

Ganesh vs Mahadeo on 5 May, 1950

Equivalent citations: AIR1950ALL647

JUDGMENT

Chandiramani, J.

1. This is the plaintiff's second appeal against the appellate decree of Shri Kali Charan Agarwal, Civil Judge, Gonda, dated 24th February 1945.

2. It appears that one Mata Prasad was the original owner of certain property and he mortgaged four pies share of zamindari property in patti Samjhari and Mahadeo Khata Khewat No. 48 Mohal Khas village Mayapur, to one Sarju Prasad. This mortgage was eventually foreclosed and a final decree for foreclosure was passed in favour of Sarju Prasad on 17th January 1942. On 3rd June 1943, Sarju Prasad sold his rights in the pro. party to the defendant Mahadeo for RS. 1,300. The plaintiff claimed that he was a co-sharer in patti Samjhari and Mahadeo and he had the right of pre-emption. The defence was that the defendant himself had a right of preemption when the foreclosure decree was passed; that he enforced his right of pre-emption and obtained this sale deed in his favour instead of filing a regular suit. Apparently he also pressed before the trial Court an argument that he being a cousin of Mata Prasad, the original owner of the property, had a preferential right of pre-emption and so the plaintiff's claim could not be allowed. The trial Court held that the right of the defendant was superior to that of the plaintiff and further the sale had been executed in enforcement of the right of preemption of the defendant on the basis of the foreclosure decree. The suit was accordingly dismissed. On appeal the findings of the trial Court were confirmed.

3. It has been urged in this second appeal that the view taken by the Court below is wrong, that the plaintiff got an independent right of pre-emption under the sale deed and that any way both he and the defendant had equal rights and the matter should have been decided by the drawing of lots. I have heard the learned counsel and find no force in this appeal.

4. It appears that the final decree for foreclosure was passed on 17th January 1942. The appellant was himself one of the judgment-debtors, Clearly, therefore, under that decree the defendant could not possibly possess any right of pre-emption. The defendant admittedly was a co-sharer in the Mohal and he had a right of pre-emption. There is no provision of the law which compels a pre-emptor to exercise his right of pre-emption only by suit. It is left to him to enforce that right out of Court either by a private sale or an exchange or any other mode of conveyance. In the present case, the defendant exercised his right of pre-emption and obtained the present sale deed. This is apparent from the recital in the sale deed itself. The sale deed was executed on 3rd June 1943. The learned counsel for the appellant stated that the right of the defendant in respect of the foreclosure came to an end when it was not exercised within one year, as the period of limitation under Article 10, Limitation Act was only one year. This contention has no force. Article 10, Limitation Act applies

to cases of sale and not of foreclosure. The article of the Limitation Act applicable in cases of pre-emption on foreclosure is Article 120, as held in *Ali Abbas v. Kalka Prasad*, 14 ALL. 405 : (1892 A. W. N. 108 F. B.). It is clear, therefore, that the defendant had an existing right of pre-emption on the date this sale deed was executed. The defendant, as already pointed out, has every right under the law to enforce his right in this manner instead of going to Court and it has also been pointed out that at that time the plaintiff had no right of pre-emption in this property. The plaintiff cannot convert a non-existing right into an existing right on the mere ground that the vendee pre-emptor having his right of pre-emption has chosen to exercise it by obtaining a sale deed in his favour.

5. The appeal fails and is hereby dismissed with costs.