ants, Madan Mohan or Ramdial, is in all respects better entitled to have a certificate under the Act.

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On the receipt of the Judge's finding on this issue, ten days will be allowed for objections from a date to be fixed by the Registrar.

Case remanded accordingly.

Before Mr. Justice Tyrrell and Mr. Justice Mahmood.

1882 *September* 14.

BHAWANI PRASAD (DEFENDANT) *v.* DAMRU (PLAINTIFF)

Pre-emption—Suit by pre-emptor and "stranger" to enforce right—Effect on pre-emptor's right—"Justice, equity and good conscience"—Muhammadan Law.

Held, applying the doctrine of the Muhammadan law of pre-emption, such doctrine being in accordance with justice, equity and good conscience, that a co-sharer in a village who had under the *wajib-ul-arz* a right of pre-emption in respect of the sale of a share who joined a "stranger," (that is, a person who had not such right,) with himself in suing to enforce such right, thereby forfeited such right.

Sheodyal Ram v. *Bhyro Ram* (1); *Guneshee Lal* v. *Zaraut Ali* (2); and *Fakir Rawot* v. *Sheikh Emambaksh* (3) referred to.

The plaintiff Damru was the co-sharer of the patti in which a two annas four pies share was owned by Ranjit, father of the defendant Kunji. Ranjit executed a *bybilwafa* mortgage of his share in favour of Bhawani Prasad, defendant, on the 15th April, 1879. Under the deed the mortgage-debt was to be repaid by instalments within the year, and the mortgagee was to be entitled to foreclose the mortgage on default of due payment of the instalments. Default occurred, and the notice of foreclosure was issued by the mortgagee on the 2nd February, 1880, and the year of grace expired on the 2nd February, 1881. Thereupon Bhawani, defendant-mortgagee, had his name entered in the revenue records as owner of the share, without any opposition by the heirs of Ranjit, who appeared to have died in the meantime. On the 19th August, 1881, a fresh deed was executed between Bhawani Prasad, defendant, and the heirs of Ranjit, whereby the former abandoned the possession he had acquired by foreclosure, and accepted a fresh

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* Second Appeal No. 61 of 1882, from a decree of W. Kaye, Esq., Officiating Commissioner of Jhánsi, dated the 23rd November, 1881, modifying a decree of J.J. McLean, Esq., Assistant Commissioner of Jhánsi, dated the 22nd September, 1881.

(1) N.-W. P. S. D. A. Rep., 1860, p. 53. (2) N.-W. P. H. C. Rep., 1870, p. 343.
(3) B. L. R., F. B. Rul., 35.

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bybilwafa mortgage of the same share in lieu of Rs. 2,401-0-0 payable by instalments up to 1942 Sambat. This deed purported to cancel the former *bybilwafa* deed of 15th April, 1879. The suit from which this appeal arose was commenced on the 29th August, 1881, by Damru, Barik Rai and Baiju, having for its object the enforcement of pre-emption under the terms of the *wajib-ul-arz* in respect of the foreclosure of 2nd February, 1881, which had taken place under the terms of the *bybilwafa* mortgage-deed dated the 15th April, 1879.

In resisting the claim, the defendants pleaded that the suit was barred by limitation; that the defendant-vendee being himself a co-sharer in the village, the plaintiffs had no preferential right of pre-emption under the terms of the *wajib-ul-arz*; that the plaintiffs had acquiesced in the sale by refusing an offer of pre-emption; and lastly, that the deed of 19th August, 1881, having cancelled and annulled the former deed of 15th April, 1879, and the foreclosure proceedings which had been taken thereupon, the plaintiffs could not enforce pre-emption in respect of a foreclosure which was no longer subsisting. The Court of first instance disallowing the first three pleas, held that the second deed was "a mere device to avoid the present claim," and decreed the suit. On appeal by the defendant-purchaser the lower appellate Court concurred with the Court of first instance in its finding respecting the deed of 19th August, 1881, but held that two of the plaintiffs, *viz.*, Barik Rai and Baiju, had no preferential right to enforce pre-emption against the purchaser; that Damru, plaintiff, who admittedly had such preferential right, could not join the other two plaintiffs in enforcing pre-emption. On this finding the lower appellate Court modified the decree of the Court of first instance, by dismissing the claims of Barik Rai and Baiju, and excluding them from the category of plaintiffs, but upheld the decree in favour of Damru, plaintiff. The defendant vendee appealed to the High Court.

Mr. *Conlan* and Pandit *Ajudhia Nath*, for the appellant.

Pandit *Bishambhar Nath* and Maulvi *Mehdi Hasan*, for the respondent (Damru).

The judgment of the Court (TYRRELL, J., and MAHMOOD, J.,) was delivered by

MAHMOOD, J. (who, after stating the facts, as stated above, continued:)—In view of a recent Full Bench ruling of this Court, the learned pleader for the appellants has withdrawn the first ground of appeal before us which relates to the plea of limitation. Nor does he insist upon the somewhat vague plea urged as the third ground of appeal. The second ground of appeal however has been argued before us with much force. That ground relates to the legal effect of the circumstance that Damru, in claiming pre-emption, associated with him two other persons who admittedly had no right to claim pre-emption against the defendant-vendee, and must therefore for the purposes of this case be regarded as strangers. On the authority of certain cases decided by this Court, in which it was held that co-sharers purchasing property jointly with strangers forfeited their pre-emptive right and rendered the entire sale liable to pre-emption at the instance of other co-sharers, who, but for such joinder of strangers in the purchase, would not be entitled to claim pre-emption, the learned pleader for the appellant contends that the same rule must be held applicable to the case of a co-sharer who, having himself the right of pre-emption, associates others having no such right in preferring a suit in which pre-emption is claimed. In support of the former part of this contention we have been referred to the case of *Sheodyal Ram* v. *Bhyro Ram* (1). The only other reported case to which our attention has been called, is that of *Guneshee Lal* v. *Zaraut Ali* (2), in which a similar rule appears to have been laid down by a Division Bench of this Court. We have, however, not been able to find any case in which the exact point now under consideration has been the subject of decision, and it may be taken that the point has not yet been settled by any authoritative ruling.

It is clear that there exist no definite rules of substantive law by which questions of this nature, relating to the right of pre-emption claimed under the terms of the *wajib-ul-arz*, are governed. It is only on the broad principles of justice, equity and good conscience that such questions can be dealt with by the Courts. The right of pre-emption, though it has undergone some essential alterations, induced either by the force of custom or the express stipu-

(1) N.-W. P. S. D. A. Rep., 1860, p. 53. (2) N.-W P. H. C. Rep., 1870, p. 343.

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lations of co-parcenary bodies of landed proprietors, is not traceable, at least in these Provinces, to any sources other than the influence of the Muhammadan Law. A Full Bench of the Calcutta High Court in the case of *Fakir Rawot* v. *Sheikh Emambaksh* (1) arrived at similar conclusions : and in two recent cases a Division Bench of this Court has broadly accepted the principle that, in the absence of circumstances to the contrary, the Court, in administering equity in cases of pre-emption, will follow the analogies furnished by the rules of the Muhammadan Law of pre-emption, so long as those rules are consistent with the principles of justice, equity and good conscience.

Viewing the case in this light, we are of opinion that the argument pressed upon us by the learned Pandit, who has appeared in support of this appeal, must prevail.

The rule of law by which a person, entitled to pre-emption, forfeits his right is based upon the principles of equitable acquiescence, which forms one of the most important elements of restrictions imposed upon the vindictive or capricious exercise of the right of pre-emption. Those restrictions appertain to the very essence and nature of the right—restrictions which, if ignored, would defeat the policy on which the right of pre-emption is based. A person who, whilst possessing the pre-emptive right, takes part in transacting the sale to a stranger, or who, in purchasing property himself, joins a stranger in such purchase, cannot, on the one hand, subsequently object to the sale which has with his acquiescence violated the pre-emptive right; nor, on the other hand, can he resist the claim of other pre-emptors who, in suing for pre-emption, vindicate the policy of the right. The rule is, that a person cannot claim a right which he has himself violated, nor can he be allowed to complain of an injury in which he has himself acquiesced. Applying these principles to the present case, it seems to us that the very fact that Damru, in suing for pre-emption, joined with him two other persons who had no such right, must be taken to amount to such acquiescence in the sale as estops him in equity from complaining of the sale. Whatever the extent of the shares claimed by those two other persons may be, it is clear that,

(1) B. L. R., F. B. Rul., 35.

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so far as Damru himself was concerned, he cannot be allowed to say that, whilst he consented to those shares being acquired by his co-plaintiffs, he has been injured by those shares being purchased by the vendee—the co-plaintiffs and the vendee being both strangers. In other words, Damru must be regarded to have foregone his pre-emptive right to the extent of the shares of his co-plaintiffs, and could not therefore, at all events, contest the sale to that extent. To that extent, therefore, the sale in favour of the defendant-vendee must be held to have remained uncontested by Damru, and it has been ingeniously urged by the learned pleader for the appellant that to that indefinite extent the vendee must be regarded to be the co-sharer of the patti in which the share in dispute is situate, and therefore entitled to the pre-emptive rights equally with the plaintiff Damru. The arguments addressed to us on behalf of the respondent aimed at drawing a distinction between the present case and cases in which a person possessing the pre-emptive right has joined a stranger in the purchase. But for the reasons already stated, we are of opinion that no such distinction in principle exists, and we hold that, as a co-sharer entitled to pre-emption forfeits the benefit of the right by joining a stranger in purchasing the property, so a pre-emptor loses his right of enforcing pre-emption by joining in his claim persons who are as much strangers as the vendee. We decree this appeal, and setting aside the decrees of both the lower Courts, dismiss the suit, the plaintiff-respondent paying the costs incurred in all the Courts.

Before Mr. Justice Tyrrell and Mr. Justice Mahmood.

1882 *September* 14.

JANKI PRASAD (DECREE-HOLDER) *v.* GHULAM ALI (JUDGMENT-DEBTOR.) *

Execution of decree—Acknowledgment in writing—Part-payment—Act XV. of 1877 *(Limitation Act), ss.* 19, 20, *and sch.* ii, *No.* 179.

A decree for money, dated the 24th June 1878, directed that a certain instalment should be paid on the 22nd July 1878, and a like on the 20th December 1878, and the balance by certain instalments commencing from a certain date; and that, in case of default, the decree-holder might realize the whole amount of the decree. The instalments were not paid at the fixed dates, but part-

* Second Appeal No. 14 of 1882, frm an order of W. Duthoit, Esq., Judge of Allahabad, dated the 15th January, 1882, reversing an order of Babu Promoda Charan Banarji, Subordinate Judge of Allahabad, dated the 12th November, 1881.