(1870) 03 CAL CK 0025

Calcutta High Court

Case No: Special Appeal No. 2180 of 1969

Syad Amjad Hossein		APPELLANT
	Vs	
Kharag Sen Sahu and Another		RESPONDENT

Date of Decision: March 24, 1870

Judgement

Mitter, J.

We are of opinion that the lower appellate Court has committed an error in law in the investigation of this case, and that this error is one which may have affected the decision of the case on the merits. The lower appellate Court seems to think that the mere fact that the plaintiff took time to ask the person who communicated to him the intelligence of the sale, as to how he had come to know about it before he made his demand of tulub-mawasabat, was sufficient to invalidate his right of pre-emption under the Mahomedan law. This opinion is contrary to that of the author of the Mahomedan text book, the Hedaya, and the pleader for the respondent has not been able to cite any authority to show that the opinion of the author of the Hedaya upon this question is not to be followed. In Volume HI of the Hedaya, page 569, the author goes on to say: If the man claim his shaffa in the presence of the company, amongst whom he may be sitting when he receives the intelligence, he is the shafee, his right not being invalidated, unless he delay asserting it till after " the company have broken up. Both these opinions are mentioned in the "Nowadir; and Koorokhee passed decrees agreeably to the last quoted report; because the power of accepting or rejecting the shaffa being established, a short time should necessarily be allowed for reflection, in the same manner as time is allowed to a woman to whom her husband has given the power of choosing to be divorced or not."

2. Then, again, in the nest paragraph: "If the shafee, on hearing of the sale, exclaim " Praise be to God," or " There is no power or strength but "what is derived from God," or " God is pure," his right of shaffa is "not invalidated, in so much that if. immediately on pronouncing these "words, he, without delay, claim his shaffa, he will accordingly get "it, because the first of these is considered as a thanks-giving on his being freed of the neighbourhood of the seller; the second (which is an expression of admiration) is

supposed to proceed from the astonishment with which he is struck at the intention manifested by the seller of doing a thing which would be vexatious to him; and the last is considered as an exclamation prefatory to further discourse. None of these expressions, therefore, can imply a refusal or rejection of the shaffa. In the same manner also, if, on receiving the news of the sale, he asks, who is the purchaser and how much is the price," it does not invalidate "his right, since these questions cannot be considered as a refusal, but, "on the contrary, it may be concluded from them that if the price be reasonable and the purchaser a person whom he would not like as a neighbour, he will afterwards claim his right of shaffa."

3. It is clear from these passages that, unless the delay on the part of the pre-emptor is of such a character as to indicate his intention of relinquishing his right of pre-emption, the mere fact that the pre-emptor takes a short time for the purpose of ascertaining whether the information communicated to him is correct or not, would not be sufficient to invalidate his demand of mawasabat, if that demand is made immediately after he has ascertained that the sale has been already made. It is true that," the examples given in the passages above quoted are not exactly on all fours with the circumstances of the case now before us, but there can be no doubt whatever as to the principles upon which those examples are based, it is admitted on all sides that the necessity for making the demand of tulub-mawasabat arises only after the pre-emptor has come to a knowledge of the sale, and in this case according to the strictest interpretation of the Hedaya, the pre-emptor had a right to ask his informant as to how he came to know that the sale had been made before he asserted his right of pre-emption by performing the necessary ceremonies. The Subordinate Judge appears to have thought that the mere fact that the plaintiff asked the person who informed him about the sale as to whence his information was derived is tantamount to a breaking up of the majlis according to the opinion of the author of the Hedaya. But, so far as we understand the passage referred to by the Subordinate Judge, there can be no doubt that the breaking up of the majlis means the breaking up of the company in which the pre-emptor may be sitting at the time when the information is communicated to him.

4. The Subordinate Judge appears also to have made certain remarks upon certain discrepancies in the evidence of the witnesses examined by the plaintiff; but it does not appear to us that he has come to the conclusion that the evidence of those witnesses ought to be rejected as untrustworthy on account of those discrepancies.

5. Under these circumstances, we are obliged to reverse the decision of the Subordinate Judge, and to remand the case to him with instructions to try the question of fact whether the plaintiff has performed the ceremonies required by the Mahomedan law to give validity to a claim of pre-emption. The costs of this appeal will abide the result.