

(1926) 06 CAL CK 0020

Calcutta High Court

Case No: Appeal No. 792 of 1924

Hahibar Rahaman

APPELLANT

Vs

Ali Azahar and others

RESPONDENT

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.