
(1871) 03 CAL CK 0005

Calcutta High Court

Case No: Special Appeal No. 1452 of 1870

Braja Kishor Surma

APPELLANT

Vs

Kirti Chandra Surma

RESPONDENT

Date of Decision: March 9, 1871

Final Decision: Dismissed

Judgement

Mookerjee, J.

The plaintiff preferred this special appeal to us, complaining that the Courts below were in error in holding that a claim founded on a right of pre-emption is in any way affected by a waiver of the right to purchase previous to the sale of the land. He contends that as the right of shaffa only accrues after the sale, the surrender of that right, before a sale has taken place, is not valid under Mahomedan law. In support of this contention, Baboo Bama Charan cites Hedaya, Volume III, page 568; Baillie's Mahomedan Law, page 500; Macnaghten's Mahomedan Law, page 196, and a precedent laid down in the case of Sakina Khatun v. Gauri Sankar Sen 5 Sel. Rep., 299. On referring to the authorities, however, we find that the Hedaya in page 568, Volume III, merely lays down that "the privilege of shaffa is established after the sale, for it cannot take place until it be manifest that the proprietor is no longer inclined to keep his house, and this is manifested by the sale of it." This merely shows when the cause of action arises in a claim for pre-emption and when the right to claim shaffa accrues; hut does not support the contention raised before us that a pre-emptor is free to assert his claim of shaffa after he has in distinct terms waived his right to do so, either immediately before the sale, or at the time of it. In Baillie's Digest of Mahomedan law, page 500, occurs this passage: The surrender of a right of pre-emption before a sale has taken place is not valid." This however is supported by no authority from the Mahomedan law books, and I would therefore hesitate to act upon this dictum. In the same paragraph however is found the following passages when the pre-emptor has said I have surrendered the right of pre-emption in this mansion, the surrender is valid;" and also if he should say to the seller, I have surrendered the right of pre-emption in this mansion to thee, the mansion being still in the seller's possession, the surrender would be valid." These passages show that a right of shaffa can he

surrendered by the pre-emptor, and if the surrender is made, it prevents the pre-emptor afterwards from asserting his claim to shaffa. The finding arrived at by the Courts below in this case is to the effect that the seller at the time of sale offered the land to the plaintiff for purchase, that the plaintiff thereupon not only refused the offer, but told the seller to sell his share to whomsoever he liked, and the purchaser relying on this surrender of the plaintiff's right of purchase under the law of pre-emption, made the purchase from the seller. Under these circumstances, it appears to me to be monstrous to contend that after such a complete surrender of the plaintiff's right, he should be allowed by any Court of Justice to assert his claim. He stood by when the defendant was selling the property to the purchaser, and in clear and unequivocal terms permitted him (the vendor) to sell and the purchaser to buy. No Court of Justice in the world would allow, or should permit the plaintiff to say that, though I had no intention to purchase when you, the defendant, purchased the land and therefore refused the offer of the vendor and gave him permission to sell to you, yet that I have subsequently changed my mind, and will now have the satisfaction to see that your purchase is invalidated, and all the costs incurred by you for the purchase of stamp, &c., are so much loss to you. The plaintiff would be stopped in law from asserting a claim of this nature after having stood by and seen the vendee make the purchase without giving him any warning that he, the plaintiff, had the preferential claim to purchase, or that he intended to purchase, and that the defendant would purchase at his own risk. Now, instead of warning the purchaser or asserting his intention to purchase, he gives the vendor to understand that he has no objection whatever to the sale. This is a complete renunciation and surrender of the plaintiff's right of pre-emption, and I would hold that after this renunciation, he should not be permitted to claim the right to purchase. It would require very clear and distinct authority in the Mahomedan law to support such a view of it as is contended for by the appellant's vakeel, which I have no hesitation in holding is against all principles of justice, against equity, and against good conscience.

2. The case in Macnaghten's Mahomedan Law, page 196, is not in point; the question put to the law officer was simply when the shafee or person who has a right to pre-emption declines to purchase the land at the price demanded by the proprietor, and states that he will not pay for it more than a certain sum," is the shafee at liberty to bring forward a claim for pre-emption when the proprietor has sold the land to a third person on receiving his own price? In the reply given to that question, the law officer states that the refusal by the shafee to pay the amount which had been paid by the purchaser amounts to a renunciation of the right of preemption. The reply, however, went on to say, and I think improperly, because unasked, that the claim of the shafee to a right of pre-emption cannot be adduced until after the land had been actually sold; and that a refusal to purchase, before the sale, cannot operate to defeat his (the shafee's) claim of preemption subsequently preferred. There is also in this reply no authority cited to support such a view of the law. The case also is not in point with the present, because in this case the pre-emptor at the time of sale repudiated all intention to become the purchaser, and induced the purchaser to buy; there is no question that the same price for

which the land was sold to the vendee was not the amount for which the land was offered for sale to him. The case of *Sakina Khatun v. Gauri Sankar* 5 Sel. Rep., 299 does not decide the question. There is only an expression of opinion by the law officer, but the Sudder Court decided the case on quite a different point. This is, I apprehend, no authority at all. In the opinion given by the Mafti, I find also that he is unable to quote from any Mahomedan law book any passage or text to support his opinion.

3. A decision of a Division Bench in the case of *Sheo Puhul Sing v. Mussamut Ram Kooer* W.R., 1864, 311, strengthens me in the view I have taken of the law. The opinion of the Judges, who decided that case, was approved of by another Division Bench, in the case of in the matter of the petition of *Jehangir Baksh*¹.

4. In this case, it is clear, that the plaintiff not only refused to purchase the property, when offered to him for sale, but actually accorded his permission to the vendor to sell the same to a third party, the purchaser, and that the purchaser, relying on that renunciation by the plaintiff, went to the expense of purchasing stamp, &c., for the purchase of the property. I hold, therefore, that the suit of the plaintiff was rightly dismissed by the Courts below. Our Courts are to be guided by the principles of justice, equity, and good conscience. The Mahomedan law is only the law of this country so far as the Legislature has adopted it as the law of British India, and so far as we see clear authorities in it on a particular point. In all cases, therefore, where there is no clear and positive authority in the Mahomedan law, I think it is our duty to follow the dictates of justice and good conscience. Now it cannot be contended for a moment that it is equitable or just that a plaintiff who refused to purchase a property, when offered to him for sale, who has likewise induced the purchaser to buy on reliance of his clear renunciation of his right to purchase, should be allowed to get rid of his renunciation, and to set aside the sales merely for the pleasure and satisfaction of seeing the whole thing rendered null and void, and the purchaser undamaged in costs.

5. If this be allowed, the consequence would be that no coparcener of a property would be able to sell his share at a just and reasonable price, but must be compelled to sell to his co-sharer at his price however low and unreasonable. He will be completely at his mercy, and, though undoubtedly entitled to sell his share, will never practically be able to sell it at its proper value. If we allow the principle contended for by the appellant, we shall assuredly act against equity and justice, which is the law we are bound to administer, and assist the plaintiff in the perpetration of a gross fraud. I cannot imagine what greater precaution could possibly be taken by a coparcener desirous of selling his property than what was taken by the vendor defendant in this case. He goes to the person who has a preferential right to purchase, namely, the plaintiff, and offers his share for sale. This offer is refused not on the score of the price offered being excessive, but the plaintiff's unwillingness to avail himself of the right given to him by the Mahomedan law, and the vendor is further permitted to sell to any party he likes. He goes to the vendee, and the vendee, finding that the shafee has declined the purchase, accepts the offer, and goes to considerable expense in perfecting his purchase. We are now asked to set aside this

sale, to compel the purchaser to forego his purchase, and to suffer the loss of his money incurred in getting the bill of sale prepared and executed, I consider the Courts below were right in declining to give such an unjust and inequitable decree to the plaintiff. I would therefore uphold the order passed by the Courts below, and dismiss this appeal without costs, no one appearing for respondents.

Jackson, J.

I am of opinion that even under the Mahomedan law the plaintiff is not entitled to exercise the rights of preemption as he had already relinquished the rights at the time of purchase and sale. I concur, therefore, with my learned colleague in dismissing this appeal without costs.

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Application for Review of judgment passed by the said Judges, on the 30th January 1869, in Special Appeal No. 2479 of 1868. See 6 B.L.R., 42, note.

11.05.1869

In Re: Jehangir Baksh

Kemp and , JJ.

Kemp, J.

The grounds taken in this review are, that under the Mahomedan law if a person having a right of pre-emption relinquishes such right, and assents to the sale of the property in question, he cannot again at any subsequent period claim that right. In support of this argument, our attention has been called to Sheo Tuhul Sing v. Mussamat Ram Kooer W.R., 1864, 811. That case is a peculiar one, and the learned Judges who decided it did not quote any law in support of their ruling. In that case the purchase was not only refused by the plaintiff, but he gave his permission to its being sold to other parties. In this case, as we have already observed in our former decision, it was very doubtful whether the plaintiff had over declined the purchase, and there is certainly nothing in the evidence to show that he gave permission to sell the property to another party. We adhere to our former judgment which we supported by authorities on the Mahomedan law, and we desire to add another authority in support of our view to be found at page 196 of Macnaghten's Precedents of Mahomedan law. The application for Review is therefore rejected with costs.