APPELLATE CIVIL.

Before Mr. Justice Lindsay and Mr. Justice Sulaiman.

1927
January, 18.

KALYAN (DEFENDANT) *v.* DESRANI (PLAINTIFF).*

Act (Local) No. XI of 1922 (Agra Pre-emption Act)—Act No. IV of 1882 (Transfer of Property Act), section 54—Sale—Pre-emption—Transfer of a right which has to be established by litigation—Sale consideration being an unascertained sum to be spent as costs of a future suit.

A Hindu widow, in possession as such of her late husband's property, sold the same. On the death of the widow the nearest reversioner, not having enough money to sue for the recovery of the property, sold his interest in a portion of it, the consideration being that the vendee undertook to pay the costs of a joint suit to recover the property from the hands of the widow's transferee. A suit was brought, but was compromised: the widow's transferee retained a portion of the property, whilst the reversioner and his vendee got the rest. A suit was then filed to pre-empt the sale by the reversioner.

Held, that under the provisions of the Agra Pre-emption Act, 1922, no suit would lie to pre-empt such a sale. *Abdul Wahid Khan* v. *Shaluka Bibi* (1), referred to.

THESE were two appeals arising out of two suits for pre-emption, the plaintiff in each case being Musammat Desrani, and the defendants being Kalyan and Paras Ram.

The second defendant to these suits, Paras Ram, had two cousins named respectively Parmanand and Pahlwan. When Parmanand and Pahlwan died, they were succeeded by their respective widows, and these widows during their lifetime alienated the property of their husbands by sale in favour of certain third parties.

* Second Appeal No. 1197 of 1925, from a decree of E. L. Norton, District Judge of Jhansi, dated the 7th of April, 1925, confirming a decree of Shri Nath, Officiating Munsif of Orai, dated the 1st of December, 1924.

(1) (1893) I.L.R., 21 Calc., 496.

When Parmanand and Pahlwan died, Paras Ram was the nearest reversioner. He was anxious to recover possession of the properties which had been alienated, as above stated, by the widows, but he had not the funds necessary to institute the suits which had to be brought in order to enable him to recover possession. In these circumstances, on the 13th of September, 1923, he executed two sale-deeds in favour of the defendant, Kalyan. By one of these deeds he purported to transfer by sale a portion of the zamindari share which had belonged to his cousin Pahlwan. By the other document, in a similar way, he purported to transfer a portion of the zamindari property which had belonged to Parmanand.

The documents were of a similar description. Referring to that which dealt with a portion of the share which had belonged to Pahlwan, in this sale-deed Paras Ram set out the facts and referred to the transfer which had been made by Pahlwan's widow, Musammat Rani Bahu. He recited that it was necessary for him to bring a suit to recover Pahlwan's property from the alienees of the widow and he declared that he had no funds for that purpose. He went on to say that Kalyan had agreed to find him the money for this litigation and in consideration of Kalyan's undertaking to supply him with funds he purported to transfer to Kalyan a portion of the property which had once belonged to Pahlwan. In this document Paras Ram stated that he had sold absolutely the property specified in the deed for the costs of the suit, which were estimated to amount to about Rs. 1,000. It was stated in the deed that Kalyan undertook to join Paras Ram in the suit which was to be brought to recover Pahlwan's property; and then the deed went on to say that "when a decree for

1927

KALYAN
v.
DESRANI.

possession has been passed Kalyan will get possession of the shares sold to him, through the court." A further provision of the deed in question was that Kalyan was to pay the consideration in the following manner, namely, he was to supply all costs which might be incurred up to the High Court in appeal. If these costs were to exceed the sum of Rs. 1,000, Kalyan was not to be in a position to recover any excess from the vendor Paras Ram. Then the document set out that in case a decree for possession was passed, Kalyan would take possession of the property sold to him and would get mutation made in his favour and would remain in possession as owner. The document wound up with the usual declaration to the effect that Paras Ram had executed this document as a deed of absolute sale.

Following on this deed a suit was filed on the 17th of September, 1923, in which Paras Ram and Kalyan were arrayed as plaintiffs. The defendants were the persons to whom Pahlwan's widow, Musammat Rani Bahu, had alienated the property of Pahlwan. On the 17th of April, 1924, the suit was compromised. Under the compromise the defendants retained a portion of the property in dispute and consented to a decree for the balance in favour of the two plaintiffs. The decree provided that out of the property allotted to the plaintiffs Kalyan was to get a 9/16ths share while Paras Ram was to get a 7/16ths share.

Following on this the present suit for pre-emption was filed on the 6th of September, 1924. The plaintiff, Musammat Desrani, having set out the facts, claimed that she was entitled to pre-emption of this property on payment of a sum of Rs. 200. In the plaint it was represented that the costs which

Kalyan had disbursed in connexion with the suit for possession could not have amounted to more than that sum.

The facts in the second suit, namely, the suit out of which Second Appeal No. 1198 arises, were similar, and the court below tried both cases together. The result in the court of first instance was that the plaintiff got a decree for pre-emption in each case. The Munsif was of opinion that Kalyan had spent Rs. 963 in conducting the litigation which was necessary for the recovery of the property from the alienees of the widows. He split this sum into two and gave the plaintiff a decree in each case for pre-emption on payment of Rs. 481-8-0. Both these decrees were affirmed in appeal by the District Judge of Jhansi and now in the second appeals the point raised was that the plaintiff had no right of pre-emption in either case, inasmuch as the sales which were effected by the documents of the 13th of September, 1923, were merely transfers of a right which had to be established by litigation.

On these appeals—

Maulvi *Mukhtar Ahmad*, for the appellant.

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

The judgement of LINDSAY, J., after setting forth the facts as above, thus continued :—

We have heard a great deal of argument in the case and a number of cases have been cited before us, all of them cases from Oudh. One decision of the Privy Council has also been cited before us, namely, the case of *Abdul Wahid Khan* v. *Saluka Bibi* (1).

After due consideration we have both come to the conclusion that the plaintiff was not entitled to pre-emption in these cases. We have not come to this

(1) (1893) I.L.R., 21 Calc., 496.

1927

KALYAN
v.
DESRANI.

Lindsay, J.

conclusion on precisely identical grounds and, therefore, separate judgements are being delivered.

These cases are governed by the Agra Pre-emption Act, and according to that Act, a right of pre-emption means the right of a person on a transfer of immovable property to be substituted in the place of the transferee by reason of that right.

The only transfers which give occasion for the exercise of the right of pre-emption are transfers by sale and foreclosure. Sale, for purposes of the Pre-emption Act, means a sale as defined in the Transfer of Property Act, 1882.

In these cases the plaintiff claims her right to pre-empt by reason of the execution and registration of the two documents of the 13th of September, 1923, and in order to ascertain whether these are sales which are pre-emptible under the Act we have to look at what was the substance of these transactions.

At the time these deeds were executed the property was in the possession of third parties to whom it had been conveyed by a Hindu widow. The transferee, that is to say Kalyan, was to provide the funds required for the prosecution of the suit necessary to recover the property. As we have pointed out, he joined as a plaintiff in the suit and was to get possession, through the court, of the property mentioned in the deed if and when a decree for possession was made in favour of himself and his transferor Paras Ram. But this decree for possession might never have been passed, in which case the transferee, that is, Kalyan, would have lost his money and got nothing for it. To quote the words of the Privy Council in *Saluka Bibi's* case (1)—

(1) (1893) I.L.R., 21 Calc., 496.

"If the defendant succeeded and the suit was dismissed there would have been no property to be sold."

Lindsay, J.

To me, therefore, the correct view seems to be that the transfers made by the deeds of the 13th of September, 1923, were merely transfers of a share of the chance of success in a suit which was subsequently to be brought. The purchaser, that is, Kalyan, knew that the title of his vendor was uncertain, dependent upon the result of a suit which itself was uncertain. He new that Paras Ram was not in a position to pass a proprietary interest in the property unless and until he had successfully vindicated his title as reversioner after the widows by avoiding the sale which had been made by them. The proprietary interest in these properties was at that time in the alienees from the widows. It is true that the sales by the widows were voidable and that these alienees had not an indefeasible title, but all the same, unless and until their title was set aside in favour of a superior title in Paras Ram, the ownership of these properties was vested in the alienees.

Kalyan knew all these facts and he took the risk of the suit not being decreed, and consequently the sum which he undertook to pay was not the price of immovable property sold to him but the price he was prepared to give for the chance of the success of Paras Ram and himself in the subsequent suit.

In a sale under section 54 of the Transfer of Property Act the proprietary interest is transferred on execution and registration of the sale-deed where the property is of the value of Rs. 100 and upwards. Here the proprietary interest in these lands could not have passed on execution and registration of the deeds of the 13th of September, 1923, and in fact no

1927

KALYAN v. DESRANI.

proprietary interest in these properties passed to Kalyan until the court gave a decree in favour of himself and Paras Ram on the 17th of April, 1924.

For these reasons I am of opinion that under the deeds of the 13th of September, 1923, there was no transfer of proprietary interest and, therefore, no case for the exercise of a right of pre-emption under the Agra Pre-emption Act. I hold, therefore, that these appeals ought to be allowed and that the decrees of the courts below should be set aside and it should be ordered that both suits brought by Musammat Desrani be dismissed with costs in all courts.

SULAIMAN, J.:—I concur in the order proposed. It cannot be said that in all cases where the vendor is not in possession of the property which he purports to sell, the sale is not capable of pre-emption. If a registered document is executed and the transfer is for a *price* paid or promised, or part paid and part promised, and comes within the meaning of section 54 of the Transfer of Property Act, a sale is duly effected and the proprietary interest in the property passes, no matter whether the vendor is or is not in actual possession. A transfer of the property which has become vested in a reversioner on the death of a Hindu widow passes the proprietary title in it even though a suit may have to be instituted to recover actual possession. The vesting of such title is not postponed till the passing of a decree on which delivery of possession would be dependent. On the other hand, there may be cases where the cash price paid or promised is not the sole consideration for the transfer, but in addition thereto there is an undertaking by the vendee to fight out a litigation and to incur all its costs as well as to run the risk of losing his money. In such cases that part of the consideration which is

1927

KALYAN
v.
DESRANI.

Sulaiman, J.

other than the cash price is not capable of exact valuation. It is, therefore, difficult to see how a pre-emptor can be given a decree for pre-emption of the property sold in such a way. In the present case the sale was effected in lieu of the costs of the litigation. If, taking the surrounding circumstances into consideration, one were to infer that part of the consideration was an undertaking by the vendee that he would fight out the case against third parties, then it is obvious that it was not a sale strictly for a cash price. Even though there was no such undertaking the transfer was in lieu of the costs of litigation, which were unknown and unascertainable in advance, and there was a risk involved. Under such circumstances it would be too much to suppose that the amount of the costs contemplated by the parties would be anything like the market value of the property if freed from all risk. It would be grossly unjust to give the plaintiff a decree for pre-emption after the suit has successfully terminated and the property has been recovered and all risks have disappeared. In my opinion a sale which is not in lieu exclusively of a cash price, or such price as can be definitely ascertained, is not capable of pre-emption.

BY THE COURT.—Second Appeals Nos. 1197 and 1198 of 1925 are allowed, the decrees of the courts below are discharged and it is ordered that the plaintiff's claim in each suit be dismissed with costs in all courts.

Appeal allowed.