

APPELLATE CIVIL.

1903

February 16.

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

KAUNSILLA KUNWAR (PLAINTIFF) v. GOPAL PRASAD AND OTHERS
(DEFENDANTS).*

*Act No. XV of 1877 (Indian Limitation Act), schedule II, Articles 10 and
120—Limitation—Suit for pre-emption—“Physical possession”—Right
of pre-emption not a purely personal right.*

The term “physical possession,” as used in article 10 of the second schedule to the Indian Limitation Act, 1877, cannot apply to property which is in the possession of tenants. To a suit for pre-emption of such property, article 120 applies. *Batul Begam v. Mansur Ali Khan* (1) followed.

Held also that the right of pre-emption being a right incident to or arising out of the ownership of land, the successor in title of a person in whose favour such right has arisen is not debarred from suing to enforce it by the fact only that his predecessor has not done so. *Muhammad Yusuf Ali Khan v. Dal Kuari* (2) followed.

IN this case a decree for foreclosure was passed in respect of shares in two villages on the 21st of May, 1897. The decree was made absolute on the 11th of March, 1898, and the decree-holder obtained possession of the property in June, 1898. On the 1st June, 1903, one Kaunsilla Kunwar filed a suit for pre-emption of the property, the subject of the foreclosure decree. The suit was met by the plea that inasmuch as the plaintiff's husband, Chandrika Prasad, was alive when the cause of action accrued (he died in May, 1899) and had not claimed pre-emption, the right of the widow was barred. It was also pleaded that the suit was barred by limitation. The Court of first instance (Subordinate Judge of Cawnpore) dismissed the plaintiff's suit. The plaintiff thereupon appealed to the High Court.

Hon'ble Pandit *Sundar Lal*, for the appellant.

Mr. A. H. C. Hamilton, Babu *Satya Chandra Mukerji* and Babu *Vikramajit Singh*, for the respondents.

STANLEY, C.J. and BURKITT, J.—This appeal arises out of a suit for pre-emption. The pre-emptive property consists of shares in two villages which were the subject of a foreclosure

* First Appeal No. 80 of 1904 from a decree of Babu Bepin Behari Mukerji, Subordinate Judge of Cawnpore, dated the 10th of December 1903.

decree of the 21st of May 1897. The present suit was brought by the plaintiff appellant, Musammatt Kaunsilla Kunwar, the widow of one Chandrika Prasad, to pre-empt the property the subject-matter of the decree for foreclosure. Chandrika Prasad was alive when the foreclosure decree was passed, but died in May, 1899. The Court below refused to entertain the claim of the plaintiff on two grounds: *firstly*, on the ground that it was barred by limitation; and, *secondly*, on the ground that the plaintiff was not competent to maintain the suit. The contention is that the widow of a deceased Hindu, who was admittedly entitled to pre-empt but who died without pre-empting, cannot in her own right or otherwise maintain a suit for pre-emption; and, secondly, that the rule of limitation applicable is that laid down in article 10 and not article 120 of the second schedule to the Limitation Act. The Court below on these grounds dismissed the suit and from this decision the present appeal has been preferred.

The first question which we shall deal with is the question of limitation. Article 10 prescribes as the period of limitation for enforcing a right of pre-emption one year from the time "when the purchaser takes under the sale sought to be impeached physical possession of the whole of the property sold, or, where the subject of a sale does not admit of physical possession, when the instrument of sale is registered." Article 120 prescribes a period of six years for a suit for which no period of limitation is elsewhere prescribed from the time when the right to sue accrues. In this case it is admitted that the property the subject-matter of the suit was in the possession of tenants and that there was also some *shamilat* held with the lands of another proprietor. The question of limitation governing a case of the kind was discussed in several cases in this High Court and ultimately by the Privy Council in the case of *Batul Begam v. Mansur Ali Khan* (1). Their Lordships in that case affirmed the judgment and decree of this Court holding that article 120 and not article 10 applied to a case in which the property was in the possession of tenants, and for this reason, namely, that an owner could not be in physical possession of property which was

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in the occupation of tenants. In the course of their judgment their Lordships say:—"The word 'physical' is of itself a strong word, highly restrictive of the kind of possession indicated; and when it is found, as pointed out by the High Court, that the Legislature has in successive enactments about the limitation of such suits gone on strengthening the language used first in 1859, prescribing 'possession,' then in 1871 requiring 'actual possession' and finally in 1877 substituting the word 'physical' for 'actual,' it is seen that that word has been very deliberately chosen and for a restrictive purpose. Their Lordships are of opinion that the High Court are right in the conclusion they have stated. Their Lordships consider that the expression used by Stuart, C.J., in regard to the words 'actual possession' is applicable with still more certainty to the words 'physical possession,' and that what is meant is a personal and immediate possession." Accordingly they held that article 10 completely failed the appellant inasmuch as the mortgagee's heir had no semblance of physical possession in the true and natural sense of the term, and as neither article 10 nor article 144 applied, admittedly, article 120 did apply. In view of this decision it appears to us that the decision of the Court below on the question of limitation cannot be maintained.

The next question is as to the competence of the plaintiff to maintain the suit. It has been contended before us very ably by Mr. *Hamilton* that a right of pre-emption is a purely personal right, and that inasmuch as Chandrika Prasad was alive at the date of the foreclosure decree and did not choose to exercise his right of pre-emption, that right being personal to him became exhausted and his widow could not claim any right to pre-empt.

We are unable to accede to this argument. The right of pre-emption is a right which is incident to or arises out of the ownership of land, and it seems to us that the persons who are for the time being entitled to the land to which the right is incident may exercise the right so long as it is not barred by limitation or by conduct or circumstances which would render it inequitable on their part to enforce the right. We think that so long as the right is not barred, by limitation or by any matter which would render it inequitable to enforce it, the owner of the

property in respect of which the right to pre-empt exists can maintain a suit for pre-emption notwithstanding that he was not the owner at the date when the cause of action first accrued. This in fact was so decided in the case of *Mohammad Yusuf Ali Khan v. Dal Kuar* (1). In that case a Hindu widow was entitled to pre-empt a sale of property in her village. She did not do so, however, but relinquished her claim to the share which gave her the right of pre-emption in favour of her daughter, and that daughter instituted a suit for pre-emption. It was held by Blair and Aikman, JJ., that on general principles the period within which pre-emptive rights can be exercised is not limited by a devolution of the estate from a co-sharer to another co-sharer. Blair, J., who delivered the judgment of the Court, observes:—"I find it difficult to conceive upon what principle applicable to pre-emptive rights, based not on Muhammadan law but upon the *wajib-ul-arz*, which must be taken to be the basis of the rights of co-sharers, it would be possible to justify the exclusion of a co-sharer from pre-emption to whom the widow's life estate has been relinquished and who herself would have had plenary proprietary rights on the determination of the life estate. There seems to be no doubt that the widow had power to make a good and legal relinquishment. As I have already said, I cannot infer from the fact that the widow took no objection for some brief time before the relinquishment, that there was on her part an abandonment of pre-emptive rights." We think that we should follow the rule laid down in this case, and hold that the mere fact that the husband of the plaintiff did not in his life-time exercise his right of pre-emption, does not preclude his widow on her succession to the estate from exercising the option given to co-sharers in this village to pre-empt.

We therefore must allow this appeal, set aside the decree of the Court below, and, inasmuch as the suit was determined upon preliminary points, we remand the case to that Court, with directions that it be reinstated in the file of pending suits and be disposed of on the merits. Costs here and hitherto will abide the event.

Appeal decreed and cause remanded.

(1) (1897) I. L. R., 20 All., 148.

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