

*Before Sir Shah Muhammad Sulaiman, Chief Justice,
and Justice Sir Lal Gopal Mukerji*

SHEO BALAK CHAUDHURI AND ANOTHER (DEFENDANTS)
v. RAM SARAN CHAUDHURI AND ANOTHER (PLAINTIFFS)*

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July, 21

*Agra Pre-emption Act (Local Act XI of 1922), section 21—
Plaintiff with a higher right associating a co-plaintiff having
an inferior right—Forfeiture of the superior right and re-
legation to the inferior right—Subsequent withdrawal of the
co-plaintiff does not restore the superior right—“Class”—
Agra Pre-emption Act (Local Act XI of 1922), section 12,
sub-sections (1) and (3).*

Upon a sale made in favour of strangers to the mahal, a suit for pre-emption was brought by three persons; the first two plaintiffs, who had not only a right of pre-emption as co-sharers in the mahal but had also a superior right of pre-emption as being related to the vendor within four degrees and descended from a common ancestor, had associated with themselves in the suit the third plaintiff who had only the inferior right of pre-emption as a co-sharer. During the pendency of the suit the vendees acquired a share in the mahal, which put them on the same footing as co-sharers with the plaintiffs; and according to the law at that time the right of pre-emption based on co-sharership could no longer be enforced. Thereupon, the third plaintiff withdrew from the suit and the first two plaintiffs amended the plaint so as to base their claim on the superior right derived from their relationship with the vendor. *Held*, that the suit must fail; according to section 21 of the Agra Pre-emption Act, where a pre-emptor possessing a superior right sues jointly with a pre-emptor possessing an inferior right, he shall have no higher right than the person with whom he sues. Accordingly the superior right, based on relationship, possessed by the first two plaintiffs was altogether lost by their associating the third plaintiff in the suit and it could not revive by the subsequent withdrawal of the third plaintiff from the suit.

The principle underlying section 21 is that if a person possessing a superior right is not prepared to pre-empt the sale on payment of the whole price but finds it necessary to join with him a person who has an inferior right, so that they may share

*Second Appeal No. 1088 of 1930, from a decree of Mohammad Ziaul Hasan, Second Additional District Judge of Gorakhpur, dated the 10th of April, 1930, reversing a decree of Zillur Rahman, Munsif of Gorakhpur, dated the 8th of April, 1929.

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in the pre-emption money to be deposited, he by his conduct gives up his superior right and lowers himself to the status of the person whom he joins. Having done so, his superior right is altogether lost, and the mere fact that at some subsequent stage the person joined is prepared to withdraw would not suffice for restoring to the former his superior right.

The word "class" referred to in section 21 does not necessarily mean one of the five classes mentioned in sub-section (1) of section 12, but must also include relations who have a preferential claim under sub-section (3) of section 12.

Mr. *Gadadhar Prasad*, for the appellants.

Messrs. *Shiva Prasad Sinha* and *Mansur Alam*, for the respondents.

SULAIMAN, C. J., and MUKERJI, J. :—This is a defendants' appeal arising out of a suit for pre-emption. On the 29th of August, 1927, a sale deed was executed by one Jaisri in favour of Sheo Balak and Ram Sundar. On the 1st of September, 1928, a suit for pre-emption was brought by the plaintiffs respondents on the ground that they were co-sharers in the mahal, whereas the vendees were perfect strangers. At that stage there was no necessity for them to allege that there was any preferential right in the first two plaintiffs on account of relationship. During the pendency of the suit, namely on the 11th of September, 1928, the vendees obtained some share in the mahal under an exchange, which put them on the same footing as co-sharers with the plaintiffs. On this, Hari Shankar plaintiff No. 3 applied to withdraw from the suit, and the other plaintiffs applied for the amendment of the plaint so as to base their claim on their preferential right, as they alleged themselves to be descended from the common ancestor of the vendor and were within four degrees of him. The plaint was amended and Hari Shankar also withdrew from the suit. The first court decided the case on the 8th of April, 1929, dismissing the claim. The lower appellate court decreed the claim of the plaintiffs on the 10th of April, 1930.

In the meantime the Amending Act (Act IX of 1929) had come into force on the 27th of January, 1930, when the assent of the Governor-General was received.

The lower appellate court has come to the conclusion that the withdrawal of Hari Shankar did not in any way affect the rights of the other plaintiffs and that by joining Hari Shankar in the suit they had, under section 21 of the Agra Pre-emption Act, reduced their old status and could not be regarded as more than mere co-sharers with the vendor. But the learned Judge has gone on to hold that the result of the amendment of section 20 is that the defendants cannot claim to have acquired an interest sufficient to defeat the plaintiffs' claim.

Before the amendment it was held by a Full Bench of this Court in *Ram Saran Das v. Bhagwat Prasad* (1), that although section 20 was applicable only to transfers and acquisitions before the institution of the suit, section 19 was applicable to acquisitions made during the pendency of the suit, and that accordingly if a vendee acquired the status of a co-sharer equal to that of the plaintiff after the institution of the suit and before the decree came to be passed, he could successfully defeat the plaintiff's claim. In the present case the defendants on the 11th of September, 1928, became co-sharers and were on the same footing as Hari Shankar, and inasmuch as the other plaintiffs had joined him in the suit, they were entitled to defeat the claim of all the plaintiffs. This right acquired by the vendees was a substantive right and extinguished the preferential right as against them.

It is, however, urged that section 21 cannot apply to a case where one plaintiff, although belonging to the same class as the other plaintiffs, has an inferior right, because he is not a relation within four degrees from the common ancestor. We think that section 21 is

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

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intended to lay down (as is also suggested by the marginal note appended thereto) that where a pre-emptor possessing a superior right sues jointly with a pre-emptor possessing an inferior right, he shall have no higher right than the person with whom he sues. The word "class" referred to in this section does not necessarily mean one of the five classes mentioned in section 12, sub-section (1), but must also include relations who have a preferential claim under section 12, sub-section (3). The principle underlying this section is that if a person possessing a superior right is not prepared to pre-empt the sale on payment of the whole price but finds it necessary to join with him a person who has an inferior right, so that they may share in the pre-emption money to be deposited, he by his conduct gives up his superior right and lowers himself to the status of the person whom he joins. Having done so, his superior right is altogether lost, and the mere fact that at some subsequent stage the person joined is prepared to withdraw would not suffice for restoring to the former his superior right. Even before the amendment it used to be held that a defect of this kind cannot be cured by a subsequent amendment of the plaint.

Hari Shankar, although a member of the plaintiffs' family, was not within four degrees of the common ancestor of the vendor, whereas the other two plaintiffs were. At the time when the suit was brought the vendees were strangers, and all the three plaintiffs being co-sharers had a preferential right as against the vendees. But the right based on relationship could not be enforced, because Hari Shankar did not possess any such right. It was on account of the fact that Hari Shankar could not claim such a right that the vendees presumably obtained a deed of exchange so as to put themselves on the same footing as the plaintiffs. The mere fact that Hari Shankar

subsequently withdrew would not help the other plaintiffs so as to enable them to claim now a preferential right based on their near relationship with the vendor. We are, therefore, of opinion that the effect of obtaining the exchange in September, 1928, was to put the defendants on the same footing as the three plaintiffs on that date, and a subsequent withdrawal of Hari Shankar or the passing of the Amending Act would not improve the position of the plaintiffs.

In the result, we allow the appeal and setting aside the decree of the lower appellate court dismiss the plaintiffs' claim for pre-emption. As the exchanges were obtained during the pendency of the suit, we direct that the plaintiffs should have their costs of the first court from the defendants vendees, but that they must pay the costs of the defendants vendees in the other two courts.

REVISIONAL CRIMINAL

Before Mr. Justice Kendall

EMPEROR *v.* KHAIRATI*

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Criminal Procedure Code, section 162—Statement of abducted girl, who had been taken to another town, recorded by the police of that town—Admissibility of such statement at the trial which was held where the abduction took place—Statement made in the course of an "investigation"—Criminal Procedure Code, sections 4(1), 156 (1) and 181—Jurisdiction.

A girl was abducted from her husband's house in the Moradabad district, and a report was made at police station Amroha in that district. About four months later she was seen in the company of one of the accused in Delhi, in suspicious circumstances; and a constable took them to a police station in Delhi and the sub-inspector recorded the statement of the girl. At the trial, which took place in the Moradabad district, this statement was adduced in evidence by the prosecution.

*Criminal Revision No. 317 of 1933, from an order of Rup Kishen Agha, Sessions Judge of Moradabad, dated the 11th of April, 1933.

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