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in which the plaintiffs were living, much less have they alleged or attempted to prove that they were individually or as members of their particular class entitled to take advantage of any such custom. Their whole suit, therefore, should have failed at the outset. This is a matter which went to the root of the plaintiffs' case, but it was not, so far as we are able to ascertain, ever taken by the defendants. We think, therefore, that the parties should bear their own costs throughout.

We agree, further, with Mr. Justice MUKERJI that the plaintiffs have not even suggested any reason why they could not adopt the simple expedient of *chicks*.

We allow the appeal and, setting aside the order of the lower appellate court, we restore the decree of the trial court. The parties will bear their own costs throughout.

Before Mr. Justice Sulaiman and Mr. Justice Pullan.

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GOVIND SINGH (PLAINTIFF) *v.* MANGLU AND OTHERS (DEFENDANTS).*

Act (Local) No. XI of 1922 *(Agra Pre-emption Act), sections* 19 *and* 20*—Indefeasible interest—Vendee obtaining before decree a gift from the father of a joint Hindu family —Interest not being indefeasible does not defeat pre-emption.*

A vendee who has, during the pendency of a suit for pre-emption, become a co-sharer by virtue of having acquired an interest in the mahal cannot defeat the claim for pre-emption unless the interest acquired by him is an indefeasible interest.

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*Second Appeal No. 1178 of 1927, from a decree of Ali Mohammad, Subordinate Judge of Meerut, dated the 14th of March, 1927, reversing a decree of Makhan Lal, Second Additional Munsif of Meerut, dated the 2nd of December, 1926.

A gift to a stranger of joint family property by a Hindu father is *prima facie* invalid, and can not be said to confer an indefeasible interest, in the absence of proof of validating circumstances or of consent by the sons.

Although the word "indefeasible" cannot be taken in its widest sense so as to exclude transactions which have a possibility of being challenged, for instance on grounds of undue influence, fraud, coercion etc., it undoubtedly means that on the obvious facts the transaction must confer a valid title on the transferee.

Ram Saran Das v. *Bhagwat Prasad* (1), and *Deo Narain Singh v. Ajudhia Prasad* (2), referred to.

Dr. *N. C. Vaish*, for the appellant.

Mr. *Ambika Prasad*, for the respondents.

SULAIMAN and PULLAN, JJ. :—This is a plaintiff's appeal arising out of a suit for pre-emption of property transferred under a sale deed dated the 3rd of August, 1925. The suit was instituted on the 1st of July, 1926. During the pendency of the suit the vendees obtained a share in the village from the vendor Sukhdeo under a deed which was ostensibly one of gift and was dated the 3rd of September, 1926. A second suit for pre-emption was instituted to pre-empt the gifted property on the allegation that the transaction was really one of sale. The connected appeal arises out of that suit.

The first court found that the ostensible gift was a colourable transaction, but at the same time it decreed the claim for pre-emption. The appellate court has found that the gift was a transaction of gift and was neither fictitious nor was it a transaction of sale. We are bound by the finding of fact of the lower appellate court. It has dismissed the suit on the ground that the vendee had become a co-sharer on the same footing as the plaintiff by virtue of this gift.

(1) (1928) I. L. R. 51 All., 411. (2) (1927) I. L. R., 49 All., 696.

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In appeal it is contended before us that the gift was made by Sukhdeo of a share in his ancestral property when he had sons alive and was therefore invalid. It is accordingly contended that the defendants have not acquired such title as to enable them to defeat the plaintiff's claim.

In a case where the purchaser has acquired an interest in the mahal prior to the institution of the pre-emption suit it is incumbent on him to establish that he has acquired an indefeasible interest (section 20). The Full Bench in the case of *Ram Saran Das* v. *Bhagwat Prasad* (1) has held that section 20 does not apply to a case where the gift is taken after the institution of the suit, but that the same result follows by virtue of the provision of section 19, and a purchaser who has become a co-sharer by virtue of a gift taken during the pendency of the suit can successfully resist the plaintiff's claim for pre-emption. In view of this pronouncement it seems to us that such purchaser also must show that he has acquired an indefeasible interest, otherwise an illogical result will follow, viz., that a purchaser who takes a gift before the suit would not be entitled to defeat the claim unless the interest taken is indefeasible, but a purchaser taking a gift during the suit need not show that he has acquired an indefeasible right.

We have therefore to see whether the interest acquired by the purchaser is an indefeasible interest or whether it is defeasible.

Under the Hindu law, with the exception of certain specified cases, a father cannot alienate family property except for legal necessity or in lieu of his antecedent debt. There can be no legal necessity for a gift in favour of a stranger, when no questions of the gift being made to a near relation, or at the time of mar-

(1) (1928) I. L. R. 51 All., 411.

riage, or for the purposes of conferring spiritual benefit, or for religious purposes, arise. Such a transfer is obviously without authority and can be upset as soon as it is challenged. The word "defeasible" has been explained in the case of *Deo Narain Singh* v. *Ajudhia Prasad* (1) as meaning liable to be defeated and not necessarily that it has already been defeated. A gift by a Hindu father of joint family property when he is not the sole owner of it is *prima facie* invalid and the defendants cannot take advantage of it without showing that it has become valid in consequence of the consent of all the other members of the family and that no such member is a minor. In the absence of such proof the gift must be deemed to have been invalid.

Although the word "indefeasible" cannot be taken in its widest sense so as to exclude transactions which have a possibility of being challenged, for instance on grounds of undue influence, coercion, fraud etc., it undoubtedly means that on the obvious facts the transaction must confer a valid title on the transferee. This is not the case here.

We would therefore hold that the defendants had not by virtue of this gift acquired an indefeasible interest so as to extinguish the plaintiff's subsisting right of pre-emption at the time of the first court's decree. The first court had found that the donor Sukhdeo had sons who were entitled to this property. This finding was not challenged by the defendants in their grounds of appeal before the District Judge. They are therefore not entitled to have the question of supposed consent of the sons determined by the lower appellate court.

The result therefore is that we allow this appeal and setting aside the decree of the lower appellate court, restore that of the court of first instance with costs.

(1) (1927) I. L. R., 49 All., 696.