Zamiar Ahmed vs S. Haidar Nazar And Ors. on 21 September, 1950

Equivalent citations: AIR1952ALL541, AIR 1952 ALLAHABAD 541

JUDGMENT

Agarwala, J.

1. This is a defendant's appeal arising out of a suit for pre-emption. The facts briefly stated are : There is a grove No. 1247 in Mahal Maufi Thok Mohammad Naqi in the town of Amroha. The parties are co-sharers in the Mahal. Defendants 2 to 6, namely, Syed Hasan, Munsif Hasan, Mt. Manzoor Fatma, Absan Hasan Khan and Mt. Fatma Sughra, sold their shares in the grove to Zamir Abmad by means of a sale deed, dated 29-6-1942, for a consideration of Rs. 200. Haidar Nazar filed a suit for pre-emption on the ground that he had, according to the custom of pre-emption prevailing with regard to the property in dispute a preferential right and was entitled to pre-empt the property sold. He claimed the preferential right on the ground that he was a relation of the vendors in addition to his being a co-sharer, while Zamir Ahmad, the vendee, was merely a co-sharer. The defence inter alia was that there was a custom of pre-emption in Amroha, that, at any rate, if there was a custom it was in accordance with the Muham-madan law and that as the plaintiff had not performed the demands necessary under that law, he was not entitled to pre-empt the property. The trial Court held that there was a custom prevailing in the town of Amroha whereby a co-sharer, who was related, had a preferential right of preemption, that the plaintiff did not perform any demands and that the Muhammadan Law of pre emption did not apply. It, therefore, decreed the suit. On appeal, the lower appellate Court confirmed the trial Court's decree.

2. In this second appeal by the defendant, four points have been urged before us; firstly, it has been urged that even if there is a custom of preemption, the Muhammadan law of pre-emption would apply because the parties are Muhammadans; secondly, that even if there is a custom, since it does not mention anything about the performance of demands, it is necessary to perform the demands and the plaintiff is not entitled to pre-empt in the absence of any demands having been made by him; thirdly, that even if there is a custom, it has ceased to exist because the land in dispute is in a Municipal area, and fourthly, that custom favouring a relation ia not reasonable.

3. So far as the general principle urged by learned counsel for the appellant that as between Muhammadans the law applies in preference to custom is concerned, we have no hesitation in holding that in India this principle does not apply, except where by law the Muhammadan law has been made applicable to Muhammadans. It will be observed that the Muhammadan law applies to Muhammadans not in all, but in some matters only. The power of Courts to apply Muhammadan law to Muhammadans is derived from and regulated partly by Statutes of the Imperial Parliament

read with Article 225 of the Constitution of India but mostly by Indian legislation. Article 225 of the Constitution provides:

> "Subject to the provisions of this Constitution and to the provisions of any law of the appropriate Legislature made by virtue of powers conferred on that Legislature by this Constitution, the jurisdiction of, and the law administered in, any existing High Court, and the respective powers of the Judges thereof in relation to the administration of justice in the Court . . . shall be the same as immediately before the commencement of this Constitution."

It has not been urged before us that there is anything in the Constitution which has affected the law as it existed before the Constitution was passed so far as this matter is concerned.

4. In West Bengal, East Bengal, Bihar, Agra and Assam, under the Bengal, Agra and Assam Civil Courts Act (XII [12] of 1887), civil Courts are directed by S. 37 of the Act to decide all questions relating to succession, inheritance, marriage or any religious usage or institution by the Muhammadan law in cases where the parties are Muhammadans, except in so far as such law has, by legislative enactment, been altered or abolished. In cases not mentioned above nor provided for by any other law for the time being in force, the decision is to be according to justice, equity and good conscience.

5. The Shariat Act (XXVI [26] of 1937) which came into force on 7-10-1987, provides that:

> Where the parties are Muslims, the Muslim Personal Law shall be applied throughout India in the cases mentioned in S. 2 of the Act. Section 2 enacts:
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> "Notwithstanding any custom or usage to the contrary, in all questions (save questions relating to agricultural laud) regarding intestate succession, special property of females, including personal property inherited or obtained under contract or gift or any other provision of Personal Law, marriage, dissolution of marriage, including taluq, ila, zihar, lian, khula and mubara'at maintenance, dower,, guardianship, gifts, trust and trust properties and wakf (other than charities and charitable institutions and charitable and religious endowments) the rule of decision in oases where the parties are Muslims shall be the Muslim Personal Law."

By S. 3, Muslim Personal Law is applied in cases of adoption, wills and legacies, if a Muslim competent to contract within the meaning of S. 11, Contract Act, 1872, and being a resident of India declares in the prescribed form that he desires to obtain the benefit of the provisions of that section.

6. The law relating to pre-emption, therefore, is not directed by any law to be applied to Muhammadan. It is applied on the ground of justice, equity and good conscience. But this rule is Subject to the overriding principle that custom is a rule of law in the absence of a statutory provision to the contrary. Where, therefore, there is a custom relating to pre-emption, the Muhammadan rule of pre-emption law is not to be applied even on the ground of justice, equity and good conscience.

The custom may incorporate into itself the incidents of the Muhammadan Law of pre-emption and in that case the Mahammadan law of pre-emption would be applied, not by reason of its own force but by reason of the force of the custom. Where it is proved or admitted that there is a custom of pre-emption and nothing else is known or, in other words, the incidents of the custom are not known, the Courts have raised a presumption that the incidents are the incidents prescribed by Muhammadan Law on the ground that the law of pre-emption is a special contribution of the Muhammadan Law to this country : vide Ram Prasad v. Abdul Karim, 9 ALL. S13; Jagdam Sahai v. Mahabir Prasad, 9 ALL. L. J. 482; Chakauri Devi v. Sundari Devi, 3 ALL.L. J. 338; Zamir Ahmad v. Abdul Razzaq, 13 ALL. L. J. 704; Jagmohan v. Brijendra Bahadur Singh, 1924 ALL. L. J. 672 and Jagannath v. Inderpal Singh, 1935 ALL. L. J. 108. But where the incidents of custom are known, no incidents described by the Muhammadan law can be deemed to be part of the custom, even though they may not be inconsistent with the known incidents, of the custom. This is so because when the custom enunciates the incidents for its enforcement and applicability, the presumption is that it is complete by itself and does not stand in need of being limited or restricted by any other incident not expressly forming part of the custom, The addition of any other incident will necessarily limit the operation of the custom and that would, therefore, be deemed to be repugnant to it.

7. In the present case, the custom as recorded in the wajibularz is in the following terms:

> "If any co-sharer wishes to transfer his proprietary interest either by sale or by mortgage, he will first offer it to a co-sharer who is a relation in the order of nearness of relationship, and on his refusal to purchase, to other co-sharers in the same thok, and on their refusal to the co-sharers in the other thoka, or strangers."

The custom is complete in itself and can be enforced in the form in which it is recorded in the wajibularz. The fact that it does not make any mention of the demands prescribed by the Muhammadan law, shows that making of the demands is not necessary. The plaintiff being admittedly a relative and a co-sharer, has a preferential right of pre-emption as against the vendees, and is entitled to pre-empt.

8. It is next urged that Amroha having been included within the limits of a Municipality, the custom recorded in the wajibularz has ceased to apply to it, and reliance has been placed upon the case of Ram Chand v. Goswami Ram Puri, A. I. R. (10) 1923 ALL. 513. In this case custom was Bought to be proved by two incidents of pre-emption which had taken place long ago before the area in question became a Municipality. It was held that those instances would not be sufficient to prove the custom as applicable to lands within a Municipality. The facts of that were quite different from the facts of the present case, and in our opinion, where it is proved that a custom applied to a certain area, the mere fact that the area has been included within the boundaries of a Municipality does not affect the applicability of the custom to that area.

9. We see nothing unreasonable in a custom relating to pre-emption providing for preferential treatment of relations.

10. There is no force in this appeal and we dismiss it with costs.