Privy Council Appeal No. 133 *of* 1929.
Allahabad Appeal No. 25 *of* 1927.

Hans Nath and others - - - - - - - - *Appellants*

v.

Ragho Prasad Singh - - - - - - - - *Respondent*

FROM

THE HIGH COURT OF JUDICATURE AT ALLAHABAD.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 14TH DECEMBER, 1931.

Present at the Hearing:
VISCOUNT DUNEDIN.
SIR LANCELOT SANDERSON.
SIR GEORGE LOWNDES.

[*Delivered by* SIR GEORGE LOWNDES.]

The dispute in this appeal is as to the appellants' right to pre-emption in respect of a $2\frac{1}{2}/16$ share in each of two villages known as Mowza Khurma and Jungle Khurma. On the 27th July, 1921, the shares in question were sold by one Thakur Prasad to the respondent. It is admitted that at the date of the sale the vendor and all the appellants were co-sharers in the villages, and that the respondent was not.

Two suits were instituted in the Court of the Subordinate Judge of Gorakhpur on the 15th and 26th July, 1922, respectively by the different appellants against the vendor and the respondent, in which the right of pre-emption by village custom was asserted.

On the 2nd November, 1922, during the pendency of these suits the respondent acquired, *ex facie* by gift, from another co-sharer a small independent fractional share in the villages. If this transfer had been made before suit raised, and had admittedly been by gift, it could not have been suggested that the custom alleged by the appellants applied.

On the execution of the transfer last referred to a third suit, No. 859 of 1922, was instituted by two of the appellants, alleging that the gift was merely colourable and that the transaction was in reality a sale to the respondent, and claiming the right of pre-emption in the fraction concerned, the value of which appears to have been in the neighbourhood of Rs. 20. This suit was accordingly instituted in the Munsiff's Court, but was transferred to the Court of the Subordinate Judge, and all the three suits were tried together.

Issues were raised as to the custom, the gift, the preferential right of the plaintiffs, and the sale price. The Subordinate Judge held the custom to be proved on the strength of entries in the *wajib-ul-arz* of each of the two villages. He was of opinion that the alleged gift was in reality a sale for Rs. 21–4–0 : that the plaintiffs (the present appellants) had under the custom a preferential right over the respondent : and that the sale price in the case of the original transaction was that stated in the deed, viz., Rs. 12,000. He accordingly, on the 18th April, 1923, made decrees for pre-emption in all the three suits upon the usual terms.

The respondent appealed in each suit. His appeal in the two suits first instituted went in the ordinary course direct to the High Court, but that in the third suit (No. 859 of 1922), owing to the small value of the property, went to the District Judge, and was decided by him with commendable promptitude on the 22nd October of the same year. He, for the reasons stated in his judgment, disbelieved the evidence of the plaintiffs' witnesses as to the payment for the fraction, and held that the transaction was a gift, and he accordingly dismissed the suit.

The appeals in the other two suits took more than three and a half years to reach a hearing in the High Court, which their Lordships cannot but regard as unfortunate. By that time a second appeal in the other suit, which had been filed from the decree of the District Judge, was also ripe for hearing. All the three appeals came before the High Court on the same day, but that from the District Judge's decree (Suit 859 of 1922) was decided first. It met with but short shrift. The learned Judges held, no doubt quite correctly, that the finding of the lower appellate Court as to the gift was a finding of fact which was binding upon them in second appeal, and that therefore the suit was rightly dismissed.

They then proceeded to consider the other two appeals, which they dealt with by one judgment. There was apparently no argument as to proof of the custom, the judgment being based upon the assumption that it was duly established. They were of opinion that the plaintiffs (the present appellants) had "entirely failed to prove that the deed of gift was in reality a deed of sale," and held, following a previous decision of their own High Court (*Baldeo Misir* v. *Ram Lagan Shukul*, I.L.R. 45, All. 709), that the respondent had acquired by the gift "an

indefeasible right as a co-sharer in the village before the first Court's decree," and that this defeated the appellants' claim. They accordingly set aside the decrees passed by the trial Judge, and dismissed these suits also. A consolidated appeal in all the three suits now comes before the Board by special leave.

The limits within which effect should be given to a customary right of pre-emption, such as the appellants assert in the present case, have been the subject of constant discussion in the Courts of the Province of Agra. Such claims appear to be of great frequency, and a Special Bench of the High Court at Allahabad seems to have been constituted to deal with them in order to ensure uniformity of decision. In 1922 it was thought desirable to legislate, and the Agra Pre-emption Act XI of 1922 was passed, Sections 19 and 20 of which dealt with questions similar to those which have been debated in the present appeal, but it was held in several cases that no change had been made in the law as previously interpreted by the High Court, and in accordance with which the decision under appeal was given. The Act of 1922 was eventually amended by Act IX of 1929, Section 5 of which enacts that a right of pre-emption cannot be defeated by a gift subsequent to suit. The question in issue between the parties in these appeals therefore can hardly arise in the case of future transactions. It is common ground that the present case falls to be decided upon the law as it stood before the passing of Act XI of 1922, and their Lordships think that if there was a current of decision in the Allahabad High Court against the contention of the appellants, as the judgment of the appellate Court would seem to indicate, it should not now be disturbed, if not manifestly wrong.

When a sale has taken place to a stranger there are three possible views as to the rights of a co-sharer, viz., (1) that an indefeasible right of pre-emption arises by the sale itself, and that no change in the status or relations of the parties after the sale can affect the question between them; or (2) that the criterion must be the position of the parties when the right is formally asserted by the institution of a suit; or (3) that the validity of the claim must be judged on the facts existing on the date when a decree has to be passed.

The first view, for which theoretically a good deal could be said, has been definitely discarded in the Allahabad Court. So it has been held in several cases that where between the dates of what may be called for convenience the pre-emption sale and the institution of the suit, the pre-emptor has lost his status as a co-sharer by the partition of the village,[1] or the stranger-purchaser has re-sold to another co-sharer,[2] or has become himself a co-sharer by an undisputed purchase or by a gift,[3] the right of pre-emption is lost.

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[1] *Janki Prasad* v. *Ishar Dar*, I.L.R. 21, All. 374.

[2] *Sehr Mal* v. *Hukam Singh*, I.L.R. 20, All. 100.

[3] *Ram Hit Singh* v. *Narain Rai*, I.L.R. 26, All. 389.

Counsel for the appellants does not dispute the correctness of any of these decisions ; his contention is that the second view is the right one : in the judgment under appeal it was the third view that prevailed.

There are no doubt expressions here and there in the decided cases which suggest that the date of the institution of the suit is the crucial date,[1] and there is a definite body of authority that a re-sale by the stranger-purchaser *after suit* will not defeat the pre-emptor,[2] but these decisions may all, their Lordships think, be ascribed to the operation of the doctrine of *lis pendeus* as embodied in Section 52 of the Transfer of Property Act, 1882, and not to any special aspect of the law of pre-emption.

Apart from these cases the *cursus curiæ* is, their Lordships think, clearly against the contention of the appellants. It was held as long ago as 1899 by Strachey C.J. and Banerji J. that a partition of the village effected after suit filed, but before decree, deprived the pre-emptor of his right : *Ram Gopal* v. *Piari Lal*, I.L.R. 21, All. 441. Following this decision and quoting from the judgment of the learned Chief Justice at p. 444, a case almost precisely similar to the one now before their Lordships was decided in January, 1920, by Tudball and Rafiq JJ., who held that the vendee's acquisition by gift of a share in the village pending suit defeated the claim of the plaintiff co-sharer to pre-emption : *Bihari Lal* v. *Mohan Singh*, 42 All. 268. It is not suggested that either of these decisions has been dissented from in principle in the Allahabad Court ; on the contrary, the doctrine that the plaintiff's preferential right must be in existence at the date of the decree has been treated as the settled law of the province : *Baldeo Misir* v. *Ram Lagan Shukul* (*supra*) : *Qudrat-un-nissa* v. *Abdul Rashid*, 48 All. 616 ; *Ram Saran Das* v. *Bhagwat Prasad*, 51 All. 411.

This being the state of the authorities in the light of which the present appeals came before the Board, it only remains to consider whether the view taken by the Allahabad High Court, that the decisive date is that of the decree, is one that can reasonably be supported.

The argument for the appellants which would make the filing of the suit the fact which crystallizes the rights of the parties is mainly based upon the maxim " *pendente lite nihil innovetur*." So far as the principle of this maxim finds expression in Section 52 of the Transfer of Property Act, it undoubtedly applies, and due effect has been given to it in cases where the defence relied upon the re-sale to a co-sharer pending suit : see the instances cited above. But no authority has been brought to their Lordships' notice which would give a wider application to the maxim than this, or would suggest a general doctrine of the law that nothing

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[1] ~~*Sabiq-un-Nissa* v. *Mati Ahmad*~~, 25 All. ~~418~~ 421 ; *Rohan Singh* v. *Bhau Lal*, 31 All. 530.

[2] *Ghasitey* v. *Gobind Das*, I.L.R. 30, All. 467 ; *Kehar Singh* v. *Jahangir Singh*, I.L.R. 47, All. 625.

occurring between the date of the institution of the suit and the decree could alter the relations existing between the parties. The maxim has been cited and the doctrine considered in many cases[1] before the passing of the Transfer of Property Act, but it has never, so far as their Lordships can discover, been applied except in cases which would now come under Section 52 of that Act. Its application in England is discussed in Storey's Equity Jurisprudence, § 405–6, where the cases are collected, but the learned author seems to regard the maxim as applicable only to " a purchase made of property actually in litigation " : see also *Bellamy* v. *Sabine*, 1 De Gex & J., 566.

It has also been brought to their Lordships' notice that the Courts of neighbouring provinces have dissented from the Allahabad decisions on various points and various grounds, but in the view their Lordships have taken of this appeal, they think that no useful purpose would be served by an examination of these cases. They are satisfied that the decision of the High Court now under appeal is in accordance with a consensus of judicial opinion in the Agra Province, which they think should not now be disturbed. It is stated by Sir John Edge, in delivering the judgment of the Board in *Digambar Singh* v. *Ahmad Said Khan*, 42 I.A., at p. 18, that " in all cases the object (of a custom of pre-emption) is as far as is possible to prevent strangers to a village from becoming sharers in the village." If this object would not be attained by a decree in favour of the plaintiff-pre-emptor, it may not unreasonably be held that such a decree should not be passed. In the present case it is not now contested that the respondent was at the time when the appellants' suits stood for adjudication a co-sharer in the villages, and no decree which might have been passed in their favour could deprive him of his status as such. If the acquisition by him of a share after the pre-emption sale but before the suit was instituted would be effective to defeat the appellants' claim, as it is admitted that it would, their Lordships think it difficult to see why the same reasoning should not be applicable in the case of a share acquired at any time before the adjudication of the suit.

For these reasons their Lordships are of opinion that these consolidated appeals fail and that the decrees passed by the High Court must be affirmed, and they will humbly advise His Majesty accordingly. The appellants must pay the costs of the respondent.

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[1] *Ravji Narayan* v. *Krishnaji Lakshman*, 11 Bomb. H.C.R. 139, and cases there cited ; *Manual Fruval* v. *Sanagapalli*, 7 Mad. H.C.R. 104 ; *Krishnappa* v. *Bahiru*, 8 Bomb. H.C.R. 55 ; *Brahannayaki* v. *Krishna*, I.L.R. 9, Madr. 92 ; *Byramji* v. *Chunilal*, I.L.R. 27, Bomb. 266.

In the Privy Council.

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