Oudh Behari Singh vs Gajadhar Jaipuriya And Ors. on 22 July, 1955

Equivalent citations: AIR1955ALL698, AIR 1955 ALLAHABAD 698

Author: Raghubar Dayal

Bench: Raghubar Dayal

JUDGMENT

Raghubar Dayal, J.

1. Ral Manmatha Nath Bose and others, defendants 2 to 5, held the enclosure bearing municipal No. D-37/84 situate in Mohalla Baradeo, Banaras, on parjawatdari tenure from Babu Oudh Behari Singh and others. They executed a sale deed of their rights of possession to the parjawat land to Gajadhar Jaipuriya, defendant 1 under a sale deed scribed on 29-3-1941 and registered on 1-4-1941.

2. Oudh Behari Singh instituted the suit against defendants 1 to 6 pre-empting the aforesaid sale alleging that custom of pre-emption prevailed in the entire city of Banaras and that he had the right to pre-empt on account of his owning property adjacent to this enclosure which had been sold.

3. Gajadhar Jaipuriya, the vendee, contested the suit on various grounds, two of which were that the plaintiff had not made the necessary demands required by the Muhammadan Law of Pre-emption and that the plaintiff had no right to take possession by dispossessing the parjawatdar in, possession, on the pretext of enforcing the right of pre-emption, and in breach of the parjawatdari agreement.

The issues framed in the suit did not include a specific issue on the basis of the second contention mentioned above. There was an issue about the plaintiff's making demands according to Muhammadan Law and also about the plaintiff having a right of pre-emption and about the existence of the custom of pre-emption in mohalla Baradeo and in the case of existence of such a custom whether the defendants-respondents of another Province were bound by that custom.

4. The trial Court held that the plaintiff did not make the necessary demands and that there was a custom of pre-emption in mohalla Baradeo in Banaras City and that such custom was, however, not binding on the defendants as they were residents of another Province. It accordingly dismissed the suit. The plaintiff's appeal was dismissed by this Court also. He then appealed to the Privy Council. The appeal was finally heard by the Supreme Court. The Supreme Court reversed the decision of this Court and held that the defendants were bound by the custom of pre-emption, which prevailed in Banaras even though they were residents of another Province.

It accordingly set aside the decree of this Court and remanded the case for consideration of the two questions left undecided, namely, whether the plaintiff had made the demands in due compliance with the forms prescribed by the Muhammadan Law and, secondly, whether the plaintiff being landlord could eject his own tenants in the exercise of the right of pre-emption.

5. On the question about the making of demands according to the requirements of Muhammadan Law of Pre-emption we are of opinion that the evidence on the record is sufficient to establish that the demands were so made. (After discussion of the evidence on this point his Lordship proceeded:)

6. We are therefore of opinion, as mentioned earlier, that the plaintiff's evidence suffices to establish that the plaintiff has made the two demands according to the Muhammadan Law of Pre-emption.

7. The second question already mentioned is with respect to what was pleaded in para. 3 of the written statement of Gajadhar Jaipuriya, defendant 1. It is necessary to reproduce it in order to indicate the true import of the contention for the defendant specially when the point urged before us is not exactly in the form in which the question is framed.

The point urged before us is that the plaintiff who is the landlord of the land sold cannot pre-empt the sale of the lessee rights of the lessees defendants 2 to 5 who hold the land from him on a tenure known as Parjawatdari tenure, The contention is that a pre-emptor can preempt the sale of land or property but not the sale of lessee rights in land or property.

The question as expressed seems to assume that the plaintiff had a right to pre-empt but in the exercise of that right has no right to dispossess his lessee. Paragraph 3 of the written statement of defendant 1 is:

> "Assuming the false allegations of the plaintiff that the land aforesaid is held on ground rent and the plaintiff is the zamindar thereof to be correct even then the predecessors of the defendant and the defendant have, on the ground of the agreement with the zamindar of the said land, been in possession of the land aforesaid, with power to make all sorts of transfers, on payment of ground rent. The plaintiff who alleges himself to be the representatives of the zamindar, has according to law and justice, no right to take possession by dispossessing the parjawatdar in possession, on the pretext of enforcing the right of pre-emption, and in breach of the parjawatdari agreement."

It is not disputed that the parjawatdar has right to sell his right, to possess under that tenure. The plaintiff himself admits in cross-examination that the parjawatdars are entitled to transfer their right of occupation and that the proprietors cannot eject any of the parjawatdars. The suit was for obtaining possession ever the enclosure and buildings sold on payment of sale consideration in the exercise of the right of pre-emption.

The contention of the defendant was, therefore, that if the plaintiff as a successful pre-emptor was to be substituted for the vendee and delivered possession that would effect that dispossession of the

parjawatdar on account of the parjawatdar exercising his right of selling his parjawatdari right granted to him by his landlord who happened to be the plaintiff pre-emptor and that such a thing could not be possible in law.

He did not put it so clearly in the written statement that as a matter of law the sale of lessee right could not be pre-empted, the point of law which has been really urged before us. The defendants could also mean that the conduct of the plaintiff in granting parjawatdari right to defendants 2 to 5, the lessees, with the right to sell the parjawatdari right and that the condition that the plaintiff would be entitled to get one-fourth of the sale consideration meant that the plaintiff waived his right to pre-empt the sale in case when the parjawatdar did sell his rights.

8. We shall consider this contention of the defendants in the written statement in its both aspects.

9. It is very relevant to the questions before us to refer to what has been said by their Lordships of the Supreme Court in their judgment in the appeal in this very case. Their judgment is reported in 'Audh Behari Singh v. Gajadhar Jaipuriya,' AIR 1954 SC 417 (A). Their Lordships propounded this first question, whether the burden and benefit of a right of preemption are incidents annexed to the lands belonging, respectively to the Vendor and the pre-emptor or is the right merely one of re-purchase, which a neighbour or co-sharer enjoys under Muhammadan Law, and which he can enforce personally against the vendee in whom the title to the property has already vested by sale.

After considering some cases they observed at p. 422:

> "In our opinion it would not be correct to say that the right of pre-emption under Muhammadan law is a personal right on the part of the pre-emptor to get a re-transfer of the property from the vendee who has already become owner of the same .....
>
> It is true that the right becomes enforceable only when there is a sale but the right exists antecedently to the sale, the foundation of the right being the avoidance of the inconveniences and disturbances which would arise from the introduction of a stranger into the land.....
>
> The correct legal position seems to be that the law of pre-emption imposes a limitation or disability upon the ownership of a property to the extent that it restricts the owner's unfettered right of sale and compels him to sell the property to his co-sharer or neighbour as the case may be. The person who is a co-sharer in the land or owns lands in the vicinity consequently gets an advantage or benefit corresponding to the burden with which the owner of the property is saddled, even though it does not amount to an actual interest in the property sold.
>
> The crux of the whole thing is that the benefit as well as the burden of the right of pre-emption run with the land and can be enforced by or against the owner of the land for the time being although the right of the pre-emptor does not amount to an

> interest in the land itself.... In our opinion the law of pre-emption creates a right which attaches to the property and on that footing only it can be enforced against the purchaser."

10. It would appear from these observations that the law of pre-emption creates a limitation or disability upon the ownership of a property to the extent that it restricts the owner's unfettered right of sale. It does not impose limitation or disability on any other right of property, namely, rights like those of a lessee or a mortgagee.

It should follow, therefore, that there was no such disability upon the parjawatdari rights of defendants 2 to 5 which they had sold and that therefore the plaintiff could not enforce his right of pre-emption in connection with the sale of lessee rights. This view that the lessee's right cannot be the subject of pre-emption has been expressed in some earlier cases of the various High Courts.

In 'Mohomed Jamil v. Khub Lal', AIR 1921 Pat 164 (B), it was held that the right of pre-emption did not extend to such cases under the Muhammadan Law where only the mokurari interest was transferred and unless the proprietary possession was transferred the right of pre-emption did not accrue. In the body of the judgment it is mentioned at p. 165 that Hedaya defines pre-emption.

> "As the becoming proprietor of lands sold for the price at which the purchaser has bought them although he be not consenting thereunto. The term shaffa is derived from the root which signifies conjunction and the land sold are here conjoined to the land of shafee or person claiming the right of pre-emption."

Reference was made to the case of -- 'Govind Dayal v. Inayat Ullah', 7 All 775 (C), where Mahmood J. defines shaffa as.

> "a right which the owner of certain immovable property possesses 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"

This view was accepted in -- 'Dashrathlal v. Bai Dnondubai', AIR 1941 Bom 262 (PB) (D).

11. In Tyabji's Muhammadan Law, Edn. 3, it is mentioned in para 539 on p. 701 that "Aqar or land alone may validly be the subject of preemption. "This means that one can pre-empt the sale of Aqar or land. To have a right to pre-empt the sale of land is something different from a vendee's right to pre-empt the sale of a lessee's right in land or to pre-empt the sale of a mortgagee's rights in land.

The law of pre-emption is to be strictly enforced and is not to be extended beyond what is laid down in the Muhammadan Law or in the precedent law interpreting the Muhammadan Law. No case has been brought to our notice in which the sale of a lessee's rights had been held to be pre-emptible under the Muhammadan Law.

We are therefore of opinion that the sale of parjawatdari tenure corresponding to the lessee's rights cannot be pre-empted.

12. So for as the particular case is concerned, we further agree that the contention of the contesting defendant that the plaintiff's conduct in granting parjawatdari rights which gives the right to a parjawatdar to sell his rights to anyone subject to the owner's getting one-fourth of the sale price amounts to a condition that the owner creating those rights would not pre-empt any sale of such rights even if such sales were pre-emptible. If such a construction be not put on the conduct the right given to the parjawatdar would be absolutely illusory.

He would be compelled to sell his rights back to his own landlord, in case that landlord happens to satisfy other conditions which create the right of pre-emption in him. We are, therefore, of opinion that the plaintiff cannot pre-empt the sale and cannot by any such exercise of general right of pre-emption indirectly deprive the lessee, the parjawatdar, of the rights granted to him.

13. In view of the above, we hold that the plaintiff's suit must fail though on grounds different on which the suit was dismissed by the trial Court. We, therefore, dismiss the appeal with costs.