## FULL BENCH.

*Before Mr. Justice Lindsay, Mr. Justice Mukerji and Mr. Justice Iqbal Ahmad.*

1928
March, 15

MAHADEO SINGH AND OTHERS (PLAINTIFFS) *v.* TALIB ALI AND OTHERS (DEFENDANTS).*

*Pre-emption—Suit for pre-emption by three plaintiffs—Suit dismissed—Appeal—Death of one plaintiff appellant pending appeal—Abatement—Custom—Effect of estate coming into the hands of a single proprietor.*

A suit for pre-emption was filed by three persons, each claiming a right to pre-empt the whole of the property sold. The suit was dismissed. The plaintiffs appealed, but, pending the appeal, one of them died, and his representatives were not brought upon the record within the period of limitation.

*Held*, that the effect of this was not that the appeal abated but that the deceased plaintiff appellant merely dropped out, and the other two plaintiffs were entitled to continue the appeal and, if they succeeded, to obtain a decree for pre-emption. *Matbar Singh* v. *Abhai Nandan Prasad* (1), *Ambika Prasad* v. *Jhinak Singh* (2), and *Wajid Ali Khan* v. *Puran Singh* (3), overruled.

When once property comes into the hands of a single proprietor, any custom of pre-emption relating thereto must come to an end. The custom may grow up again, but its growth will have to be established by evidence. *Kamar-un-nissa Bibi* v. *Sughra Bibi* (4), followed.

THIS was an appeal arising out of a suit for pre-emption which had been dismissed, and was referred to a Full Bench on the question of what effect, if any, the death of one of the plaintiffs appellants during the pendency of the appeal would have on the rights of the others to continue the appeal. The facts

*First Appeal No. 526 of 1924, from a decree of Raja Ram, Additional Subordinate Judge of Ballia, dated the 12th of May, 1924.

(1) (1927) I. L. R., 49 All., 756. (2) (1922) I. L. R., 45 All., 286.
(3) (1924) I. L. R., 47 All., 100. (4) (1917) I. L. R., 39 All., 480.

appear from the Referring Order, which was as follows :—

"LINDSAY and IQBAL AHMAD, JJ.—There is a preliminary matter to be considered in connection with the hearing of this appeal and until that has been decided we do not think the case ought to proceed any further, and, in order to have this matter decided, for reasons which we are now about to state we think it proper that the matter be referred for decision to a Full Bench.

The appeal which is before us arises out of a suit for pre-emption brought by three plaintiffs, Babu Mahadeo Singh, Babu Mathura Singh and Babu Ranbaz Singh.

The suit has been dismissed in the court of first instance. At the time the decree of the lower court was passed, and also at the time the appeal was filed in this Court, Babu Ranbaz Singh, the third plaintiff, was still alive. Since the appeal has been admitted, however, Babu Ranbaz Singh has died, and it is admitted before us that his legal representatives have not been brought on the record either as appellants or respondents.

We have been referred to a ruling of a Bench of this Court in *Matbar Singh* v. *Abhai Nandan Prasad* (1). In that case the facts were similar to the facts of the case now before us. The Bench decided, in circumstances similar to those which face us now, that in no case could the surviving plaintiffs have a decree for pre-emption, on the ground that the decree of the first court had become final and by doing so had declared that the deceased plaintiff had no right of pre-emption. In short, the case was put in this way, namely, that on these results the surviving plaintiffs must be taken to have associated with themselves a stranger in order to obtain a decree for pre-emption and, that being so, the whole suit was bound to fail.

If that is the true state of the case, then we should necessarily have to hold in the present case that the two surviving plaintiffs, Babu Mahadeo Singh and Babu Mathura Singh, cannot in any way succeed in this appeal and be given a decree for pre-emption. We are not, however, disposed to agree with the reasoning of the learned Judges in the case just mentioned

(1) (1927) I. L. R., 49 All., 756.

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and as the point is one of great importance and as, moreover, the valuation of the appeal now before us is a lakh of rupees, we think we are justified in asking that this matter be considered and dealt with by a larger Bench.

We therefore direct that the record be laid before the Chief Justice with the request that a Full Bench may be appointed to decide whether, in the circumstances above set out, it is correct to say that the surviving plaintiffs are in no case entitled to have a decree for pre-emption, on the ground that in their suit they have joined with themselves a person who is held not to have a right to pre-empt."

The appeal was then laid before a Bench consisting of LINDSAY, MUKERJI and IQBAL AHMAD, JJ.

Babu *Piari Lal Banerji*, for the appellants.

Sir *Tej Bahadur Sapru* and Munshi *Kamla Kant Varma*, for the respondents.

LINDSAY, J.—This case has been referred to a Full Bench by an order of reference dated the 24th of January, 1928, and the point for consideration is whether the view of the law laid down in the decision of the case of *Matbar Singh* v. *Abhai Nandan Prasad* (1) is correct or not.

It is not necessary for me to state the facts, which are all set out in the referring order. The case, as far as the facts are concerned, is on the same footing as the one to which I have just referred. The referring Bench was not prepared to accept the view of the law as laid down in the case above cited, and now the case has been argued before us. Speaking for myself, I have no doubt that the decision of the Bench in *Matbar Singh* v. *Abhai Nandan Prasad* (1) is not a correct exposition of the law. I do not wish to discuss the matter at any length, for, having read the referring order in that case which was made by my learned brother IQBAL AHMAD, J., I find that I have nothing more to say. I adopt all the arguments set out in his referring order and consider that the point

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of law should be decided in the manner indicated by him in that order. I would, therefore, answer this reference by saying that in the circumstances of this case the surviving plaintiffs are entitled to have a decree for pre-emption, provided they succeed in their appeal to this Court.

I should like to add that the case of *Ambika Prasad* v. *Jhinak Singh* (1), which is referred to in the referring order made by my learned brother in the case of *Matbar Singh* v. *Abhai Nandan Prasad* (2), was for the reasons just given also erroneously decided, as also the case of *Wajid Ali Khan* v. *Puran Singh* (3), which is discussed in the separate judgement of my learned brother MUKERJI, J., with which I agree.

MUKERJI, J.—The point referred to the Full Bench is whether in the circumstances to be just mentioned the appeal is maintainable.

It appears that three plaintiffs, Babus Mahadeo Singh, Mathura Singh and Ranbaz Singh, instituted a suit for the purpose, *inter alia*, of pre-empting a certain property sold by the defendant second party to the defendants first party. The claim for pre-emption was dismissed by the court of first instance and the plaintiffs appealed. Pending the appeal, Babu Ranbaz Singh died and the time for his legal representatives to be brought on the record has expired without their being placed on the record. The contention of the respondent is that the whole appeal has abated and a declaration to that effect should be made. Reliance is placed on two cases to be presently mentioned.

I am of opinion that the cases of *Matbar Singh* v. *Abhai Nandan Prasad* (2), and *Ambika Prasad* v. *Jhinak Singh* (1), relied on by the respondent should be overruled

(1) (1922) I. L. R., 45 All., 286. (2) (1927) I. L. R., 49 All., 756.
(3) (1924) I. L. R., 47 All., 100.

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and that the answer to the reference should be that the death of one of the co-plaintiffs, Ranbaz Singh, pending the appeal and the fact that his legal representatives have not been brought on the record will not interfere with the right of the other plaintiffs, Mahadeo Singh and Mathura Singh, to prosecute their appeal. In the case of *Matbar Singh* v. *Abhai Nandan Prasad* (1), the short ground on which the successful plaintiffs' decree was treated as a nullity was that the joinder of the deceased plaintiff amounted to the joinder of a stranger. If the deceased plaintiff was not a stranger to start with, that is to say when the suit was instituted, if there was no finding which became final, as between the surviving parties, that the deceased was as a matter of fact a stranger, the facts that he died and his legal representatives were not brought on the record will not make him a stranger. A pre-emptor's right to pre-empt the whole of the property sold is independent of a similar right enjoyed by another person who stands in the same degree as regards the right of pre-emption as the other claimants. The fact, therefore, that two or more such claimants to a right of pre-emption join in one suit, instead of bringing separate suits of their own, can not convert the separate rights of the several plaintiffs into a joint right. Order I, rule 1, of the Code of Civil Procedure permits the plaintiffs in such cases to join in bringing one suit. If several suits had been brought and if one suit had been compromised or withdrawn by one of the plaintiffs, that fact could not have affected the other independent suits. On the same principle, the fact that one of the plaintiffs out of several has died and his legal representatives have not thought it fit to prosecute the case further, cannot affect adversely the right of the other plaintiffs.

The cases of *Matbar Singh* v. *Abhai Nandan Prasad* (1) and *Ambika Prasad* v. *Jhinak Singh* (2) were cases

(1) (1927) I. L. R., 49 All., 756. (2) (1922) I. L. R., 45 All., 286.

where the decree had become final and the dispute arose in the execution department. In each of these cases one of the successful plaintiffs had died and the decrees under execution were passed in ignorance of the fact that one of the plaintiffs was dead. It was held that the decrees were a nullity and could not be executed at the instance of the surviving decree-holders. The reasons given above will clearly establish that the surviving decree-holders were entitled to enforce the whole decree for pre-emption. In this view alone, the decisions in those cases ought to be treated as not good law. Additional reasons would easily be forthcoming to show that the whole decree could not be treated as a nullity. One of the reasons, and probably the simplest one, would be this. The effect of the death of one of the plaintiffs, whose representative was not brought on the record, would be, let us assume, the abatement of the suit or appeal if one were pending. If during the pendency of the suit or appeal, a question arose as to whether the whole suit or appeal abated or a portion of it or none of it, any decision arrived at by the court, if not appealed against, would be final as between the parties, and after the decree it would not be open to the other side to contend, especially in the execution department, that the decree passed was a wrong decree and, therefore, must be treated as a nullity. What difference in principle, then, does it make if a final decree was passed without the question of abatement being agitated by the party whose contention it is that the suit or appeal ought to have been declared as abated? If a party to a suit or appeal has a good point and does not raise it, he cannot raise it after a decree has been made and the decree has been allowed to become final. In the execution department, therefore, it is not open to an unsuccessful judgement-debtor, in a pre-emption decree passed in favour of the plaintiffs, to contend that the decree is a nullity.

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It is now necessary to refer to another case, namely, *Wajid Ali Khan* v. *Puran Singh* (1), in which a view similar to the view taken in the case of *Matbar Singh* v. *Abhai Nandan Prasad*, quoted above, was taken. The facts of the case briefly were these. Four plaintiffs brought a suit against a single vendee for pre-emption. The suit succeeded. The plaintiffs paid in the purchase money in the terms of the decree of the first court. The vendee, Wajid Ali, filed an appeal against the decree to this Court. One of the plaintiffs respondents, Amar Singh, died pending the appeal and his legal representatives were not brought on the record by the vendee. In ignorance of the fact that one of the plaintiffs was dead and his legal representatives had not been brought on the record, a decree was passed by this Court purporting to reverse the decree made by the court of first instance and dismissing the plaintiffs' suit *in toto*. Before the High Court decree was passed, delivery of possession had been ordered and effected in favour of the plaintiffs and against the vendee Wajid Ali. Wajid Ali, on his success in appeal, applied for restoration of possession and by an *ex parte* order he was put in possession. Thereupon the three surviving plaintiffs and the legal representative of the deceased plaintiff, Amar Singh, made an application to the court of first instance, asking that they should be restored to possession. Their case was that Amar Singh having died pending the appeal, the decree passed by the High Court was a nullity. The matter came up in appeal before this Court and the question arose whether the whole decree was bad. The matter came up, in the first instance, before Mr. Justice DALAL and myself. On a consideration of the provisions of the Code of Civil Procedure, order XXII, I was of opinion that the appeal should be deemed to have abated in the High Court, only to the extent of a quarter share belonging to Amar Singh

(1) (1924) I. L. R., 47 All., 100.

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and that the rest of the decree of the High Court must be taken to have become final on the principle of *res judicata* and could not be touched by the three surviving plaintiffs. My brother DALAL, J., differed from me. He was of opinion that the appeal of Wajid Ali abated as a whole. On account of this difference of opinion, the matter was referred to another Bench. Two learned Judges (DANIELS and NEAVE, JJ.) agreed with my brother DALAL, J. It appears from the perusal of my judgement and of the other learned Judges who heard the case at different times that it was never argued before us that the plaintiffs in a pre-emption suit do not claim jointly, but claim separately and each one for himself. From what I have said above I think that if this point had been argued before me I should not have had any hesitation in coming to the conclusion to which I have now arrived. In my opinion there can be no two opinions about the nature of the claim of the plaintiffs bringing a joint action for pre-emption. In such circumstances, where one of the plaintiffs dies and his legal representatives do not propose to prosecute the case or where in the case of his being a respondent in an appeal the vendee-appellant does not bring his legal representatives on the record, no question of the survival of the right to sue to the co-plaintiffs arises. The deceased simply drops out of the case. If he dies after he has obtained a decree, his legal representatives are entitled to enforce that decree to its fullest extent so far as such decree is compatible with the decree passed in appeal. On the facts of the case of *Wajid Ali Khan* v. *Puran Singh* (1), the appellate court having dismissed the suit of the three surviving plaintiffs, there was nothing to prevent the legal representatives of Amar Singh, who claimed a right independent of the other plaintiffs, from executing the whole decree

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against Wajid Ali. In my opinion the case of *Wajid Ali Khan* v. *Puran Singh* (1) must be treated as bad law.

In the result, my answer to the reference would be as stated in the opening portion of this judgement.

IQBAL AHMAD, J.—For the reasons that are given in my referring order in *Matbar Singh* v. *Abhai Nandan Prasad* (2), I agree that the answer to the question referred to the Full Bench must be in the negative. In my judgement the cases of *Matbar Singh* v. *Abhai Nandan Prasad* (2), *Ambika Prasad* v. *Jhinak Singh* (3), and *Wajid Ali Khan* v. *Puran Singh* (1) were wrongly decided and must be overruled.

BY THE COURT.—Let the appeal be returned with this order to the Bench concerned.

The appeal was accordingly heard by a Division Bench, consisting of LINDSAY and BANERJI, JJ. (IQBAL AHMAD, J., having by this time left the Court), and was dismissed upon the ground—following the decision in *Kamar-un-nissa Bibi* v. *Sughra Bibi* (4)—that, the estate in suit having in 1912 come into the hands of a single proprietor, the custom of pre-emption relied upon by the plaintiffs had come to an end.

*Appeal dismissed.*

(1) (1924) I. L. R., 47 All., 100. (2) (1927) I. L. R., 49 All., 756.
(3) (1922) I. L. R., 45 All., 286. (4) (1917) I. L. R., 39 All., 480.