(1925) 01 AHC CK 0025

Allahabad High Court

Case No: None

Abdul Wahid		APPELLANT
	Vs	
Hatim Ali and Others		RESPONDENT

Date of Decision: Jan. 30, 1925

Citation: AIR 1925 All 554

Hon'ble Judges: Sulaiman, J

Bench: Division Bench

Final Decision: Dismissed

Judgement

Sulaiman, J.

This is a plaintiff''s appeal arising out of a suit for pre-emption with respect to the sale of a share situated in mahal munzabta of Abdul Wahid the plaintiff, in which the plaintiff and the vendor had proprietary interests, and in which the defendant vendee has not proprietary interest. There were many pleas taken by the defendants. Among others there were the pleas, that there was no custom of pre-emption in this village : that the custom did not apply to resumed muaft lands which had been sold and lastly, that the defendant being a proprietor in the village out of which this mahal had been carved, he was on an equal footing with the plaintiff. The Court of first instance decreed the claim; but on appeal the lower Appellate Court dismissed the suit in toto.

2. To prove the existence of this alleged custom the plaintiff produced a wajib-ul-arz of the year 1873 which contains a clause relating to the right of pre-emption. On behalf of the defendant three judgments, namely, of 1879, 1895 and 1899 were produced where a claim of preemption was asserted, but not allowed. The plaintiff produced a judgment of the year 1910 which we understand was affirmed by the High Court in second appeal and where a claim for pre-emption on the basis of custom was upheld. We may note that the judgments in the earlier oases proceeded on a view of law which does not now prevail. The learned Judges did not proceed on a presumption in favour of the plaintiff but rather thought that the wajib-ul-arz not

having been signed by the parties was not conclusive. In the second case the learned Judge held that the custom did not apply to muafi dawami. It is possible that the whole wajib-ul-arz was not before him because in the wajib-ul-arz in chapter III, paragraph 1, there is a special mention that transfers of muafi dawami take effect subject to the right of pre-emption.

3. The last judgment is in favour of the plaintiff.

4. In our opinion there is nothing to rebut the ordinary presumption arising from the wajib-ul-arz that a custom of pre-emption exists in this village. We therefore agree with the Courts below that it must be held that a custom exists.

5. The next question is whether such a custom applies to muafii munzabta. In paragraph 5 of the wajib-ul-arz, after giving a long list of the transfers that were in existence at the time of its preparation, there is a recital that no other property is under a mortgage and that in future every co-sharer will have a right to sell his share, but he shall first sail to his own brothers and if they refuse than to shurkayan deh (co-sharers in the village), and if they also do not take then he may transfer it to any one he pleases.

6. Paragraph 14, which has the heading of the custom of pre-emption, states that pre-emption prevails. It is noteworthy that in this paragraph the list comprises both shares in khalsa and resumed muafi, and there is nothing in it to indicate that the entry was confined to sales of shares in khalsa land alone. Furthermore, since the preparation of the wajib-ul-arz the village has been partitioned into two distinct mahals. The plaintiff''s mahal now consists of only one class of proprietors who originally were proprietors of resumed muafis and now are co-sharers in this new mahal. The plaintiff and the vendor are both co-sharers and they are on the same footing, whereas the defendant vendee is not a co-sharer in this mahal. The custom must be deemed to exist in this new mahal.

7. It is next contended before us that the defendant being a proprietor in the village is on the same footing as the plaintiff. This contention cannot prevail. Prior to the partition he certainly was a co-sharer with the vendor but since the partition he has gone off to an entirely different mahal and has no community of interest left with the vendor.

8. We are accordingly of opinion that the view taken by the learned Judge is not correct. We allow this appeal, and setting aside the decree of the lower Appellate Court restore the decree of the Court of first instance with costs in all Courts including in this Court fees on the higher scale. We extend the time for payment to six months from this date. In case of default of payment, the suit shall stand dismissed with costs in all Courts including in this Court fees on the higher scale.