

APPELLATE CIVIL.

Before Sir Louis Stuart, Knight, Chief Judge, and Mr.
Justice Muhammad Raza.

1927
September,
8.

JUGGA SINGH AND ANOTHER (PLAINTIFFS-APPELLANTS). v.
MUSAMMAT RANJITA AND ANOTHER (DEFENDANTS-
RESPONDENTS).*

*Oudh Laws Act (XVIII of 1876) sections 10, 11 and 13—
Pre-emption, vendee resiling from bargain after notice
issued under section 10 and tender by pre-emptor—Pre-
emptor, whether entitled to exercise right of pre-emption
where transaction not a completed contract of sale.*

A person having a right of pre-emption is not entitled to a decree merely on the ground that after a notice required by section 10 of Oudh Laws Act (XVIII of 1876), had been issued by the owner of the property, a tender was made under section 11, but that tender had been refused.

Where the transaction falls short of a completed contract of sale and the vendee resiles from the bargain, a person with a right of pre-emption cannot exercise that right. If a transaction for sale has arrived at a stage where the vendor can be compelled to hand over the property on payment of the price settled whether he wished to resile from the bargain or whether he did not wish to resile from it, and when the vendor is certain to lose the property the pre-emptor would have a right to take the place of the vendee on payment of the sale-price, but where the vendee has not expressed any desire to obtain the property and has himself resiled from the bargain, the pre-emptor has no right in the matter. *Jagan Nath v. Sheo Ratan Singh* (1) and *Shankar Prasad v. Hamid Ali Khan* (2), referred to.

Messrs. *M. Wasim* and *Gaya Prasad*, for the appellants.

Messrs. *Mukund Behari Lal* and *Kashi Prasad*, for the respondents.

*Second Civil Appeal No. 146 of 1927, against the decree of Tika Ram Misra, Subordinate Judge of Mohanlalgunj, Lucknow, dated the 14th of February, 1927.

(1) (1910) 13 O.C., 219

(2) (1906) 9 O.C., 169,

STUART, C.J., and RAZA, J. :—The facts of the suit out of which this second appeal arises are these. A certain Musammat Ranjita owned property in the Lucknow district in respect of which Jugga Singh and Chedda Singh had a right of pre-emption under the provision of Chapter II, Act XVIII of 1876. She formed the idea of selling this property and entered into negotiations with a certain B. Mahesh Prasad, who made a tentative offer of Rs. 1,200 for it. She thereupon gave the notice required by section 10, Act XVIII of 1876, to Jugga Singh and Chedda Singh that she was ready to sell the property for Rs. 1,200. Jugga Singh and Chedda Singh made a tender of Rs. 1,200 by paying the said sum into court. The tender was made within three months from the date of the notice. They thus complied with the provisions of section 11, Act XVIII of 1876 but Musammat Ranjita and B. Mahesh Prasad did not continue the transaction. B. Mahesh Prasad resiled from the bargain; Musammat Ranjita resiled from the bargain and the property was not sold. Jugga Singh and Chedda Singh then came into court claiming that under the provisions of section 13(b) of Act XVIII of 1876 they, being persons entitled to a right of pre-emption, could bring a suit to enforce such a right on the ground that they had made a tender under section 11, and that that tender had been refused. Undoubtedly if a transfer by sale had been effected by Musammat Ranjita in favour of B. Mahesh Prasad their suit would have been certain to succeed, but the circumstances were these. There had been no transfer by sale, and the property had remained in possession of Musammat Ranjita. The courts below considered that in these circumstances the plaintiffs' suit should fail. The present second appeal is filed against that decision. It has been argued by competent counsel, who have addressed us on all aspects of the case. It appears to us that this appeal must fail if we accept the de-

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cision of a Bench of the late Judicial Commissioner's Court in *Jagan Nath v. Sheo Ratan Singh* (1) as a correct pronouncement of the law on the subject. The facts in that appeal were similar to the facts in the present suit.

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There a person called Sheo Ratan had entered into negotiations with Umrao Singh and Gaya Din Singh for a sale to them of property in which a certain Jagan Nath had a right of pre-emption. Sheo Ratan issued notice under section 10, Act XVIII of 1876. Jagan Nath made the necessary tender under section 11. Sheo Ratan then withdrew from the sale to Umrao Singh and Gaya Din Singh and retained the property mortgaging it, however, with possession to Umrao Singh and Gaya Din Singh. The only distinction in facts between the two cases is that here Musammat Ranjita has retained the property in entirety, whereas in the former case Sheo Ratan retained only the right to redeem mortgaging the property with possession. In that case the learned Judges who formed the Bench decided that Jagan Nath had no right. It is stated at page 227 of that judgment:--

“It is impossible, therefore, to regard the right of pre-emption as defined in section 6 of the Act as one arising out of a mere offer and acceptance. A suit to enforce a right arising in this way is a suit to enforce a contract; a suit to enforce a right of pre-emption is a suit to vindicate the invasion of a special right conferred by Statute. But, it is argued, section 13 of the Act sets out the grounds on which a person entitled to a right of pre-emption may bring a suit to enforce his right, and one of these grounds is that

a tender was made under section 11 and refused; it is, therefore, sufficient for a plaintiff to show that he has made a tender, and that his tender has been rejected.

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A careful consideration of the terms of this section, however, will show that an infringement of the pre-emptive right must be deemed to be a necessary condition precedent to the bringing of a suit to enforce the right. Take, for example, the case referred to in section 13(a). A person entitled to a right of pre-emption may bring a suit to enforce his right on the ground that no due notice was given as required by section 10. Here the meaning obviously is that a sale has been made without notice being given. The person bringing the suit must, in order to succeed, show that a sale has taken place; in other words he must show that he has a cause of action arising out of a breach of his right to acquire the property in preference to the vendee. Similarly in the cases mentioned in clauses (c) and (d) it is assumed that a sale or foreclosure has actually taken place in derogation of the plaintiff's right of pre-emption. It seems impossible, therefore, to imagine that a similar assumption is not made in the case described in clause (b) and that a right to bring a suit for enforcement is conferred in a case in which the pre-emptive right has not been violated by a transfer made to a third person whose right to acquire is subject to a preferential right existing in the plaintiff. In short the true interpretation of section 13 seems to be that in all cases a violation of the right is an essential condition to the bringing of a suit for

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enforcement of it; there can be no cause of action without an invasion of the plaintiff's right."

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It has been argued by the learned Counsel for the appellants that these views should not be accepted if they in any way conflict with the view that a right of pre-emption is enforceable, not only in a case where a sale has taken place, but where there is in existence a completed contract for sale. He bases his argument largely upon an acceptance of the doctrine contained in *Shankar Prasad v. Hamid Ali Khan and others* (1). An acceptance of this doctrine would not, however, effect the present appeal, for here we find that there is nothing in the evidence to justify a decision that there was a completed contract for sale between Musammat Ranjita and B. Mahesh Prasad. As we read the facts the transaction fell short of a completed contract. We are not, however, disposed to consider that the principles laid down in *Shankar Prasad v. Hamid Ali Khan and others* (1), could operate, with the result that a co-sharer, who was not willing to part with his property and who could not be made by a third party with his property, could be compelled to part with his property at the instance of the person who possessed a right of pre-emption. We accept the views which have already been quoted from 13 O.C., 227, as a correct statement of the law upon the subject. In a case in which there has been a completed contract of sale and in which the right of the vendee has become an actual fact, although a deed of transfer has not been executed and registered, it is, no doubt, correct to say that a person with a right of pre-emption can exercise that right, but he can only exercise that right, in our opinion, to keep out a stranger. He cannot exercise that right to keep out his own co-sharer. The solution of the difficulty is really this. If the transaction between Musammat Ranjita and B.

(1) (1906) 9 O.C., 169.

Mahesh Prasad had arrived at a stage where Musammat Ranjita was compelled to hand over her property to B. Mahesh Prasad on payment of Rs. 1,200, whether she wished to resile from the bargain or whether she did not wish to resile from it, and when Musammat Ranjita was certain to lose the property, Jugga Singh and Chedda Singh would have a right to take the place of Mahesh Prasad on payment of the money to Musammat Ranjita. But where, as here, Mahesh Prasad has not expressed any desire to obtain the property and has himself resiled from the bargain, Jugga Singh and Chedda Singh have no right in the matter. For the above reasons we uphold the decision of the courts below and dismiss this appeal with costs.

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Appeal dismissed.

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MUHAMMAD AINUL HAQ AND OTHERS (PLAINTIFFS-APPELLANTS). v. ABDULLAH KHAN AND OTHERS (DEFENDANTS-RESPONDENTS).*

 1927
August, 30.

Damages, suit for—Breach of contract—Person agreeing to satisfy a mortgage-debt incurred by another making default—Suit for damages for breach of contract—Cause of action, accrual of—Civil Procedure Code (Act V of 1908) section 151—Appellate Court's power to reverse a judgment on a point not appealed against.

Where a person agrees to satisfy the debt on a mortgage incurred by another, the cause of action for a suit for damages for failure to satisfy the mortgage does not, in the absence of a covenant fixing a particular date for the payment of the mortgage-money, arise until it has been put finally out of the power of the transferee to satisfy the mortgage-debt. Where the transferee has still an opportunity of satisfying

*First Civil Appeal No. 79 of 1926, against the decree of S. Shaikat Husain, Additional Subordinate Judge of Gonda, dated the 25th of February, 1926.