

BEAMAN, J. :—The only question here was whether the widow was to forfeit her succession to her husband on the score of unchastity. The allegation of the plaintiff was that that unchastity was committed during the husband's life-time, and at his express desire. It is conceded that the husband and wife lived, to all appearances, happily up to the time of the husband's death. In these circumstances it appears to us that the decision arrived at by the lower Courts was perfectly right. We think that it would be a dangerous principle, where the husband and wife have lived together, without any open breach of marital relations up to the husband's death, to allow mere outsiders to come in and impute acts of unchastity to the wife during the period of her coverture. That is, speaking for myself, entirely opposed to the general policy of the law in dealing with the relation of husband and wife. We also think that the decisions of the Courts below rest upon very good authority, if we treat them from the point of view of Hindu lawyers. We are, therefore, of opinion that this appeal must be dismissed with all costs.

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Decree confirmed.

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APPELLATE CIVIL.

Before Mr. Justice Russell and Mr. Justice Chandavarkar.

JASUDIN WALAD AMBIR SAHEB FAKI (ORIGINAL PLAINTIFF), APPELLANT, v.
SAKHARAM GANESH SHROTRI (ORIGINAL DEFENDANT), RESPONDENT.*

1911.

August 29.

Contract of sale—Vendor's interest in the property sold ceasing to exist by Government Resolution—Vendor becoming entitled to other interest—Vendee cannot sue to recover the other right—Pre-emption—Personal right—Transfer—Transfer of Property Act (IV of 1882), section 6.

The defendant, who was occupant of certain Survey Numbers, had, under a Government Resolution, a right of pre-emption in stumps of trees standing on the lands, sold the stumps to the plaintiff. After the date of the sale, Government issued another Resolution by which the right of pre-emption was abolished, and the

* Second Appeal No. 571 of 1909.

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occupant was awarded only 20 per cent. of the net proceeds of the sale of the stumps by the Forest Department. This percentage was stated to be "a gift from Government and subject to no tribunal." The plaintiff sued to recover the percentage from the defendant, which the latter received from Government in respect of the stumps sold by him:—

Held, that the plaintiff was not entitled to recover anything from the defendant; for what the plaintiff was claiming was a gift or bonus from Government to the defendant under a Government Resolution, which gift or bonus was not and could not have been in the contemplation of the parties when the contract was entered into and which by itself was not transferable.

The right of pre-emption is a purely personal right which cannot be transferred to anyone except the owner of the property affected thereby.

SECOND appeal from the decision of A. W. Varley, Assistant Judge of Thana, reversing the decree passed by G. B. Laghate, Subordinate Judge of Bhiwandi.

The defendant Sakharam was the occupant of certain Survey Numbers in the village of Indgaon in the Vada Taluka. In 1904, he sold to the plaintiff stumps of trees standing on the Survey Numbers at the rate of Rs. 6 per 100 stumps. At the date of the sale, the interest which the defendant had in the stumps was thus stated in a Government Resolution:—

"The Conservator of Forests, Northern Circle, should now arrange to have the teak on all the occupied areas disposed of with the least possible delay. It should in the first instance be offered to the occupants at a valuation, and if the offer is not accepted, it should be cut and removed for sale, or, where such course is deemed preferable, sold on condition of immediate removal."

In 1905, Government rescinded the above Resolution, and promulgated in its place another Resolution, the material portions of which ran as follows:—

"The Governor in Council sees no sufficient reason for continuing to occupants the privilege of pre-emption when the right to the after-growth is no longer disposed of with the standing trees but is reserved to Government. So long as the purchase of the trees carried with it the right to all after-growth it was obviously desirable that the occupant of the land should be the purchaser, for otherwise while he held the land, a third person (the auction-purchaser) would be entitled to the trees in it—an arrangement that has in it no benefit to Government or to the occupant. But when the purchase of the trees carries with it no right to the after-growth, the principal reason for refraining from disposing of the trees to the best advantage to Government ceases.

The Forest Department should cut and remove for sale the teak standing in occupied yarkas land, or, when such a course is found preferable, should sell it

standing on condition of immediate removal, and 20 per cent. of the net proceeds of the sale should be paid to the occupant.

The percentage should be a gift from Government and subject to no tribunal, and in case the Collector is unable to settle summarily to his own satisfaction any disputes as to who is the occupant of any particular Survey Number, the percentage share on that number should be credited, not to any of the disputants, but to the Taluka Local Board for expenditure in the village to which the Survey Number belongs."

The plaintiff did not cut the trees after his contract. And when the Resolution of 1905 was published, the Forest Department cut and sold the teak and blackwood trees on the defendant's land and paid him 20 per cent. of the sale proceeds.

In 1907, the plaintiff sued to recover from the defendant the 20 per cent. that he received from Government and in return undertook to pay to him Rs. 220-8-0, being the price of the stumps as per his contract.

The Subordinate Judge awarded the plaintiff's claim, holding that the defendant was the owner or part-owner of the trees and that the sale-deed operated as a present conveyance of the trees.

This decree was on appeal reversed by the Assistant Judge, who dismissed the plaintiff's claim, holding that by his purchase he acquired the defendant's right of pre-emption; that that right was abolished by Government in 1905; and that the plaintiff had no right to the percentage.

The plaintiff appealed to the High Court.

Jayakar, with *G. S. Rao*, for the appellant.

H. C. Coyaji, with *B. V. Vidwans*, for the respondent.

RUSSELL, J.:—This case raises a curious and interesting point. The plaintiff Jasudin sued to recover from the defendant Sakharam Ganesh the sum of Rs. 2,350-11-5, which he said was due to him under a contract dated the 21st of July 1904. The terms of the contract are to be found in the receipt, Exhibit 26. In that document it appears that the defendant, who is the occupant of about twenty Survey Numbers in the village Indgaon in the Vada Taluka, agreed to sell teak and blackwood trees in those Survey Numbers to the plaintiff at Rs. 6 per every 100.

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stumps. The plaintiff was to pay certain fees and expenses in connection with those trees, etc. Rs. 15 was paid by the plaintiff to the defendant as earnest.

At the time when this contract was entered into there was in existence Government Resolution No. 7114, dated the 27th of September 1897, (to which we have referred), whereby, (when the right to the after-growth was no longer disposed of with the standing trees but was reserved to Government), a privilege of pre-emption was granted in respect of such trees to the occupants of the lands on which they were growing. But by a Resolution No. 3874, dated the 11th of May 1905, the Government of Bombay modified their said Resolution. This latter Resolution, after reciting that the privilege of pre-emption sanctioned by the previous Resolution had led to large gains being made by brokers and traders, which represented corresponding loss to the Government and the occupants, goes on to say that the Governor in Council sees no sufficient reason for continuing to occupants the privilege of pre-emption when the right to the after-growth is no longer disposed of with the standing trees but is reserved to Government, etc. The Governor in Council accordingly directs that the Forest Department should cut and remove for sale the teak standing in unoccupied varkas land or, when such a course is found preferable, sell it standing on condition of immediate removal, and that 20 per cent. of the net proceeds of the sale should be paid to the occupant, which percentage should be a gift from Government and subject to no tribunal, and in case the Collector is unable to settle summarily any disputes as to who is the occupant of any particular Survey Number, the percentage share of that number should be credited not to any of the disputants but to the Taluka Local Board for expenditure in the village to which the Survey Number belongs.

The plaintiff, under his contract abovementioned, claims the above sum, being 20 per cent. of the net proceeds of the sale of the trees in question. The defendant contended that the teak and blackwood trees were not his property but the property of Government and that the plaintiff was only entitled to a refund

of the Rs. 15 earnest money, which the defendant brought into Court.

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The learned Subordinate Judge passed a decree in favour of the plaintiff for the amount claimed, while the lower appellate Court reversed and dismissed the suit; but directed the earnest money Rs. 15 to be paid to the respondent.

The question we have now to decide, therefore, is: Is the plaintiff entitled to this 20 per cent. being the value of his vendor's right of pre-emption? Mr. Jayakar for the appellant-plaintiff argued that he was; and relied on the analogy of section 43 of the Transfer of Property Act. But it appears to us that no analogy can be based on that section, because standing timber, which this contract deals with, by section 3 is not included within immoveable property. Mr. Jayakar further relied upon section 18 of the Specific Relief Act, the material portion of which runs as follows:—"Where a person contracts to sell or let certain property, having only an imperfect title thereto, the purchaser or lessee (except as otherwise provided by this chapter) has the following rights:—
(a) if the vendor or lessor has subsequently to the sale or lease acquired any interest in the property, the purchaser or lessee may compel him to make good the contract out of such interest." But it appears to us that that section is not applicable, because the position of the defendant here was not that of a person having only an imperfect title to the property he contracted to sell: his sole right was a right of pre-emption, which has been defined as "a right in the event of a sale to purchase the property upon agreed terms." (Encyclopædia of English Law.)

What the plaintiff is claiming is a right of pre-emption pure and simple. Whether, as the lower appellate Court held, the defendant could convey the trees seems to us immaterial. For under section 6 of the Transfer of Property Act a right of pre-emption cannot be transferred. See clauses (b) and (d) of that section. We hold a right of pre-emption to be a purely personal right which cannot be transferred to anyone except the owner of the property affected thereby. Thus it has been held that a lessor having the right to re-enter on breach of covenant by his

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lessee may transfer the reversion, passing with it the right of re-entry, but cannot transfer that right itself: *Vagūran v. Rangāyāngar*⁽¹⁾. Similarly a license to enter and take possession of goods cannot be assigned: *In re Davis & Co., Ex parte Rawlings*⁽²⁾. And a bare license to seize chattels cannot legally be assigned: *Brown v. Metropolitan Counties Life Assurance Society*⁽³⁾.

What the plaintiff is claiming is a gift or bonus from Government to the defendant under Government Resolution No. 3874 above referred to, which gift or bonus was not and could not have been in the contemplation of the parties when the contract was entered into and which by itself was not transferable. Consequently the plaintiff is not entitled to recover it but only Rs. 15 from the defendant,; and we must confirm the decree of the lower appellate Court and dismiss this appeal with costs. There can be no question that if the plaintiff had sued the defendant to recover damages for breach of contract different considerations would have applied.

Decree confirmed.

R. R.

(1) (1891) 15 Mad. 125.

(2) (1888) 22 Q. B. D. 193.

(3) (1859) 28 L. J. Q. B. 236.

APPELLATE CIVIL.

Before Mr. Justice Beaman and Mr. Justice Hayward.

1911.

August 30.

SAYYAD JIAUL HUSSAN KHAN AND OTHERS (ORIGINAL PLAINTIFFS), APPELLANTS, v. SITARAM BHAU DESHMUKH AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

Mahomedan Law—Pre-emption—Survival of the action to executors and administrators on the pre-emptor's death—Personal action—Probate and Administration Act (V of 1881), section 89—Actio personalis moritur cum persona.

The right of pre-emption under Mahomedan Law does not abate at the pre-emptor's death; but survives to his executors and administrators under section 89 of the Probate and Administration Act (V of 1881).

* First Appeal No. 144 of 1910.