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Court : Allahabad

Decided On : Jul-13-1910

Reported in : 7Ind.Cas.739

Judge : Chamier, J.

Appellant : Ram Lal and ors.

Respondent : Ram Lal and ors.

Judgement :

Chamier, J.

1. This is an appeal by the plaintiffs in a suit for pre-emption based upon a wajib-ul-arz, which gives the right to preempt first to full brothers and nephews, and after them to the person, on whom the inheritance will devolve: Bhai bhatija haqiqi ke bad jisko warasat pahunchegi wuh pawega. The vendor has two nephews, Lachhman Das and Param Sukh. But they witnessed the deed of sale and do not claim pre-emption of the property. In the absence of these two nephews, the nearest heirs are the plaintiffs, who are first cousins, once removed, of the vendor. The first Court decreed the claim subject to the payment of Rs. 3,800. The lower appellate Court agreed with the first Court that the real consideration for the sale was Rs. 3,800, but dismissed the suit on the ground that the plaintiffs had no right to pre-empt the property under the wajib-ul-arz. Apart from authority, I should have said that the wajib-ul-arz should be construed as providing for two classes of pre-

emptors, namely,

(1) real brothers and nephews, and

(2) the person or persons who would inherit the property from the vendor in default of real brothers and nephews, and that if no person in the first class claims pre-emption, the right devolves upon the person who would be the heir of the vendor in default of brothers and nephews of the vendor. The word *bad* appears to me in the context to mean 'after them' or 'failing a claim by them'. Dr. Tej Bahadur, on behalf of the vendees respondents, relied upon a decision of this Court by Dillon, J., in Second Appeal No. 776 of 1906, affirmed on appeal under the Letters Patent No. 102 of 1907. The *wajib-ul-arz* in that case provided for three classes of pre-emptors,

(1) brothers and nephews,

(2) first cousins and their sons, who were co-sharers in the property, and

(3) the persons who would be found to be the heirs of the vendor. The plaintiff alleged but failed to prove that he was the first cousin of the vendor. He then tried to make out that he was in some way related to the vendor. This Court held that that would not be enough, and that it was for the plaintiff to prove that he was the first cousin of the vendor. If he failed to prove that, he should at least have proved that he was his next heir. But he did neither and, therefore, his claim had been rightly dismissed. That decision does not appear to me to touch the question raised in the present case, for here it is admitted that the plaintiffs are the nearest heirs of the vendor in the absence of the two nephews who are in the first class of pre-emptors. The Court in the case cited did not hold that a claim to pre-empt put forward by a person in the 2nd or 3rd class could be defeated by showing that there was a person in the first class who might have claimed pre-emption, nor can one *wajib-ul-arz* be construed by reference to other containing different provisions. The question is not altogether free from doubt. But, in my opinion, the *wajib-ul-arz* in the present case provides for two distinct classes of pre-emptors, and if no one in the first class claims to preempt, then the person in the 2nd class who is qualified is entitled to pre-empt; in other words, the person on whom the

inheritance will devolve within the meaning of the second clause is the person best entitled after the real brothers and nephews. Upon any other construction, the result will be that in the presence of a brother or nephew, no claim to pre-empt could be established. I, therefore, allow this appeal, set aside the decree of the lower appellate Court with costs here and in the lower appellate Court, and restore the decree of the first Court. Costs in this Court will include fees on the higher scale.

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