

APPELLATE CIVIL.

Before Mr. Justice Zafar Ali and Mr. Justice Jai Lal.

MUSSAMMAT BANTI (PLAINTIFF) Appellant

versus

MANDU AND ANOTHER (DEFENDANTS) Respondents.

Civil Appeal No. 978 of 1923.

1928

March 13.

Punjab Pre-emption Act, I of 1913, section 4, etc.—Property affected—covenants running with the land—Covenant to indemnify vendee—distinction.

The sale-deed, in respect of which a decree for pre-emption was granted, contained a covenant by the vendor that if the area owned by him in the land sold was found to be less than was stated in the deed, he would make good the deficiency out of other land belonging to him.

Held, that such a covenant of indemnity must be deemed to be a personal one entered into by the vendor in favour of the vendee which the pre-emptor as such had no right to enforce ; for a right of pre-emption is limited in its operation to the property actually conveyed under the sale-deed.

Saudhe Khan v. Bhana (1), relied upon.

Gobind Dayal v. Inayatullah (2), distinguished.

Bishen Singh v. Mst. Bishni (3), referred to.

Second appeal from the decree of M. V. Bhide, Esquire, District Judge, Hoshiarpur, dated the 20th January 1923, affirming that of Sheikh Abdul Rahman, Munsif, 1st class, Hoshiarpur, dated the 22nd July, 1922, dismissing the plaintiff's suit.

M. L. PURI, for Appellant.

GHULAM RASUL, for Respondents.

JUDGMENT.

JAI LAL J.—This second appeal arises out of a suit for possession of 4 *kanals* and 7 *marlas* of land

(1) 141 P. R. 1907.

(2) (1885) I. L. R. 7 All. 775 (F. B.).

(3) 103 P. R. 1919.

1928

MST. BANTI

v.

MANDU.

JAI LAL J.

brought by the plaintiff under the following circumstances :—

One Jamun sold 5 *kanals* and 3 *marlas* out of *shamilat* land to Mia Lal. The plaintiff instituted a suit for pre-emption of that sale and obtained a decree and apparently executed it. Partition proceedings were thereupon taken in respect of the entire land of which the land sold was a part and it transpired in those proceedings that Jamun had only 11 *marlas* of land in the *shamilat* land sold by him to Mia Lal. In the sale-deed executed by him he had covenanted with the vendee that if the area belonging to him in the land sold be found to be less than 5 *kanals* 3 *marlas* then he would make good the deficiency in such area to the vendee out of the other land belonging to him.

The plaintiff, the successful pre-emptor, instituted the present suit for the recovery of the deficiency out of the remaining land of Jamun. This suit has been dismissed by the trial Court and also on appeal by the District Judge on the ground that the covenant to make good the deficiency was a personal one between the vendor and the vendee and that the pre-emptor, who was neither a legal representative of the vendor nor the assignee of the vendee, was not entitled to take advantage of that covenant. In arriving at this conclusion the Courts below have relied upon *Sandhe Khan v. Bhana* (1). In that case the covenant which the pre-emptor sought to enforce against the vendor was that the latter would pay damages to the vendee if any part of the land sold was lost to him owing to any defect of title of the vendor and the suit was dismissed on the ground

(1) 141 P. R. 1907.

that a personal covenant of the above nature does not enure for the benefit of the pre-emptor.

The learned counsel for the appellant contends that the view taken in *Sandhe Khan v. Bhana* (1), is incorrect and in support of this contention relies upon a number of authorities the principal of which is *Gobind Dayal v. Inayatullah* (2) and in which it has been held that the right of pre-emption is not a right of re-purchase either from the vendor or from the vendee involving any new contract to sell, but it is simply a right of substitution entitling the pre-emptor, by reason of a legal incident to which the sale itself was subject, to stand in the shoes of the vendee in respect of the rights and obligations arising from the sale under which he has derived his title. These remarks have been cited with approval in several other cases decided afterwards where it has further been remarked that pre-emption is a right of substitution as if the name of the vendee had been rubbed out and that of the pre-emptor substituted in the sale-deed. With this statement of the law as to the nature of the right of pre-emption we have no quarrel.

The question that really arises in this case is to what property the right of pre-emption extends; whether the plaintiff is entitled to exercise it only with regard to the property described in the sale-deed or also with regard to the other property of the vendor that may not have been so described and which the vendee may under certain circumstances have become entitled to claim from the vendor. As it may happen in some cases that such property may not be initially subject to any right of pre-emption or the

1928

MST. BANTI

v.

MANDU.

JAI LAL J.

(1) 141 P. R. 1907.

(2) (1885) I. L. R. 7 All. 775 (F. B.).

1928

MST. BANTI

v.

MANDU.

JAI LAL J.

pre-emptor may not have a superior claim to that of the vendee with regard to it, I consider, that the remarks quoted by me from previous authorities are to be deemed to be limited in their operation to the property actually conveyed by means of the sale-deed and that the covenant to indemnify the vendee either by cash compensation or by delivery of other property of the vendor is not enforceable at the instance of the pre-emptor.

In *Bishen Singh v. Mst. Bishni* (1) some doubt was expressed about the correctness of the view taken in *Sandhe Khan v. Bhana* (2). The matter was not however finally decided and the remark appears to be in the nature of an *obiter dictum*. In my opinion a covenant running with the land is to be distinguished from a personal covenant such as a covenant of indemnity entered into by the vendor in favour of the vendee. While the pre-emptor may be entitled to enforce the covenants running with the land he is not entitled to the same right with regard to a covenant of indemnity which is deemed to be a personal covenant. Another way to put the same proposition is this. A pre-emptor when instituting a suit to pre-empt the land asserts that the vendor had good title to the land sold by him but that he, the pre-emptor, had a prior right to purchase it as compared with the vendee. The very nature of the suit for pre-emption, therefore, implies that there is no doubt as to the title of the vendor in the land described in the sale-deed, while in a suit for compensation, as in this case, a contrary assertion has to be made by the plaintiff. Such a situation is not permitted by law. Moreover, suppose the deficiency

(1) 103 P. R. 1919.

(2) 141 P. R. 1907.

in area had been discovered by the vendee before the sale to him was pre-empted and such deficiency had been made good to him by the vendor by giving him some land which was not initially subject to the pre-emptor's right of pre-emption; could the latter claim such land in his suit for pre-emption. The answer to this question, in my opinion, must be in the negative.

I hold, therefore, that for reasons already given the view taken by the Courts below is correct and this appeal must be dismissed with costs.

ZAFAR ALI J.—I agree.

N. F. E.

1928
 MST. BANTI
 v.
 MANDU.
 JAI LAL J.

ZAFAR ALI J.

Appeal dismissed.

ORIGINAL CRIMINAL.

*Before Mr. Justice Fforde, Mr. Justice Addison and
 Mr. Justice Coldstream.*

LAJPAT RAI, Petitioner

versus

THE CROWN, Respondent.

Original Criminal No. 5 of 1927.

*Criminal Procedure Code, Act V of 1898, section 99-A—
 Publication—creating communal hatred—forfeiture of—burden of proof—Indian Penal Code, Act XLV of 1860, section 153-A.*

Held, that in order to justify forfeiture under section 99-A of the Criminal Procedure Code, it is necessary for the Crown to satisfy the Court that on the evidence produced by the prosecution a conviction could have been had under section 153-A of the Penal Code.

Chakravarti v. Emperor (1), approved.

Application under section 99-B, Criminal Procedure Code, for setting aside the order of the Gov-

1928
 March 20.