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formal legal adoption. Our attention has been called to the case of *Narasimha Appa Row* v. *Parthasarathy Appa Row* (1). That was a case very like the present one, with this exception that the testator by his will specifically gave a one-half share to each of his two wives. We, however, are of opinion that that difference does not create any real distinction and that we ought to follow the propositions which the Privy Council laid down as regards the exercise of joint powers. We refer specially to page 225, where their Lordships lay down in general terms the intelligible principle that where a power is given to *A* and *B* jointly, that power can be exercised only in the way directed by the donor namely, by *A* and *B* together doing the necessary acts. If it should happen that one of the joint donees dies, the survivor is not competent to perform the act which by the very directions of the testator require the concurrence of both. In this case the power to take in adoption ceased at the moment of the junior widow's death in 1911. As regards the disposition of the testator's property we are of opinion that the will gave the two ladies the whole of Din Dayal's property absolutely. It follows, therefore, that in our view the appellant is a complete stranger as far as regards any rights to any share in the property of the late Musammat Ram Dei, and therefore, agreeing as we do with the finding of the learned Subordinate Judge, we dismiss the appeal with costs.

Appeal dismissed.

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

BIHARI LAL AND OTHERS (PLAINTIFFS) *v.* MOHAN SINGH AND ANOTHER (DEFENDANTS).*

1920

January, 7.

Pre-emption – Vendee a stranger at date of suit, but becoming a co-sharer pending the suit.

During the pendency of a suit for pre-emption of a share in zamindari property the defendant vendee acquired by gift a share in the village, which put him as regards pre-emption on the same level with the plaintiff pre-emptor.

*Second Appeal No. 867 of 1918, from a decree of D R. Lyle, District Judge of Agra, dated the 14th of February, 1918, confirming a decree of Babu Kauleshar Nath Rai, Subordinate Judge of Agra, dated the 18th of June, 1917.

(1) (1913) I. L. R., 37 Mad., 199.

Held that in these circumstances the suit must be dismissed. The principle of *Ram Gopal* v. *Piari Lal* (1) applied.

THE facts of this case were as follows :—

The plaintiffs sued to pre-empt a sale made to a stranger, on the ground that they were co-sharers of the vendor. Some time after the institution of the suit, the vendee acquired, by virtue of a gift made to him, certain other property, the acquisition of which made him also a co-sharer with the vendor, such that the plaintiffs would have no preferential right as against him in respect of a sale made to him at that date. On the ground of this subsequent acquisition by the vendee, the plaintiff's suit was dismissed by both the lower courts. They appealed to the High Court.

The Hon'ble Munshi *Narayan Prasad Ashthana*, (with Mr. *T. N. Ohadha*), for the appellants :—

There has been no change in the status of the plaintiff's pre-emptors between the date of the sale and the date of the decree. Any change in the status of the defendant vendee, subsequent to the institution of the suit, cannot affect the plaintiff's right. As soon as the plaintiffs instituted the suit they, so to say, seized the property, so that any subsequent dealing with that property by the defendant would be invalid, as against them, by virtue of the doctrine of *lis pendens*. It has been held, accordingly, that where after the institution of a suit for pre-emption the vendee defendant sells to a co-sharer of equal footing with the plaintiff, the suit cannot be defeated thereby; for, a cause of action which existed at the date of the suit cannot be *vitiated* or destroyed by any subsequent action taken by the defendant; *Narain Singh* v. *Parbat Singh* (2) and *Ghasitey* v. *Gobind Das* (3). These decisions show that the position taken by the lower courts, namely, that in a pre-emption suit the plaintiff must have a preferential right as against the defendant not only at the date of the suit but also at the date of the decree, is not correct in those cases in which the plaintiff's status remains unaltered while there is an alteration in the defendant's status during the pendency of the suit. Indeed, where the status or title of the plain-

(1) (1899) I. L. R., 21 All., 441.

(2) (1901) I. L. R., 23 All., 247. (3) (1903) I. L. R., 30 All., 467.

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tiff continues unchanged, the crucial date for determination of the rights of the parties is the date of the suit, and the plaintiff's suit cannot be defeated by the defendant acquiring property subsequently to the institution of the suit. I rely on the following cases. *Rohan Singh* v. *Bhau Lal* (1), *Sanwal Das* v. *Gur Prasad* (2), *Dhanna Singh* v. *Gurbakhsh Singh* (3). To hold otherwise would defeat the whole object of the law of pre-emption, as was pointed out in the case last mentioned. If the suit had been decided on the day on which it was instituted the present plaintiffs would unquestionably have got a decree. Merely by reason of the lapse of time in disposing of the suit the plaintiff's rights ought not to suffer, as there has been no fault of theirs or deterioration of their title. They have done nothing to disentitle them from getting a decree. The present case is to be distinguished from those cases in which by reason of alienation of property, or by reason of partition, the plaintiff has since instituting the suit and prior to the decree, lost his status as pre-emptor; as in the case of *Ram Gopal* v. *Piari Lal* (4).

Here, the plaintiffs maintained their status throughout; it was the defendant who changed his position after the suit had been instituted. The case is also to be distinguished from those in which the vendee, though a stranger, has acquired, *before* any suit for pre-emption has been brought, some other property, and has thereby become a co-sharer; as, for example, in the cases of *Bhagwan Das* v. *Mohan Lal* (5), *Ram Hit Singh* v. *Narain Rai* (6). There, the plaintiff had not a good cause of action even on the date of the suit.

Dr. *Surendro Nath Sen*, for the respondents, was not called upon.

TUDBALL and MUHAMMAD RAFIQ, JJ.:—This appeal arises out of a suit brought to enforce a right of pre-emption based on village custom. Both the courts below have dismissed the plaintiffs' suit. The plaintiffs pre-emptors were co-sharers in the village at the date of the sale. The vendee was a stranger on that date. After the institution of the suit certain property was

(1) (1909) I. L. R., 31 All., 530.
(2) (1903) 8 Indian Cases, 179.
(3) (1909) 4 Indian Cases, 337.
(4) (1899) I. L. R., 21 All., 441.
(5) (1903) I. L. R., 25 All., 421.
(6) (1904), I.L.R., 26 All., 389.

gifted to the vendee by which he became a co-sharer in the village such that against him, under the custom, the plainti s would have no right to pre-empt. The courts below have held that the suit for pre-emption was bound to fail by reason of this subsequent acquisition by the vendee of a share in the village, which placed him upon an equal footing with the pre-emptors in the co-parcenary body. The decisions are based upon the principle that the plaintiffs must, in order to succeed, be entitled to pre-empt not only on the date of the suit but also up to the date of the decree. The plaintiffs appeal and on their behalf attention is called to a Division Bench of this Court in the case of *Rohan Singh* v. *Bhau Lal* (1). The head-note of the report is misleading. It is set forth there that the Court held that the suit could not be dismissed, the pre-emptor having been entitled to a decree at the date of the institution of the suit. An examination of the judgment would show that though the learned Judges who constituted the Bench were inclined to that opinion they came to no definite decision on that point. They decided the case really on a different ground. The only case of this Court which is of any use to us in the present matter is that of *Ram Gopal* v. *Piari Lal* (2). In that case the plaintiff when he filed his suit for pre-emption had a full right under the custom set out in the wajib-ul-arz to pre-empt the property. Pending the decision of the suit, however, the mahal was partitioned and the plaintiff's share was put into a totally different mahal, so that on the date of the decision of the case, he was no longer a co-sharer in the mahal in which the property lay, that he was attempting to pre-empt. The learned CHIEF JUSTICE in his judgment in that case remarked at page 444 as follows :—

"That seems to be a strong reason for dismissing the suit, unless it can be shown that there is some general principle of law or procedure which compels us in disregard of the custom, and which would compel us in disregard of a contract, if this were a case of contract, to look exclusively to the state of things that existed at the date of the institution of the suit, and to say that because on that date the plaintiff was entitled to pre-emption he is to have a decree for pre-emption, although since that date his right has ceased to exist. It appears to me impossible to maintain that there is any such general principle of law."

(1) (1909) I. L. R., 31 All., 530. (2) (1899) I. L. R., 21 All., 441.

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And on page 445 he remarked :—

"There is therefore nothing which compels us to look exclusively to the date of the institution of the suit, to disregard all that has since happened, and to confirm the decree for pre-emption, although at the date of the decree the plaintiff was not entitled to pre-emption according to the terms of the wajib-ul-arz upon which the suit was based."

It is quite true that in that suit it was a case of a plaintiff pre-emptor losing his right to pre-empt by reason of his property having been removed and placed in a different mahal, that is, by his having become a stranger to the mahal in which was the property sought to be pre-empted, whereas in the case before us the plaintiff's position has not changed so far as the mahal is concerned, or his own property, but the position of the vendee has changed. It seems to us immaterial, however, whether it is the plaintiff's position that has been changed or that of the vendee. The result in either case is that on the date of the decree the plaintiff was no longer in a position to say to the court, I am a person who is entitled to pre-empt as against the vendee. Our attention has been called to certain decisions of the Punjab Chief Court in which the opposite has been held by a majority of Judges. An examination of the decisions, however, shows that the court was divided in its opinion, and we think that the opinion expressed by the late CHIEF JUSTICE of the Punjab Chief Court is one which carries more weight with us. In principle we are unable to distinguish the present case from the case of *Ra n Gopal* v. *Piari Lal* (1); and we think that the courts below were correct in dismissing the plaintiff's suit. The appeal therefore fails and is dismissed. We make no order as to costs.

Appeal dismissed.

REVISIONAL CRIMINAL.

1920
January, 13.

Before Mr. Justice Tudball.

EMPEROR v. P. U. DESOUZA.*

Act No. XLV of 1860 *(Indian Penal Code), section* 304 A—*Criminal negligence —Carelessness of compounder in dealing with poisonous drug.*

An unqualified person who was in charge of a dispensary attached to a mill at Agra had to make up a quantity of quinine mixture for cases of

* Criminal Revision No. 781 of 1919, from an order of Gopal Das Mukerji, Sessions Judge of Agra, dated the 11th of November, 1919.

(1) (1899) I. L. R., 21 All., 441.