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Mahboob Hasan and Another Vs Ram Bharosey Lal and Another

Court: Allahabad High Court

Date of Decision: Aug. 23, 1965

Acts Referred: Constitution of India, 1950 â€" Article 13, 19, 19(5)

Citation: AIR 1966 All 271

Hon'ble Judges: V.G. Oak, J; D.D. Seth, J

Bench: Division Bench

Advocate: S. Sarafat Ali, in S.A. No. 3473/59 and S.N. Kacker, in S.A. 623/59, for the Appellant; Baleshwari Pd. in S.A. No. 3473/59 and P.C. Gupta in S.A. 623/59, for the Respondent

Final Decision: Dismissed

Judgement

Oak, J.
The following two questions of law have been referred to us:--

1. Whether a custom of pre-emption is void under Article 13 of the Constitution irrespective of the fact whether it gives a right of pre-emption to a

shafi-i-sharik, a shafi-i-khalit or a shafi-i-jar?

2. Whether a custom of pre-emption is void under Article 13 of the Constitution in so far as it gives a right of pre-emption to a shafi-i-khalit who is

merely the owner of an easementary right in the property sought to be pre-empted?

2. This reference has arisen out of two suits for pre-emption. Suit No. 584 of 1955 arose in district Bareilly. In that case Mohammad Nabi

defendant, who was the owner of a certain house, sold it to Mahoob Hasan and Ayub Hasan, defendants Nos. 1 and 2 for Rs. 500. Ram

Bharosey Lal filed the suit for acquiring the property basing his claim on his right of pre-emption. The learned Munsif City Bareilly, dismissed the

suit on the ground that the custom of pre-emption was hit by Article 13 of the Constitution, and was void. That decision was reversed in appeal by

the learned 1st. Additional Civil and Sessions Judge, Bareilly. He held that the plaintiff was entitled to pre-empt the property upon payment of Rs.

500. Against the decision a second appeal has been filed in his Court by Mahboob Hasan and Ayub Hasan defendants. This is second appeal No.

3473 of 1959.

3. Suit No. 31 of 1956 arose in district Muzaffarnagar. In that case Sita Ram purchased certain property; and Atma Ram filed the suit for pre-

emption. That suit was dismissed by the learned Munsif, Kairana on the ground that the custom of pre-emption is void under Art, 19(1)(f) of the

Constitution. That view was accepted in appeal by the learned Additional Civil Judge of Muzaffarnagar. Atma Ram''s appeal was dismissed. Atma

Ram has now come to this Court in second appeal. This is second appeal No. 623 of 1959.

4. When these two second appeals came up before a learned single Judge of this Court, he noticed that there were conflicting decisions on the

question whether the custom of preemption is void under Article 13 of the Constitution. He, therefore, referred to a larger Bench the two questions

of law quoted above.

5. Three different classes of persons may claim pre-emption:--

1. a co-sharer in the property (shafi-a-sharik).

2. a participator in immunities and appendages, such as a right of way or a right to discharge water (shafi-i-khalit), and

3. owners of adjoining immovable property (shafi-i-jar), (Principles of Mahomedan Law by D. F. Mulla, Fourteenth Edition, pages 211 and 212).

6. It will be seen that a person may claim the right of pre-emption on three separate grounds. As regards the validity of the law of pre-emption

claimed by a shafi-i-sharik and shafi-i-jar, the point is now settled by two decisions of the Supreme Court. In Bhau Ram Vs. B. Baijnath Singh, , it

was held that the law of pre-emption giving right of pre-emption to a co-sharer imposes a reasonable restriction which is in the interest of general

public. If an outsider is introduced as a co-sharer in a property it will make common management extremely difficult and destroy the benefits of

ownership in common.

7. In Sant Ram and Others Vs. Labh Singh and Others, , it was held that the customary law of pre-emption on the ground of vicinage imposes

unreasonable restrictions on the right to acquire, hold and to dispose of property guaranteed by Article 19(1)(f) of the Constitution and is void.

8. These two decisions of the Supreme Court lay down authoritatively that a custom of pre-emption based on co-ownership is valid, whereas

custom of pre-emption based on vicinage is invalid. It only remains to consider whether the right of pre-emption of a shafi-i-khalit can be

recognised under the Constitution.

9. Under Article 13 of the Constitution, all laws in force in the territory of India immediately before the commencement of this Constitution, in so

far as they are inconsistent with the provisions of Part III, shall, to the extent of such inconsistency, be void. According to Sub-clause (f) of Clause

(1) of Article 19 of the Constitution, all citizens shall have the right to acquire, hold and dispose of property. Clause (5) of Article 19 states:--

nothing in Sub-clauses (d), (e) and (f) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State

from making any law imposing, reasonable restrictions on the exercise of any ol the rights conferred by the said sub-clause either in the interests of

the general public or for the protection of the interests of any Scheduled Tribe.

10. Mr. S. N. Kacker appearing for Atma Rain appellant contended that Article 19(1)(f) does not apply to the present situation at all. It was urged

that under the customary law the owner''s right in the property was subject to the incidence of pre-emption. That position remained unaltered even

after the Constitution.

11. Reliance was placed on ""Bhimrao v. Patilbua Ramkrishan"" AIR 1930 Bom 552 It was held that: --

Article 19(1)(f) does not give a citizen a larger right to hold or dispose of property than what the citizen possessed in that property before the

Constitution came into force. Thus, where prior to the commencement of the Constitution, a person holding certain property had restricted rights to

the enjoyment thereof because of the personal law governing the person or because the property was inalienable by custom, he would not get the

property freed from those restrictions merely as a consequence of the coming into operation of the Constitution.

12. In "" Shri Audh Behari Singh Vs. Gajadhar Jaipuria and Others, their Lordships observed on page 422 thus:--

The correct legal position seems to be that the law of pre-emption imposes a limitation or disability upon the ownership of a property to the extent

that it restricts the owner''s unfettered right of sale and compels him to sell the property to his co-sharer or neighbour as the ease may be .....

The crux of the whole thing is that the benefit as well as the burden of the right of pre-emption run with the land and can be enforced by or against

the owner of the land for the time being although the right of the pre-emptor does not amount to an interest in the land itself.

13. It may be pointed out that Mr. S. N. Kacker''s argument that the custom of preemption has not been affected by Articles 13 and 19 of the

Constitution applies to all possible grounds of pre-emption. Yet in Sant Ram and Others Vs. Labh Singh and Others, it was held that the

customary law of pre-emption is hit by Article 13 read with Article 19(1)(f).

14. The argument advanced by Mr. S. N. Kacker before us was noticed by the Supreme Court in Bhau Ram Vs. B. Baijnath Singh, . On page

1479 their Lordships observed:--

We are of opinion that even if the law of pre-emption creates a right which attaches be property it would be creating a restriction so far as the

acquiring, holding or disposing of property is concerned which was not there before the law of pre-emption was enacted. Therefore, even if the

liability attaches to the property, it will still amount to a restriction on the right guaranteed by Article 19(1)(f), when it attaches to the property by

the law of preemption.

15. In view of that observation in Bhau Ram Vs. B. Baijnath Singh, it is not possible to accept Mr. S. N. Kacker''s contention that (he custom of

pre-emption does not place any restriction within the meaning of Article 19(1)(f) of the Constitution. Obviously, the right of pre-emption does

place certain restrictions on the right to acquire and dispose of property.

16. We have next to consider whether the customary law is saved by Clause (5) of Article 19 of the Constitution, Mr. P. C. Gupta appearing for

Sita Ram contended that the expression used in Clause (5) of Article 19 is ""existing law""; and customary law cannot be ''existing law.''

17. Mr. P. C. Gupta pointed out that the expression ""existing law"" has been defined in Clause (10) of Article 366 of the Constitution. According

to that definition, ""existing law"" means any law, Ordinance, order, bye-law, rule or regulation passed or made before the commencement of the

Constitution by any Legislature, authority or person having power to make such a law. Ordinance, order, bye-law, rule or regulation. It is true that

the expression ""existing law"" so defined will not cover a custom. But the question arises whether the expression ""existing law"" has been used in that

sense in clause (5) of Article 19. In ""Moti Bai v. Kand Kari Channaya"" AIR 1954 Hyd. 161 (FB), it was held by a Full Bench of Hyderabad High

Court that customary law is not covered by the definition of existing law. Such a law is not saved by Clause (5) or Article 19.

18. The same point came up for consideration before a Full Bench of Rajasthan High Court in "" Panch Gujar Gaur Brahmans Vs. Amarsingh and

Others, . After referring to Article 366 of the Constitution, the learned Judges observed on page 103 thus:--

The context in Article 19(5) requires that the words ""existing law"" should be understood in their broad sense as including any kind of law and

there is no doubt that the restrictions imposed by any customary law cannot be more sacrosanct than the restrictions imposed by statute law.

19. In Sant Ram and Others Vs. Labh Singh and Others, , it was explained on page 316 that the expression ""all laws in force"" appearing in Article

13 has to be read with Article 19 and other Articles appearing in Part III of the Constitution. It would be a curious position if customary law is hit

by clause (1) of Article 19, but cannot be saved by clause (5) of Article 19. The definition relied upon by Mr. P. C. Gupta appears in Article 366

of the Constitution. Article 366 opens with these words:--

In this Constitution, unless the context otherwise requires, the following expressions have the meanings hereby respectively assigned to them.

20. These opening words make it clear that the meaning of a defined expression may be different according to context. In the context of Clause (5)

of Article 19 of the Constitution, the expression ""existing law"" would include customary law as well as statute law. We have, therefore, now to

consider whether the law of pre-emption as regards shafi-i-khalit is saved by clause (5) of Article 19.

21. In Bhau Ram Vs. B. Baijnath Singh, the Supreme Court had the occasion to examine the validity of a number of statutes. One of those statutes

was Punjab Pre-emption Act, 1913. Section 16 of that Act gave the right of pre-emption on various grounds. The first clause of Section 16

applied to co-sharers in a property. Clause (3) of Section 16 applied where the sale is of a property having a staircase common to other

properties, in the owners of such properties. It was observed on page 1483 that ground No. 3 stands on the same footing practically as the first

ground relating to co-sharer. It was, therefore, held that it was a reasonable restriction in the interest of general public. Clause (4) of Section 16 of

Punjab Pre-emption Act governed a case where the sale is of a property having a common entrance from the street with other properties, in the

owners of such properties. It was held that ground No. 4 is similar to ground No. 3.

22. In dealing with the rights of a shafi-i-khalit, it must be recognised that such claims can be of various kinds. A special case has been mentioned

in question No. 2 referred to us. That is a case where a shafl-i-khalit is merely the owner of an easementary right in the property sought to be pre-

empted. The question arises whether the restriction placed by such a custom is a reasonable restriction in the interest of general public.

23. All that the owner of an easementary right may reasonably claim is continuation of his easementary right. Now it does not appear that sale of

adjoining properly endangers the easementary right. Chapter V of the Indian Easements Act enumerates various cases of extinction of easementary

right. Mere sale of adjoining property does not extinguish easementary rights. There is, therefore, no good ground why the owner of an

easementary right should object to the sale of adjoining property to a stranger. Mr. Sharafat Ali appearing for Mahboob Hasan appellant in second

appeal No. 3473 of 1959 conceded that the rights of easement would remain unaffected by the sale which is the subject-matter of the pre-emption

suit, We consider that the right of pre-emption on the sole ground that the claimant is the owner of an easementary right cannot be recognised as a

reasonable restriction in the interest of general public under Clause (5) of Article 19, Consequently such a custom is void under Article 13.

24. Since the claim of a shafi-i-khalit may he based on a variety of grounds, it is difficult to lay down definitely that such a right can or cannot be

recognised as a reasonable restriction in the interest of general public within the meaning of Clause (5) of Article 19. Whether such a claim would

be protected under Clause (5) of Article 19 will depend upon the nature of the claim made by a shafi-i-khalit.

25. Our answers to the two questions referred to us are, therefore, as follows:

(1) The custom of pre-emption is not void under Article 13 of the Constitution as regards pre-emption by a shafi-i-sharik. Custom of pre-emption

is void under Article 13 of the Constitution as regards pre-emption by a shafi-i-jar. Whether custom of pre-emption as regards a shafi-i-khalit is

void or not will depend upon the nature of the claim.

(2) The custom of pre-emption is void under Article 13 of the Constitution so far as it gives a right of pre-emption to a shafi-i-khalit who is merely

the owner of an easementary right in the property sought to be pre-empted.

26. Let the papers be returned to the learned single Judge with these answers.