

(1868) 07 CAL CK 0007

Calcutta High Court

Case No: Special Appeal No. 104 of 1868

Abdul Gafoor

APPELLANT

Vs

Musst. Nur Banu

RESPONDENT

Date of Decision: July 3, 1868

Judgement

L.S. Jackson, J.

It appears to us that the decision of the Judge, in this case, cannot be maintained. The plaintiff sued to enforce her right of pre-emption. Her allegation was that hearing that the property in dispute had been sold, on the 13th of November 1866, by Abdool Gafoor, Nischint Ram, Brindaban, Dulung Dasi, and Subarna Dasi, the defendants, she, on the next day, immediately on receiving the news, complied with the requirements of the Mohammedan Law, and asserted her right; and, therefore, sues to enforce that right.

2. It appears that the property had been sold as belonging to several co-sharers, certain of whom were minors, the other vendors claiming to act on their behalf; and the deed of sale contained a stipulation that if the minors, on coming of age, should refuse to ratify the sale, the other vendors would compensate the purchasers for any loss that they might suffer.

3. The first Court dismissed the plaintiff's suit, holding that she was not entitled to enforce the right she claimed. On appeal, the Judge was of opinion that the claim to the property could not be enforced as regarded the shares of the minor vendors, and he allowed the case to stand over for thirty days to allow the Plaintiff to withdraw her claim, so far as the interests of the minors were concerned. The plaintiff elected to do so, and the Judge allowed the plaint to be amended so as to ask the plaintiff's right of pre-emption to be enforced only as regarded the rights of the vendors who were of full age.

4. It seems to us that this withdrawal entirely invalidates the plaintiff's claim to enforcing the right of pre-emption. If she elects to enforce her right of preemption, she must take the bargain with all its advantages and risks: and as she has thought

fit to prosecute her claim only as regards the shares which are safe, such act of hers invalidates the whole claim.

5. We cannot shut our eyes to the fact that this proceeding was not spontaneous on the part of the plaintiff, but suggested by the expressed opinion of the Judge, and it does appear probable that the plaintiff, in submitting to that suggestion, yielded to an influence which she thought herself unable to resist. But we are not at liberty to give effect to a mere surmise and to disregard what the plaintiff has deliberately done in having elected to amend her plaint. I am very doubtful whether the plaintiff could properly be allowed to amend her plaint at that stage of the proceedings, and it seems proper that in the Appellate Court, the plaintiff should stand or fall by the case with which she came into Court originally.

6. The judgment of the Lower Appellate Court must, therefore, be reversed, this appeal must be decreed, and the plaintiff's suit dismissed; but under the circumstances I would make no order as to costs.

Mitter, J.

7. I entirely concur. I think the plaintiff ought not to be permitted to split up the bargain entered into by the special appellant's vendors into two parts, and then to enforce her claim as to one part, and to renounce the other.

8. It has been said that there were various parties interested in the property in dispute, and that it was consequently at the option of the plaintiff to enforce her claim with respect to the share of any one of the vendors and to abandon her claim to the shares of the other vendors, though all these shares have been transferred under one and the same contract. The Hedaya, B. 38, C. IV. 606, lays down that: (reads). ¹ As this case falls expressly within the principle laid down in the passage above cited, the special appeal ought to be decreed, but under the circumstances mentioned, without costs.

¹"If five persons purchase a house from one man, the shaft may take the proportion of " any one of them. If, on the contrary, one man purchase a house from five persons, the "shafi may either take or relinquish the whole, but is not entitled to take any particular "share or proportion. The difference between these two cases is that, if in the latter instance, "the shafi were allowed to claim a part, it would occasion a discrimination in the bargain to "the purchaser, and be productive of vary great inconvenience to him, whereas in the former "instance, the shafi being merely the substitute of one of the five purchasers, no discrimination in the bargain is occasioned."