1926
May, 7.

Before Mr. Justice Sulaiman and Mr. Justice Banerji.

QUDRAT-UN-NISSA BIBI (DEFENDANT) *v.* ABDUL RASHID AND ANOTHER (PLAINTIFFS) AND HUSAIN ALI (DEFENDANT).*

Act (Local) No. XI of 1922 *(Agra Pre-emption Act), sections* 19 *and* 20*—Pre-emption—Defendant vendee becoming a co-sharer during pendency of suit—Appeal—Withdrawal of pre-emption money after filing appeal no bar to its continuance.*

Alike under the Agra Pre-emption Act, 1922, and under the law which subsisted just before that Act was passed, a right of pre-emption must subsist up to the time when the decree is passed. Where, therefore, a defendant vendee, by reason of a gift made during the pendency of the suit, finds himself in a position to defeat the plaintiff's claim, there is no bar to his setting up the gift as a defence. *Bihari Lal* v. *Mohan Singh* (1), and *Baldeo Misir* v. *Ram Lagan Shukul* (2), referred to.

Held also, that a defendant vendee is not prevented from prosecuting an appeal by reason of the fact that he has taken out the pre-emptive price deposited in court by the pre-emptor in accordance with the terms of the decree in his favour. *Iftikhar Ali* v. *Thakur Singh* (3) and *Sundar Das* v. *Dhanpat Rai* (4), referred to.

THE facts of this case are fully stated in the judgement of the Court.

Mr. *Zafar Mehdi* and Maulvi *Haidar Mehdi*, for the appellant.

Maulvi *Mukhtar Ahmad*, for the respondents.

SULAIMAN and BANERJI, JJ. :—This is a defendant's appeal arising out of a suit for pre-emption. On the 23rd of November, 1923, the sale sought to be pre-empted took place. The case is accordingly governed by the new Pre-emption Act of 1922, which

* First Appeal No. 154 of 1925, from an order of Gauri Prasad, Judge of the Court of Small Causes, exercising the powers of a Subordinate Judge of Allahabad, dated the 23rd of July, 1925.

(1) (1920) I.L.R., 42 All., 268. (2) (1923) I.L.R., 45 All., 709.
(3) (1912) 15 Indian Cases, 347. (4) (1907) P. R., 16.

came into force on the 17th of February, 1923. The suit for pre-emption was filed on the 22nd of November, 1924. While that suit was pending in the first court, the defendant obtained a deed of gift on the 8th of April, 1925, of another share in the property in the same mahal, and pleaded that the plaintiff had actually lost his right of preference over her. The court of first instance held that under section 19 of the Agra Pre-emption Act the plaintiff had lost his right, and accordingly dismissed the suit. On appeal, the appellate court has taken a contrary view. It has come to the conclusion that the interpretation of sections 19 and 20 of the Agra Pre-emption Act is that the defendant cannot resist the plaintiff's claim unless she had acquired an indefeasible right in the mahal prior to the suit. On the question of fact the appellate court has recorded a clear and categorical finding that the transaction of the 8th of April, 1925, was in reality a gift in its nature and not a sale. This finding must be accepted.

The question that we have to consider is whether by virtue of having obtained a share in the village by gift during the pendency of suit and before the decree, the defendant vendee can defeat the plaintiff.

Undoubtedly, before the Pre-emption Act was passed, the law as interpreted by the Special Pre-emption Bench was that the plaintiff must have a subsisting right of pre-emption not only on the date of the sale and the date of the suit, but also at the time of the decree. The result used to be that if, prior to the passing of the decree, the defendant acquired an interest by way of gift, which put him on an equal footing with the plaintiff, the suit could not be decreed. We may refer to the case of *Bihari Lal* v. *Mohan Singh* (1). As the whole object of the

(1) (1920) I.L.R., 42 All., 268.

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constitution of the Special Bench had been to ensure a uniformity of decisions, the principle that the last crucial date was the date of the first court's decree was followed in the case of *Baldeo Misir* v. *Ram Lagan Shukul* (1), though one of us there pointed out that "a possible view to take might have been that nothing which happens after the institution of a suit can alter the position of the parties."

That, however, was not a case of an acquisition of another interest by the vendee but of a loss of right by the plaintiff after the decree. The question before us is whether the law as laid down in *Bihari Lal's* case has been altered by the new Act.

No doubt sections 19 and 20 are not as clear as they might have been, but we have no doubt that the law as interpreted just before the Act was never intended to be altered. It is contended that section 20 permits a defence only when, prior to the institution of the suit, a purchaser has transferred property or has acquired an indefeasible interest in the mahal. The language of section 20, when examined according to its grammatical construction, does not bear this out. The expression " prior to the institution of such suit " follows after the word " has " in the first portion, and therefore cannot be deemed to be understood after the word " or " and *before* the words " has acquired " in the second portion. Had the latter portion been " or acquired " instead of " or has acquired ", a different conclusion might have followed. We must look at the language of the section itself and ignore the marginal note. On that language, there is no justification for confining the second portion to a contingency prior to the suit. It is argued on behalf of the respondent that by implication section 20 means

(1) (1923) I.L.R., 45 All., 709.

that in every case of an acquisition by the defendant of an interest other than an acquisition prior to the suit, the defence will not succeed. To accept this contention would be to introduce new words into the section which are not to be found there.

Even if section 20 does not govern the case, then that section would certainly be silent as to the acquisition after the suit. On the other hand, section 19 undoubtedly deals with the stage when the decree is about to be passed. If by that time the plaintiff has no longer a subsisting right of pre-emption, he cannot get a decree. The words " right of pre-emption " are used in a technical sense in this Act and have been defined in section 4, sub-clause 9. In that sub-clause, a right of pre-emption means a right of a person on a transfer of immovable property to be substituted in place of the transferee by reason of such right. If, leaving out the unnecessary words, we were to substitute the equivalent of the expression " right of pre-emption " in section 19, that section would read somewhat as follows :—

" No decree of pre-emption shall be passed in favour of any person, unless he has a subsisting right to be substituted in place of the transferee at the time of the decree, etc., etc.,"

Once this section is read in this light, it leaves no doubt that the plaintiff's right to be substituted in place of the transferee must subsist at the time when the decree is to be passed. Now the right of substitution may be lost in several ways. It may either be lost owing to the loss of plaintiff's interest in the mahal or owing to the change in the status of the defendant. But in either case no decree can be passed in favour of the plaintiff, unless he has a subsisting right to be substituted in place of the vendee at the time when the decree is to be passed.

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It is argued that section 19 was intended to deal with those cases only where the plaintiff has lost his interest independently of the vendee, whereas section 20 deals with cases where the defendant has done something, independently of any loss of right by the plaintiff. It might have been very logical to classify cases in that way, but on the language of the two sections there is no justification for holding that they can be separated in that way. If we were to accept the contention of the respondents, then, unless we introduced some more words in section 20, the result would be that neither section 19 nor section 20 would cover a case where a defendant has acquired an interest during the pendency of the suit. We do not think that this contingency was overlooked or left unprovided for by the legislature. In our opinion the true interpretation of section 19 is that the plaintiff must possess a subsisting right at the time when the decree is passed by the first court. His loss of that right subsequent to that decree would, however, in no way be prejudicial to him.

We might, however, point out that in actual practice the rule which allows vendees to rely on gifts obtained *pendente lite* often causes considerable inconvenience. A gift may be pleaded at the last moment; the court may have to take further evidence in proof of it, the plaintiff may challenge it as being fictitious or may allege it to be a sale, and a second suit to pre-empt it may also be pending. All such things involve delay and embarrassment, and place a pre-emptor in a position of great uncertainty. These, however, are matters for the consideration of the legislature. Our duty merely is to give effect to the language of the sections as they stand.

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The respondents have raised a further point before us that, inasmuch as the defendant vendee has taken out of the court the amount of pre-emption money, deposited by the plaintiffs to her credit, after filing of the appeal, she is disqualified from proceeding with the appeal. The learned vakil for the respondents has not been able to place before us any authority in support of this view. The plaintiff has taken out execution of the decree and has either obtained or is seeking to obtain possession of the property. In the meantime, the defendant, in order that the money may not lie without interest, has taken it out. There is authority for the view that such a conduct on her part does not amount to estoppel. We may only refer to the cases of *Iftikhar Ali* v. *Thakur Singh* (1), and *Sundar Das* v. *Dhanpat Rai* (2), of the Punjab High Court, where such a view has been followed. We therefore, think that there was no estoppel against the appellant.

It must, however, be admitted that on the date when the suit was instituted, the plaintiff was perfectly justified in bringing the suit. He has been deprived of his right on account of an interest acquired by the defendant subsequent to the institution of the suit. We, therefore, think that the plaintiff must be given full costs of the first court. The result, therefore, is that this appeal is allowed, the decree of the lower appellate court is set aside and that of the court of first instance restored with this direction that the plaintiff will recover his costs from the defendants in the first court but will pay the costs of the defendants in this Court and the lower appellate court.

Appeal allowed.

(1) (1912) 15 Indian Cases, 347. (2) (1907) P. R., 16.