Before Sir Henry Richards, Knight, Chief Justice, and Mr. Justice Tudball.

SUBA SINGH AND ANOTHER (DEFENDANTS). *v.* MAHABIR SINGH (PLAINTIFF).*

1917
April, 21.

Pre-emption—Wajib-ul-arz—"Intiqal"—Mortgage by conditional sale—Cause of action.

The wajib-ul-arz of a village, in recording an entry as to the right of pre-emption, referred to transfers (*intiqal*) and provided for the mode in which the first offer was to be made. *Held* that this provision applied to a mortgage by way of conditional sale and that the pre-emptor's cause of action arose upon the execution of the deed of mortgage and not when a foreclosure decree was passed or when the mortgagee obtained possession thereunder.

THE facts of this case were as follows:—

A mortgage by conditional sale was executed in favour of Suba Singh, defendant No. 1, on the 2nd June, of 1909. On the 13th of June, 1914, he obtained a decree absolute on the said mortgage. And on the 26th of February, 1915, in execution of the said decree he was put in possession of the property sought to be pre-empted. On the 5th of October, 1915, the plaintiff filed the present suit for pre-emption. The court of first instance held that a custom of pre-emption did exist in the village. It further held that the suit could have and should have been instituted within one year of the execution of the deed; that at the latest it could have been instituted within one year of the date of the final decree, when the ownership of the property passed to the defendant. The lower appellate court was of opinion that article 120 of the Limitation Act was applicable to the case and not article 10. Both parties having acquiesced in the findings of the court of first instance as to custom and consideration it decreed the plaintiff's claim. The defendant appealed to the High Court.

Dr. *Surendra Nath Sen*, for the appellant:—

There are two points to be considered. Whether in the wajib-ul-arz there is a clear recital of a custom and whether the plaintiff has based his claim on that custom. The wajib-ul-arz in suit narrates in a most general way the existence of a custom. The custom on which the plaintiff took his stand was

* Second Appeal No. 1400 of 1916, from a decree of G. C. Badhwar, District Judge of Ghazipur, dated the 13th of September, 1916, reversing a decree of Aijaz Husain, Munsif of Muhammadabad, dated the 26th of January, 1916.

a very strange and rather out of the way custom. No such custom could be deduced from the terms of the wajib-ul-arz. The custom evidently alleged was a custom to pre-empt on the right of a mortgagee by conditional sale ripening into a sale.

[The Hon'ble Dr. *Tej Bahadur Sapru* :—This point cannot now be raised. It was never raised in the pleadings. It was not raised before the lower courts.]

It was raised before the lower court. The Judge refers to it in his judgement in these words :—

"It was argued before me for the respondents that this was not a case of a voluntary sale because the defendant No. 2 had no choice but had to submit to the passing of a decree absolute by the court."

The court evidently misunderstood the nature of this argument and brushed it aside as if it related to the question of limitation. Besides the nature of custom can be explained at any stage; *Kamta Prasad* v. *Gulzar Singh* (1).

Where a wajib-ul-arz provides for the case of sale only that provision cannot be taken to be evidence of a custom of all sorts of transfers; *Hameed-ud-din* v. *Raghunath Prasad Misra*, (2).

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

The appellant is evidently trying to go behind a finding of fact. In the plaint custom of pre-emption was alleged and this custom could be no other than the one which would entitle the plaintiff to a decree. In the written statement there is no objection or to the nature of the custom alleged. In the lower appellate court the respondent admitted the existence of custom and this admission should preclude his heirs from disputing that very custom now. It was for the defendant to be specific in his denial. It would be unfair to the plaintiff to presume at this stage the non-existence of a custom which he was never given an opportunity to prove. Dr. *Sen's* plea was a plea of limitation in disguise. The court was deciding a question of limitation and not of custom. It would be setting up a new case for the defendant which was not his case in the lower courts. When a custom is alleged it evidently means a custom which gives a party right to get the property in dispute.

(1) (1914) 12 A. L. J., 611. (2) (1914) 24 Indian Cases, 271.

1917

SUBA SINGH v. MAHABIR SINGH.

RICHARDS, C. J., and TUDBALL, J.:—This appeal arises out of a suit for pre-emption. The facts are that as far back as the 3rd of June, 1909, there was a mortgage by way of conditional sale. The decree absolute was made on the 13th of June, 1914. Possession was given on the 26th of February, 1915. The present suit was instituted on the 5th of October, 1915. The plaintiff alleged his cause of action to have arisen, not at the date of the original transfer, but on the date at which possession was given under the decree absolute. The custom as proved by the entry in the wajib-ul-arz refers to transfers (*intiqal*) and provides that the first offer must be made as therein set forth. There is no reference in the entry to any right of pre-emption upon the order of the court for making a decree absolute or granting possession. The question in the court below was when did the plaintiff's cause of action, if any, arise. The court of first instance held that the cause of action, if any, arose on the 3rd of June, 1909, the date of the transfer, and that the suit was barred by limitation. The lower appellate court thought otherwise. The defendant comes here in second appeal. It is contended that there was no right to get possession as the result of the decree absolute or the order for possession of the court and that the plaintiff's right, if any, accrued at the time of the original transfer, that is, in 1909. It is contended on behalf of the respondent that this plea is not open because in the court below the right of pre-emption was admitted. It seems to us that what was admitted in the court below was that there was a right of pre-emption as recorded in the wajib-ul-arz and that this custom had reference to voluntary transfers by co-sharers, and that if the plaintiff's rights were under this custom, his suit was clearly barred. In our opinion it cannot be contended for one moment that the defendant admitted in the court below that there existed a right of pre-emption by reason of the fact that there had been an order absolute in a foreclosure suit and an order for possession following thereon. The last paragraph but one of the judgement of the lower appellate court clearly shows that the defendant's pleader in that court never intended to make any such admission. We think that the only custom which was proved in the present case was the custom recorded in the wajib-ul-arz.

The plaintiff's right therefore, if any, arose in 1909, and the suit ought to have been brought within one year from that date. We allow the appeal, set aside the decree of the lower appellate court, and restore the decree of the court of first instance with costs in this Court and in the court below.

1917

SUBA SINGH v MAHABIR SINGH.

Appeal allowed.

Before Sir Henry Richards, Knight, Chief Justice, and Justice Sir Pramada Charan Banerji.

1917 April, 25.

ANUP KUMAR (OPPOSITE PARTY) *v.* KESHO DAS (APPLICANT)*

Act No. III of 1907 (Provincial Insolvency Act), sections 34, 35—Application for declaration of insolvency—Property of applicant attached—Power of insolvency court to stay proceedings in execution.

An insolvency court has no power to interfere with execution proceedings pending in another court against a person who has filed his petition to be declared insolvent, at least, until either the debtor has been declared insolvent or until a receiver has been appointed.

IN this case one Jamna Das applied to be adjudicated an insolvent. At the time of this application Anup Kumar had obtained a decree against Jamna Das, and had attached certain property of the judgement-debtor, and that property was about to be sold. Thereupon Swami Kesho Das, alleged to be another creditor of Jamna Das, made an application to the District Judge contending that, if the property was sold at the suit of Anup Kumar, the other creditors would be prejudiced, because Anup Kumar would probably get a larger portion of the assets. He prayed that, pending the disposal of the insolvency application, the sale proceedings, pending in the Subordinate Judge's Court, might be stayed. The District Judge allowed the application and stayed the execution proceedings accordingly. Against this order the attaching creditor appealed to the High Court.

The Hon'ble Munshi *Narayan Prasad Ashthana*, for the appellant.

Babu *Purushottam Das Tandon*, for the respondent.

RICHARDS, C. J., and BANERJI, J. :—This appeal arises out of an insolvency matter. An application was made by one Jamna Das, to be adjudicated an insolvent. Lala Anup Kumar had

---

* First Appeal No. 191 of 1916, from an order of J. H. Cuming, District Judge of Saharanpur, dated the 16th of September, 1916.