APPELLATE CIVIL

Before Mr. Justice Bisheshwar Nath Srivastava and Mr. Justice Ziaul Hasan

ASHIQ ALI (DEFENDANT-APPELLANT) *v.* HINDPAL SINGH AND OTHERS (PLAINTIFFS-RESPONDENTS)* — 1934 *November, 28*

Transfer of Property Act (IV of 1882), section 55(2)—Sale—Indemnity clause in sale deed—Pre-emption—Buyer, if entitled to indemnity owing to loss of property by pre-emption—Intention of parties, how far a guide.

Where a sale deed provided that if on the claim being put forward by any one, part or whole of the property sold goes out of the possession of the vendee the vendee shall be empowered to realise through court his consideration money to the extent of the property gone out of possession and the sale was pre-empted, *held*, that it was not the intention of the parties that this indemnity clause should apply to a case of pre-emption and neither under section 55(2) of the Transfer of Property Act, nor under the terms of the contract could the buyer recover from the seller the difference between the price paid and the amount he got under the decree for pre-emption. *Khonmon Bibi* v. *Shah Mali* (1), *Sita Ram* v. *Nanak Chand* (2), *Kallan Singh* v. *Fazal Din* (3), *Ghulam Jilani* v. *Imdad Husain* (4), and *Musammat Ishro* v. *Naubat Rai* (5), referred to.

Mr. *Radha Krishna*, for the appellant.

Messrs. *M. Wasim* and *D. K. Seth*, for the respondents.

SRIVASTAVA and ZIAUL HASAN, JJ.:—Ashiq Ali appellant purchased 9 bighas odd of land in village Bhatgaon from one Mohammad Ahmad on the 5th of July, 1928, for a sum of Rs.3,500. On the 6th of November, 1928; he sold the same property to Suraj Bakhsh Singh, father of the present respondents, for Rs.3,600. Certain Baij Nath and Jagannath brought a suit for pre-emption in respect of the sale of the 5th of July, 1928 and impleaded Suraj Bakhsh Singh also as defendant. Their case

*Second Civil Appeal No. 156 of 1933, against the decree of Dr. Ch Abdul Azim Siddiqi, Additional Subordinate Judge of Lucknow, dated the 25th of February, 1933, modifying the decree of S. Akhtar Ahsan, Munsif, Lucknow District, dated the 16th of March, 1932.

(1) (1908) 4 I.C., 690. (2) (1925) 92 I.C., 313.
(3) (1926) 94 I.C., 1055. (4) (1882) I.L.R., 4 All., 357.
(5) (1933) A.I.R., Lah., 522.

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was that the real sale price of the property was Rs.2,200. The suit was contested by both Ashiq Ali and Suraj Bakhsh Singh, but it was decreed and the real sale consideration was held to be Rs.2,200 only. Thereupon Suraj Bakhsh Singh brought a suit in the Court of Munsif Havali, Lucknow, for recovery of Rs.1,400, the difference in the price which he paid to Ashiq Ali and that which was awarded to him by the pre-emption decree and for the costs which he incurred in defending the pre-emption suit. This suit was contested by the present appellant on various grounds, the chief of which was that he was not liable for the amount claimed by the plaintiff on account of the suit for pre-emption being decreed on payment of a lesser amount than the sale consideration. It was also contended that a portion of the consideration for the sale in favour of Suraj Bakhsh Singh was fictitious, but with this plea we are not now concerned. The learned Munsif held that the consideration for the sale in favour of the plaintiff was fictitious to the extent of Rs.520, and deducting this amount from Rs.3,600, he gave the plaintiff a decree for Rs.1,218-14, that is to say, for the difference between the sum of Rs.2,200 received by the plaintiff from the pre-emptors and the sums of Rs.3,080, the consideration paid by the plaintiff together with Rs.301-6, costs paid by the plaintiff to the pre-emptors, and Rs.37-8, costs incurred by the plaintiff in defending the pre-emption suit.

On appeal the learned Additional Subordinate Judge of Lucknow reversed the finding of the learned Munsif as to the inflation of the price recited in the sale deed in favour of the plaintiff and was also of opinion that the plaintiff was not entitled to the costs of the pre-emption suit. He held, however, that the defendant was liable to pay the difference between Rs.3,600, the consideration for the sale in favour of the plaintiff and Rs.2,200, the amount received by the plaintiff. The defendant has preferred this second appeal in which the

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only question for decision is whether or not he is liable to pay the difference between the price of the property received by him and the amount for which pre-emption was decreed in favour of Baij Nath and Jagannath against the respondents' father.

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The suit was based on two grounds, namely, (1) on sub-section (2) of section 55 of the Transfer of Property Act and (2) on certain terms of the sale deed executed by the defendant-appellant in favour of the respondents' father. Sub-section (2) of section 55 of the Transfer of Property Act runs thus:

> "The seller shall be deemed to contract with the buyer that the interest which the seller professes to transfer to the buyer subsists and that he has power to transfer the same."

In our opinion this sub-section does not apply to the present case inasmuch as it cannot be said that the interest which the appellant purported to sell to the respondents' father did not subsist at the time of the sale. Nor can it be argued for a moment that he had no power to transfer his interest. In fact, the learned counsel for the respondents has frankly conceded that sub-section 2 of section 55 of the Transfer of Property Act does not strictly apply to the present case.

The terms of the sale deed on which reliance has been placed by the respondents have been translated by the office as follows, and we think correctly:

> "If in future I or any of my heirs or representatives, or any other person may put forward any claim or right to the ownership of the property sold or the consideration money against the vendee, his claim in the face of this sale deed shall be deemed simply false before the presiding officer. If on the claim being put forward by any one, part or whole of the property sold goes out of the possession of the vendee, or the property sold be not held to be the property in ownership of me, the executant, or be found to have been transferred by me, the

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executant, or any legal flaw be found out—then under all these circumstances I shall be liable for every kind of defence and costs of suit and return of the consideration. The vendee is empowered to realise through court his consideration money to the extent of the property, gone out of possession from my other movable and immovable property of every kind as well as from my person with costs of suit. I and my heirs shall have no occasion to object to the payment thereof."

So far as the first portion of this clause is concerned it does not help the respondents at all. It only says that if the vendor or any of his heirs or representatives or any other person put forward any claim to the ownership of the property, or the consideration money, the claim would be deemed to be false. The rest of the clause is no doubt wide enough to cover the case of the property going out of the possession of the vendee by a suit for pre-emption, but we are of opinion that it was never the *intention* of the parties that this indemnity clause should apply to a case of pre-emption. The very fact, that it is stipulated that in the contingencies mentioned the vendor would be liable to return the whole or part of the consideration money in proportion to the extent of the property going out of the hands of the vendee shows clearly that the clause was not actually intended to cover the eventuality of the property being lost to the vendee by a pre-emption suit. Reliance has been placed by the learned counsel for the respondents on the cases of *Khonmon Bibi* v. *Shah Mali* (1), *Sita Ram* v. *Nanak Chand* (2), and *Kallan Singh* v. *Fazal Din* (3). On the other hand the learned counsel for the appellant relied on the cases of *Ghulam Jilani* v. *Imdad Husain* (4), and *Musammat Ishro* v. *Naubat Rai* (5). In all these cases the terms of the indemnity clause were different, but in

(1) (1908) 4 I.C., 690. (2) (1925) 92 I.C., 313.
(3) (1926) 94 I.C., 1055. (4) (1882) I.L.R., 4 All., 357.
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view of the particular words of the clause referred to above, we are of opinion that in this case it cannot be held that the intention of the parties was that the vendee should recover part of the purchase money if the property should go out of his hands by a suit for pre-emption. The provision that the vendee would be entitled to recover the purchase money proportionate to the property lost to him is significant. In the present case the whole of the property has gone out of the possession of the vendee by pre-emption, and on the terms of the indemnity clause the vendee should be deemed to be entitled to recover the entire purchase price, but that is not what the respondents' father himself claimed. He claimed only the difference between the price that he paid and that which he got from the pre-emptors.

It may also be noted that in the latter case of the Lahore High Court, namely, *Musammat Ishro* v. *Naubat Rai* (1), the terms of the indemnity clause were very wide, namely *"agar kisi nukhs-i-kanuni ya kisi wajah se jaidad mobaia bala mushtarian ke kabza se nikal jawe to kul zare beh tarikh nikal jane kabza mushtarian ko wapas undal (endul) talab ada karungi, jis ka moakhaza muziharra baya ki har kism jaidad wa zat-i-khas par hoga."*

It was held that the clause should be interpreted in a reasonable manner, and it was further said:

> "Now if the parties had in their mind the possibility of dispossession as a result of a pre-emption suit the plaintiff could not be expected to agree to any such condition. For, if the vendees were dispossessed of the land by a pre-emptor, the latter would have to pay purchase money or market price as found by the Court. There could therefore be no necessity for refund of the whole of the purchase money in that case."

These remarks apply in our opinion with full force to the case before us.

We are therefore of opinion that the defendant-appellant is not liable to pay any compensation to the

(1) (1933) A.I.R., Lah., 522.

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respondents. We therefore allow this appeal, and setting aside the decree of the learned Additional Subordinate Judge, dismiss the suit with costs in all the Courts.

Appeal allowed.

APPELLATE CIVIL

Before Mr. Justice C. M. King, Chief Judge and Mr. Justice Ziaul Hasan

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RAJA RAMANUJ BHAN BAKHSH SINGH (PLAINTIFF-APPELLANT) *v.* RANI MANRAJ KUER AND OTHERS (DEFENDANTS-RESPONDENTS)*

Oudh Estates Act (I of 1869), section 22—Oudh Settled Estates Act (V of 1917), sections 16, 17 and 22—Settled estates in Oudh —Will—Construction of wills—Taluqdar's bequest of both settled and unsettled estate in favour of his wife—Legatee described as "malik"—"Malik", whether imports absolute estate —Legatee's power of bequest and gift restricted—Adoption power given to legatee—Estate given, whether absolute or life-estate only—Bequest to widow of settled estate, validity of—Widow, how far capable of holding estate in accordance with provisions of Act of 1917—Power of transfer of widow—Indian Succession Act (XXXIX of 1925), sections 82 to 87—Interpretation of will by taluqdars—Presumption of absolute estate—'Stranger' in section 22(2) of Oudh Settled Estates Act, meaning of—Bequest of settled estate to person incapable of constituting fresh stock of descent, validity of—Bequest to widow conferring absolute estate—Bequest creating charges upon property and giving powers of bequest and gift to legatee—Widow takes absolute estate only.

In the interpretation of wills made by taluqdar, the Court must be guided by the rules of construction laid down in sections 82 to 87 of the Indian Succession Act, 1925, as those rules are applicable to bequests made by taluqdars.

In the wills executed by Indians the word *"malik"* imports full proprietary rights unless there is something in the context to qualify it. The mere fact that the donee or legatee is a Hindu woman does not suffice to displace the presumption of absolute ownership implied in the word *"malik"*. It is unnecessary that the power of alienation should be expressly

*First Civil Appeal No. 71 of 1932, against the decree of the Hon'ble Mr. Justice E. M. Nanavutty, Judge of the Chief Cou t of Oudh, dated the 2nd of March, 1932.