

APPELLATE CIVIL.

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February 8.

Before Mr. Justice Sir George Knox and Mr. Justice Piggott.
RAJ NARAIN RAI (PLAINTIFF) v. DUNIA PANDE AND OTHERS
(DEFENDANTS).*

*Pro-emption—Suit instituted after decrees in favour of other pre-emptors—
Plaintiff no party to former suits—Suit maintainable.*

Held that where a pre-emptor having a superior right of pre-emption brings his suit within limitation, the fact that decrees have been made in favour of other pre-emptors, the plaintiff not being a party to the suits in which such decrees were passed, will be no obstacle to the success of the suit.

Abdur Razzaq v. Mumtaz Husain (1) distinguished. *Serh Mal v. Hakim Singh* (2), *Allahdad Khan v. Abdul Hakim* (3) and *Muhammad Latif v. Gobind Singh* (4) referred to.

THE facts of this case were as follows :—

The property in suit originally belonged to Baldeo Pande and Ram Lochan Pande, who sold it on the 20th of December, 1906, to Musammatt Murti and others. One Dunia Pande brought a suit to pre-empt the property in the court of the Subordinate Judge of Ghazipur. That court gave the plaintiff a decree on the 29th November, 1907, to pre-empt 1/14 of the property only on payment of 1/14 of the purchase money.

Mahadeo Rai and others instituted another suit to pre-empt the same property on the 29th of October, 1907, in the court of the Munsif. On the 14th of December, 1907, this plaint was returned by the Munsif for presentation to the court of the Subordinate Judge, which was done on the 16th, and on the 23rd of December, 1907, these plaintiffs got a decree for 13/14 of the property.

On the 17th of December, 1907, Raj Narain Rai, appellant in this second appeal, brought a suit in the court of the Munsif to pre-empt the same property. The suit was decreed, as it was found that he had preferential rights over Dunia Pande and Mahadeo Rai and others, and he was no party to the first two suits. The defendants, Dunia Pande and others, appealed to

*Second Appeal No. 993 of 1908 from a decree of Sri Lal, District Judge of Ghazipur, dated the 25th of July 1908, reversing a decree of Freonath Ghose, Officiating Munsif of Mubammadabad, dated the 7th of April 1908.

(1) (1908) I. L. R., 25 All., 334. (3) S. A. No. 724 of 1906, decided April 12th, 1907.
(2) (1897) I. L. R., 20 All., 100. (4) (1888) I. L. R., 5 All., 382.

the District Judge, who allowed their appeals, relying on *Abdur Razzaq v. Mumtaz Husain* (1), and dismissed plaintiff's suit with costs.

Raj Narain Rai appealed to the High Court.

Munshi *Govind Prasad*, for the appellant, contended that his client not being a party to the former suits was not bound by their decision, and relied on *Kamta Prasad v. Mohan Bhagat* (2) and on the judgment of MAHMOOD, J., in *Gobind Dayal v. Inayatullah* (3).

Mr. M. L. *Agarwala*, Babu *Sital Prasad Ghosh* and Babu *Balram Chandra Mukerji* for the respondents, relied on *Abdur Razzaq v. Mumtaz Husain* (1), *Liakat Husain v. Rashid-uddin* (4) and *Intizar Husain v. Jumna Prasad* (5).

KNOX and PIGGOTT, JJ.—These are two connected appeals arising out of a suit for pre-emption. There are four distinct parties concerned. The first two defendants are the vendors, and they have sold a certain share in a mahal to defendants Nos. 3, 4 and 5, who are strangers. The defendant No. 6 (Dina or Dunia Pande) and defendants Nos. 7 to 19 (Mahadeo Rai and others) are rival pre-emptors. The sale by the vendors to the vendees took place on December 20th, 1906, the consideration stated in the deed of sale being Rs. 1,500. On October 21st, 1907, Dina (or Dunia) filed a suit for pre-emption in the court of the Subordinate Judge of Ghazipur, and on November 29th, 1907, that court gave him a decree for pre-emption in respect of 1/14th of the property concerned. The second set of pre-emptors, Mahadeo Rai and others, filed their suit in the court of the Munsif of Muhammadabad on October 29th, 1907. Their plaint was returned to them on December 14th, 1907, for presentation in the court of the Subordinate Judge. It was presented accordingly on December 16th, 1907, and the claim of Mahadeo Rai and others decreed in respect of the remaining 13/14ths of the property sold on December 23rd, 1907. The plaintiffs in both these suits accepted the sale consideration as being Rs. 1,500, according to the specification in the sale-deed. The present suit was brought on December 17th, 1907, in the court of the Munsif of

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(1) (1903) I. L. R., 25 ALL., 334.

(3) (1885) I. L. R., 7 ALL., 775, 860.

(2) (1909) 6 A. L. J., 966.

(4) (1906) 3 A. L. J., 794.

(5) (1904) 1 A. L. J., 247.

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Muhammadabad. It was expressly pleaded that the sale consideration specified in the sale-deed of December 20th, 1906, was fictitious, the correct amount being estimated at Rs. 400 only. The defendants Nos. 6 to 19 were impleaded as rival pre-emptors, but the plaintiff stated his cause of action as having arisen on December 20th, 1906, and also on November 29th, 1907, the date of the decree in favour of Dunia Pande. The present plaintiff was not a party to either of the previous suits. The learned Munsif held that in view of the plea regarding the actual amount of the consideration, he had jurisdiction to entertain the suit; he found that the present plaintiff had, under the terms of the *wajib-ul-arz* a superior pre-emptive right to any of the defendants Nos. 6 to 19. He held that the plaintiff's right could not be affected by the result of either of the previous suits, to which he was not a party. Finally he found the actual sale consideration to have been Rs. 800, and he gave the plaintiff a decree accordingly. The defendants Nos. 7 to 19 submitted to this decree, but separate appeals were filed in the court of the District Judge of Ghazipur by the defendants vendees and by the rival pre-emptor Dina (or Dunia), defendant No. 6. The learned District Judge held that no decree for pre-emption could be passed in favour of the present plaintiff after the dates of the two decrees in favour of the two rival sets of pre-emptors. He accordingly, without deciding any of the other points in issue, accepted the appeals and dismissed the plaintiff's suit. The latter comes to this Court in second appeal, and is virtually opposed by the defendant No. 6 (Dunia) only. The defendants Nos. 7 to 19 and the defendants vendors have not appeared at all in this Court, while the defendants vendees appeared only to plead that they ought to be exempted from all costs.

The decision of the learned District Judge rests entirely on the ruling of this Court in *Abdur Razzak v. Mumtaz Husain* and others (1). Now in that case it is clear that what the learned Judges of this Court held to be the "insuperable difficulty in the way of the plaintiff" was that he had been a party to the previous suit for pre-emption, and might have sought his remedy by way of appeal from the previous decree. It is true they went on to add that they could find no authority for the proposition that a right

the plaintiff as sufficient to establish such a special custom in the family as to rebut the ordinary presumption that the Mitakshara Law prevailed. It has been pointed out more than once at this Board that there is no class of evidence that is more likely to vary in value according to circumstances than that of the *wajib-ul-arzes*—*Muhammad Imam Ali Khan v. Husain Khan* (1) and *Parbati Kunwar v. Chandurpal Kunwar* (2)—and where, as here, from internal evidence, it seems probable that the entries recorded connote the views of individuals as to the practice that they would wish to see prevailing rather than the ascertained fact of a well-established custom, the learned Judicial Commissioners properly attached weight to the fact that no evidence at all was forthcoming of any instance in which the alleged custom had been observed. The question involved was one of fact only, and Their Lordships see no reason whatever to differ from the opinion of the learned Judicial Commissioners.

Their Lordships will humbly advise His Majesty that the appeal be dismissed with costs.

Appeal dismissed.

Solicitors for the appellant: *Barrow, Rogers and Nevill.*

Solicitors for the respondent: *T. L. Wilson, & Co.*

J. V. W.

APPELLATE CIVIL.

Before Mr. Justice Sir George Knox and Mr. Justice Karamat Husain.

KARANPAL SINGH (PLAINTIFF) *v.* BHIMA MAL AND ANOTHER (DEPENDANTS).
Act (Local) No. II of 1901 (Agra Tenancy Act), sections 176 and 177—Civil Procedure Code (1882), sections 2 and 102—Dismissal of suit for default—Order—Decree—Appeal.

An order of a Rent Court dismissing a suit for default of appearance by the plaintiff does not amount to a decree, and consequently such order when passed by an Assistant Collector of the first class is not appealable. *Zohra v. Mangu Lal* (3) followed.

*Second Appeal No. 1060 of 1908 from a decree of Ahmad Ali, Additional Judge of Aligarh, dated the 29th of August 1908, confirming a decree of Ram Prasad, Assistant Collector, first class, of Bulandshahr, dated the 23rd October 1907.

- (1) (1898) I. L. R., 26 Calc., 81 (92); (2) (1909) I. L. R., 31 All., 457;
 L. R., 25 I. A., 161 (169.) L. R., 36 I. A., 125 (131).
 (3) (1906) I. L. R., 28 All., 753.

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similar to the present was allowed to succeed. The actual decision as reported is upon a different point, but the fact that a pre-emption decree in virtue of which certain persons had stepped into the places of the original vendees would not bar a subsequent suit for pre-emption on the original sale was taken for granted. It was strongly urged upon us in argument on behalf of Dunia Pande that the plaintiff had no cause of action against this defendant except upon the latter decree of November 29th, 1907. In any case this argument does not apply to the defendants Nos. 7 to 19 who had not obtained any decree at all at the time when the present suit was filed. The way in which these defendants got their suit in the court of the Subordinate Judge rushed through is certainly peculiar and suggestive of collusion, and, as we have already pointed out, they have submitted to the decree of the Munsif's court in the present case and have put in no appearance in this Court. The answer, however, to the argument on behalf of the defendant respondent Dunia, seems to lie in the fact that he was really impleaded along with defendants Nos. 7 to 19 simply as a rival pre-emptor. The plaintiff had a cause of action as against all the defendants Nos. 6 to 19 from the date when they formally set up their respective claims to pre-emption regarding the sale-deed of December 20th, 1906, by filing suits to that effect. The point may not have been taken with sufficient clearness in the plaint; but this can hardly be said to affect the plaintiff's right to succeed.

We, therefore, accept these appeals, set aside the decrees of the lower appellate court, and remand the suit to that court for disposal under the provisions of order XLI, rule 23 of the Civil Procedure Code of 1908. As regards costs, we think it proper to order that Dunia (or Dina) shall pay the costs of the plaintiff appellant in this Court, and that the defendants vendees bear their own costs.

Appeal decreed and cause remanded.