Pir Khan Vs Faiyaz Husain and Others

Court: Allahabad High Court

Date of Decision: May 19, 1914

Citation: AIR 1914 All 289 : (1914) ILR (All) 488

Hon'ble Judges: Henry Richards, C.J; Tudball, J

Bench: Division Bench

Final Decision: Dismissed

Judgement

Richards, C.J. and Tudball, J.
This appeal arises out of a suit for pre-emption of a zamindari share and a house. The plaintiff appellant is a

co-sharer in the mahal. Ho is a Mussalman of the Sunni sect. The vendor is also a Mussalman but of the Shia sect. The vendees are Hindus and

strangers to the village. The plaintiff bases his right on a custom prevailing in the village among the members of the co-parcenary body. In the

alternative he claims a right baaed on Muhammadan law and alleges that he performed the two necessary preliminary demands.

2. The court below has dismissed the suit. It held that the plaintiff had failed to prove satisfactorily the existence of the alleged custom.

3. In regard to the alternative claim it held that the plaintiff was not entitled to claim the application of the Sunni rule of pre-emption to this case, the

vendor being a Shia, and under the Shia rule of pre-emption, no right of pre-emption could be claimed in the circumstances of the present case, as

there were admittedly many more than two co-sharers. It must be pointed out that the share sold is Khata Khewat No. 19, in which the plaintiff

has no share, but it is part of a patti in which he has a share. To this patti is attached certain shamilat land in which all the co-sharers of the patti

have a share and there is also soma shamilat deft in which all the co-sharers of the mahal have shares. The house in suit stands on the shamilat deh

and belongs to the vendor only. The plaintiff claims his right because he has a share in the patti and village, On appeal it is urged:

(1) That the evidence produced is amply sufficient to prove the custom.

(2) That if this is not correct then the lower court was wrong in applying the Shia rule of pre-emption, as the Muhammadan law of pre-emption

prevailing in these provinces must he taken to be the Sunni law, irrespective of the creed of the parties, and therefore the lower court ought to have

decided the third and fourth issues, which it has not touched.

4. In regard to the first point, the plaintiff produced an extract from the village wajib-ul-arz of 1867, also a copy of a judgment in a pre-emption

suit of 1897; and a copy of the dastur dehi prepared at the last settlement, which is now current, and four witnesses.

5. Taking first the extract from the wajib-ul-arz of 1867, we see that it runs as follows:

Paragraph 6 regarding the transfer of a hakiyat by sale or mortgage.

Every co-sharer has power to transfer his ''hakiyat'' (his property) entered in the khatauni. If any no-sharer wishes to transfer his hakiyat by sale ha

shall first transfer it to an ek-jaddi own brother and in case of his refusal a co-sharer in the village is entitled to make a purchase. If a dispute arises

regarding the price of the property to be transferred it shall be decided either by the court or by arbitration, and if any co-sharer does not take in

lien of the price fixed by arbitrators the co-sharer may transfer it to a stranger if be likes; and he may mortgage it to whomsoever ho likes. If a son

is alive a gift in favour of a daughter''s son or sister''s son shall not be valid in the case of Hindus, but it shall be valid in the case of Mussalmans,

while in the case of Englishmen the provisions of the statutory enactment shall be complied with.

In this village mahajans, Brahmins, Kalals, Rajputs and Saiyida are co-sharers. On the death of a proprietor without male issue, his widow,

provided she does not remarry, shall be the owner with a power to sell or mortgage, but she shall not transfer the property of the deceased to her

father, brother or relations. She can make a transfer to the heirs of her deceased husband. In case the widow adopts a son from amongst the issue

of her father or deceased husband then the property shall devolve on such adopted son, if she adopts one from among the relations of her

husband, but it shall not devolve devolve on the issue of her father or on a ""ghair kuf."" In the case of two widows with different number of children,

the estate shall divided with reference to the number of brothers and not per stirpes. In case there is no male issue the ek-jaddi relations shall be

the owners.

6. The judgment after discussing the order and as documentary evidence proceeded follows.

7. In these circumstances, looking to the ambiguity of the settlement entries and the fact that in not more than forty per cent, of the sales to

strangers have claims for pre-emption been put forward, and that not all of these were pressed or ended successfully, it is impossible to hold that

the plaintiff has put before the court sufficient evidence to establish the ""custom"" which he alleges.

8. We next come to the question of the plaintiffs right under Muhammadan law. It is urged that the Muhammadan law of pre-emption which the

courts in these provinces can apply is the Sunni law alone, and the reason given is that that was the law which was enforced before the British rule

commenced. This is not an argument of much force, if of any at all. Reliance is placed on the decision of the Calcutta High Court reported in Jog

Deb Singh v. Mahomed Afzal I. L. R. (1905) Cal. 982. We cannot follow this ruling in view of the decisions of our own High Court. In the case of

Abbas Ali v. Maya Ram I. L. R. (1888) All. 239 where the vendor and pre-emptor were both Shias and the vender a Hindu, the Shia rule of pre-

emption was enforced. In the case of Qurban Husain v. Chote I. L. R. (1899) All. 102 where a Shia sought to pre-empt in the case of a sale by a

Sunni to a Sunni the court held that the suit must fail as the plaintiff being a Shia had under the Shia law no right of preemption though under the

Sunni Law such a right was given in the circumstances of that case. As was pointed out in that case, the courts must apply the rule of justice, equity

and good conscience. In the present case, if the vendee and pre-emptor were to change places, the Shia could not pre-empt by reason of his own

law, i.e., his own law would be applied to him. In justice when he sells his own law should be applied. There is no warrant for saying that the Shia

law of pre-emption is a dead letter in these provinces. It has always been applied to Shias and we can see no justice in refusing to apply it. In the

case of a sale by a Sunni to a Hindu, the Sunni law is applied where a Sunni seeks to pre-empt: vide Gobind Dayal v. Inayat-ullah I. L. R. (1885)

All. 775.

9. In our opinion the decision of the court below is quite correct on both points. In this view the appeal fails and is dismissed with costs.