Sekh Nurul Islam and Another Vs Esrail Munshi and Others

Appeal from Appellate Decree No. 1078 of 1955

Court: Calcutta High Court

Date of Decision: Jan. 28, 1964

Acts Referred:
Civil Procedure Code, 1908 (CPC) â€" Section 100#Constitution of India, 1950 â€" Article 133(1)(c)

Citation: 68 CWN 379

Hon'ble Judges: Bijayesh Mukherji, J

Bench: Single Bench

Advocate: Manindra Nath Ghose and Anil Kumar Seth, for the Appellant; Sarat Chandra Jana and Jnanendra Mohan De, for the Respondent

Final Decision: Dismissed

Judgement

Bijayesh Mukherji, J.
This appeal by the principal defendants from an appellate judgment and decree of reversal concerning an action for

pre-emption under the Mahomedan Law has been opened by Mr. Ghose, the learned advocate for the appellants, on two points only. First, the

judgment under appeal is not a proper judgment of reversal. Second, no case of inconvenience to the plaintiffs respondents has been made out

and, worse, the right of pre-emption on the ground of vicinage does not extend to the subject-matter of this litigation, a doba (pond) which is plot

no. 7116 in khatian no. 61 of mouza Sirharai within the jurisdiction of Galsi police-station in the district of Burdwan. The first point Mr. Ghose

urges upon me arises thus. The learned munsif who dismisses the suit finds that Tamena, a daughter of the vendor Abu Bakkar, the pro-forma

defendant, and also a son-in-law of the pre-emptor Esrail Munshi, a plaintiff respondent, could not have accompanied the said Esrail Munshi out

for fishing in the doba in controversy here when he was told by Morfatan Bibi, the mother of the vendee and the first appellant Nurul Islam, of the

sale by Abu Bakkar on January 25, 1951 [vide Ext. B(1)] and made the demand of jumping, talab-i-mowasibat, then and there. So the making of

that formality is disbelieved. The learned appellate judge who upsets the decision of the learned munsif and decrees the suit for preemption says

nothing about it. But only because this is so, the judgment under appeal cannot go down as not a proper judgment of reversal. Reference may be

made to the case of (1) Jatra Mohan v. Pitamber: 19 C.L.J. 385, where it has been held that the lower appellate court is not bound to dispose of

seriatim all the reasons given by the first court if it give special reasons for an opposite conclusion. Here the learned appellate judge, the last court

of facts, after having reviewed the whole of the evidence, finds as a fact that the formality of talab-i-mowasibat was gone through in fact. For all I

see, there is no error of law which vitiates this finding. So, this finding of fact must stand. It does not appear to be of the least materiality that the

learned appellate judge has not spoken a word about the probability of Tamena having accompanied Esrail Munshi while he was out for fishing in

the doba in controversy here. Were it open to me to enter into this question of fact, I would have had unhesitatingly rejected the approach made by

the trial court. On the other hand, I would have"" held, going by probability, that it was very natural for Tamena, a daughter, to be left behind with

her mother. It was equally natural for the father to take only the sons along with him. Since, however, the realm of facts is a prohibited area for me,

I need not say on this anything further.

2. I shall now assume on the basis of submissions made by Mr. Ghose that the finding of fact on this point come to by the last court of facts is

wrong. Even then, it is not for me to upset it unless I see any error of law. The warning given by the Supreme Court in (2) Deity Pattabhi

Ramaswamy v. S. Hanymayya: AIR 1959 S.C. 57, is worth remembering. Some learned Judges of the High Court, the Supreme Court observes,

are disposing of second appeals as if they were first appeals. This introduces, the Supreme Court continues, apart from the fact that the High Court

assumes and exercises a jurisdiction which it does not possess, a gambling element in the litigation and confusion in the mind of the litigant public.

This caution is repeated in (3) R. Ramachandran Ayyar Vs. Ramalingam Chettiar, . Again, in (4) Madamanchi Ramappa and Another Vs.

Muthalur Bojjappa, , it is said:

If the High Court contravenes the express provisions of section 100 of the Code of Civil Procedure, it introduces in its decisions an element of

disconcerting unpredictability which is associated with gambling; and that is a reproach which judicial process must constantly and scrupulously

endeavor to avoid.

3. It, therefore, beats me how I can rise above the finding of fact come to by the last court of facts.

4. Mr. Ghose refers me in vain to (5) Kishan Prasad Vs. The Union of India, , where the subordinate judge considers only the fringe of the

evidence and refuses to look into the evidence on record. Now, the refusal to look into the evidence on record does constitute very much an error

of law. Nothing like that can be said of the judgment under appeal before me.

5. Equally vain is the reference by Mr. Ghose to (6) Lachman Utamchand Kirpalani Vs. Meena alias Mota, . True, it is, as Mr. Ghose submits,

that no substantial question of law is agitated in that case before the Supreme Court. What bulks large is appreciation of facts. So what? The

Supreme Court hearing a second appeal (literally speaking) is not the High Court hearing a second appeal within the meaning of section 100 of the

Code with heavy fetters on.

6. Ineffective too has been Mr. Ghose''s contention about article 133(1) (c) of the Constitution. The question of fitness this article contemplates has

no connexion whatever with the question of a substantive question of law. Still if you compare this article with section 100 of the Code, you only

compare the uncomparable.

7. The first point on which I have been addressed by Mr. Ghose also arises another way. The evidence on record is, as Mr. Ghose rightly points

out, that the doba in controversy here goes dry in the month of Chaitra every year. But that is not the only evidence. The evidence further is that

there was water up to the height of one cubit when one of the pre-emptors Esrail Munshi went there with a view to catching fish. The learned

appellate judge has taken the whole of it into his consideration and found as a fact that the pre-emptor did go there that day to catch fish. It is really

assessment of evidence followed by a finding of fact by the last court of facts. For reasons set out in the foregoing lines, this finding must also stand.

8. The first point urged in support of the appeal, therefore, fails.

9. The second point which I now take up admits of an easy answer. I am at one with Mr. Ghose that the law of pre-emption is founded on the

doctrine of convenience. Hamilton''s Hedaya, Vol. III, at page 591 says as much:

Besides, according to our tenets, the grand principle of Shaffa is the conjunction of property, and its object.....to prevent the vexation arising

from a disagreeable neighbor...

10. But this doctrine of convenience does not necessarily mean that, unless the pre-emptor can prove inconvenience, he is not entitled to pre-empt.

All that is to be seen is if the pre-emptor can pre-empt under the Mahomedan Law as it now stands. Here are two owners of an adjoining

immovable property. As a matter of fact, plot no. 7116 which is the doba in controversy before me is on the adjacent north-west of plot no. 7115

which is the tank of the pre-emptors. That being so, it is there only to be seen that they are entitled to pre-empt on the ground of vicinage,

inconvenience or no inconvenience. Because preemption is founded on the doctrine of convenience, the inference by no means follows that

inconvenience has to be proved before one can successfully pre-empt. Applying the Mahomedan Law as summarised in article 231 of Mulla''s

Principles of Mahomedan Law, fifteenth edition, the answer must necessarily be that the plaintiffs respondents have locus standi to maintain the suit

for pre-emption.

11. But this right of pre-emption is confined to houses, gardens and small parcels of land. Does the doba I see here come within the category? It

does. After all, what is a doba or a pond? It does not hang in the air. The commonsense meaning is that it is land covered with a little bit of water.

The area is only 24 acre, a little less than a bigha. So it is a small parcel too. Attention has to be called to the case of (7) Mahmood Hasan Khan

Vs. Bhikhari Lal and Others, , where land admeasuring 4 bighas 5 biswas is held to be not so big as to escape the category of a small parcel of

land. A fortiori, therefore, the land of this litigation with a little water upon it and admeasuring less than a bigha must be deemed to be a small parcel

of land as well.

12. Mr. Ghose invites my attention to article 539 of Tyabji''s Muhammadan Law. There it is stated that Aqar or land may validly be the subject-

matter of pre-emption. Now, what is Aqar? To quote Tyabji again:

The strict meaning of the word aqar, is space covered with buildings, so that, properly speaking, the term is not applicable to zaiat. But according

to the Kifayah, and the Inayah, aqar in the sense in which it is liable to preemption includes a zaiat.

13. The question, again, arises: what is zaiat? At footnote 16 of Tyabji''s book, zaiat is variously interpreted--a field whether arable or pastoral, an

estate, productive farm, villa, any immovable possession and also land and water.

14. So, there can be no escape from the conclusion that the doba here is a fit matter to be pre-empted under the Mahomedan Law. The second

point on which this appeal has been opened therefore fails. Accordingly, I dismiss the appeal with costs.