Mahmood Hasan Khan vs Bhikhari Lal And Ors. on 13 April, 1953

Equivalent citations: AIR1953ALL705, AIR 1953 ALLAHABAD 705

JUDGMENT

Agarwala, J.

1. This is a plaintiff's appeal arising out of a suit for per-emption. The property in dispute consists of certain plots of land comprised in Khata Khewat No, 14 in Qasba Fatehpur. Mohal Kamalpur Abdur Rauf Khan. The plots are situated within the Municipal limits of Fatehpur and consist of a guava grove. In a portion of it there is a graveyard as well. The total area of the plots in dispute is 4 bighas and 6 biswas. The defendants 3 and 4 sold these plots to defendants 1 and 2 for an ostensible consideration of Rs. 1300/-. The plaintiff-appellant brought the suit which has given rise to this appeal for pre-emption, on the ground that he was a co-sharer in the mohal in which the plots were situated while the vendees were not and further that he held in proprietary right a guava grove adjoining the plots in dispute. According to him, the Muhammadan Law applied to the case and he had made the necessary demands for pre-emption. He further pleaded that in any case he had a right of pre-emption according to the customary law applicable to the mohal. The real sale-consideration was alleged by him to be only Rs. 650/-.

2. The defence of the vendees was that they themselves were owners of a guava grove in proprietary right adjoining the plots in dispute and that they were also co-sharers in the mohal. They denied the custom of pre-emption and urged that the Muhammadan Law of pre-emp-tion did not apply to them, they being Hindus. They also denied that any demands were made by the plaintiff and that he had any preferential right to pre-empt. The sale consideration was asserted to be Rs. 1300/-. Bar of estoppel was also raised.

3. The trial Court held that the Muhammadan Law applied to the case and that while the plaintiff was the owner of an adjoining grove, the defendants had failed to prove that they also owned an adjoining grove. He also held that "there is some land between the land in suit and the defendants' Khanjari Bagh. The result is that the plaintiff is a Shafi-i-jar under the Muhammadan Law while the defendants are not, and under the terms of the custom, the plaintiff is entitled to pre-emption as a co-sharer while, the defendants are not co-sharers in the Mohal".

The sale consideration was held by him to be Rs. 1238/-. He held that demands were made by the plaintiff as required by law. He rejected the Plea of estoppel and decreed the plaintiff's suit for possession of the land in dispute on payment of a sum of Rs. 1238/-. The defendants-vendees appealed to the lower appellate Court. At first the appeal was dismissed mainly on the ground that the defendants had failed to prove that they were the proprietors of the land of the grove which they

claimed to be their own and which they claimed adjoined the land in dispute. It appears that the defendants had failed to file the sale-deed by which they claimed to be the owners of the adjoining grove. They, therefore, made an application for review of judgment on the ground of discovery of an important piece of evidence in the shape of the sale-deed in their favour which according to them showed that they had purchased not merely the trees but also the land on which the grove, stood. Before deciding the application for review the Court ordered that a copy on scale of the plots in dispute and the adjoining plots which the parties claimed to belong to them should bet filed, so that the matter may be decided correctly. This order was passed on 4-10-1948.

On 21-10-1948, the defendants-vendees filed a copy of a settlement map showing the plots in respect of which pre-emption was claimed as also the grove plot which the defendants alleged to belong to them and also the grove plots belonging to the plaintiff. This map showed that the grove claimed by the defendants-vendees as belonging to them and which was numbered as 1779 was indeed adjacent to plot No. 1784, one of the plots which was sold. The grove belonging to the plaintiff was also adjacent to that plot. The learned Judge of the Court below ultimately allowed the application for review and set aside his previous order dismissing the appeal and set down the case for rehearing. Against the order allowing the review application there was an appeal to this Court which was, however, dismissed. The order allowing the application for review, therefore, became final. Ultimately the lower appellate Court allowed the appeal holding that the defendants-vendees were owners of the site of the grove No. 1779 which was adjacent to one of the plots sought to be preempted and consequently they were Shafi-i-jars and as such had equal right of pre-emption with the plaintiff who was also shafi-i-jar. It, therefore, dismissed the suit, but it did not take into consideration -- and probably the point was not pressed before him -- that even though the parties were equal Shafi-i-jars, the plaintiff could claim half the property pre-empted and the suit was not liable to be dismissed merely because the plaintiff had no preferential right over the defendants-vendees. Against the decree of the Court below the pJaintiff has preferred this second appeal.

4. The first point urged before us by learned counsel appearing for the appellant is that the lower Court was not justified in coming to the conclusion that the defendants-vendees were Shaft-i-jars. He has urged that the sale-deed relied upon by the defendants does not convey the land of plot No. 1779 on which the defendants' grove stands. It is pointed out that, although the vendor stated in the sale-deed that he was the owner of the grove as well as of the land underneath it yet in the portion conveying the property he had first written out the word "Arazi Land" along with the grove as the property conveyed but later on stuck out the word. "Arazi" from the sale-deed, thus showing an intention to convey merely the trees standing in the grove and not the land underneath it. We have read the sale-deed carefully and although it is true that the vendor does not in so many words refer to the site "Arazi" as having been conveyed and indeed it appears that the word 'Arazi' was cut out from the sale-deed we have no hesitation in coming to the conclusion, that on the words of the sale-deed as it stands, the vendor parted with every right that he possessed in the grove. It was a proprietor's grove, the vendor being the sole owner of it. When an owner of a grove sells the grove by declaring that he was selling it with every right that he possessed therein, it follows that his right to the land was also conveyed to the vendee unless it was expressly reserved by him. In the case of a grove in which the groveholder is not the owner of the land, a sale by him would not be deemed to

have passed the land to the vendee. But this is not so in the case of a sale by a proprietor of the grove which he has planted over his own land.

On a perusal of the entire sale-deed we must hold that the defendants were the proprietors not only of the trees but also of the site. The map on the file clearly establishes that the defendants' grove adjoins plot No. 1784, It was attempted to show that between the defendants' grove No. 1779 and plots Nos. 1786 and 1787 which were sought to be pre-empted, there was a passage or a grave-yard intervening and that, therefore, it cannot be said that the defendants-vendees were shafi-i-jars of the vendors and in this connection the opinion of the trial Court which we have quoted earlier in the judgment was relied upon. As already stated the map clearly shows that plot no. 1779 adjoins plot No. 1784. There is no passage or graveyard between the preempted property and the defendants' grove. Indeed the plots constituting the graveyard are part of the property sold which is sought to be pre-empted and the property which is said to be a passage is also included in the sale-deed under pre-emption. It must, therefore, be held that the defendants-vendees are shafi-i-jars of the vendors. The plaintiff and the defendants-therefore are both shafi-i-jars and the question is whether the suit should be dismissed as has, been done by the Court bolew, or, as claimed by the plaintiff, the property in dispute should be divided half and half between them.

The matter is concluded by authority. Under the Mohammadan Law where a pre-emptor is equally entitled to the property along with the vendee, the property should be divided equally between the parties, vide --'Amir Hasan v. Rahim Baksh', 19 All 466 (A); --'Muhammad Yakub v. Kanhai Lal', AIR 1922 All 157 (B) and --'Vithaldas Kahandas v. Jametram', AIR 1920 Bom 343 (FB) (C). In --'Baldeo v. Badri Nath', 31 All 519 (D), the Court seems to have overlooked this aspect of the case and dismissed the pre-emption suit when the pre-emptor and the vendee were entitled to the property in equal degree. This was commented upon in the subsequent case of --'AIR 1922 I All 157 (B)'. It was not disputed that the Mohammedan Law applies even though the I vendees are Hindus, vide --'Gobind Dayal v. Inayat Ullah', 7 All 775 (E) and --'Abbas Ali v. Maya Rani', 12 All 229 (F).

5. On behalf of the defendants-vendees the decision of the Court below was sought to be affirmed on two additional grounds one of which does not seem to have been raised before that Court and the other could not have been raised before it. It was urged that the Muhammadan Law does not allow pre-emption on the ground of vicinage in respect of largg estates and allows pre-emption on that ground only in respect of houses, gardens and small plots of land. It was also urged that a garden is different from a grove and that the property in dispute does not fall within the category of a garden. No case in which the property claimed consisted of a few plots and not the entire mohal or a share in a mohal and was dismissed on the ground that such plots of land could not be pre-empted, was shown to us. The cases relied upon were all cases in which the property sought to be pre-empted consisted of mohals or a share in a mohal. --'Abdul Rahim Khan v. Kharag Singh', 15 All 104 (G), was a case in which after a perfect partition, a mohal had been formed and it was sought to be pre-empted by a co-sharer in the other mohal. It was held that on the ground of vicinage alone under the Muharamadan Law such property could not be pre-empted. In --'Munna Lal v. Hajira Jan', 33 All 28 (H), there was also an entire mohal which was sought to be pre-empted. The leading case on the point is --'Sheikh Mahomed Hussain v. Shaw Mohsin Ali', 6 Bang LR 41 (FB) (I). That was also a case of pre-emption in respect of a considerable estate consisting of a share in a village. It

was held that the right of pre-emption on the ground of vicinage alone did not extend to such property. In the course of judgment, however, it was observed that, according to the Muhammadan Law the right of pre-emption possessed by a neighbour extends only to houses, gardens and small parcels of land.

The argument of learned counsel for the vendeas-respondents was that the right of preemption being a weak right and the right to claim pre-emption on the ground of vicinage being the weakest, it should not be extended to claims in respect of plots so big as the plots in the present case covering an area of 4 bighas and 5 biswas. It appears to us, however, that there is no justification for restricting the right of pre-emption on the ground of vicinage, to plots or gardens adjoining houses. The right of pre-emption extends to plots and gardens whether they adjoin houses or not. The plots in dispute constitute one grove in which there is a small graveyard. It cannot be said that this is an estate within the meaning of the decision of the Full Bench in --'6 Beng LR 41 (I). The property in dispute is not a share in a village or in a mohal. The vendor was the exclusive proprietor of the specific plot sold. Four bighas and 5 biswas area is not so big as to be taken out of the category of cases in respect of which the right of pre-emption on the ground of vicinage extends. In our opinion the plaintiff is entitled to pre-empt.

6. The second ground on which the judgment of the Court below was sought to be supported was that the Law of Pre-emption has after the commencement of the Constitution, become unconstitutional and as such is void under Article 13 of the Constitution. Reliance was placed upon Clause (f) of Article 19(1) and it was urged that the limitation upon the right conferred on the citizens under that clause could be restricted only in the public interest under Sub-clause (5) of that Article. It is not necessary for us to express any opinion on this question because we find that the right which the plaintiff seeks to enforce in the present litigation is a right which had accrued to him before the commencement of the Constitution. It has been held by the Supreme Court that Article 13 does not act retrospectively so as to affect vested rights, vide --'Keshavan v. State of Bombay', AIR 1951 SC 128 (J).

7. There is therefore no force, in this contention. The result, therefore, is that wE allow this appeal in part, set aside the decree of the Court below and decree the plaintiff's suit for possession of half the property in dispute on payment of Rs. 619/- within two months from to-day's date. In case of the default of the payment within the time fixed therein the plaintiff's suit shall stand dismisssed with cost. The case is one in which there could have been a difference of opinion as to tha law applicable. We, therefore, order that in case the plaintiff deposits the amount, the parties shall bear their own costs throughout.

8. Learned counsel for the appellant states that the whole amount of Rs. 1238/- has already been deposited in the Court. If that is so, Rs.

619/- out of it may be paid to the vendees and the rest may be withdrawn by the plain tiff.