APPELLATE CIVIL

Before Mr. Justice E. M. Nanavutty

SHEIKH SALAMAT ALI (DEFENDANT-APPELLANT) *v.* NUR MUHAMMAD AND THREE OTHERS, PLAINTIFFS, AND OTHERS, DEFENDANTS (RESPONDENTS).* 1934 *January*, 19

*Pre-emption—Right of pre-emption, whether must exist at the time of filing of suit as well as passing of decree—Limitation Act (IX of 1908), section 28—Right of pre-emption once extinguished, whether can be revived—Transfer of Property Act (IV of 1882), section 52—*Lis pendens*—Doctrine of* Lis pendens, *if applies to pre-emption suits—Second appeal—Plea not raised in written statement, if can be raised in second appeal.*

The right of a plaintiff to enforce pre-emption must exist not only at the time of the sale but also at the time of the institution of the suit to enforce that right and if the plaintiff loses that right after the sale, or at any time after the institution of the suit and before the decree for pre-emption can be passed in his favour, he is put out of Court and no relief can be granted to him. *Kehri Singh* v. *Musammat Deo Kuar* (1), relied on.

Once a right to property has been extinguished under section 28 of the Indian Limitation Act, there can be no question of that right being revived or perfected by any action on the part of the person who lost that right.

Where, therefore, a person having a preferential right of pre-emption allows his right to become time-barred, any subsequent agreement entered into by him with the vendee referring the matter to arbitration and obtaining a decree on the basis of the award and depositing in court the amount fixed by the arbitrators, cannot re-create a right to property which had been extinguished by operation of law due to his own neglect in not bringing a suit for pre-emption and he cannot set up his time-barred right as a bar to another person having an inferior right succeeding in pre-empting the property in suit. *Sheodat Bahadur Singh* v. *Bishunath Singh* (2), referred to.

*Second Civil Appeal No. 73 of 1932, against the decree of M. Ziauddin Ahmad, Subordinate Judge of Sultanpur, dated the 23rd of December, 1931, upholding the decree of Babu Maheshwar Prasad Asthana, Munsif of Sultanpur, dated the 31st of August, 1931.

(1) (1918) 5 O.L.J., 215. (2) (1922) 9 O.L.J., 546.

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The doctrine of *lis pendens* applies to a suit of pre-emption. *Ram Shankar* v. *Nanak Prasad* (1), *Ghasitey* v. *Gobind Das* (2), and *Manpal* v. *Sahib Ram* (3), referred to.

If a defendant does not urge in his written statement that plaintiffs had no cause of action as against him and that he ought not to be impleaded but that he should be discharged and costs awarded to him from the plaintiffs but as a matter of fact he and the other defendants were all working jointly to defeat the claim of the plaintiffs, it is not open to him in second appeal to make a complete *'volte face'* and to assert that the plaintiffs had no cause of action as against him and that the suit of the plaintiffs ought to have been dismissed with costs as against him.

Messrs. *E. R. Qidwai* and *M. H. Qidwai* for the appellant.

Mr. *Zahur Ahmad* for the respondents.

NANAVUTTY, J.:—This is a defendant's appeal from an appellate judgment and decree of the Court of the learned Subordinate Judge of Sultanpur confirming the judgment and decree of the Court of the Munsif of Sultanpur decreeing the plaintiffs' suit with costs.

The facts out of which this appeal arises are briefly as follows: On the 15th of February, 1930 one Shaukat Ali, the uncle of Salamat Ali, the appellant before me, sold the property in suit to Wazir Khan and Mohammad Nazir Khan, defendants 1 and 2 respectively in the original suit. The sale-deed executed by Shaukat Ali was registered on the 22nd of February, 1930. Nur Mohammad Khan and Shakur Khan, the plaintiffs, brought a suit for preemption against Wazir Khan and Mohammad Nazir Khan on the 12th of February, 1931. It is admitted on all sides that Salamat Ali, the nephew of Shaukat Ali, had a preferential right to preempt the property in suit. He however did nothing to preempt the property in suit until the 23rd of February, 1931. The 22nd of February, 1931, was a Sunday and if Salamat Ali had filed a suit for preemption against Nur Mohammad and Shakur Khan on the 23rd of February, 1931, in respect of the property in suit, his suit would

(1) (1914) 17 O.C., 150. (2) (1908) I.L.R., 30 All., 467.
(3) (1905) I.L.R., 27 All., 544.

have been within limitation and would undoubtedly have been decreed. He however chose to pursue another course. On the 23rd of February, 1931, an agreement was entered into between Salamat Ali and defendant No. 1 Wazir Khan to refer the matter in dispute between them to arbitration. The arbitrators gave an award in favour of Salamat Ali and on the 27th of February, 1931, Salamat Ali applied to the Court to have the award made a decree of the Court. On the 16th of April, 1931, the Court made the award a decree of the Court, and then Salamat Ali deposited the amount fixed by the arbitrators and an order was passed by the Court on the 31st of July, 1931, that Salamat Ali's suit be decreed and that Wazir Khan and Mohammad Nazir Khan be allowed to withdraw the money deposited by Salamat Ali. These arbitration proceedings and the decree passed on the basis of the award were all proceedings taken while the suit of Nur Mohammad Khan and Shakur Khan was pending before the Munsif. On the 12th of March, 1931, Wazir Khan, who was defendant No. 1 in the suit brought by Nur Mohammad Khan and Shakur Khan, filed his written statement stating that an award was made in favour of Salamat Ali in respect of the property in suit and that the plaintiffs Nur Mohammad and Shakur Khan had therefore got no right to preempt that property. Thereupon Salamat Ali was made a defendant on the 19th of March, 1931, in the suit filed by Nur Mohammad and Shakur Khan, and Salamat Ali filed his written statement in that suit on the 12th of May, 1931. Both the lower courts have held that the doctrine of *lis pendens* as defined in section 52 of the Transfer of Property Act, applies to the case and that the agreement to refer to arbitration made after the expiry of the period of limitation for filing the suit for preemption by Salamat Ali did not affect the right of the plaintiffs Nur Mohammad Khan and Shakur Khan to bring their suit for preemption and they accordingly decreed the plaintiffs' suit. Dissatisfied with the

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judgment of the two lower courts, Salamat Ali has filed this second appeal.

Two questions of law have been argued by the learned counsel for the appellant before me. In the first place he contended that limitation cannot be pleaded as against Salamat Ali who was a defendant in the suit and that the preemptors Nur Mohammad Khan and Shakur Khan were bound to show that their right to preempt the property continued right up to the date the decree was passed in their favour. In the second place he contended that section 52 of the Transfer of Property Act did not apply to the facts of the present case. He invited my attention to a ruling of this Court in *Mathura Prasad* v. *Ghanshiam Das* (1), in which it was held that limitation was no bar in defence and that there could be no limitation for the prior mortgagee's setting up his rights as a shield against the pusine mortgagee. He contended that although Salamat Ali's right to preempt may have become time-barred, yet Salamat Ali could legally set up that time-barred right against the right of the plaintiffs to preempt the property in suit. He further contended that the lower appellate court had misunderstood the ruling reported in *Sheodat Bahadur Singh* v. *Bisunath Singh and others* (2), and that that ruling was really in favour of the appellant Salamat Ali. Learned counsel strongly relied upon an unreported decision of the late Court of the Judicial Commissioner of Oudh (First Civil Appeal No. 60 of 1914, decided on 22nd July, 1915), and argued on the strength of that decision that this appeal must be allowed, and the suit of the plaintiffs be dismissed with costs.

I have given my best consideration to the contentions urged on behalf of the appellant Salamat Ali by his learned counsel, but I regret I cannot accept those contentions as sound. The facts of First Civil Appeal No. 60 of 1914, above referred to, were entirely different from the facts in the present case. In that case the suit

(1) (1930) 8 O.W.N., 179. (2) (1922) 9 O.L.J., 546.

for preemption was filed by the plaintiff after the agreement to refer to arbitration had been entered into by defendant No. 3 Sultan Khan and the purchaser Rustam Khan. In the present case it is conceded on all sides that the plaintiffs Nur Mohammad Khan and Shakur Khan brought their suit for preemption on the 12th of February, 1931, whereas the agreement to refer to arbitration between Salamat Ali and Wazir Khan was made on the 23rd of February, 1931, not only 11 days after the plaintiffs had brought their suit but a day after the right of Salamat Ali to preempt the property in suit had been extinguished. Salamat Ali's right to sue for preemption accrued on the 22nd of February, 1930, which was the date of the registration of the sale-deed in favour of Wazir Khan and Nazir Khan. The last date for filing a suit for preemtion was, therefore, the 22nd of February, 1931, but, as the 22nd of February, 1931, was a Sunday, any suit filed by Salamat Ali on the following Monday, the 23rd of February, 1931, would have been within time under the provisions of section 4 of the Indian Limitation Act. Section 4 however of the Indian Limitation Act does not apply to any person entering into any private agreement. Section 28 of the Indian Limitation Act lays down that at the determination of the period hereby limited to any person for instituting a suit for possession of any property his right to such property shall be extinguished. Thus on the 23rd of February, 1931, Salamat Ali had, by his own conduct, extinguished his right to sue for the property in dispute on the ground that he had a preferential right to preempt it. On the 27th of February, 1931, when Salamat Ali applied to file the award in Court he had certainly lost his right to preempt the property, and the award in his favour was itself made beyond time. In First Civil Appeal No. 60 of 1914, which has been so strongly relied upon by the learned counsel for the appellant, the suit of the preemptor, who had an inferior right to preempt, was filed some months after the person who had a pre-

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ferential right to preempt had agreed to refer the matter to arbitration. The agreement to refer the matter to arbitration was therefore in that case made within time whereas in the present case Salamat Ali entered into this agreement after his right to preempt the property had been extinguished by operation of law. Then again it is to be noted that in the present case the agreement to refer the dispute to arbitration was not made by both the vendees, namely Wazir Khan and Mohammad Nazir Khan, but only by one of them, namely, Wazir Khan. As against Nazir Khan who had not agreed to any arbitration, there was no such agreement and, therefore, the award of the arbitrators was not binding on him, and any subsequent consent given by him would only amount to a surrender of his right or a conveyance of his right which in law would be ineffectual.

It is true as contended for by the learned counsel for the appellant that the right of a plaintiff to enforce preemption must exist not only at the time of the sale but also at the time of the institution of the suit to enforce that right, and that if the plaintiff loses that right after the sale, or at any time after the institution of the suit and before the decree for preemption can be passed in his favour, he is put out of Court and no relief could be granted to him. See *Kehri Singh* v. *Musammat Deo Kuar* (1). In the present case, however, the plaintiffs have not lost their right to enforce preemption since the preferental right of Salamat Ali to preempt the property in suit having been extinguished by his own conduct does not stand in their way.

The learned counsel for the appellant has contended that the present case can be distinguished from the case of *Sheo Dat Bahadur Singh* v. *Bishunath Singh* (2), in that the person with a preferential right to preempt had in that case not completed his title by depositing the money due under the decree passed on the award by the time when the suit of the person with an inferior right to

(1) (1918) 5 O.L.J., 215. (2) (1922) 9 O.L.J., 546.

preempt had come to be decided, whereas in the present case Salamat Ali had deposited the money due under the decree passed on the award, and so had completed his title before the suit of Nur Mohammad Khan and Shakur Khan had been decreed by the first court. He has, however, overlooked the important point that Salamat Ali, when he entered into the agreement to refer the matter to arbitration on the 23rd of February, 1931, had already lost his right to preempt the property, and all subsequent proceedings taken by him could not re-create a right to property which had been extinguished by operation of law due to his own neglect in not bringing a suit for preemption. There is, therefore, no question of the plaintiffs having lost their right to preempt the property by reason of the alleged preferential right of Salamat Ali to preempt the same property in virtue of the decree passed in his favour on the basis of the award. Had an agreement to refer to arbitration been made within time, and had Salamat Ali then secured a decree on the basis of the award before his right to preempt had been extinguished, the case would have been very different, but as it is he cannot set up his time barred right as a bar to the plaintiffs succeeding in preempting the property in suit.

As regards the doctrine of *lis pendens* as embodied in section 52 of the Transfer of Property Act, it has been contended by the learned counsel for the appellant Salamat Ali that by virtue of section 2 of the Transfer of Property Act any transfer by operation of law, or by, or in execution of a decree or order of a Court of competent jurisdiction is exempt from the operation of section 52 of the Transfer of Property Act. On the other hand the learned counsel for the respondents has contended that section 52 of the Transfer of Property Act does not only refer to transfers but also refers to the case of property which has been otherwise dealt with by any party to the suit or proceeding so as to affect the rights of any third party thereto. Sir

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Dinshaw Mulla in his learned commentary on the Transfer of Property Act, 1933, Edition, p. 209, has made the following comment on the words "transferred or otherwise dealt with" which occur in section 52 of the Transfer of Property Act:

> "The meaning of the word 'otherwise dealt with' is not so clear. They would probably include such transactions as a release or a surrender. They have been held to include a contract of sale and a partition between co-defendants. They also apply to any collusive decree or compromise by which the title of a party is affected during the pendency of a suit, for the principle underlying the section is that a litigating party is exempted from taking notice of a title acquired during the litigation."

In *Ram Shankar* v. *Nanak Prasad* (1), the facts were as follows: A suit for preemption was instituted by the plaintiff-respondent on the 13th of September, 1910 which was the last day of limitation. The defence was that the vendee had sold the property to the appellants who had admittedly a better right of preemption than the plaintiff by a deed dated the 12th of September, 1910, which was registered on the 21st of September 1910. It was found that the sale in favour of the appellants was really made at a date subsequent to the institution of the preemption suit. In these circumstances it was held that the rule of *lis pendens* applied and that no dealing with the property after the institution of the suit could defeat the plaintiff's rights. In the case above quoted reliance was placed upon a ruling of the Allahabad High Court reported in *Ghasitey* v. *Gobind Das* (2) in which case also it was held that the doctrine of *lis pendens* applied and the plaintiff was entitled to a decree. In the Full Bench ruling of the Allahabad High Court reported in *Manpal* v. *Sahib Ram and other* (3), the facts were somewhat peculiar and, in the peculiar circumstances of that case, it was held that the plaintiff could not still plead in bar of the

(1) (1914) 17 O.C., 150. (2) (1908) I.L.R., 30 All., 467.
(3) (1905) I.L.R., 27 All., 544.

claim put forward by the defendant the doctrine of *lis pendens*.

I would therefore hold in agreement with the learned Judge of the Court below that the doctrine of *lis pendens* does apply to a suit for preemption. In the present case, however, the plaintiffs need not invoke the aid of the doctrine of *lis pendens* because the appellant Salamat Ali did not acquire the property in suit within limitation and his right to preempt the property had in fact been extinguished long before he secured a decree on the basis of the award. Salamat Ali had no interest left in the property in suit after the 23rd of February, 1931, and his claim was rightly rejected by the lower courts.

The plea that Salamat Ali had perfected his right to the property in suit before the plaintiffs got a decree in their favour from the trial court is to my mind without any force. Once a right to property has been extinguished under section 28 of the Indian Limitation Act, there can be no question of that right being revived or perfected by any action on the part of the person who lost that right. The last plea taken in the memorandum of appeal has not been pressed before me and indeed it has got no force. The appellant Salamat Ali filed his written statement on the 12th of May, 1931, and therein he did not urge that the plaintiffs had no cause of action as against him and that he ought not to be impleaded but that he should be discharged and costs awarded to him from the plaintiffs. As a matter of fact at that time Salamat Ali and defendant No. 1 Wazir Khan and defendant No. 2 Nazir Mohammad Khan were all working jointly to defeat the claim of the plaintiffs, and it is not now open to Salamat Ali in second appeal to make a complete *'volte face'* and to assert that the plaintiffs had no cause of action as against him and that the suit of the plaintiffs ought to have been dismissed with costs as against him.

For the reasons given above, this appeal fails and is dismissed with costs.

Appeal dismissed.