Allah Banda And Anr. vs Lala Mato Ram on 8 September, 1950

Equivalent citations: AIR1951ALL850, AIR 1951 ALLAHABAD 850

JUDGMENT

Sapru, J.

1. These are eight appeals brought by the defendant vendees and they arise out of suits which were brought by the plaintiff-respondent for pre-empting eight sales of specific plots of land situate in village Gangoh, mahal Mazbata. They were tried together and are governed by the same judgment of the trial Court as also of the lower appellate Court It is, therefore, convenient to dispose of them by one judgment.

2. In order to decide these appeals, it is necessary to understand exactly what the nature of the plaintiff's case was. shortly put, the position taken up by the plaintiff, who is the respondent in these appeals was that he was a co-sharer in another khewat in the same mahal and that under a custom recorded in the wajib-ul-arz relating to this village he was entitled to pre-empt the property in suit as against the defendants who were not co-sharers in the village at all. It is important to appreciate that the plaintiff has based his case neither upon the Agra Pre-emption Act, nor upon the general Muslim Law of Preemption. The specific case set up by him was that he was entitled to pre-empt the eight plots in question under a general custom which was to be found recorded in the wajib-ul-arz which was relied upon by him in these cases.

3. The suit was resisted by the appellant-vendees on the ground that there was no custom of pre-emption in the village, that the custom of pre-emption, if any, had fallen into disuse as the area in dispute had come to be included in the notified area and that the plaintiff was not a co-sharer in the village. No ground to the effect that the plaintiff was not a resident of the village and that for that reason under the terms of the wajib-ul-arz he could not pre-empt the property, was taken in the written statement. No issue on that point was framed by the trial Court or the lower appellate Court. The point that under the terms of the wajib-ul-arz any resident of the village irrespective of the fact whether he had any property or not could pre-empt the property, provided he was a resident of the village was taken for the first time in second appeal. Obviously, a point which raises a question of fact cannot be allowed to be taken up for the first time in second appeal. Consequently, I have not allowed the appellants to take up that plea.

4. Both the Courts below decreed the plaintiff's suit. The defendants have now come up in appeal to this Court. The wajib-ul-arz is in the following terms:

> "Every co-sharer has power to make a transfer of his respective share entered in khewat khatauni by means of sale, mortgage and gift. If any co-sharer wants to make a transfer, the property will be taken at first by own brother, Shikmi brother and

collaterals and then by the pre-emptor."

5. It was attempted to be argued by Mr. Kazmi that this wajib-ul-arz represents a contract and is not the record of a custom. That argument cannot be allowed to prevail in view of the very decided opinion expressed by their Lordships of the Privy Council in Sheobaran Singh v. Kulsumun-nissa, 25 ALL. L. Jour 617 at p. 619. Viscount Dunedin in this case quoted with approval the observations of Chamier J., in the Full Bench case of Returaji Dubain v. Pahalwan Bhagat, 33 ALL. 196 :

> "We have all of us seen wajib-ul-arzes which contain provisions which ought not to be in them. In some, no doubt, language may be found which shows clearly an attempt to create a right of pre-emption. In others, there is an obvious contract between the co-parceners for a right of pre-emption. But where the contrary is not shown, a provision in a wajib-ul-arz relating to pre-emption should be presumed to be the record of a custom, and this rule has been affirmed repeatedly by this Court," If was for the appellants to prove that the provision in. the wajib-ul-arz relating to pre-emption should not be presumed to be a record of custom but was a record of contract. They failed to do so and on a fair reading of the wajib-ul-arz it is perfectly clear that the Courts below were right in looking upon it as a record of custom.

6. The second argument which was advanced by learned counsel for the appellants was that the meaning to be attached to the wajib-ul-arz is that all villagers, irrespective of the fact, whether they had any land in the village or not, had an equal right to pre-empt a sale by a co-sharer. I have already pointed out that this was not the defence originally taken by the appellants and for that reason alone, it would not be right for this Court at this stage to allow this line of defence to be taken. The main pleading in the written statement was that the plaintiff was not a co-sharer in the village. That was the case set up by the appellants and they cannot be allowed to build a completely new case in this Court. Apart from this, the position, as I see it, is that in the Full Bench case of Gobind Dayal v. Inayat Ullah, 7 ALL. 775 at p. 799, according to Mahmood ,J.

> "Pre-emption is 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."

7. The essential character of the word "preemption" was affirmed by a Bench decision of this Court in Sakina Bibi v. Amiran, 10 ALL. 472. What Mr. Kazmi has argued is that every villager had, regardless of the fact whether he had any property or not in the village in question, a right to pre-empt the sale-deeds in question. Having regard to the common meaning which the law attaches to the word "pre-emption", I do not think that there is any force in this argument.

8. The third line of attack by learned counsel for the appellants has taken this shape. His contention is that inasmuch as this was not a Case under the Agra Pre-emption Act, it was a case tinder the Muslim Law of Pre-emption. Under the Muslim Law of Pre-emption, demands are necessary and in

this case no demands were made. For this reason, he contends that the respondent is not entitled to pre-empt the sales in these cases. It is undoubtedly the common case of the parties that the Agra Pre-emption Act does not apply. The plaintiff's case, however, was that the cases were governed not by Muslim Law of Preemption but by the customary law. No plea was taken in the written statement that the demands had not been made by the plaintiff-respondent. As regards the two cases on which reliance was placed by Mr. Kazmi, the position is this. The case of Jagdam Sahai v. Mahabir Prasad, 28 ALL. 60, was a case in which the wajib-ul-arz merely contained the words "the custom of preemption prevails". It was pointed out by the learned Judges who decided that case that the wajib-ul-arz in the case before them had not set forth what the custom was and that the plaintiffs had not in their plaint alleged any particular custom as prevailing in the villages in question. The principle of this case was approved in Jagannath v. Inderpal Singh, 1935 ALL. L. Jour 108 I do not think that these cases have any relevanae to the case before me, as undoubtedly in these cases the wajib-ul-arz sets out in detail the incidents of the custom.

9. In Chand Rai v. Bhagwant Rai, 17 ALL. L. Jour 461, certain extracts were produced by the plaintiff from the two wajib-ul-arzes of the years 1880 and 1884. In the wajib-ul-arz of 1884 details were given to show how the property must be offered to the co-sharers. On these facts it was held that a custom of pre-emption existed not according to the Muhammadan Law but in terms of the wajib-ul-arzes. In my opinion, this case is on all fours with the case just referred to above. For these reasons I hold that there is no force in the contention of learned counsel for the appellants that the incidents of the Muslim Law and not the customary law as laid down in the wajib-ul-arz applied.

10. The result is that there is no force in these appeal. They are dismissed with costs and the judgment and decree of the lower appellate Court are affirmed.

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