

APPELLATE CIVIL

Before Mr. Justice Bisheshwar Nath Srivastava and
Mr. Justice E. M. Nanavutty

MOHAMMAD ZAFAR (DEFENDANT-APPELLANT) v. MUSAM-
MAT TAJ BIBI AND ANOTHER, PLAINTIFFS AND OTHERS
(DEFENDANTS-RESPONDENTS)*

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Oudh Laws Act (XVIII of 1876), sections 9, 10 and 13—Pre-emption suit, guiding principle of—Pre-emptor, if must have title at dates of sale and also institution of suit—Acquisition of title during pendency of suit, whether of any avail—Chapter II, Oudh Laws Act, 1876, scope of—Rival claimants—Right to pre-empt part of property—Pre-emptor of part only of property sold, if possible.

A plaintiff pre-emptor must show a substituting title not only at the date of the sale-deed forming the subject of pre-emption but also at the date of the suit. Where, therefore, during the pendency of a pre-emption suit, a collusive suit is instituted in order to make out a case for substantiating the title of a pre-emptor and is decided by a compromise entitling him to claim pre-emption, the pre-emptor cannot derive any benefit under the compromise which is made subsequent to the institution of the pre-emption suit. *Gaya Prasad v. Faiyaz Husain* (1), and *Mohammad Ibrahim v. Zahur Ahmad* (2), followed.

There is no provision in the Oudh Laws Act for tendering part of the price or for pre-empting part of the property sold. Where, therefore, one of two rival claimants suing for pre-emption of property sold in two villages has pre-emption right in both villages, while the other has a preferential right to pre-empt the property in one village and not in the other, his suit must fail altogether, even though he acquires the right in the other village after the institution of the suit. *Birendra Bikram Singh v. Brij Mohan Pande* (3), followed.

Messrs. *Hyder Husain* and *Ganpat Sahai*, for the appellant.

Messrs. *Akhtar Husain* and *Rama Shankar*, for the respondents.

*First Civil Appeal No. 43 of 1934, against the decree of Pandit Kishen Lal Kaul, Subordinate Judge of Sultanpur, dated the 22nd of December, 1933.

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

(2) (1931) I.L.R., 7 Luck., 51.

(3) (1934) I.L.R., 9 Luck., 407.

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SRIVASTAVA and NANAVUTTY, JJ.:—On the 11th of April, 1932, Saiyid Mohammad Naim executed a sale deed in respect of certain plots of land in village Chak Shikra held by him in under-proprietary right and also certain plots held by him in superior proprietary right in Qasba Muafiat in favour of Saiyid Shaukat Ali and Sheikh Siraj-ud-din for a sum of Rs.15,000. On the 12th of April, 1933, the last day of limitation, two suits for pre-emption were instituted, one No. 14 of 1933, by Musammat Taj Bibi, her grand-daughter Musammat Hajra Khatoon, and one Sheikh Abdulla, father of one of the vendees Siraj-ud-din, and the other suit No. 18 by Mohammad Zafar. The plaintiffs in each of these two suits were impleaded as defendants in the other suit. Both suits were consolidated and tried together by the learned Subordinate Judge of Sultanpur. Mohammad Zafar in his suit pleaded that the price mentioned in the sale deed was not fixed in good faith and that the sale deed in suit having been executed with the knowledge and consent of Sheikh Abdulla the latter was estopped from suing for pre-emption. He further pleaded that Musammat Taj Bibi and Musammat Hajra Khatoon were debarred from suing as they had joined Sheikh Abdulla in bringing the suit. The main contest in the two suits was as to which of the rival plaintiffs had a better right to pre-empt.

The learned Subordinate Judge found that the price mentioned in the sale deed was fictitious and that the property had been sold for a sum of Rs.10,500 only. He further held that this amount was also the fair market value of the property in suit. The plea about Sheikh Abdulla being estopped was disallowed. As regards the rival claims of the several pre-emptors the conclusions arrived at by the learned Subordinate Judge were as follows:

"1. Taj Bibi has no right to pre-empt the property in suit in Chak Shikra but she has a right to pre-empt the property in dispute in Qasba Muafiat.

2. Hajra Khatoon has a right to pre-empt the property in dispute in both the aforesaid villages.

3. Sh. Abdulla has no right to pre-empt the property in suit in either of the two villages.

4. Mohammad Zafar has a right to pre-empt the property in suit in both the villages.

5. Hajra Khatoon being more nearly related to the vendor than Mohammad Zafar has a preferential right to pre-empt the property as against Mohammad Zafar."

As a result of these findings the learned Subordinate Judge decreed Hajra Khatoon's claim for pre-emption of the property in suit subject to the condition of her depositing in Court the sum of Rs.15,000 less Rs.10,000 which admittedly had not yet been paid to the mortgagee, in other words, Rs.5,000 only for payment to the vendees within three months. If payment was not made as ordered suit No. 14 of 1933 was to stand dismissed with costs of Shaukat Ali vendee and in that event Mohammad Zafar was to have the property in dispute on condition of his depositing in Court for payment to the vendees by the end of April, 1934, the sum of Rs.500 only, minus his costs of the suit. In case Mohammad Zafar failed to deposit the money as ordered his suit also was to stand dismissed.

Mohammad Zafar has appealed to this Court. He does not contest the preferential right of Hajra Khatoon to pre-empt the property in Qasba Muafiat as a co-sharer in the superior proprietary tenure in that village. His main argument is that Hajra Khatoon did not possess any under-proprietary interest in Chak Shikra at the date of the sale and had, therefore, no right to get a decree for pre-emption.

Exhibit A-10 is a copy of the under-proprietary khewat of Chak Shikra for 1337 Fasli. It shows the names of Munir Ahmad, Musammat Taj Bibi, Mohammad Zafar and Mumtaz Ali as co-sharers in the under-proprietary tenure of this village. The learned Subordinate Judge has found that although Hajra Khatoon's

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name is not recorded in the khewat of Chak Shikra yet she owned five plots of land, khasra nos. 3, 5, 11, 15 and 17 (aggregating 5 bighas 4 biswas in area) in this village as an under-proprietor. It is admitted that her under-proprietary rights in the village are confined to these plots. It is therefore necessary to give a short history in respect of these plots. Exhibit B-5 is a sale deed, dated the 16th of October, 1925, executed by Musammat Kaniz Saida, sister of Mohammad Zafar in respect of her 3 annas 6 pies share in certain specified plots in village Chak Shikra and Qasba Muafiat in favour of one Mumtaz Ali. These plots includes the five plots in question, namely Nos. 3, 5, 11, 15 and 17 of Chak Shikra. On the 30th of May, 1928, Mohammad Zafar made a mortgage with possession (exhibit 14) of his 12 annas 6 pies share in the identical plots mentioned in exhibit B-5 as well as some other land in favour of one Amirullah. The deed shows that the said plots stood previously mortgaged to Musammat Wallan, wife of Mumtaz Ali. Thus it will be seen that exhibits B-5 and 14 between them covered the whole of the aforesaid five plots. Yet we find that on the 16th of August, 1931, Musammat Taj Bibi executed a sale deed exhibit A-6 in respect of the same plots in favour of one Khair-un-nissa. About the same time Mohammad Naim brought a suit against Taj Bibi and her two minor grand-daughters Aisha Khatoon and Hajra Khatoon for a declaration that he was the exclusive owner of certain specified plots in several villages including the five plots in question in village Chak Shikra. This dispute was settled by means of a compromise (exhibit 16), dated the 9th of September, 1931. In this compromise it was agreed that Saiyid Fazal Husain, husband of Taj Bibi, having predeceased his father the defendants had no right in the property in suit but Mohammad Naim in view of his relationship with the defendants voluntarily gave them 22 bighas 5 biswas 11 biswansis land situate in

Chak Shikra, Chak Simra and Qasba Muafiat with all proprietary rights therein. This area of 22 bighas 5 biswas 11 biswansis includes 5 bighas 4 biswas in Chak Shikra made up of the five plots Nos. 3, 5, 11, 15 and 17. During the pendency of the present pre-emption suits a suit was instituted on the 12th of July, 1933, by Khair-un-nissa for recovery of possession of 5 bighas 4 biswas land purchased by her under the sale deed exhibit A-6. She complained in this suit of her having failed to get possession over the plots sold to her, and of mutation having been refused in her favour. Exhibit 23 is the plaint in this suit. This suit was also decided by means of a compromise exhibit 24, dated the 22nd of September, 1933. Under the terms of this compromise Musammat Khair-un-nissa relinquished her rights to the 5 bighas 4 biswas sold to her under exhibit A-6 and was given certain other lands in lieu thereof. The learned Subordinate Judge has held that the compromise decree exhibit 24 can be of no avail to Hajra Khatoon because it was passed subsequent to the institution of the pre-emption suits, but he was of opinion that she acquired a good title to the five plots in Chak Shikra under the compromise exhibit 16. Thus the whole question as regards the title of Hajra Khatoon as an under-proprietor in Chak Shikra reduces itself to a question of construction of the compromise exhibit 16. As we have already stated it is admitted that Hajra Khatoon has no interest in any other lands in village Chak Shikra except the aforesaid five plots. It is also not in dispute that these plots together with other lands in Chak Shikra were held in under-proprietary rights by the family, one branch of which is represented by Mohammad Zafar and the other branch by Mohammad Naim. Fazal Husain, the husband of Taj Bibi, was a son of Nazar Husain, the grandfather of Mohammad Naim. Admittedly Fazal Husain predeceased his father. He could not therefore have any interest in the under-proprietary lands in village Chak

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Shikra or in the plots in dispute. It follows that Fazal Husain's widow Taj Bibi and Taj Bibi's grand-daughter Hajra Khatoon could also have no right in the said plots on the ground of inheritance. This fact was admitted by Taj Bibi as well as by Hajra Khatoon in the compromise exhibit 16. In the circumstances the learned counsel for Hajra Khatoon has rightly conceded that her right to the plots in question rests on the grant made to Taj Bibi and her two grand-daughters by Mohammad Naim under the compromise exhibit 16. This compromise contains a clause to the effect that the 22 bighas 5 biswas 11 biswansis land given by Mohammad Naim "includes that land also in respect whereof a sale deed has been executed by defendant No. 1 in favour of Musammat Khair-un-nissa". It has been argued by the learned counsel for the respondent Khair-un-nissa that this clause is merely descriptive of part of the property included in the area of 22 bighas 5 biswas 11 biswansis. We are unable to accede to this argument. The property was sufficiently described by the khasra numbers and their areas as given at the foot of the compromise. This precise description being there, there was no need to make a reference to the sale deed in favour of Khair-un-nissa merely for the purpose of describing the property. In the circumstances it seems to us that there was no point in making this reference to the sale deed except with the intention upholding the said sale. The position at the time when this compromise was arrived at stood thus: Evidently Taj Bibi claiming title through her husband Fazal Husain made a sale of these five plots in favour of Khair-un-nissa. When Mohammad Naim brought his suit for a declaration of his title Taj Bibi felt constrained to concede that she had no right to the property in dispute as her husband had predeceased his father. When Mohammad Naim generously agreed to give 22 bighas 5 biswas 11 biswansis to Taj Bibi and her minor grand-daughters it was thought fit to include

in this area the five plots which had erroneously been transferred by Taj Bibi to Khair-un-nissa in order to make good Taj Bibi's obligations under the said sale. Although the sale deed exhibit A-6 was executed by Taj Bibi alone yet her grand-daughter Hajra Khatoon also was a party to the compromise and bound by its terms. The fact that Khair-un-nissa was not a party to the compromise does not appear to us to be a matter of any consequence, as our interpretation of the compromise exhibit 16 is that the grant of the 5 bighas 4 biswas land in Chak Shikra out of the 22 bighas odd given by Mohammad Naim was to enure for the benefit of Khair-un-nissa in order to uphold the sale deed exhibit A-6. It should also be pointed out that in upholding the sale they were only giving effect to the equitable rule of "the estate feeding the estoppel" which has also been embodied in section 43 of the Transfer of Property Act. We are therefore of opinion that although Taj Bibi and her grand-daughters Aisha Khatoon and Hajra Khatoon acquired a new title derived from Mohammad Naim in respect of 22 bighas odd land by means of the compromise exhibit 16, yet the 5 bighas 4 biswas land of Chak Shikra included in this area enured for the benefit of Khair-un-nissa in order to make good the sale which had been made in her favour by Musammat Taj Bibi. As Hajra Khatoon was a party to the compromise and is bound by it we are unable to agree with the learned Subordinate Judge that Hajra Khatoon retained a good title as under-proprietor of this area of 5 bighas 4 biswas land in Chak Shikra by virtue of the compromise exhibit 16 on the date of the institution of her pre-emption suit.

Next, as regards the effect of the compromise decree exhibit 24 in the suit which was instituted by Khair-un-nissa, we hold that there are good reasons to suspect that this was a collusive suit instituted in order to make out a case for substantiating the title of Taj Bibi and Hajra Khatoon in these pre-emption suits. It was instituted during the pendency of the pre-emption suits

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and was decided by means of a compromise within two months of its institution. In any case there are two Full Bench decisions of this Court, *Gaya Prasad v. Faiyaz Husain* (1), and *Mohammad Ibrahim v. Zahur Ahmad* (2), in which it has been held that a plaintiff pre-emptor must show a subsisting title not only at the date of the sale deed forming the subject of pre-emption but also at the date of the suit. The learned counsel for the respondent also does not dispute the correctness of this proposition. Hajra Khatoon cannot therefore derive any benefit by the relinquishment of her rights by Khair-un-nissa under the compromise exhibit 24 which was made subsequent to the institution of the pre-emption suits. Thus we are of opinion that Hajra Khatoon has failed to substantiate her title as an under-proprietor in respect of 5 bighas 4 biswas land in Chak Shikra at the date of the institution of the pre-emption suits. She had therefore no right to pre-empt the property in suit in Chak Shikra. No doubt her preferential right to pre-empt the property in Qasba Muafiat is not denied, but it has recently been held by their Lordships of the Judicial Committee in *Raja Bivendra Bikram Singh v. Brij Mohan Pande* (3), that there is no provision in the Oudh Laws Act for tendering part of the "price aforesaid" or for pre-empting part of the property proposed to be sold. We have already pointed out that the lower Court has held that Mohammad Zafar has a right to pre-empt the property in suit in both the villages, and this finding has not been challenged before us. The result therefore is that the suit of Hajra Khatoon must fail altogether.

Another point which was sought to be argued by the learned counsel for Mohammad Zafar was that the suit of Hajra Khatoon No. 14 of 1933 was not a *bona fide* suit. This matter had formed the subject of issue No. 5 in the trial Court. The issue was decided against the appellant. The correctness of the finding on this

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

(2) (1931) I.L.R., 7 Luck., 51.

(3) (1934) L.R., 61 I.A., 235; I.L.R., 9 Luck., 407.

issue was not questioned in the grounds of appeal filed in this Court, but an application was made to us at the hearing of the appeal for permission to add a new ground challenging the correctness of the finding on issue No. 5 in the memorandum of appeal. Simultaneously with this a request was also made for reception of some additional evidence alleged to have come into existence subsequent to the decision by the lower Court. In view of the conclusion reached by us as regards the title of Hajra Khatoon we do not think it necessary to pass any orders on these applications.

For the above reasons we allow both the appeals and dismiss the claim of Hajra Khatoon, but in the circumstances make no order as to costs against her. The claim of Mohammad Zafar will be decreed on payment of Rs.500 minus his costs of suit No. 18 of 1933 and his costs of this Court in appeal No. 45 of 1934. As these costs exceed the sum of Rs.500 therefore Mohammad Zafar is not required to deposit any amount in Court and is given a decree for pre-emption of the entire property in suit without making any deposit. He will be entitled to recover the amount of such costs payable to him as are in excess of the sum of Rs.500 by execution against the vendee.

Appeal allowed.

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*Before Mr. Justice Bisheshwar Nath Srivastava and
Mr. Justice E. M. Nanavutty*

RAJA RAM (DEFENDANT-APPELLANT) v. THAKUR RAMESH-
WAR BAKHSH SINGH AND OTHERS, PLAINTIFFS AND
OTHERS (DEFENDANTS-RESPONDENTS)*

Transfer of Property Act (IV of 1882), section 59—Evidence Act (I of 1872), section 70—Mortgage suit—Execution of mortgage deed admitted by executant—Attesting witness not produced—Deed, if sufficiently proved—Limitation—General

*First Civil Appeal No. 4 of 1934, against the decree of Pandit Bishunath Hukku, Subordinate Judge of Bahraich, dated the 20th of September, 1933.

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