
(1870) 04 CAL CK 0012

Calcutta High Court

Case No: Special Appeal No. 2514 of 1869

Bhadu Mahomed and
Another

APPELLANT

Vs

Radha Charan Bolia
and Others

RESPONDENT

Date of Decision: April 7, 1870

Judgement

E. Jackson, J.

The plaintiff preferred this suit, alleging that he was entitled, by right of pre-emption, to purchase two parcels of ground which adjoined his house and grounds, and which the defendant No. 1 had sold to the defendant No. 2. Several issues were raised in the suit, but the first Court decreed the claim of the plaintiff. The second Court, on appeal, dismissed it on the ground that whether the plaintiff had a right of pre-emption or not, the agreement to purchase and sell between the defendants had been cancelled subsequent to the institution of this suit, and consequently the plaintiff's right of pre-emption was gone. The appellate Court held that the claim for pre-emption, under these circumstances, was not consistent with justice, and was not in accordance with the Mahomedan law. The first point, which is taken on this special appeal to us, is that this doctrine laid down by the appellate Court is opposed to the Mahomedan law, that the right of pre-emption having once accrued cannot be cancelled by the acts of the parties through whom that right came into force. In the Hedaya, Book XXXVIII, Chapter III, on the subject of pre-emption, at page 592, it is written: When a man acquires property in "lands for a consideration, the privilege of shaffa takes place with respect "to it, because it is in the power of the shafee to fulfil the stipulation;" and at page 598 it is laid down that if the seller and purchaser agree to dissolve the contract, the privilege of shaffa is established to the shafee; because in those instances the rejection or dissolution is a breaking off "with respect to the seller and purchaser, inasmuch as they are their own masters, and, moreover, will and intend a breaking off; yet with respect to others it is not a breaking off, hut is rather in effect a new "sale, since the characteristic of Bale, namely, an exchange of property for property with the mutual consent of the parties, exists in it; and as the

shafee is another, it is therefore a sale with respect to him whence his right of shaffa must be admitted." The appellate Court is wrong in the law which it has laid down as regards the breaking off of the right of pre-emption. The law which we have just quoted distinctly lays down that the contract of purchase and sale having been completed, the right of pre-emption accrues, and no subsequent dissolution of the contract between the parties injures or dissolves the right of pre-emption. The decision of the lower appellate Court must be set aside upon this point, and the case must be remanded to the Subordinate Judge for decision upon the other points on which the appeal had been preferred to him. Another objection to this suit was taken in the course of the argument, namely, that the seller of the estate being a Hindu, and the purchaser being a Hindu, the person who claims the right of preemption being a Mahomedan, the law of pre-emption cannot be put in force between the parties. In support of this the Full Bench Ruling in *Sheikh Kudratulla v. Mahini Mohan Shaha* and the other cases 4 B.L.R., (F.B.), 134 : 13 W.R. (F.B.) 21 are quoted. These however distinctly refer only to cases from parts of the country in which the custom of pre-emption is not exercised among Hindus. If the custom of pre-emption did not exist among Hindus in the part of Rungoore from which the case comes, the plaintiff who is a Mussulman, could have no right of pre-emption in transactions between Hindus. The Hindus would not be bound by the Mussulman law of pre-emption. But in this case the plaintiff appears to have alleged that the custom of pre-emption did prevail even between Hindus. If, then, they have adopted the Mussulman law as among themselves, there seems no objection to a Mussulman also enforcing that right as against them.

2. There does not appear, on the pleadings in this case, to have been any objection raised by the Hindu vendor and purchaser either to the effect that the custom of pre-emption did not apply amongst them, or to the effect that a Mussulman had no right of pre-emption as against them. The decision of the lower appellate Court is reversed, and the case is remanded for trial of the remaining points which arise on the appeal. Costs to follow the result.