ullah*, and Shah *Asad Ali*, for the respondents.

EDGE, C. J., and TYRRELL, J.—This was a suit for pre-emption. The defendants were Muhammad Abdul Rab, the vendee, and Wahab Ali, the vendor. The plaintiff and the vendor were half-brothers. They were shareholders in the village Muhra. The property which was sold consists of the shares in the village Muhra, and of a small piece of land in Moradabad itself. The purchaser was a stranger. The sale-deed was executed on the 12th October, 1881, and the price was Rs. 4,760. It was one sale transaction for the two properties, and one fixed price. There is no doubt that if the plaintiff had chosen to exercise his rights of pre-emption at the time, he is the person who is entitled to maintain an action for pre-emption in respect of each of these properties. The sale of the share in the village Muhra was governed by the *wajib-ul-arz*, and the sale of the Moradabad land was governed by the principles of the Muhammadan law applicable to pre-emption.

In the Court below it was contended by the plaintiff that the true price was Rs. 4,375, and not Rs. 4,760. That contention has been abandoned here, and there is ample evidence to show that the true price was, as alleged in the sale-deed, Rs. 4,760. It is proved from the evidence that the vendor was in embarrassed circumstances, that some of his property, particularly that in this village, was attached under a decree, and that he was making applications early in 1884 for postponement of the sale. It is also proved, in our opinion, that negotiations for the sale of this property in suit were being carried on certainly in July, 1884, and most probably previously. In the Court below the parties appeared to have agreed that the Muhammadan law was the law governing this case. We do not consider that they are bound by any such agreement as that. It is true, that in one view of this case the principle of Muhammadan law, which we shall refer to later on, may be a bar to the plaintiff's maintaining the action. The plaintiff's case below was, as it has been here, that he first became aware of the sale in July, 1885; and that thereupon he gave a notice required by Muhammadan law declaring himself a pre-emptor. The defendants' case is that the plaintiff knew, if not before the sale, at any rate soon afterwards, of the fact of the sale in question. The plaintiff was the lambardár of the village, and the defendants say that his agent in the village, a man called Budh Sen, knew perfectly well about the sale, and that the plaintiff must have been informed by his agent of what was taking place in the village, in which he was interested, not only as a shareholder, but also as a lambardár. Another part of the case is this. It is said on behalf of the defendant that the vendor in February, 1884, gave the plaintiff notice in writing by a registered letter that he was going to sell the property in question to Abdul Rab, the present purchaser, and the plaintiff had not the means or the desire to become a purchaser at that time. There is a contention as to what was the nature of that notice, and as to whether any reply was given in fact.

It will be convenient to consider first all what is the true construction of the *wajib-ul-arz* in this case. It appears to us that the *wajib-ul-arz* in this case made it incumbent on a sharer, who was going

1888

MUHAMMAD WILAYAT ALI KHAN v. ABDUL RAB.

to sell, or was desirous of selling, a share in the village, to give notice to his co-sharers. And it was provided by the *wajib-ul-arz* as we read it, that that notice should be given first to the nearer co-sharer, and if he desired to purchase he was entitled to purchase at what is called a "proper" or fair price; and if he did not desire to purchase, then the more distant co-sharer might purchase at a fair price; and if the more distant co-sharer did not purchase, then the shareholder desiring to sell might sell the share to whomsoever he pleased. It provides also the means by which a "proper" or fair price was to be ascertained in case of dispute. It must be ascertained by arbitration or by a suit in Court. That is to say, the co-sharer who had notice had the right to say—"I will purchase the property at a proper price"; and he had the right also, if he did say that, to have it determined, by arbitration, or by suit, what the proper price was. It was also competent to him, under this *wajib-ul-arz*, to say: "I decline to purchase at all." Now that being the construction which we place upon this *wajib-ul-arz*, we have got to see what was the nature of the notice given to the plaintiff in February, 1884. As we have said, that notice was in writing. It was sent to the plaintiff under a registered cover; the plaintiff received it and gave a receipt for it. But when the plaintiff is called upon to produce the notice, he does not produce it; but he produces a book in which he says he copied the notice in question. He accounts for copying the notice in the book by saying that he was in the habit of copying important notices into the book to provide for the event of their being lost. The Judge below came to the conclusion that that portion of the book which contains what is said to be a copy of the notice in question was an interpolation. We are not disposed to disagree with him on that point. Assuming, for the purposes of argument, that it is a genuine copy, it is wide enough in our opinion, and sufficiently informed the plaintiff that Wahab Ali was proposing to sell his shares in the villages in the district of Moradabad. The copy shows that Wahab Ali asked the plaintiff to inform him if he wished to purchase the share in any of those villages. We think, therefore, that so far as the giving of a notice was concerned, the vendor complied with the requirements of this *wajib-ul-arz*. The question then arises:—Was any

and what reply sent to that notice? The plaintiff says that he did send a written reply to the effect:—"If you sell, I will purchase," He was asked how he sent the reply, and he gave no satisfactory account of it. He was asked whether he wrote it himself. He said it was written by some one else, but was unable to say who was the person who wrote it. He kept no copy of it, although he had in his hands the present vendor's notice to him, and says that he took the precaution of copying that into his book. As he says, he kept no copy of the reply which he alleges he sent, written by a person whom he does not know. Now unfortunately in this case Wahab Ali has not given evidence. The defendant-vendee is not to be blamed for that; he took all the necessary steps to procure his attendance in Court. So that we have here no direct contradiction to the statement of the plaintiff that he did send that reply. We have, however, evidence which we believe, which is absolutely inconsistent with the plaintiff ever having sent such a reply at all. We know that at that time he was a man involved in debt. We have the evidence of the defendant-purchaser, who tells us that Budh Sen, the plaintiff's particular agent for this village, had told him plainly that he, Budh Sen, as well as his master, the plaintiff, agreed to the sale; and that Budh Sen had told him that he had advised his master to purchase the village, as it was a large one, but his master would not agree to take it. We have also got the evidence of Bulaki Das on this point. He says that Budh Sen told him of his own accord that he and his master were delighted at Abdul Rab becoming a purchaser. We have also got the answer to interrogatories of Hakim Ashgar Ali, in which he tells us that he knew that the plaintiff was not willing to purchase the property at the time; and further, with regard to the property which was sold by Zohra Begam, on the 22nd March, 1885, that the plaintiff, when asked whether he would purchase, said that he had not got the money.

Now we have come to the conclusion that the plaintiff has failed to prove that he did, in fact, reply that he would become the purchaser in the event of the property being sold. If, as we are assuming, he simply took no action within a reasonable time, on the notice

1883

MUHAMMAD WILAYAT ALI KHAN v. ABDUL RAB.

of February, 1884, that in our judgment was equivalent to an intimation that he declined to become a purchaser. If failing to take action within a reasonable time is not to be held equivalent to a declining to purchase, the result would be that a sharer wishing to sell property to which a *wajib-ul-arz* such as this applies, would practically be unable to dispose of the property at all without the risk of a pre-emption suit. Now on that ground alone we think that the plaintiff would fail in this suit, so far as the share in the village is concerned, to which the *wajib-ul-arz* applies. What we mean is that he had notice that he could purchase, and he acted in such a way as to lead the vendor to conclude that he would not interfere and would not become the purchaser. Of course in all these cases the particular wording of the *wajib-ul-arz* is to be looked at to see what was the custom or contract between the shareholders of the village. The next point to be considered is, when did the plaintiff or his agent know that the sale to the defendant had actually taken place? The patwári of the village knew in July, 1884, that the sale was being negotiated, and in that month he called upon Abdul Rab, the purchaser, to give him information as to the area and rent of the village. He tells us that Budh Sen informed him that two years before the time he was giving his evidence he called upon the purchaser to make a salaam to him as a new shareholder in the village. He gave his evidence on the 15th September, 1886, so that although two years had not expired from the actual date of the sale, it is pretty evident that the patwári called upon the defendant to make his salaam shortly after the sale, and it is also proved by him that the person who told him that the sale had taken place was Budh Sen. The evidence of the defendant and of Bulaki Das shows not only that Budh Sen knew of this sale about the time, but also that the plaintiff must have known of it too; and that at that time the plaintiff was acquiescing in the sale. Then again there is a letter from Budh Sen to the defendant-purchaser, of the 4th February, 1885, which accompanied a present of some sugar-cane juice. That letter and that present of the sugar-cane juice to our mind evidence corroborative of that given by Bulaki Das as to Budh Sen's knowledge. There was no possible reason why that letter should have been written or

that present sent if Budh Sen did not know that he was writing the letter and sending the present to a new share-holder in the village. Consequently we come to the conclusion that not only Budh Sen but the plaintiff knew shortly after the sale of the fact that a sale had taken place, but that they had known that fact many months prior to July, 1885. That has an important bearing on one view of the law, which we think is applicable to the case. The property in Moradabad was property not affected by the *wajib-ul-arz* in this case. It was a property which was subject to the ordinary Muhammadan law of pre-emption. It was incumbent on the plaintiff to show that on his obtaining knowledge that the sale had taken place, he gave without delay notice that he claimed to exercise his right of pre-emption. He does not claim to have given such notice until the 17th July, 1885, and he has attempted to prove that it was not until that date that he became aware of the sale. He has called some witnesses to show how it was that he became aware of the sale in July, and gave the alleged notice. Those witnesses say that the vendor Wahab Ali told them that the price was Rs. 4,275; in fact, if that is true, he had gone out of his way to give the information. As a fact the price was Rs. 4,700 odd. But it was part of the plaintiff's case here, and in the Court below, that the price alleged in the sale-deed was an untrue one, and that the true price was Rs. 4,275. We do not see why Wahab Ali should have given false information of that kind, or what interest he could have had in giving it; particularly when he was on unfriendly terms with the plaintiff, his half-brother. We believe that the story of those witnesses, as to the statement with regard to price, was a false story, brought in for the purpose of supporting the plaintiff's case that Rs. 4,700 was not the real price. Now the whole of the evidence relating to what we may call the July incident, appears to us to be too well prepared. It appears to us to be evidence that has been prepared for the purposes of this suit. The plaintiff says that he sent a written notice in July. It is curious that although he gave two notices to the defendants to produce documents in this case, the written notice is not included in either of them. We believe that this evidence as to the July incident was concocted, partly with the intention of disputing the true

1888

MUHAMMAD WILAYAT ALI KHAN v. ABDUL RAB.

price of the property, and partly to get the plaintiff over the difficulty in which he was with regard to the rules of the Muhammadan law as to making a prompt demand to purchase as a pre-emptor. On that point it has been pointed out by Mr. *Ross* that when there were negotiations in October and November, 1885, for the settlement of this case between the plaintiff and the purchaser, there is not a single thing to suggest in the correspondence, so far as we have seen, that any such notice had been given in the previous July. That was hardly to be overlooked. We have said we have come to the conclusion that no such notice was given, and if it was given, then we still think it was too late, and was not a prompt demand.

This raises another question in this case. It is a question on which, although we have formed an opinion, we express that opinion with some hesitation. There can be no doubt that a plaintiff coming into Court in a pre-emption suit, if he is a person having a right to claim the whole property sold, must in his suit make that claim. That is, he cannot come into Court and claim a portion only when he is entitled to the whole. That is we think settled law. That question has been considered in the cases of *Kashi Nath* v. *Mukhta Prasad* (1), *Arjun Singh* v. *Sarfaraz Singh* (2), as well as in many other cases decided in this Court. According to the judgment of Mr. Justice Mahmood in one of those cases, the plaintiff must claim the whole of the property included in the sale-deed, if he is a person entitled to claim it, and his action must stand dismissed if he fails to claim the whole of that property. Mr. Justice Mahmood has expressed his reason for that view of the law, and it appears to us that that is a rule of law which is consistent with common sense. The pre-emptive plaintiff should not be allowed to take, for instance, the best portion of the property brought, and leave the worst on the hands of the purchaser, or on the hands of the vendor. It is said here that the plaintiff is willing to pay the full purchase-money, and leave in the hands of the purchaser the property in Moradabad. Possibly in this particular case the purchaser would not be a sufferer if that was accepted. But we can understand cases in which the purchaser was induced to take property, which otherwise he

(1) I. L. R., 6 All., 370. (2) I. L. R., 10 All., 182.

would not have taken, in order to obtain the sale to him of other property which he desired. In such a case as that it might well be that although the whole of the purchase-money was refunded to him, it would be to his disadvantage to be left with the incumbrance of a portion of the property. The question then arises, can there be any difference between the case of a plaintiff coming into Court and claiming a portion of the property sold, and the case of a plaintiff coming into Court and claiming the whole, he being at the time disentitled by his own act or laches to maintain a claim as to a part? It appears to us there can be no difference in principle; and that exactly the same result must follow in this case as would have followed if the plaintiff had come into Court and had abstained from claiming the property in Moradabad. A person who claims to be a pre-emptor and has disqualified himself from claiming the whole, cannot be in a better position than a person who has come into Court, and has claimed a part only, when he was entitled to claim the whole. In the view which we take, the plaintiff was disqualified from claiming the property in Moradabad, and we think that disqualification would prevent him from maintaining his suit for any portion of this property which was included in one common sale, and for which one price was paid. There is one word more to be said, and that has reference to the point raised by Pandit *Ajudhia Nath* with regard to a receipt given by the vendor in November, 1884. The Judge below has explained that circumstance on the hypothesis as to family arrangement which had existed between the vendor, the plaintiff, and the other members of the family. We are not satisfied with that explanation, and do not think that it is a correct one. But we are also not satisfied that the money acknowledged to be received then was money which became due out of the sale to the defendant-purchaser. There are certain other receipts which were tendered in evidence before us. They are not on the record, and we have not looked at them, being of opinion that they were not proved and were not admitted by the defendants in the suit.

Shortly, in the result, we are of opinion that the plaintiff's claim must fail so far as the share in the village Muhra is concerned,

1888

MUHAMMAD WILAYAT ALI KHAN v. ABDUL RAB.

because we find that the defendant-vendor did all that was required of him by the *wajib-ul-arz* and the plaintiff did not avail himself of the right of purchase given by that *wajib-ul-arz*. We find also that the suit must fail as to the Moradabad property, because the plaintiff did not make a prompt demand as pre-emptor; and also for the reason we have just now explained, the suit must fail not only with regard to the Moradabad property, but also with regard to the share in the village; the plaintiff, having disentitled himself to obtain pre-emption in the Moradabad property, cannot obtain the share in the village. The appeal is dismissed with costs.

Appeal dismissed.

1888
July 12.

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

LOKE INDAR SINGH AND OTHERS (PLAINTIFFS) *v.* RUP SINGH (DEFENDANT). *

Unconscionable bargain—Gambling in litigation—Agreement opposed to public policy—Act IX of 1872 (*Contract Act*), *s.* 23.

For the purpose of meeting the expenses of an appeal to the Privy Council from concurrent decrees of the Subordinate Judge and the High Court, the plaintiff-appellant executed a deed of sale of certain property worth over Rs. 50,000 in consideration of the vendees providing the necessary security and moneys. The plaintiff experienced considerable difficulty in procuring the means to appeal. The vendees were not professional money-lenders, they did not put pressure on the plaintiff, but, on the contrary, he and his agent put pressure on them to agree to the terms of the deed. It appeared that, apart from the moneys borrowed by him from time to time, he was without even the means of subsistence; that he fully understood the nature of the deed; that his agents negotiated the transaction *bonâ fide* and, to the best of their powers, in his interest; that there was no fraud or deception on the part of the vendees; and that they performed all that they undertook as regards meeting the expenses of the appeal. Under the deed the plaintiffs were liable to furnish security to the extent of Rs. 4,000 and to advance Rs. 8,500 for other necessary expenses, and they did in fact furnish such security, and advanced sums aggregating Rs. 7,542. The appeal was successful. The appellant having failed to put the vendees in possession of the property conveyed by the deed, and recovered by him under the Privy Council's decree, the vendees sued him for possession of the property and mesne profits, afterwards agreeing that the Court should, in lieu thereof, award them compensation in money equivalent thereto.

* First Appeal No. 125 of 1886 from a decree of Maulvi Muhammad Abdul Basit Khan, Subordinate Judge of Mainpuri, dated the 24th April, 1886.