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BHAGWAN DAS v. MUHAMMAD YAHIA.

BY THE COURT.—The appeal is allowed, the decree of the lower appellate Court is set aside and that of the court of first instance restored. The plaintiff will pay the costs of the defendants throughout.

Appeal allowed.

1913
March, 3.

Before Mr. Justice Sir Harry Griffin and Mr. Justice Chamier.

ABDUL GHAFUR (PLAINTIFF) *v.* GHULAM HUSAIN AND ANOTHER (DEFENDANTS) *

Civil Procedure Code (1908), order XXI, rule 88—Execution of decree—Sale in execution—Pre-emption—Title of pre-emptor defeasible.

Held that a title to a share in undivided immovable property sold in execution of a decree which is still defeasible at the date of the sale in execution is not sufficient to support a claim for pre-emption under order XXI, rule 88, of the Code of Civil Procedure, 1908. *Kamta Prasad* v. *Mohan Bhagat* (1) and *Nabihan Bibi* v. *Kauleshar Rai* (2) followed.

THE facts of this case were briefly as follows:—A certain mahal was divided into two pattis, namely, (1) patti Fakir Bakhsh, in which the plaintiff was a co-sharer, and (2) patti Mumtaz-ud-din, in which the defendant was a co-sharer by virtue of shares purchased by him under two sale-deeds, dated the 11th of August, 1910. A share in the latter patti was put up, on the 20th of September, 1910, to sale by auction in execution of a decree. The plaintiff bid for the property, and the defendant, offering the same bid, claimed the right of pre-emption under order XXI, rule 88, of the Code of Civil Procedure. The sale was confirmed in the defendant's favour. Then the plaintiff brought a suit for a declaration that the defendant had no right of pre-emption, and for possession of the property. Both the lower courts dismissed the suit, hence this second appeal. Shortly before the institution of this suit, but subsequent to the date of the auction sale, the plaintiff had brought two suits for pre-emption in respect of the shares purchased by the defendant in patti Mumtaz-ud-din on the 11th of August, 1910: both these suits were decreed and the decrees had become final.

Dr. *Satish Chandra Banerji* (with him Pandit *Braj Nath Vyas*), for the appellant:—

* Second Appeal No. 39 of 1912 from a decree of Muhammad Shafi, Judge of the Court of Small Causes exercising of the powers of a Subordinate Judge of Allahabad, dated the 15th January, 1912, confirming a decree of Sumer Chand, First Additional Munsif of Allahabad, dated the 29th of August, 1911.

(1) (1909) I. L. R., 32 All., 45. (2) (1907) 4 A. L. J., 351.

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The question for determination is whether the plaintiff is a co-sharer within the meaning of order XXI, rule 88. That rule applies only when there are real bids between a co-sharer and an entire stranger. It does not deal with the question of preferential right between two co-sharers; *Farzand Ali* v. *Alimullah* (1). That case was decided under the corresponding section 14 of Act XXIII of 1861, and is an authority for the proposition that a share-holder in one patti of a pattidari estate is a co-sharer, within the meaning of that section, with reference to a share in another patti of the estate. The two pattis were formed by an imperfect partition, and the entity of the mahal was unaffected. The co-sharers of both the pattis were jointly liable for the revenue assessed on the whole mahal and there was thus a bond of union subsisting between them. The plaintiff is thus a member of the co-parcenary body and a co-sharer in the undivided immovable property, namely, the mahal. I am further supported by the case of *Ram Autar* v. *Sheo Dutt* (2). Secondly, the defendant cannot be entitled to pre-empt under order XXI, rule 88, unless he is a co-sharer. His title as a co-sharer rested on his purchases, dated the 11th of August, 1910. But both those sales were pre-empted by the plaintiff. Under such circumstances the defendant cannot be regarded as being a co-sharer at all, because he never acquired an absolute title; *Kauleshar Rai* v. *Nabihan Bibi* (3), *Nabihan Bibi* v. *Kauleshar Rai* (4), *Kamta Prasad* v. *Mohan Bhagat* (5).

The Hon'ble Dr. *Tej Bahadur Sapru*, for the respondents:—

The two pattis were absolutely separate, although for purposes of revenue the mahal remained the same, still for all other purposes it was broken up into two pattis. The mahal as a whole could not, after partition, be regarded as "undivided immovable property" within the meaning of order XXI, rule 88. The partition may have been an imperfect partition, but the fact remains that there was a division. As soon as a division, of whatever sort and to whatever extent, has taken place, the mahal ceases to be an undivided immovable property. In the present case it was patti Mumtaz-ud-din which was the undivided immovable property within the meaning of order XXI, rule 88, and the plaintiff, admittedly, was

(1) (1876) I. L. R., 1 All., 272. (3) (1906) 3 A. L. J., 426.
(2) (1874) 6 N.-W. P., H. C. Rep., 243. (4) (1907) 4 A. L. J., 351.
(5) (1909) I. L. R., 32 All., 45.

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not a co-sharer therein. I am supported by section 182 of the Land Revenue Act and by the cases of *Digambur Misser* v. *Ram Lal Roy* (1) and *Ganga Singh* v. *Chedi Lal* (2).

Dr. *Satish Chandra Banerji*, replied.

GRIFFIN and CHAMIER, JJ:—This was a suit by the appellant for possession of a share in patti Mumtaz-ud-din in mahal Fakir Bakhsh, mauza Mani Umarpur. This share was put up for sale on the 20th of September, 1910, in execution of a decree of a civil court. The plaintiff's bid was Rs. 530. The respondents offered the same amount and the share was knocked down to them under order XXI, rule 88, on their showing that they had purchased two other shares in the same patti on the 11th of August, 1910. The appellant was at the time the holder of a share in the other patti in the mahal, namely, patti Fakir Bakhsh, but held no share in patti Mumtaz-ud-din. His case is that he was at the time of the sale a co-sharer within the meaning of order XXI, rule 88, and that the respondents must be regarded as strangers, inasmuch as their title to the shares purchased by them on the 11th of August, 1910, was at the time defeasible and they have since been compelled to surrender those shares to the appellant under decrees for pre-emption obtained by him on the 8th of July, 1911, and the 31st of January, 1912.

It appears that mahal Fakir Bakhsh was recently the subject of an imperfect partition at which the two pattis were constituted. It appears also that the whole of the land comprising the original mahal lies either in one patti or the other, there being no *shamilat* patti. In these circumstances it is a nice question whether the 'undivided property' for the purposes of order XXI, rule 88, is the whole mahal or only the patti Mumtaz-ud-din. But we need not decide this question, for, in accordance with the decisions of KNOX, A. C. J., and TUDBALL, J., in *Kamta Prasad* v. *Mohan Bhagat* (3) and of STANLEY C.J., and BURKITT, J., in *Nabihan Bibi* v. *Kauleshar Rai* (4) on appeal from the decision of RICHARDS, J., in 3 A. L. J., 426, we feel bound to hold that the defeasible title to the shares in patti Mumtaz-ud-din acquired by

(1) (1887) I. L. R., 14 Calc., 761.

(2) (1911) I. L. R., 33 All., 605.

(3) (1909) I. L. R., 32 All., 45.

(4) (1907) 4 A. L. J., 351.

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the respondents in August, 1910, did not give them the right to pre-empt the share now in question as co-sharers.

We allow this appeal, set aside the decrees of the courts below, and decree the appellant's claim to possession of the share in question with costs in all three courts.

Appeal allowed.

1913

March, 4.

Before Mr. Justice Tudball and Mr. Justice Muhammad Rafiq.

BIRHAM KHUSHAL (DEFENDANT) *v.* SUMERA (PLAINTIFF).*

Act (Local) No. II of 1901 *(Agra Tenancy Act), sections* 79 *and* 95*—Jurisdiction—Landholder and tenant—Occupancy holding—Suit for declaration that plaintiff is heir of deceased occupancy tenant and for possession of holding —Practice—Useless declaration refused.*

The son of a deceased occupancy tenant filed a suit against the zamindar in the civil court asking (1) to have it declared that he was the son and lawful heir of the late tenant and (2) for possession of the occupancy holding held by him. The plaintiff had been ejected more than two years before suit.

Held, that although so far as the first relief claimed was concerned the suit might be cognizable by a civil court, so far as the second relief was concerned the plaintiff's remedy was by suit under section 79 of the Agra Tenancy Act, and, inasmuch as the time for filing such a suit had long since expired there was no object to be gained by granting the first relief. The entire suit was accordingly dismissed. *Dori Lal* v. *Sardar Singh* (1) referred to.

IN this case the plaintiff sued as the son and heir of a deceased occupancy tenant praying for a declaration of his status as such and for possession of the occupancy holding which had been of his father. He had previously made an unsuccessful application for mutation of names in respect of the holding and had also brought a suit under section 95 of the Agra Tenancy Act, 1901, which had been dismissed in appeal by the Commissioner two years before the filing of his present suit. The present suit was dismissed by the court of first instance upon the ground that it was not cognizable by a civil court. On appeal, however, this decision was set aside and the suit remanded. Against this order of remand the zamindar defendant appealed to the High Court.

Munshi *Satya Narain*, for the appellant.

Babu *Lalit Mohan Banerji*, for the respondent.

TUDBALL and MUHAMMAD RAFIQ, JJ:—This appeal arises out of a suit, which was originally brought by the plaintiff Sumera in

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* First Appeal No. 161 of 1912 from an order of Pirthvi Nath, Additional Judge of Bareilly, dated the 12th of September, 1912.

(1) (1908) 5 A.L.J., 514.