Munni Lal

Vs

Bishwanath Prasad & Ors.

Civil Appeal No. 2460 of 1966

(CJI K. N. Wanchoo, K. S. Hegde R. S. Bachawat, G. K. Mitter, V. Ramaswami JJ)

15.09.1967

JUDGMENT

WANCHOO, C.J. -

The main question raised in this appeal by special leave is whether Parjoti land (i.e. a permanent lease-hold interest) in the city of Benaras can be pre-empted. The respondent brought a suit for pre-emption of the land in disputer, which was sold under a sale deed dated February 6, 1942. The case of the respondent was that he was owner of a house and land to the south of the property sold. He based his claim to pre-emption as a shafi-i-jar (i.e. pre-emptor by right of vicinage) and also as a shafi-i-khalit (i.e. pre-emptor by right of appendages). His case was that there was such a custom of pre-emption prevailing in the whole of the city of Benaras and therefore he was entitled to pre-empt the property sold which was a khandar (i.e. a house in ruins). The plaint made the usual allegation that the necessary talabs had been performed and the respondent was entitled to pre-empt the sale.

The suit was resisted by the vendee, whose legal representative is the appellant before this Court. The vendee denied that there was any custom of pre-emption in the city of Benaras, and particularly, in the mohalla in which the property in dispute was situate. It was further alleged that even if the existence of custom of pre-emption was proved, it could not be applied to parjoti land (i.e. lease-hold land). It was also denied that the respondent was either shafi-i-jar or shafi-i-khalit. It was further pleaded that as the vendors and the vendee lived in Calcutta, they were not governed by the custom of pre-emption, if any, prevalent in the city of Benaras. The performance of talabs was also disputed. The trial court framed four issues, namely, (i) whether the respondent had a right to sue (ii) whether the custom of pre-emption prevailed in Mohalla Baradeo, in the city of Benaras, (iii) whether the vendors and the vendee, as residents of Calcutta, were governed by the custom of pre-emption, and (iv) whether the talabs had been performed.

The trial court held that the necessary talabs had been performed. It also held that the respondent was the owner of the contiguous house and had therefore the light to sue. On the question of custom, the trial court held that there was a custom of pre-emption in the locality, which was co-extensive with Mahomedan Law of pre-emption. Finally, the trial court held that the vendors and the vendee were not governed by the custom, as they did not lives in Benaras. In this view of the matter, the suit was dismissed with costs.

The respondent then went in appeal, and his contention, in one of the grounds of appeal, was that as the custom of pre-emption was held by the trial court to have been proved (and it was co-extensive with Mahomedan Law), the custom would bind Hindus also. It was further contended that the fact that the vendors and the vendee did not live in Benaras made no difference and they would be bound

by the custom prevailing in the locality in which the property was situate. Two main questions thus arose before the first appellate court, namely - (i) whether the custom as proved bound Hindus also, and (ii) whether the fact that the vendors and the vendee did not live in Benaras exempted them from being governed by the custom. On the question of custom, the first appellate court observed that custom in question had been proved to exist in the locality and was co-extensive with Mahomedan Law of pre-emption and that this finding had not been challenged before it. On the second question, the first appellate court held that the fact that the vendors and the vendee did not reside in Benaras made no difference to the application of the custom to them with respect to the property transferred.

The question whether Parjoti lands could be subjected to pre-emption was not decided by the trial court, for it dismissed the suit on the ground that the vendors and the vendee not being residents in Benaras, were not bound by the custom. The first appellate court having found that the vendors and the vendee were so bound went into the question whether lease-hold property could be pre-empted. It held that the property was heritable and transferable and though the vendors were lessees and paid some ground rent they were for all intents and purposes owners and therefore the land was pre-emptible. It therefore allowed the appeal and granted a decree for pre-emption.

Then followed a second appeal to the High Court by the vendee and two main questions were raised there, namely - (i) that the custom of pre-emption could not prevail against the vendors and the vendee as they were not residents of Benaras and (ii) that in any case it did not extend to lease-hold land or parjoti land. The High Court held that the custom would bind the vendors and the vendee in this case even though they were not residents of Benaras. On the question whether the custom prevalent applied to parjoti land or not, the High Court seems to have read the judgments of the two lower courts as holdings that the custom of pre-emption even in the case of transfer of parjoti land had been proved. The High Court therefore dismissed the appeal. The vendee's heir then obtained special leave from this Court; and that is how the matter has come before us.

A number of questions has been raised on behalf of the appellant, but it is unnecessary to go into all of them. The main point that has been urged on his behalf is that the High Court had misread the judgments of the two courts below when it held that they had found that the custom of pre-emption existed even with respect to transfer of parjoti land in the city of Benaras. It is argued that all that the two lower courts have held is that the custom of pre-emption co-extensive with Mahomedan Law existed in the city of Benaras, and the first appellate court had further held that such a custom bound even Hindus, whether they were residents in Benaras or not. We are of opinion that this contention is well-founded. We have already referred to the findings of the two lower courts. The finding of the trial court is clear and is expressed in these words :-

"I hold that there is a custom of pre-emption co-extensive with Mahomedan Law."

The first appellate court endorsed this finding in these words -

> "The trial court found that the custom in question existed in the locality and was co-extensive with Mahomedan Law of pre-emption and the finding is not challenged in appeal."

Further in the grounds of appeal by the respondent, one of the grounds was in these terms :-

> "Because when the lower court has held that the custom of pre-emption as obtaining

> in Benaras is co-extensive with Mahomedan Law which embraces the zimmees the lower court has erred in holding that the plaintiff could not enforce his right of pre-emption against the defendants."

It is thus clear that all that was found by the two lower courts was that there was a custom of pre-emption prevailing in the city of Benaras which was co-extensive with Mahomedan Law and which bound Hindus also whether they were residents there or not, so long as the property to be pre-empted was in the city of Benaras.

It is true that the first appellate court held that the custom applied to lease-hold land also because it was of opinion that the holder of parjoti land was for all intents and purposes the owner. But that does not mean that the two courts had found that the custom as such related to parjoti land. The custom that was prevailing was co-extensive with Mahomedan Law; whether it applied to parjoti land or not would depend upon the provisions of Mahomedan Law.

The first appellate court which was apparently not unaware of the provisions of Mahomedan Law with respect to pre-emption seems to have held that though there was some ground-rent payable, the holder of parjoti land was for all intents and purposes the owner. The High Court was therefore not right in saying that it had been found by the two courts below that the custom of pre-emption prevailing in the city of Benaras applied even to transfer of parjoti land. All that the two courts had found was that the custom prevailing in the city of Benaras was co-extensive with Mahomedan Law.

This immediately raises the question as to what is the extent of Mahomedan Law in the matter of pre-emption. The contention on behalf of the appellant is that Mahomedan Law recognizes pre-emption only with respect to full proprietary rights and that it does not recognise pre-emption with respect to lease-hold rights. We are of opinion that this contention is well-founded. In Principles of Mahomedan Law by D. F. Mulla (15th Edition), the extent of pre-emption in Mahomedan Law is thus stated at p. 207 :-

> "There must be also full ownership in the land pre-empted, and therefore the right of pre-emption does not arise on the sale of a lease-hold interest in land."

This statement of law is supported by a number of decisions to which reference may now be made. The earliest of these decisions is Baboo Ram Golam Singh v. Nursing Sahoy & others ((1875) XXV Weekly Reporter (Sutherland) 43). In that case, mokureree land was sold land the owner wanted to pre-empt the sale. The court held that he mokurereedar did not stand in the same position as the malik and the law of pre-emption only applied to the sale of land of a malik i.e., proprietor. Therefore there could be no pre-emption where the sale was of only mokureree rights which were permanent lease-hold rights.

The next case to which reference may be made is Phul Mohammad Khan v. Quazi Kutubuddin (I.L.R. [1937] 16 Pat. 519). In that case the Patna High Court held that Mahomedan Law of pre-emption did not apply to pre-empting Mukarrari and raivati rights, the sale of such interests being not of full proprietary interest.

The next case to which reference may be made is Dashrathlal Chhaganlal v. Bai Dhondubai (I.L.R. [1941] Bom. 460). There also the right of pre-emption arose by custom and was co-extensive with Mahomedan Law. The property sold in that case was a plot of land with two rooms on it in which the vendors had transferable and heritable rights and some rent was paid to Government on account

of the permanent lease on which the land was held. The High Court held that Mahomedan Law of pre-emption with which the custom of pre-emption was co-extensive applied only as between free-holders, that is to say, the neighbouring land in respect of which the custom was claimed must be freehold and the land sought to be pre-empted must also be freehold. It did not arise on the sale of leasehold interests in land.

The next case to which reference may be made is Rameshwar Lal Marwari v. Pandit Ramdeo Jha (A.I.R. 1957 Pat. 695). In that case rayati land had been sold and a suit was brought to pre-empt that sale. The Patna High Court held that there could be no pre-emption with respect to rayati land which amounted to a leasehold, whatsoever might be the ground on which the pre-emption might be sought under Mahomedan Law.

These cases bear out the proposition which has been accepted without dissent by High Courts that Mahomedan Law of pre-emption applies only to sales where they are of full ownership and pre-emptors must also base their claim on similar full ownership whether pre-emption is claimed on ground of co-sharership, vicinage or participation in amenities and appendages. Learned counsel for the respondent relied on Bhagwati Prasad v. Balgobind (A.I.R. 1933 Oudh 161) for the proposition that there could be pre-emption of leasehold interest also for that was a case of lease. Pre-emption there was claimed not under Mahomedan Law but under the Oudh Laws Act. That case therefore does not help the respondent. The law in our opinion is quite clear and it is that under the Mahomedan Law of pre-emption there must be full ownership in the land pre-empted and therefore the right of pre-emption does not arise on the sale of leasehold interest in land. It may be added that the pre-emptor also must have full ownership in order to maintain a suit for pre-emption, for reciprocity is the basis of Mahomedan Law of pre-emption.

In this view of the matter, as the custom which was found proved was co-extensive with Mahomedan Law there can be no pre-emption of the land which had been sold by the impugned sale-deed because the land was parjoti land i.e. leasehold. We may in this connection refer to Oudh Behari Singh v. Gajadhar Jaipuriya (A.I.R. 1955 All 698). That was also a case of pre-emption relating to this very mohalla in the city of Benaras, and the land pre-empted was parjoti land i.e. leasehold. It was held by the Allahabad High Court that the sale of parjoti land corresponding to lessee's right could not be a subject of pre-emption. The learned Judges pointed out in that case that no case had been brought to their notice in which lessee's rights were held pre-emptible under Mahomedan Law. As the property sold was leasehold land it was not open to the respondent to pre-empt it under a custom which was co-extensive with Mahomedan Law whatever might be the ground on which pre-emption was claimed. We therefore allow the appeal, set aside the decree of the High Court and of the first appellate court and dismiss the suit. The appellant will get his costs throughout from the respondent, Bishwanath Prasad.

R.K.P.S.

Appeal allowed.

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