Mt. Mahbooban vs Mt. Fatima Begum And Anr. on 28 November, 1950

Equivalent citations: AIR1952ALL167, AIR 1952 ALLAHABAD 167

JUDGMENT

Mushtaq Ahmad, J.

1. This is a defendant's appeal in a suit for pre-emption of a house sold by Mt. Batulan, defendant 2, to Mb. Mahbooban, defendant 1, on 2-8-1946 for Rs. 300. The plaintiff claimed the right both as a shafi-shareek and as a shafi-jar.

2. One Sadullah was the owner of the house in dispute originally. In 1926 he sold a one-third share in the same to his wife in lieu of her dower. In 1931, Mt. Mahbooban (other than defendant 1) purchased at auction a one half share in the house in execution of a decree against Sadullah. On 2-8-1946, defendant 2, as I have already said, sold her one-third share, which she had purchased from her husband, to Mt. Mahbooban, defendant 1. Then the suit giving rise to this appeal was brought to pre empt this sale. Mahbooban, the original plaintiff, died during the pendency of the suit, and in her place the name of Mt. Fatima Begum was substituted as her heir.

3. A number of defences were taken by the defendants, but we are concerned only with one, namely that the plaintiff had not validly made the demands required under the Muhammadan law before she filed the suit.

4. The trial Court, accepting this defence, dismissed the suit but without costs, holding that the demands had really not been validly performed by the plaintiff. This finding was based on the view that the plaintiff, when making the second demand, had not referred to the first, as required by law.

5. oN appeal by the plaintiff and cross-objections by the defendants relating to costs, the lower appellate Court reversed the decree of the trial Court, and decreed the suit with coste. The present appeal is directed against the latter decree.

6. The sole point argued before me by the learned counsel on behalf of vendee appellant was that the plaintiff had not made the demands as required by Muhammadan law and that the lower appellate Court had, therefore, erred in reversing the decree of the trial Court. The contention, in agreement with the view taken by the trial Court, was that the plaintiff having not referred, when making the second demand, to the first demand, the second demand had not been validly made.

7. The question whether, at the time of the second demand, reference should be made to the first demand is not altogether an easy question, and I have had some time to devote to a consideration of

the various points involved in finding an answer to that question. Before I enter upon this matter, I may just mention a particular point on which the trial Court expressed a certain view. It appears to have been contended by the plaintiff's learned counsel in that Court on the authority of Mt. Nathu v. Shadi, 37 ALL. 522 that witnesses having been present at the time of the first demand made to the vendor, that demand would also serve the purpose of a second demand, making it unnecessary for the plaintiff to make a separate second demand. The contention was rejected by the learned Munsif on the ground that the plaintiff's own case had been that she had made two separate demands--the first as talab i-mawasibat and the second as talab-i-istishad. I would have occasion to consider in this case whether this view was right. Prima facie, if I find that a certain party has complied with the requirements of the law in a certain matter, I would be prepared to give that party the advantage of this conduct, no matter if, under a legal misconception, the party repeated that conduct in order to comply with the letter of the law. It is certainly a fact that the plaintiff, both in her plaint and in her evidence, did set up the case of two separate demands and even offered evidence in proof of them independently of such other. It is also a fact that the plaintiff and her legal advisers in the Courts below may be taken to have believed that to allege a second demand having also been made and to prove it by independent evidence, was a legal necessity in order to obtain a decree. But the question would still remain whether the necessary conditions having already been consciously or unconsciously fulfilled by the plaintiff, she is to be deprived of the benefit of it merely by reason of her having unnecessarily gone through the same process a second time at a later stage also. I have looked into the evidence in this case, and I find that, although the plaintiff in her statement had not referred to the presence of her witnesses, Mohammad Husain and Asghar Ali, at the time of the first demand, these persons, when examined did state that it was in their presence when the plaintiff had protested to the vendor Mt. Batoolan, defendant 2, against her having sold her share in the house to defendant 1, as the plaintiff herself was not only entitled but also prepared to purchase the same. 8. Learned counsel for the defendant-appellant criticises this evidence as legally deficient inasmuch as it makes no reference to the invocation of these witnesses by the plaintiff. It is undoubtedly a fact that no such invocation appears to have been made by the plaintiff and that the evidence of these witnesses, Mohammad Husain and Asghar Ali. merely was that they were present at the time when the plaintiff had protested to defendant 2, but that they had heard that protest. There is a fair amount of divergence on the question whether invocation of witnesses is essential to constitute a valid second demand for the purposes of pre-emption under Muhammadan law or whether the mere presence of witnesses at the time of the demand and their having heard the demand is enough. Sulaiman J. delivering the judgment of the Bench in Imamud din v. Muhammad Rais-ul-Islam, 52 ALL. 1005, on a review of the original authorities and the case law held :

> "On the occasion of talab-i-istishad (second demand) it is not absolutely necessary for the pre-emptor to use words like 'be ye witness to this' addressed to the witnesses. All that is absolutely necessary is that there must be at least two witnesses present on the occasion who heard the demand and can bear witness to the fact when it is denied by the vendee."

Bound, as I am, by this decision, I must hold that the evidence given by Mohammad Husain and Asghar Ali, plaintiff's witnesses, in proof of the first demand did satisfy the conditions required by Muhammadan law even in respect of the second demand, although these witnesses had not been

invoked by the plaintiff to bear witness to her demand.

9. As I have already mentioned, it was held by a Bench of this Ct. in 37 ALL. 522, referred to above, that, if the plaintiff had invoked the witnesses at the first demand in the presence of the vendor or the vendee or on the premises, the second demand was not neceesary at all. Invocation of witnesses not being necessary, as held is 52 ALL, 1005, just cited by me, the mere presence of the plaintiff's witnesses, Mohammad Husain & Asghar Ali, at the first demand which was made in the presence of the vendor, in fact to the vendor herself. & on the premises sold, satisfied all the requirements of a valid second demand and the present case would be clearly covered by that ruling. I have already held that the learned Munsif's refusal to recognise the first demand, proved by the plaintiff's witnesses, as satisfying the conditions of the second demand also, merely on the ground that the plaintiff's case in the pleading and in her evidence was one of two separate demands, cannot be supported. In this view of the matter, I am satisfied that the necessary demands had been made by the plaintiff and the decree of the trial Court was rightly reversed by the lower appellate Court.

10. I deem it necessary, however, to examine as a proposition the question of the necessity of referring to the first demand at the time of making the second demand. There can be no doubt that the usual rule is of making such a reference and we must take it that, where no such reference has been made, the necessary demands have not been made. This is supported by Mubarak Husain v. Kaniz Bano, 27 ALL. 160, Sadiq Ali v. Abdul Baqi Khan, 45 ALL. 290, and Ahmad Hakim v. Muhammad Hikmat Ullah, 49 ALL. 385.

11. The vital question is whether this rule is subject to any exception, and so far as the present case is concerned, whether it comes within that exception. It may be noted at once that in none of these last three cases had the first demand been made in the presence of the vendee or on the premises. As for tbe question whether it had been made in the presence of the vendor, there is nothing in the reports to show that it had been so made. We, therefore, take it that in these cases the first demand had not been made either in the presence of the vendor or the vendee or even on the premises. The question is whether, if the demand had been made in the presence of the vendor or the vendee or on the premises, it was still necessary to refer to that demand when the pre-emptor made the second demand. In the Fall Bench of Rujjub Ali v. Chundi Churn, 17 Cal. 543 the question referred to the Bench was :

> "When a person claiming a right of pre-emption has performed the talab-i-mawasibat in the presence of witnesses, but not in the presence either of the seller or of the purchaser, or on the premises, is it necessary that, when performing the talab-i-ishad (isttishhed), he should declare that he has made the talab-i-mawasibat, and at the same time should invoke witnesses to attest it ?"
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> and it was answered in the affirmative. That is to say, where the first demand had not been made under any one of the conditions mentioned in the question, presence of the vendor or the vendee or its having been made on tbe premises, reference to the first demand at the time of the second demand was held to be essential. By implication it must mean that, where any one or more or all of those conditions is or

> are present, the answer to the question would be in the negative. In the present case, the first demand, according to the accepted evidence of the plaintiff, had been made in the presence of the vendor and on the premises, and answering the question for the purposes of this case, the answer must, therefore, be in the negative, that is to say a reference to the first demand, when making the second demand, would not be necessary. Looking at the matter from a commonsense point of view, a demand can be made either to the vendor or to the vendee apart from the legal significance of its being made on the premises. If either of these two persons was present when the first demand was made, so that no one can honestly deny that the same had in fact been made, it appears that a reference to the first demand at the time of the second demand is not insisted upon. Be that as it may, I am inclined to interpret the Full Bench decision of the Calcutta High Court, I have just mentioned, in the manner I have done and to hold that, in a case like the present, a reference to the first demand, when the second demand was made was unnecessary. In either view of the matter I see no bar to the claim of the plaintiff being allowed. To hold otherwise would mean to make the formalities relevant to the rule of demands all the more technical when technical they already are. In my view this would be against all legal principles and would amount to creating artificial difficulties in the way of a co-sharer, otherwise entitled to pre-empt.

12. The above considerations in the light of the relevant case-law lead to the following enunciations: (1) that the necessity of making a second demand, called the talab-i-istishhad, is dispensed with if the first demand, called the talab-i-mawasibat, was made in the presence of the vendor or the vendee or on the premises sold and in the presence of witnesses who heard that demand, even though there was no invocation of those witnesses at the time, and (2) that the necessity of making a reference to the first demand at the time of making the second demand is dispensed with if the first demand was made in the presence of the vendor or the vendee or on the premises sold.

13. For these reasons, I hold that the judgment of the lower appellate Court is perfectly right, and I shall have no justification in disturbing it. Accordingly, I dismiss this appeal with costs. Leave to appeal under the Letters Patent is refused.