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*September 2.*

# APPELLATE CIVIL.

*Before Mr. Justice Brodhurst and Mr. Justice Mahmood.*

RAJJO (PLAINTIFF) *v.* LALMAN AND ANOTHER (DEFENDANTS).*

*Pre-emption—Transfer by pre-emptor to "stranger"—Effect on 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 to the mortgage of a share in such village, who, in anticipation of obtaining the mortgage, mortgaged such share to a "stranger," (that is, a person who had not a preferential right to the mortgage,) thereby forfeited such right.

THE facts of this case are sufficiently stated for the purposes of this report in the judgment of Brodhurst, J.

Babu *Aprokash Chandar Mukarji* and Munshi *Kashi Prasad*, for the appellant.

Munshi *Hanuman Prasad*, for the respondents.

The Court (BRODHURST, J. and MAHMOOD, J.) delivered the following judgments :—

BRODHURST, J.—It appears that Bhikh Narain formerly mortgaged his share in mauza Aujani to Ranjit and others ; that after a time these mortgagees called upon Bhikh Narain to pay up the mortgage-debt ; and that he, in order to comply with their demand, executed, on the 8th October, 1880, an usufructuary mortgage in favour of the defendant Lalman ; put him in possession ; and caused mutation of names to be effected. The plaintiff, Rajjo, subsequently sued "for possession of the share in question, on payment of Rs 500, the mortgage-debt, by right of pre-emption, based on a clause in the *wajib-ul-arz*." Bhikh Narain did not make any defence, but Lalman pleaded that Bhikh Narain, being called upon by his mortgagees, Ranjit and others, to pay the mortgage-money, offered to mortgage the share to the plaintiff, and that when she, on account of poverty, declined the offer, Bhikh Narain mortgaged the share to him, Lalman ; and that the former mortgagees being thus displeased, induced Rajjo to institute this suit. The Subordinate Judge found

* Second Appeal No. 1435 of 1881, from a decree of T. R. Redfern, Esq., Judge of Mainpuri, dated the 17th September, 1881, affirming a decree of Mauvi Nasir Ali Khan, Subordinate Judge of Mainpuri, dated the 13th July, 1881.

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these allegations of Lalman to be proved, and that the former mortgagees had, on the 24th December, 1880, got Rajjo to execute a deed of mortgage in their favour, for the very same share, in consideration of Rs. 550, and induced her to bring this suit, on the 4th April, 1881; that under these circumstances a decree in favour of the plaintiff would actually be a decree in favour of Ranjit and others, who had caused the suit to be filed, and the Subordinate Judge therefore dismissed the claim with costs. The Judge, on appeal, recorded that "the points for decision are (i) whether the defendant, Bhikh Narain, offered to mortgage the property in question to the plaintiff-appellant, and she refused the offer; and (ii) whether, under the peculiar circumstances of the case, her claim to enforce the right of pre-emption should be allowed. On the first issue, the Judge observed that the refusal to accept the mortgage rested upon evidence of no weighty kind, and that he doubted whether the offer as alleged was made to the plaintiff, as the witnesses adduced did not satisfy him of the truth of this plea; but on the second issue the Judge found that the plaintiff-appellant had already, in anticipation of the success of her suit, mortgaged the property in dispute to a stranger; that she would thus, if successful in her suit, defeat the very object for which pre-emption is permitted, and the Judge added, "to prevent Bhikh Narain from mortgaging his own share to a stranger while allowing the plaintiff to mortgage the very same property to another man who is equally a stranger, would, in my opinion, be inequitable;" and he therefore dismissed the appeal with costs. I see no reason to doubt that the suit was not instituted by the plaintiff in good faith, but was brought in collusion with and at the instigation of Ranjit and others, with the object of harassing their former mortgagor, and of retaining possession of his land; and I consider that the judgment of the lower appellate Court is equitable and should not be disturbed by us in second appeal, and I would therefore dismiss the appeal with costs.

MAHMOOD, J.—I agree in the order proposed by my honorable colleague; but I wish to add a few observations in regard to the point of law raised by this appeal. Even if we were to hold that the transaction of the 24th December, 1880, was not tainted with

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fraud and collusion, I should still be of opinion that the plaintiff in this case had entirely lost her right to claim pre-emption in respect of the mortgage of the 8th October, 1880. On a recent occasion, in delivering my judgment in the case of *Zamir Husain* v. *Daulat Ram* (1), I have expressed my opinion that there being no system of law prevalent in India, other than the Muhammadan Law, which provides systematic substantive rules in regard to the right of pre-emption, Courts of Equity, acting upon the maxim *æquitas sequitur legem*, will follow and adopt the analogies furnished by the rules of that law in dealing with cases of an equitable nature, in which the right of pre-emption is the subject of controversy.

It seems to me that it is upon this principle that Courts of Justice in India, in many cases to be found in the published reports, have held that acquiescence by the pre-emptor in the sale of which he complains, or the joining of a stranger by a co-sharer (entitled to the pre-emptive right) in the purchase, extinguishes the right of pre-emption—involving the defeasance of the pre-emptor's claim in the former case, and in the latter case entitling the other co-sharers to enforce pre-emption which, but for such joining of the strangers, could not be enforced against the purchaser. Similarly, it has been held that a pre-emptor, in enforcing pre-emption, must claim the whole subject of the bargain; that he cannot divide the bargain by claiming only a portion of the property transferred, and that he would be bound by the terms and incidents of such bargain if he succeeded in his pre-emptive claim. These and other similar principles of the Muhammadan law of pre-emption have, by equitable analogy, been applied by the Courts even to cases in which pre-emption is not claimed as a rule of the personal law of the Muhammadans, but in which the right is sought to be enforced on the ground of local custom or the stipulations of the *wajib-ul-arz* irrespective of the race or religion of the parties. The point raised in this case is one in regard to which the terms of the *wajib-ul-arz* are silent, and therefore although pre-emption is claimed on the terms of that document, and has arisen from a mortgage and not from a sale, I am of opinion that the case must be disposed of by equitable analogy of the rule of the Muhammadan law of pre-emption on the subject. According to

(1) *Ante* p. 110.

that law, the very object and basis of the pre-emptive right is to prevent the introduction of strangers as co-sharers in the property; and the right is enforced on the hypothesis that the introduction of a stranger causes inconvenience to the pre-emptive co-sharers. The right is essentially based upon the injury which such inconvenience is supposed to cause. From its very origin and nature, the right of pre-emption is not one which is to be enforced merely as an instrument of capricious power or vindictiveness. It is a transient right in its very conception and nature, and being a personal privilege of the pre-emptor, cannot be made the subject of sale or bargain of any other kind. Any attempt on the part of the pre-emptor to bargain with it, is taken to indicate conclusively that the injury of which the pre-emptor complains in suing to enforce pre-emption is unreal, and that the claim is not dictated by *bonâ fide* motives. It is unnecessary to cite authorities of Muhammadan law in support of these propositions, for they appear to me to be so perfectly consistent with justice as to make them acceptable to the Courts on the broad principles of equity. Between the parties *in pari delicto* Courts of Equity decline to interfere. In the present case the plaintiff, whilst complaining of the defendant's mortgage of the 8th October, 1880, has herself, by the deed of the 24th December, 1880, mortgaged the property in suit to strangers, in anticipation of the success of her pre-emptive claim. She has transgressed the fundamental principles of the pre-emptive right by making it the subject of bargain, and her suit amounts to complaining of the infringement of a right which she herself has also infringed. Equity cannot favour such claims; the only system of law in India which provides substantive rules respecting the right of pre-emption positively prohibits such suits. I am, therefore, of opinion that the mortgage by the plaintiff on the 24th December, 1880, in respect of the property in suit, whether such mortgage was executed in good faith or otherwise, had the effect of extinguishing the pre-emptive right which she might otherwise have enforced in respect of the mortgage of the 8th October, 1880, under the terms of the *wajib-ul-arz*. To guard against being misunderstood, I may add that it is not necessary, for the purposes of this case, to consider whether the rule explained by me would have been

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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.

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*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.