Amol Singh And Anr. vs Murlidhar And Anr. on 28 November, 1950

Equivalent citations: AIR1952ALL171

JUDGMENT

Bind Basni Prasad, J.

1. This appeal came up before a learned Judge who, in view of the fact that there was no direct authority on the point requiring decision, referred to a Division Bench. The sole question for determination is whether having regard to the provisions of Section 5, Agra Preemption Act, 1922, a right of pre-emption exists in this village or not. The expression "right of preemption" is defined as follows in Sub-section (9) of Section 4 of the Act :

> " 'Right of pre-emption' means the right of a person on a transfer of immovable property to be substituted in place of the transferee fay reason of aneh right."

Section 5 (1) of the Act provides as follows :

> "A right of pre-emption shall be deemed to exist only in mahals or villages in respect of which any wajib-ul-arz prepared prior to the commencement of this Act records a custom, contract or declaration :
>
> (a) recognising, conferring or declaring a right of preemption, expressly or by necessary implication, whatever its extent and in whatever form it may be expressed, or....."

The wajib-ul-arz produced in this case was prepared at the settlement of 1869-70. The translation of the provision about the right of preemption as contained in the wajib-ul-arz is as follows :

> "At present in this village there is only one lambardar who is himself the owner of the sixteen annaa share. There is no co-sharer and hence there is no necessity for recording the condition of pre-emption. If in future, there are co-sharers and they desire to sell their share then first of all brothers and nephews nearer to them will have the right to purchase. Failing them, the co sharer will have the right to sell the property to whomsoever he likes. There shall be no right of pre-emption in the case of mortgages and thekas."

Both the Courts below have construed the above provision in the wajib-ul-arz as conferring a right of pre-emption on the plaintiff and have decreed the suit. The vendees come in appeal.

2. A right of pre-emption pre-supposes the existence of more than one co-sharer in the village. There can be no occasion for the exercise of such a right if there are no co-sharers in the village. Section 5, Agra Pre-emption Act, 1922, which deals with the right of pre-emption presupposes the existence of more than one co-sharer in the village. It lays down that if in a wajib-ul-arz there is a record of a custom, contract or declaration of a right of pre emption, then it shall be deemed to be a proof of the existence of such a right in the mahal or the village concerned. The provision in the wajib-ul-arz quoted above is not a record of a custom nor of a contract of right of pre-emption. Learned counsel for the respondent has argued that it is possible that there was a custom prior to 1869 70; but on the particular date when the wajib-id-arz was drawn up the operations of that custom were suspended by reason of the fact that the property was held by a single proprietor. No record earlier than 1870 has been produced in proof of this. Probably there is no such record. The terms of the wajib-ul-urz which have been set out above do not indicate the previous existence of any such custom. If there existed any such custom before, it could have been recorded in the wajib ul-arz that a custom to that effect was in vogue before. The only question which remains now is whether the above provision amounts to a declaration, recognising, conferring or declaring a right of pre-emp-tion expressly or by necessary implication. My construction of this wajib-ul-arz is that it is a declaration of the pious wish of the sole proprietor and not a declaration of "a right of pre emption." A distinction must be made between the declaration of a wish and the declaration of a right. As the village was owned by a sole proprietor in 1869-70, there can be no right of pre-emption at that time. But the proprietor wished that when his descendants grew in number, then in the interest of the compactness of the property the right of pre emption should be applied. As the entry in the wajib-ul-arz in tbis case does not record any existing custom or contract, nor does it declare any existing right of pre-emption. I am of opinion that it cannot confer any right of pre-emption under Section 5, Agra Pre-emption Act. I agree with my learned brother and allow the appeal, dismissing the suit with costs throughout.

Sapru, J.

3. This appeal has been presented by the defendants and arises out of a suit which was brought by the respondent for pre-emption under Section 5, Agra Pre-emption Act. Defendant 3 is the proprietor of a village called Hajipur. On 22-5-1945 he sold his entire share in favour of defendants l and 2. The plaintiff claiming to be the pre emptor, asserts that he has a right to preempt the property in preference to defendants 1 and 2 who are strangers. Tbe suit was resisted by the vendee appellants on the ground that it was incorrect to assert that there was any custom of pre emption in the village in dispute. Both the Courts below decreed the plaintiff's suit, holding that there was a custom of pre-emption in the village. The vendee-defendants have come up in appeal to this Court.

4. The learned counsel for the appellants has drawn our attention to the fact that at the time when the wajib-ul-arz was prepared in 1869 the village was under a single proprietor. In the wajib ul-arz there is a recital that it is unnecessary to record the conditions of pre-emption; but after this recital, the wajib ul-arz goes on to state that should in future the number of co-sharers increase, the sale will have first to be made to brothers then to nephews, then to cousins and thereafter, if there are no brothers, nephews or cousins, to strangers. The contention which has been pub forward by the learned counsel for the appellants is that the wajib-ul-arz cannot be said to record a custom of pre-emption inasmuch as it is in this case essentially a statement of something which was to happen

in future according to the desire of the proprietor of the village, and not of what had been the custom of the village in the past. Now, under Section 5 (1), Agra Pre-emption Act, a right of pre-emption is deemed to exist only in mahals or villages in respect of which any wajib ul-arz prepared prior to the commencement of that Act records a custom, contract or declaration :

> "(a) recognising, conferring or declaring a right of preemption, expressly or by necessary implication, whatever its extent and in whatever form it may be expressed or ....."

5. Now, undoubtedly the wajib-ul-arz in this case was prepared prior to the commencement of the Agra Pre-emption Act. But, can it be said that it is a record of custom or a declaration of a eight of pre-emption such as is contemplated in Section 5 (i), Agra Pre-emption Act ? I do not think so. The wajib-ul-arz did not recognise, confer or declare a right of pre emption expressly or by necessary implication. At the time, that it was drawn up, as it has been stated before, there was a single proprietor in the village. There is no indication whatever that the right of pre-emption which is recorded in the wajib ul-arz was a preexisting, i. e., was a right which had existed prior to the village coming under a single proprietor. In view of the fact that there is nothing in this case which would go to show that there was an existing or prior right of pre-emption in this village which was in suspension on account of its being at that time under a single proprietor to which recognition was given by the wajib-ul-arz, I would hold that in this particular case the preferential right at sales of brothers, nephews and cousias does not establish a right of pre-emption in the village but is merely a record of the views of the single proprietor in regard to what should be the rule in the village.

6. Reference may be made to some cases which were cited before us at the bar. The first of these cases, namely, Rameshwar Prasad v. Ghisiawan Prasad is reported in 1929 A. L. J. 665. This case merely lays down that the provisions of Section 5, Agra Pre emption Act, are mandatory and that their object is not to find out the particulars or the incidents of the rule of preemption but merely to fix the test which would apply in determining the question whether a rule of pre emption should be held to be applicable to the village or not. I am unable to see how this case helps the respondent. The second of these cases, namely, the Full Bench case of Riazdin v. Mt. Phula Devi, is reported at page 1212 of the same volume. It) merely decides that :

> "When an existing mahal contains portions of earlier mahals the wajib ul arzes of come of which contain entries regarding a right of pre-emption and of the others do not, a right can be presumed to exist in reapeot of the whole of the existing mahal."

There is no question in this case of any existing mahal containing portions of earlier mahals, the wajib ul-arzes of dome of which contain entries regarding a right of pre emption.

7. The short point, as I have said, in this case is whether having regard to the fact that at the time when the wajib ul-arz was prepared in 1869 the village had only a single proprietor, the record in the wajtb-ul arz of a right of pre-emption car be said to be a record of custom of pre-emptier such as ia contemplated by Section 5 (1), Agra Pre emption Act. I do not think that, in all the circumstances of this case I would be justified in inferring that there was a custom in existence to which the

wajib.ul-arz gave recognition. It could not have given recognition to a contract of custom in future for the simple reason that at the time the entry was made the village had come to be possessed by a single proprietor,

8. For the reasons given above, I would allow the appeal, set aside the decree of the Court below and dismiss the plaintiff's suit with costs throughout.