

KNOX, J.—I fully concur and have nothing more to add.

BLAIR, J.—I concur.

BY THE COURT.—The order of the Court is that the appeal be allowed, the decree on the preliminary point reversed, and the case remanded under section 562 of the Code of Civil Procedure to the lower appellate Court with directions to readmit the case on its file of pending appeals and to dispose of it according to law. Costs will abide the result.

*Appeal decreed and cause remanded.*

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AMJAD ALI  
v.  
MUHAMMAD  
ISMAIL.

*Before Mr. Justice Knox, Mr. Justice Blair, and Mr. Justice Burkitt.*

NAND LAL (PLAINTIFF) v. BANSI (DEFENDANT).\*

*Pre-mortgage—Wajib-ul-arz—Co-sharer—Mortgagee of a co-sharer not himself a co-sharer.*

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Two co-sharers in a village, A and G, mortgaged their proprietary interest, with possession, to L. L made either an assignment or a sub-mortgage of her interest under the mortgage for a term of twenty years to B, with a foreclosure clause in case of non-payment. B afterwards transferred to X for an unexpired period of sixteen years and eleven months the interest in the property which he had acquired from L. One N L, a co-sharer in the village, thereupon brought a suit for pre-mortgage in respect of the transfer to X, on the basis of the village *wajib-ul-arz*, which gave a right of pre-emption or pre-mortgage when the share of a co-sharer should be sold or mortgaged.

*Held*, that, inasmuch as B could not be regarded as a co-sharer, no right of pre-mortgage arose in favour of N L in respect of the transfer of the mortgagee interest from B to X. The principle laid down in *Khair-un-nissa Bibi v. Amin Bibi* (1) and in *Ali Ahmad v. Rahmat-ul-lah* (2) followed.

THE material facts of this case are fully stated in the judgment of Burkitt, J.

Munshi *Madho Prasad*, for the appellant.

Mr. *Roshan Lal*, for the respondent.

BURKITT, J :—The question we have to decide in Full Bench in this second appeal has arisen in the following manner. Two co-sharers named Asa and Gopal mortgaged their proprietary interest with possession to Musammata Laria. The latter made

\* Second Appeal No. 338 of 1896, from a decree of Munshi Mata Prasad, Subordinate Judge of Banda, dated the 3rd February 1896, reversing a decree of Babu Jailal, Munsif of Hamirpur, dated the 3rd December 1896.

(1) Weekly Notes, 1887, p. 93.

(2) I. L. R., 14 All., 195.

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either an assignment or a sub-mortgage of her interest under the mortgage for a term of twenty years to one Baldeo, with a foreclosure clause in case of non-payment. Baldeo afterwards transferred for an unexpired period of sixteen years and eleven months to the defendant-respondent Bansi the interest in the property which he had acquired from Musammat Laria. It is unnecessary to decide whether the instrument of transfer in his favour was an assignment by conditional sale of a mortgage or was a sub-mortgage. The plaintiff appellant, Nand Lal, being a co-sharer in the village, thereupon instituted this suit for pre-emption, or rather pre-mortgage, under the terms of the village *wajib-ul-arz*, which gives a right of pre-emption and of pre-mortgage when the share of a co-sharer is sold or mortgaged.

Now it is admitted that neither Musammat Laria nor her assignee Baldeo, nor Baldeo's assignee Bansi, is a co-sharer in the village. They are all of them strangers. It is also admitted that the plaintiff made no attempt to assert his alleged rights when the first or the second alienations were made.

The question we have to decide is—did the third transfer noted above give to the plaintiff appellant any cause of action on which he could maintain the present suit? The contention for the appellant is that a mortgagee in possession of the share of a co-sharer is *ipso facto* a co-sharer, and that if he give an assignment of his mortgage or execute a sub-mortgage to one who is not a co-sharer, the same result ensues as in the case of an alienation by a co-sharer.

In my opinion that contention is unsound and cannot be supported. A co-sharer, even though he has mortgaged with possession his interest in the mahal, and so has temporarily abandoned his right to actual possession of the land, is still nevertheless a co-sharer. As such he continues to enjoy many privileges in the village. He continues to be recorded in the *khwat* as proprietor, and above all he retains the right of redemption. No doubt the mortgagee in possession has by contract or by statute many of the rights, and is subject to many of the liabilities, of his mortgagor.

For instance, he may be entitled to sue the tenants for rent, if such be the condition of the mortgage, and he may be liable to pay Government revenue. But to my mind these very facts prove that the mortgagee in possession cannot be considered to be in law a co-sharer. For if that were his legal status, then it would require neither a contractual agreement nor any statutory provision to confer on him those rights or to render him subject to those liabilities. The vakil who appeared for the appellant was logically compelled to go so far as to contend that a lessee for a few days or weeks or months in possession of a portion, however small, of a co-sharer's property became *ipso facto* a co-sharer. Such a position is quite untenable. Indeed, to accede to the contention of the appellant would be in many cases to defeat the whole object of the law of pre-emption. A co-sharer in the proprietary rights of a mahal would have only to let in as mortgagee with possession or as lessee for some limited time a perfect stranger, and then on the strength of that limited right the mortgagor or lessor might sell to him as a co-sharer his mortgagor or lessor rights, and thus by two separate steps confer upon him the whole of such mortgagor's or lessor's rights in the property, which he could not by law have conferred upon him by one single grant so long as any co-sharer chose to exercise his pre-emptive right. Such a contention to be successful must be supported by a strong consensus of authority.

In support of the appellant's contention the case of *Salik Sahu v. Jafar Ali* (1) was cited. In that case it was held that "the term 'co-sharer' must be taken to mean the transferee for the time being of a co-sharer's interest." I am unable to concur in that dictum, if it is to be taken as one of general applicability, though it may have been correct in the case in which it was pronounced. For I notice that in that case the defendants-respondents were co-sharers, who had alienated by conditional sale to a stranger a portion of a share which they had acquired by enforcing their own pre-emptive rights as co-sharers against one Ishri Singh, another

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(1) *Weekly Notes*, 1881, p. 84.

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co-sharer. They clearly offended against the *wajib-ul-arz* none the less because the property which they alienated to a stranger had come into their hands by pre-emption from a stranger to whom another co-sharer had alienated it. I do not consider that case as being of any authority in the present appeal. The case of *Lachman Singh v. Ghasi* (1), cited for the appellant, does no more than lay down that mortgagees in possession liable to pay Government revenue may be sued by the lambardar under the Rent Act. The case of *Ganga Prasad v. Chunni Lal* (2) is not at all in point.

On the other hand in *Khair-un-nissa Bibi v. Amin Bibi* (3) it was held that a Muhammadan widow in possession, under an order of Court, of a share in the village in lieu of dower was not a co-sharer within the meaning of the *wajib-ul-arz*, and was not competent to maintain a suit for pre-emption as a co-sharer. The Court in deciding that case remarked that such a person "cannot be in a better position than that of a mortgagee in possession," meaning of course that a mortgagee in possession was not a co-sharer. The last case to which I would refer is that of *Ali Ahmad v. Rahmat-ul-lah* (4), in which the Court, after deciding that a certain document was a mortgage by conditional sale, the term of which had not expired, went on to remark that the "plaintiff (the conditional vendor) had not by reason of the mortgage ceased to be a shareholder in the village, and that he was not by reason of his having mortgaged his share in the village disentitled to maintain this suit for pre-emption." The above two cases show that a mortgagee in possession is not a co-sharer, and that a co-sharer who has mortgaged his interest, even by conditional sale, still remains a co-sharer and continues to enjoy the privileges of that status, and amongst others the right of pre-emption. In the rule laid down in those cases I fully concur.

Turning now to the present case I hold that the original mortgagors, Asa and Gopal, did not, by reason of the mortgage they executed in favour of Musammât Laria, lose the status of

(1) I. L. R., 15 All., 137.

(2) I. L. R., 18 All., 113.

(3) Weekly Notes, 1887, p. 93.

(4) I. L. R., 14 All., 195.

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co-sharers in respect of the mortgaged property, and that neither Musammat Laria nor her assignee (or sub-mortgagee) Baldeo became a co-sharer by virtue of their respective mortgages. When therefore Baldeo assigned or sub-mortgaged to Bansi, that which he transferred was not a co-sharer's interest, but an assignment of a mortgage of (or a sub-mortgage of) an interest executed by a stranger and not by a co-sharer. To such an alienation the terms of the *wajib-ul-arz* do not, in my opinion, apply. I would therefore affirm the decree of the lower Court and would dismiss this appeal with costs.

KNOX, J.—I agree with my brother Burkitt, and have nothing further to add to what he has said. I would affirm the decree of the lower Court and dismiss this appeal with costs.

BLAIR J.—I concur.

BY THE COURT.—This appeal is dismissed with costs.

*Appeal dismissed.*

*Before Mr. Justice Knox, Mr. Justice Blair, Mr. Justice Banerji,  
Mr. Justice Burkitt, and Mr. Justice Aikman.*

NAND KISHORE (PLAINTIFF) v. RAJA HARI RAJ SINGH AND OTHERS  
(DEFENDANTS)\*

*Act No. IV of 1882 (Transfer of Property Act), section 60—Mortgage—Purchase by mortgagee of portion of the mortgaged property—Mortgage not thereby necessarily extinguished.*

The purchase of a part of the mortgaged property by a mortgagee, subject to his mortgage, has not necessarily the effect of fully discharging the mortgage, without regard to the value of the property purchased and the price paid for it, whether such purchase be made in execution of a simple decree for money or in execution of a decree obtained by the mortgagee himself upon a subsequent mortgage, although it is possible that under some circumstances such purchase may have the effect of extinguishing the mortgage.

*Ahmad Wali v. Bakar Husain* (1) overruled. *Nawab Azimut Ali Khan v. Jowahir Singh* (2), *Nilakant Banerji v. Suresh Chandra Mullick* (3), *Mahtab Singh v. Misree Lall* (4), *Bitthul Nath v. Toolsee Ram* (5),

\* Second Appeal No. 677 of 1892, from a decree of H. P. Mulock, Esq., District Judge of Moradabad, dated the 21st March 1892, reversing a decree of Babu Mritonjoy Mukerji, Subordinate Judge of Moradabad, dated the 26th September 1891.

(1) Weekly Notes, 1883, p. 61.

(3) I. L. R., 12 Calc., 414.

(2) 13 Moo. I. A., 404.

(4) N.-W. P., H. C. Rep., 1867, p. 83.

(5) N.-W. P., H. C. Rep., 1866, p. 125.

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