

APPELLATE CIVIL.

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August 7.*Before Mr. Justice Mahmood and Mr. Justice Duttoit.*

RAM SAHAI (JUDGMENT-DEBTOR) v. GAYA AND OTHERS (DECREE-HOLDERS).*

Pre-emption—Conditional decree—“Finality” of decree—Holiday—Act XV of 1877 (Limitation Act), s. 5, sch. ii, No. 156—Execution of decree—Sale of property by decree-holder before obtaining possession—Decree-holder’s right not forfeited.

A decree in a suit to enforce a right of pre-emption directed that the purchase-money should be paid within a certain period from the date the decree became “final”. The period of limitation prescribed for an appeal from this decree expired on a day when the Court was closed. *Held* that the decree did not become “final” before the day the Court re-opened. *Shaikh Ewaz v. Mohuna Bibi* (1) followed.

The holder of a decree enforcing a right of pre-emption, who subsequently to the date of the decree sells the property to a “stranger” and permits the latter to pay the purchase-money decreed into court, does not by such conduct debar himself from obtaining possession of the property in execution of the decree.

Rajjo v. Lalman (2) and *Sanju Prasad v. Jamna Prasad* (3) distinguished.

THE respondents in this case obtained a decree for pre-emption on the 30th June, 1883, under the terms of which the purchase-money was to be paid into court within two months from the date of the decree becoming “final.” This decree was appealable to the High Court, but before the expiry of the period of limitation prescribed by law for the appeal, the High Court was closed on account of the long vacation and did not re-open till the 19th November, 1883, when no appeal was preferred. On the 29th November, 1883, the respondents executed a sale-deed conveying the property (to which the decree of the 30th June, 1883, related) to one Ambika Prasad. On the same day, the respondents filed an application for execution of the decree, and, after reciting that they had sold the property included in the decree to Ambika Prasad, prayed that the latter might be allowed to deposit the purchase-money, and that they (the decree-holders) might be placed in possession, in order that they might make over possession of the property to the new vendee. The Court below accepted the deposit, and allowed execution of the decree in the manner prayed.

* First Appeal No. 36 of 1884, from an order of Rai Raghunath Sahai, Subordinate Judge of Gorakhpur, dated the 21st January, 1884.

(1) I. L. R., 1 All. 132.

(2) I. L. R. 5 All. 180.

(3) S. A. from Order No. 45 of 1883, decided the 21st November 1883, not reported.

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On appeal, the judgment-debtor raised the same objections which had been urged unsuccessfully in the lower Court. In the first place, it was contended that the deposit of the purchase-money, with the application of the 29th November, 1883, was not made within the time allowed by the decree, which must therefore be taken to have become incapable of execution at the instance of the pre-emptor, under the provisions of s. 214 of the Civil Procedure Code. In the second place, it was contended that the action of the respondents in executing the sale-deed of the 29th November, before having obtained possession under the decree, invalidated their pre-emptive right, rendering the decree incapable of enforcement. In support of this contention, the appellant relied upon *Rajjo v. Lalman* (1).

Munshis *Hanuman Prasad* and *Sukh Ram*, for the appellant.

Mr. *T. Conlan* and the *Senior Government Pleader* (*Lala Juala Prasad*), for the respondents.

The Court (MAHMOOD and DUTHOIT, JJ.) delivered the following judgment:—

MAHMOOD, J.—(After stating the facts, continued):—We have no hesitation in holding that the first part of the argument addressed to us on behalf of the appellant is unsound. Reading s. 5 with art. 156, sch. ii. of the Limitation Act (XV of 1877), there can be no doubt that the period of limitation for preferring an appeal from the decree of the 30th June, 1883, did not expire till the 19th November, 1883, when this Court re-opened, and the decree cannot before be regarded as having become final before that date. The point before us is governed by the principle laid down by this Court in *Shaikh Ewaz v. Mokuna Bibi* (2), and following that ruling, we disallow the two first grounds of appeal.

The second question, however, which forms the subject of the remaining grounds of appeal, is a point of some nicety. In the case of *Rajjo v. Lalman* (1) this Court laid down the principle that when a pre-emptor, in anticipation of the success of his pre-emptive claim, transfers the pre-emptional property in any manner inconsistent with the object of the suit for pre-emption, such transfer operates as forfeiture of the pre-emptive right, and the suit for

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pre-emption must, therefore, be dismissed. Again, in the unreported case of *Sarju Prasad v. Jamna Prasad* (1) Straight and Tyrrell, JJ., laid down the rule that a decree for pre-emption, being purely personal in its character, could not be transferred so as to entitle the purchaser to execute the decree. The learned pleaders for the appellant contend that the principles laid down in these two rulings govern the present case, because the action of the pre-emptor-decree-holder, in transferring the pre-emptional property (included in the decree), by executing the sale-deed of the 29th November, 1883, virtually amounted to transfer of the decree itself, and should therefore operate in defeasance of the pre-emptor-decree-holder's right to execute the decree.

We are of opinion that this contention, though plausible, has no real force. In the case of *Rajjo v. Lalman* (2) the transfer had been made by the plaintiff-pre-emptor before his suit was decreed, and in the case of *Sarju Prasad v. Jamna Prasad* (1) the person who was seeking to execute the decree was not the pre-emptor-decree-holder, but the person to whom the decree had been transferred. We agree with the rules laid down in both these cases; but they are distinguishable in principle from the case now before us. In the former of these cases, the question was whether the plaintiff-pre-emptor, who had himself infringed the right of pre-emption in connection with the property in suit, should be allowed to obtain a decree for pre-emption; and the effect of the latter ruling was to uphold the principle, that no decree of Court passed in a suit for pre-emption can be so transferred as to invest the transferee with the right of obtaining possession of the pre-emptional property by executing that decree. The case now before us is one in which the pre-emptor's right of pre-emption had already been established by a decree which had become final before the sale-deed of the 29th November, 1883, was executed. That sale-deed did not transfer the *decree*, but the *property*, to the proprietary possession of which the pre-emptor-decree-holder was entitled, subject only to the payment of the purchase-money within time. It is not necessary for the purposes of this appeal to determine whether the sale-deed was valid. The question is one which, if it ever arises,

(1) S.A. from Order No. 45 of 1883, decided the 21st November, 1883.

(2) I. L. R., 5 All. 180.

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can be finally determined only in a suit between the pre-emptor-decree-holder and his vendee, Ambika Prasad. So long as the latter does not seek execution of the decree, the matter cannot be regarded as a question relating to the execution of the decree, such as would fall under the purview of s. 244 of the Civil Procedure Code. The parties to the decree are bound by the terms of the decree itself, and the Court executing the decree has no power to go behind it, to declare it annulled, or to enter into any questions which are beyond the scope of the decree. The rules of procedure, therefore, precluded the Court below from entertaining the objections of the judgment-debtor-appellant so far as they were based upon the sale-deed executed by the pre-emptor-decree-holder, who, in praying for execution of the decree, was obeying its terms. Nor can the decree be regarded as annulled by reason of the fact that the money was deposited on behalf of the pre-emptor-decree-holder by Ambika Prasad under the terms of the decree. All that the appellant was entitled to was the right of receiving the purchase-money before delivering possession of the pre-emptional property to the decree-holder. That decree-holder, and not Ambika Prasad, is the person who, in the proceedings from which this appeal has arisen, is seeking to obtain possession of the property, and it is of no consequence that the purchase-money was deposited by the latter on behalf of the former. For it is clear that the pre-emptor-decree-holder, and not Ambika Prasad, is the person to whom possession must be delivered in execution of the decree, and that if Ambika Prasad has any valid rights under the sale-deed, he can enforce them only by a separate suit.

This last circumstance distinguishes the present case in principle from the ruling in the case of *Sarju Prasad v. Jamna Prasad* (1). If in the present case Ambika Prasad were the transferee of the pre-emptive decree, seeking by virtue of that decree to obtain possession of the pre-emptional property, we should have disallowed his application for execution. But such is not the case, and the authority referred to does not therefore govern this case.

The distinction which we have thus drawn is not merely technical, but is based on fundamental principles of the law of pre-emption.

(1) Not reported; S. A. from Order No. 45 of 1883, decided the 21st November, 1883.

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The sole object of the right of pre-emption is the exclusion of such strangers as are objectionable to the pre-emptive co-sharers of the vendor. And if a decree for pre-emption were capable of transfer, so as to enable the transferee to obtain possession of the pre-emptional property in execution of that decree, it is clear that the object of the right of pre-emption would be defeated, for the transferee of the decree may be as much a stranger as the vendee against whom the decree was obtained, or that the latter may be a pre-emptor of a lower grade than the pre-emptor who originally obtained the decree.

A decree once passed cannot, as we have already said, be questioned by any of the parties thereto when the decree is being executed, and if a decree for pre-emption could be validly transferred, the effect would be to place the transferee in possession without the trial of the question whether such transferee had the pre-emptive right in preference to the vendee against whom the decree was obtained. Nor could the sale of a pre-emptive decree be regarded as giving rise to a fresh cause of action for a separate suit to enforce pre-emption, and it follows that, not only the rights of the vendee-judgment-debtor, but also those of other co-sharers, might be injured by allowing the transferee of a pre-emptive decree to take out execution. On the other hand, in a case like the present, where the pre-emptional *property* and not the *decree* has been transferred, the effect of executing the decree can only be to place the pre-emptor-decree-holder in possession of the pre-emptional property, and the sale-deed executed by him, if valid, would give rise to a separate cause of action for a pre-emptive suit to be instituted by any person or persons who may consider the sale as having infringed their pre-emptive right. In the present case, whether the sale-deed of the 29th November, 1883, be valid or invalid, it must necessarily remain in abeyance till the pre-emptor-decree-holder obtains possession of the pre-emptional property under the decree; and, under this view, the present case is analogous to one in which the pre-emptor-decree-holder, immediately after obtaining possession under the decree, sells the property.

For these reasons, and without prejudice to any rights that may arise out of the sale-deed of the 29th November, 1883, we hold

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that the Court below was right in allowing the execution of the decree at the instance of the plaintiff-pre-emptor, and we dismiss this appeal with costs.

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Appeal dismissed.

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Before Mr. Justice Oldfield and Mr. Justice Duthoit.

THE MAHARAJA OF BENARES (PLAINTIFF) v. ANGAN
(DEFENDANT).*

Jurisdiction—Act XII of 1881 (N.-W. P. Rent Act), ss. 10, 95 (a)—Suit by landlord to determine nature of tenant's tenure.

The cognizance of the Civil Courts of a suit by a landholder for a declaration that a tenant is not a tenant at fixed rates, or an occupancy-tenant, but a tenant-at-will, is barred by the provisions of s. 95 (a) of the N.-W. P. Rent Act 1881.

THE plaintiff, the Maharaja of Benares, let certain land to the defendant, for purposes of cultivation. Subsequently desiring to eject the defendant from his holding, the plaintiff's lessee caused a written notice of ejectment to be served on him under s. 38 of the N.-W. P. Rent Act (XII of 1881). The defendant objected that he was a tenant having a right of occupancy, and eventually this objection was allowed by the Board of Revenue, and the notice of ejectment set aside.

The plaintiff then brought the present suit for possession of the land, and for a declaration that the defendant had no right thereto. The lower Courts (Munsif and District Judge of Benares) concurred in dismissing the claim, on the ground that, as the plaintiff admitted the defendant's tenancy, the sole question in the suit was as to the nature and class of the tenure, and that such a question was, by the provisions of s. 95 of the Rent Act, excluded from the cognizance of the Civil Court. The plaintiff appealed to the High Court.

Munshi, Hanuman Prasad and Babu Sital Prasad, for the appellant.

Lala Lalta Prasad, for the respondent.

The Court (OLDFIELD and DUTHOIT, JJ.) delivered the following judgment:—

* Second Appeal No. 257 of 1884, from a decree of D. M. Gardner, Esq., District Judge of Benares, dated the 24th November, 1883, affirming a decree of Shukh Ahmad-ulla, Munsif of Benares, dated the 2nd July, 1883.