Mst. Ummi-Ul-Nissa Vs Mst. Fatima Begum

Court: Allahabad High Court

Date of Decision: Dec. 3, 1945

Hon'ble Judges: Verma, J; Mathur, J

Bench: Division Bench

Advocate: K.C. Mital, for the Appellant; Mushtaq Ahmad, for the Respondent

Final Decision: Dismissed

Judgement

Verma, J.
This is a Plaintiff''s appeal arising out of a suit for pre-emption under the Mahommadan Law. The trial Court decreed the suit

but the lower appallate Court has, reversing the decree of the trial Court, dimissed it.

2. It is common ground that the parties--the vendor, the vendee and the pre-emptor--are all shias. There can therefore be no doubt that the case

has to be decided in accordance with the principles of the Shia law of pre-emption.

3. The Plaintiff alleged in the plaint that she bad, immediately on hearing of the sale made the demands required by law in the presence of

witnesses'', (paragraph 5).

4. At the trial also the Plaintiff''s case was that she had made two demands, one immediately on hearing of the sale and the other in the presence of

witnesses at the house and in the presence of the vendee. The Defendant vendee denied that any demands had been made at all. She pleaded in

the alternative that, even if any demands had been made, they bad not been made in accordance with law.

5. The first issue framed by the Munsif was:

Did the Plaintiff make the necessary talabs?

6. The Munsif began his judgment on this issue with the observation that the parties were Shia and that,

as such, the strict formality of two demands, the immediate demand and demand by invocation, is not necessary

7. He continued as follows:

All that is necessary is that one demand, without any formality, and which should amount to an assertion of her right to be exercised by due

diligence and unnecessary delay.

8. The sentence, as it stands, is obviously not correct. We take it, however, that what the Munsif meant was that, evan according to Shia law, the

Plaintiff had to exercise her right with the diligence and without unnecessary delay. The next observation of the Munsif was:

This being the law, the oral evidence produced by the Plaintiff on the point must be deemed sufficient,

9. He then summarised the evidence given by the Plaintiff"s witnesses, Mohammad Ahsan and Qudrat Ali, and concluded as follows:

There are certainly some discrepancies and contradictions in the testimony of the Plaintiff"s witnesses but they ace not so material as to demolish

the entire case of demands. Since no formality of demands and the fact that two demands are necessary, are not needed under Shia law, it must be

natural in the ordinary course of events particularly when no notice was given to Plaintiff before the sale, that the Plaintiff may have asserted a right

to pre-empt. I therefore hold that the talabs were performed.

10. Apart from the fact that the penultimate sentence in the passage just quoted is grammatically incorrect, it is obvious that the finding, as recorded

by the Munsif, is not a proper finding. The reason given by him for holding that the talabs were performed is no reason at all and the use of the

word "may" goes to show that probably the Munsif was not quite clear in bis own mind as to the value to be attached to the evidence adduced by

the Plaintiff.

11. The learned Judge of the lower appellate Court has also unofrtunately not recorded a finding which can be said to be a clear finding. He begins

by criticising the view of the Munsif that the Shia law did not require any formality in the making of the demands and that it was not necessary

under the Shia law to mike two demands. Ha refers to certain passages in Wilson"s Anglo-Muhammadan Law and K. P. Saksena"s Muslim Law-

-to which his attention was apparently drawn by the Plaintiff"s counsel--and concludes that: those passages did not mean that

the demands should not be made among the Shias for pre-emption.

12. He next observes that

the correct legal position is that the Plaintiff should have established the making of both the demands in order to be able to pre-empt the vended

property.

13. He then refers to the statements made by the Plaintiff"s witnesses and observes that the evidence does not show that the second demand, viz

talab-i-ishhad, was made according to law, inasmuch as there was nothing in the evidence to show that, when the talab-i-ishhad was made, any

reference was made to the talab-i-mowasibat. He concludes his discussion of the evidence in these words:

Thus all the three witnesses failed to prove that the demands as required by Mohammadan Law were a all made by the Plaintiff.

14. As shown above, both the Courts below failed to keep questions of fact and questions of law apart. The learned Judge of the lower appellate

Court does not say clearly whether he believes the Plaintiff''s witnesses and, if so, to what exent. His finding does not make it clear whether any

talab was as a mutter of fact, made and, if so, what wen the exact words used and what was the procedure followed by the Plaintiff. We do not,

however, consider it necessary to send the case back to the Court below for a consideration of the evidence afresh and for the recording of clearer

findings of fact. We are of opinion that this is a case in which this Court should go through the evidence for itself.

15. Learned Counsel for the Plaintiff Appellant has strenuously contended that the view of the law, on the question of demands expressed by the

Munsif was correct. His argument is that according to the Shia law only one demand--and that also without any formality at all--is sufficient. In

support of his contertion he has relied on paragraph 489 at page 474 of the 6th Edition of Wilson''s Anglo-Mohammadan Law, edited by Mr A.

Yusuf Ali and on Mr. K P. Saksena''s Muslim Law (1937 Edition) page 565, paragraph 5. The paragraph in Wilson''s book is as follows:

The distinction between the immediate demand, talab-i-mowasibat, and the formal demand before witnesses, talab-i-ishhad, is not recognised. All

that is necessary is that the pre-emptor should use reasonable diligence in preferring his claim either personally or by an agent, after becoming

acquainted with his right.

16. The paragraph in Mr. Saksena''s book is as follows:

The distinction, between the immediate demand, and the demand by invocation is not recognised; all that is essential is that the pre-emptor should

use reasonable diligence, without any unnecessary delay, to make the assertion of his right after receiving the information.

17. The paragraph in Mr. Saksena''s book appears to be a mere production of the paragraph in Wilson''s book with slight verbal alterations. It will

be noticed that in the paragraph itself it is not stated that only one demand is required by the Shia law. This statement is, however, contained in the

placitum to the paragraph which is in these words:

Only one demamd necessary.

18. In Mr. Saksena''s book this placitum is also reproduced. No authorities are quoted. On the other hand, we have the fact that there is no such

statement either in Ameer Ali''s book or in Mulla''s book on Mohammadan Law. The differences between the Sunni Law and the Shia law of pre-

emption are stated in both those books at length, but it is not stated in either of them that the Shia law requires only one demand or that all that is

necessary under the Shia law is that the pre-emptor should use reasonable diligence in freferring his claim after becoming acquianted with his right.

In Wilson''s book, below paragraph 489, a reference is made to Baillie, Volume II. pages 183, 184 and 195. We have examined those portions of

the second Volume of Baillie''s Digest of Mohammadan Law and are unable to find any justification for the view that the Shia law requires only one

demand. The reference is apparently to the last paragraph at page 183, which is continued at page 184, and to the paragraph after it at page 184.

It appears to us that all that Baillie states there is that the Shia law is not so rigid as the Hanafi law, in the matter of the requirement that the pre-

emptor, immediately on hearing of the sale, should jump up and shout out that he has a claim for pre-emption. Under the Hanafi law even a

moment''s delay is fatal, the Shia law on the other band, lays down that, should the pre-emptor be delayed in making his demand ""from any

necessary cause preventing his personal appearance, or the appointment of an agent to assert it on his behalf, his right is not extinguished.

19. The Shia law further lays down that a delay in the making of the demand, after receiving information as to the sale brought about by certain

other causes, mentioned in the book, is excusable. All this, it appears to us refers to the making of the talab-i-mowasibat. The passages at page

195 of Baillie''s book do not lay down the law differently. Those passages simply give further details of the circumstances in which delay will or will

not be excused. It is nowhere stated in Baillie that the Shia law requires only one demand. Another authority referred to in Willson''s book is,

Querry, II"". Evidently the reference is to ""Droit Musalman, Recuel''des Lois concernant les Musalmans Sehytes,"" in two volumes by a Querry,

That book has not been made available to us, and we are therefore unable to deal with its contents. We see no reason, however, to think that

Querry has laid down any proposition which runs counter to what is contained in Baillie''s, Ameer All''s and Mulla''s books.

20. We have gone through the evidence for ourselves and we find that the learned Judge of the lower appellate Court is right in observing that

there is nothing in the Plaintiff''s evidence to show that when the talab-i-ishhad was made, any reference was made to the talab-i-mowasibat.

21. It is well settled that such a reference is obsolutely necessary. The result is that, even if the evidence adduced by the Plaintiff is believed in toto,

the talab-i-ishhad was defective in an essential particular.

22. For the reasons given above we dismiss the appeal with costs.