(1869) 03 CAL CK 0019

Calcutta High Court

Case No: Regular Appeal No. 179 of 1868

Woli Sahu		APPELLANT
	Vs	
Kantiram and Another		RESPONDENT

Date of Decision: March 17, 1869

Judgement

Norman, J.

This was a suit for possession of 51 bigas of lakhiraj land in Pergunna Futtehpore Singhya, in the district of Purneah. The plaintiff claims, in respect of an alleged right of pre-emption, as owner of a plot of lakhiraj land forming the northern boundary of the land in dispute. All parties, the plaintiff and the defendants (vendors and purchasers of the land) are Hindus. The case was tried before the Judge of Purneah, Mr. Muspratt. The defendants objected that there is no right of pre-emption amongst Hindus. The Judge raised the issue-- "Can the right of pre-emption be ever used by a Hindu within the Province of Behar?" He says that all the parties are Hindus of Chakla Behar. He cites two cases: Fakir Rawot v. Sheikh Emambaksh (Case No. 1116 of 1861 28th Sept. 1863), and Baboo Moheshee Lal v. Christian (6 W.R., 250), and treats it, as decided by these cases, that the Mohammedan custom of preemption has been adopted by the Hindus of the Province of Behar, and is, therefore, binding on them. He declares that the plaintiff has established his right to preemption. From this decision there is an appeal by the purchaser-defendants. We are not aware of any case in which it has ever been judicially noticed, or even found as a matter of fact that, according to the customs of the Hindus in the District of Purneah, a right of pre-emption is recognized as existing amongst them. Neither of the decisions referred to by the Judge bears out his view. The first merely shows that the right where found to be now existing amongst Hindus, is regulated by the rules of the Mohammedan law of pre-emption. The Court expressly says that, "in districts where the existence of the custom has not been judicially noticed, the custom will be matter to be proved." In the second case the Court directed an issue whether there was such a custom binding on Christians in Bhagulpore.

2. But even, supposing that a custom of pre-emption can be shown to exist amongst Hindus in Purneah, or in any part of the Purneah District, another question lies behind, viz., whether the custom extends to give a right of pre-emption amongst Hindus on the ground of mere vicinage. We should entertain very grave doubt whether, if the parties were Mohammedans, there would be any right of preemption in the present case. The parties are simply owners of adjacent lakhiraj estates, the one wholly unconnected with the other. It is not suggested that the plaintiff would or could sustain any injury, or that his comfort or convenience would be interfered with in any way, if the appellants be permitted to enjoy the property they have bought.

3. In the Hedaya, Vol. 3, 562, it is said:--"Shafei is of opinion that a neighbour is not a Shafi, because the prophet has said Shaffa relates to a thing held in joint property, and which has not been divided off; when, therefore, the property has undergone a division, and the boundary of each partner is particularly discriminated, and a separate road assigned to each, the right of Shaffa can no longer exist. Besides, the existence of the right of Shaffa is repugnant to analogy, as it involves the taking possession of another''s property contrary to his inclination, whence it must be confined solely to those to whom it is particularly granted by the law. Now it is granted particularly to a partner; but a neighbour cannot be considered as such; for the intention of the law in granting it to a partner, is merely to prevent the inconveniences arising from a division; since if the partner were not to get the share, which is the subject of the claim of Shaffa, a new purchaser might insist on a division, and thereby occasion him a great deal of unnecessary vexation. But this argument does not hold good in behalf of a neighbour; he is, therefore, not entitled to the privilege of Shaffa. We (i.e., the Hanifites) on the contrary, allege that the precept of the prophet, already quoted, is a sufficient ground for establishing the right of Shaffa in a neighbour. Besides, the reason for establishing this right in a partner, is the circumstance of his property being continually and inseparably adjoined to that of a stranger, viz., the purchaser, which is injurious to him, because of the difference of a stranger''s position." Amongst Mohammedans, the right of preemption on the ground of vicinage may be defeated if a man sells the whole of his house, excepting only the breadth of one yard, extending along the house of the Shafi.--Hedaya, Vol. 3, 604.

4. According to the better opinion, it is applicable only to houses and small pieces of land. See Baillie''s Mohammedan Law, page 474, note 1; page 471, note 3; and page 472, note 2. There is a saying of the prophet''s:-- Shaffa affects only houses and gardens. The intention of Shaffa being to prevent the vexation arising from a bad neighbour, it is said to be needless to extend it to property of a moveable nature."--Hedaya, Vol. 3, 591.

5. In Abdul Azim v. Khondkar Hamid Ali (Ante 2 B.L.R.A.C. 63) a Division Bench of this Court held that, even amongst Mohammedans, "the right of pre-emption does not

extend to give a party a right to purchase a separate estate, merely because a part of it is conterminous with that of the Shafi.

6. So far as we know, it has never been decided in any case that any custom prevails amongst Hindus giving a right of pre-emption to the owner of an estate adjacent to that sold on the mere ground of vicinage. In fact, the Courts have repeatedly refused to recognize such a custom; as, for instance, the Sudder Court of the N.W. Provinces in two eases referred to in Fakir Rawot v. Sheikh Emambaksh (Case No. 1116 of 1861, 28th September 1863). The same point was decided in the cases of Ejnash Kooer v. Shaikh Amjudally (2 W.R., 261) and Nirput Mahtoon v. Mussamut Deep Koonwar (8 W.R., 3).

7. No evidence was given of the existence in Purneah of any custom amongst Hindus giving a right of pre-emption on the ground of such vicinage, and no such custom is even alleged by the plaintiff, and, therefore, we think it unnecessary to remand the case for the trial of an issue on the point. We reverse the Judge''s decree, and dismiss the suit with costs in both Courts.