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SHEORAJ SINGH v. NAIK SINGH SAHAI.

rights with the plaintiff while another set had an inferior right to the plaintiff. In the present case all the plaintiffs have a right of pre-emption and the vendee had no right at all. We cannot agree with the view taken by the learned Judge. The result is that we allow the appeal, set aside the decree of the lower appellate court and restore that of the court of first instance, with this modification that the plaintiffs will have one-third of the property conditional upon their paying the amount of the consideration within three months from this date. Munna Lal will be at liberty to withdraw any money which he has paid in excess of his share as a consequence of the decree of the lower appellate court. Sheoraj Singh and Ram Ghulam will have their costs of this Court and of the court below against defendants 1—3. If the money is not paid by Sheoraj Singh and Ram Ghulam within three months allowed, their suit will stand dismissed with costs in all courts. As between Munna Lal and Sheoraj Singh and Ram Ghulam each party will pay his own costs in this Court and in the court below.

Appeal allowed.

Before Sir Henry Richards, Knight, Chief Justice, and Mr. Justice Muhammad Rafiq.

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February, 17.

DEOKINANDAN (PLAINTIFF) *v.* MAHTAB RAI (DEFENDANT).*

Pre-emption—Custom—Wajib-ul-arz—Partition of village—Old custom adopted in new mahals—Right of pre-emption not surviving as between the new mahals.

The wajib-ul-arz of an undivided village afforded evidence of the existence of a custom of pre-emption in the village *between co-sharers*. Subsequently the village was divided by perfect partition into several mahals, and each of the new mahals adopted the old custom. *Held* that no right of pre-emption survived as between the different new mahals. *Ganga Singh* v. *Chedi Lal* (1) referred to.

THIS appeal arose out of a suit for pre-emption. The property in suit was situated in a mahal which was one of several mahals into which a village, originally undivided, had been split up. The vendor was a sharer in one of the other mahals of the original village. The plaintiff pre-emptor, however, was a sharer

* Second Appeal No. 209 of 1918, from a decree of Shamsuddin Khan, Subordinate Judge of Meerut, dated the 17th of December, 1917, confirming a decree of Kashi Prasad, Munsif of Ghaziabad, dated the 31st of July, 1917.

(1) (1911) I. L. R., 33 All., 605.

in the same mahal in which the property in suit was situated. The court of first instance dismissed the suit, and on appeal this decision was confirmed. The plaintiff appealed to the High Court.

Babu *Sital Prasad Ghosh*, for the appellant.

Mr. *A. H. C. Hamilton* (for whom Babu *Harendra Krishna Mukerji*), for the respondent.

RICHARDS, C. J., and MUHAMMAD RAFIQ, J.:—This appeal arises out of a suit for pre-emption. Both the courts below dismissed the claim of the plaintiff, who has come here in second appeal. The plaintiff is a co-sharer in the same mahal as the vendor. The defendant vendee is a proprietor in another mahal in the village. It appears that in the year 1872 the whole village constituted one mahal, but in the year 1887 or thereabout perfect partition took place, when a number of new mahals were formed, and the defendant vendee is in one of these new mahals. Both the courts seem to have been of opinion that a custom of pre-emption prevailed, but they thought that because the vendee was a co-sharer in the village the pre-emptor had no better right than him and therefore his suit must fail. The evidence of the existence of the custom was the wajib-ul-arz of 1872. This document contains a clear record as to pre-emption. In 1887, after partition (according to the finding of the court below) each of the new mahals adopted the old custom. It seems to us that, once we assume that the custom existed, the plaintiff had a right of pre-emption, and that as against him the defendant vendee was a complete stranger. The custom of 1872 was a custom *between co-sharers*. Every proprietor in the village then was a co-sharer with the other. The change brought about in the year 1887 was that the proprietors in each of the new mahals ceased to have any community of interest with the proprietors of the other mahals. In short, the proprietors of the different mahals ceased to be co-sharers with each other. The facts and circumstances connected with the case of *Ganga Singh* v. *Chedi Lal* (1) are very similar to the present case. It appears that the court of first instance found the amount of consideration. We, therefore, allow the appeal, set aside the decrees of both the courts below, and in lieu thereof decree the plaintiff's claim for pre-emption

(1) (1911) I. L. R., 33 All., 605.

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of the property conditional upon his paying the sum of Rs. 250 within three months from this date. If he fails to pay the money within the time allowed, the suit will stand dismissed with costs in all courts. If the money is duly paid in the plaintiff will have his costs in all courts.

Appeal allowed.

1919
February, 18.

Before Sir Henry Richards, Knight, Chief Justice, and Mr. Justice Muhammad Rafiq.

FAZAL AHMAD (PLAINTIFF) *v.* TASADDUQ HUSAIN (DEFENDANT).*

Pre-emption—Muhammadan law—Applicability of Muhammadan law in the case of a sale of zamindari property.

The Muhammadan law of pre-emption applies to zamindari property and is not restricted to houses, gardens and small plots of land. *Munna Lal* v. *Hajira Jan* (1) followed.

THE facts of this case were as follows :—

The plaintiff instituted the suit for pre-emption according to the Muhammadan law of certain zamindari property. The court of first instance decreed the suit, but the lower appellate court found that, although the demands required by the Muhammadan law had been duly performed, the plaintiff had made a usufructuary mortgage of his own share in the zamindari, to a third party four days after the institution of the suit. It further found that what purported to be a mortgage was really an out-and-out sale. It, therefore, reversed the decree of the court of first instance on the ground that at the date of the decree the plaintiff himself had no share in the mauza. The plaintiff appealed to the High Court.

Pandit *Kailas Nath Katju* (Dr. *S. M. Sulaiman* and the Hon'ble Syed *Raza Ali*, with him):—

The court below has erred in holding that what purported to be a mortgage was really a sale. No evidence of any kind was adduced by the defendant on the point. It is doubtful whether any could be legally admitted. In construing the terms of a deed the question is not what the parties may have intended but what is the meaning of the words they have used; *Manindra Chandra Nandi* v. *Durga Prasad Singh* (2).

* Second Appeal No. 1179 of 1917, from a decree of H. E. Holme, District Judge of Bareilly, dated the 6th of August, 1917, reversing a decree of Baijnath Das, Subordinate Judge of Bareilly, dated the 8th of May, 1917.

(1) (1910) I. L. R., 33 All., 28. (2) (1917) 15 A. L. J., 432 (436).