Abdul Hafiz Pahalwan vs Dr. Bijai Dhari And Ors. on 24 August, 1950

Equivalent citations: AIR1951ALL578, AIR 1951 ALLAHABAD 578

Author: Raghubar Dayal

Bench: Raghubar Dayal

JUDGMENT

Raghubar Dayal, J.

1. Mukat Bebari Lal, defendant 3, and Dr. Bijai Dhari, plaintiff, are brothers. Mukat Behari Lal sold one-fourth share in khewat No. 58, Koil, Aligarh, to Abdul Rauf, defendant 2, who subsequently sold it to Abdul Hafiz, defendant 1. Dr. Bijai Dhari instituted the suit to pre-empt the sales on the ground that there prevailed a custom of preemption in Koil, Aligarh.

2. Abdul Hafiz contested the suit on various grounds including one to the effect that the land in suit was situate in mohalla Guriabagh and that no custom of pre-emption prevailed in that mohalla.

3. The pleadings of the parties were not clarified by the learned Munsif. He framed an issue to the effect whether there was any custom of pre-emption in mohalla Guriabagh. The contention of the parties before him really amounted to the question whether the locality known as mohalla Guriabagh was a part of mohalla Katra or was an independent mohalla. It does not appear to have been seriously disputed that there was a custom of pre-emption in mohalla Katra. The learned Munsif found on the evidence that Guriabagh was not a separate mohalla but was part of mohalla katra. He also found that the custom of preemption prevailed in mohalla Katra. He, how ever, dismissed the suit as he held it to be time barred.

4. The plaintiff appealed. The appellate Court remanded the issue of limitation for a further finding and it was found that the suit was not time-barred. The appellate Court agreed with the learned Munsif about his findings on Guriabagh being a part of mohalla Katra and on the prevalence of the custom of preemption in mohalla Katra. In fact it was admitted before him that custom of pre-emption, prevailed in mohalla Katra. A belated attempt was, however, made to qualify the admissions to the effect that the custom related to the sale of houses and not to the sale of open land. The Civil Judge, therefore, allowed the appeal and decreed the suit.

5. Abdul Hafiz, the ultimate vendee, filed this second appeal. When the appeal was heard by a learned single Judge of this Court, it was urged before him that the learned Civil Judge had ignored certain evidence which -conclusively established that Guriabagh was not a part of mohalla Katra and

that his finding, therefore, was vitiated by an error of law. The learned single Judge, therefore, considered it necessary to send down issues to the Court below with respect to the questions about Guriabagh being a part of mohalla Katra or a separate mohalla and about the prevalence of the custom of preemption in mohalla Guriabagh.

6. Findings on these issues have been received and they are to the effect that Guriabagh is no recognised mohalla of the municipality and, according to the municipal map, is included in mohalla Katra and that there was no evidence about the prevalence of the custom of preemption in mohalla Guriabagh as such. It was also found that Guriabagh can be described as a mohalla if the word mohalla is given a popular meaning according to which mohalla is the name given to a fairly large group of houses with a definite name.

7. When the appeal came up for hearing before another learned single Judge of this Court, it was contended for the respondents that the remission of the issues to the Court below was not necessary and that the case should have been decided on the findings recorded originally by the Court below. In view of this contention it was considered desirable that the appeal be heard by a larger bench.

8. The sole point that has been argued before us in second appeal for the appellant is with respect to the question of fact whether mohalla Guriabagh forms part of mohalla Katra. The finding is a finding of fact and is not open to question in second appeal. We, however, heard the learned counsel for the appellant on this point. It is clear from the statement of Mohsin Raza Khan, Nazul Inspector, that what is known as Guriabagh is included in block No. 38 which is known as mohalla Katra. What is described as mohalla Guriabagh is not made precisely clear in the statement of any witness. It appears that what is described as mohalla Guriabagh comprises a larger area than what was denoted as Guriabagh in block No. 38. It appears that land in the vicinity of Guriabagh happened to be described as Guriabagh or mohalla Guriabagh for facility of reference as the entire block No. 38 which constitutes mohalla Katra is large in area. The mere fact that people describe a certain locality as a mohalla or that oven a municipality recognises a portion of its recognised mohalla with its special name does not constitute such a recognised sub-division which should be treated as a unit of locality independent of the main mohalla which is marked out and designated as a mohalla by the municipality. If particular localities within a recognised mohalla were, on account of their importance or some particular association, get well known by their particular names and get referred to by that name, that should not be deemed to carve out a mohalla from the main mohalla. If such carving out was to be recognised, there can be sub-divisions and sub-divisions in a mohalla. In this view of the matter it is not necessary to refer to those documents individually in which expressions like mohalla Guriabagh or Guriabagh have been used to describe the residence of the person concerned or to describe the locality. We are, therefore, of opinion that what is known as Guriabagh or mohalla Guriabagh is part of mohalla Katra, a mohalla with definite boundaries and recognised as such by the Municipal Board.

9. There is ample evidence on the record to support the finding that custom of pre-emption prevails in mohalla Katra. It has been urged for the appellant that that custom will not be deemed to prevail in Guriabagh or mohalla Guriabagh in view of the fact that the locality mentioned thus became a separate entity within the main mohalla. We do not agree with this contention. Once it is held that

the custom of pre-emption prevails in the mohalla, it can be deemed to prevail throughout the mohalla irrespective of the fact whether portions of the mohalla are well known with separate names or are not so known. Giving particular names to important houses or enclosures or areas within a mohalla must be for facility of reference. Description of a place is just to facilitate the fixing of its identity. If an identity can be better fixed by reference to any particular name, the place will be described by that name and need not be described by reference to the mohalla in which the place is situated. If this contention for the appellant was to be upheld, it would mean that even though custom of pre-emption can be said to prevail in such a locality prior to its obtaining the well known name the custom will have to be proved afresh from incidents of the enforcement of the custom during the period subsequent to the locality acquiring a proper name. The mere fact of the locality acquiring a particular name will therefore, lead to the cessation of the prevalence of the custom. Once the custom of pre-emption is said to prevail in a certain locality, it will be deemed to prevail in that locality, whether that assumes a well known name or whether it is even recognised by the municipality as a separate mohalla, till such time that it could be proved from instances that the people of such a locality actually abandoned the custom.

10. Abandonment of the custom can be proved not merely by the fact that no instance of the enforcement of the right of pre-emption took place, but by the fact that somebody claimed pre-emption but failed because the people of the locality indicated that the custom was not to prevail any more Instances in which the claim has been refused will determine the alleged abandonment and not a mere absence of any case of pre-emption.

11. Learned counsel for the appellant referred us to the note in connection with the question of abandonment of custom on p. 30 of Customs and Customary Law in British India by Sripati Boy (Tagore Law Lectures, 1908). The note refers to the cases of C. Abraham v. F. Abraham, 9 M. I. A. 195 : (l W. R. 1 P. C.) and Rajkishen Singh v. Ramjoy Surmah, 1 Cal. 186 : (.19 W. R. 8) and is in connection with the abandonment of family customs. Their Lordships drew distinction between family visage and territorial custom and observed at p. 195 of the case reported in Rajkishen Singh v. Ramjoy Surmah, 1 Cal. 186 : (19 W. R. 8):

> "Their Lordships cannot find any principle or authority for holding that in point of law a manner of descent of an ordinary estate, depending solely on family usage, may not be discontinued, so as to let in the ordinary law of succession. Such family usages are in their nature different from a territorial custom, which is the lea loci binding all persons within the local limits in which it prevails." "

It follows, therefore, that even if it be held that what formerly formed part of mohalla Katra now forms an independent mohalla, the custom of pre-emption which was held to prevail in the locality now known as mohalla Guriabagh when it formed part of mohalla Katra would still be deemed to prevail in this mohalla unless it be established that there had been cases in which the right was claimed with respect to sales in this newly formed mohalla and was denied. There is no evidence of such claim and denial though no case of pre-emption with respect to sale of property in this very mohalla has been proved.

12. The learned counsel for the appellant relied on certain cases in support of his contention that as mohalla Guriabagh is a newly formed mohalla, the custom which originally prevailed in mohalla Katra will not be deemed to prevail in this mohalla. The case Asa Ram v. Asa Ram, 1945 A. L. J. 407 : A.I.R. (33) 1946 ALL. 133) is distinguishable. In that case the question was whether the custom of pre-emption prevailed in that part of Shamli which was new and was separated from the old part by the public road. It was held that the mere fact that the new part was treated as part of the same town for administrative or physical purposes would not justify the finding that the custom which prevailed in the old part must be held to prevail in the new part. It was held that the locality for the purposes of the prevalence of a custom can be a unit smaller than a city or a town and could be a mohalla. If did not go further than that and did not hold that any locality better known by any particular name within the mohalla will also constitute a unit for the purposes of the determination of the prevalence of a custom in a locality. The quotations from Halsbury's Laws of England in this case mention that some definite limit must be assigned to the area wherein the custom is said to obtain, and that the area must be defined by reference to the limits of some recognised division of land. According to this criterion what is known as Guriabagh or mohalla Guriabagh cannot be held to be a locality because as mentioned above, the evidence about its separate existence is not precise about the limits of what is alleged to be mohalla Guriabagh. When there are no definite limits of the alleged mohalla, it cannot be given the status of an independent locality for the purposes of determining the prevalence of customs.

13. The next case referred to is Ram Saran Das v. Pearay Lal, 1930 A. L. J. 1555 : (A.I.R. (18) 1931 ALL. 104). The plaintiff in that case alleged in the plaint that a custom of preemption prevailed in the entire city of Bareilly and especially in mohalla Azamnagar whereof a number of mohallas, including Kauwa Tola, formed part. The Courts below found that the prevalence of the custom of pre-emption in mohalla Kanwa Tola was not established. The contention in this Court was that the Courts below ignored the evidence relating to the prevalence of such a custom in the surrounding mohallas. The Court considered the evidence and held that the findings of the Courts below were correct. It does not appear from the judgment that the Court held that mohalla Kauwa Tola was carved out of the larger mohalla Azamnagar and that custom of pre-emption prevailed in mohalla Azamnagar. There is reference to a sale-deed of 1885 which mentions the residence of the vendee to be mohalla Azamnagar known as Kauwa Tola. Whether mohalla Kauwa Tola was another name of mohalla Azamnagar or whether it was an independent mohalla, this judgment does not help the appellant. It could have helped the appellant only if it had been clear that custom of pre-emption prevailed in mohalla Azamnagar and yet it was held that it did not prevail in mohalla Kauwa Tola which at one time was included in mohalla Azamnagar but constituted a separate mohalla later on. Such are not the findings.

14. The case reported in Gopal Singh v. Moolraj, A.I.R. (11) 1924 Lah. 557 : (5 Lah 312) is also distinguishable. It was held there that the fact that the custom of pre-emption prevailed in certain parts of the town of Gujranwala is not sufficient to show that it prevailed in the business quarter of recent growth which lay outside the walls of the town of Gujranwala and that even if the custom existed in the entire old town, it cannot be presumed to exist in an outgrowth or an extension of the town. There the locality in dispute was absolutely new and outside the town. In the present case the locality alleged to be Guriabagh or mohalla Guriabagh is not any new, independent locality but is a

locality which formerly formed part of mohalla Katra. What is held in this case is the same what was held in Asa Ram v. Asa Ram, (1943 A. L. J. 407 : A. I. R. (33) 1946 ALL. 133) (ubi supra).

15. In Allah Din v. Shankar Shah, A. I. R. (11) 1924 Lah. 335: (71 I. C. 898) it was held that when a custom of pre-emption is held to prevail in a certain mohalla, it must be treated as existing throughout that mohalla including such parts of it which are known by special names. It appeals that Chuni Mohalla was a sort of an enclosure within Multani Mohalla. It was held that inasmuch as the property in suit lay in Chuni Mohalla and Chuni Mohalla was part of Multani Mohalla where a custom of pre-emption existed, the custom of pre-emption applied to the land in suit. This case is practically on all fours with the present case where mohalla Guriabagh or Guriabagh formed part of mohalla Katra.

16. In Niran Baksh v. Mohammad Akram Khan, A.I.R (24) 1937 Lah. 167 : (161 I. C. 610) it was held that if the custom of pre-emption prevailed in a particular town and the same town expended in the ordinary course of things, the custom of pre-emption would also be enforcible in the extended boundaries of the original town where the custom had prevailed. The principle of this case would apply to the present case if it be assumed that at the time the municipality recognised mohalla Katra most of the land which is now known as Guriabagh or mohalla Guriabagh was vacant land and that houses were built in that area subsequently. The conversion of vacant land into habitable land is not shown to be due to some special reason and would, therefore, be considered to be in the normal development of a town. It would follow on the principle of this case that the custom which prevailed in the remaining mohalla would prevail in this gradually developed area.

17. Reference was also made to Gurdayal Mal v. Jhandu Mal, 10 ALL. 585 : (1888 A. W. N. 242) to support the contention that in the absence of any case of pre-emption in the area known as Mohalla Guriabagh or Guriabagh it must be held that the custom of pre-emption does not prevail there. It was observed in this case at p. 586:

> "It appears to us that the learned District Judge was fully authorised in finding that the custom of preemption existed in the town. It is said that there was no evidence of the custom having existed or of its having, been enforced in this part of the town or mohalla. That, in our judgment, is immaterial. The custom applied to the whole town, and the greater included the less. There was no evidence that the custom did not apply to this particular ward."

This case seems to support our view that when the custom previled in mohalla Katra which included the locality known as Guriabagh or mohalla Guriabagh, it would be deemed to prevail in that locality and that it is immaterial that no evidence of the custom being in force in this particular locality was produced. The last sentence in these observations means that the mere absence of the enforcement of a custom does not amount to the evidence that custom did not apply. We do not think that this case in any way supports the appellant.

18. We are, therefore, of opinion that Guriabagh is not an independent mohalla of Koil, Aligarh, that it is part of mohalla Katra and that custom of pre-emption which prevails in mohalla Katra prevails

in the locality alleged to be Guriabagh or mohalla Guriabagh. The order of the Court below is correct. We accordingly dismiss the appeal with costs.