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different if the mortgage of the 24th December, 1880, had related to property other than the one in respect of which pre-emption is claimed by the plaintiff in this suit.

I concur with my brother Brodhurst in dismissing the appeal with costs.

1882 *September* 8.

Before Mr. Justice Brodhurst and Mr. Justice Mahmood.

BHAGWAN SINGH AND OTHERS (DEFENDANTS) *v.* MAHABIR SINGH AND OTHERS (PLAINTIFFS).*

Pre-emption—Purchase-money—Burden of proof—Act I. of 1872 *(Evidence Act), s.* 106.

In a suit to enforce the right of pre-emption, in which the plaintiff impugns the correctness of the price stated in the instrument of sale, although the burden of proof *primâ facie* is on him to show that the property has in fact been sold below the stated price, yet very slight evidence is ordinarily sufficient to establish his case, and when such case is established, it rests upon the defendants, the vendor and vendee, to prove by cogent evidence that the stated price is the correct one.

The principle laid down by the Privy Council in *Rajah Kishen Dutt Ram Panday* v. *Narendar Bahadoor Singh* (1) applied.

Sheikh Mahomed Noorul Hossein v. *Sheikh Hyder Buxsh* (2) and *Sheikh Golam Ayhya* v. *Joy Mungul Singh* (3) referred to.

THIS was a second appeal by the defendants in a suit to enforce the right of pre-emption. The principal contention between the parties from the beginning was, whether the sum actually paid for the property in suit was Rs. 2,000, the amount entered in the instrument of sale, or Rs. 1,005, its market-value. The lower Courts had differed on this point; the first Court finding that the sum entered in the instrument of sale had actually been paid, while the lower appellate Court had held that that sum had not been paid, and that the market-value of the property should be paid by the plaintiffs. The main question raised by this appeal was whether the pre-emptor, who alleges that the actual purchase-money is less than that stated in the instrument of sale, is bound to prove what the actual purchase-money is, or the vendor and vendee are bound,

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* Second Appeal No. 1045 of 1881, from a decree of H. D. Willock, Esq., Judge of Azamgarh, dated the 16th June, 1881, modifying a decree of Rai Bhagwan Prasad, Subordinate Judge of Azamgarh, dated the 23rd March, 1881.

(1) L. R., 3 I. A., 85. (2) W. R., Jan.—July, 1864, 304.
(3) 13 W. R., 435.

on such an allegation being made, to prove that the amount stated in the deed is the actual purchase-money.

Pandit *Ajudhia Nath* and Lala *Lalta Prasad*, for the appellants.

Mr. *Conlan* and Shah *Asad Ali*, for the respondents.

The judgment of the Court (MAHMOOD and BRODHURST, JJ.), so far as it related to the question stated above, was as follows :—

MAHMOOD, J.—Before entering into the question as to the amount of the price, we wish to dispose of the contention raised by the learned pleader for the vendees-appellants in regard to the *onus probandi* in this case. It is contended that it lay entirely upon the plaintiffs-pre-emptors to prove that the actual price paid was different from that which was recited in the sale-deed, *viz.*, Rs. 2,000; that therefore, even if the evidence produced by the defendants be regarded as insufficient or untrustworthy, the price recited in the deed must be taken to be correct in the absence of proof to the contrary being adduced by the plaintiffs. In support of this contention the rulings of the Calcutta High Court in *Sheikh Mahomed Noorul Hossein* v. *Sheikh Hyder Buxsh* (1) and in *Sheikh Golam Ayhya* v. *Joy Mungul Singh* (2) are relied upon by the learned pleader for the appellants. In the former case it was held that "where a party claiming a right of pre-emption impugns the correctness of the price stated in the deed of sale, the burden of proof is on him to show that the property had in fact been sold below the stated price." The rule laid down in the latter case is stated in more qualified terms by Couch, C. J., who held that slight evidence on the part of the plaintiff-pre-emptor would be sufficient to throw on the other party the burden of meeting it with some other evidence. We are of opinion that the rule laid down in the former of these cases cannot be accepted in the unqualified terms in which it has been stated. It seems to us that an allegation to the effect that the price recited in the deed of sale is more than the actual consideration paid, amounts to an imputation of fraud to the vendor and vendee, which it lies upon the plantiff-pre-emptor, in the first instance, to substantiate by some *primâ facie* evidence, and it depends upon the particular circumstances of each case to determine how much evidence is sufficient to establish a *primâ facie*

(1) W. R., Jan.—July, 1864, 304. (2) 13 W. R., 439.

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case in favour of the plaintiff. But when such *primâ facie* case is established it lies upon the defendants, vendor and vendee, to prove that the entire amount stated in the deed was actually paid as the price of the property sold. The plaintiff-pre-emptor cannot be held to be bound by the recital in the deed of sale, and it is the interest of the vendee to prove the payment of the sum over and above the admitted amount, *i.e.*, the difference between the amount stated by the plaintiff and that recited in the deed of sale. Moreover, in considering the question of *onus probandi* in such cases, the rule laid down in s. 106 of the Evidence Act (I of 1872) cannot be lost sight of. That rule has been frequently applied to cases between mortgagors and mortgagees, where no evidence whatsoever is forthcoming in regard to the issue as to the amount of the mortgage-debt; and it has been held that in such cases it lies upon the mortgagee to prove that the amount of the mortgage-debt was larger than that stated by the mortgagor. In the case of *Rajah Kishen Dutt Ram Panday* v. *Narendar Bahadoor Singh* (1), which was a suit for redemption, and the mortgage-deed being lost, the question was, whether the *onus probandi* as to the terms of the mortgage lay upon the mortgagor or the mortgagee, the Lords of the Privy Council made certain observations, which appear to us to be applicable, in principle, to the question now under consideration. Their Lordships observed:—"In this, as in most other cases, when the *quantum* of evidence required from either party is to be considered, regard must be had to the opportunities which each party may naturally be supposed to have of giving evidence; and although the burden of proof *primâ facie* in this case in their Lordships' view is upon the plaintiff, still they think the consideration should not be omitted that the defendant would naturally have the mortgage-deed, and that it would be *primâ facie*, at all events, more in his power to give accurate evidence of its contents than in that of the plaintiff." Applying this principle to cases of pre-emption, it is clear that the pre-emptor, whose rights have been infringed upon, is the last person to have been taken into confidence by the vendor and the vendee, and he is the least likely to know what sum of money passed as consideration of the sale. On

(1) L. R. 3 I. A., 35.

the other hand, the vendor and the vendee are the persons who are in a position to prove exactly what sum was actually paid; they are supposed to be in possession of receipts and other evidence of similar description such as liquidated bonds, &c., which may have formed part of the consideration of the sale; and it is they who are expected to know the witnesses in whose presence the consideration money changed hands. Considering that the vendor and the vendee of property, subject to the right of pre-emption, are, *ex hypothesi*, wrong-doers, and considering also the temptation to over-state the price in order to evade the exercise of the right of pre-emption, we have no hesitation in holding that very slight evidence is ordinarily sufficient to establish a *primâ facie* case in favour of the pre-emptor, and that when such case is established, it rests upon the defendants, vendor and vendee, to prove by cogent evidence that the amount of price actually paid was larger than that stated by the plaintiff-pre-emptor. We may add that we do not consider the rule thus stated by us to be in conflict with the rule laid down by Couch, C. J., in the case of *Sheikh Golam Ayhya* (1) already referred to, or with the view recently adopted by a Division Bench of this Court in S. A. No. 572 of 1881, decided the 13th January, 1882 (2).

Before Mr. Justice Brodhurst and Mr. Justice Mahmood.

1882
September 6.

ASHIK ALI (PLAINTIFF) *v.* MATHURA KANDU (DEFENDANT).*

Pre-emption—Mortgage by conditional sale—Construction of wajib-ul-arz—Purchase-money—Limitation—Act XV. of 1877 (Limitation Act), sch. ii, Nos. 10, 120,

The limitation applicable to a suit to enforce the right of pre-emption in respect of a mortgage by conditional sale of a fractional share of an undivided mahal is that contained in No. 120, sch. ii of the Limitation Act 1877. *Nath Prasad* v. *Ram Paltan Ram* (3) followed

The *wajib-ul-arz* of a village provided that the right of pre-emption should accrue "not only in respect of absolute sales, but also in regard to conditional sales, mortgages, and "*thika*" leases."

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* Second Appeal No. 514 of 1882, from a decree of H. D. Willock, Esq., Judge of Azamgarh, dated the 28th January, 1882, reversing a decree of Maulvi Amin-ud-din, Munsif of Muhammadabad, dated the 14th November, 1881.

(1) 13 W. R., 435. (2) Not reported.
(3) I. L. R., 4 All. 218.