1903

EMPEROR v. GEORGE BOOTH.

of the Indian Penal Code. The prisoner has been very ably represented in this Court by counsel; and on his behalf it has been urged that the so-called trial is not a trial at law. It appears that the Magistrate, acting apparently on an old order of the Local Government, which was cancelled in 1884 by Notification No. $\frac{1693}{VI-545A-10}$, empanelled a jury of seven, whereas by the order we have just cited, which order has the force of law, the trial ought to have been held before the Magistrate and a jury consisting of five persons. After hearing the learned Assistant Government Advocate we find ourselves compelled to sustain the contention and to hold that the so-called trial is a nullity as not having been held by a properly constituted tribunal. The case cannot be held to be one of mere irregularity. The trial was held by a court which had no jurisdiction to try it.

Into the merits of the case we do not propose to enter in view of the order we are about to pass. There has been no trial as provided by law, and we are of opinion that the case is one which should be tried. At the same time, without pronouncing on the merits of the case one way or the other, we would observe that should the case result in a conviction, the District Magistrate would do well to consider whether taking into consideration the facts as put at their highest by the prosecution, and the expense and detention which the prisoner has already undergone, anything more than a nominal sentence is called for in the interest of justice. We set aside the trial, leaving it to the district authorities to take such further action as they may deem fit.

1903
November 19.

APPELLATE CIVIL.

Before Mr. Justice Aikman.

LEKHRAJ (PLAINTIFF) *v.* GURDAT AND ANOTHER (DEFENDANTS).*

Pre-emption—Wajib-ul-arz—Pre-emption rights of manager of a Hindu temple.

Held that the manager of a Hindu temple, who as such manager holds zamindari property on behalf of the temple, has the same rights of

* Second Appeal No. 107 of 1902, from a decree of C. D. Steel, Esq., District Judge of Shahjahanpur, dated the 18th of November, 1901, reversing a decree of Muhammad Musharraf Ali Khan, Munsif of Shahjahanpur, dated the 22nd of May, 1901.

pre-emption (or pre-mortgage) under the village wajib-ul-arz as any other zamindar in the village may possess.

THE facts of this case are as follows :—

The plaintiff was the manager of a temple known as the temple of Sri Parmanand Behariji, and as such manager was in possession of certain landed property in Mauza Rampur Khadir Mahal Danda and Sailab. Jagat Narain and Dharam Narain also owned a share in the same village, and on the 19th of January, 1898, they made a usufructuary mortgage of a portion thereof to one Gurdat. A suit for pre-emption was then preferred in the name of the temple, but it was dismissed, and subsequently, on the 27th of September, 1900, the present suit was filed by Lekhraj as manager of the temple claiming a right under the terms of the wajib-ul-arz to stand in the position of the mortgagee. The Court of first instance (Munsif of Bisauli) decreed the plaintiff's suit; but on appeal by the defendant mortgagee the lower appellate Court (District Judge of Shahjahanpur) reversed the decree of the Munsif and dismissed the suit, holding that the plaintiff as the manager of a religious endowment could have no right of pre-emption. The plaintiff thereupon appealed to the High Court.

Munshi *Gobind Prasad*, for the appellant.

Babu *Jogindro Nath Chaudhri*, Pandit *Sundar Lal* and Dr. *Satish Chandra Banerji*, for the respondents.

AIKMAN, J.—This appeal arises out of a suit brought by the appellant, Lekhraj, as trustee of a Hindu temple to establish on behalf of the temple a right of pre-emption, or rather of pre-emptive mortgage. The suit was decreed by the Court of first instance, but on appeal by the vendee the learned District Judge reversed the Munsif's decree and dismissed the suit with costs. The plaintiff comes here in second appeal. An interesting point arises in the case. It appears that one Balmakund owned property in patti Gulab Kunwar, in which the property the subject of the suit is situate. That property he conveyed by a deed of endowment to a Hindu temple known as the temple of Sri Parmanand Behariji. That temple is now through its manager and trustee in possession of the endowed property, for which it pays revenue in the same way as an ordinary zamindar. The

1903

LEKHRAJ v. GURDAT.

plea was raised by the defendants as to whether any right of pre-emption could in such a case be asserted on behalf of the temple. The Courts below have written very good judgments, but have come to opposite conclusions on the question indicated above. After hearing the case argued and considering the reasonings of the Courts below, I come to the conclusion that the decision of the first Court on the point is right and must be sustained. On page 192 of W. H. Macnaghten's Principles and Precedents of Muhammadan Law, Edition of 1890, we find a case stated among the precedents for pre-emption which fully bears out the rights of the superintendent of a Hindu temple which owns property bordering on land about to be sold to assert a right of pre-emption. This is a work of considerable authority, and, as the title page shows, the precedents are taken from legal opinions delivered in the several Courts of Justice subordinate to the presidency of Fort William. On the other hand, we find at page 478 of Baillie's Digest of Muhammadan (Hanifeea) Law a passage to the effect that if a mansion by he side of endowed property has been sold, neither the person who made the endowment nor the superintendent of the endowed property would have any right of pre-emption. That may be the law as to Muhammadan endowments, but the precedent cited, which is also from a work on Muhammadan Law, has a direct bearing on the present case, as it deals with the case of an endowed Hindu temple, and is clearly in favour of the view contended for by the appellant. I must say that I can see no reason why a suit like the present should not lie. The presence of an undesirable neighbour might seriously affect the value of the endowed property, and in my judgment the trustee of the endowment ought to have a right like any other zamindar to claim to take the place of the stranger.

The learned vakil who has appeared for the respondent vendee endeavours to support the decree of the Court below by contending that, even assuming that such a suit is maintainable, the plaintiff has no preferential right as against him. As stated above, the temple property is situated in the same patti as that in which the property sold lies. The vendee, though a co-sharer in the village, owns no property in that

1903

LEKHRAJ v. GURDAT.

patti. According to the terms of the wajib-ul-arz which governs the rights of the parties, when a sale or mortgage takes place the first right to claim to take over the sale or mortgage rests with the near co-sharers (*shurkae qarib*). If they refuse, the right to buy or take the mortgage comes to other co-sharers of the village who are near in the property (*digar shurkae diha jo qarabat qarib haqiat men rakhte hôn*). If no one out of these two categories chooses to buy or take the mortgage, then the property may be sold or mortgaged to any outsider. The learned Judge has interpreted *shurkae qarib* as referring, not to consanguinity but to vicinage. No doubt in some documents such words do bear that meaning, just as in others they refer to relationship. In the present case I have no doubt they refer to relationship, as, if they did not, the second category would be meaningless. In my opinion the plaintiff in this case comes within the second category and the defendant vendee does not. The result is that I allow the appeal with costs, and, setting aside the decree of the lower appellate Court with costs, I restore that of the Court of first instance.

Appeal decreed.

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

1903 *November* 23.

RAM ADHAR (PLAINTIFF) *v.* RAM SHANKAR AND ANOTHER (DEFENDANTS).*

Act No. I. of 1877 (Specific Relief Act), section 42—Suit to set aside an auction sale—Plaint not asking for possession—Defendant subsequently put into possession of property sold.

A plaintiff instituted a suit to set aside an auction sale. The plaintiff, not having at the time of filing the suit been dispossessed of the property sold, claimed only the setting aside of the auction sale and costs, and paid a proper court fee on the suit so framed. About a month after the institution of the suit the auction purchaser was put into possession of the property which he had purchased. When the suit came on for hearing the plaintiff was directed to amend his plaint by adding a claim for possession of the property, and to pay the proper court fee upon a suit for possession, and on his declining to do so his suit was dismissed with costs. On appeal by the plaintiff it was *held* that the suit when instituted being in every respect regular and properly stamped no action on the part of the defendants subsequent to the institution of the suit could affect or prejudice the right of the

* First Appeal No. 6 of 1902, from a decree of Munshi Sheo Sahai Subordinate Judge of Cawnpore, dated the 16th of October, 1901.