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will, under which, had it been legal, a *waqf* would have been constituted. It has been found that nothing amounting to a will had been made, but that it was his desire that his property should be used for the purposes of a *waqf*, and it is not denied that such a use of the property did take place. The executant of the deed in question, in our opinion, though using no express words of transfer, expresses with abundant clearness her intention to perpetuate the state of things existing in relation to the property in the hands of her predecessor. It is recited in the document that that predecessor had set apart a certain portion of his property for purposes which she desired should still be served out of the profits of the same property. In our opinion that is a sufficient expression of her desire to transfer absolutely, beyond recall and without power of alienation, every proprietary interest which she had in this property. Our view upon that matter is reinforced by the fact that she speaks of herself as intending to occupy towards that property the position merely of a manager. Under these circumstances we are of opinion that the document in question does create a valid *waqf* under the Shia law, and that this appeal should be, as it is, dismissed with costs.

Appeal dismissed.

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March 19.

Before Sir John Stanley, Knight, Chief Justice and Mr. Justice Burkitt.

BHAGWAN DAS (DEFENDANT) *v.* MOHAN LAL (PLAINTIFF).*

Pre-emption—Wajib-ul-arz—*Assignment of mortgagee rights by mortgagee in possession—Sale to stranger who before suit brought becomes a co-sharer.*

Held that the assignment of mortgagee rights in a share in a village by a co-sharer mortgagee in possession to a stranger is not a transfer of any part of the mortgagee's "*haqqiyat*" in the village, and will not give rise to any right of the nature of pre-emption in the absence of express provisions relative to mortgagees in the village *wajib-ul-arz*. *Nand Lal* v. *Bansi* (1) referred to.

Held also that if a stranger purchases a share in a village in respect of which a right of pre-emption subsists in favour of co-sharers, but subsequently to such purchase, and before any suit for pre-emption is brought in respect of such share, becomes himself, apart altogether from the purchase

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* First Appeal No. 294 of 1900 from a decree of Munshi Raj Nath Prasad, Subordinate Judge of Agra, dated the 19th of September, 1900.

(1) (1897) I. L. R., 20 All., 19.

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in dispute, a co-sharer in the village, he cannot be ousted by any co-sharer not having superior pre-emptive rights to himself. *Serh Mal* v. *Hukam Singh* (1) followed. *Ram Gopal* v. *Piari Lal* (2) referred to.

BY a registered sale-deed, dated the 13th of September, 1898, the trustees, as they described themselves, of a banking firm styled Badri Das Ram Ratan, purporting to be empowered in that respect by a registered deed of trust, dated the 25th of February, 1898, sold to one Bhagwan Das certain property of their *cestuis qui trustent*, which they described as "all the zamindari property in mauza Semra, pargana Itmadpur, district Agra, and the property held under mortgage, whatever it may be, which belongs to the firm at Agra called after the name of Sah Ram Ratan Badri Das, of which all the partners in the firm are proprietors." The property thus disposed of consisted of shares in certain pattis of two thoks—Karu and Karma—in the village of Semra, and of the rights of mortgagees in possession with respect to other shares.

By two conveyances, each dated the 4th of May 1899, Bhagwan Das acquired by purchase from co-sharers in the village named, in the one case Tota Ram and Dal Chand, and in the other case Tika Ram, absolute possession as owner of certain areas of land in two *pattis* of *thok* Karu and in three *pattis* of *thok* Karma. When Bhagwan Das made these latter purchases he was admittedly a 'stranger' in the village, but nevertheless no attempt was made by anyone to claim a right of pre-emption in respect of either purchase.

The *wajib-ul-arz* of Semra gave successive rights of pre-emption in the case of a co-sharer desiring to sell his share, *first*, to a relative being a co-sharer descended from a common ancestor; *secondly*, to co-sharers in the patti in which the share about to be sold is situate; *thirdly*, to co-sharers in another patti in the same thok; and *fourthly*, to the co-sharers in another *thok*.

On the 29th of May, 1899, the suit out of which this appeal arose was filed by one Mohan Lal. In this suit the plaintiff claimed a right of pre-emption in respect of the zamindari and mortgagee rights conveyed to Bhagwan Das by the sale deed mentioned above of the 13th of September, 1898. There were

(1) (1897) I. L. R., 20 All., 100. (2) (1899) I. L. R., 21 All., 441.

other pleas raised by Bhagwan Das in defence to the suit, but the principal plea was that the defendant by reason of his purchase of the share of Tika Ram was himself a co-sharer of equal status with the plaintiff.

The Court of first instance (Subordinate Judge of Agra), held that the plaintiff had shown himself entitled to a decree, but inasmuch as there was another similar suit for pre-emption of the same property pending before him, in which plaintiffs had equal claims with Mohan Lal, he divided the property between the rival pre-emptors.

From this decree the defendant Bhagwan Das appealed to the High Court.

Pandit *Moti Lal Nehru* and the Hon'ble Pandit *Madan Mohan Malaviya*, for the appellant.

Pandit *Sundar Lal*, for the respondent.

STANLEY, C.J. and BURKITT, J.—This is an appeal by the vendee defendant in a pre-emption suit against a decree of the Subordinate Judge of Agra, by which the claim of the pre-emptor was decreed in part. We have also before us a connected appeal against a rival pre-emptor, one Ganga Prasad. The Subordinate Judge has divided the pre-empted property between the two pre-emptors plaintiffs.

The pre-empted property is situate in mauza Semra, in the district of Agra. The vendors are certain trustees acting on behalf of the proprietors of a banking firm styled Badri Das Ram Ratan. The village in which the property in suit is situate is divided into *thoks*, which again are sub-divided into *pattis* within which are situate many holdings comprising each a number of fields. These holdings are locally known as "*kabzas*." This case concerns only two—Karu and Karma—of the *thoks*. The vendors did not possess a whole *thok*, or even a whole *patti*. They were proprietors of shares in some of the *pattis*, and also were mortgagees in possession of some other shares in some of the *pattis* belonging to other zamindars of the village.

By a registered sale-deed, dated September 13th, 1898, the vendors, purporting to be empowered in that respect by a "registered instrument of trust" dated February 25th, 1898, in order

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to "liquidate the debt of the creditors of the firm" of their *cestuis qui trustent*, whom they describe as the "Sahjis proprietors of the firm at Agra," transferred by sale "all the zamindari property in mauza Semra, pargana Itmadpur, district Agra, and the property held under mortgage, whatever it may be, which belongs to the firm at Agra, called after the name of Sah Ram Ratan Badri Das, of which all the partners of the firm are proprietors"; to the defendant (appellant) Lala Bhagwan Das, proprietor of the firm of Jagannath Bhagwan Das in consideration of Rs. 17,000. This sum the instrument acknowledges to be due from the firm of Badri Das Ram Ratan to the firm of which the vendee Bhagwan Das was proprietor. The same instrument as part of the consideration transfers to the vendee "the arrears (of rent), *takavi* debt of the amount due under decrees which are due to us by the tenants and *pattidars* of mauza Semra," but from this transfer it excepts certain debts to be disposed of by another instrument. Finally, the vendors authorize their vendee to recover the debts due to them from tenants, and declare that they have put him into possession of the property sold to him.

The plaintiff respondent Sah Mohan Lal instituted this suit to pre-empt the landed property conveyed by the abovementioned sale-deed. His suit was filed on May 29th, 1899. By his plaint he complained that the defendants vendors, in violation of the terms of the *wajib-ul-arz* and despite of the desire and readiness of the plaintiff "to purchase", had sold the property in suit to a stranger. He alleged that the consideration mentioned in the deed was fictitious and contrary to facts. He adds that he does not desire to pre-empt "the arrears of rent and revenue, and those due under decrees," the value of which he puts at Rs. 5,000, and alleging that the "market value of the proprietary and mortgagee rights is Rs. 10,000," he prays to be "put in proprietary possession, and as mortgagee of the property sold and specified in two lists, on payment of Rs. 10,000, or whatever sum may be determined by the Court."

Another suit praying for similar relief was instituted by the rival pre-emptor, Ganga Prasad, on June 6th, 1899.

It is unnecessary to notice any of the written statements put in by the defendants, except that filed by the vendee, Bhagwan Das, who is the appellant here. In his written statement he denies that the sale was contrary to the *wajib-ul-arz* or in despite of the pre-emptor's readiness to purchase; he denies that the consideration for the sale had been overstated; he says the property in suit had been formed into a separate *mahal*, and that therefore the plaintiff had no longer any right to sue. This last plea refers no doubt to a partition which had effect from July, 1902, which will be noticed later on. Next, the appellant pleaded that he "is a co-sharer in *patti* Bhup by reason of his purchase of the share of Tika Ram," and that therefore his status was the same as that of the pre-emptor, Sah Mohan Lal. This is the plea to which the arguments of the learned advocates for the parties were mainly directed at the hearing of this appeal. Finally, after reiterating his assertion that no part of the sale consideration was fictitious, and giving details as to the respective values of the proprietary and mortgagee interests sold and of the arrears, he pleaded that the plaintiff did certain acts which amounted to a refusal to purchase the property at the price asked by the vendors. This last plea, we may here say, was overruled by the Court below, and though the decision was questioned on that point in the memorandum of appeal, no argument respecting it was addressed to us at the hearing. The case put forward by the rival pre-emptor appellant, Ganga Ram, in the other suit is much the same. The two appeals were argued together.

Another and all important *fact* in the case is, that by two conveyances, each dated May 4th, 1899 (which date, it is to be noted, is anterior to the institution both of this suit and of Ganga Prasad's suit) the appellant Bhagwan Das acquired by purchase from co-sharers, named in one case Tota Ram and Dalchand, and in the other case Tika Ram, absolute possession as owner of certain areas of land in *patti* Sukhdeo Silra and Sukhdeo Nagla Nib of *thok* Karu and in *patti* Bhup and *patti* Sajan and another *patti* of *thok* Karma in mauza Semra. And it is admitted on all hands that though, when he made these purchases, the appellant was a "stranger," no attempt was made by

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anyone to pre-empt the sales. It therefore follows that from May 4th, 1899, the appellant was a co-sharer in *pattis* Bhup and Sajan of *thok* Karma, and in *pattis* Sukhdeo Silra and Sukhdeo Nagla Nib of *thok* Karu, and further that he acquired that status without opposition from any co-sharer (including the plaintiffs in these two suits) entitled to pre-empt his purchase.

The *wajib-ul-arz* of Semra, which governs both parties to this litigation, gives successive pre-emptive rights in the case of a share-holder being willing to sell his share in the mauza—(1) to a relative, being a co-sharer descended from a common ancestor; (2) to co-sharers in the *patti* in which the share about to be sold is situate; (3) to co-sharers in another *patti* in the same *thok*; (4) to the co-sharers in another *thok*, and (5) to a stranger on refusal by all the persons successively entitled to take.

Now, it will be noticed that this *wajib-ul-arz* does not provide that if any co-sharer mortgage his share even to a stranger, any other co-sharer shall have a right to take over that mortgage on repaying the mortgage-money to the mortgagee. It does not provide for any right of pre-mortgage. But it was contended that when the vendors here disposed of their interests in the village to the appellant, they, in the words of the *wajib-ul-arz*, sold their "*haqqiyat*;" that that "*haqqiyat*" included the shares they held under mortgage; that as to those shares also they were in the position of share-holders, and that therefore a right of pre-emption (or rather of pre-mortgage) accrued to the plaintiffs in respect of those mortgaged shares. We are unable to concur in the contention that the shares belonging to other co-sharers, which these vendors held in mortgage, constituted any portion of the vendor's "*haqqiyat*" in the mauza or that *in respect of those mortgaged shares* the vendors could be considered to be co-sharers. This question was decided by a Bench of three Judges of this Court (of which one of us was a member) in the case of *Nand Lal* v. *Bansi* (1). It was therein held that a mortgagee in possession as such of the share of a co-sharer does not *thereby* become a co-sharer, and that an assignment by him of his mortgage does not give rise

(1) (1897) I. L. R., 20 All., 9.

to any pre-emptive right. It makes no difference in principle that in the case first cited the mortgagee was "a stranger," and that in the present case he was a co-sharer, the contention here being that by virtue of their holding certain shares in mortgage the vendors became co-sharers *in respect of those shares*. And, further, we would point out that what the vendors have done in this case is nothing more than an assignment of a debt secured on land. They have not mortgaged any land to the appellant; they have simply sold to him their interest in a debt due to them by their mortgagors as security for the repayment of which the latter had (years ago) mortgaged certain land. It is to us perfectly clear that a conveyance of the vendor's "*haqqiyat*" only in the village would not have passed their interest in this debt secured by mortgages on other shares unless it had been mentioned in the conveyance as intended to pass. The mortgage debt then was not a part of the "*haqqiyat*," and it is the transfer of the latter which gives rise to a right of pre-emption. We have no hesitation in holding that an assignment of a debt is not liable to be pre-empted under the terms of the *wajib-ul-arz*. This matter does not appear to have been raised in the arguments before the learned Subordinate Judge. At any rate, he does not refer to it in his judgment. It is, however, distinctly raised in the fourth paragraph of the memorandum of appeal, and as the appeal was filed in December, 1900, the respondents cannot complain of having been taken by surprise.

We must, for the above reasons, hold that the Court was wrong in giving respondents a pre-emption decree in respect of these mortgaged shares, and that, as far as they are concerned, the appeal must be allowed and the suit dismissed.

Next, we have to consider whether the plaintiffs respondents had at the date of suit any right of pre-emption against the appellant in respect of the property as to which the vendors made an absolute sale to him on September 13th, 1898.

On this matter the learned advocate for the appellant contended that by reason of a perfect partition, by virtue of which all the shares in dispute in this part of the case were allotted to the appellant, no suit for pre-emption can be maintained against the appellant. The learned advocate relied on the ruling in

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Ram Gopal v. *Piari Lal* (1). In that case it was held that where a plaintiff in a suit for pre-emption based on the provisions of the *wajib-ul-arz* during the pendency of the suit lost by partition the pre-emptive right which under those provisions he had possessed when he instituted the suit, his claim could not be maintained. The learned Chief Justice is reported to have said (at p. 445 of the report):—"There is nothing, therefore, which compels us to look exclusively to the date of the institution of the suit, and to disregard all that had since happened, and 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*." Now, in that case, the plaintiff had lost his pre-emptive right *before decree*, and consequently the learned advocate admitted that he was (in order to make that case applicable to this appeal) compelled to ask us to extend considerably the principle deducible from it. It will be useful to set forth certain dates as to this partition. The application for perfect partition was made, we are told, by the respondent pre-emptor, Sah Mohan Lal, some time before the sale of September 13th, 1898. The *tarz taqsim* or partition proceeding was drawn up on June 24th, 1899, namely, subsequent to the institution of this and of the connected suit and subsequent to the date (May 4th, 1899), on which the appellant became by purchase a share-holder in the village. After various proceedings in the Revenue Court the partition was confirmed by the Collector some time in 1901, and took effect from July 1st, 1902. It was from the latter date only that the pre-emptive rights of the parties to the partition lapsed by the creation of new *mahals*. This and the connected suit were decided by the Subordinate Judge on September 19th, 1900. Therefore whatever pre-emptive rights the plaintiffs pre-emptors may have possessed at the date of the institution of this and of the connected suit, they continued to possess unimpaired at the date of the decree. The learned advocate admits that if the two appeals had come on for hearing in this Court before July, 1902, he could not have used this argument, but contends that inasmuch as the position of the parties was changed on July 1st, 1902, that

(1) (1899) I. L. R., 21 All., 441.

alteration had the effect of nullifying the decrees passed in September, 1900. His argument went the length of contending that the decrees, which *ex hypothesi* were good decrees when passed, were vitiated by an event which happened nearly two years afterwards. This he contended was a position which was logically deducible from the principle laid down in the case cited above, though he admits that his contention would require us considerably to extend the rule therein stated. Now all we consider it necessary to say is, that in that case the alteration in the position of the plaintiff took place before decree, and not as here long afterwards, and we certainly are not inclined to extend the rule in the way desired by the learned advocate. We overrule this plea.

Next, it was contended that when the plaintiffs in this and in the connected suit instituted their suits they had no pre-emptive rights as against the appellant. Now, there can be no possible doubt that on the execution of the sale-deed of September 13th, 1898, the plaintiffs under the terms of the *wajib-ul-arz* did acquire a right to pre-empt the sale of the shares in dispute in this part of the case, inasmuch as they were co-sharers, and the purchaser the appellant did not come under any of the four categories of pre-emptors mentioned above. He was a stranger to the village, and on purchase of a share in it he was liable to be pre-empted by anyone who came within any of these four categories, and who had not refused to purchase. But for the appellant it is contended that before the plaintiffs' suits he, on May 4th, 1899, had become by purchase (without opposition from the respondents) a co-sharer, not merely in the village, but also in the *thoks*, and some of the *pattis* in which the disputed shares are situate. Such undeniably was the case. He contends that as a co-sharer he is on the same level as the plaintiffs respondents, and being such cannot be pre-empted. As tersely put by the learned advocate for the appellant, the question is whether one co-sharer is to be allowed to retain lands he has purchased or is he to be compelled to sell them to another co-sharer? On the other hand, the learned advocate for the respondent takes his stand on the undoubted accrual to his clients of a cause of action immediately on the execution of the sale-deed of September 18th,

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1898, and he contends that nothing which may have happened between that date and the date of the institution of their suits can have the effect of invalidating or impairing that cause of action. The appellant's purchase on May 4th, 1899, cannot, he urges, have restrospective effect, so as to annul the respondents' cause of action.

As bearing on this question the case of *Serh Mal v. Hukam Singh* (1) was referred to on both sides. It has, in our opinion, an important bearing on this case. In that case a co-sharer had, contrary to the provisions of the *wajib-ul-arz*, sold a share in the village to a stranger. Another co-sharer instituted a suit for pre-emption. But before the plaint in that suit was filed the stranger conveyed the share to a third co-sharer, who possessed pre-emptive rights under the *wajib-ul-arz*. In that case the learned Chief Justice, who delivered the judgment of the Court, is reported to have said :—"On a sale to a stranger each share-holder of equal right has at the moment such a sale is effected an equal right to pre-empt the whole property sold." And again :—"Until suit has been brought by a co-sharer for pre-emption of the property sold to a stranger, another co-sharer can purchase from the stranger the share which had been sold to the stranger ;" and it was held that the co-sharer who had purchased from the stranger *before suit* was entitled to retain possession of the share. The facts of this case certainly are not on all fours with those of the appeal now before us. But we think the principle is applicable. That principle seems to us to be that where a share has in violation of the provisions of the *wajib-ul-arz* been sold to a stranger, if before the institution of a suit for pre-emption that share has found its way into the hands of a co-sharer whose rights of pre-emption as such are equal to those of the plaintiffs in a suit for pre-emption subsequently instituted, then the pre-emptor's suit will fail. The reason of the rule seems to be that, as the object and cause of the institution of pre-emptive rights is the desire to keep strangers excluded from the co-parcenary body, that reason and object cannot justify a pre-emptive suit by one co-sharer against another, to compel the latter to surrender a share over which his pre-emptive rights are on the

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

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same level as those of the plaintiff. So here, we do not think that it makes any difference in the application of the principle that when the appellants acquired the shares in dispute on September 13th, 1898, he was not *then* a co-sharer. He had acquired that status before the date of the institution of either of these two suits. He was on that date a co-sharer in the village, and as such entitled to all the rights (including that of pre-emption) appertaining to that status. If the shares in dispute here had been sold not to appellant but to some third party, a stranger to the village proprietary body, the appellant in right of his purchases of May 4th, 1899, would have been entitled to pre-empt them. For the above reasons we hold that where the plaintiffs respondents and the appellants are on the same level in respect of any of the lands comprised in the disputed property, the plaintiffs are not entitled to pre-emption in respect of these lands.

[The remainder of the judgment dealing merely with questions of fact is not reported.—ED.]

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March 19.

Before Mr. Justice Blair and Mr. Justice Banerji.

MANOHAR DAS (DEFENDANT) *v.* RAM AUTAR PANDE (PLAINTIFF).*

Civil Procedure Code, section 492—*Act No. IX of* 1872 *(Indian Contract Act), section* 23—*Temporary injunction — Civil Procedure Code, sections* 276, 295—*Application for rateable share in proceeds of sale not equivalent to an attachment.*

Held that an alienation made pending a temporary injunction under section 492 of the Code of Civil Procedure, is not void either under section 23 of the Indian Contract Act, 1872, or any other law. *Delhi and London Bank, Ld.*, v. *Ram Narain* (1) followed.

Held also that an application under section 295 of the Code of Civil Procedure for a rateable share in the proceeds of the sale of property attached by a creditor other than the applicant, is not equivalent to an attachment, and will be no bar to the judgment-debtor privately selling the property attached for the benefit of the attaching creditor. *Ganga Din* v. *Khushali* (2) and *Durga Churn Rai Chowdhry* v. *Monmohini Dasi* (3) followed. *Sorabji Edulji Warden* v. *Govind Ranji* (4) dissented from.

THE facts of this case are as follows:—One Manohar Das, on the 12th of June 1898, obtained a simple money decree

* Second Appeal No. 264 of 1901, from a decree of Nawab Muhammad Ishaq Khan, District Judge of Mirzapur, dated the 18th of December, 1900, confirming a decree of Babu Jotendro Mohan Bose, Munsif of Mirzapur, dated the 19th of July, 1900.

(1) (1887) I. L. R., 9 All., 497.
(2) (1885) I. L. R., 7 All., 702.
(3) (1888) I. L. R., 15 Calc., 771.
(4) (1891) I. L. R., 16 Bom., 91.