

APPELLATE CIVIL.

Before Justice Sir Cecil Walsh and Mr. Justice Banerji.

MATBAR SINGH AND OTHERS (DECREE-HOLDERS) *v.*
ABHAI NANDAN PRASAD (JUDGEMENT-DEBTOR).*

1927
March, 22.

Civil Procedure Code, order XXII, rules 2 and 3—Pre-emption—Suit by several plaintiffs—Suit dismissed—Appeal—Death of a plaintiff pending appeal—Remand—Suit continued and decree passed ignoring the fact of the death of one plaintiff—Joinder of a “stranger” in the suit.

Nine plaintiffs brought a suit for pre-emption. The suit was dismissed by the trial court. The plaintiffs appealed, and pending the appeal one of them died. No steps, however, were taken to bring upon the record any representative of the deceased plaintiff appellant. The appeal proceeded and resulted in an order remanding the suit to the court of first instance for re-trial. Again, the attention of the court was not drawn to the fact that one of the plaintiffs was dead and a decree was passed in favour of the whole nine of them. The eight original plaintiffs with the legal representatives of the deceased plaintiff then applied for execution, and were met with the objection that the decree, having been passed in favour of one plaintiff who was dead at the time of its passing, was a nullity, and this objection was sustained.

Held, on appeal by the plaintiffs that, when the decree was passed in favour of the plaintiffs, it was a decree passed in favour of the eight pre-emptors and a person who must be deemed, by reason of the abatement of his appeal against the original dismissal of his suit, to have been a person without right, i.e., a stranger. The suit, therefore, ought in the circumstances to have been dismissed.

THE facts of the case are fully stated in the following order referring the appeal to a Bench of two Judges :—

IQBAL AHMAD, J. :—This is a decree-holders' appeal in an execution case and is directed against

* First Appeal No. 414 of 1926, from a decree of Kauleshwar Nath Rai, Subordinate Judge of Gorakhpur, dated the 12th of July, 1926.

an order passed by the court below refusing to execute the decree on the ground that that decree was null and void and incapable of execution.

1927

MATBAR
SINGH
v.
ABHAI
NANDAN
PRASAD.

There is no controversy about the facts. A suit for pre-emption was brought by nine persons. One of the nine plaintiffs was a man named Girdhari Singh. The suit was dismissed by the trial court and an appeal against the decree of the trial court was filed in the High Court. During the pendency of the appeal Girdhari Singh died and his legal representatives were not brought upon the record. The appeal was heard and decided by the High Court in ignorance of the fact that Girdhari Singh was dead. The appeal was allowed by the High Court and the case was remanded to the court of first instance for trial on the merits. The fact that Girdhari Singh was dead was also not brought to the notice of the trial court, and that court eventually passed a decree in favour of all the nine plaintiffs. The surviving eight plaintiffs and the legal representatives of Girdhari Singh, having deposited the consideration money within the time fixed by the decree to the credit of the vendee, applied for execution of the decree by delivery of possession of the property. The vendee judgement-debtor objected to the execution of the decree on the ground that the decree having been passed jointly in favour of nine persons, one of whom had died before the passing of the decree, was null and void and incapable of execution. The court below relying on the case of *Ambika Prasad v. Jhinak Singh* (1) has allowed the objection and rejected the application for execution.

The decision of the appeal must turn on a consideration of the provision of order XXII, rules 2 and 3, of the Code of Civil Procedure. If the matter were

(1) (1922) I.L.R., 45 All., 286.

1927

MATBAR
SINGH
v.
ABHAI
NANDAN
PRASAD.

not covered by authority, I would have no hesitation in holding that, after the death of Girdhari Singh, the right to sue survived to the surviving plaintiffs appellants, and their omission to bring upon the record the legal representatives of Girdhari Singh did not render the decree in the pre-emption suit a nullity.

The plaintiffs in a pre-emption suit claim under their individual titles. in other words, the right to pre-empt is not a right which is jointly shared by one plaintiff with the other plaintiffs in a pre-emption suit. Every one of the plaintiffs in a pre-emption suit, if otherwise entitled to pre-empt, has a right to pre-empt the whole property, and this right is only controlled by a similar right of other pre-emptors of equal degree, and consequently in the case of various suits for pre-emption, brought by persons having an equal right of pre-emption, the property pre-empted is awarded to all the pre-emptors in equal shares. In the case of several persons, having an equal right of pre-emption, joining as plaintiffs in one suit, every one of the plaintiffs in his individual right is entitled to a decree in respect of the entire property and the mere fact of some of the plaintiffs withdrawing from the suit does not and cannot affect the right of the remaining plaintiffs to a decree for the entire property. For the same reason, the death of one or some of the several plaintiffs in a pre-emption suit, though their legal representatives are not brought upon the record, cannot affect the rights of the surviving plaintiffs to claim a decree with respect to the entire property which is the subject-matter of the suit. If the legal representatives of the deceased plaintiffs are brought upon the record, they by virtue of the individual right to pre-empt the entire property vested in the deceased plaintiffs

will be entitled to a decree jointly with the surviving plaintiffs. But if the legal representatives of the deceased plaintiffs are not brought upon the record, there can be no justification for depriving the surviving plaintiff or plaintiffs of his or their right to pre-empt the entire property by dismissing the pre-emption suit. The only effect of the omission to array as plaintiffs the legal representatives of the deceased plaintiffs is that they are wiped out of the case, and thereafter the right of the surviving plaintiff or plaintiffs to pre-empt the entire property remains intact. It may be that after the death of one or some of several plaintiffs in a pre-emption suit, the right to sue in place of the deceased plaintiff or plaintiffs survives to his or their legal representatives, and the omission to make those legal representatives parties to the suit results in the abatement of the suit so far as the deceased plaintiff or plaintiffs are concerned, but such abatement does not cut away or prejudicially affect the rights of the surviving plaintiffs to pre-empt the entire property. The omission to make the legal representatives of the deceased plaintiffs parties to the suit within the time allowed by law destroys the right of those legal representatives to enforce the right of the deceased plaintiffs to pre-empt the property, but that right being a right which the deceased plaintiffs did not jointly share with the surviving plaintiffs, the rights of the latter remain intact. The same reasoning applies with equal force to the case of an appeal by several plaintiffs in a pre-emption suit. The death of some of the plaintiffs appellants does not disentitle the remaining plaintiffs appellants to a decree in respect of the entire property pre-empted. For these reasons I am of opinion that the omission to bring upon the record the heirs of Girdhari Singh did not render

1927

 MATBAR
 SINGH
 v.
 ABHAI
 NANDAN
 PRASAD.

1927

MATBAR
SINGH
v.
ABHAI
NANDAN
PRASAD.

the decree passed in the pre-emption suit a nullity. True it is that Girdhari Singh appears in the decree as one of the decree-holders, but he having died before the date of the decree, the decree must be regarded as being in favour of the surviving plaintiffs. In my judgement the principle deducible from the case of *Sarju Prasad v. Ram Sarup* (1), applies to the present case.

But the view that I have expressed above is not in consonance with the view taken in the case of *Ambika Prasad v. Jhinak Singh* (2) on which reliance has been placed by the court below for holding that the decree in the pre-emption suit, by reason of the failure of the surviving plaintiffs to make the legal representatives of Girdhari Singh parties, is rendered a nullity. The case of *Ambika Prasad* was adversely commented upon by Mr. Justice MUKERJI and Mr. Justice DALAL in the case of *Wajid Ali Khan v. Puran Singh* (3). Mr. Justice DALAL observed that "I shall not rely upon it because the reasoning does not appear to be sound that one of several pre-emptors in equal degree cannot appeal with respect to the entire property. I should have thought that, taking the facts of the present case for an example, if the plaintiffs had failed in the first court, any one of them could have appealed alone to pre-empt the entire property."

In view of such a conflict of judicial opinion in this Court, it is desirable that this case be heard by a Bench of two Judges.

It is needless to point out that those cases in which it has been held that the omission to make the legal representatives of one of several vendees parties to the suit or appeal has the effect of causing the abatement of the entire suit or appeal, have no

(1) (1921) 19 A.L.J., 266.

(2) (1922) I.L.R., 45 All., 286.

(3) (1924) I.L.R., 47 All., 100.

1927

MATBAR
SINGH
v.
ABHAI
NANDAN
PRASAD.

application to the present case, inasmuch as the principle underlying those decisions is that a suit for pre-emption being one which can succeed either with respect to the entire property pre-empted or not at all, the necessary consequence of the omission to bring upon the record the legal representatives of the deceased vendee is to make it impossible to pass a decree with respect to the share of the deceased vendee, and as such the entire suit or appeal abates.

For the reasons given above, I refer this case to a Bench of two Judges.

Mr. *P. N. Sapru*, for the appellants.

Babu *Piari Lal Banerji* and Mr. *Shankar Saran*, for the respondent.

WALSH and BANERJI, JJ.:—This is an appeal under the following circumstances:—

Nine persons instituted a suit to pre-empt a sale in favour of the respondent in this appeal, Rai Bahadur Abhai Nandan Prasad. The court of first instance dismissed the suit, and thereupon the nine plaintiffs filed an appeal to this Court. One of the appellants was Girdhari Singh. This Court allowed the appeal and set aside the decree of the court below and remanded the suit. The case was then finally decided by the Subordinate Judge. An application for execution having been filed by eight of the original plaintiffs and two persons who alleged themselves to be the heirs of Girdhari Singh, objections were raised by Abhai Nandan Prasad on the ground that the decree was a nullity inasmuch as Girdhari Singh had died during the pendency of the first appeal in this Court and his heirs not having been brought on the record, no steps could be taken by the persons who had applied for the execution of the decree for pre-emption. The court of first instance

1927

MATBAE
SINGH
v.
ABHAJ
N ANDAN
PRASAD.

came to the conclusion that the petitioners knew perfectly well that Girdhari Singh was dead, and, therefore, his heirs not having been brought on the record, the decree was a nullity. The eight original plaintiffs and the heirs of Girdhari Singh have filed an appeal to this Court contesting the judgement of the learned Judge below. This appeal having been laid before Mr. Justice IQBAL AHMAD for hearing, has been referred to a Bench. The contention of the learned counsel for the appellants is that upon the facts set forth above it did not matter whether Girdhari Singh's heirs had been brought on the record or not, because each of the other eight plaintiffs in his own right was entitled to pre-empt the sale, and he has further submitted that under the provisions of rules 2 and 3 of order XXI, the right to sue, which was vested in their co-plaintiff Girdhari Singh, survived to the other plaintiffs. We have, therefore, to consider whether that contention can be accepted or not. We have come to the conclusion that that contention cannot be accepted. It is no doubt true that the eight other appellants had a co-extensive right to institute the suit for pre-emption, but a long series of rulings of this Court has made it clear that if in a suit for pre-emption a stranger is introduced, that suit must fail. Now the position of the learned advocate for the respondent is that in consequence of the heirs of Girdhari Singh not being brought on the record, the judgement of the first court dismissing as between the nine plaintiffs and the respondent the claim of Girdhari, that decree was final and negatives the right of Girdhari Singh as a person entitled to pre-empt. Now it is conceded by Mr. *Piari Lal Banerji* that if Girdhari Singh had died before the decision of the case by the learned Subordinate Judge, there is no question that the

right to sue would have survived to the other plaintiffs and no question could arise as to any decree that was passed in that suit. But when the decree was passed in favour of the plaintiffs, it was a decree passed in favour of the pre-emptors and a person who had been held as between the parties to this litigation to be a stranger. The conclusion, therefore, is that under the particular circumstances of this case and in view of the fact that a court of competent jurisdiction has held Girdhari Singh not to be entitled to pre-empt the sale, he was a stranger within the meaning of the rulings of this Court, namely, that upon joining a stranger in a suit for pre-emption the suit must fail. We have, therefore, no option but to dismiss this appeal with costs.

Appeal dismissed.

Before Mr. Justice Lindsay and Mr. Justice Sulaiman.

HARKESH SINGH (PLAINTIFF) *v.* HARDEVI AND OTHERS
(DEFENDANTS).*

1927
March, 23.

Hindu law—Joint property—Partition by will executed by head of—Consent of members necessary—Limitation—Act No. IX of 1908 (Indian Limitation Act), schedule I, article 127—Article not applicable after partition—Adverse possession.

Even the head of a joint Hindu family has no right to make a partition by will of joint property among the various members of the family except with their consent. *Brijraj Singh v. Sheodan Singh* (1), followed.

Article 127 of the first schedule to the Indian Limitation Act, 1908, presupposes the existence of a joint family and the exclusion of a co-parcener from his joint family property. *Bisheshar Tewari v. Bisheshar Dayal* (2) and *Banoo Tewari v. Doona Tewary* (3), followed.

* First Appeal No. 193 of 1924, from a decree of Govind Sarup Mathur, Subordinate Judge of Saharanpur, dated the 22nd of January, 1924.
(1) (1913) I.L.R., 35 All., 337 (346). (2) (1912) 15 Oudh Cases, 111.
(3) (1896) I.L.R., 24 Calc., 309 (314).