

Before Sir Shah Muhammad Sulaiman, Chief Justice, Justice  
Sir Lal Gopal Mukerji and Mr. Justice King.

1928  
June, 6

NARSINGH NARAIN (PLAINTIFF) v. RAM CHANDER  
PANDE AND OTHERS (DEFENDANTS).\*

*Agra Pre-emption Act (Local Act XI of 1922), sections 4(1),  
11, 12, 19—Pre-emption by a recent purchaser of a share,  
who is himself liable to be pre-empted—“Indefeasible right”  
not necessary in pre-emptor—“Subsisting right” sufficient  
—“Co-sharer”.*

A person who has purchased a share in a village can maintain a suit for pre-emption against a stranger who has subsequently purchased another share, although twelve months from the date of the registration of the plaintiff's deed of purchase have not expired and he himself is still liable to be pre-empted by other co-sharers.

To be a “co-sharer” as defined by section 4(1) of the Agra Pre-emption Act it is not necessary that he should be of any particular standing. Under section 11 of the Act his right to pre-empt accrues as soon as the sale takes place. All that is required by section 19 of the Act in the case of a plaintiff pre-emptor is that he should have a subsisting right at the date of the decree; it is not necessary that he must have an indefeasible right. A right which is liable to be defeated may still be a subsisting right so long as it has not been defeated.

The rules applicable to the case of a defendant acquiring an equal status with the plaintiff before the date of the decree are not applicable to the case of the plaintiff:

Mr. *Mansur Alam*, for the appellant.

Mr. *Sankar Saran*, for the respondents.

SULAIMAN, C. J., MUKERJI and KING, JJ. :—The point that has been referred to a Full Bench is as follows: “Whether a person, who has purchased a share in a village, can maintain a suit for pre-emption against a stranger who has subsequently purchased another share, although 12 months from the date

\*Second Appeal No. 2029 of 1928, from a decree of Jagannath Singh, Additional Subordinate Judge of Easti, dated the 14th of June, 1928, modifying a decree of Shyam Behari Lal, Munsif of Bansi, dated the 13th of January, 1928.

1932

NARSINGH  
NARAIN  
v.  
RAM  
CHANDER  
PANDE.

of the registration of the plaintiff's deed of purchase have not expired and he himself is still liable to be pre-empted by other co-sharers."

The only facts that are necessary to be stated for the decision of this point are as follows. One Mst. Atraji executed a sale deed to one Narsingh Narain on the 23rd of February, 1926. It was by virtue of this purchase that Narsingh became a co-sharer in village Jiwa and by virtue of this purchase he claimed pre-emption of a subsequent transfer to be mentioned presently. On the 1st of May, 1926, two persons, Lakhpat and Mst. Kanika, sold, among other properties, a share in village Jiwa to one Ram Chander. Two suits for pre-emption were brought, one against Narsingh Narain by Ganpat which was instituted on the 21st of February, 1927, being suit No. 174 of 1927, and the other suit was filed by Narsingh Narain, seeking to pre-empt the second sale. This was instituted on the 3rd of May, 1927, being suit No. 418 of 1927. The question now is whether by virtue of his purchase, dated the 23rd of February, 1926, Narsingh Narain is entitled to maintain his suit instituted on the 3rd of May, 1927, although his own purchase had not been of 12 months' standing when the second sale was held.

The case is governed by the Pre-emption Act of 1922. Sections 11 and 12 of the Act lay down in what cases a right of pre-emption accrues and who are the persons entitled to pre-emption. In section 12 in class IV are co-sharers in the mahal. If Narsingh Narain is a co-sharer in the mahal, he would be entitled to pre-empt the property in suit. A co-sharer is defined in section 4(1) of the Act as follows: "Co-sharer means any person, other than a petty proprietor, entitled as proprietor to any share or part in a mahal or village, whether his name is or is not recorded in the register of proprietors." It will be noticed that to be a co-sharer within the meaning of this definition it is not necessary that the co-sharer should be of any

particular standing. If he made a purchase one day earlier than the day on which the sale he proposes to pre-empt took place, he would be entitled to take the step as a co-sharer. Under section 11 of the Act his right to pre-empt accrues as soon as the sale takes place. As the sale took place in this case subsequent to the purchase, the right to pre-empt accrued to Narsingh Narain on the 1st of May, 1926.

1932

NARSINGH  
NARAIN  
v.  
RAM  
CHANDER  
PANDU.

The argument, however, on behalf of Ram Chander is as follows. The cases have laid down that under section 19, a purchaser who obtains a transfer in his favour in order to defeat the plaintiff's right of pre-emption must obtain a transfer which is indefeasible. This was held in *Kundan Gir v. Jaswant Singh* (1). It is therefore argued that if the defendant should possess an indefeasible title in order to be able to defeat the plaintiff's right to pre-empt, it is but fair that the plaintiff himself should possess an indefeasible title in order to pursue his remedy. This argument no doubt sounds plausible, but it is not in keeping either with the language of section 19 or with the spirit of it.

Section 19 runs as follows: "No decree for pre-emption shall be passed in favour of any person unless he has a subsisting right of pre-emption at the date of the decree . . ." All that is necessary in the case of the plaintiff is that he should have a subsisting right at the date of the decree. A subsisting right is one which merely exists and has not been lost. A right which is liable to be defeated, or in other words is "defeasible", may still be a subsisting right so long as it is not defeated.

The principle on which the ruling quoted above, namely *Kundan Gir v. Jaswant Singh* (1), was given was that we had to read sections 19 and 20 so as to make them consistent and not inconsistent. We need not go

(1) [1929] A.L.J., 1270.

1932

NARSINGH  
NARAIN  
v.  
RAM  
CHANDER  
PANDE.

over the grounds which were given in that case for holding that in the case of a defendant who takes a transfer subsequent to the institution of the suit, he must acquire a title which is indefeasible. The fact that in the case of the defendant certain rules are necessary does not establish that the same rules are necessary for the case of a plaintiff. At any rate, we have not got any duty here to reconcile any two apparently inconsistent sections of the law and therefore so to read them as to make them consistent. Here, the language of the law is entirely clear and we cannot read the word "subsisting" as meaning "indefeasible".

When we are talking of a subsisting right it must of course be a subsisting right which will give the plaintiff preference over the defendant. The subsisting right must be also a preferential right, but this is a point which does not arise for decision in this particular case.

The view which we are inclined to take in this case is also supported by a ruling of a Bench of this Court in *Ram Raj Pandey v. Har Prasad* (1).

Reliance has been placed by the learned counsel for the respondent on the case of *Abdul Ghafur v. Ghulam Husain* (2). That was a case in which it was held that a person to be a co-sharer entitled to pre-empt an auction sale under the provisions of order XXI, rule 88 of the Code of Civil Procedure must be a co-sharer of 12 months' standing, so that his right to pre-empt as a co-sharer might not be defeated later on. When this decision was given the Pre-emption Act of 1922 did not exist and the Civil Procedure Code does not contain any definition of the word "co-sharer". Applying the common law of the land, the decision was given. In the particular case before us, we have to interpret the word "co-sharer" as defined in the Pre-emption Act of 1922 and therefore we cannot hold

(1) [1932] A.L.J., 109.

(2) (1913) I.L.R., 35 All., 293.

that the case of *Abdul Ghafur v. Ghulam Husain* (1) has any bearing on the case before us.

In the result, we answer the question in the affirmative and direct that this answer be sent back to the Division Bench which made the reference.

1932

NARASINGH  
NARAIN  
v.  
RAM  
CHANDER  
PANDE

### APPELLATE CIVIL.

*Before Sir Shah Muhammad Sulaiman, Chief Justice, and Mr. Justice Mukerji.*

*(And on a Reference)*

*Before Mr. Justice King.*

JAUHARI AND ANOTHER (DEFENDANTS) v. TUNDE  
(PLAINTIFF).\*

1932  
April, 27.

*Transfer of Property Act (IV of 1882, as amended by XX of 1929), sections 92, 95—Subrogation—Joint mortgagors—Redemption of whole mortgage (usufructuary) and possession by one mortgagor—Integrity of mortgage broken up—Another co-mortgagor then redeeming (and obtaining possession of) more than his own share from the mortgagor who had redeemed initially—Whether subrogation qua the excess shares redeemed—Suit for possession by owners of these shares—Contribution—Contract Act (IX of 1872), section 70.*

Certain zamindari property, which was subject to a usufructuary mortgage, was in course of time split up into three mahals; and *K*, who owned a share in one of the mahals, redeemed the whole mortgage and got possession of the whole property, in 1898. *J* and *M*, who had become the owners of another mahal, redeemed in 1920 from *K* not only their own mahal but the whole of the mortgaged property, on payment of the whole mortgage money to him, and got possession from him of the whole property, *K* not retaining with him even his own share which he held free from encumbrance. In 1928 suits were brought against *J* and *M* by the owners of other shares in the property for recovery of possession of their shares, and the question was whether they were entitled to recover possession without paying to the defendants a proportionate share of the mortgage debt.

\*Appeal No. 52 of 1931, under section 10 of the Letters Patent.  
(1) (1913) I.L.R., 35 All., 296.