APPELLATE CIVIL

Before Mr. Justice A. H. de. B. Hamilton and Mr. Justice Radha Krishna Srivastava

1939 July, 26

ABDUL HAFIZ (PLAINTIFF-APPELLANT) *v.* MANOHAR LAL AND OTHERS (DEFENDANTS-RESPONDENTS)*

Pre-emption—Plaintiff alleging himself to be a co-sharer—Defendant simply denying—Entry of plaintiff's name in khewat, whether prima facie *proof of plaintiff's title—Sale of half property for financing litigation for its recovery—Sale, whether of doubtful right and not pre-emptible—Oudh Laws Act (XVIII of* 1876), *section* 7*—Mesne profits for years previous to sale, whether pre-emptible—Every property included in a sale deed not pre-emptible—Suit for pre-emption fails if everything sold under sale deed is not pre-emptible—Second appeal—Question of law, if can be raised for first time in second appeal.*

If a plaintiff sues for pre-emption on the ground that he is a co-sharer in a mohal or a village and there is a bare denial or non-admission by the defendant, such denial means nothing more than a denial that the plaintiff was entered as a co sharer in the village. If it was intended to be a denial of the possession of any proprietary title by the plaintiff, there should have been a specific denial such as is contemplated by order 8, rules 4 and 5. In such a case an entry in the khewat is *prima facie* evidence that there is an existing title and the objection of the defendant is met by the entry in the khewat. *Mst Bhagwani Kunwar* v. *Mohan Singh* (1), and *Ram Partap Misra v Brij Prasad* (2), distinguished.

Where the owner of a property died issueless and another person took possession of his property claiming to be his adopted son which was denied by the defendant who claimed to be his rightful heir and the defendant in order to finance the necessary litigation sold a half share of the estate of the deceased to another and in the suit by the defendant and his vendee for recovery of the property there was a compromise by which they got 7/12ths of the property and the other party got 5/12ths and then the present plaintiff brought a suit for pre-emption against the defendant and his vendee in respect of their sale-deed and the defence was that as the title of the vendor was doubtful no right of pre-emption arose, *held*, that

*Second Civil Appeal No. 391 of 1936, against the decree, dated the 6th August, 1936, of Mr. Kishan Lal Kaul, Civil Judge, Fyzabad, upholding the decree dated the 13th January, 1936, of Mr. Data Ram Misra, Munsif, Havali, Fyzabad.

(1) (1925) A.I.R., P.C., 192. (2) (1913) 18 I.C., 386.

the fact that the defendant contented himself with 7/12ths of the whole is no reason for presuming that his title was doubtful so as to justify rejection of the plaintiff's claim for pre-emption. *Abdul Wahid Khan* v. *Shaluka Bibi* (1), *Mirza Mohammad Abbas Ali, Khan Bahadur* v. *A. Quieros* (2), *Raj Bahadur* v. *Jagrup Pande* (3), *Babu Lal* v. *Ali Ahmad Khan* (4), *Jiyaoo Singh* v. *Jageshar Singh* (5), and *Gajadhar Prasad* v. *Manrakhan* (6), referred to.

When a question of law is raised for the first time in a court of last resort upon the construction of a document or upon facts, either admitted or proved beyond controversy it is not only competent but expedient in the interests of justice to entertain the plea. Where, therefore, the point is raised for the first time in Second Appeal that everything sold by the sale-deed, which was the subject of pre-emption, could not be pre-empted, the plea must be allowed to be raised. *Official Liquidator of M. E. Moola Sons Ltd.*, v. *Perin R. Burjorjee* (7), and *Connecticut Fire Insurance Co.* v. *Kavanagh* (8), followed, and *Ram Kinkar Rai* v. *Tufani Ahir* (9), referred to.

Past mesne profits are not pre-emptible under the Oudh Laws Act.

Where a sale-deed of land and houses, which could be pre-empted, also includes past mesne profits, which are not pre-emptible, the position is that all that is sold under the sale-deed cannot be pre-empted and as the law does not allow pre-emption of a part only, so the suit for pre-amption must fail. *Birendra Bikram Singh* v. *Brij Mohan Pande* (10), relied on.

Messrs. *Hydar Husain* and *H. H. Zaidi*, for appellant.

Mr. *Ram Prasad Verma*, for respondent No. 1.

Mr. *S. N. Srivastava*, for respondent No. 6.

HAMILTON and RADHA KRISHNA, JJ.:—This is an appeal by one Abdul Hafiz whose original suit No. 113 of 1935, was dismissed and whose appeal No 17 of 1936, in the Court of the Civil Judge of Fyzabad was also dismissed.

Abdul Hafiz's suit was for pre-emption of property which purported to have been sold on the 5th May, 1934, by Rahat Ali and his son Mohammad Ali to

(1) (1893) I.L.R., 21 Cal., 496 (2) (1906) 9 O.C., 86.
(3) (1917) 20 O.C., 249 (4) (1932) 25 O.C., 253.
(5) (1929) I.L.R., 4 Luck., 185. (6) (1921) 8 O.L.J., 403
(7) (1932) A.I.R., P.C., 118. (8) (1892) A.C., 473.
(9) (1930) I.L.R., 53 All., 65 (F.B.) (10) (1934) I.L.R., 9 Luck., 407 P.C.

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Manohar Lal the main contesting respondent though Mohammad Ali has also contested this appeal.

Zafaruddin and Mst. Kaniz Fatima, the latter being the mother of Rahmat Ali, were the children of Fakhruddin, great-grand-son of Wali Mohammad. Rahat Ali was a great great-grand-son of Wali Mohammad, in another branch Zafaruddin and Rahat Ali being descended through males from the common ancestor Wali Mohammad. On the 10th January, 1930, Zafaruddin died issueless and Rahmat Ali took possession of his property claiming that he was an adopted son. Rahat Ali denied the claim of Rahmat Ali and alleged that he was entitled as residuary to all the estate of Zafaruddin. To finance the necessary litigation he with his son Mohammad Ali, who really had no title, executed on the 5th May, 1934, a sale-deed in favour of Manohar Lal and it is clear that this sale-deed sold half the estate of Zafaruddin to Manohar Lal. Rahat Ali and his son Mohammad Ali as vendors together with their vendee Manohar Lal sued Rahmat Ali and there was a compromise on which was based the decree Ex. A-12 dated the 15th March, 1935, by which those plaintiffs, that is, to say, the vendors and the vendee got seven-twelfths of the property and Rahmat Ali got five-twelfths. Apart from the landed property this decree dealt also with two houses and mesne profits. On the 8th May, 1935, Abdul Hafiz filed this suit for pre-emption based on the sale-deed of the 5th May, 1934. He alleged that he was a co-sharer of superior proprietary rights in Mohal Ramzan Ali in the village where the land of Zafaruddin was situated.

The courts below dismissed the suit on the ground that the plaintiff had not proved that he was a co-sharer in that mohal and also on the ground that the deed in suit did not give rise to a right of pre-emption because the title of the vendors was clearly doubtful. We have already stated that the plaintiff based his right to pre-empt on the fact that he was a co-sharer in a different

mohal of the village where the property in suit was situated. Mohammad Ali in answer to paragraph 1 stated that it was denied and Manohar Lal the purchaser stated that it was denied subject to additional pleas, but no additional pleas deal with this matter. The only issue which can be held to deal with this allegation is issue 1 which runs as follows:

> "Which of the plaintiffs or defendants 4 to 6 have got preferential right, if any, to pre-empt the property in suit?"

The decision went against the plaintiff on this issue because although he was recorded as a co-sharer, the court held that the entry in the khewat does not establish title and there was no other evidence. In our opinion, considering paragraph 1 of the plaint and the contents of the written statements in reply to this paragraph, we think that defendants never at the time of the written statement meant to assert that although the plaintiff's name was entered in the khewat in reality he had no title.

The lower appellate court has depended, especially for its decision, on *Ram Partap Misra* v. *Brij Prasad* (1), a decision of the Additional Judicial Commissioner of Oudh. The names of the plaintiff's in that case were recorded in the village papers as being in possession of their share in the village but it was held:

> (1) that the burden of proving that the plaintiffs were co-sharers lay on them;
>
> (2) that the mere fact that their names were entered in the revenue papers was not sufficient to constitute them co-sharers within the meaning of that expression as used in the Oudh Laws Act, mere mutation of names in the absence of proprietary title being no proof of ownership.

The learned Judge has also referred to *Mst. Bhagwani Kunwar* v. *Mohan Singh* (2), where it was stated that the fact of a person's name being entered in the Collector's book as an occupant of land does not necessarily

(1) (1913) 18 I.C., 386. (2) (1925) A.I.R., P.C., 152.

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of itself establish that persons title. We are aware that the khewat is not a book where titles are registered, for possession has to be prominently considered. As regards *Ram Partap Misra* v. *Brij Prasad* (1), it is clear that there was a contention there that the plaintiffs had not proved that they succeeded to the property left by one Mst. Sukh Dei merely because they had got their names entered in the khewat. It was distinctly pleaded that they were not co-sharers and it appears to us that the meaning of "distinctly pleaded" was that there had been a distinct assertion that they were not the heirs of Mst. Sukh Dei. That decision must not be taken to mean that if a plaintiff sues for pre-emption on the ground that he is a co-sharer in such a mohal or in such a village and there is a bare denial or non-admission by the defendant it is his duty to bring evidence beyond the contents of the khewat, generation after generation, until one reaches some document showing transfer or until one reaches the first settlement to show title. In our opinion, the denial contained in the written statements was meant to be nothing more than a denial that the plaintiff was entered as a co-sharer in this particular village. If it was intended to be a denial of the the possession of any proprietary title by the plaintiff, there should have been a specific denial such as is contemplated by order 8, rules 4 and 5. The ground on which issue 1 was decided shows the unfortunate results of vague pleadings and vague issues—issues which can be turned to include a multitude of defences where the plaintiff is given no opportunity of knowing what is admitted by the defendant and what is left for him to prove.

It has repeatedly been held that an entry in the khewat is *prima facie* evidence that there is an existing title. In this case, however, we go further than that and say that we can only read the pleadings to which we have referred, (and further the oral pleadings of defendants' counsel of the 16th October, 1935, that the plaintiff was not a

(1) (1913) 18 I.C., 386.

co-sharer in mohal Zafaruddin), as an objection that the plaintiff was not a recorded co-sharer. As regards this oral pleading we may further note that it was never the case of the plaintiff that he was a co-sharer in mohal Zafaruddin where the property in suit is, and this oral pleading was unnecessary in view of the ground on which the plaintiff based his claim for pre-emption.

In our opinion the plaintiff has met the objections made by the defendant in their written statments and the suit should not have been dismissed on this ground.

Passing now to the second ground on which the suit was dismissed, we have again to say that there was vagueness both in the written statement and in the issues and it appears to us as if the defendants somewhat changed their position. The only issue that deals with this point is no. 6—"does the deed in suit give rise to a right of pre-emption." Obviously a number of defences might be raised as coming within this issue. The objection of defendant Mohammad Ali is embodied in paragraph 11 of his written statement:

"keeping in view the facts mentioned above, the deed, the basis of the suit, is not a deed of such nature as to give rise to a suit of pre-emption."

When we seek to finding out exactly what were the facts mentioned above, they are that the real agreement between the parties was that whatever property which formed the estate of Zafaruddin was to be secured in the suit brought against Rahmat Ali, would be divided in halves of which one would go to Manohar Lal the vendee and the other half would go to Rahat Ali the vendor. The written statement of Manohar Lal is to the effect that the deed which is the basis of the suit was executed in lieu of Rs.2,500 for transfer of an "actionable claim". As explanation why this deed is to be regarded as only a transfer of an "actionable claim" we have only the statement that Rahat Ali was not in possession of the property left by Zafaruddin and was not in a financial position to bring a suit so

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that he had to get hold of Manohar Lal in the suit. The objection of Mohammad Ali was, therefore, really that this deed was superseded by an agreement that only what would be decreed in the suit against Rahmat Ali would be divided in equal shares and not the property left by Zafaruddin. We deduce from this that the defendants meant that there could be no pre-emption because there was no sale of property *in præsenti* but the sale of a share in a law suit, and there is an implied reference to *Abdul Wahid Khan* v. *Shaluka Bibi* (1), where the words are used in a judgment of their Lordships of the Privy Council. It does not in itself suggest that there was doubt in the title of Rahat Ali but only that possession could not be secured without litigation. We would here note that the learned counsel for Mohammad Ali tells us that he insisted on this part of his case that Manohar Lal was only entitled to half of the property which he and his vendors would get, namely, one half of 7/12ths as granted by a decree on a compromise in the suit they brought against Rahmat Ali. We find no reference to this in the judgment of the court below and there is no issue which covers this point. There should have been an issue with a decision on it, or if the issue was left undecided, with a mention of this fact, because we do not now know whether this point, though raised in the pleading, was dropped at once or whether it was in fact urged by counsel for this appellant but was not taken into consideration by the courts below. The written statement of Manohar Lal does not make clear why the deed should be regarded as a transfer of an "actionable claim", but it seems to us to have the same meaning as the one it bears in the statement of Mohammad Ali.

The trial court referred to *Abdul Wahid Khan* v. *Shaluka Bibi* (1), to *Mirza Mohammad Abbas Ali, Khan Bahadur* v. *A. Quieros* (2), to *Raj Bahadur* v. *Jagrup Pande* (3), and to *Babu Lal* v. *Ali Ahmad Khan* (4), and found that the vendors were out of possession,

(1) (1893) I.L.R., 21 Cal., 496.
(2) (1906) 9 O.C., 86.
(3) (1917) 20 O.C., 249.
(4) (1922) 25 O.C., 258

and at the most they had a claim to recover that property from third parties in possession on an alleged good title, and the title of the vendors was clearly doubtful and the sale under the circumstances was clearly a sale of a law suit and as such gave rise to no right of pre-emption. The rulings quoted are not all really on the same point. In *Abdul Wahid Khan* v. *Shaluka Bibi* (1), the facts were that a lady Shaluka Bibi claimed certain property as inheritance and dower and not having enough money to pay the costs of litigation and personal expenses she sold *a share of whatever she might obtain if the suit was successful* to her brothers who agreed to pay all costs of the litigation and her personal expenses. The approximate value of the property and dower to the extent of a moiety share sold was considered to be Rs.10,000. Their Lordships of the Privy Council found that the plaintiff was not entitled to pre-empt because he denied the title of the vendor and further because the consideration was the providing the money necessary for carrying on the suit, the amount of which could not be estimated. If the defendants succeeded and the suit was dismissed there would have been no property to be sold. In truth the transaction was a sale of a share in a law suit. To rely on this decision the learned Judge would have had to consider whether the consideration in this case was similar to that one and whether the property sold was to be whatever the present respondents would get and not a definite share of the property left by Zafaruddin but the learned Judge has not done this. It was not contended in the written statement, that the consideration for the sale-deed was uncertain and, therefore, the would-be-pre-emptor could not pay the real consideration and, therefore, he was not entitled to pre-empt. On the pleadings what had to be decided was whether there was a sale of property *in præsenti* for a certain sum of money, or whether there was sale of an unknown part of the property of Zafaruddin which would only

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become certain when the suit against Rahmat Ali was decided for an uncertain amount of money which was not the amount actually stated in the sale-deed but something else which depended on what the vendor might have to pay in the prosecution of the suit. The second point does not appear to us to have been pressed and the first point is settled by the sale-deed, if that alone has to be considered, for the sale-deed makes it perfectly clear that half the property of Zafaruddin was sold. Doubt was raised as to this by Mohammad Ali and he said that the agreement was really different, and whether counsel urged this or not it was certainly not decided by the courts below. It appears to us, therefore very doubtful whether the second point on which the lower appellate court has decided the suit really arises from what was stated in the written statements but we will consider it from this point of view too.

It has been held in *Jiyaoo Singh* v. *Jageshar Singh* (1), that when considering the question of whether there is a sale of a doubtful right no definite rule can be laid down for determining in what cases such a right must be held to be doubtful. The mere circumstance that a person is out of possession is not enough to make a right doubtful. In *Gajadhar Prasad* v. *Manrakhan* (2), this had also been said and the result of the litigation which afterwards took place was relied upon showing that the vendor had good title to the property.

In the present case Rahat Ali did get 7/12ths by means of a compromise and the fact that he sued for the whole property is no proof that he had no title to the remaining 5/12ths. People who have good title not infrequently prefer to compromise because the expenses of further litigation may make it expedient for them to accept less than all what they are entitled to. In this case the pedigree put forward by Rahat Ali contained a pedigree now given by the appellant and on this pedigree Rahat Ali was entitled to the property of

(1) (1929) I.L.R., 4 Luck., 185. (2) (1921) 8 O.L.J., 408.

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Zafaruddin, and it was the claim of Rahmat Ali that he was entitled to the property of Zafaruddin that was a weak one. The learned Judge has held that the title was doubtful firstly on the fact that Mohammad Ali, one of the vendors, had not title but only his father had. His father was vendor with him and the fact that the son had no right in the property cannot in any way make the title of the father doubtful. The other reason for finding the title doubtful was that Zafaruddin had stated in a mortgage-deed that Rahmat Ali, his sister's son, was his heir. Of course, he was not his heir under Mohammadan Law, and a wrong statement of the law by Zafaruddin could not in any way make the title of Rahat Ali doubtful. We have already shown why the fact that Rahat Ali contended himself with 7/12ths of the whole is no reason for presuming that his title was doubtful. We do not find, therefore, that the title was doubtful to the extent that is necessary to justify a rejection of the plaintiff's claim for pre-emption.

The learned counsel for the respondents has referred us to various cases referring to suits decided on this point, but we have not found that in any of them the facts were so similar to those in the present case as to enable us to disregard what we have already quoted that every case of the kind must be judged on its own facts.

Had these been the only two points to be considered in this appeal we would have allowed it, but there is one point which is fatal to the appellant and it is that everything sold by this sale-deed cannot be pre-empted, and in view of *Birendra Bikram Singh* v. *Brij Mohan Pande* (1), the appeal must fail. This objection raised by the learned counsel for the respondents has undoubtedly been first taken in this Court, that is, at a very late stage in the litigation. The learned counsel relying on *Ram Kinkar Rai* v. *Tufani Ahir* (2),

(1) (1934) I.L.R., 9 Luck., 407 P.C. (2) (1930) I.L.R., 53 All., 65 (F.B.)

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has argued that it is too late for us to consider this point. Undoubtedly it was there held that a point not taken in the court below will not be permitted to be raised, except possibly when the point is

(1) involving jurisdiction,

(2) involving the principle of *res judicata*,

(3) prevent future litigation,

(4) or where the plaint discloses no cause of action or the written statement no ground of defence.

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There has, however, been a later decision of their Lordships of the Privy Council reported in the *Official Liquidator of M. E. Moola Sons, Ltd.*, v. *Perin R. Burjorjee* (1). The point of law raised there was a certain document had not been registered and was thereby invalid and inoperative. This point had not been raised in the lower courts, but their Lordships allowed it to be raised and referred to *Connecticut Fire Insurance Co.*, v. *Kavanagh* (2) where Lord WATSON in delivering judgment of their Lordships stated that—

> "When a question of law is raised for the first time in a court of last resort upon the construction of a document or upon facts, either admitted or proved beyond controversy it is not only competent but expedient in the interests of justice to entertain the plea."

We think that in view of this decision we cannot but allow the plea to be raised.

In this sale-deed a share in land was sold, a share in houses was sold and a share in mesne profits for the current and for past years. Undoubtedly the land comes within section 7 of the Oudh Laws Act and we think the houses too, but we are unable to hold that past mesne profits also come in. Under section 7 the right of pre-emption shall be presumed, and to extent to the village site, to the houses built upon it, to all lands and shares of lands within the village boundary, and to all transferable rights affecting such lands. Mesne profits

(1) (1932) A.I.R., P.C., 118. (2) (1892) A.C., 473.

are obviously neither land nor shares of lands and they can only, therefore, be subject to pre-emption if they are transferable rights affecting such lands. We find it difficult to say what meaning should be attached to the word "affecting", but it certainly cannot be wider than the words "arising from". These transferable rights under section 7 would then be rights derived from the ownership of land and enjoyed by the owner of the land. Presuming that mesne profits may be treated as profits, under section 55 of the Transfer of Property Act it is laid down that the seller of immovable property is entitled to the rents and profits of the property till the ownership thereof passes to the buyer. Profits would, we think, be transferable rights arising from the land and would, therefore, be pre-emptible under section 7 of the Oudh Laws Act. If such rights arising from land are transferable rights affecting such land they would, however, only pass to the buyer from the date of the sale, and rights prior to the date of the sale would belong to the then owner of the property *qua* owner and not to the vendee for at that time he was not owner of the land. In other words, had this sale not mentioned past mesne profits the vendee could not have claimed them as having passed to him because he had bought the land as to which these rights had arisen, and to transfer these rights it was necessary specifically to mention them in the sale-deed. Such past mesne profits are not pre-emptible under the Oudh Laws Act and the appellant, therefore, finds himself in the position that he cannot pre-empt. all that was sold under the sale-deed and the law does not allow him to pre empt a part only. Consequently, on this ground his appeal must fail.

We accordingly dismiss the appeal.

As regards costs the parties shall bear their own costs because the appellant would have succeeded had not this plea been raised in this Court.

Appeal dismissed.