(1887) 03 AHC CK 0004

Allahabad High Court

Case No: None

Ram Prasad		APPELLANT
	Vs	
Abdul Karim		RESPONDENT

Date of Decision: March 28, 1887

Citation: (1887) ILR (All) 513

Hon'ble Judges: Mahmood, J; John Edge, J

Bench: Division Bench

Final Decision: Dismissed

Judgement

John Edge, Kt., C.J.

In this action the plaintiff claimed a decree for pre-emption in respect of 5 biswas of land which had been sold by a co-sharer in the mauza to a stranger. The right of pre-emption was alleged to have arisen by reason of the wajib-ul-arz. The wajib-ul-arz in question contained the following paragraph: "The custom of pre-emption prevails according to the usage of the country." That I understand to mean a declaration by the parties to that wajib-ul-arz that pre-emption, according to the usage of the country, should be the rule amongst them. The plaintiff in his plaint alleged that the property in suit was in fact sold for Rs. 5,500, and that a fictitious price of Rs. 6,825 was mentioned in the sale-deed: that, as a matter of fact, a portion of that price had been returned. He also alleged that he had several times given notice to the defendant-vendee to the effect that he should take the actual price and convey the property to the plaintiff; but that the defendant bad refused to sell on those terms.

2. Paragraph 3 of the written defence alleged that, after the purchase, the defendant had given information to the plaintiff, orally as well as by written notice, of the sale; that the plaintiff had not shown his readiness to pay the sale consideration, notwithstanding that he was aware of the actual price; and that the plaintiff did not even say in reply what price he wished to pay; and by reason of that his right was lost.

3. The third issue which was framed by the Subordinate Judge was as follows: "Whether the plaintiff did not show his readiness on notice being given by the defendant; or whether the plaintiff sent several notices to the vendee, to the effect that he should take the proper value, but the vendee did not agree." The Court below found that the wajib-ul-arz was vague and meaningless; that the plaintiff had failed to prove that Rs. 6,825 was not the correct price; and that there was utter silence on the part of the plaintiff with regard to the notices sent by the defendant; and accordingly it dismissed the plaintiff''s suit with costs.

4. From that decree this appeal is brought. It would be convenient to dispose of the case as regards the sale consideration first. I am satisfied that the plaintiff has failed to prove that Rs. 6,825 mentioned in the sale-deed was not the correct price. It was a case in which, in my judgment, it lay upon the plaintiff to make out that the price mentioned in the sale-deed was not a true price. There are no suspicious circumstances in the case pointing to the conclusion that the alleged price was not the true price. As a matter of fact, the plaintiff himself had purchased one biswa in this village for a sum of Rs. 1,300. Under these circumstances I hold that the price mentioned in the sale-deed was the true price.

5. The next point to consider is, whether the plaintiff is entitled to pre-emption or not. There is no evidence to show what, in fact, the custom of the country was in that district with regard to pre-emption. The plaintiff''s witnesses say that there had been sales, but the question of pre-emption had never arisen up to this time. Therefore, if there is, in fact, any special custom prevailing in that district, the Court is left without any information on that point. It is the duty of the plaintiff, who is alleging a custom as the basis of his right of pre-emption to give evidence in proof of that custom. But he has done nothing of the kind. There being, therefore, no evidence that there was any peculiar custom in that particular district with regard to pre-emption, what is then the law to be applied to the case? This is a point which has been very frequently considered, and particularly in this Court, by my brother Mahmood. The first case to which I need refer is the Full Bench case of the Calcutta High Court, namely, Fakir-Rawot v. Sheikh Emambaksh B. L. R Sup. 35. In the judgment of Sir Barnes Peacock, C. J., we find at page 47 the following: "We therefore think the established law upon this subject is clear enough, that a right or custom of pre-emption is recognized as prevailing among Hindus in Behar and some other portions of Western India; that in districts where its existence has not been judicially noticed the custom will be matter to be proved; that such custom, when it exists, must be presumed to be founded on, and co-extensive with, the Muhammadan Law upon that subject, unless the contrary be shown; that the Court may, between Hindus, administer a modification of that law as to the circumstances under which the right may be claimed, when it is shown that the custom in that respect does not go the whole length of the Muhammadan Law of pre-emption, but that the assertion of the right by suit must always be preceded by an observance of the preliminary forms prescribed in the Muhammadan Law, which forms appear to

have been invariably observed and insisted on through the whole of the cases from the earliest times of which we have record."

6. According to that judgment, if we are to follow it in this particular case, there being no evidence to show that the custom here amongst Hindus was not co-extensive with the rule of Muhammadan Law, we ought to dismiss this appeal; because the rule of Muhammadan Law with regard to preemption has not been complied with by the plaintiff.

7. The next case is that of Choudhry Brij Lall v. Rajah Goor Sahai, N.-W. P. Full Bench Rulings, July--December 1867, p. 128. That was a judgment of this Court, and, so far as I can see, the only point in which it diverges materially from the judgment of the Full Court of Calcutta is in the following, which we find on page 130: "It is conceivable that there may be districts in which the right of pre-emption obtains by general usage, unfettered by any, or accompanied by only some, of the restrictions of the Muhammadan Law. If the existence of such a custom so unfettered were proved, it would be the duty of the Court to give effect to it without adding to it incidents which are not proved to form part of the custom;" My observation with regard to that is, that if we are to follow it, it leaves Mr. Colvin in the same difficulty in which he was in the former case. It would still lie upon the plaintiff to show that there was something in the custom which curtailed the requirements of Muhammadan Law, and admittedly there is no evidence to that effect.

8. There is also a case decided by this Court, Jai Kuar v. Heera Lal N.W. P. H. G. Rep. 1875. That case goes no further than the ruling last referred to. The head-note says: "Where the custom of pre-emption prevails among the Hindus, it does not necessarily follow that the person claiming pre-emption must fulfil all the conditions of the Muhammadan Law regarding pre-emption. It should be determined whether the custom is a custom under which it is incumbent upon him to fulfil those conditions." All that I can say about this is, that if a person comes into Court and relies upon a custom ho must prove that custom, but if he cannot prove that custom, but relies upon a rule of law, ho must take the rule of law as he finds it.

9. The next case is that of Zamir Husain v. Daulat Ram I. L. R All. 110 in which the judgment of the Full Bench of Calcutta referred to above is very fully considered by my brother Mahmood. Looking into that judgment, I entirely agree with what fell from my brother Mahmood in that case.

10. In the case of Gobind Dayal v. Inayat-ullah I. L. R. 7 All. 775 my brother Mahmood very fully points out what the origin of this law is, that it is a law which had its origin in the old Muhammadan Law, and was administered by the Muhammadan Judges. He also points out that though the law of pre-emption was originally Muhammadan, pure and simple, yet subsequently it was adopted by the Hindus, and he points to a great many cases relating to the subject of pre-emption.

11. The law with regard to pre-emption was again discussed by my brother Mahmood and Duthoit, J., in their judgment in the case of Ram Dial v. Budh Sen, Weekly Notes, 1884, p. 123.

12. The result is this, that if we are to follow the ruling of the Pull Bench of the Calcutta High Court, then all the requirements of the Muhammadan Law must be strictly complied with to entitle a person to claim pre-emption; for instance, he must make an immediate demand and a confirmatory demand as understood in the Muhammadan Law. On the other hand, if we regard the Full Bench ruling of 1867 of this Court, it may be that the plaintiff-pre-emptor might be entitled to show that a particular custom prevailing in the district exempted him from performing all the strict requirements of the Muhammadan rule. But on either view the plaintiff fails in this case. There is no evidence here that the plaintiff performed the strict requirements of the Muhammadan Law, nor has he given any proof of the existence of a custom exempting him from such performance. Mr. Colvin, on behalf of the plaintiff-appellant, has relied on the notice of the 19th September 1884, sent by the respondent to the plaintiff; he has also relied upon the notice sent by the respondent on the 22nd September 1884; and he has asked us to infer from these notices that there had been a demand made, and notice given that the property would be taken at the contract price by right of pre-emption. Looking at those notices, I infer, in the first instance, that, if there was any demand made at all within a reasonable time, it was a demand that the property should be handed over to the plaintiff on payment of the price which he himself assessed, that is, Rs. 5,500, and not at the price which really was the contract price. But even of any demand, I think these letters do not afford a sufficient proof. There is further no evidence of any confirmatory demand. There is no evidence that the plaintiff was willing to pay the actual contract price. What the actual price was is one of the points which he has contested up to the present moment.

13. Under these circumstances, it appears to me that the plaintiff in this case failed to show that there was, in fact, any custom which absolved him from complying with those rules of the Muhammadan Law, and lie failed to prove that he did, in fact, comply with such rules. For these reasons I am of opinion that this appeal must be dismissed with costs.

14. It is suggested that we should send down issues as to what the custom was, or whether there was any custom curtailing the general rule of the Muhammadan Law, or whether any immediate demand or confirmatory demand was made. I, as a rule, object to send down cases of this kind where the point has been framed as an issue by the Judge below and brought to the attention of the parties, and they have failed at the trial to give any evidence in support of or against it. It would only give the parties a chance of procuring false and perjured evidence, and trying their cases in two or three different ways. I therefore decline to accede to that suggestion.

Mahmood, J.

15. I am entirely of the same opinion, but only wish to add, with reference to the language of the wajib-ul-arz, Clause 14, that the word shufaa is used. The word shufaa is a technical Arabic legal expression, and, as such, I cannot read that clause of the wajib-ul-arz as if no such word existed, and in interpreting that clause I would attach to the word shufaa such meaning and all those incidents which it possesses under the Muhammadan Law. There is no doubt in my mind that the parties to the wajib-ul-arz did use that expression in the sense it has under the Muhammadan Law. The plaintiff having declined to buy the property at the proper time, when it was offered to him, he has no right to come into Court now. I entirely agree with the learned Chief Justice that if we were to remand this case it would be giving the appellant a chance of producing evidence which he could have produced at the proper time, but did not choose to produce. He might well have produced all the evidence which he now wishes to produce, when the case was being tried by the Court below. I therefore concur in dismissing the appeal with costs.