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December 23.

Before Sir John Edge, Kt., Chief Justice, Mr. Justice Blair and  
Mr. Justice Banerji.

RAM NATH AND OTHERS (DEFENDANTS) v. BADRI NARAIN AND OTHERS  
(PLAINTIFFS).\*

*Pre-emption - Wajib-ul-arz - Effect of a co-sharer vendee joining with  
himself in his purchase a stranger.*

When in the purchase of immovable property in respect of which a right of pre-emption exists, a vendee, being a person entitled to purchase, joins with himself in the purchase a stranger, then, in the event of a suit for pre-emption being brought, if the interest of the co-sharer vendee can be separated from the interest of the stranger vendee, the plaintiff pre-emptor can succeed only as against the stranger, the rights of the co-sharer vendee being equal or preferential to those of the pre-emptor. If, however, the interest of the co-sharer vendee cannot be separated from the interest of the stranger vendee, the plaintiff pre-emptor can succeed as against both. *Sheobharos Rai v. Jiach Rai* (1) approved. *Sheo Dyal Ram v. Bhyroo Ram* (2), *Gunesshee Lal v. Zaraut Ali* (3), *Manna Singh v. Ramadhin Singh* (4), referred to.

THIS was a suit for pre-emption based upon a *wajib-ul-arz*. The *wajib-ul-arz* provided that co-sharers should have a right of pre-emption if a sale was made to a stranger. The sale in dispute was a sale of shares in four villages. There were several vendees, of whom two were strangers. In the sale-deed the respective share of each vendee was defined, but it was not specified what portion of the sale consideration was to be paid by each vendee. So far as appeared from the deed the purchase money was one lump sum. The plaintiffs, who were co-sharers, made all the vendees defendants to the suit and claimed to pre-empt the whole property covered by the sale-deed.

The Court of first instance (Additional Subordinate Judge of Gorakhpur) decreed the claim as against all the defendants, holding, upon the question whether the co-sharer vendees had lost their rights by joining strangers with them in the purchase, that the case was governed by the decision in *Manna Singh v. Ramadhin*

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\* Second Appeal No. 750 of 1894, from a decree of V. A. Smith, Esq., District Judge of Gorakhpur, dated the 8th May 1894, confirming a decree of Kunwar Mohan Lal, Additional Subordinate Judge of Gorakhpur, dated the 20th September 1893.

(1) I. L. R., 8 All., 462.

(2) S. D. A., N.-W. P., 1860, p. 53.

(3) N.-W. P., H. C. Rep., 1870, p. 343.

(4) I. L. R., 4 All., 252.

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*Singh* (1) and that the co-sharer vendees having associated strangers with them in the purchase must themselves be regarded as strangers.

The defendants vendees appealed. The lower appellate Court (District Judge of Gorakhpur) dismissed the appeal, holding on the question above referred to that the shares purchased by the strangers could not be separated from the shares purchased by the co-sharer vendees, because not only a separate specification of shares but a separate specification of purchase money was necessary. The District Judge referred to the case of *Sheobharos Rai v. Jiach Rai* (2).

The defendants vendees appealed to the High Court.

Pandit *Sundar Lal*, for the appellants.

The respondents were not represented.

EDGE, C.J., BLAIR and BANERJI, J.J.—This was a suit for pre-emption brought on the *wajib-ul-arz* of the village. By the *wajib-ul-arz* co-sharers had a right of pre-emption in the case of a sale made to a stranger. The sale in this case was effectuated by one sale-deed. The vendees were five in number, some of them being co-sharers. The share sold to each of the five vendees was specified in the sale-deed, but there was no specification of the proportion of the purchase money which was paid by the respective vendees. The purchase money of the whole was one lump sum, so far as appears from the deed. The plaintiffs, who were co-sharers, brought this suit, making all five vendees defendants and claiming to pre-empt the whole property comprised in the sale-deed. They obtained a decree in the first Court and also in the Court of first appeal. From the decree of the latter Court this appeal has been brought.

The decisions on this point in these Provinces are but four. The earliest reported decision of which we are aware is that in the case of *Sheo Dyal Ram v. Bhyroo Ram* (3). There was no specification of the separate share sold to each vendee in that case. It was held that the co-sharer vendee must have a decree against

(1) I. L. R. 4 All., 252.

(2) I. L. R., 8 All., 462.

(3) S. D. A., N.-W. P., 1880, p. 53.

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him for pre-emption because he had associated with himself in the purchase strangers to the village. The next earliest reported case in these Provinces is that of *Guneshee Lal v. Zarat Ali* (1). In that case this Court, wrongly, in our opinion, held that there was no specification of the share sold to each of the purchasers. The Court conceived that the specification in the schedule at the foot of the deed of sale could not be read into the body of the sale-deed as part of the contract between the vendor and the vendees. In our opinion it formed part of the contract. The next case is that of *Manna Singh v. Ramadhin Singh* (2). There there was one joint price with no specification of the proportions in which it was to be borne by the vendees, but the share purchased by each vendee was separately specified. It appears to us that the learned Judges in that case decided it on the principle of law which applies when a co-sharer seeking pre-emption associates with himself in the suit as a plaintiff a stranger to the village. It appears to us that that principle does not apply to a suit against a co-sharer who has associated strangers with himself in his purchase. Where a co-sharer associates with himself as a plaintiff a stranger to the village in a suit in which he seeks to enforce the village contract or the village custom as to pre-emption, he comes into Court asking that the custom shall be enforced against the defendants, although in the very inception and maintenance of his suit he is breaking the custom himself, and he mixes up his own rights as a co-sharer with those of strangers who could have no common right to pre-empt with him. In the case of a defendant co-sharer in a suit for pre-emption who has associated with himself in his purchase a stranger to the village, he stands upon his right as a co-sharer; he seeks the assistance of the Court to enforce nothing. The next and last case upon this subject in the reports of these Provinces is that of *Sheobharos Rai v. Jiaoh Rai* (3). In that case the four shares purchased by the respective vendees were separately specified, and the share of the purchase money

(1) N.-W. P., H. C. Rep., 1873, p. 343.

(2) I. L. R., 4 All., 252.

(3) I. L. R., 8 All., 462.

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paid by each separate vendee was also separately specified. In that case this Court held, and we think rightly, that the plaintiffs, who were seeking pre-emption, were not entitled to a decree against the defendant vendee co-sharer. We think that the principle of law applying in these cases is correctly laid down in the following passage from the judgment in the case to which we have last referred :— “ In the two last mentioned cases the shares are separately specified, and where such shares are separately specified and the sale to the stranger is distinct and divisible, although contained in one deed, the reason of the rule does not exist. The rule applies only to those transactions which, while contained in one deed, cannot be broken up or separated ; and the rule should be so limited, for it would be a very great hardship if the vendee, by the association of a stranger in respect of a small but specified portion of the property purchased, should have to forfeit his entire right of purchase in favour of a sharer having equal, but not preferential, rights.” Mr. Justice Mahmood, from whose judgment we have quoted, having, as we conceive correctly, expounded the law on this subject in the passage which we have cited, went on to illustrate his views from the case then before him, and in illustrating his views referred to a sale in which the interests of the vendees were not only separately specified *quod* share, but *quod* purchase money. In our opinion where in cases of this kind the sale-deed specifies the interest or share purchased, so that it shows what was the particular property purchased by each of the vendees, whether by definition of share or plot, the vendee co-sharer, who is a co-sharer of equal rights of pre-emption with the plaintiff co-sharer, cannot be disturbed in the rights acquired by him under the sale-deed, and it is immaterial whether the proportion of the purchase money found or to be found by each of the vendees is or is not specified in the sale-deed. It happens in most suits for preemption that the Court has to ascertain what was in fact the true price ; and the rules which guide the Court in ascertaining what is the true price where there is only one vendee can equally be applied to ascertain what is the share of each vendee in the total amount of

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the true price paid for the whole property sold. Where the share of each vendee in the property sold is specified in the sale-deed, the actual property to which the right of pre-emption is attached is ear-marked and specified in the sale-deed. The object of pre-emption is to exclude strangers from the village and not co-sharers of equal rights. Where from the sale-deed it can be ascertained what is the share, area of property or interest in the village which the stranger has purchased, that share, area or interest alone can be the object of pre-emption in the suit. Where the share purchased and the proportionate price to be paid by each vendee are specified in the sale-deed it would not be necessary to make the co-sharer vendee a defendant in the suit: but where there is no such separate specification of the proportionate part of the purchase money to be paid by each vendee, the co-sharer vendee would be a necessary party to the suit for pre-emption, as the proportionate part of the purchase money of each vendee would have to be ascertained. Where a co-sharer chooses to associate with himself in the purchase a stranger to the village, and the sale-deed does not on the face of it disclose the particular share or interest purchased by the co-sharer vendee on his own behalf, as distinct from the share or interest purchased by the stranger, then the rule of pre-emption can only be enforced by treating the co-sharer vendee as if he were in the same position as the stranger in decreeing pre-emption against him. In such a case the bargain made between the vendees and the vendor is one joint in all its incidents.

It is necessary to refer an issue to the lower appellate Court under section 566 of the Code of Civil Procedure for findings in order to enable us to dispose of the case. The Court below will try the following issue, taking such evidence as may be produced before it and may be relevant:—

What was the true price paid by each vendee?

The Court will find in the case of each vendee the price paid by him. Ten days will be allowed for filing objections on the return of the finding.

*Issue referred.*