1899
May 15.

Before Sir Arthur Strachey, Knight, Chief Justice, Mr. Justice Knox, Mr. Justice Banerji, Mr. Justice Burkitt and Mr. Justice Aikman.

JANKI PRASAD AND ANOTHER (DEFENDANTS) *v.* ISHAR DAS (PLAINTIFF).*

Pre-emption—Wajib-ul-arz—Partition—Effect of partition on pre-emptive rights, no new wajib-ul-arz being framed—Cause of action—Extinction of cause of action before suit brought.

In order that a suit for pre-emption may be successfully maintained, it is necessary not only that a cause of action should arise in favour of the pre-emptor at the time of the sale on which the suit is based, but that such cause of action should subsist at the time when the suit is brought. *Dalganjan Singh* v. *Kalka Singh* (1) referred to.

THIS was a suit for pre-emption of a 4 biswansi 12 kachwansi 10 nanwansi share in mauza Rajora. The defendants were Kalyan, Kuar Sen and Naik Rai, the vendors, Janki Prasad and Raghubar Dial, the vendees, and Musammat Jai Debi, the plaintiff in an earlier suit for pre-emption arising out of the same sale. The suit was brought on the basis of the wajib-ul-arz, the plaintiff alleging that the vendors being owners of a share in patti No. 2 of the plaintiff's thoke had sold the same to strangers. The plaintiff also alleged that the price (Rs. 500) entered in the sale deed was fictitious, and that the true price was Rs. 375. Both vendors and vendees pleaded that by reason of a partition which had taken place in 1894-5 the plaintiff was not a sharer in the patti in which the share in question was sold and therefore had no right of pre-emption. Musammat Jai Debi pleaded a pre-emptive right superior to that of the plaintiff. The sale out of which the suit arose was effected by a deed executed on the 28th of February 1895. By virtue of proceedings which were completed on the 15th August 1895, the mahal in which originally both the plaintiff and the defendants vendors were sharers was broken up, so that the plaintiff ceased to be a sharer in the mahal in which the share sold was situated. No new wajib-ul-arzes were prepared for the new mahals which were formed on partition. The suit was filed on the 25th of February 1896.

* Second Appeal No. 860 of 1896, from a decree of H. W. Lyle, Esq., Officiating District Judge of Mainpuri, dated the 7th July 1896, confirming a decree of Babu Jagat Narain, Munsif of Shikohabad, dated the 30th March 1896.

(1) Weekly Notes, 1899, p. 111.

The Court of first instance (Munsif of Shikohabad) decreed the plaintiff's claim for half the share sold, having regard to the pre-emptive rights of Jai Debi, and found the true sale price to be Rs 400.

The defendants-vendees appealed, and the lower appellate Court (District Judge of Mainpuri) dismissed the appeal and upheld the decree of the Munsif on the grounds upon which that decree was based.

The defendants-vendees appealed to the High Court.

Pandit *Sundar Lal* for the appellants. The plaintiff cannot maintain the suit for pre-emption unless he can show that he continued a co-sharer at least until the day when he instituted his suit for pre-emption. The object of a suit for pre-emption is to exclude strangers and to prevent them from intruding into a coparcenary body. It would be defeating the object of preemption if a person who himself has ceased to be a co-sharer at the date of suit and has thus become a stranger is permitted to pre-empt. That would be permitting one stranger to step into the place of another.

The Muhammadan law requires that the pre-emptor's interest in the tenement, the ownership of which gives him a right of pre-emption, should be subsisting up to the time when the Qazi pronounces his decree for pre-emption—*Sakina Bibi* v. *Amiran* (1), Baillie's Digest of Moohummudan Law, Hanifeea, p. 505, Tagore Law Lectures, 1873, p. 535. The principle upon which this rule of Muhammadan law is based is applicable equally to pre-emption cases based on the wajib-ul-arz.

The wajib-ul-arz conferred a right of pre-emption on co-sharers of four classes. The plaintiff does not come within the first three of these classes. The fourth class within which he fell on the date of sale (*viz.*, that of co-sharers in the thok) had ceased to exist on the date of suit by reason of the thok itself having ceased to exist.

Babu *Satya Chandra Mukerji* (for Babu *Jogindro Nath Chaudhri*) for the respondent.—This case differs in a material respect from *Dalganjan Singh* v. *Kalka Singh* (2) which has

(1) (1888) I. L. R., 10 All., 472. (2) Weekly Notes, 1899, p. 111.

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just been argued before this Bench. In this case the plaintiff was a co-sharer with the vendor at the date of sale, but, by reason of partition proceedings having been completed in the meanwhile, he had ceased to be a co-sharer at the date of suit. The question to be determined here is whether under such circumstances the suit is maintainable. It is submitted that it is. The crucial date to be looked at is the date on which the cause of action arose, which was here the date of sale. A complete cause of action which has once accrued can be enforced by a suit brought according to law and within the statutory period.

The plaintiff may waive his right to relief or defendant may discharge the cause of action which had accrued to the plaintiff by performance; but the plaintiff cannot lose his right to relief by something independent of his will. Here the plaintiff did not apply for partition and he cannot lose his right by some act of a third person which he was powerless to prevent. The principle contended for is supported by the decision of Mr. Justice Burkitt in Second Appeal 649 of 1895*. If the argument for the appellant were correct, a man has only to sell his share to a stranger and the stranger has the next day to apply for partition and get the property sold partitioned into a separate mahal. Would such a course defeat all rights of pre-emption? It is not an essential element of the plaintiff's cause of action that he was a co-sharer at the date of suit. He need only show that he was a co-sharer at the date when the cause of action arose.

[STRACHEY, C. J.—Supposing there had been a compulsory sale by process of law of the share of the plaintiff between the date of sale and the date of suit, would he still be entitled to bring his suit?]

No. Sale in execution of a decree stands on the same footing as a private sale. The compulsory sale by process of law follows some preceding act of the person against whom execution is enforced, and would be included in the principle of losing one's cause of action by waiver.

* (Unreported.) This case has however been dissented from by Edge, C. J., and Banerji, J. in *Serh Mal* v. *Hukam Singh*, (1897) I. L. R., 20 All., 100.—ED.

[STRACHEY, C. J.—Supposing in a suit for an easement the dominant tenement is destroyed by lightning or earthquake before the suit is instituted, would the suit lie still?]

Yes, it would; the Court might not be able to grant relief by reason of the destruction of the dominant tenement; but it might grant other reliefs, such as for damages.

STRACHEY, C. J.—This case raises a question similar to that considered by this Full Bench in *Dalganjan Singh* v. *Kalka Singh* (1). It relates to the effect of a perfect partition upon the right of pre-emption recorded in the wajib-ul-arz of an undivided mahal, where no new wajib-ul-arz has been framed for the new mahals created by the partition. The village Rajora originally consisted of several thokes, one of which was shown as "thoke Ishar Das." That thoke was an undivided 3 biswas 16 biswansis 10 kachwansis share of the village. The wajib-ul-arz prepared at the last settlement contained a chapter, headed "Chapter II, about the right of co-sharers *(hissadars)* among themselves based on custom or covenant." Clause 4 was as follows :—"Custom *(dastur)* relating to pre-emption *(shafa)*.—If any co-sharer *(hissadar)* wishes to transfer his share *(hissa)*, then, having regard to the right of pre-emption, he should transfer his estate *(haqiyat)*, that is, the claim to pre-emption shall accrue to, first, own brothers and brothers' sons, next to cousins, next to co-owners in the parcel sold *(sharik-i-haqiyat)*, after them to co-sharers in the patti *(sharkian patti)*, after them to co-sharers in the thoke *(sharkian thoke)*.

In February 1895 the defendants Nos. 3 to 5 sold a share in thoke Ishar Das to the defendant-appellant Janki Prasad, a stranger to the village. The plaintiff-respondent was at that time a co-sharer with the vendors in thoke Ishar Das. At the time of the sale, proceedings for perfect partition of the village had been commenced and were still pending. After the sale the perfect partition was completed, and it became operative on the

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1st July 1895, when the sanction of the Collector was given. By the partition thoke Ishar Das was divided into several separate mahals. The property sold fell within one of the mahals shown as mahal Ganga Prasad. In that mahal neither the plaintiff nor the vendees owned any share. No new wajib-ul-arz was framed for any of the new mahals. The present suit for pre-emption was brought in 1896. It was based on the pre-emption clause of the old wajib-ul-arz. In this appeal two questions have been discussed. The first is whether, after the perfect partition, the plaintiff was still entitled to pre-emption under the old wajib-ul-arz. The second is, whether it makes any difference that the sale took place before the completion of the partition: in other words, whether, granting that the plaintiff at the time of the sale obtained a good cause of action, he was deprived of it by the completion of the partition before the institution of the suit.

The principles upon which the first question must be decided have been fully considered in *Dalganjan Singh* v. *Kalka Singh* (1). The wajib-ul-arz was not in my opinion abrogated by the perfect partition. The question is whether, upon the true construction of its provisions, the plaintiff is entitled to pre-emption. The pre-emption clause gives the right (1) to certain relatives of the vendor, (2) to *sharik-i-haqiyat* or co-owners in the parcel sold, (3) to co-sharers in the patti, (4) to co-sharers in the thoke. "Co-sharers in the thoke" means co-sharers in the thoke which contains the property sold. No right is given to co-sharers in any other thoke or in any part of the village other than the thoke in which the vendor is a co-sharer. The plaintiff claims as one of this fourth class of pre-emptors, as a co-sharer in thoke Ishar Das. If he is a member of that class he is entitled to pre-emption: if he is not, his claim must fail. The effect of the perfect partition was to destroy the thokes into which the village Rajora had been divided, and thoke Ishar Das had, at the date when the suit was brought, ceased to exist. Neither the plaintiff nor any one else has, since the partition, been a co-sharer in thoke Ishar

(1) Weekly Notes, 1899, p. 111.

Das, and no one, therefore, can now claim pre-emption as a member of the fourth class of pre-emptors mentioned in the wajib-ul-arz. That disposes of the first question.

Next, does it make any difference that, at the date of the sale, though not at the date of the suit, thoke Ishar Das still existed, and that the plaintiff could, before the partition, have successfully sued for pre-emption as one of the co-sharers in the thoke? In my opinion, it makes none. No case exactly in point has been cited, but the principle appears to me to be clear. To maintain a suit for pre-emption, the plaintiff must, I think show not only that the sale gave him a cause of action, but that the cause of action still subsisted at the date of the institution of the suit. It is not necessary to consider what would have been the effect of the partition if it had been completed after the institution of the suit but before decree. To hold that the plaintiff is entitled to a decree if he merely proves that he had a right of pre-emption and a good cause of action at the time of sale, and that it is unnecessary to show that the right and the cause of action still subsisted when the suit was brought, should result in all sorts of anomalies. Suppose, for instance, that the plaintiff, after the sale, ceased to be a co-sharer in the thoke, not by reason of a partition but in any other way, such as by selling his share, could he still sue as a co-sharer? The learned pleader for the respondent admitted that he could not, but suggested that in such a case there would be a waiver or relinquishment of the right by the pre-emptor's voluntary act. But suppose that the sale was not a voluntary one : suppose that it was in execution of a decree against him? The learned pleader could suggest no answer to that question. Again, suppose that, after the sale, the vendee sold the property to a co-sharer having an equal right with the plaintiff to pre-emption under the wajib-ul-arz. Could the plaintiff deprive the new purchaser of the benefit of his purchase, although the rights of the two were equal? In *Serh Mal* v. *Hukam Singh* (1) that question was

(1) (1897) I. L. R., 20 All, 100.

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answered in the negative. The argument that "at the moment when the sale to the stranger was made, the plaintiffs obtained their cause of action," was not allowed to prevail.

For these reasons I am of opinion that the suit ought to have been dismissed by the Courts below, and that we ought to allow the defendants' second appeal and dismiss the suit with costs in all Courts

KNOX, BANERJI, BURKITT and AIKMAN, J J., concurred.

Appeal decreed.

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May 16.

APPELLATE CIVIL.

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

YAD RAM (PLAINTIFF) v. UMRAO SINGH AND OTHERS (DEFENDANTS).*

Mortgage—Suit for sale on a mortgage—Benamidar—Right of benamidar mortgagee to sue.

Held, that the mortgagee named in a deed of mortgage is competent to sue in his own name for sale on the mortgage, though he is admittedly only a benamidar for some third person. *Nand Kishore Lal* v. *Ahmad Ata* (1) followed. *Gopi Nath Chobey* v. *Bhugwat Pershad* (2); *Bhola Pershad* v. *Ram Lall* (3); *Sachitananda Mohapatra* v. *Baloram Gorain* (4); *Shangara* v. *Krishnan* (5); *Ravji Appaji Kulkarni* v. *Mahadev Bapuji Kulkarni* (6) and *Dagdu* v. *Balvant Ramchandra Natu* (7) referred to; *Hari Gobind Adhikari* v. *Akhoy Kumar Mozumdar* (8); *Issur Chandra Dutt* v. *Gopal Chandra Das*, (9) and *Baroda Sundari Ghose* v. *Dino Bandhu Khan* (10) dissented from.

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

Babu *Jogindro Nath Chaudhri* (for whom Babu *Harendra Krishna Mukerji*) for the appellant.

Mr. *D. N. Banerji* and Munshi *Ram Prasad* for the respondents.

* Second appeal No. 21 of 1897, from a decree of T. C. Piggott, Esq., Additional District Judge of Aligarh, dated the 2nd October 1896, reversing a decree of Babu Bepin Behari Mukerji, Officiating Subordinate Judge of Aligarh, dated the 24th March 1896.

(1) (1895) I. L. R., 18 All., 69.
(2) (1884) I. L. R., 10 Calc., 697.
(3) (1896) I. L. R., 24 Calc., 34.
(4) (1897) I. L. R., 24 Calc., 644.
(5) (1891) I. L. R., 15 Mad., 267.
(6) (1897) I. L. R., 22 Bom., 672.
(7) (1897) I. L. R., 22 Bom., 820.
(8) (1889) I. L. R., 16 Calc., 864.
(9) (1897) I. L. R., 25 Calc., 98.
(10) (1898) I. L. R., 25 Calc., 874.