APPELLATE CIVIL.

1905
August 2.
1906
February 16.

Before Mr. Justice Sir George Knox.

CHAKAURI DEVI (DEFENDANT) *v.* SUNDARI DEVI (PLAINTIFF) AND ANOTHER (DEFENDANT).*

Pre-emption amongst Hindus—How far requirements of Muhammadan law applicable—Statement of claim—Meaning and not form of the statement to be considered.

Held that "in the absence of allegation or proof as to any custom different from, or not co-extensive with, the Muhammadan law of pre-emption, that law must be applied" between Hindus. *Jagdam Sahai* v. *Mahabir Prasad* (1); *Chowdhree Brij Lal* v. *Raja Goor Sahai* (2); *Jai Kuar* v. *Heera Lall* (3), referred to.

Further, where the words used were "I have a claim for pre-emption on this house. If any one else purchases it, I shall be put to inconvenience. Go at this very moment and take the money from Shoshi Bhushan Sircar and tell Ram Charan and Chakauri Devi to return the house by taking the money." *Held* that this was sufficient claim, the concluding portion evincing a desire on the part of the plaintiff to avail herself of her right. If she had merely stated that she had a claim that would not have been sufficient.

THE facts appear from the judgments.

The Hon'ble Pandit *Sundar Lal* and Munshi *Gokul Prasad* for the appellant.

Babu *Sital Prasad Ghosh*, for the respondents.

KNOX, J.—The property, which is the subject-matter of this second appeal, is property situate in muhalla Pitambarpur in the city of Benares. The claim brought by the plaintiff, who is now respondent, was a claim to pre-empt this property based upon custom prevalent in the city of Benares. The lower appellate Court held that the custom of pre-emption existed throughout Benares city and must therefore be held to exist in muhalla Pitambarpur. Further, as the claim was not made under the Muhammadan law of pre-emption, there was no necessity for the plaintiff respondent observing the preliminary conditions the Muhammadan law requires the pre-emptor should observe. Lastly, it held that the plaintiff respondent had done

* Second Appeal No. 287 of 1904, from a decree of J. Sanders, Esq., District Judge of Benares, dated the 17th of December 1903, confirming a decree of Babu Hira Lal Singh, Munsif of Benares, dated the 18th of August, 1903.

(1) (1905) I. L. R., 28 All., 60.
(2) N.-W. P., H. C. Rep., F. B., 1866-67, Vol. I, p. 128.
(3) N.-W. P., H. C. Rep., 1875, p. 1.

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all in the way of demand that was necessary. It dismissed the appeal and confirmed the decree of the Court of first instance, which was a decree granting the plaintiff respondent's claim upon certain conditions. In appeal before me it is contended *inter alia* that the preliminaries of *talab-i-mawasibat* and *talab-i-ishtishhad* were essential preliminaries, and, unless it was shown that they had been performed, the suit should have been dismissed. In support of this I was referred to various precedents, specially to the case of *Jagdam Sahai* v. *Mahabir Prasad* (1) and to a Full Bench decision of this High Court to be found in Volume I of Full Bench rulings, *i.e.* the case of *Chowdhree Brij Lal* v. *Raja Goor Sahai* and others (2). In this last-named case a number of cases bearing upon the question of pre-emption as prevalent in these Provinces were considered with this result formulated therefrom:—"the true rule should be, as laid down by the Calcutta Full Bench, to administer among Hindus a modification of that law and to insist that the assertion of the right by suit should be preceded by an observance of the preliminary forms prescribed in the Muhammadan law." This case was one in which the pre-emptive claim in suit was founded upon the *wajib-ul-arz* of the village. In the case before me, there is no *wajib-ul-arz* and the rule laid down by the Full Bench would be entitled to greater weight. I was asked, on the other hand, to follow the procedure of this Court in *Jai Kuar* v. *Heera Lall* (3). There the learned Judges remanded an issue as to whether under the custom of pre-emption found to prevail amongst "Hindus in muhalla Alapura it was incumbent on the pre-emptor to fulfill all the conditions of the Muhammadan law of pre-emption, and if so whether he had fulfilled them or not." I find, however, on referring to the plaint that the plaintiff expressly alleged that she had fulfilled the preliminary conditions. This allegation of hers was challenged in the written reply; it formed the subject of the second issue in the Court of first instance. The matter was also raised in appeal. In view of the Full Bench ruling already quoted and the recent case of *Jagdam Sahai* v. *Mahabir Prasad* (1), I hold that although the parties are

(1) (1905) I. L. R., 28 All., 60.
(2) N.-W. P., H. C. Rep., F. B., 1866-67, Vol. I, p. 128.
(3) N.-W. P., H. C. Rep., 1875, p. 1.

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Hindus and the right of pre-emption is one claimed over property situate in the eminently Hindu city of Benares, still, in the absence of any allegation of proof as to any custom different from, or not co-extensive with, the Muhammadan law of pre-emption that law must be applied to the case.

Before determining the question of fact which thus arises, it is essential for me to have a finding on the following issue, *i.e.* :—

(1) Whether or not the plaintiff respondent observed the conditions prescribed by the Muhammadan law when she claimed her right of pre-emption.

I refer this issue for trial to the lower appellate Court, which will take the additional evidence required and after recording a finding return it with the evidence to this Court.

Ten days will be allowed to either side for objections.

On return of the finding, the following judgment was delivered :—

KNOX, J.—The lower appellate Court has found that the formalities prescribed by the Muhammadan law were fully complied with. An objection was taken to this finding under section 567 of the Code of Civil Procedure, and I am asked to hold that the words used by the lady, Musammat Sri Sundari Devi, when she heard of the sale, are not sufficient to assert a claim for pre-emption when viewed from the stand-point of Muhammadan law. The words used by the lady are thus given :—"I have a claim for pre-emption on this house. If any one else purchases it, I shall be put to inconvenience. Go at this very moment and take the money from Shoshi Bhushan Sircar and tell Ram Charan and Chakauri Devi to return the house by taking the money." According to the *Hidaya* it is the meaning and not the style of the statement which is to be considered. If the words used by the lady had been a mere statement of the fact that she had a claim for pre-emption, they would not have been sufficient to satisfy the requirements of the Muhammadan law. But the concluding portion of the statement of the lady, in my opinion, evinces a desire on her part to avail herself of that right. I agree with the learned Judge

that the lady did make the demand known as *talab-i-mawasibat*. The result is that this appeal is dismissed with costs.

Appeal dismissed.

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Before Mr. Justice Sir George Knox and Mr. Justice Aikman.

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BOHRA THAKUR DAS AND OTHERS (PLAINTIFFS) *v.* COLLECTOR OF ALIGARH (DEFENDANT) AND COLLECTOR OF ALIGARH (DEFENDANT) *v.* BOHRA THAKUR DAS AND OTHERS (PLAINTIFFS).*

Mortgage—Redemption of part—Whole burden on remainder—Transfer of Property (Act IV of 1882), section 72—Purchase by mortgagee of portion of mortgaged property—Enhancement of Government revenue—Compensation for improvements.

G., the predecessor in title of the plaintiffs, mortgaged Kachaura to N. K., the predecessor of the defendant, and subsequently mortgaged 11 biswas of Kachaura and 6 biswas of Agrana to N. K. N. K. obtained a decree on the first mortgage and purchased the whole of Kachaura. The plaintiffs acquired from G. the equity of redemption in 5¼ biswas of Agrana and brought the suit out of which these two appeals arose to redeem this 5¼ biswa share on payment of a proportionate amount of the mortgage-money and to recover surplus profits if any. The parties submitted to the decision of the lower Courts that the plaintiffs must redeem the whole 6 biswa share.

Held (in S. A. 265 of 1904) that the answer to the question whether the defendant (mortgagee) could throw the whole burden of the second mortgage on the remainder of the mortgaged property depended on the circumstances under which his purchase was made. If two persons jointly mortgaged property to a third person who subsequently purchased the equity of redemption from one of them he could not throw the whole burden of his mortgage on the other. But in this case the purchase was made at an open sale and not subject to any charge, and the defendant could throw the whole burden on the remaining property. *Sesha Ayyar* v. *Krishna Ayyangar* (1), referred to.

The second mortgage further contained clauses *(a)* that if the Government revenue was enhanced the mortgagor was to be liable for the amount to the enhancement; *(b)* that if the mortgagee spent any money in the construction of wells the mortgagor would recoup him the amount at the time of redemption.

Held (in S. A. 298 of 1904) *(a)* that the defendant (mortgagee) having paid enhanced revenue to save the property upon failure by the mortgagor was entitled to receive from the plaintiff the whole amount of the enhancement with interest. *Girdhar Lal* v. *Bhola Nath* (2), referred to.

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* Second Appeals Nos. 265 and 298 of 1904, from decrees of L. M. Thornton, Esq., District Judge of Aligarh, dated the 2nd of January, 1904, modifying decrees of Maulvi Maula Bakhsh, Additional Subordinate Judge of Aligarh, dated the 23rd of December, 1902.

(1) (1901) I. L. R., 24 Mad., 96. (2) (1894) I. L. R., 16 All., 611, at p. 614.