

will be drawn up in accordance with the provisions of section 88 of the Transfer of Property Act. The plaintiff appellant will have the costs of this appeal and also the costs in the Court below against all the defendants.

Appeal decreed.

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

HASHMAT-UN-NISSA BEGAM AND OTHERS (DEFENDANTS) v. MUHAMMAD ABDUL KARIM (PLAINTIFF).*

Act No. VII of 1870 (Court Fees Act), section 17—Court fee—Suit embracing two or more distinct subjects—Claim on an agreement to sell with an alternative claim for pre-emption.

The plaintiff came into Court claiming in the first place specific performance of an alleged agreement to sell to him certain immovable property, and secondly, in the alternative, the enforcement of a pre-emptive right in respect of a mortgage of the same property executed by one of the defendants in favour of the other.

Hold that the suit was within the meaning of section 17 of the Court Fees Act, 1870, a suit embracing two distinct subject matters and therefore chargeable with the court fee assessable upon each alternative relief separately.

THE suit out of which this appeal arose was one for specific performance of an agreement alleged to have been entered into between the defendant Musammat Hashmat-un-nissa Begam and Musammat Zainab-un-nissa Begam and the plaintiff on the 27th of July 1902. In the alternative, the plaintiff prayed for a declaration that he was entitled to pre-empt a mortgage executed after the alleged agreement for purchase, on the 17th of September 1902. The plaintiff alleged that on the 27th of July 1902 Musammat Hashmat-un-nissa Begam along with Musammat Zainab-un-nissa Begam, her sister, entered into an agreement with him for the sale of 2 biswas of the village of Sheikhpur. The share which belonged to Hashmat-un-nissa was attached in execution of a decree, and in consequence of this, as the plaintiff alleged, it was agreed that the sale of the share of Zainab-un-nissa should be carried out forthwith, and that the sale of the share of Hashmat-un-nissa should be completed when permission was

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* First Appeal No. 249 of 1904 from a decree of Maulvi Muhammad Shah, Additional Subordinate Judge of Moradabad, dated the 30th of July 1904.

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obtained from the Court of the Subordinate Judge for the sale of that share under the provisions of section 305 of the Code of Civil Procedure. In spite of this agreement, the plaintiff alleged, Hashmat-un-nissa entered into an agreement with the defendants Musammat Ruzia, Musammat Kubra and Alim-uddin for a mortgage of her share in the village to secure a sum of Rs. 8,000. As a matter of fact a mortgage was executed in favour of these parties on the 17th of September 1902, and the mortgagees were put into possession, the mortgage being a usufructuary mortgage.

The Court of first instance (Subordinate Judge of Moradabad) held that the defendant Hashmat-un-nissa had entered into a binding agreement for the sale of her share, and gave the plaintiff a decree for specific performance. In regard to the claim for pre-emption the learned Judge came to no decision, holding that it was unnecessary to do so in view of his decision on the first question.

The defendant Hashmat-un-nissa, as also her mortgagees, appealed against this decision to the High Court.

Maulvi *Abdul Majid* for the appellants.

Mr. *Wallach* and Maulvi *Ghulam Mujtaba*, for the respondents.

STANLEY, C.J., and BURKITT, J.—This appeal has occupied a considerable time. The learned counsel for the respective parties have opened up before us and discussed carefully all the points which could be urged on behalf of their clients. The suit was one for specific performance of an agreement alleged to have been entered into between the defendant Musammat Hashmat-un-nissa Begam and Musammat Zainab-un-nissa Begam and the plaintiff on the 27th of July 1902. In the alternative, the plaintiff prays for a declaration that he is entitled to pre-empt a mortgage executed after the alleged agreement for purchase, on the 17th of September 1902. The plaintiff's case is as follows:—He alleges that on the 27th of July 1902 Musammat Hashmat-un-nissa Begam along with Musammat Zainab-un-nissa Begam her sister, entered into an agreement with him for the sale of 2 biswas of the village of Sheikhpur. The share which belonged to Hashmat-un-nissa was attached in execution of a decree and

in consequence of this, as the plaintiff alleges, it was agreed that the sale of the share of Zainab-un-nissa should be carried out forthwith, and that the sale of the share of Hashmat-un-nissa should be completed when permission was obtained from the Court of the Subordinate Judge for the sale of that share under the provisions of section 305 of the Code of Civil Procedure. In spite of this agreement, the plaintiff says, Hashmat-un-nissa entered into an agreement with the defendants Musammat Ruqia, Musammat Kubra and Alim-ud-din for a mortgage of her share in the village to secure a sum of Rs. 8,000. As a matter of fact a mortgage was executed in favour of these parties on the 17th of September 1902, and the mortgagees are in possession, the mortgage being a usufructuary mortgage.

The learned Subordinate Judge held that the defendant Hashmat-un-nissa had entered into a binding agreement for the sale of her share, and gave the plaintiff a decree for specific performance. In regard to the claim for pre-emption the learned Judge came to no decision, holding that it was unnecessary to do so in view of his decision on the first question.

The defendant Hashmat-un-nissa, as also her mortgagees, have preferred the present appeal against this decision. Throughout Hashmat-un-nissa denied that she had any knowledge of the agreement of sale, and indeed after careful consideration of the evidence it seemed to us impossible to hold that there was any binding agreement for sale. The learned counsel for the respondent recognized the difficulties in his way in supporting the decision of the Court below, and ultimately withdrew his prayer for specific performance and consented to the suit being dismissed so far as regards this relief. We think that no other course was open to him, the evidence failing to show that there was any binding agreement for the sale of the property. In addition to this there were other defects in the way of the respondent, the difficulty of surmounting which was apparent to his learned counsel.

Having withdrawn his prayer for specific performance the respondent falls back upon the alternative claim and asks the Court to consider the case made by him upon this branch of the suit. He is met, however, by the objection that the stamp paid

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on the plaint was insufficient in view of the provisions of section 17 of the Court Fees Act. That section provides that "where a suit embraces two or more distinct subjects, the plaint or memorandum of appeal shall be chargeable with the aggregate amount of the fees to which the plaint or memorandum of appeal in suits embracing separately each of such subjects would be liable under this Act." A court fee was paid only in respect of the claim for specific performance. No fee was paid on the claim for pre-emption. Mr. Wallach ingeniously argued that the suit did not embrace two or more distinct subjects; that the claim was in reality a claim to recover possession of property either on the ground that the plaintiff was entitled to possession by reason of the agreement for sale or by reason of his right of pre-emption. When we look into the position of matters we find that this is not so. The claim for specific performance is a claim in respect of the proprietary interest in the land. Whereas under the claim for pre-emption the plaintiff respondent could only obtain such interest as the mortgagees of the defendant Hashmat-un-nissa possessed. Their claim in fact is to stand in the shoes of the mortgagees, taking over their bond and obtaining possession as usufructuary mortgagees. These two claims appear to us to be separate and distinct claims, and, as such, to fall within the purview of the section to which we have referred. This being so, the plaint having been insufficiently stamped, there is no alternative for us but to allow the appeal. We allow the appeal, set aside the decree of the Court below, and dismiss the plaintiff's suit with costs in all Courts.

Appeal decreed.

Before Mr. Justice Banerji and Mr. Justice Aikman.

BANWARI LAL AND ANOTHER (PLAINTIFFS) v. NIADAR (DEFENDANT).*

Act (Local) No. II of 1901 (Agra Tenancy Act), section 201—Suit for profits—Receipt of profits within 12 years of suit denied—Plaintiffs recorded co-sharers—Burden of proof.

The plaintiffs—recorded co-sharers—sued another co-sharer for profits. The defendant pleaded that the plaintiffs or their predecessors in title had not received profits within twelve years preceding the institution of the suit, and that the suit was time-barred. *Held* that it was not for the plaintiffs to

*Second Appeal No. 352 of 1905, from a decree of Mr. A. C. Chatterji, Additional District Judge of Saharanpur, dated 23rd of January 1905, reversing a decree of Munshi Maksud Ali Khan, Assistant Collector of the first class, dated the 6th June 1904.

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