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

1908
May 21.

GHASITEY (DEFENDANT) *v.* GOBIND DAS (PLAINTIFF) AND BAIJ NATH AND ANOTHER (DEFENDANTS).*

Pre-emption—Re-sale to a co-sharer after institution of a suit for pre-emption—Act No. IV of 1882 (Transfer of Property Act), section 52—Lis pendens.

After the filing of a suit for pre-emption but before service of summons on the defendants, the defendant vendee re-sold the property claimed to a second vendee who had equal rights as a co-sharer with the plaintiff. This second vendee was added by the Court as a party defendant, but the plaint was not amended and the plaintiff did not seek to pre-empt the sale made in his favour. *Held* that the doctrine of *lis pendens* applied, and the plaintiff was entitled to a decree. *Faiyaz Husain Khan* v. *Prag Narain* (1) referred to. *Manpal* v. *Sahib Ram* (2) distinguished.

THE facts out of which this appeal arose are as follows:—

ONE Janki Das sold his share in certain property on the 10th of July 1905 to Baijnath, who is a stranger. On the 1st of June 1906, the present suit was instituted by Gobind Das, the plaintiff, to enforce his right of pre-emption in respect of this sale. On the 11th of June 1906, before the summons in the suit was served on Baijnath, the latter sold the property to Ghasitey, who is a co-sharer of equal degree with the plaintiff in the village. Ghasitey was added as a defendant by the order of the Court and not on the application of the plaintiff. The plaint was not amended and the plaintiff did not seek to pre-empt the sale made in his favour. It was not disputed that the plaintiff had no right of pre-emption superior to that of Ghasitey, but the contention put forward on behalf of the plaintiff which found favour with the Court below was that, having regard to the provisions of section 52 of the Transfer of Property Act, the purchase by Ghasitey after the institution of the plaintiff's suit could not defeat the plaintiff's right of pre-emption.

The claim was decreed by the Court of first instance (Munsif of Banda) and the decree of that Court was affirmed by the lower appellate Court (District Judge of Banda.) The defendant Ghasitey appealed to the High Court.

* Second Appeal No. 224 of 1907, from a decree of L. Marshall, District Judge of Banda, dated the 21st of December 1906, confirming a decree of Syed Hamid Husain, Munsif of Banda, dated the 8th of November 1906.

(1) (1907) I. L. R., 29 All., 339. (2) (1905) I. L. R., 27 All., 544.

1908

GHASITEY v. GOBIND DAS.

Babu *Jogindro Nath Chaudhri* (for whom Babu *Sarat Chandra Chaudhri*), for the appellant.

Mr. *Muhammad Raoof*, for the respondent Gobind Das.

STANLEY, C. J., and BANERJI, J.—This appeal arises in a suit for pre-emption brought under the following circumstances. One Janki Das sold his share in certain property on the 10th of July 1905 to Baijnath, who is a stranger. On the 1st of June 1906, the present suit was instituted by Gobind Das, the plaintiff, to enforce his right of pre-emption in respect of this sale. On the 11th of June 1906, before the summons in the suit was served on Baijnath, the latter sold the property to Ghasitey, who is a co-sharer of equal degree with the plaintiff in the village. It is not disputed that the plaintiff has no right of pre-emption superior to that of Ghasitey, but the contention put forward on behalf of the plaintiff, which found favour with the Court below, was that, having regard to the provisions of section 52 of the Transfer of Property Act, the purchase by Ghasitey after the institution of the plaintiff's suit could not defeat the plaintiff's right of pre-emption. Ghasitey, we may mention, was added as a defendant by the order of the Court and not on the application of the plaintiff. The plaint was not amended and the plaintiff did not seek to pre-empt the sale made in his favour. The claim was decreed by the Court of first instance and the decree of that Court was affirmed by the lower appellate Court.

It is urged before us that the rule of *lis pendens* cannot apply to the present case, and that as the right of Ghasitey was not inferior to that of the plaintiff, the suit ought to have been dismissed. In our judgment this contention is not well founded. It has been held by the Privy Council in the recent case of *Faiyaz Husain Khan* v. *Prag Narain* (1) that where a suit is contentious in its origin and nature it is not necessary that the summons should have been served in the suit in order to make it a contentious one within the meaning of section 52 of the Transfer of Property Act and render the doctrine of *lis pendens* applicable. The fact therefore of the purchase by Ghasitey having been made before the service of summons does not make section 52 of the Transfer of Property Act inapplicable. That

(1) (1907) I. L. R., 29 All., 339.

section provides that during the active prosecution of a contentious suit or proceeding in which any right to immovable property is directly and specifically in question, the property cannot be transferred or otherwise dealt with by any party to the suit or proceeding, so as to affect the rights of any other party thereto under any decree or order which might be made therein. Had the sale in favour of Ghasitey not been affected, the plaintiff would have got a decree for pre-emption as against the original vendee, Baijnath. As the purchase by Ghasitey was made after the institution of the plaintiff's suit, this purchase cannot, having regard to the provisions of section 52, affect the right of the plaintiff under the decree obtained in the suit. Had the sale been made before the institution of the suit, the result would have been different, because at the date of the institution of the suit the plaintiff would have had no right preferential to that of the purchaser then holding the property. When however after the institution of the suit for pre-emption a sale is made that sale cannot affect the right of the plaintiff to the decree obtained in the suit, as the purchaser took the property subject to the result of the suit. The case of *Manpal* v. *Sahib Ram* (1), referred to by the learned vakil for the appellant, is distinguishable. There the plaintiff amended his plaint, made the second purchaser of the property a defendant to the suit, and raised the issue of his title to pre-empt as against that purchaser. It was held that after having gone to trial upon that issue, he could not take shelter under the provisions of section 52. That is not the case here. In the present suit the sale was made, as we have said above, some days after the institution of the suit. For these reasons we dismiss the appeal with costs.

Appeal dismissed.

(1) (1905) I. L. R., 27 All., 544.