

APPELLATE CIVIL.

Before Addison and Agha Haidar JJ.

HET RAM AND OTHERS (PLAINTIFFS) Appellants

versus

DAL CHAND AND OTHERS (DEFENDANTS)

Respondents.

1932

Dec. 20.

Civil Appeal No. 243 of 1928.

Pre-emption—Suit for—whether plaintiff's right to pre-empt must exist up to the date of the decree.

The plaintiff was a co-sharer in the property sought to be pre-empted when he instituted his three suits for pre-emption, but during the pendency of the suits he ceased to be a co-sharer as a result of certain partition proceedings.

Held, that the plaintiff, in order to maintain his suits for pre-emption, should have the right to pre-empt on three important dates, namely, (1) the date of the sale, (2) the date of the institution of the suit, and (3) the date of the first Court's decree.

And, that the suits must consequently fail.

Case law discussed.

Second appeal from the decree of Mr. D. Johnstone, District Judge, Delhi, dated the 26th October, 1927, affirming that of Lala Radha Kishan, Subordinate Judge, 2nd Class, Delhi, dated the 23rd December, 1926, dismissing the plaintiffs' suits.

KISHEN DAYAL and BHAGWAT DAYAL, for Appellants.

SHAMAIR CHAND and QABUL CHAND, for Respondents.

AGHA HAIDAR J.—These three connected appeals AGHA HAIDAR J. (Nos. 243, 244 and 245 of 1928) arise out of three pre-emption suits. Both the Courts below dismissed the plaintiff's suits and the plaintiff has come up to this

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Court in second appeal. The appeals were first heard by a learned Judge of this Court; but, in view of what the learned Judge described as the serious conflict of opinion on the point involved in these cases, he thought it advisable to refer them to a Division Bench.

The facts of the case are fairly simple, and the judgment of the learned District Judge and of the learned referring Judge of this Court are full and exhaustive, and it is not necessary to go into them in any detail. At the time when the three suits were instituted the plaintiff was admittedly a co-sharer in the property sought to be pre-empted, but a parallel litigation had been going on in the shape of a partition suit and, before a decree could be passed, the final stages of the partition suit had been reached and certain specific plots were marked off for each of the co-sharers. The result of this was that the plaintiff ceased to be a co-sharer in the land in respect of which he had brought the three pre-emption suits. The Punjab Pre-emption Act (Local Act No. I of 1913) gives the right of pre-emption to various classes of persons and, under section 16, "firstly," the plaintiff must be a co-sharer in the property. There is no definition of the word 'co-sharer' given in the Act, and we have to go to first principles in order to find out who is a co-sharer under a given set of circumstances. There are two decisions of this Court which require consideration and which seem to have weighed with the learned referring Judge of this Court. The first is reported as *Mohindar Singh v. Arur Singh* (1). In that case two suits for pre-emption were pending in the trial Court and, during their pendency, a notification was issued by the Punjab Government under

the provisions of section 8 (2) of the Punjab Pre-emption Act, declaring that "no right of pre-emption shall exist" within a certain area. The two Courts below dismissed the plaintiff's suits, holding that the right of pre-emption claimed by the plaintiff had been wiped out as a result of the Punjab Government notification. The plaintiff filed two second appeals against the dismissal of his suits. These appeals came up for hearing before a Division Bench of this Court which held that, if a right of pre-emption existed at the date of the suits, the mere fact that the notification had been issued while the suits were pending would not deprive the plaintiff of his right unless the notification had the retrospective effect. Admittedly the notification had no retro-activity and the learned Judges held that, under the circumstances, the right of pre-emption, which existed at the date of the institution of the suits, could not be said to have been taken away as a result of the notification. They further held that, although there might be circumstances which justified a Court in refusing to enforce a right of pre-emption unless it was maintained intact throughout the progress of the suit, the usual method of dealing with suits was to decide the questions at issue according to the state of affairs existing when the plaintiff's cause of action arose. The learned Judges (Abdul Raof and Campbell J.J.) accepted the appeals and remanded the two suits for decision on the other points.

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In a subsequent decision reported as *Ladha Ram v. Jidhu Ram* (1), Campbell J. had to consider a similar question and he dismissed the plaintiff's suit because, before the decree could be obtained, circum-

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stances had happened which were calculated to deprive him of his right of pre-emption. In this case *Mohindar Singh v. Arur Singh* (1), was referred to and the learned Judge held that the circumstances of the case which was before him justified the dismissal of the suit on the ground that before the decree could be passed the plaintiff had lost his right of pre-emption by ceasing to be a co-sharer. Another case is *Amar Chand v. Satyapal* (2), where leRossignol J. held that the plaintiff's right should be determined by the situation existing at the time of the sale. No authority is quoted in support of this view.

This matter has been considered in a number of decisions by the Allahabad High Court. It was held in *Janki Prasad v. Ishar Das* (3), that a cause of action must exist at the date of the institution of the suit. It was not necessary for the learned Judges to decide any other matter, and this case, therefore, cannot be said to be an authority in favour of the plaintiff.

There are, however, more recent decisions of the Allahabad High Court, *e.g.* *Baldeo Misir v. Ram Lagan Shukul* (4), and *Umrao v. Lachhman* (5), in which the view has been expressed that the plaintiff, in order to maintain his suit for pre-emption, should have his right to pre-empt on three important dates, namely, (1) the date of the sale, (2) the date of the institution of the suit, and (3) the date of the first Court's decree. This seems to be the correct view and, with due respect, I fully endorse it. The law of pre-emption is a highly technical one, and a plaintiff, before he can succeed, must show that his right existed not only in its preliminary stages before he went into the

(1) (1922) I. L. R. 3 Lah. 287.

(3) (1899) I. L. R. 21 All. 374 (F.B.).

(2) 1925 A. I. R. (Lah.) 56.

(4) (1923) I. L. R. 45 All. 709

(5) (1924) I. L. R. 46 All. 321.

Court but also while the case was in the course of active prosecution before the trial Judge and in fact up to the time when the Court passed the decree.

I may mention here the case reported as *Nuri Mian v. Ambica Singh* (1), where the learned Judges have accepted the principle that a person who enforces a right of pre-emption in a suit must establish his right not only before he instituted his suit but at the time when the decree had been given in his favour.

There are two cases reported as *Kehri Singh v. Mussammatt Deo Kunwar* (2), and *Wali Muhammad Khan v. Nabi Hasan Khan* (3), which follow the law as laid down in the Allahabad decisions.

Thus it appears that there is a large volume of case law in which the point had been definitely agitated and the view expressed that the plaintiff must have his right not only at the date of the sale or at the date of the institution of the suit, but right up to the moment when the decision of the Court is to be given in the shape of a decree. Under these circumstances, and having regard to the findings of fact arrived at by the learned Judge of the lower appellate Court, the plaintiff's suits must fail. I would, therefore, affirm the decrees of the lower appellate Court in the three suits and dismiss with costs the three appeals preferred by the plaintiff.

ADDISON J.—I agree.

A. N. C.

Appeals dismissed.

(1) (1917) I. L. R. 44 Cal. 47.

(2) (1918) 46 I. C. 389.

(3) (1918) 46 I. C. 353.