

Hahibar Rahaman Vs Ali Azahar and others

Court: Calcutta High Court

Date of Decision: June 28, 1926

Final Decision: Allowed

Judgement

1. This is an appeal by Defendant No. 2 which arises, out of a suit for specific performance of a contract of sale entered into with the plaintiff by

Defendant No. 1 by an agreement dated the 17th October 1921. Defendant No. 2 who was a co-sharer of Defendant No. 1, purchased the share

of Defendant No. 1 of the property in suit by a kabala dated the 26th of October 1921. The plaintiff brought the suit against both the defendants

for specific performance of the contract of sale entered into by Defendant No. 1 on the allegation that Defendant No. 2 purchased with full notice

of his contract.

2. The trial Court dismissed the plaintiff's claim for specific performance of contract but awarded him damages against Defendant No. 1 to the

extent of Rs. 150. One unusual thing in this suit is that in the plaint the plaintiff did not ask for any relief against Defendant No. 2. Ordinarily one

would expect that in such a suit the prayer would be that the purchaser with notice of the contract should be compelled to join in the conveyance

which the Court would direct against the person who had originally entered into the contract for sale. The plaintiff appealed against the decree of

the Munsiff and the Subordinate Judge has decreed the appeal, and directed the plaintiff to deposit a sum of twelve hundred rupees in favour of

Defendant No. 1 within a certain time and Defendants Nos. 1 and 2 to execute a kabala as claimed by the plaintiff. It seems that in the lower

appellate Court the plaintiff for the first time urged that the Defendant No. 2 should also join in the kabala to be executed by Defendant No. 1. It

was apparently urged on behalf of that defendant that he would be a preempt or under the Mahomedan Law and if he were compelled to execute

a document in favour of the plaintiff he would for no reason whatever lose his right of preemption, because he cannot certainly pre-emption as

against the plaintiff being himself the vendor. The Subordinate Judge however, brushed aside this argument of Defendant No. 2, because he said

that there was nothing to show that in the circumstances disclosed Defendant No. 2's claim for pre-emption should prevail. It is well known that

the right of pre-emption arises on the sale of a property by a co-sharer when the parties are Mahometans. It is urged on behalf of the respondent

that the matter should be sent back for an enquiry as to why the Subordinate Judge has held that the defendant's claim for pre-emption should not

prevail. We are not disposed to grant that prayer made in his behalf by Dr. Basak. It is well known that in Bengal the Mahomedans have a right of

preemption under the Mahomedan law. That being so we must take the position of the parties to be this: that the plaintiff is entitled to the specific

performance of the contract as against the Defendant No. 1. Defendant No. 2 has a right of pre-emption as against the plaintiff Under such

circumstances we do not think that it would at all be equitable to decree the specific performance as claimed by the plaintiff. The result of making

an order in favour of the plaintiff would be to cause a multiplicity of suits. In fact the Defendant No. 2 will have to bring a suit for pre-emption as

against the plaintiff on payment of the purchase money and then Defendant No. 2 must bring a suit against Defendant No 1 for recovery of the

purchase money paid to her. This certainly should be avoided by the Court in the exercise of the discretionary powers given under S. 22 of the

Specific Relief Act.

3. We, therefore, allow the appeal set aside the judgment and decree of the Subordinate Judge and restore the decree of the Munsiff in which he

made a decree for Rs. 150 with costs in proportion as against Defendant No. 1 Mahumda Khatun only. The claim for specific performance of

contract is dismissed. Having regard to the fact that Defendant No. 2 never raised specifically this question of the right of pre-emption in the trial

Court we think the reasonable order should be that he would not get his costs either in this Court or in the lower appellate Court. The plaintiff

would bear his own costs both here and in the lower appellate Court.