Mst. Nanhi Nabbi vs Mst. Bunyadi Begam Ghani Raza on 26 August, 1953

Equivalent citations: AIR1954ALL87, AIR 1954 ALLAHABAD 87

JUDGMENT

Malik, C.J.

1. This second appeal has been referred to a bench for the decision of the question whether the second demand, 'talab-i-ishhad', was performed by the plaintiff in accordance with the provisions of the Mohammadan law of Pre-emption.

2. The plaintiff Bunyadi Begam filed a suit against the defendants Mst. Nanhi and Mst. Shakila Begam claiming pre-emption of a house on the ground that the vendee was a stranger and the plaintiff pre-emptor was entitled to claim pre-emption under the Mohammedan law. The plaintiff alleged that she had performed the first demand, 'talab-i-mowasibat', immediately on coming to know of the Sale, and the second demand by going to the house to be pre-empted in the company of witnesses and declaring her intention to pre-empt by touching the wall of the house and also after mentioning that the 'talab-i-mowasibat', had been performed.

3. The plaintiff's evidence was believed and the suit was decreed by the lower appellate court.

4. Mst. Nanhi, defendant, has filed this appeal and a question was raised by learned counsel for the appellant before the learned single Judge that a ltalab-i-ishhad' must be performed "on the premises" and that the mere fact that the plaintiff went to the house, remained outside, and touched the wall with her hand while performing the 'talab' was not enough. The learned Judge was of the opinion that the case raised an imp9rtant point of Mohammedan law of pre-emption and, there-fore, referred it to a bench for decision.

5. Reliance is placed by learned counsel on Mulla's Mohammedan Law, Chapter XIII, Section 236 (1950 edition) where dealing with the question "Demands for pre-emption" the learned author has said "No person is entitled to the right to pre-emption unless (1) .....

(2) he has with least practicable delay affirmed the intention, referring expressly to the fact that the 'talab-i-mowasibat' had already been made, and had made a formal demand

(a) either in the presence of the buyer, or the seller, or on the premises which are the subject of sale, and

(b) in the presence at least of two witnesses. This formality is called 'talab-i-ish-had' (demand with invocation of witnesses)."

It was pointed out that according to Mohammedan Law if it is a second 'talab' and if it is not performed in the presence of the buyer or the seller it must be performed 'on the premises' which are the subject of pre-emption.

6. The point for decision, therefore, is, what the words "on the premises" mean on which reliance has been placed by learned counsel. In Hamilton's Hidaya, Vol. III, Book 38, Chap. II, page 571 the law is thus quoted :

> "It is therefore necessary afterwards to make the 'talab ishhad wa takree' which is done by the 'shafee' 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....."

7. The question of the validity of second 'talab' has arisen in many cases but the exact point that has been raised before us does not seem to have been discussed in any of the reported cases. In -- 'Kulsum Bibi v. Faqir Muhammad Khan', 18 All 298 (A), the question was of pre-emption of a zamindari share in an undivided village and the plaintiff, who was a co-sharer in the village, had made the second demand within the area of the zamindari, the two annas' share in which was sold, and it was held that it was a valid demand. That decision is not very helpful.

8. In -- 'Muhammad Usman v. Muhammad Abdul Ghafur', 34 All 1 (B), which was again a case of pre-emption of a zamindari share, the plaintiff made the second demand on his own 'chabutra' in the 'abadi' which was inside the village the share of which was being sold and that too was held to be a valid demand as it was made "on the premises".

9. The point was not discussed but the decision which is nearer to the case before us is the decision in the case of -- 'Jog Deb Singh v. Mahomed Afzal', 32 Cal 982 (C), where the second demand was made in the presence of two of the purchasers and 'at the empty doors of the other three' and it was held that it was a valid demand.

10. In many of the text books on Mohammedan Law the words used are "on the premises" and the question that we have to consider is whether the words "on the premises"

> mean at or near the premises, or they mean that the pre-emptor must actually enter the premises before he can make the second demand. If the latter interpretation is accepted, in a case where the second demand cannot be made in the presence of the vendor or the vendee, the pre-emptor will be in some difficulty as he would not be entitled to enter the premises without the risk of being prosecuted for trespass.

11. As we were not able to get much assistance from the reported cases, we looked up the original Arabic words, which have been translated by various authors as "on the premises" or "upon the

spot" etc. and found that the words are "Andal Akar" (and) means in Urdu 'nazdik ya karib' i.e. near, while, ('akar') means 'ghair mankula jaidad' i.e. im-moveable property (see Firozul Loghat by Maulvi Firoz Uddin Saheb). In Abbasi's Law of Pre-emption, 1st edition, published in 1899 the words 'Andal akar' have been translated in Urdu as meaning 'akar ke nazdeek'. Though the point did not arise in -- 'Muhammad Askari v. Rahmat Ullah', AIR 1927 All 548 at p. 549 (D), a decision by Lindsay and Sulaiman JJ., Lindsay, J. Who knew Arabic said that it was not suggested that the pre-emptor had made any second demand "in the presence of the property sold". The learned Judge probably gave a literal translation of the words 'Andal akar'.

12. The object why, if the second demand could not be made in the presence of the vendor if he was still in possession of the property, or against the purchaser, the demand had to be made 'upon the spot' was for the purposes of identification of the property and, in our view, it was not necessary for the pre-emptor in this case to actually enter the house and her making the second demand near the house touching the wall of the house was enough compliance with the Mohammedan law of preemption.

13. The result, therefore, is that this appeal has no force and is dismissed with costs.