

APPELLATE CIVIL.

Before Mr. Justice Scott-Smith and Mr. Justice Fforde.

UDE RAM AND HARI KISHEN (PLAINTIFFS)

Appellants,

versus

ATMA RAM AND OTHERS (DEFENDANTS) Respondents,
Civil Appeal No. 801 of 1920.

Pre-emption—Suit for part of the property sold—when competent.

On 18th March 1918, one R. S. sold certain house property to A. R. and J. D. On 16th July 1918 J. D. sold his half share to A. R., and on the same day A. R. sold a portion of the property to M. S., defendant-respondent on the latter asserting his right of pre-emption. The plaintiffs then brought the present suit for pre-emption of the portion which A. R. had not sold to M. S. The first Court decreed the claim, but the District Judge on appeal held that M. S., not having pressed his claim to the whole of the property sold, had lost his right as a pre-emptor, and that the plaintiffs therefore could and should have sued for the whole of the property sold and that they were not entitled to pre-empt a part only.

Held, that as A. R. had himself broken up the property sold by parting with a portion of it to M. S., who had a right of pre-emption, he had no grievance when the plaintiffs sued him for the remainder of the property and the suit was therefore competent. The principle of denying the right of pre-emption except as to the whole property sold is that by breaking up the bargain the pre-emptor would be at liberty to take the best portion of the property and leave the worst part with the vendee.

Sheobharos Rai v. Jiach Rai, per Mahmood, J. (1) and *Ram Nath v. Badri Narain* (2), followed.

Ellis' Law of pre-emption, 4th Edition, page 147 *et seq.* referred to—also *Fatteh Chand v. Nihal Singh* (3), and *Ralla v. Dayal* (4).

(1) (1886) I L. R. 8 All. 462.

(2) (1896) I L. R. 19 All. 148.

(3) 106 P. R. 1880

(4) 34 P. R. 1903

Second appeal from the decree of Lt.-Col. A. A. Irvine, District Judge, Ambala, dated the 2nd February 1920, reversing that of Sheikh Rukn-ud-Din, Subordinate Judge, 1st class, Ambala, dated the 26th June 1919, and dismissing the plaintiffs' suit.

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JAGAN NATH, for Appellants.

G. C. NARANG, for Respondents.

The judgment of the Court was delivered by—

SCOTT-SMITH, J.—The material facts of the case out of which the present second appeal arises are as follows:—

On the 18th March 1918 Ram Singh sold certain house property to Atma Ram and Janki Das. On the 16th July 1918 Janki Das sold his half share to Atma Ram and on the same day Atma Ram sold a portion of the property to Mukand Singh, defendant-respondent, on the latter asserting his right of pre-emption. Udé Ram and another then brought the present suit for pre-emption of the part which Atma Ram had not sold to Mukand Singh. The first Court decreed the claim, and both the parties appealed to the District Judge who held that Mukand Singh, who had a right of pre-emption, not having pressed his claim to the whole of the property sold, had lost his right as a pre-emptor and that the plaintiffs therefore could and should have sued for the whole of the property sold and that they were not entitled to pre-empt a part only. He accordingly dismissed the plaintiffs' claim, and they have come up on second appeal to this Court.

It is common ground that the general rule is that the pre-emptor must take over the bargain as a whole, and that he is not entitled to sue for a part only, when he is entitled to sue for the whole. Ellis in his Law

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of Pre-emption, 4th Edition, points out at pages 147 *et seq.* that this general rule is limited to certain cases which he details. The present case does not appear to be covered by authority. Counsel for the respondents cites *Fatteh Chand v. Nihal Singh* (1) and *Ralla v. Dayal* (2) as authorities for the proposition that a pre-emptor cannot relinquish his claim to a part of the property sold, and that if in buying property to which he has a right of pre-emption he associates himself with a stranger who has not such a right, he loses his right of pre-emption. In accordance with these authorities it appears that Mukand Singh, who had a right to pre-empt the whole property, by taking only a portion from Atma Ram, lost his right of pre-emption and therefore the plaintiffs could have brought the present suit for the whole of the property sold. The question, however, is whether they were bound to sue for the whole of the property. Counsel for the appellants has cited the case of *Sheobharos Rai v. Jiach Rai* (3), in which Mahmood J. said that the principle of denying the right of pre-emption except as to the whole of the property sold, is that by breaking up the bargain the pre-emptor would be at liberty to take the best portion of the property and leave the worst part of it with the vendee. He said that the rule applied only to those transactions which, while contained in one deed, could not be broken up or separated, and that it should be limited to such transactions, and the reason of it does not exist where the shares sold are separately specified, and the sale to the stranger is distinct and divisible, though contained in the same deed as the sale to the co-sharers. In that case the sale was to persons having a right of pre-emption and to a stranger who had no such right, but the shares sold to each were distinctly specified and it was held that in such a case the suit could not be

(1) 10 P. R. 1880.

(2) 34 P. R. 1903.

(3) (1886) I L R. 8 All. 462.

brought in regard to the portion of the property sold to the persons who had a right of pre-emption. This case was followed in *Ram Nath v. Badri Narain* (1). Dr. Narang who appeared for the respondents admitted the force of these authorities, but said that they did not apply to the present case, because the original sale was not one of specified portions to Atma Ram and Mukand Singh. They are not on all fours with the present case, but in our opinion the principle of them should be made applicable to it. Atma Ram having himself broken up the property sold by parting with a portion of it to Mukand Singh who had a right of pre-emption has no grievance when the plaintiffs sue him for the remainder of the property. He would not gain anything by plaintiffs suing not only for the portion of the property left with him but also for that sold by him to Mukand Singh. This is not a case where the plaintiff is seeking to pick and choose part of the property in the possession of the vendee. The vendee himself having parted with a portion of the property does not suffer in any way whatsoever by plaintiffs not suing for the whole of it. The reason for the rule that the pre-emptor must take over the whole of the property sold no longer exists. The giving of a decree to the plaintiffs will not involve any breaking up of the bargain as understood in the law of pre-emption because it has already been broken up by Atma Ram himself in selling a portion of the property to Mukand Singh.

We therefore accept the appeal and setting aside the decree of the District Judge remand the case to him for redecision of the parties' appeals lodged in his Court. Stamp in this Court will be refunded and other costs will be costs in the cause.

C. H. O.

Appeal accepted.
Case remanded.

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