

1924
 ALLAN
 BROTHERS
 & Co.
 v.
 SHAIK
 JOOMAN
 SONS & Co.
 ROBINSON,
 C.J.

The provisions of sections 52 and 53 of the Presidency-Towns Insolvency Act also apply in favour of the appellant.

The mortgage was ordered prior to the adjudication; the appellant has never lost the right to have that order executed in his favour; and this appeal must be accepted, and the insolvent must execute the mortgage as directed, and, on his failure to do so, the Court will order the mortgage to be executed.

As to costs, the respondent must pay the appellant's costs of this appeal. Advocate's fee will be fixed at five gold mohurs.

BAGULEY, J.—I concur.

APPELLATE CIVIL.

Before Mr. Justice Young.

MAUNG MAUNG AND ONE,

v.

MAUNG SHWE GOE AND TWO.*

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 Sep. 10.

Buddhist Law—Pre-emption—Offer made to co-heirs before offer to a stranger, whether sufficient.

Held, that in a case of pre-emption, it was sufficient for the vendor to offer the property to his co-heirs and then on refusal to sell it to a stranger; and that he was not bound, having offered it to a stranger, to offer it again to his co-heirs at the same price.

Gobind Dayal v. Mayatullah, 7 All. 775; *Ma Ngwe v. Lu Bu*, S.J., 76; *Maung Shwe Nyan v. Ma So* (1897-01), 2 U.B.R., 155; *Nga Myaing v. Mi Baw*, S.J., 39; *Ye Nan O v. Aung Myat San*, 8 B.L.T., 167—*referred to*.

May Oung's Leading Cases on Buddhist Law; Sparks' Code of Buddhist Law—*referred to*.

McDonnell—for the Appellants.

Anklesaria—for the Respondents.

YOUNG, J.—The only question raised in this appeal was whether, in a case of pre-emption, it was sufficient

* Special Civil Second Appeal No. 442 of 1923 from the decree of the District Court of Mergui in Civil Appeal No. 54 of 1923.

for the vendor to offer the property to his children and then on refusal to sell it to a stranger at the same price, or whether he was bound having offered it to a stranger to offer it again to his children at the same price.

In section 97 of Part 2 of what is known as Sparks' Code, the correct title of which is Civil Code of the Province of Pegu sanctioned by resolutions of His Honour the President in Council recorded on the 4th November 1859 and 17th January 1860 and which Sir Charles Fox, C.J., in the Full Bench case of *Ye Nan O v. Aung Myat San* (1), laid down was at the time equivalent to legislation and professed to be a Code of Burmese Law and the *lex loci*, we read that if a person wished to sell his share in an undivided ancestral estate, he should first offer it to all the co-heirs.

In *Nga Myaing v. Mi Baw* (2) Sandford, J.C., held as follows: "A sharer in undivided ancestral property, if he wishes to sell his share must first offer his share to his co-heirs and consequently a sale to strangers effected without such offer is invalid if the co-heirs promptly assert their rights.

In Upper Burma the same view of the law was taken by Thirkell White, J.C., who held that if a person wishes to sell ancestral property, whether it had been divided or not, he must first offer it to his co-heirs before offering it to strangers (3).

May Oung, J., in his work on Buddhist Law at page 150, says, "If an heir wishes to sell, he must first offer the property to his co-heirs: if he should sell it without making such offer, the co-heirs may, if they claim with reasonable promptitude, recover

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(1) (1915) 8 B.L.T., 167, 171.

(2) (1874) S.J., 39; see also (1877) S.J., 76.

(3) (1897-01) 2 U.B.R., 155.

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it by paying the same price as that paid by the purchaser."

The learned author however goes on to say, "One other possible argument in favour of the present Lower Burma view seems to have been missed. It is only when an estate is undivided that the advent of a stranger into the group of co-owners is really objectionable. For instance the estate may consist of a family dwelling house—if a stranger were to acquire the right of a co-owner, he might insist on occupying at least a portion of it: or if it were cultivable land, the stranger might not agree to lease it to a person chosen by the members of the family or to accept a certain rental These and other difficulties might arise to the annoyance and discomfort of the heirs." Amongst the other difficulties that might arise would be those arising from the personality of the purchaser. The heirs or one of them might object to the particular person to whom it was proposed to sell the property and sooner than see it pass into his hands might be willing to buy it himself, though before unwilling. This would entail a renewed offer when the personality of the offer was ascertained. The definition of pre-emption for Mahomedans as laid down by Mahmood, J., in *Gobind Dayal v. Mayatullah* (4) seems to provide for this, for he says that pre-emption is a right which the owner of certain immoveable property possesses as such for the *quiet enjoyment* of that immoveable property to obtain *in substitution* for the buyer, proprietary possession of certain other immoveable properties, not his own on such terms as those on which such later immoveable property is sold to another person.

(4) (1895) 7 All., 775, 799.

But however desirable it may be to lay down the law in similar terms, Sir Charles Fox in the Full Bench case of *Maung Ye Nan O v. Aung Myat San* (1) laid down that the right of pre-emption amongst co-heirs must be recognised by our Courts to the extent laid down in section 97 of Sparks' Code, Part 2, and to this extent only, and that if any one claimed to have it further extended, he must prove in one or more of the recognised ways of proving a custom that the right is now greater than it was declared to be in that Code. Sparks' Code speaks only of one offer made to the co-heirs first, and not of any offer to be made to them after the land has been offered to a stranger and no attempt has been made to prove a custom to the latter effect. I must therefore hold that unless and until a custom extending the law as laid down in Sparks' Code is proved, my task is merely to construe that section and I take the section to mean that the offer to the co-heirs may precede that to a stranger, but must all form part of one and the same transaction and be of the same or a smaller price than that at which it is offered to the stranger, and that, if these conditions are carried out, there is no necessity for a second offer to the heirs when they have once refused to buy.

In the present case the father offered the property to the heirs in September and on their refusal sold it to a stranger by a registered deed dated the 3rd October 1922. This all seems to me to be part of one and the same transaction, and I hold that the offer was sufficient and dismiss the appeal with costs.

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(1) (1915) 8 B.L.T., 167.