

Before Mr. Justice Banerji.

KISHAN LAL (DEFENDANT) v. ISHRI (PLAINTIFF).*

1905

November 6.

Pre-emption—Wajib-ul-arz—Pre-emptor accepting lease of property in suit from the vendee.

Where in a suit for pre-emption based upon a custom declared in the wajib-ul-arz it was found that the pre-emptor had, with knowledge of his right as pre-emptor, accepted a lease of the land claimed from the vendee, it was held that this amounted to such an acquiescence in the sale as would bar the plaintiff's right of suit.

THIS was a suit for pre-emption based upon a custom declared in the village wajib-ul-arz. The defence was, *inter alia*, that the plaintiff had by accepting a lease of the property in suit from the vendee disentitled himself from claiming pre-emption thereof. The Court of first instance (Munsif of Aligarh) decreed the plaintiff's claim, and the defendant's appeal was dismissed by the Extra Additional Subordinate Judge. The latter Court held that the defendant's plea of acquiescence could not be applicable to a suit based upon custom under a wajib-ul-arz. The defendant appealed to the High Court. An issue was remitted for trial to the lower appellate Court, *viz.*, "at the time when the plaintiff took a lease of the land in suit was he aware that he had a right of pre-emption in respect of that land, and did he take the said lease with the knowledge of such right?" On return in the affirmative being made to this issue the appeal was put up for final disposal.

Mr. M. L. Agarwala, for the appellant.

Munshi Gulzari Lal, for the respondent.

BANERJI, J.—This appeal arises out of a suit for pre-emption brought in respect of a sale made in favour of the defendant appellant. It appears that, subsequently to the defendant's purchase, the plaintiff took a lease of the property the subject-matter of the sale from the defendant. It has been found by the Court below that the plaintiff was aware of the sale to the defendant, and was also aware that he himself had a right of pre-emption in respect of the sale. By taking a lease from the purchaser he acquiesced in the purchase, and is estopped from now asserting

* Second appeal No. 402 of 1904 from a decree of Maulvi Muhammad Shaif, Additional Subordinate Judge of Aligarh, dated the 1st of February, 1904, confirming a decree of Babu Banke Bihari Lal, B.A., Munsif of Hawail, Koll, dated the 14th of September, 1903.

1905

KISHAN LAL
v.
ISHRI.

his right of pre-emption. Had the suit been governed by the Muhammadan law of pre-emption, there can be no doubt that under the circumstances of the case the claim would have failed. I think the principle upon which the rule of Muhammadan law is founded equally applies to the present case. I accordingly allow the appeal, set aside the decrees of the Courts below, and dismiss the suit of the plaintiff-respondent with costs in all Courts.

Appeal decreed.

1905
November 8.

Before Mr. Justice Banerji and Mr. Justice Richards.

AHMAD BAKHSH (JUDGMENT-DEBTOR) v. LALTA PRASAD AND ANOTHER
(DECREE-HOLDERS) AND AZMAT ALLI (AUCTION-PURCHASER).*

Civil Procedure Code, sections 306, 311—Execution of decree—Sale in execution—Non-payment of required portion of purchase money at date of sale—Irregularity.

Held that the fact that an auction purchaser at a sale held in execution of a decree did not pay the 25 per cent. of the purchase money required by section 306 of the Code of Civil Procedure at the time of the sale was a mere irregularity which would not affect the validity of the sale unless it could be shown that substantial injury was thereby caused to the judgment-debtor. *Intizam Ali Khan v. Narain Singh* (1) declared to be no longer law.

THIS was an application by a judgment-debtor under section 311 of the Code of Civil Procedure to set aside a sale of some zamindari property in execution of a decree against him. Various irregularities in publishing the sale were alleged, and also that the sale was invalid because the officer conducting it had not taken the full 25 per cent. of the purchase money from the auction purchaser at the time of the sale, as required by section 306 of the Code of Civil Procedure, but had allowed the auction purchaser to pay in a certain portion of the deposit some days later. The Court of first instance (Officiating Subordinate Judge of Bareilly) dismissed the judgment-debtor's application, overruling all his objections to the sale.

The judgment-debtor appealed to the High Court.

Maulvi Ghulam Mujtaba, for the appellant.

Dr. Satish Chandra Banerji, for the respondents.

* First Appeal No. 77 of 1905 from an order of Pandit Pitambar Joshi, Subordinate Judge of Bareilly, dated the 3rd of April, 1905.