

1896

IN THE  
MATTER OF  
THE PETI-  
TION  
OF RUDRA  
SINGH.

lay down a direction that before exercising his powers he should record reasons. He is given a discretion which he may be trusted to use properly, and it will be for a person impugning his order to satisfy us that a judicial discretion has not been used before we can interfere with an order passed under this section. We need not go into or state any reason why it is necessary that this section should appear on the statute book. It is there; and as it is there, it is the duty of every Magistrate, who considers that the use of it is necessary and expedient in the interests of justice, to make use of it to the fullest extent necessary in the interests of justice. If he does not do so, he neglects an obvious duty. No case has been made out to us showing that in the present instance the Joint Magistrate of Etah failed to exercise his discretion or abuse it. We decline to interfere and return the record.

*Application dismissed.*

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May 18.

## APPELLATE CIVIL.

*Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Blennerhassett.*

UJAGAR LAL (PLAINTIFF) v. JIA LAL AND OTHERS (DEFENDANTS).

*Pre-emption—Wajib-ul-arz—Right of pre-emption not forfeited by breach on a former occasion of the rules of the wajib-ul-arz relating to pre-emption.*

*Semle* that a claimant for pre-emption under a *wajib-ul-arz* would not forfeit his right to pre-emption if upon a former occasion he had violated the provisions of the *wajib-ul-arz* by mortgaging his share to a stranger. *Gokul Chand v. Ram Prasad* (1) followed: *Bhajjo v. Lalman* (2) referred to.

This was a suit to obtain possession as mortgagee of certain zamindari which had been mortgaged by a deed of conditional sale by three of the defendants to the fourth defendant. The plaintiff claimed under a clause of the *wajib-ul-arz* relating to pre-emption and he alleged his right as a co-sharer to be superior to that of the defendant mortgagee.

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Second Appeal No. 357 of 1894, from a decree of G. E. Gill, Esq., District Judge of Mainpuri, dated the 30th January 1894, confirming a decree of Rai Pandit Indar Narain, Subordinate Judge of Mainpuri, dated the 25th November 1892.

(1) Weekly Notes 1889, p., 127.

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

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The defendant mortgagee pleaded that as to part of the property mortgaged the plaintiff had no right of suit, not being a co-sharer ; that the mortgage was executed with the plaintiff's knowledge and acquiescence, and that the plaintiff had forfeited his right of pre-emption by having on a previous occasion mortgaged his own share to a stranger.

The court of first instance (Subordinate Judge of Mainpuri) found that the plaintiff had about four weeks before the suit mortgaged his own share to one Harbans Rai, who was a stranger, and, applying the ruling in *Rajjo v. Lalman* (1), dismissed the suit on the ground that the plaintiff had by his own act deprived himself of his right to claim pre-emption.

The plaintiff appealed, and the lower appellate court (District Judge of Mainpuri), taking the same view of the law as that taken by the court below, dismissed the appeal.

The plaintiff appealed to the High Court.

Munshi *Madho Prasad* for the appellants.

Munshi *Gobind Prasad* for the respondents.

EDGE, C. J., and BLENNERHASSETT, J.—This was a suit for pre-emption of a share in a village brought on a clause in the *wajib-ul-arz* providing for pre-emption in case of mortgages or sales of shares by co-sharers. The first Court dismissed the plaintiff's suit on the ground that on a previous occasion he himself had mortgaged his share in the village to a stranger. The lower appellate Court, accepting that view of the law, dismissed the appeal. The plaintiff has brought this appeal.

It so happens that on the previous occasion when the plaintiff himself mortgaged to a stranger no co-sharer in the village claimed pre-emption. No *wajib-ul-arz* which we have ever seen has contained a clause absolutely and in all events prohibiting a co-sharer from selling or mortgaging to a stranger. Such a clause would be unreasonable and bad in law. It would be against public policy. What is provided by such clauses is that a co-sharer shall have a right to take the mortgage or to

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buy in preference to a stranger; and that is a perfectly reasonable custom or contract as the case may be. There is nothing to show, in that view of the law, that on the previous occasion the plaintiff acted contrary to the provisions of the *wajib-ul-arz*, for there is nothing to show that any co-sharer desired to take the mortgage. Even if the plaintiff had on a previous occasion acted in violation of the provisions of the *wajib-ul-arz* as to pre-emption, we should hesitate before deciding that such previous contravention of the provisions of the *wajib-ul-arz* deprived him of all right to claim pre-emption in case of a mortgage or sale of another share by another co-sharer in the village. We are disposed to think that the decision in *Gokul Chand v. Ram Prasad* (1) was right. It must not be assumed from what we have said that we throw any doubt on the correctness of the decision in *Bhajjo v. Lalman* (2), with the decision in which case on the facts there before the Court we agree. We allow this appeal, and, setting aside the decrees of the Court below and the first Court, we remand this case under section 562 of the Code of Civil Procedure to the Court of first instance to be disposed of on the merits. Costs here and hitherto will abide the result.

*Appeal decreed and suit remanded.*

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May 21.

*Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Blennerhassett.*

HINGAN LAL (JUDGMENT-DEBTOR) v. MANSA RAM (DECREE-HOLDER).\*

*Execution of decree—Limitation—Act No. XV of 1877, section 19—Acknowledgment—Admission of liability contained in a memorandum of appeal in a different suit.*

An admission made by an advocate or duly authorized vakil on behalf of his client in a memorandum of appeal in a case not *inter partes* that a certain decree was a subsisting decree capable of execution will amount to an acknowledgment within the meaning of section 19 of Act No. XV of 1877 so as to give a fresh starting point to limitation for execution of such decree, provided that such ad-

Second Appeal No. 314 of 1894, from an order of H. Bateman, Esq., District Judge of Saharanpur, dated the 10th March 1894, confirming an order of A. M. R. Hopkins, Esq., Subordinate Judge of Dehra Dún, dated the 18th November 1893.

(1) Weekly Notes 1889, p. 127.

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