APPELLATE CIVIL.

Before Mr. Justice Abdul Raoof and Mr. Justice Bevan-Petman.

MASIHUDDIN (PLAINTIFF)—*Appellant.*

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July 24.

versus

MATU RAM, ETC., DEFENDANTS—*Respondents.*

Civil appeal No. 1413 of 1916.

Lunacy (District Courts) Act, XXXV of 1858, section 14—sale by Manager without obtaining order of Court—void—Pre-emption—compromise in suit for land—whether a sale—Transfer of Property Act, IV of 1882, section 54.

One J. D. was judicially decreed insane and his wife *Mussammat* R. N. was appointed his Manager. On 19th January 1883 she sold part of her husband's estate to N. R., father of present defendant-respondent M. R., without obtaining an order of the Court. The property sold was already in possession of N. R. as mortgagee and the mortgage money was part of the consideration for the sale. On 10th May 1883, *Mussammat* R. N. was removed from the Managership and M. D., the brother of the lunatic, was appointed in her place and N. R. was informed that the sale was invalid but nothing further was apparently done. In July 1895 there was a dispute in mutation proceedings in connection with the sale but mutation was granted mainly on account of the vendee's possession. On 3rd March 1909 the lunatic J. D. died and on 29th February 1912 his sons who had attained majority instituted a suit against the representatives of N. R. for the possession of the land sold by their mother on the ground that the sale was void and also for redemption on payment of Rs. 260. The defendants pleaded that the plaintiffs were governed by Muhammadan Law, and that the mother was herself a sharer; that the suit was barred by limitation and acquiescence; that plaintiffs were estopped; that they had gained a title by adverse possession and that plaintiffs had benefited by the purchase money. But before any evidence was recorded the suit was compromised, the plaintiffs giving up all their claims on payment of Rs. 500 and the suit was accordingly dismissed. In August 1913 a cousin of J. D. instituted the present suit for pre-emption on the basis that the compromise was a sale of the land.

Held, that under the provisions of section 14 of Act XXXV of 1858 the sale by *Mussammat* R. N. was void and as such could not be ratified.

Held also, that by the compromise the sons of J. D. did not sell the land; they merely abandoned, in consideration of Rs. 500,

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their rights to obtain a decision of the Court in a case which was genuinely contested, and therefore no claim for pre-emption was competent.

Janki v. *Girja Dat* (1), *Gul Mohammad Khan* v. *Khan Ahmad Shah* (2), *Tikava Ram* v. *Dharam Chand* (3), *Krishna Tanhaji* v. *Aba Shetti Patil* (4), *Rani Mewa Kuwar* v. *Rani Hulas Kuwar* (5), *Abdul Wahid Khan* v. *Shalakhi Bibi* (6), *Raj Bahadur* v. *Jagrup Pande* (7), *Mirza Muhammad Abaz Ali* v. *A. Quieros* (8), *Khurshaid Ali* v. *Rashid Hussain* (9), *Laiq Singh* v. *Harnam* (10), *Miles* v. *New Zealand Alfred Estate Co.* (11) referred to ; also *Pollock* and *Mulla's Indian Contract Act, 3rd edition, p.* 152.

Second appeal from the decree of Rai Sahib Lala Bishambar Dayal, District Judge, of Karnal, dated the 8th February 1916, *reversing that of Lala Izzat Rai, Munsif, Rohtak, dated the* 25*th June* 1915, *decreeing plaintiff's claim.*

ABDUL GHANI, for Appellants.

SHAMAIR CHAND, for Respondents.

The judgment of the Court was delivered by—

BEVAN-PETMAN, J.—Counsel for the appellant in the connected Second Appeal No. 1520 of 1916 has adopted the arguments addressed to us on behalf of the appellant in this appeal and has added that, in the event of the appeal being accepted there should be a remand to decide the rights of the appellants *inter se*. We will therefore dispose of both appeals in the one judgment.

The facts necessary to be stated are the following—One Jamaluddin was, under Act XXXV of 1858, judicially declared insane and his wife, *Mussammat* Rashid-ul-Nisa, was appointed the manager of his estate. They had three minor sons, Sarfaraz-ud din, Niaz-ud-Din and Latif Din. The last named died and we are not concerned with him. By a deed, dated the 19th January 1883, *Musammat* Rashid-ul-Nisa sold, or rather purported to sell, the land in dispute, which formed part of her husband's estate, for Rs. 400 to Naunid Rai,

(1) (1885) I. L. R. 7 All. 482 (F. B.)
(2) 29 P. R. 1893.
(3) 45 P. R. 1895.
(4) (1909) I. L. R. 34 Bom. 139.
(5) (1874) L. R. 1. I. A. 157 (166) (P. C.)
(6) (1893) I. L. R. 21 Cal. 496 (P. C.)
(7) (1917) 42 Indian Cases 37.
(8) 9 O. C. 86.
(9) 9 O. C. 331.
(10) (1912) 20 Indian Cases 351.
(11) (1886) 32 Ch. D. 266 (291).

the father of Matu Ram, defendant-respondent. Naunid Rai was in possession of the land as mortgagee and the paying off of the mortgage was part of the consideration for the sale. In consequence of this and other alienations by *Mussammat* Rashid-ud-Nisa she was removed from the appointment of manager of the estate on the 10th May 1883 and Masihuddin, brother of Jamaluddin, was appointed in her place and the various alienees, including Naunid Rai, were informed that the alienations were invalid by reason of the Court's sanction to the alienations not having been taken in accordance with the provisions of section 14 of Act XXXV of 1858. Nothing further appears to have been done at the time and Naunid Rai continued in possession. A dispute arose in July 1905 in the course of mutation proceedings in connection with the sale deed of the 19th January 1883. The Revenue Assistant refused to trench upon the functions of a Civil Court in deciding as to the validity of the sale and sanctioned the mutation on the ground of long possession by Naunid Rai and his representatives after his death, and the title deed, which was apparently valid on the face of it.

Jamaluddin died on the 3rd March 1909 and, on the 29th February 1912, Sarfaraz-ud-din and Niaz-ud-din, his sons, who had then attained majority, instituted a suit in the Court of the District Judge at Rohtak against the representatives of Naunid Rai for possession of the land in suit on the ground that the sale to Naunid Rai was void. The suit was subsequently amended as to include a prayer for redemption on payment of Rs. 260.

It is important to see what defences were raised. These can be seen from some of the issues framed which included the following :—

1. Whether the plaintiffs are governed by Muhammadan Law or custom (this is to cover the plea that *Mussammat* Rashid-ul-Nisa is herself a sharer).
2. Whether the suit is within time.
3. Whether the doctrine of acquiescence and estoppel applies.

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4. Whether the defendants have been in possession as owners and adversely for more than twelve years.

5. Whether the sale was made for the benefit of the plaintiffs and they benefited by it and hence are barred from bringing the suit.

Before any evidence was recorded this suit was compromised. The plaintiffs gave up all their claims on payment of Rs. 500 by the defendants and the suit was accordingly dismissed. The compromise was on the 6th August 1912.

On the 5th August 1913 Arif-ud-din, a cousin of Jamaluddin, instituted a pre-emption suit against the sons of Jamaluddin and Matu Ram, defendant-appellant, on the basis that the compromise was a sale of the land. On the following day Masihuddin, the brother of Jamaluddin, instituted a similar suit. The two suits were consolidated. Matu Ram raised various pleas but it is necessary only to notice one, namely, that the compromise was not a sale of the land. The first Court held that the compromise was a sale and gave a decree in favour of Masihuddin and, on his failure to deposit the money within the time stated, in favour of Arif-ud-din. Both plaintiffs and Matu Ram appealed, Masihuddin in respect of the amount of money and on the ground that he had prior rights and Matu Ram on various grounds. The Lower Appellate Court held that there was a valid and completed sale in 1883 and that *Mussammat* Rashid-ul-Nisa, as *sarbarah* of her husband, was competent to sell the land, that the want of the Court's sanction was merely a technical defect which was cured when the sons ratified the sale by the compromise of 1912. It therefore accepted the two appeals of Matu Ram and dismissed the appeals of the plaintiffs as time-barred. The plaintiffs appeal to this Court.

Though Lala Shamair Chand attempted at first to support the decision of the Lower Appellate Court on the grounds and for the reasons stated by that Court, he wisely abandoned that attempt and has supported the decision on the ground, all along urged on behalf of his client, that the compromise was not a sale of the land, a

point not touched by the Lower Appellate Court. It is clear that under the provisions of section 14 of Act XXXV of 1858 the sale by *Mussammat* Rashid-ul-Nisa in 1883 was void and that a void transaction cannot be ratified.

By the Transfer of Property Act 'sale' is defined as "a transfer of ownership in exchange for the price paid or promised or part paid and part promised." In *Janki* v. *Girja Dat* (1) it was held that the above definition could be accepted for the purposes of the pre-emption law but in *Gul Mohammad Khan* v. *Khan Ahmad Shah* (2) it was held that "Now the general question is the meaning of the word 'sale' as used in section 9 of the Punjab Loans Act, 1872, and we do not think that section can be interpreted by reference to the definition of sale or be affected by the definition of exchange in the later Act (the Transfer of Property Act) * * * Without attempting to define sale or exchange we entertain no doubt that a permanent transfer of land in a village for a sum of money, plus something that is not money, does not, merely because of such addition, of necessity cease to be a sale within the meaning of the Act. If a transfer of land for Rs. 100 is a sale we entertain no doubt that the parties to the transaction, by agreeing that the price should be Rs. 100 and (for example) a brass *lota* could not alter the true character of the transaction and exclude it from being the subject of a claim of pre-emption * * * We consider that whatever the form the parties to the transaction may choose to give to it for their own purposes, or for the purposes of defeating a pre-emptor's claim the question remains open to the Courts to decide whether the particular transaction does, or does not, amount to a sale within the meaning of that section."

In *Tikava Ram* v. *Dharam Chand* (3) it was remarked that the essence of a sale is that the owner of property parts with it permanently for consideration. The first Court was of the opinion that the compromise was a sale, the consideration for which was partly the

(1) (1885) I. L. R. 7 All. 482 (F. B.) (2) 29 P. R. 1893.
(3) 45 P. R. 1895.

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price originally paid in 1883 and partly what it describes as the price of the *chose* in action.

Reliance has been placed by Lala Shamair Chand on *Krishna Tanhaji* v. *Aba Shetti Patil* (1) in which the learned Judges quoting the Privy Council in *Rani Mewa Kuwar v. Rani Hulas Kuwar* (2) remarked that the nature of a compromise is that it is an acknowledgment of the existing rights of the parties and held that a compromise was not a sale within the definition of the Transfer of Property Act. Reliance has also been placed on a number of judicial decisions relating to pre-emption under the Oudh Laws Act, the provisions of which, in relation to the right of pre-emption, are similar to those of the Punjab Laws Act.

In *Abdul Wahid Khan* v. *Shalakhi Bibi* (3) their Lordships of the Privy Council held, in a case in which the facts were that a plantiff, who sought to recover possession of land in possession of others on alleged good title, and who had sold a share of the land claimed by her in order to raise funds for the purposes of the suit, that the transfer was a sale of a share in a law suit and that a transfer of a part of the claim created no right of pre-emption under the provisions of the Oudh Laws Act.

In *Raj Bahadur* v *Jagrup Pande* (4) the Judicial Commissioner, Oudh, followed the above Privy Council decision and also supported his decision by two decisions *Mirza Muhammad Abaz Ali* v. *A. Quieros* (5) and *Khurshaid Ali* v. *Rashid Hussain* (6). These last eports are not at our disposal.

In *Laiq Singh* v. *Harnam* (7) the Judicial Commissioner distinguished the two Oudh cases mentioned in that in those cases the property sold was not in the possession of the vendor at the time of the sale and all that was sold was a doubtful right to recover the property, if the suit was successful, and that, in other words, what was sold, was a *chose* in action and, therefore, it had been rightly held that it was not

(1) (1909) I. L. R. 34 Bom. 139.
(2) (1874) L. R. 1 I. A. 157 (166) (P.C.)
(3) (1893) I. L. R. 21 Cal. 496 (P. C.)
(4) (1917) 42 Indian Cases 37.
(5) 9 O. C. 86.
(6) 9 O. C. 331.
(7) (1912, 20 Indian Cases 351.

a sale on which a right of pre-emption could be claimed, whereas, in the case before him, the vendor was in constructive possession and there was no cloud over his title.

On the question of the meaning of "sale" it was also held that where a sale is effected partly in lieu of money and partly in view of something computable in money, or valued in money, a right of pre-emption would accrue.

We have also been referred to Pollock and Mullas Indian Contract Act, 3rd edition, page 152, where the legal aspects of a compromise of a suit are discussed.

For the appellants it is contended that there was no legal defence to the suit which was compromised, that the defences of limitation and adverse possession were clearly untenable, that there were no rights for the defendants to give up, that the only consideration moving from the defendants was the payment of Rs. 500, that up to the date of the compromise the defendants were not owners and had no rights under the void sale of 1883, that after the compromise they became owners and that the transaction was therefore a sale. It is also contended that to hold otherwise would be to defeat the law of pre-emption because all that had to be done was to go through the farce of a suit and compromise. This result, however, does not follow where the facts indicate that the suit and compromise are a sham there is nothing to prevent the Courts from holding that the transaction was in reality a sale.

The facts in the present case are quite different. The defendants, whether rightly or wrongly, were genuinely contesting the claim and had been fighting the matter even previously at the time of the mutation. Apart from the fact that no evidence was recorded and the defendants had no opportunity to prove their defence, we are of opinion that we are not entitled to go behind the compromise and see whether the defence was well founded. If the parties were governed by Muhammadan Law, as contended by the defendants, it is probable that the defendants would have been at least entitled to retain *Mussammat* Rasuid-ul-Nisa's

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share. In law, the abstaining from doing anything which a man is lawfully free to do, or not to do, is a good consideration. It cannot be presumed that the parties knew the law and what the judgment of the Court would be and the defendants had the right to obtain judgment on their defence. It was pointed out in *Miles* v. *New Zealand Alfred Estate Co.* (1) that "If an intending litigant *bonâ fide* forbears a right to litigate a question of law, or fact, which is not vexatious, or frivolous to litigate, he does give up something of value. It is a mistake to suppose it is not an advantage which a suitor is capable of appreciating to be able to litigate his claim, even if he turns out to be wrong." Again, as pointed out by Pollock and Mulla, that which is abandoned, or suspended, in a compromise is not the ultimate right, or claim, of the party, but his right, of having the assistance of the Court to determine and, if admitted, or held good, to enforce it. We hold that the sons of Jamaluddin by the compromise did not sell the land. For the consideration of Rs. 500 they abandoned their rights to obtain a decision by the Court. They abandoned their alleged rights which were to be recognised as the owners of the land and to redeem it.

There is evidence on the record to show that the land was of considerably more value than Rs. 900 and it cannot, therefore, be said that the Rs. 500, taken with the previous Rs. 400, represented the sale price of the land. It is clear that the parties to the litigation were not at all certain as to the merits of their respective claims and genuinely compromised. It appears to us immaterial whether the compromise amounted to a sale or not. If a sale, a *chose* in action, and not the land was sold.

On the above findings we dismiss the appeals with costs throughout.

Appeal dismissed.

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(1) (1886) 32 Ch. D. 266 (291).