

A. Razzaque Sajansaheb Bagwan and Others

Vs

Ibrahim Haji Mohammed Husain

Civil Appeal No. 6788 of 1994

(G.T. Nanavati, S.P. Kurdukar JJ)

14.10.1998

JUDGMENT

NANAVATI, J. -

1. The plaintiff-respondent claiming a right of pre-emption on the ground of being "Shafi-i-jar" and "Shafi-i-sharik" filed a suit in the Court of Civil Judge, Senior Division, Sholapur being Special Civil Suit No. 376 of 1990 and prayed for a decree of pre-emption and also for a direction to the appellants to sell the suit property for the price mentioned in the sale deed executed by their sisters in his favour. The trial court on appreciation of the evidence led by the parties held that the respondent was no longer a co-sharer, as in the suit filed by the sisters for partition, a decree was passed in their favour and in the execution proceedings, Suit House No. 85 went to the two sisters and the appellant become the owner of House No. 84-B. The trial court, therefore, held that the appellants did not fall in Class I of the persons who are entitled to claim pre-emption under the Mohammedan Law. It further held that the appellants who were defendants in the suit have also their property adjoining House No. 85 and, therefore, they are also entitled to claim the right of pre-emption. As the respondent and the appellants belong to the same class, both are entitled to half share in the suit property. Accordingly, it partly decreed the suit. The respondent was directed to deposit Rs. 92,500 in the Court and the appellants were directed to execute a sale deed for half the suit property.

2. Feeling aggrieved by the judgment and decree passed by the trial court, the appellants preferred an appeal to the High Court. No appeal or cross-objections were filed by the respondent. The High Court dismissed the appeal on the ground that it was without any substance. The appellants have therefore, filed this appeal challenging the judgment and order passed by the High Court.

3. The contention of the learned counsel for the appellants is that the only ground on which the plaintiff's suit has been decreed is that he being a "Shafi-i-jar" was entitled to claim the right of pre-emption. He submitted that this Court in Bhau Ram v. Baij Nath Singh [AIR 1962 SC 1476 : 1962 Supp (3) SCR 724] and in Sant Ram v. Labh Singh [AIR 1965 SC 314 : (1964) 7 SCR 756] has held that the law of pre-emption based on vicinage is void. Unfortunately, attention of the High Court was not drawn to these two decisions of this Court, and therefore, the High Court did not consider this aspect. As the very basis of the claim has been held to be unconstitutional by this Court, the suit filed by the plaintiff ought to have been dismissed. We, therefore, allow this appeal, set aside the judgment and order passed by the High Court and dismiss the suit filed by the respondent. It will be open to the respondent to withdraw the amount deposited by him in the trial court. There shall be no order as to costs.