FULL BENCH.

1885
January 24.

Before Sir W. Comer Petheram, Kt., Chief Justice, Mr. Justice Oldfield, Mr. Justice Brodhurst, Mr. Justice Mahmood, and Mr. Justice Duthoit.

SHEO NARAIN (PLAINTIFF) *v.* HIRA (DEFENDANT)*

Pre-emption—Wajib-ul-arz—Purchase of share subsequent to sale—Purchaser's right of pre-emption.

Where there is a right of pre-emption under the *wajib-ul-arz*, which a shareholder could claim and enforce in respect of a sale of property, a person purchasing the said shareholder's interest in the village subsequently to the sale cannot claim and enforce pre-emption as his vendor might have done.

THE plaintiff in this case, subsequently to the 5th August, 1881, became a co-sharer in a village called Rasulpur, by purchase at a sale in execution of a decree of the share of a certain co-sharer in that village. He obtained a sale-certificate bearing date the 20th August, 1881. In the present suit he claimed to enforce the right of pre-emption, under the terms of the *wajib-ul-arz*, in respect of a sale by certain other co-sharers in the village of their share to the defendant Hira Panday, by a deed bearing date the 5th August, 1881. He alleged that this deed was really executed on the 26th November, 1881, the day on which it had been registered; and contended that, that being so, the transfer was made on the latter date. The defendant-vendee set up as a defence to the suit that the deed was executed on the 5th August, 1881, and the plaintiff was not entitled to claim pre-emption, not being at that date a co-sharer in the village. The Court of first instance found that the deed was executed on the 26th November, 1881, and gave the plaintiff a decree. On appeal by the defendant-vendee, the lower appellate Court found that the deed was executed on the 5th August, 1881, and dismissed the suit.

In second appeal the plaintiff contended that, assuming the deed was executed on the 5th August, 1881, he was nevertheless entitled to claim pre-emption, inasmuch as he had purchased all the rights and interests of the judgment-debtor whose share he had purchased, and, among them, the right of pre-emption.

* Second Appeal No. 281 of 1884, from a decree of R. J. Leeds, Esq., District Judge of Gorakhpur, dated the 26th November, 1883, reversing a decree of Rai Raghunath Sahai, Subordinate Judge of Gorakhpur, dated the 23rd February, 1883.

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The Divisional Bench (OLDFIELD and BRODHURST, JJ.) hearing the appeal referred to the Full Bench the following question :—

"Where there is a right of pre-emption under the *wajib-ul-arz*, which a shareholder could claim and enforce in respect of a sale of property, can a person purchasing the said shareholder's interest in the village subsequently to the sale claim and enforce pre-emption just as his vendor might have done?"

Mr. *R. C. Saunders*, for the appellant.

The *Senior Government Pleader* (Lala *Juala Prasad*) and Munshi *Kashi Prasad*, for the respondent.

The following judgments were delivered by the Full Bench :—

PETHERAM, C. J.—In my opinion, the question referred should be answered in the negative.

OLDFIELD, BRODHURST, and DUTHOIT, JJ., concurred.

MAHMOOD, J.—I have arrived at the same conclusion, but I am anxious to explain my reasons for taking this view. I take it as a fundamental principle of the right of pre-emption, that it is based on the inconvenience to co-sharers arising from the introduction of a stranger into the co-parcenary. I have on previous occasions explained that, in cases like the present, where, even though the right is not claimed under the Muhammadan Law, but under a custom recognized in the *wajib-ul-arz*, the rules of the Muhammadan Law must be applied by analogy, because equity follows the law, and the only system of the law of pre-emption to which we can look for equity to follow is the Muhammadan Law. Under that law, when the ownership of the pre-emptive tenement is transferred or devolves by act of parties, or by operation of law, the transfer or devolution passes pre-emption to the person in whose favour the transfer or devolution takes place; but the rule is essentially subject to the proviso that such person cannot enforce pre-emption in respect of any sale which took place before such transfer or devolution. This rule must also be applied to the present case. The reason why, although the right of pre-emption runs with the land, the plaintiff in this case cannot be allowed to enforce it, is that, to rule otherwise, would in effect be to allow a "stranger" to oust one who was not a "stranger" at the time of the sale. It is found in this

case that the sale respecting which pre-emption is claimed occurred on the 5th August, 1881. At that time the plaintiff was not a co-sharer, and his title did not come into existence till the 20th August, 1881. The reason why pre-emption in respect of the former sale does not go with the subsequent sale is that, while it may be that the plaintiff's vendor had no objection to the sale of 5th August, 1881, the plaintiff-purchaser may have objections.

Now, if at the time of the sale of the 5th August, the person who at that time owned the share purchased by the plaintiff had no objection to the sale, that sale gave rise to no cause of action, and nothing which happened afterwards could create one. In other words, a sale not open to any pre-emptive objection at the time it was made, cannot by a retrospective effect be subjected to objection on account of a subsequent event, namely, the sale of a share in the village to the plaintiff. To hold any other view would be to recognize absurdities which the law of pre-emption cannot possibly have contemplated. If the purchaser at the later sale (and this is the position of the plaintiff here) were to be allowed to pre-empt in respect of the previous sale, the consequence would be that, whilst the purchaser in the earlier sale could maintain a suit to enforce pre-emption in respect of the later sale, the purchaser at such later sale could maintain a pre-emptive suit in respect of the earlier sale. There would thus be two suits equally maintainable but wholly inconsistent with each other, for each plaintiff would call the other a "stranger," and the object of each suit would be to preclude the plaintiff in the other suit from the coparcenary. If both suits were dismissed, the state of things would remain exactly as it was before the suits were instituted: if both suits were decreed the result would simply be to introduce a kind of exchange—the one plaintiff taking the share purchased by the other plaintiff—a result which of course means that neither could exclude the other from the coparcenary. This would be a *reductio ad absurdum* of the rule of pre-emption, for it would defeat the sole object of the right, namely, the exclusion of strangers. The only possible way to administer the rule of pre-emption would be to decide which of such two inconsistent suits was maintainable. And the answer is simple. The purchaser in the earlier sale was a co-sharer and not a stranger when the later sale took place,

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whilst the purchaser at such later sale was a stranger liable to be excluded from the coparcenary by the pre-emptive claim of any co-sharer for the time being. And it follows naturally that the suit of the purchaser in the earlier sale would be maintainable in respect of the later sale, and the later purchaser would have no right of pre-emption in respect of the earlier sale. To allow the later purchaser to maintain a pre-emptive suit in respect of the earlier sale would be to reverse the course which the rule of pre-emption contemplates.

For these reasons I am of opinion that the plaintiff in this case never had any right of pre-emption on the ground of the sale of 5th August, 1881, and my answer to the question referred is therefore in the negative.

APPELLATE CIVIL.

1885
January 29.

Before Mr. Justice Oldfield and Mr. Justice Mahmood.

HIRA DAI (DEFENDANT) *v.* HIRA LAL AND OTHERS (PLAINTIFFS)*.

Ex-parte decree—"Appearance" of defendant under Civil Procedure Code, s. 101—*Civil Procedure Code, ss.* 64, 100, 108, 157.

The first hearing of a suit was fixed for the 12th December, 1883, on which day the defendant did not appear, and the case was adjourned to the 18th December, and, as the defendant did not then appear, a decree was passed in favour of the plaintiff. A *vakalat-nama* had been previously filed on the defendant's part, and he had also objected to an application filed by the plaintiff for attachment of the defendant's property before judgment.

Held that these acts on the defendant's part did not constitute an "appearance" by him within the meaning of s. 100 of the Civil Procedure Code, which referred to an appearance in answer to a summons to appear and answer the claim on a day specified, issued under s. 64; that the decree was therefore *ex-parte* within the meaning of ss. 100 and 108, and an appeal consequently lay to the High Court under s. 588, clause (9), from an order rejecting an application to set the decree aside. *Zain-ul-abdin Khan* v. *Ahmad Raza Khan* (1) distinguished. *The Administrator-General of Bengal* v. *Dyaram Das* (2), *Bhimacharya* v. *Fakirappa* (3), and *Bibee Huloo* v. *Atwaro* (4) referred to.

Per MAHMOOD, J.—That the Court on the 18th December seemed to have acted under s. 157 of the Civil Procedure Code, and, choosing the first of the alterna-

* First Appeal No. 69 of 1884, from an order of Maulvi Zain-ul-abdin, Subordinate Judge of Agra, dated the 14th April, 1884.

(1) I. L. R., 2 All. 67; L. R., 5 Ind. Ap., 233.
(2) 6 B. L. R., 688.
(3) 4 Bom. H. C. Rep. 206.
(4) 7 W. R., 81.