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March, 15.

Before Mr. Justice Sulaiman and Mr. Justice Sen.

LAL CHAND (DEFENDANT) v. RAM CHANDAR AND  
OTHERS (PLAINTIFFS).\*

*Act (Local) No. XI of 1922 (Agra Pre-emption Act), sections 4(10), 6 and 11—"Sale"—Sale effected by court under order XXI, rule 34, C.P.C.—Pre-emptible—Failure by defendants to claim right of pre-emption in suit for specific performance of contract of sale—Constructive Res judicata.*

A sale effected by means of a sale deed executed by a court under order XXI, rule 34, Civil Procedure Code, in pursuance of a decree for specific performance of a contract to sell, is a sale within the meaning of section 11 of the Agra Pre-emption Act, so that a suit for pre-emption can lie in respect of it. Such a sale is not one "in execution of a decree" and does not come within the exception to section 6.

Where a suit was brought to pre-empt such a sale, by persons who had been arrayed as defendants in the suit for specific performance which culminated in that sale, the fact that they did not in that suit assert a right of pre-emption was held not to operate by way of constructive *res judicata* to bar their suit for pre-emption, inasmuch as a right of pre-emption can accrue only after the sale has taken place.

Mr. P. L. Banerji, for the appellant.

Messrs. U. S. Bajpai and N. P. Asthana, for the respondents.

SULAIMAN and SEN, JJ. :—This is an appeal by Lal Chand arising out of a suit for pre-emption under very peculiar circumstances. On the 18th of August, 1922, a sale deed was executed by Himmat in favour of Raushan Lal for Rs. 1,400. Suit No. 159 of 1923 was instituted for pre-emption of the property sold, by Ram Chandar and Tej Ram. This suit was dismissed and an appeal by the pre-emptors was preferred to the court of the District Judge. While this matter was pending there was another suit (suit No. 188 of 1923) instituted by Lal Chand for specific performance of a previous

\* Second Appeal No. 672 of 1927, from a decree of Fariduddin Ahmad Khan, Subordinate Judge of Mainpuri, dated the 24th of January, 1927, confirming a decree of Sirajuddin Ahmad, Munsif of Shikhabad, dated the 27th of March, 1926.

contract alleged to have been entered into by Himmat in his favour. Lal Chand impleaded the vendor Himmat, the vendee Raushan Lal, as well as the two pre-emptors Ram Chandar and Tej Ram. This suit for specific performance was decreed. An appeal was preferred by Raushan Lal in the suit, but this was dismissed by the District Judge and so also was an appeal preferred by Ram Chandar and Tej Ram in the pre-emption suit. The position thus was that the suit for pre-emption by Ram Chandar and Tej Ram stood dismissed and the suit for specific performance by Lal Chand stood decreed.

The vendee Raushan Lal declined to obey the decree for specific performance and the court ordered that a sale deed be executed in favour of Lal Chand. This actually took place on the 25th of November, 1925. On this, two new suits for pre-emption, one by Raushan Lal and the other by Ram Chandar and Tej Ram, were instituted against Lal Chand in which Himmat was also impleaded. Both these suits have been decreed by the courts below and Lal Chand has appealed.

The two points urged on behalf of Lal Chand are (1) that no suit for pre-emption lay in respect of the sale deed executed by the court on the 25th of November, 1925, and (2) that the plaintiffs are debarred from now claiming pre-emption when they did not set up this right in the specific performance suit.

The first question to consider is whether the transfer of proprietary interest for consideration which is effected by means of a sale deed executed in pursuance of a decree for specific performance is a sale within the meaning of section 11 of the Agra Pre-emption Act so that a right of pre-emption can accrue in respect of it. Under section 4(10) a sale means a sale as defined in the Transfer of Property Act. We think that the transfer of proprietary interest for a cash consideration, though it was under orders of the court for enforcement of a previous voluntary contract for sale, is a sale within the

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meaning of section 11. It would therefore follow that a right of pre-emption would accrue on such sales. This result is in conformity with the general policy of the Act that property cannot be privately transferred so as to defeat the rights of pre-emption. If a sale outright cannot be affected, the result ought to be the same if a private contract for sale is entered into and then a decree for specific performance allowed to be passed.

The next question to consider is whether the case comes within the exception contained in section 6. If it can be called a sale in execution of a decree of a civil court, then by virtue of that section no right of pre-emption can arise in respect of it. Having considered the language of the section we have come to the conclusion that the exception does not apply to this case. The expression "sale in execution of a decree" is not identical with the execution of a sale deed by the court in pursuance of a decree. There has really been no sale in execution, but the execution of a sale deed because the judgment-debtor Raushan Lal declined to execute it. We therefore think that there is no prohibition against the accrual of the right of pre-emption.

It is quite clear that the right of pre-emption accrues after a sale has taken place. There is no prospective right before such a contingency happens. It is therefore difficult to see how Ram Chandar and Tej Ram or Raushan Lal could be said to have been able to put forward their right of pre-emption in the suit for specific performance. Up to that time the position of Ram Chandar and Tej Ram was merely that of pre-emptors in respect of the earlier sale deed of the 18th of August, 1922. The position of Raushan Lal was undoubtedly that of a vendee. But the sale which is now sought to be pre-empted is of the date 25th of November, 1925, and the right of pre-emption which is now claimed has accrued in respect of it. We therefore fail to see how before the sale deed was executed by the court it could

be said that Ram Chandar and Tej Ram and Raushan Lal were bound to plead that they had a right of pre-emption, in anticipation of any sale deed that might be in future executed under the orders of the court. This being so, it is difficult to hold that the present suit is barred by the principle of *res judicata* on account of the omission on the part of Ram Chandar and Tej Ram and Raushan Lal to set up their right of pre-emption.

Only one appeal has been preferred under section 18 of the Act by Lal Chand and as a result of the consolidation of the suits in the courts below our judgement governs both these cases. The appeal is accordingly dismissed with costs.

REVISIONAL CIVIL.

Before Mr. Justice Kendall.

SECRETARY OF STATE FOR INDIA IN COUNCIL  
(PETITIONER) *v.* HAR CHARAN DAS (DECREE-HOLDER AND GULZARI LAL (JUDGEMENT-DEBTOR).\*

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*Act No. XIX of 1925 (Provident Funds Act), sections 2 and 3(1)—Provident Funds Rules, rule 10—Authority of rules—Provident Funds deposit—Attachment after retirement—Civil Procedure Code, section 60 (k)—Government of India Act 1919, section 96B, clause (4).*

Money lying to the credit of a retired Government servant in the General Provident Fund is not liable to attachment in execution of a decree against him.

Rule 10 of the General Provident Funds rules is merely a rule of procedure for the Accounts Officer and does not legalize an attachment or authorize the Accounts Officer to comply with a notice of attachment. The rule can have no statutory authority to override the provisions of the Provident Funds Act, 1925, or of section 60(k) of the Civil Procedure Code.

*Veerchand Nowla v. B. B. and C. I. Railway Company (1), Hindley v. Joynarain Marwari (2) and Secretary of State for India v. Raj Kumar Mukerjee (3), referred to. Devi Prasad v. Secretary of State for India in Council (4) and Jagannath v. Tara Prasanna (5), followed.*

\* Civil Revision No. 285 of 1926.

(1) (1904) I. L. R., 29 Bom., 259. (2) (1919) I. L. R., 46 Cal., 962.  
(3) (1922) I. L. R., 50 Cal., 347. (4) (1923) I. L. R., 45 All., 554.  
(5) (1923) I. L. R., 3 Pat., 74.