Mohd. Ismail vs Abdul Rashid And Ors. on 27 July, 1955

Equivalent citations: AIR1956ALL1, AIR 1956 ALLAHABAD 1, ILR (1956) 1 ALL 143

JUDGMENT

Agarwala, J.

1. This is an application in revision against an order rejecting the applicant's application for being brought on the record as the successor-in-inte-rest of the plaintiff-appellant who had dled during the pendency of the appeal in the lower appellate court. The facts in brief are as follows :

2. Amanatullah, father of the applicant owned a house in the city of Banaras. Adjacent to it to the north, is the house of Abdul Rashid and Abdul Jalil, opposite parties Nos. 1 and 2. The latter sold their house by means of a deed of sale dated 20-7-1946 to Barkatullah, opposite party No. 3 for a sum of Rs. 1200/-. Amanatullah claimed a right of pre-emption with regard to this sale on the ground that he was the owner of the adjoin-ing house and that he also participated in the appendages of the house in other words, he claimed to be a 'Shafi-e-Jar' and a 'Shafi-e-Khalit'. He claimed that he had performed the necessary demands. The suit was Instituted in the court of the Munsif, Banaras.

3. The defence was that the plaintiff did not possess the preferential right of pre-emption nor had he made any demands as required by the Mohammedan Law. There were other defences with which we are not concerned.

4. The Munsif dismissed the suit on the grounds that the plaintiff did not possess a pre-ferential right of pre-emption and that he had not made the necessary demands. Amanatullah appealed to the lower appellate court but died during the pendency of this appeal leaving six sons, Mohammad Ayub, opposite party No. 4 and Mohammad Ismail, the applicant. It is not necessary to mention the names of the other four sons. Mohammad Ayub and Mohammad Ismail both made applications to the court below as successors of Amanatullah for being brought on the record in place of Amanatullah and being allowed to prosecute the appeal.

5. The court below dismissed their applications and one of the grounds mentioned by the court below was the 'maxim, actio personalis moritun cum persona' applied to the case, as according to the Hanafi Mohammadan Law which governed the parties, the right of pre-emption was a personal right and did not survive to the heirs if the pre-emptor died before obtaining a decree in his favour. Reliance was placed by the court below upon a ruling of this Court in 'Muhammad Husain v. Niamat-un-nissa', 20 All 88 (A).

The court below by the same order dismissed the appeal also. The applicant then came up in revision to this Court and urged that the view taken by the court below that the right did not survive to the heirs of the deceased pre-emptor was erroneous. The.case came up before a learned Single Judge who considered that the right survived to the heirs because it was not a personal right but was attached to property, but De-cause of the Division Bench Ruling in 'Muhammad Husain's case (A)', he referred the case for decision by a Division Bench. The case came up before a Division Bench and in view of the Supreme Court Ruling reported in -- 'Audh Behari Singh v. Gajadhar Jaipuria', AIR 1954 SC 417 (B) in which it was held that the right of pre-emption was not a personal right but was attached to property, and in view of the importance of the question involved in the case, the Bench referred the case to a Full Bench.

6. The case has been ably argued before us by learned counsel for both sides. Upon hearing them we have come to the conclusion that this revision must fail. It may be observed that when Amanatullah died he had not obtained a decree for pre-emption in his favour, as his suit had" been dismissed by the trial court. The question is whether under the Hanafi Mohammedan Law the heirs of Amanatullah could continue the appeal and claim to pre-empt the property.

7. The right of pre-emption signifies "the becoming proprietor of lands sold for the price at which the purchaser has bought them, although he be not consenting there unto. . The word "Shafa" (pre-emption) is derived from a right which signifies conjunction, i.e., the lands sold are conjoined to the land of the pre-emptor". See Hedaya by Hamilton, Vol. 3, p. 561.

The right is available first to a partner in the property of the land sold, second to a partner in the immunities and appendages of the land, and, third to the owner of the land adjoining the lands sold. The basis of the right is to prevent apprehended inconveniences by the introduction of a stranger as partner or neighbour. Shaffa is therefore, a right to have an offer of sale made to the pre-emptor in the first instance before the property is sold to a stranger and if the property is sold to a stranger, the pre-emptor has a right. to be substituted in the sale in place of the purchaser.

8. Inasmuch as the right of pre-emption is "the disseizing another of his property merely in order to prevent apprehended inconveniences" it is considered to be "a feeble right" by Hanafi Mohammedan Law vide, Hamilton's Hedaya, Vol. III, p. 568, and for this reason the right is circumscribed or hedged in by certain conditions the fulfilment of which is essential for the enforcement of the right in a court of law. The first of these conditions is that the pre-emptor must himself be the owner of the property by virtue of which he claims the right at the date of the sale.

The seeond condition is that he must make known his intention to pre-empt 'without delay by making the two demands which are technically called 'Talab Mawasibat, or immediate claim and 'Talab Ishhad' or claim by confirmation before witnesses. The Talab Mawasibat is made immediately when the pre-emptor is apprised of the sale being concluded. If he makes the slightest delay his right is gone. He must farther make the second demand in the presence of witnesses against the purchaser if he is still in possession of the land or against the seller, or upon the spot.

The third condition is that he must continue to possess his right of pre-emption so long as a decree is not passed by the Court in his favour, for if he loses his right before that event happens, he cannot claim to be 'entitled to a decree. The Mohammedan Law texts are clear on the point. At page 568, Vol. III of Hamilton's Hedaya, it is stated thus:

> "The right of Shaffa is not established until the demand be regularly made in the presence of witnesses; and it is requisite that it be made as soon as possible after th'e sale is known; for the right of Shaffa is but a feeble right, as it is the disseizing another of his property merely in order to prevent apprehended inconveniences. It is therefore requisite that the Shafee without delay discover his intentions, by making the demand; which must be done in the presence of witnesses, otherwise it cannot be afterwards proved before the Kazee.
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> When the demand has been regularly made in the presence of witnesses, still the Shafee does not become proprietor of the house until the purchaser surrenders it to him, or until the magistrate passes a decree; because the purchaser's property was complete, and cannot be transferred to the Shafee but by his own consent, or by a decree of a magistrate; in the same manner as in the case of a restriction of a grant, where the property of the grantee being completely established by the grant, it cannot be transferred to the grantor, but by the surrender of the grantee, or by a decree of a magistrate.
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> The use of this law appears in a case where the Shafee, after having preferred his claim before witnesses previous to the decree of the magistrate or the surrender of the purchaser, dies, or fells the house from whence he derived his right; or where the house adjoining to that to which the right of Shaffa relates is sold; for in the first of these instances the house is not a part of his hereditaments, because it was not his property; and the right of Shaffa fails in the second instance, as the fundamental principle of that right is extinguished previous to his becoming the proprietor; and in the third case, he has no right to Shaffa with respect to the house which is sold, since the house from which he would have derived that right is not his property."

Again, at page 600, while dealing with the circumstances which invalidate the right of Shaffa, the learned author states as follows;

> "If the Shafee die, his right of Shaffa becomes extinct. Shafei maintains that the right of Shail'a is hereditary. The compiler of the Hedaya remarks that this difference of opinion obtains only where the Shafee dies after the sale, out previous to the Kazee decreeing him the Shaffa; for if he die after the Kazee has decreed his Shaffa, without having paid the price, or obtained possession of the property sold, his right devolves to his heirs, who become liable for the price. The argument of our Doctors upon the point in which they differ from Shafei is that the death of the Shafee extinguished his right in the property from which he derived his privilege of Shaffa; and the property did not devolve to his heirs until after the sale.

> Besides, it is an express condition of Shaffa, that a man be firmly possessed of the property from which he derives his right of Shaffa at the time when the subject of it is void, a condition which does not hold on the part of the heirs. It is, moreover, a condition that the property of the Shafee remain firm until the decree of the Kazee be passed; and as this does not hold on the part of the deceased Shafee, the Shaffa is therefore not established with respect to any one of his descendants, because of the failure of its conditions."

Analysing this passage, we find two reasons for the view that the right of pre-emption does not survive to the heirs if the pre-emptor dies before obtaining a decree in his favour:

> (1) That the pre-emptor must be possessed of the property on account of which he claims pre-emption on the date of the sale. This condition is not satisfied by the heirs.
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> (2) that the pre-emptor must be firmly possessed of his own property till the date of the decree in his favour, and if he dies before that date, this condition is not fulfilled. The same view is expressed in Baillie's Digest of Mohammedan Law, 1875 Edition, page 505: In Chapter 8 the learned Author described the mode in which the right of pre-emption is rendered void after it has been established. He says that:
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> "The right of pre-emption is rendered void in two different ways after it has been established. One of these is "Ikhtiyaree, or voluntary, the other Zurooree, or necessary." ..... The right of pre-emption is rendered void necessarily when the pre-emptor has died after the two demands and before taking the thing under the pre-emption; for the right is then extinguished according to 'us'. But it is not made void by the death of the purchaser; and the pre-emptor may, accordingly, assert his right, and take the subject of sale from his heirs."

This view seeing to be well established, see Shyama Charan Sirkar's Mohammedan Law, Second Edition, I Volume, 603, and Tyabji's Muhammadan Law, 1940 Edn., p. 696, paragraph 532 and Ameer Ali's Muhammadan Law, Vol. I, 2nd Edn., p. 603. These authorities were followed by a Division Bench of this Court in 20 All 88 (A). That was a case the facts of which were very similar to the facts of the present case. In that case the pre-

emptor brought a suit for pre-emption against the vendor and the vendee. The suit was dismissed.

He died after the decree but before the appeal was filed. His heirs filed the appeal. The lower appellate court decreed the suit. From this decree the defendant appealed to the High Court and the High Court decreed the appeal holding that the right of pre-emption had determined upon the death of the pre-emptor and did not survive to his heirs. This is what they observed:

> "All the authorities of which we are aware show that it did, that the right of pre-emption is gone when the pre-emptor is a Sunni of the Hanafi Sect and has not obtained the decree during his life time and the right to sue does not survive to his

heirs."

9. It is true that the right of pre-emption has been stated to be not a personal right but a right attached to property, see -- 'Gobind Dayal v. Inayatullah',, 7 AH 775 (FB) (C) and AIR 1954 SC 417 (B). In 'Gobind Dayal's case (C)' the question was :

> "in a case of pre-emption where the pre-emptor and the vendor are Muhammadans and the vendee a non-Muhammadan, is the Muhammadan Law of pre-emption to be applied to the matter in advertence to the terms of Section 24 of Act VI of 1871", and the question was answered in the affirmative on the ground that pre-emption was a right which the owner of certain immovable property possessed as such for the quiet enjoyment of that immovable property to obtain in substitution for the buyer, proprietary possession of certain other immovable property not his own on such terms as those on which such latter immovable property is sold to another person, that the right partakes of the nature of an easement and is in the nature of a legal servitude running with the land and that the right exists before sale and does not come into existence after the sale.
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> In 'Audh Behari Singh's case (B)' the question was whether the Muhammadan Law of preemption which prevailed in the city of Banaras under a custom could be availed of in a case where neither the vendor nor the vendees were the natives of Banaras but were residents of a different province. It was in this connection that it was observed that the right of pre-emption is a right attached to property and is not a personal right. The question which arises in the present case did not fall to be considered in any of the above cases, and the learned Judges were not called upon to consider the circumstances in which the right is lost or becomes unenforceable.
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> There is nothing illogical in the right being not personal and attached to property and at the same time not being heritable or transferable after the sale has been made to a stranger but before a decree has been passed in favour of the pre-emptor. There are many interests in land which are neither heritable nor transferable and the bare right of pre-emption after the sale has been effected but before it has ripened into a decree of Court, seems to be such a right.

10. The same thing might be put in another way. It can be said that although the right of preemption runs with the land and is not initially personal it assumes a personal aspect for the purposes of enforceability in a court of law. From the moment of the sale in favour of the stranger till the date of the decree in favour of the pre-emptor, the right can be enforced only by the person who was the owner of the pre-emptive property on the date of the sale of the property sought to be pre-empted.

During this interval, the right is attached to the person of the owner of the pre-emptive property and he alone can enforce it in a court of law. The right continues to be personal to him so long as a decree is not passed in his favour. During this interval the right is neither transferable nor heritable. But as soon as a decree is passed in his favour the right ceases to be personal and becomes a

proprietary right fit to be transferred as well as to be inherited.

11. Dr. Agarwala in his Commentary on the law of Pre-emption states his opinion thus:

> "The primary right exists in every owner for the time being of the pre-emptive property, and entitles him to have an offer of sale made to him whenever the owner of the pre-emptional property cares to sell it, while the secondary right arises on a sale of the pre-emptional property in favour of the owner, at that time, of the pre-emptive property, and is a right of substitution, i.e. a right to be substituted for the vendee in the sale transaction. The difference between the persons of inherence in the two cases is very important. The primary right is in every owner for the time being of the pre-emptive property; the secondary right is only in favour of the person who is the owner of the pre-emptive land at the date of She sale.
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> The primary right, i.e. the right to have an offer of an intended sale, is inherent to the preemptive property and passes along with it to transferees, assignees, legal representatives, and heirs, in other words, it is a right attached to the pre-emptive property and inseparable from it. The secondary right, i.e. the right of substitution which arises only on an infringement of the primary right caused by a sale to a stranger, is personal to the owner of the pre-emptive property at the time of the sale. It is not heritable, and does r.ot pass with the pre-emptive property to transferees, assignees, legal representatives and heirs."

Where a rule of Mohammedan Law is well settled in the view of the ancient expositors of the Mohammedan Law, it is not open to us to disregard or to reject it on the ground that to us it appears to be illogical or unsound, provided, of course, it is not contrary to equity, justice and good conscience on which ground alone, as observed by the Supreme Court, the right is enforced at the present day.

12. In cases of pre-emption arising under the terms of a wajib-ul-arz, it has been held by this Court that the right of pre-emption is heritable, vide -- 'Muhammad Yusuf All Khan v. Dal Kuer', 20 All 148 (D); -- 'Kaunsilla Kunwar v. Gopal Prasad', 28 All 424 (E) and -- 'Wajid All v. Shaban', 31 All 623 (P). It has also been held that where the pre-emptor died after the trial court's decree, then even though the trial court had not decreed the suit in his favour, the heirs were entitled to continue the appeal as the appellate court merely passes a decree which the trial court ought to have passed, vide, -- 'Sakina Bibi v. Amiran', 10 All 472 (G); -- 'Rohansingh v. Bhau Lal', 31 All 530 (H); -- 'Baldeo Misir v. Ram Lagan Shukal', AIR 1924 All 82 (I) and -- 'Umrao V. Lachhman', AIR 1924 All 448 (J).

These decisions which were given in respect of the customary law of pre-emption based upon the terms of wajib-ul-arzes cannot be made applicable to a case arising under the Hanafi Mohammedan Law especially when the rule under the latter law is clearly against the views expressed in the aforesaid cases.

13. It was urged that under Section 306, Succession Act. the administrator or executor of a Hanafl Mohammedan estate is entitled to conti-

nue the suit which was pending at the date of the death of the deceased and reference was made to -- 'Sita Ram Bhaurao v. Jiaul Hasan Sirajul Khan', AIR, 1917 Bom 276 (K) which was affirmed on appeal by the Privy Council in -- 'Sita Ram v. Jiaul Hasan Sirajul Khan', AIR 1923 PC 41 (L). Section 306, Succession Act provides:

> "All demands whatsoever and all rights to prosecute or defend any action or special proceeding existing in favour of or against a person at the time of his decease, surviving to and against his executors or administrators, except causes of action for defamation, assault, as defined in the Indian Penal Code or other personal injuries not causing death of the party and except also cases where, after the death of the party, the relief sought could not be enjoyed, or granting it would be nugatory."

We are not quite sure whether the right of preemption is not covered by the expression "the relief sought could not be enjoyed" in the above section. However that may be, the section does not apply to the present case inasmuch as there was no administrator or executor appointed for the estate of Amanatullah. The heir himself, unless he has taken out a probate or letters of administration, cannot take advantage of this section, vide -- 'Jiaul Husain Khan v. Sitaram Bhau 36 Bom 144, at p. 146 (M).

14. On behalf of the opposite parties two points were urged, first, that in the will executed by Amanaullah he had stated that he had only life interest in the property, and as such the right of pre-emption did not survive to his heirs, and second that the lower appellate court having dismissed the appeal, the applicants should have filed an appeal and not an application in revision.

15. In view of the opinion expressed by us above that according to the rule of Mohammedan Law applicable to Hanafl Mohammedans the right to continue a suit for pre-emption did not survive to the heirs, it is unnecessary for us to decide these points.

16. The application in revision, therefore, fails and is dismissed with costs.