

Before Mr. Justice Sulaiman and Mr. Justice Sen.

1929
April, 12.

GURDIAL SINGH (PLAINTIFF) v. ARJUN SINGH AND
OTHERS (DEFENDANTS).*

Act (Local) No. XI of 1922 (Agra Pre-emption Act), section 19—*Ex parte* decree for pre-emption—Set aside under order IX, rule 13—Acquisition thereafter by defendant of a share in the village—Plaintiff's right not defeated thereby.

An *ex parte* decree, even though it has subsequently been set aside by the court under order IX, rule 13, of the Civil Procedure Code, is within the scope of the clause "where a decree for pre-emption has been passed" in section 19 of the Agra Pre-emption Act. Where, after the *ex parte* decree had been set aside the defendant vendee obtained by gift a share in the village, the plaintiff's right to a decree for pre-emption could not be defeated thereby, inasmuch as a decree, though *ex parte*, for pre-emption had actually been passed before the defendant's acquisition of the status of a co-sharer.

Mr. Shiva Prasad Sinha, for the appellant.

Mr. Saila Nath Mukerji, for the respondents.

SULAIMAN and SEN, JJ. :—This is a plaintiff's appeal arising out of a suit for pre-emption. The sale deed was executed on the 8th of January, 1923, and a suit for pre-emption was instituted on the 7th of July, 1924. At first an *ex parte* decree was passed against the defendants vendees on the 31st of July, 1924. Subsequently an application for setting aside the *ex parte* decree under order IX, rule 13, of the Civil Procedure Code was presented because there was no personal service on the defendants. The court was satisfied that good cause had been shown and the *ex parte* decree was set aside and the suit was restored on the 10th of January, 1925. After that, on the 28th of April, 1925, the defendants obtained

* Second Appeal No. 956 of 1927, from a decree of P. K. Ray, District Judge of Mainpuri, dated the 19th of February, 1927, reversing a decree of Kanhaiya Lal Nagar, Additional Subordinate Judge of Mainpuri, dated the 14th of December, 1925.

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a gift of a small share in the same village, which placed them on the same footing as the plaintiff. The court of first instance decreed the suit on the 14th of December, 1925, but the appellate court has dismissed it. The lower appellate court has held that by virtue of this gift the defendants were entitled to defeat the plaintiff's suit altogether.

It has now been held by a Full Bench of this Court in the case of *Ram Saran Das v. Bhagwat Prasad* (1) that a gift taken by a vendee, during the pendency of the suit, which has the effect of depriving the pre-emptor of his right to be substituted in place of the vendee at the time when the decree is to be passed is a good defence to the suit under section 19 of the Act. That section, however, has a further provision that where a decree for pre-emption *has been passed* in favour of a plaintiff, whether by a court of first instance or of appeal, the right of such plaintiff shall not be affected by any transfer or loss of his interest occurring after the date of such decree.

The question before us is whether this provision would govern a case where an *ex parte* decree has been obtained by the plaintiff once, but that decree has been set aside by the same court. It is noteworthy that the tense used in this portion of the section is the present perfect tense, and we think that it would certainly cover the case of an *ex parte* decree once passed even though it has been set aside subsequently.

When an *ex parte* decree is passed the defendant has two courses open to him. He may either apply to the court under order IX, rule 13, of the Civil Procedure Code and if he shows good cause as required by that rule he may have the decree set aside. Or he may appeal from the *ex parte* decree and may on the same ground ask the appellate court to set it aside.

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

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In one case the suit will be restored to its original number and in the other it would be remanded by the appellate court. In either case the *ex parte* decree would have been the same. It seems to us that in the case where the suit has been remanded on a reversal of the *ex parte* decree there can be no doubt that nothing which happens subsequent to the *ex parte* decree would prejudicially affect the right of the plaintiff. The same principle will apply to a case where a decree has been set aside by the first court itself. There is nothing in the language of this section which would indicate that the decree passed by the court of first instance must be a subsisting decree up to the time when the loss of the plaintiff's right occurs. We think that if once such a decree has been passed, nothing which happens after that date can affect the rights of the parties. The mere fact that for some reason or another the previous decree has been set aside and the suit restored would not take the case out of the scope of section 19 of the Agra Pre-emption Act.

We are therefore clearly of opinion that in the present case the vendees are not entitled to take advantage of the gift taken by them subsequent to the 31st of July, 1924, on which date the plaintiff succeeded in obtaining "a decree for pre-emption".

We accordingly allow this appeal and setting aside the decree of the lower appellate court decree the plaintiff's suit for pre-emption on payment of Rs. 4,500 within two months from this date.