

Allahabad High Court

Syed Shabbar Hussain vs Haji Abbas Ali And Ors. on 25 June, 1925

Equivalent citations: 90 Ind Cas 324

Bench: Lindsay, K Lal

JUDGMENT

1. The appellant in this case Syed Shabbar Hussain was the plaintiff in the Court below in a suit brought to pre-empt a sale which was carried out by means of a document executed on the 20th August 1920. The first party of defendants to the suit consisted of eight persons who are the purchasers under the deed just mentioned. The defendants second party, consisting of two persons, were the vendors. The sale was a sale to eight persons in consideration of a sum of Rs. 14,999.

2. The plaintiff's suit failed in the Court below on the ground that the existence of a custom of pre-emption had not been proved. The plaintiff then appealed to this Court and impleaded the eight vendees and the two vendors as respondents. Since they filing of the appeal one of the vendees has died and admittedly no application has been made within time to make his legal representatives parties to the appeal. The necessary result of this default on the part of the plaintiff-appellant is that the appeal has abated as against the deceased respondent in accordance with the provisions of Order XXII, Rule 4(3). Under that sub rule it is declared that where within the time limited by law no application is made under Sub-rule (1) the suit shall abate as against the deceased defendant. The same rule is applicable in the case of appeals.

3. A preliminary objection is now raised on behalf of the remaining respondents vendees to the effect that the appeal has abated not only as against the deceased respondent but in its entirety, and we are of opinion that this plea must prevail.

4. It cannot be contended on the language of Order XXII, Rule 4(3) that the only result of the default to make the legal representatives of the deceased respondent parties to the record is that the appeal abates only against the deceased respondent and can proceed as against the others. In our opinion that is not the meaning of the sub-rule. The question whether the appeal abates entirely or only against the deceased respondent must be determined with reference to the nature of the suit or rather the nature of the right to sue. We may here refer to the observations at page 112 Page of 47 A.--[Ed.] Wajid Ali Khan v. Puran Singh 85 Ind. Cas. 66 : 47 A. 100 : 22 A.L.J. 994 : L.R. 6 A 39 Civ. (1925) A.I.R. (A.) 108 in which the argument that the appeal necessarily abates only against the deceased respondent but not against the others was repelled.

5. We have, therefore, in this case to consider what was the plaintiff's right to sue. He claimed as a co-sharer of the vendors to pre-empt the sale made in favour of the eight defendants vendees and his right as a pre-emptor was a right to sue all these vendees as one party and to claim that he should be substituted as vendee in their place. He was bound to pre-empt the whole sale and could not pre-empt a part and so he was under an obligation to make all the vendees defendants in the suit. Every one of the vendees was a necessary party.

6. Now it is the same right of suit which the plaintiff-appellant is asserting here in this appeal. His suit has failed in the Court below and he asks this Court to notice the right that he asserted in the Trial Court. If that right is one which in the Court below he could assert only against the eight vendees together it follows that he cannot assert it here against only seven of them. His claim as pre-emptor was to be substituted as vendee of the entire property sold and by his own default that relief can no longer be granted. No decree which we could give could displace the representatives of the deceased vendee from possession.

7. The fact is that the cause of action for the suit for pre-emption was one and indivisible. There was only one sale in favour of the body of eight persons who are for the purposes of the suit to be treated as one legal entity. The plaintiff asks to be put in the place of this body of purchasers. That was his right to sue a right which he could assert by a suit and as this cannot now be done it appears to us that the claim must fail in its entirety. The right to sue does not survive against the remaining vendees who constitute only a part of what is for the purposes of this case, one legal unit.

8. The case is covered by authority [see the report as *Imam-ud-din v. Sadarat Rai* 5 Ind. Cas. 897 : 32 A. 301 : 7 A.L.J. 228.]

9. We must, therefore, give effect to the preliminary objection and hold that the appeal abates in its entirety. The result is that this appeal fails and is dismissed with costs including in this Court fees on the higher scale.