

tion in respect of such property is to go in the teeth of the arrangement which was come to at the time the *wajib-ul-arz* was framed, to which the co-sharers and the subordinate holders had been signatories. Further, as has been pointed out by my brother Knox, the predecessor in title of the present plaintiff, when a partition was being carried out in 1839, repeated this disavowal of all concern with the resumed revenue-free land. For these reasons I think that the view taken by the Court of first instance was the correct one.

Per Curiam.

This appeal is decreed, the order of the lower appellate Court is set aside, and that of the Court of first instance restored with costs in all Courts.

Appeal decreed.

APPELLATE CIVIL.

Before Mr. Justice Burkitt.

RAM DIN AND OTHERS (DEFENDANTS) v. RANG LAL SINGH (PLAINTIFF)*

Pre-emption—Limitation—Sale, with subsequent agreement for re-purchase—Mortgage by conditional sale.

On the 6th of June 1887, one R. K. sold a certain zamindari share to S. On the 18th of May 1888, B. brought a suit for pre-emption of that share. Pending the suit, on the 6th of July 1888, the vendor, the vendee and the pre-emptor entered into an agreement by which the vendee, recognizing the pre-emptive right of the plaintiff, agreed to re-transfer the property to the vendor or the pre-emptor on payment by either of them on the full moon of Jeth in any year of the price paid by him. On the 20th of June, 1891, the vendor, affecting to treat the transaction of the 6th of June 1887, as a mortgage, made an application purporting to be under s. 83 of the Transfer of Property Act accompanied by payment of the price of the property into Court and prayed for redemption. The vendee refused to take out the money deposited by the vendor; and subsequently, on the 13th of November, 1891, R. K. applied for repayment to him of the said money, stating that he wished the vendee to remain in possession and asking that the agreement of the 6th of July, 1888, might be considered null and void. On the 1st of September 1892, one R. S. filed a suit for pre-emption of the said property.

* Second Appeal No. 793 of 1894, from a decree of Kunwar Jwala Prasad, District Judge of Azamgarh, dated the 26th June 1894, reversing a decree of Munshi Kishan Lal, Additional Subordinate Judge of Azamgarh, dated the 20th of March 1893.

1895

KALLIAN MAJ

v.
MADAN
MOHAN.

1895.

March 15.

1895

RAM DIN
v.
RAM LAL
SINGH.

Held that the original transaction of the 6th of June, 1887, was an out and out sale, and was not, and could not be, by the subsequent agreement between the parties, turned into a mortgage by conditional sale; and in consequence that the suit brought by R. S. was barred by limitation.

The facts of this case are fully stated in the judgment of the Court.

Babu *Bishnu Chandar* for the appellants.

Maulvi *Muhammad Ishaq* for the respondents.

BURKITT, J.—This is an appeal in a pre-emption suit. The vendor, one Ram Khilawan, by a registered sale-deed dated the 6th of June, 1887, sold certain property to one Sheoraj Ahir. Subsequently, in May, 1888, a suit was instituted by one Bharos to pre-empt that property on the ground that the vendee was not a co-sharer. The suit was brought under the provisions of the *wajib-ul-arz* as to pre-emption. Before that suit came to a hearing in Court an agreement was entered into by the vendor, the vendee and the pre-emptor and was registered on the 6th of July, 1888. The effect of that document is that the vendee, practically admitting the pre-emption right of Bharos, agreed to hand back the property on the Puran Mashi of Jeth of any year on being repaid by either the vendor or the pre-emptor the amount he had given for it. Nothing further appears to have been done in the matter till the year 1891, when, on the 20th of June of that year, the vendor, assuming to treat the sale of 1887 as a mortgage, and after referring to the stipulation contained in the agreement of July, 1888, applied to the Court under the provisions of s. 83 of the Transfer of Property Act to permit him to deposit the mortgage money in Court on the ground that Sheoraj had refused to accept it. This application appears to have been shelved on the 3rd of August, 1891. Subsequently in November, 1891, Ram Khilawan applied for leave to withdraw the money from Court and asked that the agreement of 6th July, 1888, should be considered null and void, and stated that he had no longer any desire to interfere with Sheoraj's possession. This application of the 13th of November, 1891, is the foundation of the plaintiff's suit. In the sixth paragraph of the plaint plaintiff alleges that this

1895

 RAM, DIN
 v.
 RANG LAL
 SINGH.

transaction of the 13th of November, 1891, amounted to a sale and that therefore he is entitled to pre-empt. In the first Court the Subordinate Judge very properly held that the suit was barred by limitation, being of opinion that the plaintiff's pre-emptive rights were, as I understand him, in no way affected by the agreement of July, 1888, or by the application of the 13th of November 1891. The lower appellate Court disagreed with the first Court, and held that, though the sale of June, 1887, was an absolute out-and-out sale, the agreement of the 6th of July, 1888, had the effect of turning that absolute sale into a mortgage by conditional sale. He further held that "the effect of the application of the 13th of November, 1891, is that the conditional vendor relinquished his equity of redemption and made the sale absolute." He further held that, as the sale thus became absolute on the 13th of November, 1891, the plaintiff's cause of action arose on that date, and that therefore his suit was in time. I am unable to concur in any one of the conclusions at which the learned Judge arrived, excepting so far as he finds that the sale of June, 1887, was an out-and-out absolute sale. In that matter he is quite right. But the agreement dated the 6th of July, 1888, did not have, could not have, and was not intended to have, the effect of turning the absolute sale of June, 1887, into a mortgage by conditional sale. From the beginning to the end of that instrument the word "mortgage" is nowhere mentioned, and the sale of June, 1887, is described in it as an absolute sale (*bainamah la kalami*.) The matter to which the parties to that instrument agreed is no more than that if either the vendor or the pre-emptor repaid the purchase money on a fixed date to the vendee the latter would reconvey the property. In fact this document can be considered as neither more nor less than a promise by the vendee to re-sell the property on certain conditions. The sale as originally made remained untouched as an out-and-out absolute sale and the only right which the vendor or the pre-emptor acquired was a right of repurchase. The learned Judge in the Court below is quite wrong in holding that under the deed of July, 1880, the previous absolute sale became a conditional sale with power of redemption, and the vendor's statement in his petition of June, 1891, as to the sale

1895

RAM DIN
v.
RANG LAL
SINGH.

having become a mortgage, and, in his petition of November, 1891, as to his relinquishment of his supposed equity of redemption are simply absurd. I concur fully with the view of the law taken by the Court of first instance and dissent *in toto* from that laid down by the District Judge. I allow this appeal. I set aside the decree of the lower appellate Court, and I restore the decree of the Court of first instance dismissing the plaintiff's claim. Defendants are entitled to their costs in all three Courts.

Appeal decreed.

Before Mr. Justice Burbitt.

1895.
March 19.

AMJAD ALI AND OTHERS (PLAINTIFFS) v. MUSHTAQ AHMAD AND ANOTHER
(DEFENDANTS.)*

Pre-emption—Wajib-ul-arz—"Stranger."

Under the terms of a *wajib-ul-arz* successive pre-emptive rights were given, first, to 'own brothers,' secondly, to 'near cousins,' thirdly, to 'shareholders.' *Held*, the parties being Muhammadans, that in regard to a sale of land to which this *wajib-ul-arz* applied a nephew (brother's son) of the vendee was a 'stranger' and his joinder as co-vendee would vitiate the sale and let in other persons having a right of pre-emption. *Bhurey Mal v. Nawal Singh* (1) distinguished.

The facts of this case sufficiently appear from the judgment of Burbitt, J.

Mr. D. N. Banerji for the appellants.

Mr. T. Conlan and Pandit Sundar Lal for the respondents.

BURKITT, J.—This is an appeal in a pre-emption suit. One Muhammad Saddiq, a co-sharer, sold a small property to Mushtaq Ahmad and Muhammad Israil. Mushtaq Ahmad is a co-sharer in the same *thok* with the vendor. Muhammad Israil is not a co-sharer, but is the nephew of Mushtaq Ahmad and the son of Mushtaq Ahmad's brother, who is a co-sharer. The plaintiffs-appellants have instituted this suit for the purpose of acquiring by pre-emption the property sold to the vendees. The allegation on which their plaint is founded is that Muhammad Israil is a 'stranger' and that Mush-

* Second Appeal No. 744 of 1894, from a decree of H. G. Pearse, Esq., District Judge of Agra, dated the 23th July 1894, reversing a decree of Babu Prithi Nath, Munsif of Muttra, dated the 21st October 1893.

(1) I. L. R., 4 All. 259.