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February 26.

Before Mr. Justice Banerji and Mr. Justice Aikman.

BHUPAL SINGH (DEFENDANT) *v.* MOHAN SINGH AND OTHERS (PLAINTIFFS) *

Pre-emption—Wajibularz—Hindu widow in possession of property of her deceased husband but not as his heir—Stranger—Effect of joining a stranger as plaintiff in a suit for pre-emption.

A Hindu widow in possession of the immovable property of her deceased husband, but not as his heir, there being a son living, has no right of pre-emption as a co-sharer by virtue of such possession, even though she may be recorded as a co-sharer in the village papers. *Phopi Ram* v. *Rukmin Kuar* (1) and *Imam-ud-din* v. *Surjaiti* (2) followed.

Where a plaintiff having a right to pre-empt joins with himself in a suit for pre-emption a stranger, *i.e.*, a person who has no such right, he thereby forfeits his right to pre-empt, and this disability cannot be overcome by amending the plaint by striking out the name of the stranger. *Bhawani Prasad* v. *Damru* (3), *Ram Nath* v. *Badri Narain* (4) and *Fida Ali* v. *Muzaffar Ali* (5) referred to.

THE suit out of which this appeal arose was a suit for pre-emption on the basis of the *wajib-ul-arz*. The property in suit was ten biswa share in the village, forming a separate patti belonging to Shibraj Singh and Bahadur Singh. They sold their share under a sale deed dated the 18th of August and registered on the 7th of September 1893 to Kunwar Misr Harcharan Lal; and he in turn sold it to one Bhupal Singh on the 22nd of July 1894. The plaintiffs were for the most part sharers in the other patti in the village, and as such entitled under the *wajib-ul-arz* to pre-emption as against Kunwar Misr Harcharan Lal who was a stranger; but they joined with themselves in the suit two widows, Musammat Indar Kunwar and Musammat Gaura, who, though recorded in the village papers as co-sharers, were only so recorded by courtesy, being widows of deceased co-sharers whose sons were living. The subsequent vendee, Bhupal Singh, was made a party to the suit, under section 32 of the Code of Civil Procedure, and he raised the plea that the female plaintiffs, being in fact not

* First Appeal No. 79 of 1895 from a decree of Maulvi Jafar Husain, Subordinate Judge of Bareilly, dated the 27th March 1895.

(1) Weekly Notes, 1895, p. 84.
(2) Weekly Notes, 1895, p. 85.
(3) I. L. R., 5 All., 197.
(4) I. L.R., 19 All., 148.
(5) I. L. R., 5 All., 65.

co-sharers in the village, had no right of pre-emption, and further, that the other plaintiffs who were co-sharers, by joining with them in their suit these two strangers, had forfeited their own right of pre-emption.

The Court of first instance found that the two widows were not strangers, inasmuch as their names were recorded in the *khewat* of the village, and also apparently because they would be entitled to get a share on partition. In other respects the Court found in favour of the plaintiff and gave them a decree for $\frac{12}{16}$ of the share claimed, having regard to the fact that Bhupal Singh was a pre-emptor of equal rights with themselves.

From this decree Bhupal Singh appealed to the High Court, raising the same plea as to the effect of the joinder of the two widows as plaintiffs as he had raised in the suit.

Mr. *Roshan Lal* and Pandit *Sundar Lal*, for the appellant.

Mr. *T. Conlan* and Babu *Jogindro Nath Chaudhri*, for the respondents.

BANERJI and AIKMAN, JJ.:—This was a suit for pre-emption, on the basis of the *wajib-ul-arz*. The property in suit belonged to Shibraj Singh and Bahadur Singh, and was sold by them on the 18th of August, 1893, to Kunwar Misr Harcharan, a stranger to the village. The latter sold the property on the 22nd of July, 1894, to Bhupal, the appellant, who is a co-sharer of the original vendors. The plaintiffs brought the present suit to enforce their right of pre-emption in respect of the sale to Kunwar Misr Harcharan, and subsequently added Bhupal as a defendant to the suit. One of the grounds on which Bhupal contested the claim was that the female plaintiffs were not co-sharers in the village, and had not the right to pre-empt, and that the other plaintiffs by associating them with themselves in the suit had forfeited their own right of pre-emption. The Court below has granted to the plaintiffs a decree for a portion of the property after excluding the portion which in its opinion Bhupal was entitled to pre-empt. Bhupal has preferred this appeal, and he reiterates the plea raised in the Court below as to the right of the plaintiffs to maintain the suit. We have two

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questions to decide in this appeal, first, whether the two female plaintiffs are co-sharers or strangers; and secondly, if they are strangers, what is the effect on the claim of the other plaintiffs of their being associated in the suit with those plaintiffs.

As regards the first point, it appears that the sons of both the ladies are alive, and therefore the ladies have no right as heirs to their husbands to share in their husbands' property. It is not alleged that they had acquired a share in the property by any right other than a right derived from their husbands, who were the original owners of the property, on the strength of which they claim to be co-sharers. It is true that in the revenue records their names have been entered along with those of their sons as co-sharers in the village, but that circumstance alone would not make them co-sharers and confer on them the right of pre-emption as co-sharers, since as a matter of fact they have no right to the property as co-sharers. The Subordinate Judge has held that the ladies have a right of pre-emption, because they have a right to maintenance and also because on a partition they would get a share in their husband's estate. This view is opposed to the ruling of this Court in *Phopi Ram* v. *Rukmin Kuar* * (1) and *Imam-ud-din* v. *Surjaiti* † (2). Had these rulings been before the Subordinate Judge he would probably have arrived at a different conclusion.

We must therefore hold that the two plaintiffs, Musammat Indar Kunwar and Musammat Gaura, were not entitled to claim pre-emption in respect of the property in suit.

As for the second question, it has been held that a co-sharer by associating with himself a stranger in a suit brought for pre-emption thereby forfeits his right of pre-emption. By the very act of joining a stranger in the suit he attempts to violate the pre-emptive right and estops himself from asserting it. This was held in *Bhawani Prasad* v. *Damru* (3) and in the recent case of *Ram Nath* v. *Badri Narain* (4) decided by a Bench of three Judges. It was contended before us that the female plaintiffs were not such strangers as would entail the dismissal of the suit of the other

(1) Weekly Notes, 1895, p. 84.
* *Vide infra*, p. 327.
† *Vide infra*, p. 329.
(2) Weekly Notes, 1895, p. 85.
(3) I. L. R., 5 All., 197.
(4) I. L. R., 19 All., 148.

plaintiffs, and that the defect in the suit, if any, might be remedied by an amendment of the plaint and by striking out the names of the female plaintiffs. We cannot accept either of these contentions. As held in *Fida Ali* v. *Muzaffar Ali* (1) the word "stranger" is a correlative to "pre-emptor," and is used to denote a person who has not the right of pre-emption. If these ladies, who had not the right of pre-emption by reason of their not being co-sharers in the village, were granted a decree in this case, the result would be that a share of the village would pass into the hands of the personal heirs of these ladies, who might be entire strangers to the village. As to the argument that the defect in the plaint could be remedied by an amendment, we may observe, as held in the cases above referred to, that the very fact of a person having the right of pre-emption joining with himself strangers, *i. e.* persons who have not a right of pre-emption, is in itself sufficient to estop him from asserting his claim. An amendment of the plaint therefore would not be of any avail to the other plaintiffs. For the above reasons we are of opinion that the suit ought to have been dismissed. We allow the appeal, and, setting aside the decree below, dismiss the suit with costs here and in the Court below. The objections under section 561 necessarily fail and are dismissed with costs.

Appeal decreed.

* Judgment in this case was as follows :—

EDGE, C. J., and BRODHURST, J.—This appeal has arisen in a pre-emption suit. The appellants before us are the defendants to the suit. The plaintiff is the respondent. She is a Hindu lady. Her husband, Jai Singh, had two sons by her, and one son, Beni Singh, by a first wife. Beni Singh brought a suit for partition. On that the plaintiff here brought her suit claiming her share on partition and obtained a decree for a share, and on partition her share. It is in right of her interest in that share that she claims to be entitled to maintain this suit for pre-emption. It has been contended on behalf of the appellants that a Hindu widow or wife who has obtained on partition a share does not in right of that share obtain any right of pre-emption. On the other hand it is contended that a Hindu lady who obtains a share on partition stands in exactly in the same position, so far as pre-emption is concerned, as does a Hindu widow who has taken by inheritance a share from her deceased husband. In support of the contention that a Hindu widow who has taken a share by inheritance from her

(1) I. L. R., 5 All., 65.

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deceased husband has a right of pre-emption we have been referred to the case of *Phulman Rai* v. *Dani Kuari* (1), to Mayne on Hindu Law and Usage, (4th edition), page 689, para. 577, and that portion of the judgment of the Calcutta High Court in *Sorolah Dossee* v. *Bhoobun Mohun Neoghy* (2) at page 307. On behalf of the appellants we have been referred to *Dila Kuari* v. *Jagarnath Kuari*; (3) Tagore Law Lectures on the Hindu Widow, 1879, page 467; *Sorolah Dossee* v. *Bhoobun Mohun Neoghy* (2), and particularly to that portion of the report at page 303; *Hemangini Dasi* v. *Kedarnath Kundu Chowdhry* (4), and particularly to that portion of the judgment at pages 765 and 766. We have also been referred to *Sheo Dyal Tewari* v. *Jadoonath Tewari* (5); Mitakshara, Chap. I., s. 7, para. 1, and Chap I, s. 2, verse 8; Smriti Chandrika, Chap. IV, verse 7; West and Buhler's Hindu Law, page 303. Now it appears to us that it is admitted law that a Hindu lady, whether she be wife or widow, cannot claim partition unless and until some male member of the Hindu family entitled to partition has claimed partition. It is also, we think, certain, in those Provinces at least, that a Hindu lady who has obtained a share on partition obtains nothing beyond a life-interest in the share. A Hindu widow is entitled to maintenance out of the family property, and it appears to us that her right to a share on partition flows from her right to maintenance and arises on the breaking up of the family property; and, so far as pre-emption is concerned, her obtaining a share on partition would give her no more right to claim pre-emption in the village than if she had been allowed to have possession of a particular share for maintenance without partition, that is, that she does not obtain, by reason of getting a share on partition, such an interest as would support a suit for pre-emption. We do not see in the case of a Hindu lady who has obtained a share on partition anything which would give her a right to claim pre-emption, any more than what existed in *Dila Kuari* v. *Jagarnath Kuari* (3) in which case a Hindu widow had under the decree of Court been put in possession of a share in lieu of maintenance. Difficulties might arise if we were to hold that a Hindu widow in right of a share obtained by her on partition got thereby a right of pre-emption in the village. Cases might arise in which a share obtained by pre-emption by a Hindu widow, if she had such a right, might on her death pass away into the hands of a person who was not a co-sharer and under circumstances which would preclude any co-sharer in the village claiming pre-emption. Such a case might possibly arise if the Hindu widow paid the pre-emptive price out of her *stridhan*, which on her death would go to her father's heirs. We think it is better for us to follow the principle which we find in *Dila Kuari* v. *Jagarnath Kuari* (3) which will not interfere with the very object of the custom of pre-emption, namely, the exclusion of strangers from the village, rather than to follow the principle affirmed in *Phulman Rai* v. *Dani Kuari* (1) which was a case in which a lady took by

(1) I. L. R., 1 All., 452.
(2) I. L. R., 15 Calc., 292.
(3) I. L. R., 6 All., 17.
(4) I. L. R., 16 Calc., 758.
(5) 9 W. R., 61.

inheritance to her husband. We need not express any opinion as to whether that case was correctly decided or not. In our opinion the plaintiff here did not obtain in right of the share she got on partition any right of pre-emption in the village. We allow the appeal with costs and dismiss the suit with costs.

Appeal decreed.

† In *Imam-ud-din* v. *Surjaiti* the following judgment was delivered :—

EDGE, C. J. and BANERJI, J.—This appeal has arisen in a suit for pre-emption brought on a *wajibularz*. The first Court gave a decree, and the defendants, who were the vendees, have appealed. The facts are simple in so far as they refer to the point which decides this case. The plaintiff is the widow of one Sukh Darshan Singh. Sukh Darshan Singh and his brother, Umrao Singh, were in the possession of twenty biswas in the village. On the death of Sukh Darshan Singh a dispute arose between Umrao Singh and the present plaintiff as to her rights, and in the end that suit was settled by an agreement of compromise, dated the 19th of March, 1887, entered into between the parties. Under that agreement the plaintiff was allowed the profits of 5 biswas of the property for her life, but the agreement specifically provided that she should have no other interest in the property and that she should have no power to transfer by way of mortgage, or sale, or will, or in any other way, any part of the property. The Subordinate Judge who tried the case found that the brothers were separate and not joint. In our opinion it is immaterial whether Umrao Singh and Sukh Darshan Singh were joint or separate. The plaintiff's sole title now is that conferred on her by the compromise of the 19th of March, 1887. It appears to us that the effect of that compromise was to limit the interest of the plaintiff, whatever it may have been before the compromise, to the enjoyment of the profits of the 5 biswas for her life-time without any power of mortgaging or selling or transferring even her life-interest. Under that agreement the plaintiff was in the position of a Hindu widow in a joint family who is allowed the profits of a portion of the family property for her maintenance, that is, so far as any interest she took in the property is concerned. The interest which the plaintiff has under that compromise is of a totally different description and far more limited than the interest which the Hindu widow of a sonless separated husband would have in his estate on his death. In our opinion the plaintiff is not a proprietor in the mahál within the contemplation of the pre-emption clause of the *wajibularz*. The position of Hindu widows, so far as the right of pre-emption is concerned, has been considered by this Court in *Phulman Rai* v. *Dani Kuari* (1), in *Dila Kuari* v. *Jagarnath Kuari* (2), and in Second Appeal No. 958 of 1888 decided on the 20th of May 1890 [ante p. 327].

We hold that the plaintiff in this case had no pre-emptive right, and we allow this appeal and dismiss the suit with costs in all Courts.

Appeal decreed.

(1) I. L. R., 1 All., 462. (2) I. L. R., 6 All., 17.