
(1871) 03 CAL CK 0002

Calcutta High Court

Case No: Special Appeal No. 1875 of 1870

Sheikh Bandi Hossein

APPELLANT

Vs

Lala Prag Dutt and
Another

RESPONDENT

Date of Decision: March 2, 1871

Final Decision: Allowed

Judgement

Ainslie, J.

This is a suit founded on right of pre-emption. The plaintiff claims as shafee khalit" and has obtained a decree in the lower Appellate Court. The first ground of appeal taken by the defendants, special appellants, is that, whereas the plaintiff claims as khalit" or preemptor in the second degree, it was not open to the Judge to find that he was sharik or pre-emptor in the first degree.

2. This objection is founded on the opening words of Chapter II, on Pre-emption, in Baillie"s Digest of Mahomedan Law, page 476. "A "sharik" (or partner in the substance of a thing) is preferred to "a khlait" (or partner in its rights, as of water or way)." But it has been brought to our notice by the respondent"s pleaders that in the original Arabic version of the Hedaya the word khalit" is used in both places, and sharik does not appear at all; and from my personal experience, I incline to think that in the Bihar districts khalit" is habitually used to represent a pre-emptor of the first degree.

3. It certainly was so in Tirhoot, in the case of Mahadeo Sing v. Mussamat Zaitannissa Ante, p. 45, and in a Sarun case (this appeal also comes from this district) to be found in Syed Wajid Ali Khan v. Lata Hanuman Prasad 4 B.L.R., A.C., 139.

4. And as it appears that the term "khalit" is used in the Hedaya to designate the person whom Baillie calls a sharik" it cannot be said that it is improperly used in a plaint, as a designation of a partner in the substance. No doubt, it requires some addition to make clear what the foundation of the plaintiff"s alleged title is, but this may be either shown by express words, or it may be inferred from the written statement. In this suit it seems clear

that the plaintiff was claiming as partner in the substance.

5. It is therefore quite unnecessary to follow the appellant's pleader into a discussion of whether a pre-emptor by partnership in the appendages (one of the second degree) can enforce his claim in respect of anything but small parcels of land.

6. The respondent has attempted to set up an alternative case for the plaintiff that he is "khalit" either in respect of the substance or of the appendages.

7. In the first place I think a plaint that is ambiguous is bad in form. I do not mean to say that the plaintiff might not have claimed under two several rights; but if he intended to do so, he should have stated the fact distinctly, that the adversary might have due notice, and the Court be enabled to raise the proper issues; and in the second, I think that in this case the ambiguity really is non-existent, and is only an ingenious suggestion of the respondent's pleader. From the judgment of the first Court, it is quite clear that what the Court and the parties understood to be in issue, was simply the right by partnership in the substance, and that no claim by partnership in the appendages was advanced under cover of the ambiguous expression khalit."

8. If it were possible at this stage to admit a claim as pre-emptor by right of way, it would be very simply disposed of by pointing out that public thoroughfares give no right of pre-emption, and that village roads are in the nature of thoroughfares.

9. It remains to enquire whether the Judge was right in holding the plaintiff to be a partner in the substance. The village was regularly partitioned by the Revenue authorities. The plaintiff's interest is in one of the separated lots, and the defendants' in another: but it is urged that some 11 bigas were left undivided. The greater portion consisted of the aforesaid roads, and of land of mafidars and others over which the owners of the village exercised no rights of proprietorship; but the Judge finds that certain small portions, recorded in Nos. 248, 251, and 314 of the batwara khasra, were left the joint property of the owners of the village, and on the existence of these lands, he founds a title for the plaintiff by right of partnership in the substance. The Judge states that these lands are described in the partition proceedings as worthless and therefore not susceptible of being divided, but that one small plot of 6 katas, which was described as a hole, is now a fishery yielding rent, and that on another, which was then a road, a ryot has since erected a house.

10. It is on this joint ownership that the respondent relies; the decision in *Mahatab Sing v. Ramtahal Misser* 6 B.L.R., 43 is brought forward in support. In that case the reservation of the jalkar and namak sar as common property after the division of the land was held to be sufficient foundation for the claim of the pre-emptor. I wish to offer no opinion on this point, this case is clearly distinguishable. In that case the parties by consent and deliberately reserved a joint interest (if the subject-matter was capable of partition). In this case it is stated by the Judge of the first Court that they divided jalkar, namak sar, kayari,

&c.,--in short, everything which was worth dividing,--and only remained jointly interested in what was either utterly worthless, or (more probably) was treated as public property in the same way as the roads.

11. In short, the partition was as if two persons dividing a house and its cartilage carefully marked off each room and foot of ground, but forgot or neglected to sub-divide a worn and useless brick that had fallen from one of the walls, and was lying in a rubbish heap in some corner. Out of this brick, can we build a joint ownership of a portion of the thing sold, when one of the two sells his separated share to a stranger? Yet this is just what the plaintiff seeks to do in this case. It is said that the undivided property is now of some value. But it is manifest that the intention was to make a complete separation, and that the incompleteness, if such it can be called, was, at the utmost, the result of mere accident (as I have said above, I think it extremely probable that this land was treated as subject to the rights of the public at large, and not private property of the landlords); and I cannot conceive that the respondent can maintain that the oversight is to over-ride the express intention of the parties.

12. Mr. Twidale for the respondent has quoted the instances mentioned in page 478 of Baillie's Mahomedan Law; but in my opinion those cases in no way support his contention, but rather go against it. In the first instance, when two persons holding land in common divide it, but leave an existing wall and the land on which it stands undivided as their common boundary, they deliberately and intentionally maintain a community of interest for their mutual advantage; the wall is an integral part of the property of each at the time of partition, and consequently the right of pre-emption by partnership is held to attach. In the second case, no community of interest is maintained; a new common interest is created, but does not extend further than the intention of the parties at the time of creating it,--i.e., beyond the wall. The previous intention to divide completely is not affected though the new wall becomes a source of common profit. So in this case, the common profit which may have arisen since the separation, which was intended to be complete at the time it was made, cannot operate to defeat the original intention.

13. I would therefore reverse the decision of the lower Appellate Court, and dismiss the suit with costs in all Courts.

Loch, J.

14. I concur in making an order, reversing the judgment of the lower Appellate Court, as proposed by my colleague. The cases which rule that a partner in the substance is entitled to exercise the right of pre-emption, presume that the party so claiming is a partner in the whole property, and those rulings are not applicable to a case like the present, where the original estate has been partitioned under the batwara law, and these separate estates formed out of the one original estate. The utmost that can be conceded to the plaintiff is a right of pre-emption to so much of the land as remains in the joint possession of him and the vendor, but nothing beyond it. The appeal is decreed with

costs in this and the lower Appellate Court, and the decree of the first Court, dismissing the suit with costs, is restored.

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25.02.1869

Mahadeo Sing Vs. Musst. Ziatannissa and Ors.

Kemp and Glover, JJ.

Baboo Ramesh Chandra Mitter

Mr. R.E. Twiddle and Munshi Mahomed Yusaff

Glover, J.

This was a suit by the plaintiff to enforce the right of preemption over a three-anna share in Mauza Tikhawli, on the ground that the plaintiff possessed the right of shaffa as being a part-owner of the thing sold, and likewise on the ground of vicinage. The plaintiff is admittedly the proprietor of a one anna divided share in the estate. It appears that there was a batwara of the four annas under which three annas were measured off as belonging to the defendant, the vendor, and one anna as belonging to the plaintiff. The first Court decreed the suit in favor of the plaintiff, holding that he was entitled as a co-parcener in the estate to the right he sought; but the Judge on appeal held that, as the plaintiff by his own showing claimed as the owner of a separated share of one anna in the estate, he was no longer a co-parcener, and therefore not entitled as a shafee khalit" to the right of pre-emption in the remaining three annas; he decided the case therefore without taking into consideration the objection raised in the first Court as to whether there had or had not been any real sale of the property. It is contended before us by the pleader for the special appellant that the plaintiff was not only the owner of this one anna divided share in the estate, but was likewise joint owner with the defendant of some four bigas six katas thirteen and a half dhurs of land which had been, at the time of the batwara, set apart for the joint use and enjoyment of both the proprietors, and it was contended that, on this state of facts, the plaintiff would be entitled to the position of a shafee khalit," inasmuch as he was a partner, if not in the land itself, in the appendages of that land, and therefore, under the Mahomedan law, entitled to pre-emption over a three annas share of the property. This objection, we say, was taken by the special appellant's pleader before us, but it is not to be found in the grounds of special appeal, which proceed simply on the fact that the plaintiff was a shafee khalit, inasmuch as his ownership in a one anna share of the estate gave him that position, nor do we find that this objection was ever taken in the lower Courts at any stage of the proceedings from

first to last. In the first Court, as well as before the Judge, the only grounds of the plaintiff's suit were, first, that he was a partner in the property to be sold, inasmuch as he was a share-holder of the entire patti, and, second, that if he was not a share-holder, he was at least a neighbour. It was never contended at any stage of the case that there was any land left ijmalī between the two proprietors, on the strength of which either one of them could claim, if necessary, the rights of a partner in the appendages of the land. No doubt, it has been shown to us, by the special appellant's pleader, that evidence as to the lands set aside for the joint enjoyment of both proprietors is to be found in the batwara papers on which it is stated that the plaintiff based his suit; but when the sole cause of the plaintiff's action, as detailed by him, was that he claimed priority of purchase in these lands as share-holder of one anna in the estate, and made no mention whatever of any right that he supposed himself to have had on the fact that a portion of the land was left ijmalī, we do not think that, at this eleventh hour, and after the case has been decided upon entirely different grounds in both the lower Courts, and especially considering the nature of the case, we should be justified in allowing that objection to be taken now.

As the case was put before the Judge, that is, to say simply on the ground that the plaintiff was the owner of a divided one anna share, we think that the Judge was quite right in holding that that possession gave him no claim to the right of preemption over the remaining three annas. The special appeal, is therefore dismissed with costs.