

APPELLATE CIVIL.

1928
July, 20.

Before Mr. Justice Muhammad Raza and Mr. Justice
Bisheshwar Nath Srivastava.

RAM UDIT (PLAINTIFF-APPELLANT) v. SHEO HARAKH AND
OTHERS (DEFENDANTS-RESPONDENTS).*

Pre-emption—Co-sharer vendee having a preferential right of pre-emption associating a stranger in the sale without specification of share of each—Pre-emptor's title to enforce his right in respect of the entire property against both vendees—Contract between vendees regarding their interest in the sale-deed or presumption regarding their shares, effect of—Absence of evidence that price was not fixed in good faith—Pre-emptor's right to obtain a decree on payment of price entered in the sale-deed—Market-value—Burden of proof of market-value.

If a sale-deed has been executed in favour of two persons, one of whom is a co-sharer and the other a stranger and there is no specification of the interests of each of the vendees then the sale-deed as it stands collectively in favour of the joint vendees is a transaction in respect of which the pre-emptor has a right of pre-emption, for the Oudh Laws Act affords no protection to such joint vendees. If the pre-emptor acting on the faith of the terms of the sale-deed as it stands institutes a suit his right cannot be defeated by any evidence subsequently led at the trial of the suit to prove the contract subsisting between the vendees *inter se* regarding their interests in the property or in the absence of evidence to that effect by any presumption which might then arise. The co-sharer-vendee having associated a stranger with himself in the sale-deed forfeits his rights as a co-sharer and he is in the same position as his co-vendee. The pre-emptor is, therefore, entitled to enforce his right of pre-emption in respect of the entire property against both the vendees.

In the absence of any evidence that the price had not been fixed in good faith the pre-emptor can get a decree only on payment of the sum entered in the sale-deed. If it is however, found that the price was not fixed in good faith

*Second Civil Appeal No. 384 of 1927, against the decree of E. M. Nanavutty, District Judge of Fyzabad, dated the 27th of September, 1927, modifying the decree of Shaikh Mohanmad Baqar, Additional Subordinate Judge of Sultanpur, dated the 27th of May, 1927.

the pre-emption can be allowed on payment of the market value.

The burden of proof of the market-value lies in the first instance upon the plaintiffs. If they fail to discharge it and the defendants produce no evidence upon which the court can ascertain the true market-value, the plaintiffs can only obtain a decree for pre-emption upon payment of the sum, if any, admitted by the defendant to be the market-value or failing that the sum mentioned in the deed. But they cannot in any case be compelled to pay more than the latter sum. *Wajid Khan v. Ratan* (1), *Aulad Husain v. Musammam Zainab-un-nisa* (2), and *Hubdar Singh v. Nankoo* (3), relied upon.

Messrs. *Haidar Husain* and *A. C. Mukerji*, for the appellant.

Messrs. *A. P. Sen*, *M. H. Kidwai* and *Ganpat Sahai*, for the respondents.

RAZA and SRIVASTAVA, JJ.:—This is a second appeal arising out of a suit for pre-emption. On the 21st of September, 1925, the defendants Nos. 3 to 5 sold the property in suit to the defendants Nos. 1 and 2 for Rs. 1,500. The plaintiff claimed to pre-empt the sale on the ground that the defendants Nos. 1 and 2 were strangers and he had a preferential right to buy the property. He also questioned the good faith of the price entered in the sale-deed. The vendee defendants pleaded that the defendant No. 1 was purchaser of half the property and that the defendant No. 2 of the other half; that defendant No. 1 was co-sharer in the mahal in which the property in suit was situate and had a preferential right as against the plaintiff. They also denied that the price entered in the sale-deed had not been fixed in good faith.

The trial court held that the defendant No. 1 had lost his preferential right by joining a stranger defendant No. 2 with him in the purchase. On the second point it held that the price had not been fixed in

(1) (1904) 7 O.C., 22.

(2) (1907) 10 O.C., 225.

(3) (1908) 6 O. C., 327.

1928
 RAM UDIT
 v.
 SHEO
 HARAH.

Raza and
 Bishesh-
 war Nath
 Srivastava
 JJ.

good faith and that the market-value of the property was only Rs. 150 taking into consideration the previous charge of Rs. 413. It, therefore, decreed the plaintiff's claim for pre-emption in respect of the entire property on payment of Rs. 150. The defendant No. 1 appealed. The learned District Judge decided that the defendant No. 1 did not lose his preferential right in respect of half the property purchased by him and that the plaintiff therefore could get a decree for pre-emption only in respect of the other half purchased by the defendant No. 2, who was a stranger. As regards the price also he disagreed with the finding of the trial court and held that the plaintiff had failed to prove that the price entered in the sale-deed was fictitious. He accordingly allowed the appeal and gave the plaintiff a decree only for half of the property on payment of Rs. 750. The plaintiff has come here in second appeal.

The first point requiring determination in the appeal is whether the defendant No. 1 who, it is now admitted, is a co-sharer with a preferential right as against the plaintiff, has lost his right by reason of his joining a stranger with himself in the purchase. The sale-deed dated the 21st of September, 1925, which forms the subject of pre-emption, does not contain any specification regarding the price paid by each of the two vendees or as regards their respective shares in the property purchased. The law applicable to such cases has been laid down in two Bench cases decided by the late court of the Judicial Commissioner, namely *Wajid Khan v. Ratan* (1) and *Aulad Husain v. Musammam Zainab-un-nisa* (2). The principle laid down in these cases was that if the share of the vendees is specified in the sale-deed then the pre-emptor could get a decree only against such of the vendees as were strangers; but

(1) (1904) 7 O.C., 22.

(2) (1907) 10 O.C., 225.

if the sale-deed does not contain any specification of the shares acquired by each of the vendees then the vendee who is a co-sharer loses his preferential right and the whole property is liable to pre-emption. The argument which has found favour with the lower appellate court is that under section 45 of the Transfer of Property Act it must be presumed that each of the two vendees had an equal interest in the property. We regret we are unable to accept the soundness of this argument. The presumption referred to in section 45 arises only in the absence of evidence of any contract to the contrary and in the absence of evidence regarding the share contributed by each of the vendees in the purchase price. A pre-emptor cannot be expected to know the contract existing amongst the co-vendees. He cannot be required to raise any such presumption which can arise only when the matter has been inquired into in a court of law. The pre-emptor when he institutes a suit for pre-emption can proceed only upon the terms of the sale-deed. If the sale-deed has been executed in favour of two persons, one of whom is a co-sharer and the other a stranger and there is no specification of the interests of each of the vendees then the sale-deed as it stands collectively in favour of the joint vendees is a transaction in respect of which the pre-emptor has a right of pre-emption for the Oudh Laws Act affords no protection to such joint vendees. If the pre-emptor, acting on the faith of the terms of the sale-deed as they stand, institutes a suit his rights cannot be defeated by any evidence subsequently led at the trial of the suit to prove the contract subsisting between the vendees *inter se* regarding their interests in the property or in the absence of evidence to that effect by any presumption which might then arise. We might also point out

1928

RAM UDAY
v.
SHEO
HARAKH.

Raza and
Bishesh-
war Nath
Srivastava
J.J.

1938
 RAM UDIT
 v.
 SHEO
 HARAKH.

Raza and
 Bishesh-
 war Nath
 Srivastava,
 JJ.

that the view of law taken in *Wajid Khan v. Ratan* (1) and *Aulad Husain v. Musammatt Zainab-un-nisa* (2) has, in spite of the provisions of section 45 of the Transfer of Property Act of which the learned Judges who decided those cases could not be ignorant held sway in this Province for about the last 25 years and even if we had any doubt about its correctness we should have been most reluctant to interfere with it on the principle of *stare decisis*. But as a matter of fact we are in entire agreement with the decisions referred to and consider the principle enunciated therein to be perfectly sound. We hold therefore that the defendant No. 1 having associated a stranger with himself in the purchase and there being no specification of their respective shares in the sale-deed has forfeited his right as a co-sharer. He is in the same position as his co-vendee. The plaintiff is therefore entitled to enforce his right of pre-emption in respect of the entire property against both the defendants Nos. 1 and 2.

The next point argued was regarding the amount of payment of which the plaintiff is entitled to get a decree for pre-emption. We agree with the learned District Judge that there is absolutely no evidence to show that the price had not been fixed in good faith. In the absence of such evidence the plaintiff can get a decree only on payment of the price entered in the sale-deed. There is another difficulty in the way of the plaintiff in this matter, namely that there is no evidence worth the name about the market-value of the property. Even if we were to assume that the price had not been fixed in good faith the plaintiff, in the absence of any evidence about the market-value, must pay the price entered in the sale-deed. As pointed out in the case of *Hubdar Singh v. Nankoo* (3) the

(1) (1904) 7 O.C., 22.

(2) (1907) 10 O.C., 225.

(3) (1903) 6 O. C. 327.

burden of proof of the market-value lies in the first instance upon the plaintiffs. If they fail to discharge it and the defendants produce no evidence upon which the court can ascertain the true market-value, the plaintiffs can only obtain a decree for pre-emption upon payment of the sum, if any, admitted by the defendants to be the market-value or failing that the sum mentioned in the deed. But they cannot in any case be compelled to pay more than the latter sum. In this case there is no admission about the market-value, so the plaintiff can get a decree only on payment of the price entered in the deed.

We therefore allow the appeal, modify the decree of the lower appellate court and grant the plaintiff a decree for possession of the entire property by right of pre-emption on payment of Rs. 1,500 within two months from today. If the amount is not paid into court within the time fixed, the decree shall become void and the plaintiff shall lose his right of pre-emption over the property to which the decree relates. The plaintiff shall get his costs from the defendants Nos. 1 and 2 in all the three courts, if he pays into court the sum of Rs. 1,500 as ordered by the court. If he fails to pay the amount as ordered and the decree consequently becomes void then he shall have to pay the costs of the defendants Nos. 1 and 2 in all the three courts.

Appeal allowed.

1928

RAM UDDI
2.
SHOO
HARAH.

Raza and
Bishesh-
war Nath
Srivastava,
JJ.