(1863) 09 CAL CK 0001

Calcutta High Court

Case No: Special Appeal No. 1116 of 1861

Fakir Rawot and Others		APPELLANT
	Vs	
Sheikh Emambaksh		RESPONDENT

Date of Decision: Sept. 28, 1863

Judgement

Sir Barnes Peacock, Kt., C.J.

The question submitted to us by the referring Judges in this case, is whether, when a right of pre-emption is claimed and admitted among Hindus in Western India, the exercise of that right is to be regulated by the Mahomedan law of pre-emption, or is to be regarded as an independent custom based upon the constitution of Hindu society itself, wholly irrespective of the Mahomedan law. Mr. Justice Campbell is of opinion that all the earlier decisions, as well as administrative experience, establish the latter view; and that the ruling of the late Sudder Court, in Mewa Lal v. Sooltan Singh 7 Sel. Rep., 129, dated the 25th July 1843, and the numerous decisions which have since followed that ruling, were wrong. Mr. Justice Bayley intimates a doubt upon the point.

2. The question, we may observe, relating to this right, is two-fold: first as to the circumstances under which it may be allowed; second, as to the manner in which it is to be asserted.

3. Mr. Justice Campbell thinks that, on the one hand, Mahomedan law sanctions the right in cases where Hindu custom would not permit the claim, such as mere vicinage; and, on the other hand, the procedure enjoined by the Mahomedan law is absurdly technical, and as such oppressive. The argument before us on this occasion throwing but little light on the subject, and the text books of Hindu law being wholly silent upon it, we have carefully compared the reports of decided cases, including a few from the North-Western Provinces.

4. The Bengal cases are:--Ramrutun Singh v. Chunder Narain Rai 1 Sel. Rep., 1, Ram Kunhaee Rai v. Bung Chund Banhoojea 3 Sel. Rep., 17, Omed Rai v. Nakched Rai 5 Sel. Rep., 68; note, 71, Partab Narayan v. Rattun Mahtan, Rajendra Narayan Adhikari

v. Syud Abdul Hakim Ibid, 307, Ramnath Singh v. Rajroop Singh and Rada Kishen 6 Sel. Rep., 82, Mohabul Nath Sewaree v. Bhowanee Dutt Singh Ibid, 83, Meetun Lal v. Mussamut Deo Murat 6 Sel. Rep., 163, Mahadeo Dutt v. Poorun Bibi Ibid, 277, Mewa Lal v. Sooltan Singh 7 Sel. Rep., 129, Gooroo Churn Sircar and others, applicants 1 Sev., 27; see Morley''s Digest, I, 536, Bhyroo Chunder v. Hurwuttee Ram, S.D.A., 1847, 22, Purbhoo Raee v. Bhehun Raee S.D.A., 1848, 359, Boijzung Szuahaee v. Munraj Singh Ibid, 533, Omrao Singh v. Sukhawat Hosein S.D.A., 1848, 894 Sheo Dyal Roy v. Baboo Sheo Sahaj Singh S.D.A., 1852, 859, Lotun Roy v. Doomun Roy S.D.A., 1853, 704, Dulloo Koonwar v. Bundhoo Koonwar S.D.A., 1855, 12, Shah Moshum Alee v. Nakenam Singh S.D.A., 1857, 525, Muhabeer Persaud v. Pertab Narain S.D.A., 1858, 427, Seetaram v. Komul Sahoo Ibid, 771, Baboo Kustooree Singh v. Gokool Persad Ibid, 1754, Radha Pattuk v. Lalla Burmanund S.D.A., 1859, 714, Kalee Churn v. Bishen Dyal Singh S.D.A., 1859, 746, Kali Pursad Singh v. Busunt Koomaree 1 Hay, 32. They range from 1792 to 1862, including a case decided in this Court by Trevor and Morgan, JJ.

5. With regard to the precedent of 1843, Mewa Lal v. Sooltan Singh 7 Sel. Rep., 129, we do not find that it decided anything more than that the right of pre-emption, where it is recognized among Hindus on the ground of custom, has to be governed by the rules and restrictions of Mahomedan law, whence, the Court observed, the right derived its origin. These rules and restrictions, we understand, to have reference to the mode of asserting the right. The ruling was not a mere obiter dictum, for the point was directly in issue in the case. The same view has been adopted without hesitation, and even without question, in all the decisions since that time; and on referring to the earlier cases in the Select Reports, we think the view taken in 1843 by no means inconsistent with those precedents; and we think it fully borne out by the leading cases in the North-West Provinces. Shah Muqbool Alum v. Ajoodhea Singh S.D.A., N.W.P., 1849, 137, Jowahir Lal v. Mirza Mogul Beg Ibid, 1850, 21, Nawab Mustafa Khan v. Ranee Bhoj Kooer and Kunwur Himanchul Singh Ibid, 1852, 227, and Nunko Doobe v. Narain Doss Ibid, 1856, 393.

6. We proceed to notice briefly the old cases cited in Morley''s Digest, Volume I, Page 535, under the somewhat misleading title "Hindu Law of Pre-emption." First in order is the oldest reported case, Ramrutun Singh v. Chunder Narain Rai 1 Sel. Rep., 1. In that case (from what zillah does not appear) an estate had been separated into two distinct parts paying revenue separately to Government, and thus being quite independent estates. The owner of one part sold a moiety of it to a stranger, and the owner of the other part claimed a right of pre-emption, all the parties being Hindus. The Court held, with the majority of the pundits, that the plaintiff had no such right. The Mahomedan law does not seem to have been appealed to on either side, and it seems very doubtful whether even Mahomedan law would have countenanced such a claim. The next, Ram Kunhaee Rai v. Bung Chund Banhoojea 3 Sel. Rep., 17, is a Bengal case, and it is admitted that the right of pre-emption is not recognized under any form in Bengal Proper. We now come to the two cases Omed Rai v. Nakched Rai

5 Sel. Rep., 68; note, 71 and Partab Narayan v. Rattan Mahtan 5 Sel. Rep., 68; note, 71. In the latter of these two cases, which was the earlier in point of time, it is curious to find the pundits asserting the existence of a right of pre-emption founded on vicinage under Hindu law, and supporting their opinion by the only text that has ever been adduced from any Hindu authority on the subject--and that a work of mythological rather than of a legal character. In that case, it seemed that "both parties, though Hindus, referred to the civil law of the Arabs, and the suit was ultimately dismissed on the ground of plaintiff''s failure to assert his right in sufficient time." The plaintiff, it appears, claimed both as a shafee khalit (neighbour by common tenancy or partner) and also by right of ordinary vicinage. The vicinage was admitted, and the partnership denied, by defendant, and the Court reserved the question whether the right by vicinage might or might not be valid under the Hindu law current in Western India. In Omed Rai v. Nakched Rai 5 Sel. Rep., 68 note 71 to which the above case is given by way of note, the parties again seem to have relied upon the Mahomedan law, plaintiff alleging that he had given notice of his claim to the Kazee; and defendant pleading first, that plaintiff had refused the bargain; secondly, omission to advance the claim within the period prescribed by law. The Court remarked that "the parties being Hindus, the dismissal on a technical point of Mahomedan law was improper. The right of pre-emption was supported not only by local usage, but by the Hindu law as expounded by the pundits." Now it is clear enough that if the parties were Hindus, and the Court thought the right of pre-emption sanctioned by the Hindu law, the claim could not be defeated upon a rule taken from the Mahomedan law upon the same subject. The Court, however, went on to observe that, "upon the particular question of laches on the part of plaintiffs," it "could find no neglect in asserting their right, sufficient to bar their claim," so that, in fact, it was immaterial whether the points were decided under the Mahomedan law or not. In another case, Rajendra Narayan Adhikari v. Spud Abdul Hakim 5 Sel. Rep., 307, everything turned upon the covenants executed between the parties, and it was remarked that, under the circumstances, the Mahomedan law was irrelevant, Ramnath Singh v. Rajroop Singh 6 Sel. Rep., 82 and Mohabul Nath Tewaree v. Bhowanee Dutt Singh Ibid, 83 are two cases from Shahabad, in which it is merely laid down that the practice of claiming right of pre-emption is current among Hindus in the Province of Bihar (although the right is not expressly recognized by Hindu law). In one of these cases, both parties relied upon vicinage, and in both cases "legal preliminaries" or "conditions" are referred to as necessary. The case of Meetun Lal v. Mussamut Deo Murat 6 Sel. Rep., 163 merely upholds the doctrine that Hindus are to be admitted to the right of pre-emption as matter of custom--what the nature of that custom was is not stated. In the next case, Mahadeo Dutt v. Poorun Bibi Ibid, 277, there was no question of the right of pre-emption raised, the only point in dispute being the amount of purchase-money that was to be paid. We think, it cannot be said that these cases decide anything as to the existence of a Hindu custom of pre-emption not founded upon Mahomedan law, or that they afford any ground for holding that the decision of 1843 was wrong.

There is then the precedent in Gooroo Churn Sircar and others, applicants 1 Sev., 27; see Morley''s Digest, I, 536, but that is a case to which we find some difficulty in referring, as we do not understand on which principle it was decided. The appeal came from Beerbhoom, which is a Bengal district; it had been repeatedly held that a right of pre-emption was not recognized in Bengal, and the petitioner referred to neither Mahomedan law nor custom. The application was to cancel the sale, made in execution of a decree to the defendant, of the female apartments of one Ashernund, which were contiguous to those of the applicants, on the ground that by such a sale the petitioners would suffer serious inconvenience, and the females of their family incessant exposure. The Court gave this final judgment: "Pre-emption is recognized by the Mahomedan law. It is unknown to the Hindu law "whereby vicinage does not confer any right to such claims; but by "the practice of the Court, a claim of the right of pre-emption arising "from vicinage has been recognized to extend even to Hindus, in preference to claims advanced by strangers;" and it was ordered that the Zillah Judge should depute a Hindu Moonsiff to enquire and report whether the sale complained of would be really opposed to the feelings, peculiar usages, and institutions of the natives; and that, if the Judge should he satisfied upon the Moonsiff''s report that it would be so, he should cancel the sale and make over the premises to the applicants on their paying the purchase-money with interest at 5 per cent. This order appears to have "been made upon general considerations of equity and justice.

7. We may now briefly refer to the cases in the North-Western Reports. There is a case. Shah Muqbool Alum v. Ajoodhea Singh S.D.A., N.W.P., 1849, 137, which the Court appears to have decided on somewhat narrow grounds. The plaintiff claiming a right of pre-emption, under Mahomedan law, was a Mussulman, the defendant was a Hindu and objected to the application of Mahomedan law; and the Court, without adverting to the question whether or not a pre-emption existed by usage, and what the nature of the usage was, held simply that, under the circumstances, the 9th section of Regulation VII of 1832 was decisive, and forbade the admission of huq shaffa (pre-emption). But in 1850, a broader view was taken. In Jowahir Lal v. Mirza Mogul Beg S.D.A., N.W.P., 1850, 21, Regulation VII of 1832 was again mooted, but the Court said:--"In this case the only "party who loses anything is the defendant Jowahir Lall, and he is of "the same persuasion with the plaintiffs." . . . "Still less can any "objection be now taken by the defendant Mogul Beg, who is a Mahomedan. The right of pre-emption is of Mahomedan origin, but it has "frequently been accepted by the Hindus; and whereas in the instance "before the Court no objection whatever is made to the applicability of "the law which governed the decision, the Courts are not called upon, "proprio motu, to refuse to administer that law to the Hindus." In Nawab Mustafa Khan v. Ranee Bhoj Kooer and Kunwur Himanchul Singh S.D.A., N.W.P., 1852, 227, the same Court quoted with approbation, and affirmed the Calcutta Sudder Court ruling of 1843. They did so again, in 1856, in Gunesh Deen Panda v. Bhola Singh S.D.A., N.W.P., 1856, 363, and this brings us to the case of

Nunkoo Doobe v. Narain Doss Ibid, 393, relied on by Mr. Justice Campbell. What was actually decided in this case was, that a Hindu claimant could not, on the mere ground of vicinage, support a claim to pre-emption in respect of an entire estate. We think it pretty clear, however, that even among Mahomedans, the Courts would not carry the right of pre-emption so far as this. The Court, indeed, observes that the grounds upon which the Courts have based their recognition of the right of pre-emption among Hindus are, first, prescriptive usage and local custom, and, second, the justice and propriety of the measure to prevent dissension by the introduction of strangers. Now this we presume is precisely the principle which must be at the bottom of the right to pre-emption by vicinage, when that right is restrained within reasonable limits; and it is because this principle is to a less degree concerned in cases of vicinage, that the right by vicinage is regarded by the Mahomedan law itself as weaker than the right by common tenancy. We are not inclined to dissent from this ruling of the Agra Sudder Court. It in no respect impugns, on the contrary it again affirms, the Calcutta decision of 1843. Its effect is not to establish among Hindus the existence of a separate law or custom of pre-emption distinct from that set forth in Mahomedan law, but rather to qualify the application of that law and to intimate that the Court will not admit that right among Hindus in all cases possible among Mahomedan, but in cases of doubt will look to the nature of the asserted right or custom, and ascertain whether it be reasonable; and this appears to us a very proper view of the subject, and one consistent with most of the cases decided in the late Sudder Court of Calcutta.

8. 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 Bihar, and some other provinces 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 Mahomedan law upon that subject, unless the contrary be shown; that the Court may, as 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 Mahomedan 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 Mahomedan 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. In this requirement we see no evil, inasmuch as a right of pre-emption, undoubtedly, tends to restrict the free sale and purchase of property, and it is desirable, therefore, to encompass it with certain rules and limits lest the right should be exercised vexatiously.

9. It may be noted as a significant fact that every term employed in connection with this right, including the name of the right itself, Shaffa, is borrowed from the Arabic; and that the special appellant''s pleader, himself a Hindu, could not, when questioned by the Court, refer to any term of Hindu origin connected with the

subject. And in reference to this particular case we may add that no separate Hindu custom was ever pleaded, nor was the applicability of Mahomedan law ever disputed, by the defendant, until the point was orally taken up at hearing of the special appeal. We consider that the view originally taken by Mr. Justice Bayley was correct, and that the case should be remitted to the zillah authorities, for a finding on the second issue.