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Court : Allahabad

Decided On : Mar-15-1926

Reported in : AIR1926All420; 94Ind.Cas.463

Appellant : Deonath Singh and ors.

Respondent : Tilakdhari Singh and ors.

Judgement :

Sulaiman, J.

1. This is a plaintiff's appeal arising out of a suit for pre-emption. On a previous occasion DeoriSingh for himself and acting as guardian for his nephew Udai Narain Singh transferred a share in this same village to the present vendees, Tilakdhari Singh and Amrat Singh. The Plaintiff No. 1 and the father of the Plaintiffs Nos. 2 and 3 brought a suit for pre-emption and obtained a decree. In that suit it was found against the vendees that there was a custom of pre-emption in this village under which the vendors were bound to make the offer to the co-sharers in the first instance. About the same time the minor Udai Narain Singh through another next friend, brought a suit for cancellation of the sale-deed on the ground of want of legal necessity. The decree in the suit was a conditional decree and the document was to be set aside on payment of a part of the sale consideration. The property having gone back to the family the same has now been sold by Deoraj Singh and Udai Narain Singh who is now a major, in favour of

the same vendees. The Courts below have held that the finding in the previous suit between the parties does not operate as *res judicata*. They have held that in view of the interpretation now put on *wajib-ul-arzes* of a similar nature by a recent Full Bench of this Court the evidence is not sufficient to establish the custom.

2. In our opinion the finding in the previous suit being *inter partes* must bind the present defendants. The question of the existence or non-existence of a custom of pre-emption is not a pure question of law but is a mixed question of law and fact which depends on evidence which may be oral or documentary. If a finding is once arrived at that ought to bind the parties to that litigation, of course it would be open to either party at a subsequent stage to show that the custom has ceased to exist or has in any other way been abandoned.

3. The learned advocate for the respondents has argued before us that inasmuch as Udai Narain Singh was a minor on the previous occasion the vendors are not the same. With this contention I do not agree. In the pre-emption suit Udai Narain Singh was impleaded under the guardianship of a person who was appointed by the Court, and he was bound by the finding arrived at in that litigation. Next the defendants vendees claimed to derive title through Udai Narain Singh on the previous occasion and they claimed to do the same on this occasion. It is therefore difficult to hold that they are defending this case on a title derived from a different person. I am therefore of opinion that the finding in the previous suit as between Plaintiff No. 2, Deonath Singh, and the two vendees is *res judicata*. There is no evidence to show that this custom has fallen into disuse. The learned advocate for the respondents has drawn our attention to the fact that after the institution of the suit the recent pronouncement of a Full Bench in *Randhir Singh v. Rajpal Misra* AIR 1934 All 321 has thrown a doubt on the previous view. That case, however did not come from this particular village and there is nothing to show that the decision of the Full Bench became known to the co-sharers and they put an end to the custom in this village before the decree was passed by the first Court.

4. The learned advocate for the appellants concedes that it is difficult to hold that the other plaintiffs can take advantage of this finding on the ground that their father was a party to the previous litigation inasmuch as these plaintiffs cannot be said to

claim title through their father. I would therefore allow the appeal.

Mukerji, J.

5. I entirely agree. I wish to say one word on the question whether Udai Narain Singh is bound by the previous judgment in the pre-emption case.

6. Udai Narain Singh was made a party although he was a minor. Prima facie the judgment would bind him and for the binding character of the judgment it is not necessary that Udai Narain Singh should have been an adult at the date of the suit. Udai Narain Singh could have escaped the binding effect of the judgment by showing that he was not represented by a proper guardian and that therefore he was not at all represented in the suit. He has not taken any such plea and such a plea would be one of fact. I should therefore have no hesitation in holding that the preemption suit is as much binding on Udai Narain Singh as on Daoraj Singh.

7. We allow the appeal of Deonath Singh alone, and setting aside the decrees of the Courts below remand the case to the Court of first instance through the lower appellate Court for disposal of the remaining issues according to law. The suit of the Plaintiffs NOS. 2 to 4 will stand dismissed. The plaintiffs Nos. 2 to 4 will bear their own costs and will pay to the contesting defendants half of their costs incurred so far. The costs in this Court will include counsel's fees on the higher scale.

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