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dissented from the rule of law laid down in the case of *Dhian Singh v. King Emperor* (1), which was a judgment of a single Judge of this Court. They distinctly say "we cannot agree with the rule of law laid down in *Dhian Singh v. King Emperor*." We would also call attention to the decision of this Court in the case of *King-Emperor v. Newaz* (2). This was similarly a case of three men who with the same intent and object attacked one other. They were armed with *lathis*. They inflicted serious injuries which resulted in death. All three of them were found guilty of the offence of murder. These cases no doubt are distinguishable from the case before us, for here the matter was a sudden one, it sprang up suddenly and the injuries were inflicted in the heat of passion. We think that the case falls within exception 4 of section 300 of the Indian Penal Code. We, therefore, alter the conviction in the present case from one under section 325 of the Indian Penal Code to one under section 304 of the Indian Penal Code, and in view of the circumstances of the case, we do not think it necessary to enhance the sentences that have been passed.†

## APPELLATE CIVIL.

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

SHAMSHER SINGH AND OTHERS (DEFENDANTS) v. PIARI DAT (PLAINTIFF.)  
 AND SUBEDAR AND OTHERS (DEFENDANTS).\*

*Pre-emption—Custom—Wajib-ul-arz—Property to be sold to co-sharer first—Sale to stranger—“Refusal to purchase.”*

As a general rule the custom as to pre-emption as evidenced by the record in the *wajib-ul-arz*, is that where a co-sharer wishes to sell his property he must first offer it to another co-sharer and if the co-sharer refuses to purchase, he is entitled to go to a stranger. Where the custom proved is of this nature, if the co-sharer (vendor) offers property to another co-sharer and such co-sharer refuses to purchase on the ground that he has no money or is unwilling for any other reason to purchase, the owner of the property is entitled to go and sell it to a stranger, and he is not obliged, after he has made a definite agreement with the stranger to return and offer the property a second time to the

\* First Appeal No. 265 of 1916, from a decree of Piare Lal Katara, Subordinate Judge of Mainpuri, dated the 28rd of September, 1916.

(1) (1912) 9 A. L. J., 180. (2) (1913) 1 L. R., 85 All., 506.

†But see also *Emperor v. Ekiela Singh*, 1 L. R., 29 All., 289.—Ed.

co-sharer. *Naunihal Singh v. Ram Ratan* (1) and *Nathi Lal v. Dhani Ram* (2) followed. *Munawar Husain v. Khadim Ali* (3) and *Kanhai Lal v. Kalka Prasad* (4) not followed.

THIS was a suit for pre-emption based upon a custom recorded in the *wajib-ul-arz* to the effect that a co-sharer wishing to sell his share was bound first to offer the property to another co-sharer before he could sell it to a stranger. The sole question in the case was whether or not the plaintiff pre-emptor had refused to purchase the property when offered to him. The court of first instance disbelieved the evidence adduced by the vendees on the subject of the plaintiff's refusal to purchase and decreed the suit. The defendants vendees appealed to the High Court.

Mr. A. H. C. Hamilton (the Hon'ble Dr. Tej Bahadur Sapru and Babu Piari Lal Banerji with him), for the appellants.

Mr. T. N. Chadha (with him, Munshi Girdhari Lal Agarwala), for the respondents.

RICHARDS, C. J., and TUDBALL, J. :—This appeal arises out of a suit for pre-emption and was before us on a previous occasion. We held that the plaintiff, under the circumstances of the case, was entitled to get the property by pre-emption provided that he had not refused to purchase it. The court below has decided that the plaintiff did not refuse to purchase. The court disbelieves the evidence adduced by the vendees upon this point, and it is to be remembered that, although the plea was raised when the case came on originally for trial, it was not until after the order for remand that evidence of refusal to purchase was given. We see no reason to differ from the court below upon the issue of the refusal to purchase. The learned Subordinate Judge in the course of his judgment held that even if the plaintiff had refused to purchase that would not be sufficient to debar him from his right of pre-emption, and has cited two cases, namely, *Munawar Husain v. Khadim Ali* (3) and *Kanhai Lal v. Kalka Prasad* (4). In the last mentioned case there is the following passage in the judgment:—"As we pointed out in our judgment in *Sahan Lal v. Shahab-ud-din Khan* (5), in order to debar a party

(1) (1917) I. L. R., 39 All., 127. (3) (1908) 5 A. L. J., 331.

(2) (1918) 15 A. L. J., 315. (4) (1905) I. L. R., 27 All., 679.

(5) S. A. No. 909 of 1901, unreported.

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entitled to pre-empt a sale from exercising his right an opportunity to purchase must be given, when a definite agreement to purchase at a fixed price has been entered into with a stranger. It is not enough to offer property to a person entitled to pre-empt before an agreement to purchase has been entered into with a third party as was the case here." This Bench has had occasion to deal with this *dictum* in several cases, see *Naunihal Singh v. Ram Ratan* (1) and *Nathi Lal v. Dhani Ram* (2). As a general rule the custom, as evidenced by the record in the *wajib-ul-arz*, is that where a co-sharer wishes to sell, he must *first* offer it to his co-sharer, and if the co-sharer refuses to purchase, he is entitled to go to a stranger. Where the custom proved is of this nature we have no hesitation in saying that if the co-sharer offers the property to another co-sharer and he refuses to purchase upon the ground that he has no money or is unwilling for any other reason to purchase, the owner of the property is quite entitled to go and sell it to a stranger and that he is not obliged after he has made a definite agreement with the stranger to return and offer the property to the co-sharer a second time. It seems to us that (where the custom is as stated) the going to a stranger and making a bargain with him before offering it to the co-sharer would be acting contrary to the custom. We dismiss the appeal with costs.

*Appeal dismissed.*

*Before Mr. Justice Tudball and Mr. Justice Abdul Raof.*

BALWANT SINGH (JUDGMENT-DEBTOR) v. JOTI PRASAD AND OTHERS  
(DECREE-HOLDERS).\*

*Act No. IV of 1882 (Transfer of Property Act), section 6 (a)—Hindu law—Adoption by widow—Postponement of adopted son's estate during the widow's life—Transfer made by adopted son of property forming part of the estate in the widow's life-time—Spes successiois.*

An agreement depriving an adopted son of his right to take possession of the property of his adoptive father is not prohibited by law. *Kali Das v. Bijai Shankar* (3) and *Visalakshi Ammal v. Sivaramien* (4) referred to.

Where such an agreement has been entered into, for example, an agreement giving a life estate to the adoptive mother and the remainder to the adopted

\* First Appeal No. 160 of 1918, from a decree of Ragbunath Prasad, Subordinate Judge of Saharanpur, dated the 5th of April, 1918.

(1) (1916) I. L. R., 39 All., 127.

(3) (1891) I. L. R., 18 All., 391.

(2) (1917) 15 A. L. J., 815.

(4) (1904) I. L. R., 27 Mad., 577.

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