

Kunwar Nihal Singh Vs. Chanda Kunwar and anr.

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Court : Allahabad

Decided On : Jan-08-1925

Reported in : AIR1925All358

Appellant : Kunwar Nihal Singh

Respondent : Chanda Kunwar and anr.

Judgement :

1. These two second appeals arise out of two suits for pre-emption brought in respect of two different transactions. The decision in one case is likely to affect the decision in the other. It appears that Musammat Kesar was the owner of a certain share in mahal khas of the village Anwalkhera. On the 26th May, 1919 she sold that share to Kunwar Nihal Singh, and a suit was brought by the present plaintiffs-respondents for the preemption of that property, alleging that the consideration specified in the deed of sale was bolstered up to defeat their pre-emptive right.

2. During the pendency of that suit; Kunwar Nihal Singh, the defendant-vendee obtained a deed of gift of plot No. 221 khasra measuring 1 bigha 4 biswas situated in mahal khas of the same village from Daryai Singh and Balwant Singh, the brothers of the deceased husband of Musammat Kesar. That deed of gift was set up by Kunwar Nihal Singh as a shield against the claim of the plaintiffs. The plaintiffs, however, sought to pre-empt that transaction by a subsequent suit filed by them against the alleged donee and his donors on the allegation that the transaction was really a sale clothed in the form of a gift to defeat their pre-emptive

right.

3. The former suit was filed in the Court of the Subordinate Judge of Agra. The latter suit was filed in the Court of the Munsif of Agra. The decision of the Munsif of Agra in the latter suit was that the deed of gift was not a sale and no suit for pre-emption could therefore, be entertained. There was an appeal from this decree to the District Judge of Agra who came to the conclusion that the donee had undertaken to pay a prior mortgage due to Rup Ram, and that the gift was to that extent for a consideration, promised to be payable. At the same time he expressed the opinion that the deed of gift was void under Section 53 of the Transfer of Property Act and Section 23 of the Indian Contract Act in as much as it was intended thereby to defraud the plaintiffs who had filed a suit for pre-emption in respect of the property and to defeat the right which they had acquired by reason of the prior sale. The result of that decision was that the suit for pre-emption brought by the present plaintiffs-respondents in respect of the alleged deed of gift was dismissed. The plaintiffs have filed no appeal from that decree which has become final. The defendant-vendee has, however, filed an appeal against that decree; and his contention is that the decision of the lower appellate Court that the deed of gift was void under Section 23 of the Indian Contract Act or Section 53 of the Transfer of Property Act was erroneous. The learned District Judge had further held that the gift was virtually a transfer of an exproprietary right and it was, therefore, also void under Section 20 of the U.P. Tenancy Act (II of 1901). The correctness of that finding is also challenged here.

4. These findings do not really affect the result of the decision in the suit for preemption brought by the plaintiffs in respect of the alleged gift, because that suit has failed and the decision in that suit has become final. Those findings only affect the previous suit brought by the plaintiffs for pre-emption of the sale effected by Musammat Kesar in favour of Kunwar Nihal Singh on the 27th May, 1919. The contention of Kunwar Nihal Singh is that by reason of the deed of gift, he became a co-sharer in the mahal and that the plaintiffs consequently were not entitled to a preferential right. To that the reply of the plaintiffs is that that gift was really a sale, though clothed in the form of a gift. That defence having failed, they fall back upon the finding of the learned District Judge that the gift was void because it offended

against the provisions of Section 53 of the Transfer of Property Act, Section 23 of the Indian Contract Act, and Section 20 of the U.P. Tenancy Act (II of 1901).

5. We have, therefore, to examine how far these contentions can be sustained. Section 53 of the Transfer of Property Act has no application because it deals with a case where a transfer is effected either to defraud a future creditor or defeat the rights of co-owners or other persons having an interest in the property transferred. The plaintiffs are admittedly not the creditors of the alleged donors. They do not claim to be co-owners of the specified plot transferred, though they may be co-sharers of the village. As co-sharers they may have a right to claim a partition but the deed of gift, if valid, operates to transfer only such right; as the alleged donor possesses in the plots transferred, and so far as that interest is concerned, Section 53 of the Transfer of Property Act can have no application. That interest belongs exclusively to the alleged donor and the transfer cannot be regarded as a transfer made to defeat the interest, if any, which the plaintiffs may possess therein.

6. Section 23 of the Indian Contract Act has similarly no application, because it is recognized that a right of pre-emption can be defeated by legitimate methods known to the law. One of those methods is to obtain a preferential or equal right by the acquisition of a certain interests the mahal in which the disputed property is situated at any time prior to the decree. No person who claims pre-emption can succeed unless he can show a subsisting right of preemption; and he cannot be deemed to have such a subsisting right until he is in a position to show that on the date on which he seeks to obtain the decree he had a preferential right as against the defendant vendee. If prior to the date of such a decree the defendant-vendee acquires an interest in the village or mahal in which the disputed property is situated and becomes a co-sharer entitled to resist the claim of any other person brought against him, no decree can be passed against him for pre-emption. The object of such an acquisition is clearly not to defeat the law of pre-emption but to acquire a preferential right. Section 23 does not forbid an acquisition of that nature.

7. Section 20 of the Agra Tenancy Act has also no bearing on the present question, because the deed of gift purports to transfer the proprietary rights of the donor. It is said that prior to the gift there was a simple mortgage effected by Daryai Singh' and Balwant Singh in favour of Kunwar Nihal Singh for the purpose of paying a previous usufructuary mortgage held by Jagram Singh. But the deed of gift now in question does not purport to transfer any exproprietary rights. It merely purports to transfer what on the above facts amounted to the equity of redemption held by the donors in the said property and the gift cannot, therefore, be regarded as invalid.

8. The suit for pre-emption brought by the plaintiffs in respect of the sale of the 26th May, 1919 must, therefore, fail. Second Appeal No. 775 of 1923 is, therefore, allowed and the suit of the plaintiffs dismissed with costs here and hitherto.

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