

Alimullah Vs. Mohammad Khalil and anr.

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Court : Allahabad

Decided On : Feb-29-1940

Reported in : AIR1940All478

Appellant : Alimullah

Respondent : Mohammad Khalil and anr.

Judgement :

Iqbal Ahmad, J.

1. This is an appeal by Alimullah, defendant-vendee, arising out of a pre-emption suit. The vendee contested the suit inter alia on the ground that Mohammad Khalil, plaintiff respondent, had no preferential right of pre-emption as against him. This contention of the vendee was overruled by both the Courts below and Mohammad Khalil's suit was decreed in part. In order to appreciate this contention of the vendee, it is necessary to state the following facts: On 1st July 1935, Mohammad Yakub vendor entered into a transaction of exchange with Alimullah. The transaction was effected by a registered instrument. By the deed of exchange, Yakub transferred a one pie share to Alimullah in the village in which the pre-empted property is situated, and Alimullah in exchange gave to Yakub two specific plots in another village called Nagaria. Thereafter, on 22nd July 1935, Yakub sold a four pies share to Alimullah for an ostensible consideration of Rs. 374. Mohammad Khalil, plaintiff-respondent, then brought the suit for pre-emption

giving rise to the present appeal. In the plaint he alleged that the exchange and the sale were parts of one and the same transaction and that the actual consideration paid by Alimullah with respect to both the transactions was only Rs. 300. It was also stated in the plaint, that Alimullah had no right to transfer the two plots in village Nagaria. On these allegations Mohammad Khalil prayed for a decree for possession of the five pies share by right of pre-emption on payment of Rs. 300.

2. The allegation that the exchange and the sale were parts of the same transaction was denied by Alimullah and he asserted that the exchange was a separate transaction and, by virtue of the exchange, he became a cosharer in the village, and, as such, the plaintiff had not a preferential right of pre-emption as against him. He also contended that the consideration entered in the sale deed was correct. The findings of both the Courts below on these questions are in favour of Alimullah vendee and there is no dispute about these points in the present appeal. It appears that Mohammad Yakub was not able to get possession over the two plots given to him in exchange by Alimullah; Mohammad Yakub then brought a suit for return of the one pie share given by him in exchange to Alimullah. This suit, though contested by Alimullah, was decreed by the trial Court, and the decision of that Court was, on appeal, affirmed by the District Judge. It is, therefore, clear that, during the pendency of the suit for pre-emption giving rise to the present appeal, Yakub had obtained a decree for the return of the one pie share given by him in exchange to Alimullah. The contention put forward by Alimullah in the Court below was that, as on the date of the sale sought to be pre-empted as also on the date of the institution of the suit for pre-emption he was entitled to the one pie share given to him by exchange, Mohammad Khalil had not a preferential right of pre-emption as against him. The argument put forward on behalf of Mohammad Khalil, on the other hand, was that as the suit of Yakub for the return of one pie share was decreed it must be held that the exchange was void from the very outset and Alimullah had never any title to one pie share. This contention of Mohammad Khalil, as already stated, prevailed in the Courts below. I am unable to agree with the decisions of the Courts below. It was held by a Full Bench of this Court in *Tara Chand v. Radha Sami Satsang Sabha* : AIR1934 All343 that

a vendee can be a cosharer within the meaning of Section 4(1), Pre-emption Act, at the time of the sale-deed in his favour if he possesses merely a defeasible interest in the mahal.

3. The case is an authority for the proposition that a suit for pre-emption does not lie against a vendee who, on the date of the sale, sought to be pre-empted had an interest in the mahal, even though that interest is defeasible. The only exception to this rule, according to the Full Bench decision, is furnished by cases in which there are successive sales in favour of the vendee and each of those sales is pre-empted by the pre-emptor. In such a case the vendee is not entitled to defeat the suit for pre-emption as regards the second sale deed in his favour on the basis of the defeasible title acquired by him under the first sale deed. The reason for this rule is stated to be that where a pre-emptor pre-empts the first sale deed in favour of the vendee he destroys the very foundation on which the vendee could base his defence in bar of the suit for pre-emption of the second sale in his favour. In the case before me, there is no question of successive sale deeds in favour of Alimullah, defendant-appellant, and the exception to the rule noticed above has, therefore, no application to the case. It cannot be disputed that by the exchange Mohammad Yakub had transferred a one pie share to Alimullah. The exchange was effected by means of a registered instrument and, therefore, conveyed good title to Alimullah to the one pie share. It is, however, a fact that Alimullah was not solely entitled to the two plots given by him in exchange to Mohammad Yakub. In view of the defect in the title of Alimullah to the two plots Mohammad Yakub had by virtue of Section 119, T.P. Act, a right to claim damages from Alimullah or to sue for the return of the one pie share. It is this latter right that Yakub exercised by bringing the suit referred to above against Alimullah. That suit, as stated before, was decreed and Yakub got back his one pie share. This, however, happened after the date of the institution of the suit for pre-emption filed by Mohammad Khalil.

4. The question then arises whether on these facts Mohammad Khalil was entitled to pre-empt the sale of four pies share in favour of Alimullah. In my judgment, the answer must be in the negative. It is well settled that a right of pre-emption can be exercised only if the right exists on three material dates, viz., on the date of the

sale sought to be pre-empted, on the date of the suit, and on the date of the decree of the trial Court. If a right of pre-emption does not exist on any one of these three dates the suit for pre-emption cannot be decreed. In view of the fact that Yakub's suit for the return of one pie share was decreed prior to the decision by the trial Court of the suit giving rise to the present appeal, it may be assumed that the plaintiff had the right of pre-emption on the date of the decree of the trial Court. But, in my opinion, Mohammad Khalil had no preferential right of pre-emption either on the date of the sale or on the date of the institution of the pre-emption suit by him. The deed of exchange was perfectly valid and conveyed a good title to Alimullah with respect to the one pie share given to him. It was however subject to such rights as Yakub may have because of the statutory provision contained in Section 119, T.P. Act. But notwithstanding those provisions, Mohammad Yakub had the option of not availing himself of either of the two remedies provided for by Section 119. In other words, it was perfectly open to Yakub to remain content with the possession of the fractional share owned by Alimullah in the two plots given by him in exchange. In such a case, it could not be said that the exchange was not binding and operative so far as the parties to that transaction were concerned.

5. It is however a fact that Mohammad Yakub successfully claimed the return of the one pie share given in exchange. The effect of the decree in favour of Mohammad Yakub was to pass the title to one pie share from Alimullah to Mohammad Yakub from the date of the decree. This follows from the use of the word 'return' in Section 119. The effect of a decree directing the 'return of the thing transferred,' in any judgment, is not to declare that the exchange was void from the very outset. The effect of such a decree is to divest the title of one of the parties to the exchange and to vest that title in the original owner who had given that property in exchange. It follows that till the date of the decree directing the return of the property the title to that property remains with the person to whom the same was given in exchange. It is therefore manifest that the exchange holds good till the date of the decree. That the exchange holds good till a decree directing the return of the property is passed is also apparent from the fact that an alternative right is given by Section 119 to claim damages for the loss. If only damages are claimed and not the return of the property it is clear that the transaction of

exchange will stand.

6. This conclusion becomes all the more irresistible when one keeps in view the fact that the right to claim 'return of the thing transferred' can be exercised only against a party to the exchange or his legal representative or a transferee from him without consideration. This right is not enforceable against a transferee for consideration for the simple reason that, so long as a claim for the return of the transferred thing is not brought, the title to that thing remains vested in the person to whom it was given in exchange. In the view that I take it must be held that Alimullah had a good title to the one pie share both on the date of the sale and on the date of the suit for pre-emption. At any rate he had at least a defeasible title to the one pie share. The plaintiff-respondent was therefore not entitled to exercise the right of pre-emption either on the date of the sale or on the date of the suit. His suit was therefore wrongly decreed by the Courts below. For the reasons given above, I allow this appeal, set aside the decrees of the Courts below and dismiss the plaintiff's suit with costs in all Courts. Leave to appeal under the Letters Patent is granted.