

Before Mr. Justice L. S. Jackson and Mr. Justice Mitter.

ABDUL GAFOOR v MUSST. NUR BANU.

Pre-emption—Splitting Claim—Amending Plaintiff.

1868
July 3.

The property of several co-sharers, some of whom were minors, was sold to a single purchaser, under a deed of sale, which contained a covenant by the vendors, who professed to act on behalf of themselves and the minors, that they would compensate the vendee for any loss he might incur, should the minors, when they came of age, not ratify the sale. A sued to enforce her right of pre-emption in respect of the lands sold. The lower appellate Court was of opinion that A. could not enforce her claim of pre-emption in respect of the shares of the minors, and on the Court's suggestion, the plaint was amended so as to ask only for enforcement of her claim in respect only of the shares of the vendors of full age. *Held*, that A. was bound to claim her right against all the shares, and could not enforce it in respect of some only.

See Act X.
of 1877.

Seemle.—A plaint cannot be amended in an Appellate Court.

The plaintiff sued to enforce the right of pre-emption, with respect to an eight-anna share of a certain talook, by setting aside a *kubala* dated 28th Kartik 1273 (November 1866) executed in favor of Abdul Gafoor.

The talook was *ijmali*; the property sold belonged to several co-sharers, of whom two were minors; and the deed of sale contained a stipulation to the effect, that it was liable to be set aside at the instance of the minors, and that the other vendors were bound to compensate the vendee for any loss he might sustain respecting the shares of the minors, if they should object to the validity of the sale.

The Court of first instance dismissed the plaintiff's suit, on the ground that the plaintiff did not perform the necessary preliminaries.

The Judge, on appeal, held, that the plaintiff could not enforce the right of pre-emption with respect to the shares of the minors. But the Court allowed the plaintiff to amend her plaint, by withdrawing her claim in respect of the shares of the minors. The Judge gave a decree for the plaintiff, when her plaint was so amended.

* Special Appeal, No. 104, of 1863, from Sylhet.

Baboo *Debendra Narayan Bose* for appellant.—A pre-emptor cannot be allowed to split up his claim, and he cannot enforce his right with respect to a portion of the property sold, without laying claim to the remainder.

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Baboo *Girish Chandra Ghose*, for respondent.

JACKSON, J —It appears to us that the decision of the Judge, in this case, cannot be maintained.

The plaintiff sued to enforce her right of pre-emption. Her allegation was that hearing that the property in dispute had been sold, on the 13th of November 1866, by Abdool Gafoor, Nischint Ram, Briudaban, Dulung Dasi, and Subarna Dasi, the defendants, she, on the next day, immediately on receiving the news, complied with the requirements of the Mohammedan law, and asserted her right; and, therefore, sues to enforce that right.

It appears that the property had been sold as belonging to several co-sharers, certain of whom were minors, the other vendors claiming to act on their behalf; and the deed of sale contained a stipulation that if the minors, on coming of age, should refuse to ratify the sale, the other vendors would compensate the purchasers for any loss that they might suffer.

The first Court dismissed the plaintiff's suit, holding that she was not entitled to enforce the right she claimed. On appeal, the Judge was of opinion that the claim to the property could not be enforced as regarded the shares of the minor vendors, and he allowed the case to stand over for thirty days to allow the plaintiff to withdraw her claim, so far as the interests of the minors were concerned. The plaintiff elected to do so, and the Judge allowed the plaint to be amended so as to ask the plaintiff's right of pre-emption to be enforced only as regarded the rights of the vendors who were of full age.

It seems to us that this withdrawal entirely invalidates the plaintiff's claim to enforcing the right of pre-emption. If she elects to enforce her right of pre-emption, she must take the bargain with all its advantages and risks: and as she has thought fit to prosecute her claim only as regards the shares which are safe, such act of hers invalidates the whole claim.

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We cannot shut our eyes to the fact that this proceeding was not spontaneous on the part of the plaintiff, but suggested by the expressed opinion of the Judge, and it does appear probable that the plaintiff, in submitting to that suggestion, yielded to an influence which she thought herself unable to resist. But we are not at liberty to give effect to a mere surmise and to disregard what the plaintiff has deliberately done in having elected to amend her plaint. I am very doubtful whether the plaintiff could properly be allowed to amend her plaint at that stage of the proceedings, and it seems proper that in the appellate Court, the plaintiff should stand or fall by the case with which she came into Court originally.

The judgment of the lower appellate Court must, therefore, be reversed, this appeal must be decreed, and the plaintiff's suit dismissed; but under the circumstances I would make no order as to costs.

MITTER, J.—I entirely concur. I think the plaintiff ought not to be permitted to split up the bargain entered into by the special appellant's vendors into two parts, and then to enforce her claim as to one part, and to renounce the other.

It has been said that there were various parties interested in the property in dispute, and that it was consequently at the option of the plaintiff to enforce her claim with respect to the share of any one of the vendors and to abandon her claim to the shares of the other vendors, though all these shares have been transferred under one and the same contract. The *Hedaya*. B. 38, C. IV., p. 606, lays down that : (*reads*) (1).

As this case falls expressly within the principle laid down in the passage above cited, the special appeal ought to be decreed, but under the circumstances mentioned, without costs.

(1) "If five persons purchase a house " latter instance, the *shafi* were
" from one man, the *shafi* may take " allowed to claim a part, it would
" the proportion of any one of them. " occasion a discrimination in the
" If, on the contrary, one man pur- " bargain to the purchaser, and be
" chase a house from five persons, the " productive of very great inconveni-
" *shafi* may either take or relinquish " ence to him, whereas in the former
" the whole, but is not entitled to " instance, the *shafi* being merely the
" take any particular share or pro- " substitute of one of the five pur-
" portion. The difference between " chasers, no discrimination in the
" these two cases is that, if in the " bargain is occasioned."