Beni Prasad and ors. Vs. SheodIn and anr.

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Court : Allahabad

Decided On : Feb-07-1924

Reported in : AIR1924All425; (1924)ILR46All361; 78Ind.Cas.586

Judge : Lindsay and ;Kanhaiya Lal, JJ. ;Lindsay and ;Kanhaiya Lal, JJ.

Appellant : Beni Prasad and ors.

Respondent : SheodIn and anr.

Judgement :

Lindsfay and Kanhaiya Lal, JJ.

1. This appeal arises out of a suit for pre-emption. The property in dispute comprises a one anna share in mahal. Rukmin Kunwar of the village Azampur Garhua and was sold by the defendant Manni Lal, to the other defendant, Sheo Din, for a consideration of Rs. 4,000 out of which Rs. 2,500 were credited towards a mortgage held by the vendee. Rs. 652 were paid at the time of registration, and the balance was left with the vendee for payment to one Ram Sahai.

2. The plaintiffs claimed to be the co-sharers of the vendor in mahal Rukmin Kunwar. The defendant vendee was a stranger to the village. The allegation of the plaintiffs was that there was a custom of pre-emption applicable to mahal Rukmin Kunwar. The courts below found that there was a custom of pre-emption applicable to the village Azampur Garhua; but it had been abrogated by the partition of the village in 1906 and that what was recorded in the wajib-ul-arz prepared at the time of partition was a mere contract which terminated with the expiry of the term of the settlement. They further found that in any case the custom could not survive the partition, because there was a single proprietor left of the entire mahal in which the property now in dispute was situated.

3. The existence of a custom of pre-emption applicable to the village Azampur Garhua as originally constituted and carrying the incidents recorded in the wajib-ul-arz of 1876 is not now disputed. It allowed a right of pre-emption in the first instance to such co-sharers of the vendor as were his kinsmen and, on their refusal, to the other co-sharers of the village. In 1906 the village was divided into two mahals, one of which was called mahal Rukmin Kunwar. It was the sole property of Musammat Rukmin Kunwar. The wajib-ul-arz of mahal Rukmin Kunwar prepared at that time provided that the right of pre-emption shall belong to the hissedar ekjaddi and after him to the other co-sharers of any mahal of the village. The effect of the latter wajib-ul-arz was that the custom, as originally recorded in the wajib-ul-arz of 1876, was maintained intact in spite of the partition between the co-sharers of the different mahals. Mahal Rukmin Kunwar had for the time being become the property of a

single individual; but later on the mahal became the property of several co-sharers, one of whom sold the share in dispute to a stranger. It was open to the co-sharers of the new mahals at the time of partition to submit to a continuance of the custom as it stood prior to the partition or to abrogate it. In the present instance they agreed to submit to the continuance of the custom, and the plaintiff, who is one of the co-sharers of mahal Rukmin Kunwar, is entitled to claim pre-emption in respect of the share sold out of that mahal.

4. It is contended on behalf of the defendant vendee that the fact that the mahal Rukmin Kunwar had become the property of a single co-sharer had the effect of abrogating that custom in its entirety; but what was done at the time of partition was to continue the application of the custom to the altered state of things by declaring that the right of preemption shall be enforceable as between the co-sharers of the different mahals in the same manner as if no partition had taken place. What was recorded in the wajib-ul-arz prepared at the time of partition cannot, therefore, be regarded as a contract; and the plaintiffs are entitled to sue for pre-emption. In Parbhu Dayal v. Jamil Ahmad (1921) I.L.R. 44 All. 117, it was held, in somewhat similar circumstances that the effect of the partition was not to abrogate or extinguish the old custom but to maintain it.

5. In the court of first instance one of the pleas raised by the defendant vendee was that the entire consideration mentioned in the sale-deed was genuine. Out of the three items mentioned in the sale-deed, two were allowed by the court of first instance, namely, the sum of Rs. 2,500 which was credited towards the prior mortgage held by the vendee and that of Rs. 652 paid in cash before the Sub-Registrar. As regards the third item, the court of first instance held that it was doubtful whether that money was really due to Ram Sahai inasmuch as Ram Sahai was related to the vendee; but without recording a definite finding on that point, it proceeded to declare that if the amount was really due to Ram Sahai, the matter could be determined in a suit between the person liable to pay the money and the person who claimed it. The defendant vendee admitted that he had not paid the money left with him for payment to Ram Sahai; and in those circumstances no further finding is called for.

6. This appeal is, therefore, allowed and the suit of the plaintiff decreed for pre-emption subject to the payment of Rs. 3,152 to the defendant vendee within two months from this date. In case of non-payment the suit of the plaintiff will stand dismissed. As regards the sum of Rs. 848 left with the defendant vendee for payment to one Ram Sahai, the plaintiffs will have to take their chance to pay this money if Ram Sahai succeeds in establishing his right to it. In case of payment of the amount first mentioned, the plaintiffs will get their costs here and hitherto from the defendant vendee, who will bear his own costs throughout. In case of non-payment, the defendant vendee will get his costs from the plaintiffs appellants in all the courts.