

**(1959) 09 AHC CK 0001**

**Allahabad High Court**

**Case No:** S.A. No. 2085 of 1951

Teg Singh

APPELLANT

Vs

Govind Ballabh and  
Another

RESPONDENT

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**Date of Decision:** Sept. 26, 1959

**Citation:** (1960) 30 AWR 131

**Hon'ble Judges:** Gurtu, J; Dwivedi, J

**Bench:** Division Bench

**Advocate:** L.M. Pant, for the Appellant;

**Final Decision:** Allowed

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### **Judgement**

Gurtu, J.

The question which arises in this case is as to what are the rights under the custom of preemption prevailing in Kumaun.

2. It appears that the Plaintiff was a nonresident cosharer but was related within three degrees to the vendor. The vendee was a resident cosharer but not related at all. The question was whether in the circumstances, the Plaintiff could preempt the vendee. The existence of a custom of preemption was not disputed in the two courts below, but the only dispute was as to what were the rights under this custom, so far as Kumaun was concerned.

3. Both the courts below found that the Plaintiff was a cosharer but not resident. The lower appellate court, however, came to the conclusion that he had a right of preemption because he was related within three degrees and was a cosharer, even though non-resident.

4. The only question which we have got to determine in this case is whether in Kumaun the fact of being related within three degrees would confer a preferential right even though the person claiming a right is a non-resident cosharer.

5. Stowell's Manual of the Land Tenures, of the Kumaun Division (Hill tracts) published in 1947 contains an authoritative exposition of the preemption law as applicable to the entire Kumaun Division including Almora. The rights under the law of preemption are set out at p. 49, Chap. II under head (8) of the said book. The custom, as recorded under that head, was the subject matter of consideration by a learned single Judge of this Court in *Deb Singh v. Thagu Sah and Ors.* 1937 AWR 960 wherein Sulaiman C.J. after considering the statement in Stowell's Manual, laid down that:

A person cannot be said to be a resident cosharer in a village if he has got no residential house of his own where he ordinarily resides, but has a mere cowshed for keeping cattle and for servants to look after them. His ordinary residence being in another village, he must be deemed to be a resident of that village and not of the village where he has a cowshed.

According to the custom prevailing in Kumaun a resident cosharer has preference over the person who is a non-resident cosharer.

6. In other words, according to the interpretation put on Stowell's statement by Sulaiman, C.J., non-residence relegates a person to a secondary right of preemption.

7. We have carefully considered the details of the custom, as set out under head No. 3 in Stowell's Manual and we do not find, from a perusal of the same, that it can be held that the custom, as recorded by Stowell, is that a relation within three degrees has a preferential right merely on the basis that he is such a relation independently of whether he is a resident cosharer or otherwise. In our view, the said head No. 8 does not record a right whereby a relation within three degrees, on the basis of his mere relationship and being a cosharer, gets a preferential right. Residence in a village seems to confer a preferential right and non-residence postpones the same. Upon the finding of the court below that the Plaintiff is not a resident of the village, it cannot be said that he had acquired a preferential right of preemption in the present case.

8. Our attention was drawn to the case of *Billu Thakedar v. Thakur Dan Singh* 1950 AWR 379 in which there is a quotation from Dr. L.D. Joshi's book "The Khasa Family Law" which sets out the custom of preemption as prevailing in the Hirnaliyan districts of the then United Provinces, namely, Kumaun. There is also a quotation from Walton's Gazetteer, Vol. XXXV relating to the district of Almora. Joshi states that the right to preempt belongs to the inner circle of agnates within three degrees and then to the outer circle which forms the village proprietary body. Walton states that the other cosharers in the village within the third degree can claim preemption against an outsider.

9. No decision has been given in *Ballu Thekedar's* case as to what are the precise rights under the custom of preemption in Kumaun and it appears that the only question which was before the Bench was whether, in point of fact, there was a custom of preemption in Kumaun Division or not and it was held that a custom of preemption did exist in the

village in question also. Deb Singh's case 1937 AWR 960 has been noticed but has not been dissented from. In the circumstances, we do not think that by merely drawing attention to what Dr. Joshi or Walton have stated as being the rights under the custom of preemption in Kumaun it can be said that the said statement of the rights under the custom by those two authors has been preferred to the statement as given by Stowell in his Manual of Land Tenures of the Kumaun Division (Hill tracts) which gives a preferential right to a resident cosharer in the village. Inasmuch as Stowell's statement has received direct and authoritative consideration in Deb Singh's 1937 AWR 960 case at the hands of this Court we think that we should follow that decision, which has stood since 1937 rather than Joshi or Walton's statement of the rights under the said custom.

10. We may now note that during the pendency of this appeal, the vendor, who was a party to the appeal, died and his heirs were not brought on the record, but this is really a fight between the Plaintiff and the vendee and inasmuch as the Plaintiff's suit is now being dismissed, the absence of the heirs of the vendor, in our view, is immaterial because the vendor was really a proforma Defendant.

11. We, accordingly, allow this appeal, set aside the judgment and decree of the court below and dismiss the Plaintiff's suit; parties bearing their own costs of this Court.