

*Judgment of the Lords of the Judicial Committee of the Privy Council on the consolidated Appeals of Baijnath Gaenka, legal representative of Mangni Ram Marwari, deceased, v. Ramdhari Chowdhry and others, and of Deo Nandan Pershad, legal representative of Jowhuri Lal, deceased, v. Ramdhari Chowdhry and others, from the High Court of Judicature at Fort William in Bengal; delivered the 24th January 1908.*

Present at the Hearing :

LORD ROBERTSON,

LORD COLLINS.

SIR ARTHUR WILSON.

[*Delivered by Sir Arthur Wilson.*]

These two consolidated Appeals arise out of two Suits, one brought by Mangni Ram, the other by Jowhuri Lal, to enforce a right of pre-emption in respect of a share in certain properties comprised in taluka Rasulpur Bhatowni.

By conveyances, dated 28th January 1891 and 9th July 1897, Mangni and Jowhuri had become the owners in equal shares of 12 annas of the property. The remaining four annas belonged to the Respondent, Anupbati Koeri, who on the 17th December 1897 sold those four annas to Nirbhoy Chowdhry; and that is the sale against which the right of pre-emption is claimed. It has been found that Jowhuri first heard of the sale on 20th December 1897, and that thereupon he at once made the immediate

claim to pre-empt which the law requires. Mangni first heard of the sale on the 5th of January 1898, and at once made his immediate claim. No question therefore arises with regard to the first claim by each of the two men. The principal controversy between the parties, and the point on which the Courts below have differed, is an alleged delay in making the second claim, the claim with witnesses, which also is required by law.

Jowhuri, on hearing of the sale, which he did at Monghyr, at once sent to his Agent at or near Gogri to procure from the Registry Office a copy of the sale deed. The Agent obtained that copy and sent it to Jowhuri, who actually received it on the 4th January. The High Court, differing from the Subordinate Judge, has found unreasonable delay at two points of these proceedings. It has held, first, that the copy from the Registry was not obtained and sent off as soon as it might have been. But an examination of the Official Calendar shows clearly that the learned Judges were led to this conclusion by a misapprehension as to the time during which the Registry Office was closed for the Christmas Vacation. The High Court held, secondly, that Jowhuri was guilty of wilful delay by his refusal to receive the packet containing the copy of the sale deed from the Post Office peon. This conclusion is based upon the evidence of the peon himself, which the learned Judges believed. But the Judge who had this witness before him disbelieved his story. That story is admittedly inconsistent with the rules of the Post Office; and it finds no support from the witness's own endorsement made at the time. Their Lordships think that the Subordinate Judge was right in rejecting that story, and therefore the second allegation of delay fails.

The more serious case of delay is said to have occurred subsequently, and with respect to it the position of Mangni and Jowhuri is identical. On the 5th January they knew everything which it was essential to know. On that day they took the advice of a local barrister, and in accordance with his advice they on the next day, the 6th January, applied to the proper officer for a police guard to protect the messengers and the money, which it was proposed those messengers should tender. This guard they obtained on the 7th, and the messengers started. On that day those messengers made the claim (and, as has been found, with due formalities) at the house of Nirbhoy, the purchaser. On subsequent days the claim was renewed at the house of the vendor, and upon the land. The question that arises is, whether the interval that elapsed between the 5th January and the 7th January is a fatal delay. The Subordinate Judge held that it was not; the High Court held that it was.

There is no question of law in the case. It is clear that the right of pre-emption must be exercised, and the claims necessary to give effect to it must be made, with the utmost promptitude, and that any unreasonable or unnecessary delay is to be construed as an election not to pre-empt. And whether there has been such delay is a question to be determined upon the facts of each particular case. It is enough for their Lordships to say that, in their opinion, the grounds stated by the learned Judges of the High Court for overruling the decision of the first Court, on a pure question of fact, were insufficient.

Another point argued on behalf of the Respondents arises in this way :—The two Plaintiffs

Mangni and Jowhuri had obtained a transfer of a zurpeshgi mortgage binding the four annas share sold by Anupbati to Nirbhoy. After that sale Nirbhoy paid the mortgage money into Court, in accordance with the provisions of the Transfer of Property Act, for the purpose of redeeming the mortgage; and after some hesitation the two Plaintiffs took out that money. It was contended that by so doing they had recognised the title of Nirbhoy under his purchase and could not claim pre-emption.

Their Lordships cannot agree with this contention. Until a decree for pre-emption was made Nirbhoy owned the land as purchaser, and had a right to redeem. The taking out of the money by the Plaintiffs, as mortgagees, was no recognition of anything more than this, and was quite consistent with the claim to pre-empt.

There remains only one other point for consideration, as to which again the Courts in India have differed; and that is as to the amount actually paid by Nirbhoy to Anupbati, the difference being Rs. 7,850. As to this point their Lordships do not find a clear and positive finding by the Subordinate Judge that the full sum named in the deed of sale was not in fact paid; and they are not prepared to dissent upon this point from the judgment of the High Court.

Their Lordships will humbly advise His Majesty that these Appeals should be allowed; that the decrees of the High Court should be discharged with costs; that the decrees of the Court of the Subordinate Judge should be varied by directing the price of pre-emption to be calculated on the sum of Rs. 44,850 (the price named in the deed of sale from Anupbati to

Nirbhoy) and the amounts to be deposited in the Court of the Subordinate Judge within such times as the High Court or the Subordinate Judge may determine; that subject to these variations and the payment to the Appellants of additional costs (if any) the decrees of the Subordinate Judge should be restored; and that the cases should be remitted to the High Court in order that the necessary steps may be taken for the disposal thereof on the above footing.

The Respondents who have resisted the Appeals will pay the costs thereof.

