APPELLATE CIVIL.

Before Sir Lallubhai Shah, Kt., Acting Chief Justice, and Mr. Justice Crump.

TRIBHUVAN UTTAMRAM AND OTHERS (ORIGINAL PLAINTIFFS), APPELLANTS *v.* BAI KHUSHAL, DAUGHTER OF RANCHHOD BAPUJI, AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS*.

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Indian Registration Act (XVI of 1908), section 17—Agreement creating a right of pre-emption—Agreement needs no registration—Admissibility.

An agreement creating a right of pre-emption does not require to be registered as it does not by itself create any interest in immoveable property.

Ramasami Pattar v. *Chinnan Asari*(1), approved.

Kashi Kumbi v. *Sumer Kunbi*(2), disapproved.

SECOND appeal against the decision of N. V. Desai, Assistant Judge of Ahmedabad, reversing the decree passed by H. K. Mehta, Subordinate Judge at Borsad.

Suit for pre-emption.

The plaintiffs claimed a right of pre-emption in respect of two houses mentioned in the plaint. The houses originally belonged to one Girjashankar, brother of Bai Khushal (defendant No. 1).

Girjashankar made a will, dated 3rd September 1907, bequeathing the properties in suit and others in Dharmada and appointed the plaintiffs as trustees.

In 1908, Girjashankar's widow, Bai Javer, brought a suit against Bai Khushal and the trustees for recovery of possession of plaint properties and other properties. In that suit a compromise was arrived at between the parties and the plaint properties were awarded to Bai Khushal with this condition that in case Bai Khushal wanted to sell the said houses she should sell them to the trustees.

* Second Appeal No. 785 of 1921.

(1) (1901) 24 Mad. 449 at p. 461. (2) (1910) 32 All. 206.

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On the 13th March 1917 the plaintiffs as trustees gave a notice to Bai Khushal to sell the houses to them ; but in spite of the notice, Bai Khushal (defendant No. 1) sold the houses to Girdhar (defendant No. 2) by a registered sale deed, dated the 19th April 1917.

The plaintiffs thereupon sued to recover possession of the houses on payment of market value to defendants.

The defendants contended *inter alia* that the agreement in suit was embodied surreptitiously in the compromise recorded in Court and that the said agreement was not enforceable at law as it was not stamped or registered.

The Subordinate Judge following *Ramasami Pattar* v. *Chinnan Asari* (1901) 24 Mad. 449, held that the suit was maintainable as the agreement could be admitted into evidence without registration, and that defendant No. 2 bought the property with notice of the agreement. He decreed that on payment of Rs. 650 into Court by the plaintiff, the pre-emption decree under Order XX, Rule 14, Civil Procedure Code, should be passed in his favour.

On appeal the Assistant Judge following the ruling of *Kashi Kunbi and others* v. *Sumer Kunbi*, 32 All. 206, held that the agreement required to be registered under section 17 (*b*), Indian Registration Act, as it declared the rights of the parties to houses which were of the value of more than Rs. 100. He, therefore, reversed the decree and ordered that the suit be dismissed.

The plaintiff appealed to the High Court.

R. J. Thakore, for the appellant :—The lower appellate Court was wrong in holding that the agreement in suit required registration. A covenant giving the right of pre-emption gives to the promisee merely the right of first refusal and nothing more. It does not create or declare any interest in his favour. As held in

Ramasami Pattar v. *Chinnan Asari*[1] where a right to pre-emption arises out of a contract it is a personal covenant which does not require to be registered. The decision in *Kashi Kunbi* v. *Sumer Kunbi*[2] does not apply to this case as there the covenant was part of the *Sulahnama*, with respect to properties exceeding Rs. 100 in value.

H. V. Divatia, for the respondent :—The lower Court is right in holding that the agreement requires registration. An agreement for pre-emption does not stand on the same footing as an agreement to sell. In the latter case, the property is agreed to be sold and only the conveyance remains to be executed ; while in the former case, the property is not agreed to be sold forthwith but, if at all, it is to be sold to the person with whom the agreement is made. The agreement for pre-emption therefore *itself* limits the right of the owner to sell it to whomsoever he likes to sell and therefore falls under section 17 (1) (*b*) and under section 17 (2) (*v*) of the Indian Registration Act. Such an agreement may be entered into and still no conveyance might come to be executed as the owner may not wish to sell the property at all. While in the case of an agreement to sell, the purchaser can compel the owner to execute a conveyance which may be subsequently registered.

The case of *Ramasami Pattar* v *Chinnan Asari*[1] does not directly decide this question. There the question was not whether an agreement for pre-emption requires registration but whether, it being a mere agreement, the pre-emptor requires such an interest under it as alone can extinguish the mortgagor's right

(1) (1901) 24 Mad. 449.

(2) (1910) 32 All. 206.

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of redemption. There was no question there as to whether it came under section 17 (*b*) of the Indian Registration Act. It was not a suit for specific performance of an agreement for pre-emption.

The authorities of *Kashi Kunbi* v. *Sumer Kunbi*[1] and *Muthayya* v. *Venkataratnam*[2] apply to the facts of this case and they hold that such an agreement requires registration.

Thakore, in reply :—Where the right of pre-emption is given by the Statute it runs with the land and an agreement about that will require registration. But where the right arises out of a contract it is a personal covenant, and no registration is necessary.

SHAH, AG. C. J. :—The facts which have given rise to this second appeal are these. One Girjashankar made a will in respect of his properties on the 3rd September 1907, and he appointed the present plaintiffs as executors under that will. He died in October 1907. Thereafter in 1908 a suit was filed by his widow against the present plaintiffs and the present defendant No. 1, who is the sister of Girjashankar. In that suit there was a compromise. In accordance with that compromise, a decree was passed in favour of the then plaintiff, i. e., the widow of Girjashankar, so far as it related to the suit. The rest of the agreement being outside the scope of the suit was not incorporated in the decree. The present defendant No. 1 sold the properties in suit to defendant No. 2 in April 1917.

Thereupon the plaintiffs filed the present suit in December 1917 with a view to enforce the agreement relating to their right of pre-emption in respect of the two houses in suit.

The defendants raised various defences, one of which was that the agreement under which the plaintiffs

(1) (1910) 32 All. 206. (2) (1901) 25 Mad. 553.

claimed the right of pre-emption required to be registered, and that as it was not registered, it was inadmissible in evidence.

The trial Court over-ruled this plea, and on other points, which need not be detailed, the learned Subordinate Judge decided in favour of the plaintiffs. He accordingly passed a decree in their favour, holding in effect that on the plaintiffs paying Rs. 650 in Court for payment to defendant No. 2, the properties were to be conveyed to the plaintiffs.

The defendants appealed, and in appeal the learned Assistant Judge came to the conclusion that the agreement required to be registered, and accordingly dismissed the plaintiffs' suit. The learned Judge also remarked that even if he had confirmed the decree of the trial Court, he would have found it necessary to remand the case for findings on the issues relating to the validity of the bequest in the will relating to *dharmada*.

The plaintiffs have appealed to this Court, and the point as to registration has been argued before us. It is urged on behalf of the plaintiffs that the agreement does not require registration, and that the decree of the trial Court is right. The agreement as to pre-emption is in these terms :—" If the plaintiff and defendant No. 1 wish to sell the houses situate at Singlav, they should first sell them to trustees Nos. 2 to 6 at the market value ; that is to say, first right in respect of 'safil' is to be reserved for them ; and accordingly, they have been given by this document a right in respect of 'safil' ". The plaintiff and defendant No. 1 referred to in the agreement are the widow and the sister of Girjashankar. The lower appellate Court has relied upon the decision in *Kashi Kunbi* v. *Sumer Kunbi*[1] in support of its view and the same decision

[1] (1910) 32 All. 206.

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has been relied upon before us on behalf of the respondents. On behalf of the appellants reliance is placed in support of the argument that the agreement does not require registration upon the remarks in *Ramasami Pattar* v. *Chinnan Asari*[1].

Apart from the authorities, we think that this agreement is an agreement between the parties which could be enforced by the present plaintiffs, and that it does not create any right in immoveable property. It cannot stand on any footing higher than an agreement to sell immoveable property. In terms and in effect it is merely an agreement to sell to certain persons in case the widow or the sister wished to sell the houses which they got under the compromise. In any case, when the occasion for pre-emption would arise, it would be enforced as an agreement, and the plaintiffs in the present suit seek to enforce that agreement against the owner (defendant No. 1) and the purchaser from her (defendant No. 2).

In the case of *Ramasami Pattar* v. *Chinnan Asari*[1] to which we have referred, Bhashyam Ayyangar J. observes as follows :—

"In cases in which the right of pre-emption springs from a contract it rests only upon a convenant which does not run with the land. Being only a species of contract for the sale of immoveable property the contract of pre-emption stands on no higher footing than a contract for the sale of immoveable property and does not of itself create any interest in or charge on the immoveable property which is subject to the right of pre-emption—vide section 54 of the Transfer of Property Act. Until the contract is carried out by specific performance either by act of parties or decree of Court, the pre-emptor acquires no title to or interest in such property which alone can extinguish the mortgagor's right of redemption though he may have a right to call for a conveyance of the property."

This view is no doubt in conflict with the decision in *Kashi Kunbi* v. *Sumer Kunbi*[2]. We have considered

[1] (1901) 24 Mad. 449 at p. 461.

[2] (1910) 32 All. 206.

the *ratio decidendi* in this case, and with great respect we are unable to concur in the view taken in that case that an agreement, such as we have here, requires registration. We are not concerned in the present case with the question as to whether the compromise, so far as it related to the title of the various parties to the immoveable property and so far as it has not been incorporated in the decree, required registration or not. We are only concerned with the question as to whether this particular agreement relating to the right of pre-emption requires registration. On that point, as we have already indicated, the agreement could be proved without registration ; and in that view of the matter there can be no doubt that the present plaintiffs are entitled to the decree which was passed in their favour by the trial Court.

We should like to make it clear that we agree with the lower appellate Court that " the properties pre-empted should be only those that are sold by Exhibit 17, and that the present plaintiffs should take them only in their capacity of trustees or executors of Girjashankar's will so that they will be bound to fulfil the directions in the will ". It is hardly necessary to add this because in any case, the present plaintiffs are bound to fulfil their obligations with respect to that property as executors under the will when they get the property in suit.

There is one other point as to which we may add a word. The lower appellate Court has expressed the opinion that a remand would have been necessary in order to determine in this suit whether certain bequests were not void on account of uncertainty and vagueness. That is a point which does not arise in the present suit. It is entirely outside the scope of the suit, and the question as to whether any property

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which the executors may hold should be used as directed in the will, or that there is any intestacy in respect of any part of that property, is a question which cannot possibly be considered in this suit.

In the result, therefore, we allow the appeal, reverse the decree of the lower appellate Court and restore that of the trial Court with costs here and in the lower appellate Court on the defendants.

Decree reversed.

J. G. R.

APPELLATE CIVIL.

Before Sir Lallubhai Shah, Kt., Acting Chief Justice, and Mr. Justice Crump.

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FATTECHAND ANANDRAM MARWADI (ORIGINAL PLAINTIFF), APPELLANT *v.* UMAJI WALAD VALUJI MAHAR AND ANOTHER (ORIGINAL DEFENDANTS), RESPONDENTS*.

Indian Registration Act (XVI of 1908), sections 34, 72, 76 and 77—Document—Registration—Executant not appearing in time to admit execution—Refusal to register—Suit to compel registration.

A document was presented by the plaintiff to the Sub-Registrar for registration, but the other executing parties failed to appear and admit execution till after the prescribed time had expired. The Sub-Registrar, after reference to the Registrar, refused to register the document on the ground that the Registrar had not given the necessary sanction under section 34 of the Indian Registration Act.

The Registrar, on a further application by the plaintiff, declined to revise his decision :—

Held, on the facts, that the Registrar had refused to direct the registration of the document under section 72, within the meaning of section 76 (1) (*b*), and that a suit was, therefore, maintainable by the plaintiff under section 77.

SECOND appeal from the decision of M. H. Wagle, First Class Subordinate Judge, A. P., at Nasik, confirming the decree passed by G. V. Jadhav, Subordinate Judge at Nasik.

* Second Appeal No. 769 of 1921.