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August 13.

Before Mr. Justice Burkitt and Mr. Justice Chamier.

BELA BIBI (DEFENDANT) v. AKBAR ALI (PLAINTIFF).*

Pre-emption—Muhammadan Law—Mortgage by a successful pre-emptor of the pre-empted property to a stranger—Pre-emptive rights of decree-holder not thereby destroyed.

The plaintiff in a pre-emption suit having obtained a decree for possession, in order to provide the means of paying the pre-emptive price mortgaged the property, the subject of the suit, to a stranger. *Held* that, whatever rights the mortgage to a stranger might or might not give rise to in the future, the successful plaintiff did not by that transaction forfeit the fruits of her decree. *Raijo* v. *Lalman* (1) distinguished. *Ram Sahai* v. *Gaya* (2) referred to.

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

Pandit *Moti Lal Nehru* and Maulvi *Muhammad Ishaq*, for the appellant.

Maulvi *Ghulam Mujtaba* (for whom Pandit *Baldeo Ram Dave*), for the respondent.

BURKITT, J.—This is one of three appeals in a pre-emption suit against a decree of the District Judge of Azamgarh declaring that the appellant Musammat Bela had forfeited her pre-emptive rights, and giving a decree for possession of the pre-empted property in equal shares to two other rival claimants, one of whom is the respondent, Mir Akbar Ali.

The property, the subject of the pre-emption claim, consists of a 4 pie share which belonged to one Waris Ali. On October 20th, 1898, Waris Ali conveyed that property by sale to one Muhammad Ali, who is admittedly a "stranger."

Thereupon on October 2nd, 1899, the appellant Musammat Bela Bibi instituted a pre-emption suit against the vendor and vendee, and obtained a decree by consent on November 14th, 1899. The decree was for possession of the pre-empted property on payment of the sale consideration, Rs. 975, within a limited period to the vendee. Not having so much ready money available Musammat Bela Bibi on December 6th, 1899, mortgaged the pre-empted share for Rs. 1,500, paid the Rs. 975 into Court

* Second Appeal No. 788 of 1900, from a decree of J. H. Cumming, Esq., District Judge of Azamgarh, dated the 14th April, 1900, confirming a decree of Babu Jai Lal, Subordinate Judge of Azamgarh, dated the 9th February, 1900.

(1) (1882) I. L. R., 5 All., 180. (2) (1884) I. L. R., 7 All., 107.

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on December 8th, 1899, and was put into possession of the pre-empted share on January 7th, 1900.

Meanwhile the respondent Akbar Ali had on October 5th, 1899, instituted a suit for possession by pre-emption of the same property. Among the defendants he impleaded Musammat Bela Bibi and another rival pre-emptor, one Manla Bakhsh.

The summons to appear and defend the suit was not served on Musammat Bela Bibi till three days after November 14th, which was the date on which she obtained her decree for possession of the pre-empted property.

In Akbar Ali's plaint there is only one paragraph which affects the appellant Musammat Bela Bibi. That is the 5th paragraph, in which the respondent charges Musammat Bela Bibi with having instituted a collusive pre-emption suit, as, he says, her father had done on a previous occasion. This is the only reference in the plaint to the appellant. It is to be noticed that Akbar does not allege that he possessed a pre-emptive right superior or preferential to that of Musammat Bela Bibi. Indeed he rather implies the contrary in the same paragraph, where he alleges that Musammat Bela's father had "a preferential right as against the plaintiff's (Akbar Ali's) ancestor" in a former suit for this same property.

In her written statement Musammat Bela Bibi asserted her superior right of pre-emption, and denied the existence of any collusion between her and the vendee.

On these pleadings the parties went to trial. Five issues were fixed by the Court of first instance, but none of them raised the plea on which the decisions of the lower Courts are chiefly founded, namely, that Musammat Bela Bibi had forfeited her pre-emptive right by the fact that she executed the mortgage of December 6th, 1899, to raise the money to comply with the terms of her decree. That document had not been executed at the date of Akbar Ali's suit, nor until after the pleadings in that suit had been filed and issue joined on the pleadings.

Eventually the Court of first instance held that all three claimants for pre-emption were on the same level and had equal rights, but further held as to Musammat Bela Bibi that she had forfeited her rights by reason of the mortgage of December

6th, 1899. The Court also rejected the claim of Maula Bakhsh, finding him guilty of collusion. A decree for pre-emption of the whole property was given in favour of Akbar Ali on payment of a certain sum. This decree did not purport to set aside or in any way to interfere with the decree obtained by the appellant on November 14th, 1899. From that decree three appeals were taken before the District Judge, namely, one by Musammat Bela Bibi and two by Maula Bakhsh.

In Musammat Bela Bibi's appeal the District Judge held that her pre-emptive rights were superior to those of Akbar Ali, but found that she had forfeited them by executing the mortgage of December 6th, 1899.

On second appeal to this Court Musammat Bela Bibi contends, among other matters which need not now be referred to, that the lower appellate Court was wrong in holding that she had forfeited her pre-emptive rights. For the respondent in support of the decree of the lower Court it was objected, under section 561 of the Code of Civil Procedure, that the Court below was wrong in holding that the appellant possessed a right of pre-emption superior to that of the respondent Akbar Ali. I will dispose of this matter first. I am of opinion that the District Judge is right, and for the reasons given by him, in holding that Musammat Bela Bibi had a preferential right. Indeed, as pointed out above, Abkar Ali must be taken to have admitted this in his plaint, where he stated that in respect of this same property Musammat Bela Bibi's father had a right of pre-emption superior to that held by his predecessor in title. The vakil who appeared for the respondent laboriously and volubly spent much time in addressing us on the interpretation to be put on the words "hissadar karibi" in a wajib-ul-arz relating to a pure zamindari village, quite ignoring and not contesting the finding of the lower appellate Court that the village had been partitioned into thokes and sub-divisions of thokes, and therefore could not be considered to be pure zamindari. His arguments therefore do not require any notice. As to Musammat Bela Bibi's appeal, I notice that the decisions of the two lower Courts that she had forfeited her pre-emptive rights are largely founded on the case of *Rajjo* v. *Lalman* (1).

(1) (1882) I. L. R., 5 All., 180.

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In my opinion that case has no bearing whatever on the question here. In that case Musammat Rajjo was the plaintiff in a pre-emption suit, who before suit had mortgaged to third parties the property which she subsequently sought to recover by right of pre-emption. It was held by this Court as between the pre-emptor and the vendor and vendee, that in consequence of having executed that mortgage she had disqualified herself from enforcing her pre-emptive rights. In the case now under appeal Musammat Bela Bibi is not the plaintiff, nor has she asked the Court to grant her a pre-emptor's decree for possession of the disputed share. She had already obtained that relief by the decree in her own suit. The plaintiff is Akbar Ali, a person who possesses a right of pre-emption, but one which is inferior to that of the appellant. He it is who has asked the Court in this case to give him a pre-emptor's decree for possession of the property. The case cited above does not apply to the facts of this case, and I am not inclined to extend further the principle on which that case depends. The respondent had of course to get rid of the appellant's superior right, but the only allegation he made against her in the plaint was that she had had instituted a collusive pre-emptive suit. By this allegation I presume he meant that the plaintiff when instituting her suit intended in some way with the connivance of the vendee to leave the property in the hands of the latter. The only facts alleged in proof of this collusion are firstly that appellant's father did something of the kind some time ago in another suit. This is really too absurd, and I am not a little surprised that the two lower Courts should have paid any attention to such an allegation. Then it is said, appellant got a decree in her suit on a compromise without contesting the amount of the consideration money, and that therefore the suit was collusive. There is in my opinion nothing in this matter. It means no more than that the vendee knowing he had no case against appellant forebore to defend a hopeless suit, and that Musammat Bela Bibi, rather than go to the trouble and expense of producing witnesses to prove a negative (namely that full consideration had not passed), accepted as correct the purchase money set forth in the deed of sale of October 20th, 1898. And further she admittedly paid that amount into Court, and was put into possession of the

disputed shares. She may have paid a high price, but as she admittedly did pay it there is no more to be said. In my opinion nothing has been established on which it is possible to find collusion between the appellant and the vendee. As to the question of forfeiture I have shown above that the case of *Rajjo* v. *Lalman* is not in point. It would, I think, be most dangerous to extend to the facts of this case the doctrine laid down in the case just cited. I know of no case in which it has been held that a person in the position of the appellant, that is to say, one who has obtained a decree for possession of certain property on paying a certain sum, and who raised money on the security of that property to pay off the purchase money, thereby forfeits his pre-emptive rights. The plaintiff's act in raising money by a mortgage of that property is not inconsistent with the object for which the pre-emption suit was brought. The money was raised on mortgage for the purpose of perfecting the decree for possession she had already obtained, and which she perfected by paying the sum due and obtaining possession. No doubt she borrowed the money and gave the mortgage while Akbar Ali's suit was pending. But she had no knowledge of his suit for three days after she obtained the decree in her own suit. Was she then bound, though knowing she had the superior claim, to put off all attempts to perfect her decree until the respondent's suit had been decided, and so forfeit the benefit of her decree by not paying up the purchase money within time? Had she acted in that manner, the two lower Courts would no doubt have treated her act as further evidence of collusion.

For the above reasons I am of opinion that the Courts below were wrong in holding that the appellant forfeited her pre-emptive rights. I would therefore allow this appeal, and, setting aside the decree of the lower Courts, I would dismiss the respondent's suit with costs in all Courts.

CHAMIER, J.—The first question which we have to decide in this case is whether the appellant Musammat Bela Bibi has a right of pre-emption superior to that of the respondent Akbar Ali.

This case came before me sitting alone and was referred by me to a Bench of two Judges. At that hearing counsel for the

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respondent admitted that the appellant had a preferential right of pre-emption. At the present hearing the respondent appeared by other counsel who preferred to argue the point.

The wajib-ul-arz of the village provides that pre-emption may be claimed firstly, by *hissadar karibi;* secondly, by co-sharers in the same thoke as the vendor; thirdly, by co-sharers in other thokes; and fourthly, by relations of the vendor.

The appellant and the vendor were co-sharers in the same sub-division of the thoke. The respondent Akbar Ali holds a share in a different sub-division of the thoke.

In villages of pure zamindari tenure where there was nothing to which such words as *karibi, nazdiki* and *mukaribat* could apply except to relationship with the vendor, it has been held that those words in the wajib-ul-arz applied to relationship—see, for example, *Gursaran* v. *Akhandanand* (1) and *Muhammad Sadi* v. *Muhammad Abdul Razzak* (2); but where that was not the case such words have been held to apply, not to relationship, but to holders of shares in the same sub-division of the village or tenure, in one case a *khata* and in another a thoke—see *Mahadeo Prasad* v. *Sabiha Bibi* (3) and *Balzor Rai* v. *Madho Rai* (4). In fact it is a question which must be decided in each case with reference to the terms of the particular wajib-ul-arz and the circumstances of the village and tenure.

In the present case it appears to me that the words *hissadar karibi* do not refer to relations of the vendor. They are provided for as a separate class. Having regard to the scheme provided by the wajib-ul-arz, I think that the word *karibi* refers to co-sharers who are near to the vendor in some sense other than relationship. In my opinion the lower appellate Court was right in holding that the appellant being a co-sharer of the vendor in the same sub-division of the thoke was a *hissadar karibi* as compared with the respondent, who is only a co-sharer in the same thoke.

The next question is whether the appellant has, as found by the Courts below, forfeited her right of pre-emption by having mortgaged the share in question to a stranger during the pendency of the suit brought by the respondent Akbar Ali.

(1) Weekly Notes, 1890, p. 227.
(2) Weekly Notes, 1891, p. 187.
(3) Weekly Notes, 1887, p. 260.
(4) Weekly Notes, 1895, p. 78.

I have found some difficulty in arriving at a decision on this question.

What Bela Bibi did was this :—She sued the vendor and vendee for pre-emption, and after having obtained a decree she mortgaged the share in question in order to obtain funds wherewith to comply with the terms of the decree. So far it would appear on the authority of the decision of this Court in *Ram Sahai* v. *Gaya* (1) that she did nothing which could prevent her from claiming the property from the vendee. In fact in the present case she took out execution of the decree and obtained possession. But it is said that, as the suit of the present respondent against her was then pending, she brought herself within the rule laid down in *Rajjo* v. *Lalman* (2), in which it was held that a co-sharer in a village who had under the wajib-ul-arz a preferential right to the mortgage of a share in that village forfeited such right by mortgaging such share to a stranger in anticipation of the success of her suit to enforce that right. The reasons for that decision seem to be that a right of pre-emption being a personal right cannot be made the subject of sale or bargain of any kind, and that the plaintiff could not be allowed to complain of the infringement of a right which she herself had also infringed. In the later case in 7 Allahabad it was said that the principle established by the decision in *Rajjo* v. *Lalman* was that when a pre-emptor in anticipation of his success in a pre-emption suit transfers the "pre-emptional" property in any manner inconsistent with the object of the suit for pre-emption, the plaintiff forfeits his right and his suit would be dismissed.

There are several points on which that cass differs from the one now before us:—In the present case the appellant did not mortgage the share until she had obtained a decree for it against the vendee, and she is not a plaintiff complaining of the infringement of a right. At the date of the respondent's suit he had no right (according to my interpretation of the wajib-ul-arz) to obtain a decree against the appellant. It has been held that the right of a plaintiff suing for pre-emption must remain firm up to the date of the decree [See *Ram Gopal* v. *Piare Lal* (3)], but

(1) (1884) I. L. R., 7 All., 107. (2) (1882) I. L. R., 5 All., 180.
(3) Weekly Notes, 1899, p. 163.

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it does not follow that a person having the best right to pre-empt, who enforces that right and actually takes possession from the vendee should be compelled to surrender her acquisition merely because, after she has established her right, she mortgages the property to a stranger.

On the other hand it may be said that where, as here, rival pre-emptors are parties to a suit, the pre-emptor who is arrayed as defendant to the suit is none the less a claimant to the right of pre-emption, and that the rules which require a plaintiff not to deal with his right of pre-emption apply with equal force to a defendant in such a case as this. There is considerable force in this contention, but on consideration I have come to the conclusion that we should not hold that the appellant has forfeited her right of pre-emption. She obtained her decree for pre-emption before notice of Akbar Ali's suit was served upon her. She did not bargain with her right of pre-emption, but what she dealt with was the property which she had established her title to. A person who establishes her right of pre-emption by suit, and takes possession under the decree, and then proceeds to mortgage the property to a stranger cannot be called upon to surrender the property to a person having an inferior right of pre-emption, though the mortgage in such a case may give rise to a fresh right of pre-emption. In the present case I think that Bela Bibi had arrived at a stage when she was entitled to deal with the property without thereby forfeiting her right to it.

It was said that all the proceedings in Bela Bibi's suit were held in the interest of the vendee. That was not the case put forward in the first Court. The Subordinate Judge drew up a *rubkar* in which the allegations of the defendant Akbar Ali are set out. They amount to nothing more than that Bela Bibi in exercising her right of pre-emption was actuated by the desire to prevent Akbar Ali and others from pre-empting the property.

I concur in the order proposed by my learned colleague.

BY THE COURT.—The order of the Court is that this appeal be allowed, the decrees of the two lower Courts be set aside, and the suit of Akbar Ali be dismissed with costs in all Courts.

Appeal decreed.