

Amir Mohammad Khan And Ors. vs Mohammad Ahsan Khan And Ors. on 17 March, 1950

Equivalent citations: AIR1950ALL491, AIR 1950 ALLAHABAD 491

JUDGMENT

Agarwala, J.

1. These are three connected appeals and a cross-objection arising out of a suit for pre-emption. Mt. Hafis Fatima and Mt. Qadir Fatima were owners of a two-third share in zamindari in certain khewats in village Shahjahanpur, pergana Kithore, tehsil Mowana, district Meerut. There were certain abadi plots also appertaining to these khewals, in which the two ladies had a two-third share. On some of these abadi plots there were houses of the vendors as well as of riyayas.

2. On 21st September 1943, Mt. Hafiz Fatima and Mt. Qadir Fatima sold their two-third share in certain specified abadi plots to Sher Zaman Khan and Abdul Rauf Khan for a sum of Rs. 3,000/-. It is a matter of dispute whether by this sale-deed they transferred the rights of the vendors in the houses that stood on the plots. On 10th November 1943, the two ladies executed a deed of rectification in respect of the sale-deed of 21st September 1943. This deed of rectification is not questioned by any party in this litigation.

3. On the same date the vendees Sher Zaman Khan and Abdul Rauf Khan retransferred the share in one plot along with the house standing thereon to Qadir Fatima for a sum of Rs. 50/-. On 18th November 1943, the vendees again retransferred the shares of the original vendors in nine other plots along with the houses standing thereon to Qadir Fatima for a sum of Rs. 400/-. The property covered by those two sale-deeds was part of the property originally transferred under the sale-deed of 21st September 1943. Thus the situation after the sale-deed of 21st September 1943, was that the vendees had parted with a portion of the property originally purchased by them and had been left with the remaining property. On 23rd November 1943, the plaintiffs Mohd. Ahsan Khan and others filed a suit which has given rise to these appeals for pre-emption in respect of the entire property covered by the sale-deed of 21st September 1943. In the plaint they claimed that the sale-deed had transferred not only the abadi plots but also the houses standing thereon and that, therefore, they were entitled to possession of the plots along with the constructions.

4. The vendees' defence was, first, that the plaintiffs had no right of pre-emption because the property in suit was an abadi area and, secondly, that, in any case, they had already retransferred some portion of the property and, therefore, the plaintiffs' suit could succeed only in respect of what had been left with them. They also contended that no costs could be claimed from them as previous to the institution of the suit they had already offered to sell what was with them to the plaintiffs.

5. Qadir Fatima defended the suit mainly on the ground that the property retransferred to her under the sale-deeds of 10th November 1943, and 18th November 1943, could not be pre-empted. The trial Court held against the plaintiffs in respect of their claim that the houses standing on the plots had also been transferred; in other respects it held in their favour and decreed the plaintiffs' suit for pre-emption. From this decree there were two appeals to the lower appellate Court (Appeal No. 620 of 1945 by the vendees and Appeal No. 589 of 1945 by the vendors). The plaintiffs filed cross-objections in both these appeals in respect of the houses. The lower appellate Court confirmed the decree of the trial Court in all respects. The plaintiffs have filed Appeals NOS. 1494 of 1946 and 1531 of 1946 and the heirs of Qadir Fatima, who died during the pendency of the appeal in the lower appellate Court, have filed an Appeal No. 1645 of 1946. The vendees have filed a cross-objection in the plaintiffs' Appeal No. 1531 of 1946.

6. The points that are to be determined in these appeals and cross-objections are :

(1) Whether the sale-deed of 21st September 1943, transferred not only the abadi plots but also the houses standing thereon.

(2) Whether after the re-sale by the vendees on 10th November 1943, and 18th November 1943, the plaintiffs were entitled to pre-empt the property covered by the two sale-deeds as against Qadir Fatima.

(3) Whether the plaintiffs were entitled to the costs of the suit.

7. As regards the first point, I am of opinion that the view taken by the Courts below was erroneous. The sale-deed of 21st September 1943 recited that the vendors were owners of a two-third share in certain khewats as the heirs of their father the abadi appertaining to those khewats was in those plots mentioned at the bottom of the sale-deed. Then the sale deed went on to recite:

"in which plots, residential houses, enclosures for cattle, a karkhana for sugar-cane pressing machines, passages, courtyards, latrines and houses of riyayas both servants and non-servants and vacant lands and land for market existed along with trees fruit-bearing and non-fruit-bearing."

Then in the operative portion the sale deed recited: "all the share in the abadi detailed below with the exception of houses In plot No. 1494 belonging to Mt. Qadir Fatima and plot No. 1484 are being transferred for a sum of Rs. 3000/-."

at the end of the deed, it was stated that "a sale deed of the abadi plots has, therefore, been executed so as to serve as evidence." Then the details of the plots were given and then there was another recital :

"Details of the plots in which the vendors' haq-i-asaish (right of easement) will remain as before plots 1485 and 1486."

8. Although in the operative portion the sale-deed mentions the sale of the abadi plots alone, yet by the very fact that it goes on to exempt from the sale the houses belonging to Qadir Fatima, one of the vendors, on plots NOS. 1494 and 1484, as also the rights of easement in plots NOS. 1485 and 1486 and the fact that in the earlier portion of the sale deed the houses and other constructions standing on the plots were meticulously described leave no room for doubt that what was sold was not merely the abadi plots but also the constructions standing thereon, provided, of course, they could be transferred by the vendors. The constructions belonging to persons other than the vendors could obviously not be transferred by them, such as, for example, the houses belonging to the riyayas; but the houses and other constructions belonging to the vendors themselves, by necessary implication were transferred under the sale-deed. That this interpretation is correct finds support from the two latter deeds of retransfer executed by the vendees in favour of one of the vendors. These were clearly re-sales not only of the shares of the plots originally sold to the vendees but also of the houses standing thereon. The vendees could not have re-transferred the houses unless the houses had been transferred to them originally. I have, therefore, no doubt whatsoever that the sale-deed of 21st September 1943, transferred to the vendees not only the abadi plots but also the constructions standing thereon provided these constructions belonged to the vendors themselves.

9. Learned counsel has pointed out that in *Umrao Singh v. Kacheru Singh*, 1939 A. L. J. 308 : (A. I. R. (26) 1939 ALL. 415), a Full Bench of this Court held that on a sale of zamindari share the residential houses of the zamindar in the abadi are not necessarily transferred to the vendees and that in *Mt. Zainab Bibi v. Umar Hayat Khan*, A. I. R. (as) 1936 ALL. 732 : (58 ALL. 873), it was held that on a transfer of the zamindari share in a village by the zamindar, materials of the residential house as well as the right of residence in that house are not necessarily transferred. These cases were concerned with sales in which there was no specific transfer of houses. In the sale-deed in question, as I have already pointed out, the transfer of the constructions belonging to the vendors was intended. The aforesaid rulings will, therefore, have no application to the present case.

10. The next point that arises is whether the plaintiffs were entitled to pre-empt that portion of the property which was covered by the deeds of re-transfer dated 10th November 1943, and 18th November 1943.

11. The provisions of the Agra Pre-emption Act which have to be considered in connection with this question are as follows :

"Section 10. On a sale to, or foreclosure by, any of the persons named in Section 12, no right of pre-emption shall accrue to any person who has an equal or Inferior right of pre-emption.

Section 11. Subject to the foregoing provisions, a right of pre-emption shall accrue to the persona mentioned in Section 12, whenever a co-sharer or petty proprietor sells any proprietary interest in land forming part of any mahal or village in which a right of pre-emption exists, or when any such interest is foreclosed, Section 13. Where two or more persons claiming are equally entitled to pre-emption, the property shall be equally divided between them, each paying an equal share of the consideration for

the transfer.

Section 20. No suit for pre-emption shall lie where, prior to the institution of such suit, the purchaser has transferred the property in dispute to a person, having a right of pre-emption equal or superior to that of the plaintiff

12. When the property was transferred on 21st September 1943, the plaintiffs undoubtedly obtained a right to claim the whole of that property by the right of pre-emption, as they were undoubtedly persons falling Under Section 12 and had a right of pre-emption as against the vendees who are strangers. This right of pre-emption which accrues to a person Under Section 12, Pre-emption Act, can be defeated if the vendee re-transfers the whole of the property to a person, who has "an equal or superior right of pre-emption to that of the claimant." This is clear from a reading of Section 20.

13. What is to happen if instead of the whole of the property being retransferred only a portion thereof is retransferred to a person having an equal or superior right of pre-emption ? At first sight Section 20 in its terms may be said to be inapplicable because that section bars the whole suit and where a portion only of the property had been so retransferred the whole suit in any event cannot be said to be barred. But along with this section we have to read Section 10. "On a sale to any of the persons named in Section 12,) no right of pre-emption shall accrue to any person who has an equal or inferior right of pre-emption." In the present case the re-sale by the vendees was to one of the vendors, namely Qadir Fatima. Qadir Patima and her co-vendor Hafis Fatima had not transferred their entire rights in the zamindari under the sale-deed of 21st September 1943. They had merely transferred their shares in the abadi area appertaining to these khewats. They still retained their share in the agricultural area. They were, therefore, co-sharers of an equal degree with the plaintiffs. The sales to one of them made by the vendees on 10th November 1943, and on 16th November 1943, were sales to a person having an equal right of pre-emption to that of the plaintiffs. Those sales, therefore, could not be pre-empted.

14. The same result can be arrived at if we read Section 20, as applying not only to a re-sale of the entire property but also to a re-sale of a part of that property. The word 'property' in Section 20, may be taken to refer to a 'part of the property' also. To my mind this is the effect of reading Sections 10 and 20 together.

15. The provisions of Section 13 do not apply to a case in which before the suit is instituted there has been a re-sale to a person having on equal right of pre-emption with the plaintiff. Those provisions apply to a case in which two equal pre-emptors claim the same property by suit. In that case the property has to be equally divided between the rival pre-emptors. Where there had been a re-sale before the suit the property is not to be divided although the re-sale is to a person having an equal right of pre-emption with the plaintiff.

16. In this view of the matter the plaintiffs had no right to claim pre-emption in respect of the property covered by the two sale-deeds dated 10th November 1943 and 18th November 1943.

17. As regards the costs of the suit the vendees informed the plaintiffs by means of a notice dated 20th October 1943, that they were willing to transfer to the plaintiffs the property that had been left with them after the execution of the sale-deeds of 10th November 1943 and 18th November 1943. The plaintiffs, however, insisted upon a transfer to them of the entire property covered by the original sale-deeds. This they were not entitled to claim.

18. In the suit, however, the vendees denied the plaintiffs' right of pre-emption. In these circumstances I think the best course would be to order the plaintiffs and the vendees to bear their own costs of the entire litigation. The costs of the other parties to the litigation will be in accordance with their failure and success.

19. I, therefore, modify the decrees passed by the Courts below. I allow Appeal No. 1645 of 1946 and dismiss the plaintiffs' claim with regard to the plots Nos. 1457, 1485, 1486, 1487, 1488, 1489, 1490, 1491 and 1492. The appellants in appeal No. 1645 of 1946 will have their costs of this Court as well as of the lower appellate Court. I allow appeals NOS. 1531 of 1946 and 1494 of 1946 in part. The plaintiffs' suit shall stand decreed with regard to the remaining plots in dispute, as also in respect of the houses or other constructions standing thereon, provided those houses or constructions belonged to the vendors, on payment of Rs. 2550/- as pre-emption money within a period of one month from this date. As the plaintiffs have already deposited this amount, it would be deemed to be a payment under this decree. If Qadir Fatima or her heirs have withdrawn the sum of Rs. 450/- according to the directions of the lower Court, the amount would be refunded by them to the plaintiffs.

20. The cross-objection in second appeal No. 1531 of 1946 is allowed to this extent that the plaintiffs and the vendees defendants 3 and 4 shall bear their own costs.

21. Leave to appeal under the Letters Patent is refused.