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binding upon both the parties. The fact that the compromise and the decree was held to be a nullity in the suit brought by Parag is irrelevant. Parag was not a party to that compromise or to the decree. He was a transferee from Biru before the compromise was entered into, and his rights were in no way affected by any compromise entered into subsequently by his vendor. Thus although the compromise and the decree may very well have been a nullity as far as Parag was concerned they have never been declared to be nullity in the case of Narain and in our opinion they are binding upon him and have in the present case the effect of *res judicata*.

Misra and Pullan, JJ.

We, therefore, allow this appeal, set aside the decrees of the courts below and direct that the plaintiff's suit stand dismissed with costs in all courts.

Appeal allowed.

APPELLATE CIVIL.

Before Mr. Justice Gokaran Nath Misra and Mr. Justice Muhammad Raza.

JIYAO SINGH (DEFENDANT-APPELLANT) *v.* JAGESHAR SINGH (PLAINTIFF-RESPONDENT).*

1928 *September*, 29.

Pre-emption—Construction of documents—Dispute about succession to a deceased Hindu between his widowed daughter-in-law and his reversionary heirs—Sale by the reversioners of a moiety of the property for an ascertained sum leaving the major portion of the sale consideration with the vendee to meet the expenses of litigation—Sale, whether one of a doubtful right or of a share in a law suit—Sale, whether gives rise to a right of pre-emption.

Where a Hindu died and a dispute arose relating to the succession of his property between the deceased's widowed

*Second Civil Appeal No. 29 of 1928, against the decree of Pandit Krishnanand Pandey, Additional Subordinate Judge of Sultanpur, dated the 24th of October, 1927, modifying the decree of Pandit Shyam Manohar Tewari, Munsif of Musafirkhana at Sultanpur, dated the 1st of August, 1927, decreeing the plaintiff's claim.

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daughter-in-law who was no heir at all and his collateral heirs who under the Hindu law were entitled to succeed but were out of possession, and a sale was affected during the pendency of the dispute by the collateral heirs of a moiety of the property for an ascertained sum, a major portion thereof being left with the vendee to meet the expenses of the litigation in respect of the property, *held*, that the transaction evidenced by the sale was an out and out sale *in presentii* and not a sale of a doubtful right and a definite sum having been stated in the deed as sale price, the transaction was one which would give rise to a right of pre-emption.

The mere fact that a vendor is out of possession of certain property to which his right *in law* is clear, would not alone, unless accompanied by other circumstances, justify a court in holding that the sale executed by him was a sale of a share in a law suit. It must in every such case appear that the right sold was doubtful right. No definite rule can be laid down for determining in what case such a right must be held to be doubtful, that must depend upon the facts of each case. *Abdul Wahid Khan* v. *Shaluka Bibi* (1), distinguished. *Mirza Mohammed Ali Khan Bahadur* v. *A. Quieros* (2), *Khurshaid Ali v. Rashid Husain* (3), *Babu Lal* v. *Ali Ahmad* (4), *Gajadhar Prasad* v. *Manrakhan* (5) and *Rampher Singh* v. *Sheo Saran Singh* (6), referred to.

Messrs. *R. D. Sinha* and *A. C. Mukerji*, for the appellant.

Messrs. *Bhagwati Nath Srivastava* and *Bishambhar Nath Srivastava*, for the respondent.

MISRA and RAZA, JJ. :—This is an appeal arising out of a pre-emption suit.

The facts of the case are that one Ramanand Singh was the original owner of certain properties situate in villages Sarangpur, Ahrani and Pipri, pargana Barausa, district Sultanpur, and died in 1925 leaving behind him his widowed daughter-in-law Musammat Marjadi Kuar and the defendants Surajpal Singh, Mahabal Singh and

(1) (1894) I.L.R., 21 Calc., 496.
(2) (1906) 9 O. C., 86.
(3) (1906) 9 O.C., 331.
(4) (1922) 25 O.C., 258.
(5) (1921) 8 O.L.J., 403.
(6) (1926) 3 O.W.N., 138.

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Lakhni Singh (defendants Nos. 2, 3 and 4) as his collateral heirs. On his death Musammat Marjadi Kuar, his widowed daughter-in-law, applied for mutation of names in respect of the said property in her own favour. The aforesaid defendants raised objections in the revenue courts to mutation being effected in favour of Marjadi Kuar. The plaintiff Jageshar Singh was also an objector in the same proceedings. During the course of mutation proceedings the defendants Nos. 2 to 4 named above executed a sale deed in favour of defendant No. 1 Jiyao Singh who is now the appellant before us, on the 22nd of March, 1926. By virtue of that sale-deed defendants Nos. 2 to 4 transferred a moiety of the properties belonging to Ramanand Singh, and to which they alleged they were entitled, for Rs. 1,000. Under the terms of the sale-deed Rs. 200 alone were paid to the vendors at the time of the execution of the sale-deed and the remaining Rs. 800 were left with the vendee Jiyao Singh for the expenses of the litigation relating to the property in suit from time to time. It might be mentioned here that although Musammat Marjadi Kuar was successful in obtaining mutation in her favour from the lowest Revenue Court, yet she subsequently died and the mutation of names was ultimately effected in favour of the defendants Nos. 2 to 4 who were the collaterals of Ramanand Singh and were entitled to the entire property left by him.

The plaintiff-respondent Jageshar Singh has brought the present suit for pre-emption in respect of the half share transferred by defendants Nos. 2 to 4 in favour of defendant No. 1 under the sale-deed mentioned above. He claimed pre-emption on the payment of Rs. 175 only, which had been paid to the vendors at the time of the execution of the sale-deed. He claimed pre-emption on the ground that he was preferentially entitled to the property in suit, it being situate within Mahal Ramanand Singh in which he himself was a co-sharer.

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The defendant-appellant Jiyao Singh contested the suit on two grounds. *Firstly*, that the sale evidenced by the deed, dated the 22nd of March, 1926, was merely a sale of a share in a law suit and could not, therefore, form the subject of pre-emption and *secondly*, that if the plaintiff be held entitled to pre-empt he must be ordered to pay Rs. 1,000, the price of the property entered in the sale-deed.

The learned Munsif of Musafirkhana at Sultanpur by his decree, dated the 1st of August, 1927, held that the deed in suit was not a sale of a doubtful claim amounting to a sale of a law suit, but was a sale-deed relating to the property belonging to the vendors and was, therefore, one which could validly give rise to a right of pre-emption. He found that the actual price paid was Rs. 175, Rs. 25 having been spent in purchasing stamp and meeting other costs of execution of the deed, and this the vendee was bound in law to bear. On these findings he decreed the suit of the plaintiff-respondent Jageshar Singh and gave him a decree in respect of the property covered by the sale-deed on payment of Rs. 175.

The vendee appellant Jiyao Singh appealed to the Court of the Additional Subordinate Judge of Sultanpur who passed a decree, dated the 24th of October, 1927, allowing his appeal to this extent that he decreed pre-emption in favour of the respondents on payment of Rs. 1,000 instead of Rs. 175 as decreed by the learned Munsif. On an interpretation of the sale-deed, he agreed with the learned Munsif, and came to the conclusion that the transaction was not a sale of doubtful rights which could be considered as a sale of a share in a law suit and as such not liable to pre-emption.

The vendee Jiyao Singh has now appealed to this Court. The case was originally set down for hearing

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before one of us, but as it appeared that the question involved was one of importance it was referred for decision to a Bench of two Judges, and the case is now before us.

The case has been argued at great length and the only point which we have to decide is whether the transaction evidenced by the sale-deed of the 22nd of March, 1926, amounts to such a sale of the property covered by it as would validly give rise to a right of pre-emption or whether it is merely a sale of a doubtful claim falling within the description of a sale of a share in a law suit which would not give rise to a right of pre-emption.

Misra and Raza, JJ.

We have read the deed carefully and have come to the conclusion that on a proper interpretation of the same it cannot be held to be a sale of a law suit, and we now proceed to give our reasons for holding this opinion. The deed recites that the property belonged to Ramanand Singh and on his death the vendors were his nearest collaterals and that Musammat Marjadi Kuar had no right to the property in suit. If further states that the said lady had filed an application for mutation of her own name after the death of Ramanand Singh to which the respondent Jageshar Singh and other persons as well as the vendors had objected. It was further stated in the deed that a litigation (*muqadma bazi*) was, therefore, going on in the revenue courts and as the vendors were not possessed of sufficient means to fight the case they were compelled to transfer a half share in the properties left by Ramanand Singh to the appellant Jiyao Singh, for a sum of Rs. 1,000. Out of this sum, a sum of Rs. 200 was stated to have been received by the executants for their own expenses as well as to meet the costs of the stamp and registration of the deed, and a sum of Rs. 800 was left with Thakur Jiyao Singh for the purpose of fighting out the case. It was further stated in the deed that the consideration for the sale had been fixed at

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Rs. 1,000 which was to be treated as the purchase-money (*zarsaman*) and that if the vendee had to spend more than Rs. 800 left with him for the litigation expenses he would not be entitled to recover it from the vendors and if he spent less they would not be entitled to claim any refund of the said amount. In the end the deed was described as a deed of absolute sale (*bainama qatai*).

From the provisions of the deed which we have stated above it would be clear that the price fixed in the deed was an ascertained sum, it being Rs. 1,000. It would also appear from the terms of the deed itself as well as from the facts proved that there was no doubt of any sort as to the rights of the vendors Surajpal Singh and others. Musammat Marjadi Kuar being the widowed daughter-in-law of Ramanand Singh could not be considered to have any right to the property left by him under Hindu law, her husband having pre-deceased Ramanand Singh. The appellant has not drawn our attention to any circumstance which might enable us to hold that the right of the vendors in this case was a doubtful one. It was only pointed out that the vendors were out of possession and consequently the sale of the property must be held to be a sale of a law suit. We regret that that circumstance alone, unless it is accompanied by other circumstances, would not justify us in holding that the property sold was merely a law suit. In *Abdul Wahid Khan* v. *Shaluka Bibi* (1) a suit for pre-emption brought by the appellant Abdul Wahid Khan was dismissed on the ground that he had previously denied the title of the respondent Musammat Shaluka Bibi and which had compelled her to raise money to defray the costs of a suit to recover her share and the consideration of the sale-deed executed by her was for the purpose of providing the money necessary for carrying on the suit, the amount of which could not be esti-

(1) (1894) I.L.R., 21 Calc., 496.

mated. In these circumstances the Privy Council dismissed the suit holding the transaction to be one which should be called a sale of a share in a law suit. We asked the learned Advocate for the appellant to point out to us whether the respondent Jageshar Singh had at any time denied the title of the vendors of the appellant, namely, Surajpal Singh and others. He has frankly admitted that he was unable to do so. We are, therefore, compelled to hold that the two elements, namely, denial of the right of the vendors by the person claiming pre-emption and the sale price being not an ascertained one were not present in the present suit and consequently the present case was one which could clearly be distinguished from the case decidedly by their Lordships of the Privy Council.

Our attention was next drawn to three cases decided by the late court of the Judicial Commissioner of Oudh reported in *Mirza Mohammed Ali Khan Bahadur* v. *A. Quieros* (1) and *Khurshaid Ali* v. *Rashid Husain* (2) and *Babu Lal* v. *Ali Ahmad* (3). In these cases it was held that where property was not in possession of the vendor at the time of the sale and he had only a doubtful right to recover it, the sale could not be considered to be such a sale of a proprietary or under-proprietary tenure or a share of such tenure within the meaning of section 9 of the Oudh Laws Act as could give rise to a right of pre-emption. We do not dissent from the view laid down in these cases though we must state as was pointed out in a subsequent decision of the same court in *Gajadhar Prasad* v. *Manrakhan* (4) that the mere fact that a person is out of possession would not alone justify a court in holding that the sale in dispute was a sale of a share in a law suit if unaccompanied by other circumstances. It must, in our opinion, further appear that the right

(1) (1906) 9 O.C., 86.
(2) (1906) 9 O.C., 331.
(3) (1922) 25 O.C., 258.
(4) (1921) 8 O.L.J., 408.

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sold was really a doubtful right. No definite rule can be laid down for determining in what cases such a right must be held to be doubtful. It must depend upon the facts of each case. If it is found that the property sold consisted merely of a doubtful right, the rule laid down in the three cases mentioned above would apply. In conclusion we would also like to refer to a recent case of this Court which is reported in *Rampher Singh* v. *Sheo Saran Singh* (1). It was held in that case that before a pre-emptor can succeed in such a case he must assert title in the vendor and he must also show that the deed of conveyance is one evidencing a transaction of out and out sale, and not merely a promise to sell the property in future. It was also held in that case that the fact that the vendor is out of possession or in possession would not matter. It was further laid down that the price must be stated or ascertainable at the time of the execution of the deed, and therefore where a conveyance was executed in consideration of a price and also a promise to do certain things which was to cost an indefinite sum of money, the conveyance would not give rise to a right of pre-emption. We are in entire agreement with the view of law laid down by this Court in that case.

On the interpretation of the deed in suit and on a consideration of all the circumstances, we are driven to the conclusion that though the vendors in the present case were out of possession at the time of the execution of the sale-deed in suit, yet their claim which formed the subject of the transfer could not be considered to be a doubtful claim, nor could the sale be considered to be a sale of rights to come into existence at some future time or a mere promise to sell the same rights at some future time; nor could it be said that the sale was not for a definite sum mentioned in the deed. The conclusion at which we have therefore arrived, as will appear from what we

(1) (1926) 3 O.W.N., 138.

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have stated above, is that the sale in the present case was an out and out sale *in presentii*, that it was not a sale of a doubtful right and that a definite sum was stated in the deed as the sale price for which the property was sold. Under these circumstances we hold that the transaction evidenced by the sale-deed, dated the 22nd of March, 1926, was one which could give rise to a right of pre-emption and that the courts below were right in allowing that right to prevail.

Misra and Raza, JJ.

We, therefore, dismiss this appeal with costs.

Appeal dismissed.

APPELLATE CIVIL.

Before Justice Gokaran Nath Misra and Mr. Justice Bisheshwar Nath Srivastava.

MUSAMMAT NAUROZI (PLAINTIFF-APPELLANT) *v.* MOHAMMAD NOOR KHAN (DEFENDANT-RESPONDENT).*

1928 *October*, 10.

Oudh Laws Act (XVIII of 1876), section 5—Dower, reasonable amount of—Dower fixed should be reasonable with reference to the means of the husband and the status of the wife—Means of the husband at the time of the enforcement of the contract and not at the time of the making of the contract to be looked to.

Under section 5 of the Oudh Laws Act the dower to be allowed by the court should be reasonable with reference to the means of the husband and the status of the wife. But the court should look to the means of the husband at the time when the contract is sought to be enforced and not to his means at the time when the contract was entered into.

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*First Civil Appeal No. 32 of 1928, against the decree of Pandit Tika Ram Misra, Subordinate Judge of Mohanlalganj at Lucknow, dated the 28th of November, 1927, decreeing the plaintiff's suit.