1910.

JOHN GEORGE DOBSON v. THE KRISHNA MILLS, LTD.

prevent the plaintiff making the application at any time before the hearing. However, apart from other circumstances, the measure of his success would probably depend on the application being made at the earliest opportunity, and it would certainly be advisable for a plaintiff to make an application under clause 14 at the time the plaint is presented. On the merits I see no reason why the cause of action in respect of claim C should not be tried in this suit. Evidence will have to be taken regarding the contracts for purchases of yarn by the defendants from the plaintiff, and neither party will be embarrassed by the inclusion of evidence regarding the contract for the sale of yarn by the defendants to the plaintiff.

Summons absolute.

K. McI. K.

Attorneys for the plaintiff:—Messrs *Smetham, Byrne & Co.*

Attorneys for the defendants:—Messrs. *Bicknell, Merwanji & Romer.*

APPELLATE CIVIL.

Before Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Batchelor.

1910.
April 12.

VITHAL NARAYAN KARANDIKAR AND OTHERS (ORIGINAL PLAINTIFFS), APPELLANTS, *v.* MARUTI NARAYAN KALE, HEIR AND LEGAL REPRESENTATIVE OF SUNDRABAI, DECEASED, AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

Family property—Division under an award—House of residence—Prohibition of sale by a co-sharer of his portion to an outsider—Pre-emption—Construction—Court-sale—Prohibition not effective.

An award under which family property was divided among co-sharers provided that in case of a sale by any of the co-sharers of his portion of the house of residence he should sell it to his co-sharer for a certain sum and that he should not sell it to an outsider until the expiration of two months from the date of a notice in writing saying that they (co-sharers) were not willing to buy it. Subsequently a portion of the house belonging to one co-sharer having been sold in execution of a decree against him it was purchased by an outsider. The

* Second Appeal No. 155 of 1907.

1910.

VITHAL NARAYAN v. MARUTI NARAYAN.

sons of one of the other co-sharers, thereupon, having brought a suit for a declaration that the Court-sale was not binding upon them,

Held that the term of pre-emption in the award was contemplated to attach to sales made privately and willingly and not to attachment and sales *in invitum* the judgment-debtor.

SECOND appeal from the decision of V. V. Vagh, Joint First Class Subordinate Judge of Poona with appellate powers, confirming the decree of Gulabdas Laldas, First Class Subordinate Judge.

The facts of the case were as follows :—

Three co-sharers Dattatraya, Narayan and Balvant effected partition of family property under an award of arbitrators dated the 30th November 1880. One of the conditions of the award was as follows :—

In case of a sale by any of the brothers of his portion of the house of residence he should sell it to his brother for the aforesaid price (Rs. 1,800). He should not sell it to an outsider until the expiration of two months from the date of a notice in writing saying that they (brothers) are not willing to buy it. In case of making a mortgage of the same the brothers must have precedence up to the amount of Rs. 1,700 and the term of notice in regard to sale shall hold good in case of mortgage.

Afterwards one Sundrabai obtained a decree against Dattatraya, one of the co-sharers, and in execution got his share in the said house attached. Thereupon the present plaintiffs, that is, the sons of Narayan, another co-sharer, intervened by a petition and sought to have the attachment raised but their petition was dismissed for want of prosecution. The attached share of Dattatraya was then sold in the execution-proceedings and it was purchased at auction by one Vishnu Shankar Gore.

After the Court-sale the plaintiffs, that is, the sons of Narayan, brought the present suit on the 26th July 1904 against Sundrabai, the judgment-creditor of Dattatraya, as defendant 1, Parvatibai, widow of Dattatraya the judgment-debtor, as defendant 2, and Vishnu Shankar Gore, the auction-purchaser, as defendant 3. The plaintiffs prayed among other things for a declaration that Dattatraya's share in the house of residence was not liable to be sold in execution of the decree against him, that, if at all, the right to receive Rs. 1,800 as the value of the

share was liable to be sold under the terms of the award and that the execution-sale was null and void.

Defendant 1 was absent though duly served.

Defendant 2 contended that the suit to enforce one of the terms of the award could lie.

Defendant 3 answered *inter alia* that he had purchased the property at auction-sale for valuable consideration and that the provision in the award was not capable of the construction which the plaintiffs contended for.

The Subordinate Judge found that the provision in the award was not binding on defendant 3 the auction-purchaser, that the term in the award regarding the co-sharer's right of pre-emption was not capable of bearing the interpretation sought to be put upon it by the plaintiffs and that defendants 1 and 3 who were strangers to the award were not bound by it. He, therefore, dismissed the suit.

On appeal by the plaintiffs the Appellate Court relying on the decision in *Shaikh Ferasut Ali* v. *Ashootosh Roy Singh*[1] confirmed the decree.

The plaintiffs preferred a second appeal.

S. V. Bhandarkar for the appellants (plaintiffs) :—Our first contention is that what was attachable under the terms of the award was the value of the share in the house, namely, Rs. 1,800 and not the portion of the house itself. Next we contend that the right of pre-emption runs with the property. It is not purely a personal right. It is incident to or arises out of the ownership of immoveable property : *Karim Baksh Khan* v. *Phula Bibi*.[2]

M. V. Bhat for respondent 3 (defendant 3):—The right of pre-emption as given and enjoyed by law and custom is generally sought to be exercised in connection with transactions between individuals. The privilege does not attach to sales held at the instance of the Court in execution of a decree: *Shaikh Ferasut Ali* v. *Ashootosh Roy Singh*[1]. The language of the proviso in the

(1) (1871) 15 W. R. 455. (2) (1886) 8 All. 102.

1910.

VITHAL NARAYAN v. MARUTI NARAYAN

award clearly shows that the right of pre-emption was intended to apply to private sales and not to sales *in invitum* the judgment-debtor.

SCOTT, C. J.:—In this case the plaintiffs sue as heirs of Narayan Govind Karandikar to have it declared that a purchase at a Court-sale by the third defendant is not binding upon them. They based their claim upon the fact that by an award under which certain family property was divided between their father and his two co-sharers of whom one is the judgment-debtor, it was provided that in case of a sale by any of the co-sharers of his portion of the house of residence he should sell it to his co-sharer for the aforesaid price of Rs. 1,800, and that he should not sell it to an outsider until the expiration of two months from the date of a notice in writing saying that they (the co-sharers) were not willing to buy it.

It was held by the first Court that the correct reading and interpretation of the words "if any one should have occasion to sell his share of the house of residence" was that the term of pre-emption was contemplated to attach to sales made privately and willingly and that therefore the attachment and sale *in invitum* the judgment-debtor was legal and proper.

In the lower Appellate Court the same conclusion was arrived at upon the authority of *Shaikh Ferasut Ali* v. *Ashootosh Roy Singh*[1] where the learned Judges say "the only other privilege which the brothers had left to them under the ikrar was the right to become purchasers by pre-emption of Mohabharut's share in the event of Mohabharut selling; but Mohabharut has not sold his share. It has been sold it is true, but by the action of the Court in execution of a decree passed against Mohabharut, which is quite a different thing. Moreover, if the plaintiffs Ashootosh and Joykishen wished to purchase their brother's share, they could easily have done so by bidding at the sale which took place in execution of the decree." These observations are directly applicable to the case before us.

[1] W. R. 455.

1910.

VITHAL NARAYAN v. MAHETI NARAYAN.

It is argued, however, on behalf of the appellants that upon the authority of *Karim Baksh Khan* v. *Phula Bibi*[1] the right of pre-emption is a right running with the land.

Whether the right of pre-emption in the present case is a right running with the land or not we do not decide, but if it is, it is not a right which will render the purchase in execution invalid. At most it would give the owner of the right a title to exercise that right as against the purchaser if the purchaser intended to sell voluntarily at some future date.

We therefore dismiss the appeal with costs.

Appeal dismissed.

G. B. R.

(1) (1886) 8 All. 102.

APPELLATE CIVIL.

Before Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Batchelor.

1910.
June 16.

BASLINGAPPA PARAPPA AND OTHERS (ORIGINAL PLAINTIFFS), APPELLANTS, *v.* DHARMAPPA BASAPPA AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

Public road—Right of marching in procession with a car—Suit for declaration of right—Injunction restraining interference with the right.

Plaintiffs sued on behalf of themselves and of other members of a religious community to have a declaration of their right of marching in procession with a car along a particular public road to certain temples and for an injunction restraining the defendants from interfering with the plaintiffs. The defendants contended that the plaintiffs had no right to march along the road. The lower Courts dismissed the suit on the ground that the road being public the plaintiffs could not sue unless special damage were shown and proved.

On second appeal by the plaintiffs *held*, reversing the decree and allowing the claim, that the suit was not for removal of a public nuisance but for a declaration of the right of an individual community to use the public road. Every member of the public and every sect has a right to use the public streets in a lawful manner and it lies on those who would restrain him or it to show some law or custom having the force of law abrogating the privilege.

Sadgopachariar v. *A. Rama Rao*[1] followed.

* Second Appeal No. 346 of 1907.

(1) (1902) 26 Mad. 376.