

Karim Ullah vs Abdul Hamid And Anr. on 16 April, 1953

Equivalent citations: AIR1953ALL696, AIR 1953 ALLAHABAD 696

JUDGMENT

Agarwala, J.

1. This is a defendant's appeal arising out of a suit for pre-emption. The property in dispute is a house situated in the town of Amroha. The plaintiff-respondent is a co-sharer in the house. The house consists of two kothas, a courtyard, a latrine and a passage. One kotha was owned by defendant 2 and the other by the plaintiff-respondent. The courtyard, the latrine and the passage were owned by both of them jointly. Defendant 2 transferred his share of the house to defendant 1 by a sale-deed dated 1-12-1943. The plaintiff instituted a suit for pre-emption of the house on 25-10-1944, which has given rise to this appeal. On 4-8-1945, defendant 1 re-transferred the house to defendant 2, the original vendor. It was alleged in the sale-deed that when the original transfer was made by defendant 2 in favour of defendant 1 on 1-12-1943, it was orally agreed that the vendee would transfer the house to the vendor if the vendor paid the price within two years. It was further alleged that in pursuance of that oral agreement an agreement on the stamp paper was also executed on 27-12-1943. That agreement is on the record.

2. The defence to the suit was that the plaintiff had no right of suit, inasmuch as the re-sale had been effected by defendant 1 in pursuance of the oral agreement of sale entered into at the time of the provisional sale. The trial Court dismissed the suit holding that the oral agreement of re-conveyance as embodied in the written agreement of 27-12-1943 was established. The lower appellate Court, however, decreed the plaintiff's suit on the ground that even if there was a contract as alleged by the defendant, the plaintiff's right could not be affected thereby and that the re-sale was of no effect. The lower Court has assumed the existence of the contract of re-conveyance without giving any finding of its own. In this appeal by the defendant it has been urged that the view of the law taken by the Court below is erroneous. I agree with this argument. The right of pre-emption is a right not of re-purchase from the vendee but of substitution in place of the vendee.

As was observed by Mahmood J. in -- 'Gobind Dayal v. Inayatullah', 7 All 775 at p. 809 (FB) (A) :

"The right of pre-emption is not a right of 're-purchase' either from the vendor or from the vendee, involving any new contract of sale; but it is simply a right of substitution, entitling the pre-emptor, by reason of a legal incident to which the sale itself was subject, to stand in the shoes of the vendee in respect of all the rights and obligations arising from the sale under which he has derived his title. It is, in effect,

as if in a sale-deed the vendee's name were rubbed out and the pre-emptor's name inserted in its place."

If the sale to defendant 1 was subject to an agreement for re-conveyance of the property sold, the sale by defendant 2 to defendant 1 was in pursuance of the condition of re-purchase. The pre-emptor could pre-empt the property and get into the shoes of the vendee subject to the same condition. He could not obtain the property without complying with the condition. Even if the suit for pre-emption were decreed he would have to part with the property if the original vendor required him to sell it to him on the same price.

As on the date of the sale-deed executed by defendant 1, i.e. 4-8-1945, the pre-emptor had not yet become the owner of the property, defendant 1 was authorised to re-sell the property according to the terms of the contract of re-purchase to defendant 2. This having been done, the plaintiff lost his right of pre-emption. This view is supported by a decision of Iqbal Ahmed J. in -- 'Chunni Lal v. Ram Prasad', AIR 1940 All 90 (B). It is true that case was under the Agra Preemption Act, but the decision was on general principles and applied equally to the facts of the present case. Learned counsel for the respondent relied on a decision in -- Abdul Rahman Khan v. Mohd. Ayyub Khan', AIR 1924 All 806 (C). That was a case in which a transfer by the vendee, sought to be pre-empted, was made to the pre-emptor not in pursuance of an agreement of repurchase but simply to defeat the right of the pre-emptor to pre-empt the property. The facts of that case were therefore, entirely different. The Court below has not gone into the question whether there was in fact an agreement of re-sale between the parties.

3. The result, therefore, is that the appeal is allowed, the decree of the Court below is set aside and the case is remanded to that Court for decision of the case after recording a finding as to the existence of the agreement of re-purchase of the property between defendant 1 and defendant 2.

4. Costs here and hitherto will abide the result.

5. Leave to appeal to a Division Bench is refused.