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March, 7.

*Before Mr. Justice Sulaiman and Mr. Justice Kendall.*

RAMESHAR PRASAD (PLAINTIFF) *v.* GHISIAWAN PRASAD AND OTHERS (DEFENDANTS).*

*Act (Local) No. XI of 1922 (Agra Pre-emption Act), sections 5, 14 and 15—Ambiguous entry of right of pre-emption—"Refusal to purchase"—Estoppel by conduct.*

Section 5 of the Agra Pre-emption Act is mandatory and its object is not to find out the particulars or the incidents of the rule of pre-emption but to lay down the test as to whether a rule of pre-emption should be held applicable to the village or not. However vague the rule may be and in whatever imperfect form it may be recorded, if it amounts to a declaration recognizing the right of pre-emption, it would fulfil the conditions required by section 5. Once a right of pre-emption is deemed to exist, the rule of pre-emption embodied in section 12 will prevail.

Sections 14 and 15 of the Agra Pre-emption Act are not exhaustive and do not lay down the only rule of estoppel which can operate in pre-emption cases. A waiver of the right of pre-emption can also be inferred from a clear, unambiguous and absolute refusal to purchase. So, where the plaintiff, on being asked by the vendor to purchase the property on certain terms, refused, saying he had no money and could not raise it even by borrowing, but said nothing about reserving his future right of pre-emption, and a few days later the property was sold to a third person without giving any previous intimation of the sale and its terms to the plaintiff, it was *held* that the plaintiff was estopped from claiming to pre-empt the sale. *Subhagi* v. *Muhammad Ishak* (1), *Kanhai Lal* v. *Kalka Prasad* (2) and *Munawar Husain* v. *Khadim Ali* (3), not approved. *Naunihal Singh* v. *Ram Ratan* (4), *Nathi Lal* v. *Dhani Ram* (5) and *Shamsher Singh* v. *Piari Dat* (6), distinguished. *Ranjit Singh* v. *Bhagwati Singh* (7), approved.

*Dr. K. N. Katju* and *Mr. N. P. Asthana*, for the appellant.

* First Appeal No. 407 of 1926, from a decree of S. Maitra, Additional Subordinate Judge of Basti, dated the 30th of April, 1926.

(1) (1884) I. L. R., 6 All., 463. (2) (1905) I. L. R., 27 All., 670.
(3) (1908) 5 A. L. J., 321. (4) (1916) I. L. R., 39 All., 127.
(5) (1917) 15 A. L. J., 315. (6) (1918) I. L. R., 40 All., 690.
(7) (1926) I. L. R., 48 All., 491.

Mr. *Harnandan Prasad*, for the respondents.

SULAIMAN and KENDALL, JJ.:—This is a plaintiff's appeal arising out of a suit for pre-emption. The property in dispute was sold under a sale deed dated the 18th of March, 1924, for Rs. 30,000. The plaintiff claimed that under section 5 of the Agra Pre-emption Act which governs this transaction he had a right of pre-emption. The main defence to the suit was a denial of any right of pre-emption in that village, and also a plea that the plaintiff was estopped from pre-empting the property on account of a previous refusal. The learned Subordinate Judge has found both the points against the plaintiff and has dismissed the suit.

We are not prepared to accept the view of the court below that there is no right of pre-emption in this village. In the *wajib-ul-arz* 1292F. (1885), under the heading "custom of pre-emption" we have an entry which has been translated by the official translator as follows:—"At the time of transfer of the property of any co-sharer other co-sharers have a right of pre-emption according to the rule and custom." This translation omits one word which has been read by the learned Subordinate Judge as "*mazhab*", meaning religion. The entry would then read "according to the rights and usage of religion". The learned advocate for the appellant says that the word is "*dehi*" i.e., village, and says that the rights and usage of the village are referred to. We have not the original before us, but only a certified copy. If the word is "village" then the learned advocate for the respondents concedes that the case would come directly under section 5 of the Act. Assuming that the word is "religion," there is undoubtedly a record of a right of pre-emption accruing on a transfer, according to the rights and usage of religion.

Section 5 provides that if the village records a custom, contract or declaration recognizing, conferring

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or declaring a right of pre-emption expressly or by necessary implication, whatever its extent and in whatever form it may be expressed, or imposing on a co-sharer desiring to transfer his interest in land an obligation to offer it to other co-sharers, or forbidding co-sharers to transfer their interest in land to persons other than co-sharers, the right shall be deemed to exist; and under sub-clause (2) such a record is conclusive evidence of the existence of such right. The section is thus mandatory. The object of the section is not to find out the particulars or the incidents of the rule of pre-emption, but merely to lay down the test as to whether a rule of pre-emption should be held to be applicable to the village or not. Once a rule of pre-emption prevails, that rule must be the one embodied in section 12. It is therefore wholly immaterial for the purposes of the applicability of section 5 to inquire into the constitution of the village or the class of co-sharers which existed at the time when the *wajib-ul-arz* was prepared. If the *wajib-ul-arz* does record a declaration recognizing a right of pre-emption, howsoever limited in its scope, the entry is conclusive. Of course if the entry in a *wajib-ul-arz* expressly declares that no right of pre-emption exists or by necessary implication it negatives the existence of such a right it would be difficult to say that there is a right. On the other hand, however vague the rule may be and in whatever imperfect form it may be recorded, if it amounts to a declaration recognizing the right of pre-emption, it would fulfil the conditions required by section 5. In the present case if the right had been confined to the rights and usage of any particular religion according to which such right could not exist, e.g., the Hindu religion or the Christian religion, there would have been a contradiction in terms, and we might have been compelled to hold that the entry by necessary implication negatived the existence

of such a right. But the rule is not limited in that way. In these provinces the rule of pre-emption according to the Muhammadan law is quite common. The Muhammadan religion is at least one religion according to which a right of pre-emption can be exercised. The entry, therefore, is not absolutely a contradiction in terms, and although it is ambiguous it is capable of a meaning, viz., to lay down a rule of pre-emption according to the Muhammadan law. We therefore think that it is impossible to take this case out of the language in sub-clause (*a*) of section 5, and we must hold that this village does record a declaration recognizing a right of pre-emption. That being so, it is a conclusive proof of the existence of a right of pre-emption according to the rule laid down in section 12 of the Act. The defendant vendee is admittedly a stranger and the plaintiff would therefore have a right of pre-emption if there were no bar of estoppel.

We however agree with the court below that in this particular case the plaintiff is estopped from pre-empting this property. The refusal of the plaintiff is based principally on the statement of Mr. Stern, who was examined on commission. The answers to the interrogatories served on him are to be found on pp. 8 to 17 of the supplementary book. He has no longer any interest left in this property, and the learned Judge has believed his statement in spite of the plaintiff's denial. We therefore accept the statement of Mr. Stern as regards the circumstances preceding the sale. According to him there was a contract of sale of the village in various shares with different purchasers. Some of them made the purchases, but others got further indulgence from time to time. The plaintiff Rameshar Prasad was one of these and had purchased a one-anna share. Another prospective purchaser was Kishen Prasad

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Singh who wanted to take 3 annas 6 pies. Kishen Prasad Singh had been given time which had been extended by four days more. On the fourth day, i.e. the 4th of March, 1924, Kishen Prasad along with Rameshar Prasad (plaintiff) went to Mr. Stern and asked for further time, but Mr. Stern refused to give any more time. Then he asked Rameshar Prasad to purchase that $3\frac{1}{2}$ annas or any portion of it at the same price which was settled with Kishen Prasad, but Rameshar Prasad answered that with great difficulty he managed to borrow money for purchasing 1 anna share and that it was impossible for him to raise any further sum to purchase another share. It was after this refusal that Mr. Stern negotiated with Ghisiawan Pandey and Mahadeo Pandey, the vendees, and accepted their earnest money on the 6th of March, 1924. The sale actually took place on the 18th of March. We accept this statement as substantially embodying what actually happened.

The learned advocate for the plaintiff contends that there can be no absolute refusal so as to operate as an estoppel unless there first has been a definite contract settled, with a definite vendee, for a definite price, of the sale of a definite property and that no amount of refusal before such a complete contract can deprive the pre-emptor of his right of pre-emption. He strongly relies on a number of earlier cases of this Court which no doubt lay down the rule in those broad terms. We may refer to the cases of *Subhagi* v. *Muhammad Ishak* (1), *Kanhai Lal* v. *Kalka Prasad* (2), *Munawar Husain* v. *Khadim Ali* (3), and other cases referred to therein. With great respect, we would say that the rule was laid down too broadly in these cases. There can be an estoppel under section 115 of the Indian Evidence Act if the refusal of the plaintiff has prejudiced the predecessor or the vendee and has induced them to act upon such representation

(1) (1884) I. L. R., 6 All., 463. (2) (1905) I. L. R., 27 All., 670.
(3) (1908) 5 A. L. J., 331.

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and to compromise their position. We do not see why there should not be a personal estoppel against the plaintiff on account of his own previous conduct and unambiguous declaration.

The learned advocate for the respondents has invited our attention to subsequent rulings of this Court where it has been laid down that in cases where the custom requires an offer to be made to the co-sharers in the first instance such a custom is complied with as soon as the offer has been made, ever though no definite contract with a prospective purchaser has yet been made. We may refer to the cases of *Naunihal Singh* v. *Ram Ratan* (1), *Nathi Lal* v. *Dhani Ram* (2) and *Shamsher Singh* v. *Piari Dat* (3). But these cases turned on the particular language of the *wajib-ul-arz* which recorded the custom. Of course, if a custom merely requires that an offer should be made to the co-sharers before a share is sold, the prospective vendor fulfils the condition by making the offer and obtaining refusal. Under such a custom it is no part of his duty to go back once more to the co-sharers, after he has entered into a contract, to obtain their refusal.

The present case is governed by the Agra Pre-emption Act. Sections 14 and 15 lay down a rule under which notice can be given to co-sharers and cases where the right of pre-emption may be extinguished. Section 14, sub-clause (2) clearly provides that the notice should describe the property to be sold and the name of the vendee and the price settled. But, in our opinion, these two sections are not exhaustive and do not lay down the only rule of estoppel which can operate in pre-emption cases. That the section is not exhaustive has been held in the case of *Ranjit Singh* v. *Bhagwati Singh* (4). With that view we agree. If a notice as prescribed in section 14 has been given, a mere failure

(1) (1916) I. L. R., 39 All., 127. (2) (1917) 15 A. L. J., 315.
(3) (1918) I. L. R., 40 All., 690. (4) (1926) I. L. R., 48 All., 491.

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to reply would extinguish the right; but it does not follow that if no such notice has been given, there can never be a case in which there may be a similar estoppel.

In our opinion every case must be considered on its own facts. A mere refusal to purchase need not in every case amount to a waiver of the right of pre-emption. A co-sharer may not be prepared to take the sale direct, but may well be prepared to pre-empt the property in case it is sold to a stranger. On the other hand a waiver of the right of pre-emption can also be inferred from a clear, unambiguous and absolute refusal to purchase the property in any event. It seems to us that if a co-sharer wishes to preserve his right of pre-emption in case of a sale he should not merely refuse to purchase the property on the ground that he had no means to purchase it, but he should make it clear that he is reserving his right of pre-emption. He cannot be allowed to use unambiguous language indicating an absolute refusal and yet make a mental reservation in his favour to the prejudice of the vendor.

In the present case we are satisfied that the statement made by the plaintiff Rameshar Prasad to Mr. Stern, under the special circumstances of this case and having regard to what had happened previously, amounted to an absolute refusal on his part to take the property on the ground that it was impossible for him to raise the money. This flat refusal induced Mr. Stern to enter into negotiations with the vendees, who acting upon such representation believed that Rameshar Prasad had waived his right of pre-emption and that there was no longer any fear of such a suit. In our opinion the plaintiff is now estopped from going behind his refusal and claiming a right to pre-empt the property.

We accordingly uphold the decree of the court below and dismiss this appeal with costs.