(1865) 02 CAL CK 0002

Calcutta High Court

Case No: Special Appeal No. 1727 of 1864

Gurdial Mundar and Others		APPELLANT
	Vs	
Raja Teknarayan Sing and Others		RESPONDENT

Date of Decision: Feb. 27, 1865

Judgement

Sir Norman, Officiating C.J., Trevor, Morgan and Kemp, JJ.

We think it is clear that, in cases of mortgages which are foreclosed, the right of pre-emption does not arise till the sale becomes absolute. This is evident from the very definition given by Macnaghten of the right of pre-emption, viz., that it is a power of possessing property which has been sold by paying a sum equal to that paid by the purchaser. See also Hamilton''s Hedaya, Vol. III, p. 568; Macnaghten''s Precedents, p. 196; and a case of Mussamut Jankee Kooer v. Mussamut Lekranee Kooer W.R., 1864, Civ. Rul., 285, decided in this Court by Trevor and Campbell, JJ., 18th June 1864. It has never been contended that a right of pre-emption includes a right of paying off a mortgage, and of standing in the position of the mortgagee. It appears from Baillie''s Mahomedan Law of Sale, p. 303, edition of 1850, that, notwithstanding a mortgage by way of conditional sale to a co-sharer, the mortgagor, in right of his equity of redemption, retains his right of pre-emption in respect of other land sold by that co-sharer to a stranger. This shows that a mortgage does not in any way affect the right of pre-emption. For this purpose the mortgagor still remains, in contemplation of law, the owner of the mortgaged property. The right of pre-emption does not arise until the seller''s right of property has been completely extinguished, and therefore has been said not to exist if the seller has secured to himself any condition of option, or power of dissolving the sale at a future time. If he transfers the property by an invalid sale, there is no right of pre-emption, for the property continues his notwithstanding such a sale--Hedaya, Vol. III, p. 596. We must therefore say that no right of pre-emption can arise on a mere conditional sale or mortgage, while any right of redemption remains in the mortgagor. It has been decided that a refusal to purchase before the sale is complete cannot operate to defeat a claim of right of pre-emption subsequently

preferred--Macnaghten''s Precedents, p. 196. We need not now discuss the question whether this proposition is universally true; but it is certain that the mere declaration of an intention to exercise a right, which has not yet accrued, is in no sense a claim of a right of pre-emption. On these grounds we are of opinion that it was wholly immaterial whether the plaintiff had made any formal demand of pre-emption at any other time than after the sale became absolute.

Bayley, J.

2. It is with much diffidence that I still differ from my former colleague in the Division Bench, Mr. Justice Macpherson, and from my four colleagues in the Full Bench. The reasons for my holding to my opinion that the case should be remanded for investigation, whether plaintiff did or did not make the necessary formal demand at the time of hearing of the execution of the deed of sale, are briefly these:--

I.--The claim of pre-emption is one under Mahomedan law, and the provision of that law requires the claim of pre-emption to be made on hearing of the sale. The plaintiff alleges that when he heard of the sale he made his claim of pre-emption. In this case the deed had the form of an absolute deed of sale. It was only discovered to be conditional some time afterwards. The Mahomedan law defines a conditional sale as one of the recognized species of sale. I have before quoted two passages where a conditional sale and an absolute one are declared to be both equally sales: Paragraph 4 of the Chapter of Sales in Macnaghten''s Mahomedan Law, and Baillic''s Mahomedan Law of Sale, pp. 302, 303.

3. Then if we look to the policy of the Mahomedan law in regard to pre-emption, it is clearly this, that coparceners, those interested in the profits, and neighbours, in order thus enumerated, shall have the earliest opportunity of knowing of land being available to them in respect to which to assert the claim of pre-emption--Chapter V on Pre-emption in Macnaghten''s work, pp. 42, 43.

4. Again, in this case, at the time at which plaintiffs allege they made the claim, the deed in the only form in which it appeared was an absolute sale. Can it be said, then (leaving alone for the present the question whether we are to consider the transaction a mortgage under English or Regulation law, or an equivalent to a sale under Mahomedan law), that the pre-emptor transgressed the law in making the claim when he first heard of the execution of the deed as an absolute sale? I hold that he followed the law, and is therefore entitled to have its privileges, if it be ascertained on remand (a point not yet enquired into) that he did then make the necessary formal demands. I would still, then, remand the case for re-trial on this matter.