

We can find no ground for interference and dismiss the appeal. The respondents are absent though sufficiently served.

1931

GANESHI
LAL,

IMTIYAZ ALI.

Appeal dismissed.

FULL BENCH.

Before Syed Wazir Hasan, Chief Judge, Mr. Justice Muhammad Raza and Mr. Justice Bisheshwar Nath Srivastava.

1931

March, 25.

MOHAMMAD IBRAHIM AND ANOTHER (DEFENDANTS-APPELLANTS) v. ZAHUR AHMAD, PLAINTIFF AND ANOTHER DEFENDANT (RESPONDENTS).*

Oudh Laws Act (XVIII of 1876), section 13—Claim of pre-emptor and position of vendee, how to be determined—Co-sharership of pre-emptor only at the date of sale, if sufficient—Words “entitled to a right of pre-emption” in section 13, meaning of.

In a suit for pre-emption the claims of the pre-emptor must be determined with reference to the position of his co-sharership not only at the date of sale but also at the date of suit and the position claimed by the vendee must be determined only with reference to his position as a co-sharer at the date of sale.

The words “entitled to a right of pre-emption” as used in section 13 of the Oudh Laws Act, 1876, must be construed as meaning “entitled at the date of suit”. This is the only construction consistent with the general principles and there is nothing in the language of section 13 to justify the interpretation that a person entitled to a right of pre-emption at the date of sale may bring a suit to enforce such right even after he has ceased to be so entitled. Both on the ground of principle and also on the terms of section 13 of the Act, the plaintiff in a suit for pre-emption must show that he possessed necessary qualifications not only at the date of sale but also at the date of the suit. *Gaya Prasad v. Faiyaz Husain*

*Second Civil Appeal No. 308 of 1930, against the decree of M. Ziauddin Ahmad, Subordinate Judge of Sultanpur, dated the 27th of August, 1930, reversing the decree of Pandit Shiam Manohar Tewari, Munsif, Musafirkhana at Sultanpur, dated the 10th of April, 1930.

1931

MOHAMMAD
IBRAHIM
v.
ZAHUR
AHMAD.

(1), *Basdeo v. Bir Indar Bikram Singh* (2), *Tahawwar Khan v. Madho Ram* (3), *Amir Hasan v. Musammat Sardar Begam* (4), *Kehri Singh v. Musammat Deo Kunwar* (5), *Janki Prasad v. Ishar Das* (6), *Khan v. Mahanda* (7), *Nuri Mian v. Ambica Singh* (8), *Sewa Ram v. Azim Khan* (9), *Sadiq Husain Khan v. Muhammad Karim* (10), discussed and relied on.

The case was originally heard by SRIVASTAVA, J., who referred an important question of law involved in it to the Full Bench for decision. His order of reference is as follows:—

SRIVASTAVA, J.:—This appeal arises out of a suit for pre-emption.

The suit was based upon a sale deed, dated the 21st of March, 1929, executed by the defendant No. 1 in favour of defendants Nos. 2 and 3. It comprises two plots of land in mauza Asisipur. At the date of sale these two plots formed part of khata No. 6 in patti Jafar Khan.

The plaintiff pre-emptor is a nephew of the vendor and at the date of sale was a co-sharer in the aforesaid khata No. 6. He instituted a suit for pre-emption on the 29th of November, 1929, but before the institution of the suit an imperfect partition of the village had been carried out through the revenue courts and this partition came into effect from the 1st of July, 1929. As a result of this partition the plots in suit formed part of khata No. 13 of patti Mansab Khan. The vendees are proprietors of several other *khata*s in this *patti* Mansab Khan. The pre-emptor has no share in this *patti*. But his share lies in khata No. 33 *patti* Zahur Ahmad. It is conceded that if the rights of parties are to be determined according to the state of affairs as it existed at the date of sale, then the plaintiff pre-emptor has a preferential right

(1) (1929) 7 O.W.N., 622.

(3) (1908) 11 O.C., 290.

(5) (1918) 5 O.L.J., 215.

(7) 37 P.R., 1902, Vol., 32.

(9) (1923) 84 I.C., 610.

(2) (1930) 7 O.W.N., 335.

(4) (1909) 12 O.C., 229.

(6) (1899) I.L.R., 21 All., 374.

(8) (1916) I.L.R., 44 Calc., 47.

(10) (1922) 25 O.C., 319.

to purchase the property as against the vendee. On the other hand it is admitted by the learned counsel for the plaintiff respondent that if the state of affairs existing at the date of suit is to be relied on, then the vendees defendants have a preferential right as compared to the plaintiff.

1931

 MORAMMAD
IBRAHIM
v.
ZAKIUS
AHMAD.

The learned Subordinate Judge relying on the authority of two cases decided by this Court, namely, *Gaya Prasad v. Faiyaz Husain* (1) and *Basdeo v. Bir Indar Bikram Singh* (2), has held that the plaintiff must succeed on the basis of the title which he had at the time of sale when the cause of action accrued in his favour. The correctness of this view is challenged by the appellant.

The learned counsel for the appellants has relied upon the decisions of the late Court of the Judicial Commissioner of Oudh in *Tahawwar Khan v. Madho Ram* (3), *Amir Hasan v. Musammam Sardar Begam* (4) and *Kehri Singh v. Musammam Deo Kunwar* (5) in support of the argument that the pre-emptor must show a valid title not only at the date of sale but also at the time when he brings his suit. He has also referred to a Full Bench decision of the Allahabad High Court in *Janki Prasad v. Ishar Das* (6) and a decision of the Punjab Chief Court in *Khan v. Mahanda* (7) in support of the same view. He has further relied on certain observations of the late Mr. Justice MISRA in the Full Bench decision of this Court in *Gaya Prasad v. Faiyaz Husain* (1) as supporting his contention. In my opinion the two decisions of this Court relied upon by the learned Subordinate Judge do not cover exactly the point which arises for determination in this appeal. The decisions of the late Court of the Judicial Commissioner of Oudh

(1) (1929) 7 O.W.N., 622.

(2) (1930) 7 O.W.N., 885.

(3) (1908) 11 O.C., 290.

(4) (1909) 12 O.C., 229.

(5) (1918) 5 O.L.J., 215.

(6) (1899) I.L.R., 21 All., 374.

(7) 37 P.R., 1902, Vol. 32.

1931

MOHAMMAD
IBRAHIM
v.
ZAFUR
AHMAD.

seem to lend support to the contention of the appellants. The learned counsel for the plaintiff respondent on the other hand relies on two decisions of the late Court of the Judicial Commissioner of Oudh in *Manna Singh v. Bihari Singh* (1) and *Lal Raghoindra Pratab Sahi v. The Hon'ble Raja Syed Abu Jafar* (2) and contends that the right which accrued in favour of the plaintiff at the date of sale cannot be affected by anything that happens afterwards. He argues that the earlier decisions of the late Judicial Commissioner's Court followed the view prevailing in the Allahabad High Court which has not found favour in the later cases.

The matter seems to me to be one of considerable importance and one which frequently arises in pre-emption cases in this province. I therefore think it desirable that I should refer the following question of law for decision by a Full Bench under section 14(2) of the Oudh Courts Act:—

Should the respective claims of the pre-emptor and the vendee, as regards the preferential right to purchase property, be determined with reference to the position of their co-sharership at the date of sale or with reference to the position as it exists at the date of suit?

Mr. *Akhtar Husain*, for the appellants.

Mr. *Hyder Husain*, for the respondents.

RAZA and SRIVASTAVA, JJ. :—The question which was referred by one of us to the Full Bench is as follows:—

“Should the respective claims of the pre-emptor and the vendee, as regards the preferential right to purchase property, be determined with reference to the

(1) (1916) 19 O.C., 183.

(2) (1919) 22 O.C., 359.

position of their co-sharership at the date of sale or with reference to the position as it exists at the date of suit ?

The facts which gave rise to this reference are briefly as follows :—

On the 21st of March, 1929 Ali Ahmad, defendant No. 1, executed a sale deed in favour of Mohammad Ibrahim Khan and Ghulam Rasul Khan, defendants Nos. 2 and 3 in respect of two plots of land then situate in Khata No. 6 of patti Jafar Khan in mauza Asisipur. Zahur Ahmad, plaintiff, was admittedly a co-sharer in the aforesaid khata No. 6 of Patti Jafar Khan at the date of sale. It is also admitted that he was not given any notice as required by section 10 of the Oudh Laws Act. On the other hand the vendees defendants had no share in patti Jafar Khan. Their share lay in another patti. Thus it is the common case of both the parties that at the date of sale the plaintiff was a co-sharer of the sub-division of the tenure in which the property sold was comprised under clause I of section 9 of the Oudh Laws Act, 1876, whereas the defendants (vendees) were co-sharers only of the whole mohal under clause II of that section. It appears that at the date of sale, proceedings of an imperfect partition of the village Asisipur were pending in the revenue court. This partition came into effect from the 1st of July, 1929. As a result of it the two plots which formed the subject matter of the sale in question were allotted to khata No. 13 of patti Mansab Khan. The plaintiff has no share in this patti, his share having been thrown in khata No. 33 of patti Zahur Ahmad. The vendees, though they have no share in khata No. 13 of patti Mansab Khan, yet they are proprietors of several other khatas in that patti. Subsequent to this partition coming into force the plaintiff on the 29th of November, 1929, instituted a suit for pre-emption which has given rise

1931
 MOHAMMAD
 IBRAHIM
 v.
 ZAHUR
 AHMAD.

*Raza
 and Sricas-
 tava, JJ.*

1981

MOHAMMAD
IBRAHIM
v.
ZAHUR
AHMAD.

Raza
and Srivas-
tava, JJ.

to the present appeal. It is not disputed that on the date of the institution of this suit the plaintiff's position was only that of a co-sharer of the whole mahal under clause II of section 9 of the Oudh Laws Act whereas the position of the vendees had, as a result of that partition, improved into that of a co-sharer of the sub-division of the tenure under the 1st clause of that section.

The question therefore involved in the reference is whether the determination of the respective rights of the pre-emptor and the vendee is to be based on the state of co-sharership as it existed at the date of sale or on the state as it had come into existence at the date of suit. In *Rai Gaya Prasad v. S. Faiyaz Husain* (1) a Full Bench of our court consisting of Mr. Justice WAZIR HASAN, acting Chief Judge, Mr. Justice MISRA and Mr. Justice PULLAN held that a vendee who at the date of the sale was not a co-sharer cannot defeat the suit brought by a pre-emptor by acquiring the position of a co-sharer during the pendency of the suit provided he has not acquired such a position from a person who was entitled to a notice under section 10 of the Oudh Laws Act, 1876, and had not received it and whose rights of pre-emption was not extinguished by any rule of law on the date of the acquisition by the vendee. This decision emphasises the principle that in pre-emption suit the question as regards the rights of the vendee which were under consideration in that case, must be determined with reference to the terms of the statute, namely, the Oudh Laws Act, 1876. In a subsequent case *Basdeo v. Bir Indar Bikram Singh* (2) a division bench consisting of the Hon'ble the CHIEF JUDGE and Mr. Justice PULLAN relying upon the Full Bench ruling just mentioned decided that a purchaser cannot use a title acquired by him subsequent to the origin of the cause of action in a pre-emption suit as a defence.

(1) (1929) I.L.R., 5 Luck., 12.

(2) (1930) 7 O.W.N., 835.

against a pre-emption suit instituted after his acquisition of the said title. The learned Judges constituting the division bench, who were also members of the Full Bench, were of opinion that though the Full Bench ruling concerned with a case where a vendee acquired a right after the sale, yet the principle underlying that decision applied equally to a case in which the right on which the vendee relied came into existence simultaneously with the sale. We think that we are bound by the decision of the Full Bench and we must abide by the interpretation placed on it by two of the learned Judges who constituted the Full Bench. We will therefore accept the position that the rights of the defendants vendees must be determined with reference to their position as co-sharers at the date of sale. This position, as we have already stated, was that of a co-sharer of the mahal under clause II, section 9 of the Oudh Laws Act, 1876.

Then there remains another part of the question under reference, namely, as regards the rights of the pre-emptor. We are definitely of opinion that the Full Bench case—*Rai Gaya Prasad v. S. Faiyaz Husain* (1)—is not decisive on this point. In our opinion the position of a plaintiff is essentially different from that of a defendant. We think, therefore, we are free to consider this question independently of that decision. Mr. *Haider Husain* the learned Counsel for the plaintiff respondent has strenuously argued that the adjudication as regards the rights of the pre-emptor also must be based strictly upon the provisions of the statute. He has strongly contended that we cannot call in the aid of any general principle so as to affect a right which has accrued in the pre-emptor's favour under the provisions of the Oudh Laws Act. We are of opinion that in spite of the law of pre-emption in Oudh being embodied in a statute there are certain

1931

 MOHAMMAD
 IBRAHIM
 v.
 ZAHUR
 AHMAD.

*Raza
 and Sricas-
 tava, JJ.*

(1) (1929) I.L.R., 5 Luck., 12.

1931

MOHAMMAD
IBRAHIM
v.
ZAHUR
AHMAD.

Raza
and Sricas-
tava, JJ.

general principles of universal application which cannot be ignored. A plaintiff can succeed only on the strength of his own title. When any person seeks the assistance of the court, it is not enough for him to show that a right accrued in his favour at some time antecedent to the suit, but he must also show that the right subsisted in his favour at the date of the institution of his suit. As a rule the question as regards the title of the plaintiff is to be judged with reference to the state of affairs as it existed at the date of the plaint. We are unable to find anything peculiar in a case of pre-emption which would justify a departure from this rule based on sound principle.

In the course of arguments one of us asked Mr. *Hyder Husain* if he could point to any other class of cases in which it could be said that the plaintiff is entitled to a decree in his favour though he may have lost the title which formed the basis of his claim, at the date of suit. He mentioned only one such case, namely, that of a Hindu widow who was chaste at her husband's death but has become unchaste before the institution of her suit claiming inheritance to her husband. We are of opinion that it is not a case in point because it is governed by a positive rule of Hindu law on the subject but there is no such rule either in the general law of pre-emption or in the Oudh Laws Act in favour of a pre-emptor.

The argument on behalf of the plaintiff is that once a cause of action has arisen in favour of a pre-emptor under the provisions of the Oudh Laws Act, he is entitled to maintain a suit in respect of it in spite of any change which might have taken place in the position of the plaintiff since. If we carry this to its logical conclusion a co-sharer who becomes entitled to acquire property by pre-emption would be entitled to claim a decree for pre-emption even though he might have sold away all the property which entitled

him to the right of pre-emption before the date of suit. If we examine the situation a little more closely a further absurdity would arise inasmuch as it is admitted by the learned Counsel for the plaintiff, respondent that if a co-sharer, who was entitled to a notice under section 10 of the Oudh Laws Act and has not received it, sells his interest to another person, such transferee acquires the same right of pre-emption which had accrued in favour of his vendee. This view is supported by the decision of the Full Bench in *Rai Gaya Prasad v. S. Faiyaz Husain* (1). This being so, will the original co-sharer and his transferees both have the same right? If it is said that in such a case the original co-sharer would lose his right, then what of the argument that the right which had once accrued in favour of the pre-emptor under the provisions of the Oudh Laws Act cannot be defeated by anything which takes place subsequent to the accrual of the cause of action.

Let us now examine the provisions of the Oudh Laws Act and see if there is anything in them to compel us to accept the plaintiff's contention. Section 9 of the Act lays down the order in which the right of pre-emption can be claimed by various classes of co-sharers, in other words, it lays down the qualifications which are required to be possessed by a pre-emptor in order to entitle him to a right of pre-emption. Section 10 provides for the issue of notice to all persons who are entitled to a right of pre-emption in the case of a proposed sale. Section 13 lays down that "any person entitled to a right of pre-emption may bring a suit to enforce such right on any of the following grounds", one of these grounds being that no due notice was given as required by section 10. The absence of necessary notice under section 10 is a ground on which a suit can be instituted, as distinct from the qualifications which entitle the pre-emptor

1931

MOHAMMAD
IBRAHIM
v.
ZAHUR
AHMAD.

*Raza
and Srisas-
tava, J.J.*

(1) (1929) I.L.R., 5 Luck., 12.

1931

MOHAMMAD
IBRAHIM
v.
ZAHUR
AHMAD.

Raza
and Srivas-
tava, JJ.

to maintain his action for pre-emption. These qualifications are to be found in the terms of section 9. The words "entitled to a right of pre-emption" as used in section 13, must in our opinion be construed as meaning entitled at the date of suit. This is the only construction consistent with the general principles to which reference has been made above. We are unable to see anything in the language of this section to justify the interpretation put by the plaintiff that a person entitled to a right of pre-emption at the date of sale may bring a suit to enforce such right even after he has ceased to be so entitled. We are therefore of opinion that both on the ground of principle and also on the terms of section 13 of the Oudh Laws Act, 1876, the plaintiff, in a suit for pre-emption, must show that he possessed the necessary qualifications not only at the date of sale but also at the date of suit.

Lastly turning to the case law we think that there is a large body of decisions in support of the view adopted by us. In *Janki Prasad v. Ishar Das* (1) a Full Bench of the Allahabad High Court held that in order that a suit for pre-emption may be successfully maintained, it is necessary not only that a cause of action should arise in favour of the pre-emptor at the time of the sale on which the suit is based but that such cause of action should subsist at the time when the suit is brought. This view has ever since been consistently followed in that Court. The same view was taken by a Bench of the Calcutta High Court in *Nuri Mian v. Ambica Singh* (2). It is no doubt true that these decisions were passed in suits for pre-emption based on Muhammadan law or on principles of justice, equity and good conscience. Our object in referring to them is to show that all the courts in this country whether administering Muhammadan law or statute law or principles of justice, equity and good

(1) (1899) I.L.R., 21 All., 374.

(2) (1916) I.L.R., 44 Cal., 47.

conscience are agreed that the determination of the rights of a plaintiff in a pre-emption suit must be based on his rights as they existed at the date of the suit. In this connection it might be pointed out that the Legislature in codifying the law of pre-emption in the Agra province has embodied this principle in section 19 of the Agra Pre-emption Act (XI of 1922) which goes the length of providing that the pre-emptor must have a subsisting right of pre-emption at the time of the decree.

It is matter of history that the law of pre-emption, as enacted in chapter II of the Oudh Laws Act, 1876, was borrowed mainly from law of pre-emption as enacted for the Punjab four years earlier by the Punjab Laws Act, 1872. Most of the provisions are identical in language and there is hardly any difference in principle in the law of pre-emption as it obtains in the two Provinces. In 1902 Punjab Record No. 32 it was held that the pre-emptive right of a co-sharer of land in joint holding does not subsist after partition at the application of the vendee. Again in a recent decision of the Lahore High Court in *Sewa Ram v. Azim Khan* (1) a bench consisting of Sir SHADI LAL, Chief Justice and Mr. Justice LE-ROSIGNAL held that in order to sustain a claim for pre-emption the plaintiff must prove, not only that at the time of the sale he possessed the qualifications which conferred upon him the right to pre-empt the property, but also that those qualifications subsisted at the time when the suit was brought.

Turning now to the case law in this Province we find that in *Tahawwar Khan v. Madho Ram* (2), it was held by Mr. PIGGOT, A. J. C. that the plaintiff in a pre-emption suit must be able to show a valid and subsisting title at the time when he brings his suit into court. The same view was adopted by a bench of the late Judicial Commissioner's Court consisting

1931

 MOHAMMAD
IBRAHIM
v.
ZAHUR
AHMAD.

*Raza
and Srivas-
tava, J.J.*

(1) (1923) 84 I.C., 610.

(2) (1908) 11 O.C., 290.

1931

MOHAMMAD
IBRAHIM
v.
ZAHUR
AHMAD.

Raza
and Srivastava, JJ.

of Messrs. EVANS and TUDBALL in *Amir Hasan v. Musammat Sardar Begam* (1). In this case they went a step further and held that the plaintiff pre-emptor must show a valid title on the date of the decree of the court of first instance. Again in *Kehri Singh v. Musammat Deo Kunwar* (2) another bench of the Judicial Commissioner's Court consisting of Mr. STUART and Pandit KANHAIYA LAL held that the right of a plaintiff to enforce pre-emption must exist not only at the time of the sale or foreclosure but also at the time of the institution of a suit to enforce that right. It may be pointed out that even in the Full Bench decision of this Court to which we have already made reference [*Rai Gaya Prasad v. Faiyaz Husain* (3)] two of the learned Judges constituting that bench seem to have been of the same opinion. Mr. Justice MISRA remarked as follows :—

“It has, however, been consistently held in the province of Oudh that although it is incumbent for a pre-emptor to show that he had a preferential right to purchase at the date of the sale, yet, if events have subsequently happened, which deprive him of this preferential right, he would not be entitled to a decree. This may happen in various ways, for instance, he may sell the property on the basis of the ownership of which he was entitled to pre-empt or by virtue of a subsequent partition, his share might be thrown in a patti or mahal other than that in which the share sold is situate.”

The observations of Mr. Justice PULLAN were to the following effect :—

“It may be considered too late at this stage to permit a plaintiff to claim pre-emption

(1) (1909) 12 O.C., 229.

(2) (1918) 5 O.L.J., 215.

(3) (1929) I.L.R., 5 Luck., 12.

in a suit when he has already lost his position as a co-sharer, because this view has been consistently held for a long period of years and on the principle of *stare decisis* it is inadvisable now to absolve the plaintiff from the necessity of proving at least that at the time of bringing the suit he is one of those persons entitled under the Oudh Laws Act to do so. Further than this I would not go."

1931

 MOHAMMAD
 IBRAHIM
 r.
 ZAHUR
 AHMAD.

*Raza
 and Srivastava, JJ.*

Thus if for no other reason, at least on the principle of *stare decisis*, we must abide by the rule consistently followed in this province, and hold that the determination of the rights of the plaintiff must be based not merely upon his position as a co-sharer at the date of sale but also upon the position of his co-sharership at the date of suit. It has already been pointed out that at the date of suit the plaintiff was only in the position of co-sharer under clause II of section 9.

The answer which we would therefore return to the question referred to the Full Bench is that the claims of the pre-emptor must be determined with reference to the position of his co-sharership not only at the date of sale but also at the date of suit and that the position claimed by the vendee must be determined only with reference to his position as a co-sharer at the date of sale.

HASAN, C. J. :—I have had occasion to consider the principle underlying the question which has been referred for opinion to this Bench as a Judge of the late Court of the Judicial Commissioner of Oudh, in *Sadiq Husain Khan v. Muhammad Karim* (1) and again as a member of this Court in *Rai Gaya Prasad v. Faiyaz Husain* (2).

(1) (1922) 25 O.C., 319.

(2) (1929) I.L.R., 5 Luck., 12.

1931

MOHAMMAD
ISRAHIM
v.
ZAHUR
AHMAD.

Raza
and Srivastava, JJ.

I have had the advantage of reading the common judgment of my learned brothers RAZA and SRIVASTAVA in this case. My learned brothers have accepted the decision of the Full Bench in the last-mentioned case to which I still adhere. I have therefore nothing more to say. My answer to the question is therefore the same as is given by my learned brothers.

PRIVY COUNCIL.

P. C.*
1932
January, 18.

SATGUR PRASAD (DEFENDANT No. 1) v. HAR NARAIN
DAS (PLAINTIFF).

[AND CROSS APPEAL]

[On Appeal from the Chief Court of Oudh.]

Mesne Profits—Date from which payable—Possession obtained under Deed—Fraud and Undue Influence—Fiduciary Relation—Concurrent Findings—Restitutio in integrum—Indian Contract Act (IX of 1872) section 65—Indian Trusts Act (II of 1882) section 88—Code of Civil Procedure (V of 1908) section 2 (12).

On the 5th of November, 1924, the defendant obtained possession of immoveable property under a deed by which the plaintiff transferred it to him subject to conditions. In a suit brought by the plaintiff in 1927 it was concurrently found that the deed had been procured by fraud and undue influence, and that the defendant was in a fiduciary relation to the plaintiff and had taken advantage of that relation.

Held, that under the concurrent findings, for disturbing which no ground had been shown, the plaintiff was entitled to recover the property with mesne profits from the 25th of November, 1924, not only from the date of the suit. The defendant was liable under the Indian Trusts Act, 1882, section 88 to pay mesne profits from the date when he took possession, receiving credit for sums which he had paid under the deed; if the matter had remained in contract he would have been similarly liable under the Indian Contract Act, 1872, section 65. Apart from the above statutory provisions the plaintiff having rescinded the transaction without delay was entitled in equity to an account of the profits upon the principle of *restitutio in integrum*.

Reg. v. Saddlers' Co. (1863) 10 H. L. C., 404; 11 E. R., 1083, and other English decisions, applied.

*Present: Lord BLANESBURGH, Sir GEORGE LOWNDES, and Sir DINSHAH MULLA.