1885

JAWAHIR SINGH v. JADU NATH.

April, 1881, and then the matter seems to have slept. The Munsif's file was apparently over-laden, and the case was transferred from his file to that of the District Judge, who does not appear to have taken any action in the matter. The proper application for the decree-holder to have made in September, 1882, was, that the case might be restored by the Munsif. The only question we have now to consider is, whether the present application can be so dealt with as to meet this state of things.

I think that it can, because the prayer contained in the application is, "that the suit may be restored to its number, and that the judgment-debt may be caused to be realized by attachment and sale of the debtor's property specified in the former schedule of property." Now the "number" here referred to is the number of the proceedings of October, 1879, and the "schedule of property" means the schedule of the property then ordered to be sold. Under the circumstances, I think that the appeal should be dismissed with costs, but that the order should be modified by making it an order to the Munsif to restore the proceedings of the 1st October, 1879, to his file, and to proceed to levy the debt under that order.

STRAIGHT, J.—I am of the same opinion.

Appeal dismissed.

1885
February 26.

Before Mr. Justice Oldfield and Mr. Justice Mahmood.

THAMMAN SINGH (PLAINTIFF) *v.* JAMAL-UD-DIN AND OTHERS (DEFENDANTS)*

Pre-emption—Partition of property sold on application of vendee—Silence of pre-emptor—Waiver—Estoppel.

Subsequently to the sale of a one-third share in a village, the vendee applied for partition of the share. A co-sharer, who had a right of pre-emption in respect of the sale, made no objection to this application, and the partition was effected. The co-sharer afterwards set up a claim to pre-emption.

Held that there was nothing in the conduct of the pre-emptor which could amount to estoppel, or to a waiver of his right of pre-emption.

Motee Sah v. *Goklee* (1) distinguished and dissented from, and *Bhairon Singh* v. *Lalman* (2) referred to by MAHMOOD, J.

* Second Appeal No. 476 of 1884, from a decree of T.B. Tracy, Esq. Offg. District Judge of Bareilly, dated the 15th January, 1884, affirming a decree of Maulvi Muhammad Abdul Qaiyum, Subordinate Judge of Bareilly, dated the 19th September, 1883.

(1) N.-W. P. S. D. A. Rep., 1861, p. 506. (2) Weekly Notes, 1884, p. 216.

1885

THAMMAN SINGH v. JAMAL-UD-DIN.

THE claim in this suit was to enforce the right of pre-emption in respect of the sale of a one-third share of a village to the respondent, Jamal-ud din, under a deed dated the 14th August, 1882. This claim was founded on the *wajib-ul-arz*. It appeared that there were three equal shares in this village, one belonging to the plaintiffs, one to one Jawahir Lal, and one the subject of this suit. This last mentioned share, at the time of sale, was in the possession of the respondent, Jamal-ud-din, the vendee, under a mortgage. After the sale to the respondent, Jawahir Lal applied for the partition of his one third share. In the course of the proceedings which followed this application, the respondent applied for the partition also of the share which he had purchased. It further appeared that the plaintiff did not object to this application on the ground that he had a right of pre-emption, and the partition was effected. The lower Courts both held that the plaintiff was estopped by his conduct from suing to enforce his right of pre-emption. Upon this point the Court of first instance observed as follows:—"In my opinion, though it was useless to raise the objection, or to assert the right of pre-emption in the Revenue Court, as the plaintiff, in consequence of the possession of the defendant-vendee and mortgagee, could not prevent the partition, and could not, except through the medium of the Civil Court, obtain the property by asserting the right of pre-emption, yet it has been clearly held in the case of *Motee Sah* v. *Goklee* (1), on the authority of some other precedents and no adverse ruling of a subsequent date has been found in the Indian Law Reports), that a pre-emptor, who has not preferred an objection to the partition, and who has not brought a suit prior to the partition, will be considered to have relinquished his right of pre-emption. In the present case, after the application of Jawahir Lal, the partition of the property sold and claimed by pre-emption was also effected in the course of the same partition suit, at the instance of the vendee, with the knowledge, nay, with the written consent, of the plaintiff, and therefore his right should, as is laid down in the precedent quoted above, be considered to have been extinguished — *Vide* the plaintiff's application, dated the 13th July, 1883, which shows his knowledge and consent." Upon the same point, the lower appellate Court observed

(1) N.-W. P. S. D. A. Rep., 1861, p. 506.

1885

THAMMAN SINGH v. JAMAL-UD-DIN.

as follows:—"It is perfectly clear that the plaintiff-appellant was all along aware that the defendant-respondent was a party to the partition. It is immaterial that the partition case was originally instituted by one Jawahir Lal, another co-sharer. It was open to the plaintiff-appellant to have urged his pre-emptive claim by way of objection under s. 113 of Act XIX of 1873, but as he failed to do this, and allowed the respondent (vendee) to incur all the trouble and expense attendant on partition proceedings, he must, in accordance with the ruling cited by the lower Court, be held to have waived his claim."

In this second appeal by the plaintiff, it was contended on his behalf that there was nothing in his conduct in respect to the partition proceedings which constituted waiver of his right of pre-emption or estoppel.

Mr. *T. Conlan* and Pandit *Bishambhar Nath*, for the appellant.

Mr. *Amir-ud-din*, for the respondent Jamal-ud-din Khan.

OLDFIELD, J.—There is nothing in the conduct of the plaintiff during the partition proceedings which can amount to estoppel or to waiver of the exercise of his right of pre-emption. The decree of the lower appellate Court is set aside, and the case remanded to the lower appellate Court for disposal on the merits. Costs to abide the result.

MAHMOOD, J.—I am of the same opinion as my learned brother Oldfield, and I wish only to refer to two cases which were cited by the learned counsel for the respondent in support of his client. One of these cases is *Motee Sah* v. *Goklee* (1). I do not regard that case as by any means on all fours with the present, and I wish to say that I do not accept the rule of law as to acquiescence or estoppel which was there laid down, and from which I have already expressed my dissent upon a former occasion. The other case cited by Mr. Amir-ud-din was that of *Bhairon Singh* v. *Lalman* (2) and the passage in that case to which the learned counsel referred was as follows:—

"The single question for our determination is whether, after having notice of the intended sale to the respondent-vendee, the appellant's conduct was such as to warrant the inference that he,

(1) N.-W. P. S. D. A. Rep., 1861, p. 506. (2) Weekly Notes, 1884, p. 216.

1885

THAMMAN SINGH v. JAMAL-UD-DIN.

either expressly or impliedly, acquiesced in or relinquished his claim to pre-emption. It is found by the Judge that he made no communication whatever to the vendor after he became aware that a sale was being negotiated, nor did he make it known to him that, while he stood upon his pre-emptive right, he declined to pay the Rs. 4,000, because it was not the condition agreed on between the vendor and the vendee."

The rule laid down in that case was, that the pre-emptor may be estopped by conduct amounting to an admission before the sale occurs which is the basis of the exercise of the pre-emptive right. The report does not, of course, enter fully into the peculiar circumstances of the case ; but if I thought that the decision bore the interpretation placed upon it by Mr. Amir-ud-din, I should be unable to concur in it,—an interpretation which could not be reconciled with the ruling of the same learned Judge in the case of *Subhagi* v. *Muhammad Ishak* (1). I agree in the order passed by my learned brother Oldfield.

Appeal allowed.

Before Mr. Justice Straight and Mr. Justice Brodhurst.

1885
March 3.

SUKRIT NARAIN LAL (JUDGMENT-DEBTOR) *v.* RAGHUNATH SAHAI (DECREE-HOLDER). *

Insolvent judgment-debtor—Civil Procedure Code, s. 351 (*b*)—"*Property*"—*Fraudulent intent.*

S. 351 (*b*) of the Civil Procedure Code contemplates a case of active concealment, transfer, or removal of substantive property since the institution of the suit in which was passed the decree in execution of which the judgment-debtor was arrested or imprisoned, with intent to deprive the creditor or creditors of available assets for division ; and it does not cover an omission by the judgment debtor, in his application for a declaration of insolvency, of a statement as to his right to demand partition of ancestral estate in which he is a sharer, especially where there is no evidence of any intent to defraud.

THIS was an appeal from an order under s. 351 of the Civil Procedure Code, refusing to declare the appellant an insolvent. The facts of the case are stated in the judgment of Straight, J.

Munshi *Kashi Prasad*, for the appellant.

Munshi *Sukh Ram*, for the respondent.

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* First Appeal No. 140 of 1884, from an order of R. J. Leeds, Esq., District Judge of Gorakhpur, dated the 1st August, 1884.

(1) I. L. R., 6 All., 463.