

1885

The Judge had no power to pass the order he did ; but we cannot interfere in revision, and this application must be rejected with costs.

BALDEO DAS

v.

GOBIND
SHANKAR.

TYRRELL, J.—I agree with the learned Chief Justice's view of this application. I think also that it is very questionable whether any application to this Court would lie as made before us. The application to the lower Court, if made under s. 32 of the Act, is not appealable. There is no appeal under s. 588, but there is the question whether the order of the lower Court could not be considered a decree, within the meaning of the definition section (2) of the Civil Procedure Code. The petitioner claimed to appear as guardian. The Court decided he had not that right. That order decided his position in the suit. It seems to me that an appeal might have been preferred, and for this reason also this application must be rejected with costs.

Application rejected.

APPELLATE CIVIL.

1885

July 23.

Before Sir W. Comer Petheram, Kt., Chief Justice, and Mr. Justice Tyrrell.

HIRA AND ANOTHER (PLAINTIFFS) v. KALLU AND OTHERS (DEFENDANTS).*

Pre-emption—Hindus—Local custom—Sale to a stranger.

The right of pre-emption, when it exists among Hindus, is a matter of contract or custom agreed to by the members of a village or community. Such a custom is not properly described as attached to the land, and as soon as any members of a Hindu community, who have agreed to be governed by it, sell to any one who is a stranger to the agreement, the land is no longer subject to pre-emption.

THIS was a suit to enforce a right of pre-emption, and was founded upon an alleged custom of a *mohalla* in the city of Muzaffarnagar, in which the pre-emptive property, which was part of a house, was situated. All the parties to the suit were Hindus. The defendant-vendee pleaded, *inter alia*, that her right to the property was preferential to that set up by the plaintiffs, inasmuch as she had lived for many years in the house in question, which had formerly belonged to her husband. The Court of first instance (Munsif of Muzaffarnagar) found that the existence of the alleged custom in the part of the town in which the property was situate was

* Second Appeal No. 1481 of 1884, from a decree of C. W. P. Watts, Esq., District Judge of Saharanpur, dated the 10th June, 1884, affirming a decree of Maulvi Muhammad Said Khan, Munsif of Muzaffarnagar, dated the 7th December, 1883.

not proved, and accordingly dismissed the claim. On appeal, the District Judge of Saharanpur affirmed the decree, being of opinion that the plaintiffs had not established a right preferential to that of the defendant-vendee.

In second appeal, it was contended on behalf of the plaintiffs that, "as it was admitted that in the town of Muzaffarnagar the custom existed, it must be presumed to exist in this *mohalla* also," and that "the appellants as neighbours have a preferential right to purchase."

Lala *Lalta Prasad*, for the appellants.

Munshi *Kashi Prasad*, for the respondents.

PETHERAM, C. J.:—This appeal must be dismissed with costs. I agree with the learned Judge in his decision, but not altogether for the reasons assigned by him. The suit was based on a wrong idea as to the custom of pre-emption asserted by Hindus. Pre-emption is a right which is known to the Muhammadan Law. It is not fixed to the land or country, but follows the persons of Muhammadans wherever they may be in the world. Among Hindus, on the other hand, it is a matter of contract or custom agreed to by the members of a village or community. When it is said that such a custom is attached to the land, I do not think that is a correct description. A community of Hindus may agree to be governed by the custom of pre-emption, but the moment they sell to a stranger to the agreement, there is no pre-emption attaching to the land. I think there is no ground for declaring such a custom to exist. The Judge was right in his decision, and this appeal must be dismissed with costs.

TYRRELL, J., concurred.

Appeal dismissed.

Before Sir W. Comer Petheram, C.J., Chief Justice, and Mr. Justice Tyrrell.

HANUMAN RAI (PLAINTIFF) v. UDIT NARAIN RAI AND OTHERS (DEFENDANTS).*

Pre-emption—Wajib-ul-arz—Transfer under compromise and decree thereon to person claiming pre-emption.

An appeal having been preferred from a decree in a suit for pre-emption, based on the *wajib-ul-arz* of a village, the parties to the suit entered into a compromise.

* Second Appeal No. 1501 of 1884, from a decree of Lala Mata Din, Officiating Subordinate Judge of Gorakhpur, dated the 16th June, 1884, reversing a decree of Maulvi Ahmad Ali Khan, Munsif of Banaganj, dated the 19th March, 1884.