where a Court had not seen fit to exercise the discretion conferred upon it by that section. For these reasons I am of opinion that the appeal should be dismissed.

BY THE COURT:—

The appeal is dismissed with costs.

*Appeal dismissed.*

## APPELLATE CIVIL.



*Before Sir Arthur Strachey, Knight, Chief Justice, and Mr. Justice Banerji.*

RAM GOPAL (DEFENDANT) *v.* PIARI LAL (PLAINTIFF).*

*Pre-emption—Wajib-ul-arz—Plaintiff's title to sue for pre-emption lost after suit but before decree—Suit to be dismissed.*

Where a plaintiff who had filed a suit for pre-emption based on the provisions of a wajib-ul-arz lost during the pendency of the suit the right to pre-empt by reason of the mahal in which both properties were originally comprised having become the subject of a perfect partition, it was *held* that the suit for pre-emption should be dismissed. *Sakina Bibi* v. *Amiran* (1) distinguished.

THE facts of this case sufficiently appear from the judgment of the Chief Justice.

The Hon'ble Mr. *Conlan* and Mr. *E. Chamier*, for the appellant.

Pandit *Sundar Lal*, for the respondent.

STRACHEY, C. J.—This was a suit for pre-emption in respect of a sale of a share in a mahal, the sale having been made on 20th of March, 1894. The suit was based upon a provision of the wajib-ul-arz giving a right of pre-emption to co-sharers in the mahal. At the time of the sale the plaintiff was a co-sharer of the mahal with the vendor. Before the sale, proceedings for perfect partition of the mahal had begun. The suit was instituted on the 19th of March, 1895. On the 1st of July, 1895, while the suit was pending, the partition proceedings were completed and

* Second Appeal No. 64 of 1897 from a decree of Maulvi Syed Tajammal Husain, Subordinate Judge of Saháranpur, dated the 10th December 1896, confirming a decree of Munshi Sheo Sahai, Munsif of Kairana, dated the 19th September 1895.

(1) (1888) I. L. R., 10 All., 472.

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the partition took effect from that date. By that partition the mahal was subdivided into four mahals and the property sold was included in a mahal in which the plaintiff was not a co-sharer. The suit proceeded, and on the 19th of September, 1895, a decree was passed in the plaintiff's favour by the Court of first instance, which was subsequently affirmed on appeal by the lower appellate Court. The question to be determined in this appeal is whether the decrees in the plaintiff's favour can be maintained, having regard to the fact that at the date of the first Court's decree the plaintiff had ceased to be a co-sharer with the vendor in the mahal in which the property sold is situated and therefore did not fall within the category of persons entitled to pre-emption under the wajib-ul-arz. In the recent Full Bench decision in *Janki Prasad* v. *Ishar Das* (1), it was held that the plaintiff in a suit for pre-emption based on a clause in the wajib-ul-arz giving pre-emptive rights to co-sharers, must show that his right and his status as a co-sharer subsisted not only at the date of the sale, but also at the date of the institution of the suit. The question whether the plaintiff must go farther and show that his right and his status as a co-sharer upon which the right is based still continue up to the date of the decree, or whether the defendant can obtain the dismissal of the suit by showing that the plaintiff's right and status have been lost by partition or otherwise during the pendency of the suit was expressly left open by the judgment of the Full Bench. Upon this question there appears to be no authority, and we must therefore determine it upon principle. The analogy of the Muhammadan law of pre-emption and the case of *Sakina Bibi* v. *Amiran* (2), with reference to that law, have been discussed. It appears to me that they afford us little or no guidance. In that case the plaintiff had lost her share by a sale in execution of a decree in another suit pending the Second Appeal in this Court in the pre-emption suit; and it was held that what the Court had to determine was only the correctness or otherwise of the decree appealed against, and that in determining that question events

(1) Weekly Notes, 1899, p. 127. (2) (1888) I. L. R., 10 All., 472.

which had occurred subsequently to the decree could not be taken into account. That of course completely distinguishes that case from the present. Mr. Justice Mahmood in his judgment referred to a passage in the Hedaya which he construed as showing that if by reason of a voluntary sale or other circumstance the pre-emptor before the passing of the decree of the first Court ceases to be the owner of the tenement by virtue of which he claimed pre-emption, then the decree could not be given in his favour. He expressed some doubt as to whether that principle would apply to a compulsory sale, such as a sale in execution of a decree. It appears from Baillie's Digest of Moohummudan Law (2nd edition, p. 505), that "the right of pre-emption is rendered void in two different ways after it has been established. One of these is termed *ikhtiyaree*, or voluntary, the other *zuroorse*, or necessary." But no instance is given of the loss of the right of pre-emption in the latter way except the death of the pre-emptor, and the result is that we get no light from the Muhammadan law as to the effect upon the right of pre-emption of a pre-emptor parting with the property, by virtue of which he claims the right, by a partition or any mode other than a voluntary sale. In the absence of authority on the subject, and in dealing with claims for pre-emption arising under the wajib-ul-arz, it seems to me that the only safe course is to see what mode of deciding the question would be most in furtherance of the contract or custom of pre-emption, and the principles upon which such a contract or custom is based. There can be no question that the effect of a decree in the plaintiff's favour in this suit would be to enforce the right of pre-emption in favour of a person who does not now form one of the class to whom alone the right of pre-emption is given by the wajib-ul-arz. The custom is one in favour of co-sharers of the undivided mahal, and no others. The object was to give such persons a preference over strangers, that is, over persons not co-sharers of the undivided mahal, and to exclude such strangers as much as possible. The plaintiff is not a co-sharer in the undivided mahal any longer. He is not even a co-sharer with the vendor in the new mahal in which the property sold

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is situate. He is just as much a stranger in the sense of the wajib-ul-arz as the defendant to whom the property was sold. That seems to be a strong reason for dismissing the suit, unless it can be shown that there is some general principle of law or procedure which compels us in disregard of the custom, and which would compel us in disregard of a contract, if this were a case of contract, to look exclusively to the state of things that existed at the date of the institution of the suit, and to say that because on that date the plaintiff was entitled to pre-emption he is to have a decree for pre-emption, although since that date his right has ceased to exist. It appears to me impossible to maintain that there is any such general principle of law. On the contrary, there are many provisions of the Code of Civil Procedure which clearly show that matters may arise after the institution of the suit which either destroy or materially affect the rights which the plaintiff possessed when the suit was brought, and which may be pleaded successfully by the defendant in answer to the suit In England the Rules of the Supreme Court provide in detail for grounds of defence which have arisen after action brought, and Order XXIV, which deals with the subject, only embodies a much older principle. In Daniell's Chancery Practice (6th edition, volume I, p. 307), it is said that "if plaintiff has a title to relief at the time of the issue of the writ, the mere fact that, owing to change of circumstances, that title has before trial expired or determined, will not prevent him obtaining a judgment in his favour for some relief, or for costs only, at the trial." The cases cited in the foot-note are cases of suits for an injunction, in which the right to the injunction, or the wrongful act to restrain which it was claimed, had ceased during the pendency of the suit. It was held that although, in consequence of what had happened, an injunction could not be granted, the Court could still order an inquiry as to the damage sustained by the plaintiff, and could, for the purpose of deciding how the costs of the suit were to be borne, decide whether the bill had been properly filed. That does not affect the point before

us in this case. There is therefore nothing which compels us to look exclusively to the date of the institution of the suit, to disregard all that has since happened, and to confirm the decree for pre-emption, although at the date of the decree the plaintiff was not entitled to pre-emption according to the terms of the wajib-ul-arz upon which the suit was based. For these reasons I am of opinion that the decrees of the Courts below were wrong, and I would allow this appeal, set aside the decrees of both the Courts below, and dismiss the suit with costs in all Courts.

BANERJI, J.—I am of the same opinion. The object of the pre-emption clause recorded in the wajib-ul-arz was to exclude a stranger from the co-parcenary body. That object would be defeated were we to decree the plaintiff's claim for pre-emption in this suit, for since the subdivision of the mahal into four mahals subsequently to the institution of the suit the plaintiff has ceased to be a co-sharer with the vendor in the mahal to which the property in suit appertains. In order to justify us in maintaining a decree which would defeat the object of pre-emption in a case of this kind, we should be satisfied that a rule of law or procedure exists, which makes it obligatory on us to make such a decree. We have not been referred to any such rule. The analogy of the Muhammadan law is not in favour of the plaintiff. The learned advocate who appeared for the respondent urged upon us to regard the date of the institution of the suit as the date to which we must refer for the purpose of determining the rights of the parties on the date of the decree, but he has not been able to point to any authority in support of that contention. The instances to which the learned Chief Justice has referred, clearly show that the mere fact of the plaintiff's having a right of action on the date of the suit would not entitle him to a decree if he had ceased to have that right subsequently to the institution of the suit and before decree. I concur with the learned Chief Justice in holding that in a suit for pre-emption if after the institution of the suit and before decree the plaintiff has lost the

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status by virtue of which he could claim pre-emption, his claim must be dismissed. I agree in the order proposed by the learned Chief Justice.

*Appeal dismissed.*

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*June* 20.

*Before Mr. Justice Knox and Mr. Justice Aikman.*

KANAHAI LAL (PLAINTIFF) *v.* SURAJ KUNWAR AND ANOTHER (DEFENDANTS).*

*Res judicata—Appeal—Plea of res judicata taken for the first time in appeal—Court not bound to entertain it if by so doing further findings of fact will be rendered necessary—Practice.*

Although the plea of *res judicata* may be taken at any stage of a suit, including first or second appeal, an appellate Court is not bound to entertain the plea if it cannot be decided upon the record before that Court, and if its consideration involves the reference of fresh issues for determination by the lower Court. *Muhammad Ismail* v. *Chattar Singh* (1) and *Tek Narain Rai* v. *Dhondh Bahadur Rai* (2) referred to.

THE facts of this case sufficiently appear from the judgment of Knox, J.

The Hon'ble Mr. *Conlan* and Mr. *D. N. Banerji*, for the appellant.

Mr. *E. Chamier* and Babu *Jogindro Nath Chaudhri*, for the respondents.

KNOX, J.—The sole plea raised in this Second Appeal is that the matter in issue in the present suit has become *res judicata*, inasmuch as the issues in the suit now under appeal were also raised and determined in appellant's favour in a connected suit, and the decision in that suit has now become final. The suit before us was a suit for the balance of money due under a bond. That bond was executed by Musammat Suraj Kunwar and Sheo Prasad, both of whom are respondents to this appeal. The suit was instituted on the 6th of March 1896, against the

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*Second Appeal No. 180 of 1897, from a decree of D. F. Addis, Esq., District Judge of Shahjahanpur, dated the 22nd January 1897, reversing the decree of Maulvi Muhammad Abdul Ghafur, Officiating Subordinate Judge of Shahjahanpur, dated the 13th August 1896.

(1) (1881) I. L. R., 4 All., 69. (2) Weekly Notes, 1893, p. 104.