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Court, and the original *ex parte* decree has been merged in this and has passed beyond the control of the trial court. I have come to this conclusion somewhat reluctantly, as it appears to me that it is a pity that the applicant has not been able to obtain a decision on his application, but the proper course apparently was for him to apply in the High Court for a stay of the proceedings in revision until he had obtained a decision from the trial court on his application under order IX, rule 13. He did not take the right step at the right time and has suffered in consequence. The application therefore fails and is dismissed with costs.

FULL BENCH

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

BALKESHA KUNWAR AND ANOTHER (PLAINTIFFS) *v.* HARAKH CHAND AND OTHERS (DEFENDANTS)*

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Agra Pre-emption Act (Local Act XI of 1922), section 19—Pre-emptive right whether affected by anything happening subsequent to decree of trial court—Suit dismissed as plaintiff ceased to be co-sharer due to execution sale of his property—Execution sale set aside during pendency of appeal—Sale set aside, after confirmation, by reason of fraud—Retrospective effect—Civil Procedure Code, order XXI, rules 89, 92.

Upon a sale to strangers, a suit for pre-emption was brought by two co-sharers. During the pendency of the suit the entire share of the second plaintiff in the mahal was sold by auction in execution of a decree and purchased by the defendants vendees. The sale was confirmed and possession was also delivered. The second plaintiff then applied under order XXI, rule 89 of the Civil Procedure Code for setting aside the sale, and as regards limitation he claimed the benefit of section 18 of the Limitation Act on the allegation that by fraud practised on him he was kept unaware of the entire sale proceedings, and came to know of it only when the delivery of possession took place. While this matter was pending in the execution court,

*First Appeal No. 89 of 1930, from a decree of C. Deb Banerji, Subordinate Judge of Azamgarh, dated the 23rd of November, 1929.

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the pre-emption suit came up for trial, and the trial court dismissed the suit on the ground that by reason of the confirmation of the auction sale the second plaintiff had lost his status as a co-sharer, the other plaintiff suing jointly with him also forfeited his right, and the vendees had become co-sharers. The plaintiffs appealed and during the pendency of this appeal the application for setting aside the auction sale was granted by the execution court and the sale was set aside. The question was whether and what effect could be given to this fact by the appellate court in the pre-emption suit.

Held that when the execution court extended the time, on the ground of fraud, for applying under order XXI, rule 89, and set aside the sale, it necessarily also set aside its order of confirmation of sale. The effect was to set aside the sale *ab initio;* the previous order was actually vacated, and so the subsequent order setting aside the sale and its confirmation must necessarily have a retrospective effect, the result being as if no sale had ever taken place and as if no order of confirmation had ever been passed, so that the plaintiff had never lost his status as a co-sharer. It followed therefore that at the date of the decree of the trial court the plaintiff had a subsisting right of pre-emption, and the appellate court should decree the suit.

Per KING, J.—It cannot be laid down as a general proposition that when a question of title vitally affecting a claim for pre-emption is *sub judice* in a suit or appeal or other proceeding between the same parties in some other court on the date when the decree is passed in the pre-emption suit, then the court hearing the appeal against the decree in the pre-emption suit must invariably disregard the decision on the question of title. If the effect of the subsequent decision is that the plaintiff had or had not a subsisting right of pre-emption on the date of the decree in the pre-emption suit, then the appellate court should give effect to it by reversing the decree, if necessary.

Umrao v. *Lachhman* (1), discussed and distinguished.

Per SULAIMAN, C. J.—Where, on the date of the decree in the pre-emption suit, another decree or order exists which makes the pre-emptor lose his status as a co-sharer, then his claim would fail. But if that decree or order were subsequently set aside, either on appeal or review or by a separate suit, the question whether he should be deemed to have had a subsisting right on the date of the decree in the pre-emption suit would depend on the form of the decree or the order, as the case may

(1) (1924) I.L.R., 46 All., 321.

be. If the subsequent decree or order is given a retrospective effect so as to vacate the previous decree or order, then it must be held that he never lost his right and that he continued to have a subsisting right. On the other hand, if the subsequent decree or order takes effect from any date subsequent to the date of the previous decree or order, then obviously the pre-emptor had lost his status, at least for a time, and his suit must fail if it is decided during that time.

Where a separate suit is brought for the cancellation of a previous transfer which is voidable, and on which the right to obtain pre-emption depends, the decree may not necessarily be given a retrospective effect, particularly if the option to avoid it was exercised after some interval of time, or where some condition precedent is imposed by the decree.

Baldeo Misir v. *Ram Lagan Shukul* (1), explained and distinguished.

Mr. *Shiva Prasad Sinha,* for the appellants.

Dr. *K. N. Katju* and Mr. *M. L. Chaturvedi,* for the respondents.

KING, J.:—This reference arises out of a suit for pre-emption.

On the 16th of March, 1928, Harakh Chand, defendant No. 1, sold certain shares in two villages to defendants Nos. 2 to 7. On the 10th of September, 1928, Mst. Balkesha Kuar and Kalap Nath Singh instituted their suit for pre-emption against Harakh Chand and his vendees. On that date the plaintiffs were co-sharers in the villages, while some of the defendants vendees were mere strangers, so the plaintiffs had a right of pre-emption.

During the pendency of the pre-emption suit one Jagannath obtained a decree for money against Kalap Nath Singh (plaintiff No. 2) and in execution of his decree the entire proprietary interests of Kalap Nath Singh in the two villages were sold by auction on the 21st August, 1929, to the defendants vendees. This sale was confirmed, and possession was delivered to the auction purchasers on the 20th of October, 1929. On the 23rd of October, 1929, the judgment-debtor Kalap

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Nath Singh made an application to the execution court praying that the sale be set aside upon his depositing in court the sum required under order XXI, rule 89, and he deposited that sum. The auction purchasers objected that the application and deposit under order XXI, rule 89 were time barred, as having been made more than 30 days from the date of sale. The applicant claimed the benefit of section 18 of the Limitation Act on the ground that he had been fraudulently kept in ignorance of the auction sale and had only become aware of it on the 20th of October, 1929, when possession of the property was delivered by the amin. This application was still pending in the execution court when the learned Subordinate Judge pronounced judgment in the pre-emption suit. He held that by reason of the confirmation of the auction sale the plaintiff No. 2 had ceased to be a co-sharer in the villages, while the defendants vendees had become co-sharers. Plaintiff No. 1 also lost her right of pre-emption as she was suing jointly with plaintiff No. 2 who had become a mere stranger. It was admitted that an application for setting aside the auction sale was pending, but the trial court held that it could not take into account the possibility that the auction sale might be set aside at some future date. The trial court could only consider whether the plaintiffs had a subsisting right of pre-emption up to the date of passing the decree. On that date the plaintiffs had no subsisting right of pre-emption and therefore their suit must be dismissed. The trial court's decree, dismissing the suit, is dated the 23rd of November, 1929.

The plaintiffs appealed against this decree and during the pendency of the appeal the execution court set aside the auction sale on the 20th of August, 1930. This order has been upheld by the Subordinate Judge on appeal and by the High Court in revision. The question for our consideration is what is the effect, if any,

of the setting aside of the auction sale after the date of the decree in the pre-emption suit.

As we considered it necessary, for the purpose of deciding this appeal, to know the result of Kalap Nath Singh's application for setting aside the auction sale, we permitted the appellants to file certified copies of the Munsif's order dated the 20th of August, 1930, and of the Subordinate Judge's appellate order dated the 21st of March, 1931. The Munsif found that the applicant, Kalap Nath Singh, was unaware of the sale and was undoubtedly "kept out of its knowledge fraudulently by the auction purchasers and their coadjutor the decree-holder." He held therefore that under section 18 of the Limitation Act the application and deposit under order XXI, rule 89 were made within limitation, and he ordered accordingly that the sale be set aside.

It is argued for the appellants that the effect of this order was to set aside the auction sale *ab initio,* so that the plaintiff No. 2 never lost his title and remained a co-sharer throughout. For the respondents, on the other hand, it is contended that when the auction sale was confirmed the title passed to the auction purchasers. Even though the sale has been set aside by a subsequent order of the execution court, that order should not be interpreted as having any retrospective effect; so the auction purchasers did not lose their title until the 20th of August, 1930, long after the date of the decree in the pre-emption suit, and the plaintiffs therefore had no subsisting right of pre-emption on that date.

In my opinion the appellants' contention must prevail. When Kalap Nath Singh's property was sold by auction he had a right to get the sale set aside within 30 days by making an application and deposit under order XXI, rule 89. If he had done so the sale would not have been confirmed and no title would have passed. He was fraudulently kept in ignorance of the sale and therefore could not make his application within 30 days. When he became aware of the sale he promptly made

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his application and deposit. I think it is immaterial whether the decree-holder alone was guilty of the fraud or whether the auction purchasers were also accessories to the fraud. It has been finally held in the execution proceedings that by reason of the fraud practised upon the judgment-debtor he was entitled under section 18 of the Limitation Act to make the application and deposit under order XXI, rule 89 when he did, and to get the sale set aside under the provisions of rules 89 and 92(2). This means that the auction sale, and the order confirming the sale, have been set aside *ab initio*. In other words, no title has passed and the sale must be treated as absolutely void as if it had never taken place and as if no order of confirmation had ever been passed. The auction purchasers cannot base any title upon the order of confirmation which has obviously been set aside along with the sale. To construe the order of the 20th of August, 1930, as setting aside only the sale, while leaving the order of confirmation in force, would amount to depriving the former order of all meaning. I am quite unable to hold that the order of the 20th of August, 1930, set aside the sale with effect from that date only and not with effect from the date of the sale itself.

If my view is correct, it follows that on the date of the decree in the pre-emption suit the plaintiffs had a subsisting right of pre-emption, as required by section 19 of the Agra Pre-emption Act. Although plaintiff No. 2 had apparently lost his proprietary rights and had apparently ceased to be a co-sharer, nevertheless in reality he remained a co-sharer, just as if no auction sale had taken place.

Dr. *Katju*, for the respondents, has relied strongly upon the case of *Umrao* v. *Lachhman* (1) for the proposition that it is not competent to an appellate court to pay regard to any events which may happen subsequent to the date of the trial court's decree. In that

(1) (1924) I.L.R., 46 All., 321.

case the pre-emptor's claim was founded upon a sale deed executed in his favour by one Jawahir on the 10th of January, 1919. During the pendency of the pre-emption suit the sons of Jawahir filed a suit for setting aside that sale, and that suit was pending when a decree in the plaintiff's favour was passed in the pre-emption suit. Three months after the pre-emption decree Jawahir's sons succeeded in getting the sale of 1919 set aside and this decision was affirmed in appeal. The result was that the plaintiff lost his right of pre-emption by reason of a decree passed after the date of the pre-emption decree. The question arose whether the appellate court could set aside the decree for pre-emption on the strength of the subsequent decree. The learned Judges referred to *Baldeo Misir* v. *Ram Lagan Shukul* (1) and made the following observations: "We held in that case, and we hold in this case, that it is not competent to courts in appeal to pay regard to any events which may happen subsequent to the date of the first court's decree; if on that latter date the plaintiff has a subsisting right to pre-empt, he is entitled to succeed and his suit cannot be defeated because, by reason of some event which has happened subsequent to the date of the first court's decree, he has lost the status of a co-sharer."

There is nothing in the judgment to show whether the decree in favour of Jawahir's sons set aside the sale with effect from the date of the sale, or from the institution of their suit, or from the date of the decree in their suit, or from some subsequent date. In a suit of that kind it may be that the decree for setting aside the sale was made upon the condition that the plaintiffs should deposit some portion of the sale consideration which was held to be binding upon the family on the ground of legal necessity, and that the sale should be set aside with effect only from the date of such deposit. We do not know the terms of the decree, but it seems to have

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been assumed that the sale was set aside with effect from the date of the decree or some subsequent date. On that assumption the ruling was, if I may say so with all respect, obviously correct. The plaintiff's right of pre-emption was subsisting at the date of the pre-emption decree and could not be affected by the loss of his interest occurring after the date of his decree. This is clearly laid down in section 19 of the Pre-emption Act. But on that assumption the present case is easily distinguishable. In the present case the plaintiff No. 2 did not acquire any fresh title after the date of the pre-emption decree, but it was finally decided after that date that he had never lost his title and that his right of pre-emption was subsisting, although apparently lost, on that date. The language used in *Umrao's* case (1) is certainly very wide and general, but I do not think the learned Judges meant to lay down a general proposition that when a question of title vitally affecting a claim for pre-emption is *sub judice* in a suit or appeal between the same parties in some other court on the date when the decree is passed in the pre-emption suit, then the appellate court hearing the appeal against the decree in the pre-emption suit must invariably disregard the decision on the question of title. In my opinion the subsequent decision cannot be disregarded. If the effect of the subsequent decision is that the plaintiff had or had not a subsisting right of pre-emption on the date of the decree in the pre-emption suit, then the appellate court should give effect to it by reversing the decree if necessary. In the present case the question whether plaintiff No. 2 had ceased to be a co-sharer was being litigated in execution proceedings, and not in a regular suit, but I think the same principle will apply. If it were held that a judicial determination of a question of title must be invariably disregarded in an appeal against a decree in a pre-emption suit, if the determination is made after the date of such decree, then I think it would be necessary to issue general instructions

(1) (1924) I.L.R., 46 All., 321.

to courts hearing pre-emption suits not to pass any decree until the question of title has been finally decided. This would mean great delay in the disposal of pre-emption suits, as the question of title might have to be finally decided in appeal to the Privy Council. It is undesirable to keep pre-emption suits pending so long, and it is unnecessary if the court hearing the appeal from a pre-emption decree can give effect to the decision of a question which was *sub judice* in some other court on the date of the decree. I think this Court can and should give effect to the decision arrived at in the execution proceedings which set aside the auction sale *ab initio* and thus established the plaintiffs' subsisting right of pre-emption on the date of the trial court's decree in the pre-emption suit.

I would allow the appeal and decree the plaintiffs' claim for pre-emption with costs in both courts.

MUKERJI, J.:—I agree and have nothing to add.

SULAIMAN, C. J.:—I agree, and would like to add only a few words.

Section 19 of the Agra Pre-emption Act requires that the plaintiff must have a subsisting right of pre-emption at the time of the decree. It means that he must have a continuous and unbroken preferential right over the vendee from the time of the sale deed till the date when the decree comes to be passed. If he had a subsisting right at the time of the decree, then the mere fact that he lost it afterwards would not affect his claim. On the other hand, if he did not have a subsisting right on the date of the decree and came to acquire it subsequently, it would not help him. It follows that one of the crucial dates is the date of the decree. Events which happen after the decree cannot be taken into account.

Where, however, on the date of the decree in the pre-emption suit, another decree or order exists which makes the pre-emptor lose his status as a co-sharer, then his claim would fail. But if that decree or order were subsequently set aside, either on appeal or review or by

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a separate suit, the question whether he should be deemed to have still had a subsisting right on the date of the decree in the pre-emption suit would depend on the form of the decree or the order, as the case may be. If the subsequent decree or order is given a retrospective effect so as to vacate the previous decree or order, then it must be held that he never lost his right and that he continued to have a subsisting right. On the other hand, if the subsequent decree or order takes effect from any date subsequent to the date of the previous decree or order, then obviously the pre-emptor had lost his status, at least for a time, and his suit must fail.

Where a suit is brought for the cancellation of a previous transfer on the ground that it is voidable, it is possible to conceive of a period during which the option has not been exercised, and the deed would not be cancelled with effect from any date previous to the exercise of such option. It is also conceivable that the court may cancel the deed with effect from the date of its own decree or, in some cases, with effect from some future date when a condition is imposed for being fulfilled. In such a case the subsequent decree does not make the transfer void *ab initio,* it merely sets aside or cancels it with effect from a later date.

In the present case when the execution court itself extended the time for the application under order XXI, rule 89 on being satisfied that fraud had been committed, and accepted the deposit, it set aside its own order of confirmation and necessarily set aside the sale. Without having set aside the confirmation order it could not have entertained the application at all. It therefore follows that the court actually vacated its previous order, and so the subsequent order setting aside the confirmation and the sale must necessarily have a retrospective effect and date back to the previous date. The result is as if in the eye of the law no confirmation order had ever been passed and the sale had never been confirmed and therefore the pre-emptor had never lost his status as a

co-sharer at all. It is inconceivable that an order setting aside the confirmation of a sale in such circumstances should have effect from any subsequent date. When we take into account such a subsequent order we are not really giving effect to any subsequent event that happened after the first court's decree, but we are merely receiving evidence to show that the right of the plaintiff had in fact never been lost and that it had been subsisting all along, and that an order which had been obtained fraudulently and was in reality not binding on the plaintiff and was of no effect against him was subsequently revoked.

With regard to the case of *Baldeo Misir* v. *Ram Lagan Shukul* (1), decided by a Bench of which I was a member, I would only add that that was a case not governed by the Pre-emption Act but was decided on the principles of the common law of the province. It was assumed in that case that the decree in favour of the sons setting aside the sale was effective from its own date. When a separate suit is brought for setting aside a sale, the decree may not necessarily be given a retrospective effect, particularly if the option to avoid it was exercised after some interval of time. But where the decree or order is vacated by a subsequent decision which binds the parties and operates as *res judicata,* it is not as if a new event has happened subsequently, but only that it is decided subsequently that the right had never in fact been lost. The setting aside of the previous order has necessarily a retrospective effect and the position is as if the previous order had never existed.

(1) (1923) I.L.R., 45 All., 709

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

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LALLU SINGH (DEFENDANT) *v.* CHANDRA SEN (PLAINTIFF)*

Agra Tenancy Act (Local Act III of 1926), sections 226, 229—Suit by assignee of profits—Cognizable by revenue court—Jurisdiction—Civil and revenue courts—Set off—Suit for profits—Lambardar can claim set off for arrears of revenue paid by him for the plaintiff co-sharer in the year to which the suit relates—Transfer of Property Act (IV of 1882), sections 3, 132—Actionable claim—Claim for profits, cognizable by revenue courts, is not an actionable claim—Assignee of profits whether liable for equities enforceable against the assignor—Transfer of Property Act (IV of 1882), section 53—Fraudulent transfer—Plea of fraudulent transfer can be raised in defence by a creditor and not only on a suit by him—Practice and pleading.

Where a co-sharer assigns not his share but his right to recover the profits due to his share for a particular year or years, the transferee is an "assign" of the co-sharer within the meaning of section 229 of the Agra Tenancy Act, 1926, and a suit by the transferee to recover such profits from the lambardar is cognizable by the revenue court.

In a suit for profits the defendant lambardar can get credit for all payments of arrears of revenue made by him, on account of the plaintiff co-sharer, in the particular year or years for which the profits are claimed. The language of section 226 of the Agra Tenancy Act, 1926, is different from that of the corresponding section 164 of the Tenancy Act of 1901, and the change in the language suggests that in the suit for profits the mutual accounts that may stand between the co-sharer and the lambardar will have to be adjusted and then a decree should be made. This applies also where the suit is brought by an assignee of the profits. But the set off can be claimed by the lambardar only in respect of payments made by him in the year or years in suit, and the mere fact that he has obtained a decree for arrears of revenue against the co-sharer will not entitle him to a set off except as regards such portion of it as represents payments made by the lambardar in the years in suit.

In the province of Agra a suit for profits is cognizable by the revenue courts and not by the civil courts; a claim for profits

*Second Appeal No. 10 of 1932, from a decree of Joti Sarup, District Judge of Bulandshahr, dated the 16th of November, 1931, modifying a decree of Abdul Wahid Khan Khalil, Assistant Collector, first class of Bulandshahr, dated the 31st of May, 1930.