Nundo Pershad Thakur vs Gopal Thakur on 30 July, 1884

Equivalent citations: (1884)ILR 10CAL1008

JUDGMENT

Richard Garth, C.J.

1. We think the Court below has fallen into error on several points of law in this ease.

2. The facts are these: Mouzah Bishenpur Lukhmi, otherwise called Gahi, has been partitioned into two estates, bearing Nos. 1656 and 1657 on the touzi of the Mozufferpore District. The plaintiff is a proprietor of No. 1656, in which the second party defendants had also a small share. This share they sold to the first party defendants, who are proprietors in estate No. 1657. The plaintiff accordingly brought this suit to establish his right of pre-emption to purchase the property so sold.

3. Now it appears that, at the time the butwara was made, the julkur, nimaksayer, and some 70 bighas of culturable land were left in the joint possession of the proprietors of both estates, and were not partitioned, and the plaintiff and the first party defendants were both joint co-proprietors in the same. The Subordinate Judge considers that this circumstance gave the first party defendants a right equal to that of the plaintiff to purchase the property in question. But this clearly is not so. The plaintiff, who was a co-sharer of the defendants second party in No. 1656, had a preferential right of purchasing lands forming part of that patti as against the defendants first party. The case quoted by the Subordinate Judge Golam Ali Khan v. Agurgeet Roy 17 W. B. 343 appears to be precisely in point. The Subordinate Judge attempts to distinguish it on the ground that in this case there were 70 bighas of " cultivated and ryatti lands" left ijmali; but we think this is a distinction which makes no difference in the present case.

4. Then it appears that there are other co-sharers in estate No. 1656, and the Subordinate Judge seems to think that for this reason the plaintiff's suit will not lie.

5. But here, again, we think he is in error. The provision of the Mahomedan law, on which he has relied, is peculiar to the Imamiyah Code, which is not generally applicable in this country. The Sunni law, which prevails here, allows the exercise of the right by one or more of a plurality of co-sharers (Tagore Law Lectures for 1873, pp. 518-19). Moreover, it does not appear that this objection was either taken in the written statement, or when the issues were framed between the parties.

6. The next point on which we think the Subordinate Judge erred is this: It appears that at the time when the first party defendants purchased the property in suit, they also by the same conveyance purchased a share in another property; and the consideration paid for both properties was Rs. 700. The plaintiff alleged that the price assessed by the parties for the property in suit was Rs. 400, but he offered in his plaint to pay any further sum which the Court might find the property to be worth.

The first party defendants did not deny this allegation, and no issue was raised upon the point. The allegation was, moreover, supported by the statement of one of the vendors. We think the Subordinate Judge, therefore, was wrong in saying that the plaintiff was bound to prove the alleged separate price for the land in suit, and in finding that he had not offered a proper price for the property. We think that it was impossible to gather from the defendant's written statement that this objection would be raised in the suit; and that if the Subordinate Judge considered it a proper objection to be taken for the first time in appeal, he should have remanded the case, in order to give the plaintiff an opportunity of proving his allegation. But in point of fact it has been frequently ruled, that a tender of the price paid is not necessary in such cases; and that it is sufficient if the person seeking pre-emption agrees to pay any sum which the Court may assess as the proper price of the property. See Jahangeer Buksh v. Bhickaree Lall 11 W.B. 71; Heera Lall v. Moorut Lall 11 W.B. 275; Nubee Baksh v. Kaloo Lashker 22 W.B. 4; and Lalga Prasad v. Debi Prasad I.L.B. 3 All. 236.

7. The real defence to the suit was not that the price offered was insufficient, but that the plaintiff was aware of the purchase long before the date on which he says he became aware of it; and that, in fact, the property was offered to him and that he declined to purchase it. This defence has, so far as we can see, completely broken down.

8. Lastly, the Subordinate Judge says: "Then as to the performance of the ceremonies of talubs, I see that the principal demand by invocation of witnesses was not, even according to the statements of the plaintiff's witnesses, duly made. For one of the main ingredients in the talubi-ishhad is the declaration by the shaft that he made the claim in the talubi-mowasibat (i.e., immediately after the hearing of the sale) and this none of the plaintiff's witnesses testify that the plaintiff did. That an omission to do this is fatal to the plaintiff's suit was held by the High Court, in accordance with the provisions of the Mahomedan law in a case which was cited from page 462, vol. 24, of Sutherland's Weekly Beporter."

9. Now, what the Subordinate Judge means in this passage is apparently this:--that the plaintiff's witnesses do not say that at the time of the talubi-ish-had the plaintiff stated, in their presence, that he had claimed his right of preemption (in other words, performed the talubi-moivasibat) as soon as he heard of the sale. And this omission on the plaintiff's part, the Subordinate Judge, relying on the ruling of this Court in the case cited by him, considers to be fatal to his suit. The facts of that case are not set out in the report; and it may be that some considerable time elapsed between the performance of the two ceremonies. In the present case, however, the two ceremonies followed immediately upon one another, if indeed they were not performed simultaneously. It would appear from the authorities that the talubi-ishhad, or demand with invocation of witnesses, should take place either in the presence of the vendor or of the purchaser, or on the land which is the subject of dispute. The Hedaya says that the ceremony is performed "by the shaft taking some person to witness, either against the seller (if the ground sold be still in his possession) or against the purchaser, or upon the spot regarding which the dispute has arisen," and the form of affirmation should be to the following effect: " Such a person has bought such a house, of which I am the shaft; I have already claimed my privilege of shafa and now again claim it; be therefore witness thereof."--(Hedaya, III, 571-72). And the Futawa Alamgiri (V. 268) tells us that this ceremony is only necessary " if at the time of making the talubi-mowasibat or immediate demand, there was no

opportunity of invoking witnesses; as for instance, when the pre-emptor at the time of the hearing of the sale was absent from the seller, the purchaser and the premises. But if he heard it in the presence of any of these and had called on witnesses to attest the immediate demand, it would suffice for both demands, and there would be no necessity for the other. The principle of the law indeed seems to be this: First, that the pre-emptor should assert his right as soon as he hears of the sale; and, secondly, that he should demand his right from the vendor or purchaser or on the ground in the presence of witnesses; and of course this assertion and demand may be simultaneous. But if they are not, the pre-emptor, when he makes the demand, is required to make a declaration before the witnesses that he asserted his right when first he heard of the sale. And the reason of this seems to be that, in the absence of witnesses at the time of the assertion or talubi-mowasibat, the declaration of the pre-emptor himself shortly afterwards was good evidence that he had really asserted his right without delay. But in this case the witnesses in whose presence the plaintiff demanded his right from, first, the vendor, and then the purchasers, were also present when he first heard of the sale, and asserted his intention of claiming his right. It was, therefore, unnecessary for him to go through the form of reminding them that he had claimed his right as soon as he heard of the sale. The witnesses all say that they proceeded at once with the plaintiff to the houses of the vendors and the purchasers, and that he then and there demanded his right of preemption. Under these circumstances, we think that it was not necessary that the plaintiff should go through the empty form of reminding the witnesses of what they had just heard. We may add that it does not appear that this objection was taken in the first Court.

10. Finding then, as we do, that the lower Appellate Court has fallen into several errors on points of law, we must set aside its decree, and send the case back for a new trial. We think that the costs in both Courts should abide the event.