repairs of other buildings owned by them as tenants-in-common and so nothing was due. But the defendants never attempted to prove a case of this kind.

For the reasons given above, we allow the appeal in part, modify the decree of the court below by dismissing the plaintiff's claim for interest claimed by him. The decree in favour of the plaintiff for a sum of Rs.2,457 stands. He will get future interest on the amount at Rs.6 per cent. per annum from the date of the suit till satisfaction. The parties will receive and pay costs in both the courts in proportion to their success and failure.

Before Justice Sir Lal Gopal Mukerji and Mr. Justice Young

MANGAT RAI AND OTHERS (PLAINTIFFS) *v.* DULI CHAND AND OTHERS (DEFENDANTS)* 1933 APRIL, 25

Election—Choice of two remedies which are not co-existent but alternative—Adoption of one bars the other—Estoppel—Decree-holder accepting payment of decree money is barred from pressing appeal against order which had set aside the sale—Civil Procedure Code, section 11, *explanation IV—Constructive* res judicata *arising out of execution proceedings—Transfer of Property Act (IV of* 1882), *section* 52—*—Affected by doctrine of election.*

Mortgaged property was sold in execution of a decree for sale and was purchased by the mortgagee decree-holder. On an application by the judgment-debtor the sale was set aside, and two days later he sold the property by private sale. The decree-holder filed an appeal against the order setting aside the sale; to that appeal the vendee was not a party. A few days later the vendee deposited in the execution court money for discharging the decretal amount. Before the appeal came up for hearing, the decree-holder withdrew the money from the execution court, but he did not mention this fact at the

*First Appeal No. 67 of 1930, from a decree of Muhammad Aqib Nomani, Additional Subordinate Judge of Meerut, dated the 14th of December 1929.

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hearing of the appeal, which was in due course heard and allowed. The decree-holder then claimed the property as his, and the vendee brought a suit against him for declaration of the vendee's title.

Held that the doctrine of election applied to the case. Where a litigant has a right to choose between two remedies which are not co-existent but alternative, and adopts one of those remedies, his act at once operates as a bar as regards the other, and the bar is final and absolute. When the decretal amount was deposited in court the decree-holder had two alternative remedies; he could either take the money or prosecute his appeal. He definitely adopted the first and was thereby absolutely estopped and barred from prosecuting his appeal. He acted dishonestly in prosecuting his appeal after having taken the money, and he obtained a decision of the appeal in his favour by keeping the appellate court ignorant of the fact of his having withdrawn the money.

Qudrat-un-nissa Bibi v. *Abdul Rashid* (1), distinguished.

Held, also, that the fact that the point about the doctrine of election was not raised in the execution appeal did not operate as constructive *res judicata* under explanation IV of section 11 of the Civil Procedure Code. An implied decision in execution proceedings cannot be a bar to the trial of a question which arises in a subsequent suit. Further, as the question arising in the execution appeal had to be decided on the facts relating to the sale, and the withdrawal of the money was a new fact arising long after the sale, it could not be said that this point was one which might and ought to have been raised in that appeal.

Held, further, that by the application of the doctrine of election the decree-holder was estopped from relying on section 52 of the Transfer of Property Act.

Sir *Tej Bahadur Sapru* and Mr. *M. N. Raina*, for the appellants.

Dr. *K. N. Katju* and Mr. *P. L. Banerji*, Dr. *N. C. Vaish* and Mr. *Ambika Prasad*, for the respondents.

MUKERJI and YOUNG, JJ. :—This is a first appeal from the judgment of the Additional Subordinate Judge of Meerut. The plaintiffs brought a suit for a declaration that they were the owners of certain property and

(1) (1926) I. L. R., 48 All., 616.

that the defendants had no right to it. The lower court dismissed the suit. The plaintiffs appeal. The admitted facts are as follows. One B. Duli Chand, a vakil, together with his two infant sons were the mortgagees of the land in suit. On the 12th of March, 1927, B. Duli Chand obtained a decree for sale of the mortgaged property for the sum of Rs.5,000. The property in due course was put to auction and was purchased by B. Duli Chand for Rs.1,300. On the 5th of September, 1927, the sale was set aside at the instance of the judgment-debtor by the Subordinate Judge. On the 7th of the same month the judgment-debtor sold this property together with other property to the plaintiffs for the sum of Rs.13,000. On the 1st of November, 1927, B. Duli Chand filed an appeal in the High Court against the order setting aside the sale. In that appeal the plaintiffs were not parties. On the 4th of November, 1927, the plaintiffs, who had meanwhile purchased the property from the judgment-debtor, deposited in court Rs.5,529 for the discharge of the debt due to B. Duli Chand. The execution case was thereupon struck off as satisfied. On the 1st of March, 1928, B. Duli Chand and his two sons applied to the court to withdraw the deposit paid in by the plaintiffs and on the 21st of May the money was withdrawn. On the 6th of February, 1929, the appeal to the High Court against setting aside the sale was heard and decided in favour of B. Duli Chand. It is to be noted that when this appeal was heard by the High Court the Bench which heard it, of which one of us was a member, was not informed by the appellants of the deposit of the amount due to the appellants in court or that the said sum had been taken out in satisfaction. B. Duli Chand, after his success in the High Court, claimed the property as his, and this suit was thereupon filed by the plaintiffs.

It is argued by Sir *Tej Bahadur Sapru* on behalf of the appellants that the defendants are now estopped

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from denying the plaintiffs' proprietary rights in respect of the property in suit; that when they took their money out of court they must be held to have abandoned their other remedy of appeal against the order setting aside the sale and that their election in that matter is now binding upon them and they cannot fall back upon their other remedy. It is urged by Sir *Tej Bahadur Sapru* that the present plaintiffs were not represented in the appeal to the High Court; that the judgment-debtor, who was represented, having sold his property to the plaintiffs had thereafter no real interest in defending the appeal, and that if the High Court had been informed that the appellants before it then had taken the money out of court, the appeal would undoubtedly have been dismissed. He further says that it was the duty of the appellants in that case to lay all the facts before the Court and that they failed in that duty.

Dr. *Katju*, who appears for the respondents, on the other hand relies on section 52 of the Transfer of Property Act. He contends that the plaintiffs when they bought the property took it subject to the law of *lis pendens* and that they are bound by the decision of the court below. He further argues that section 11 of the Code of Civil Procedure applies, that the point now relied upon—that the appellants in that case took the money out of court—ought to have been pleaded in the case, and that therefore the matter is *res judicata*. He contends that the doctrine of election does not apply, and relies upon a decision of a Bench of this Court in *Qudrat-un-nissa Bibi* v. *Abdul Rashid* (1). This was a pre-emption case and it was there held that where the pre-emptor in execution of his decree paid the purchase price of the property into court and the vendee took it out, the vendee was not estopped from prosecuting his appeal against the decision of the lower court.

(1) (1926) I. L. R., 48 All., 616.

We are satisfied that the respondents in this case having taken out of court the money due to them on account of the property did not act honestly in prosecuting thereafter their appeal against the order setting aside the sale, and we are further satisfied that if the High Court, which decided the appeal in favour of the present respondents, had known the facts which it was the duty of the appellants to place before the Court, the appeal would not have been allowed. We must, however, decide this appeal according to law.

We are not satisfied that the pre-emption case relied upon by the counsel for the respondents is an authority on the point before us. It is to be noted that when a successful pre-emptor pays money into court, he becomes entitled to take possession of the property at once. That being so, it would be unreasonable to suggest that the vendee, having been threatened with a loss of his property, was not entitled to take the money out of court and obtain upon it interest, which he otherwise would not obtain, until the appeal was heard. We do not think that, properly considered, taking out the money in the case of a pre-emption decree is an election within the meaning of the decisions upon that doctrine. We think, therefore, that the authority quoted above can be distinguished. We have, therefore, not had to consider whether we agree or not with the Bench of this Court which decided the pre-emption case alluded to above. The main difficulty which the appellants had to overcome was section 11 of the Code of Civil Procedure, which enacts that "No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, . . ." and, further, explanation IV, which is that "Any matter which might and ought to have been made ground of defence or attack in such

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former suit shall be deemed to have been a matter directly and substantially in issue in such suit."

We have come to the conclusion that the respondents have failed to establish that section 11 applies in this case. The proceedings which ended in the appeal to the High Court were not a "suit". They were proceedings in execution only. An implied decision in that case cannot be a bar to the trial of a question which arises in a subsequent suit: See *Ram Charan Sahu* v. *Salik Ram Sahu* (1). No doubt the principle of *res judicata* has been extended to proceedings in execution. We, therefore, have to decide whether the appellants, as successors in title of the respondents in the former execution first appeal, are precluded from arguing the question of election on the ground that this is a point which "might and ought to have been made ground of defence or attack in the former proceedings." The only question before the court of appeal in the former proceedings was whether the sale of the property was a valid sale or not. That question was to be decided on the facts which arose on or before the day of the sale. The taking out of the money by the appellants took place months after the appeal was filed. The present plaintiffs or their predecessors in title (the respondents to the former appeal) could not have argued this point without producing additional evidence in the High Court. The Court might have refused to admit additional evidence. The predecessors in title of the appellants were entitled to argue that appeal on the points then before the Court. We cannot say that they either "might or ought" to have raised the present point in the former proceedings. We, therefore, hold that explanation IV does not apply, and that section 11 cannot help the respondents in this present appeal.

Section 52 of the Transfer of Property Act would help the decree-holder in the former litigation and would be

(1) (1929) I. L. R., 52 All., 217.

for his benefit. But if the contention of the present appellants is correct in law that the decree-holder when he took the money out of court in the execution case came to a final and conclusive election, he would be estopped from relying upon section 52. When the present plaintiffs paid the money into court in the execution proceedings B. Duli Chand had two alternatives. He could either take the money out of court or prosecute his appeal. He definitely decided to adopt his right of taking the money out of court. He thereby represented to the present plaintiffs and to all the world that he had abandoned his appeal. The doctrine of election undoubtedly, in our opinion, applies. The alternatives before B. Duli Chand were not co-existent, but alternative, and once having adopted one of his remedies, he cannot now be allowed to rely upon another. The doctrine of election has been applied in England in many cases. The leading case is that of *Scarf* v. *Jardine* (1), where it was held that where a customer might at his option have sued a late partner of a firm or the members of a new firm, and had elected to sue the new firm, he could not afterwards sue the late partner. In *Ferguson* v. *Wilson* (2) it was held that where the plaintiff could receive payment for a loan to a company either in shares or in money, and where his conduct led to the inference that he had accepted a cheque in payment, he was debarred from any claim to the shares. Further, in *Bedford and Cambridge Railway* v. *Stanley* (3) where the promoters of a railway company could either sue upon an agreement with landholders along the course of their proposed line for the purchase of their land, or might acquire the land compulsorily under the Land Clauses Act, 1845, Chapter XVIII, section 85, and had commenced proceedings under their compulsory powers, it was held that they were therefore precluded from enforcing their rights under the agreement. The question of election has also been considered in India. In

(1) (1882) 7 A. C., 345. (2) (1866) 2 Ch. A., 77.
(3) (1862) 70 E. R., 1260.

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Beni Madhub Das v. *Jotindra Mohun Tagore* (1) a Bench of the Calcutta High Court held that where a court had returned a plaint for presentation to the proper court and the plaintiff had taken back his plaint and presented it to the proper court, it was not open to him to appeal from the order returning the plaint. The learned Chief Justice of the Calcutta High Court said: "The plaintiff having availed himself of the benefit of the order and having elected to present his plaint to the Burdwan Court, I do not see how he can now appeal from the order . . . He seems to have exercised the option that was given to him either to avail himself of the order or to appeal against it, and he elected to proceed under the order and avail himself of it." In *Baikuntha Nath Dey* v. *Nawab Salimulla Bahadur* (2) the Calcutta High Court held that where a litigant has a right to choose between two remedies which are not co-existent but alternative, and adopts one of those remedies, his act at once operates as a bar as regards the other, and the bar is final and absolute. Mr. JUSTICE MOOKERJEE said: "There can be no doubt that when a litigant has the right to choose between two remedies which are not co-existent but alternative, he may select and adopt one as better adapted than the other to work out his purpose; but once he has made his choice, and adopted one of the alternative remedies, his act at once operates as a bar as regards the other, and the bar is final and absolute."

We have no doubt that the two remedies before B. Duli Chand were not co-existent but alternative; that he deliberately selected one, and that his act undoubtedly operated as a bar to his further appeal to the High Court. This point, as we have held above, is open to the present appellants, as it could not be said that their predecessors in title might and ought to have raised this point in the former appeal. The question whether the respondents would have the money or the property arose definitely

(1) (1907) 11 C. W. N., 765. (2) (1907) 12 C. W. N., 590.

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when the appeal in the execution case was decided. As the result of that appeal, the respondents had both the money and the property. They could not keep both. Hence they offered to return the money. In the suit out of which the appeal has arisen the question we have to decide is whether the respondents should have the property or the money. This is, therefore, a proper stage to raise the question. We have held that the respondents having decided to take the money cannot keep the property.

We accordingly allow the appeal, set aside the decree of the court below and decree the appellants' claim with costs throughout.

Before Sir Shah Muhammad Sulaiman, Chief Justice, and Mr. Justice Thom

ANIS BEGAM AND OTHERS (DEFENDANTS) *v.* MUHAMMAD ISTAFA WALI KHAN (PLAINTIFF)*

1933
April, 25

Muhammadan law—Restitution of conjugal rights—Prompt dower remaining unpaid after cohabitation—Suit for restitution not defeated thereby—Conditional decree—Power to impose condition of payment or other equitable or necessary conditions—Legal cruelty of husband—Discretion of court—Interpretation of Muhammadan law—Injunction claimed against wife's relations—Burden of proof.

The absolute right of a Muhammadan wife to insist on the payment of the whole of the prompt portion of her dower before restitution of conjugal rights (except when the husband wants to take her out on a journey to another town) is lost after the consummation of the marriage, unless the consummation took place when she was a minor or of insane mind so as to be incapable of giving consent.

Although the observation of MAHMOOD, J., in the case of *Abdul Kadir* v. *Salima* (1) was an *obiter dictum*, founded upon

*First Appeal No. 234 of 1931, from a decree of Raj Rajeshwar Sahai, Subordinate Judge of Bareilly, dated the 7th of March, 1931.

(1) (1886) I. L. R., 8 All., 149.