

Phul Chand Vs. Dharam Chand

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Court : Allahabad

Decided On : Jan-28-1938

Reported in : AIR1938All314

Appellant : Phul Chand

Respondent : Dharam Chand

Judgement :

Iqbal Ahmad, J.

1. This appeal arises out of two rival pre-emption suits that were consolidated and disposed of by a single judgment and decree by the trial Court. The suits were to pre-empt a sale dated 19th May 1933. That sale deed was executed by one L. Parduman Kunwar and was with respect to entire khewat No. 1 of mahal Kalyan Singh in village Shadamabad. Shugan Chand, father of Dharam Chand, respondent, owned a 5 biswa haqiyab in village Shadamabad and this 5 biswa haqiyat constituted khata-khewat No. 2 of the mahal mentioned above. The area of khata-khewat No. 2 was 8 bighas and 8 biswas. Shugan Chand executed a sale deed of his 5 biswa haqiyat in favour of Phul Chand appellant. But in the sale deed the area of the property sold was mentioned as 8 bighas 2 biswas only. In the mutation proceedings that followed the execution of the sale deed by Shugan Chand an area of 8 bighas 2 biswas only was entered in the revenue papers in the name of Phul Chand and the remaining 6 biswas of khata-khewat No. 2 continued

to be recorded in the name of Shugan Chand.

2. Phul Chand brought a suit for pre-emption with respect to the sale deed dated 19th May 1933, on the allegation that he as the owner of khewat No. 2 was a cosharer in the mahal and that the vendee under the said sale deed was a mere stranger and as such he had a right of pre-emption. Phul Chand's suit was numbered as Suit No. 573 of 1933. Shugan Chand brought a rival suit for pre-emption on the allegation that as he still owned an area of 6 biswas in khewat No. 2 and as he was the brother of the vendor he had a preferential right of pre-emption as against Phul Chand. Shugan Chand's suit was numbered as Suit No. 664 of 1933. In accordance with the provisions of Section 18, Pre-emption Act (Act 11 of 1922) both the suits were as already stated consolidated and the trial Court by an order dated 12th December 1933, directed that the plaintiff of the one suit be impleaded as a defendant in the other. By some oversight however Shugan Chand was not impleaded as a defendant in Phul Chand's suit. This omission however has no effect on the decision of the appeal before me.

3. Phul Chand in both the suits maintained that the entire khata-Khewat No. 2 was transferred to him by Shugan Chand and Shugan Chand had no share left in that khewat. Phul Chand was however faced with this situation that in the revenue papers Shugan Chand's name was entered over an area of 6 biswas of Khewat No. 2. In other words, Shugan Chand was recorded as a cosharer of Khewat No. 2. In order to strengthen his position in the preemption suit Phul Chand brought a suit for a declaration that he was the owner of the 6 biswas recorded in the name of Shugan Chand and this suit was numbered as Suit No. 742 of 1933. This suit was also on the file of the same Court in which the two pre-emption suits were pending. Shugan Chand contested this suit on the allegation that he had sold only an area of 8 bighas 2 biswas out of Khewat No. 2 to Phul Chand and was still the owner of the remaining 6 biswas in that khewat. Shugan Chand further contended that as Phul Chand was not in possession of the 6 biswas in dispute his suit for declaration was barred by the provisions of Section 42, Specific Belief Act. The trial Court overruled the pleas urged in defence and decreed Suit No. 742 of 1933. The result of this decision was that Shugan Chand was held to be a total stranger to the mahal and accordingly the trial Court decreed Phul Chand's suit for pre-

emption (Suit No. 573) and dismissed Shugan Chand's suit (Suit No. 664).

4. The vendee filed an appeal in the lower Appellate Court against the decree in Suit No. 573 and Shugan Chand filed an appeal against the decree in Suit No. 664 dismissing his claim for pre-emption. Shugan Chand also filed an appeal in the lower Appellate Court against the decree in Suit No. 742. The lower Appellate Court allowed the appeal of Shugan Chand against the decree in Suit No. 742 and dismissed Phul Chand's suit. That Court held that Shugan Chand had sold only 8 bighas and 2 biswas out of Khewat No. 2 to Phul Chand and was still the owner of 6 biswas. It further held that Shugan Chand was in possession of the 6 biswas land and the suit of Phul Chand was therefore barred by Section 42, Specific Relief Act. In view of this finding the lower Appellate Court necessarily held that Shugan Chand was still a cosharer in Khewat No. 2 and being the own brother of the vendor had a preferential right of pre-emption as against Phal Chand. Accordingly the lower Appellate Court reversed the decree of the trial Court in the preemption suits and decreed Shugan Chand's suit for pre-emption and dismissed Phul 'Chand's suit. Phul Chand preferred two second appeals in this Court. Second Appeal No. 278 of 1936 is directed against the appellate decree passed by the lower Appellate Court in Suit No. 742, and Second Appeal No. 279 of 1936 is against the appellate decree in the two pre-emption suits. Both the appeals were connected and have been heard together.

5. In Second Appeal No. 278 I have decided that the sale by Shugan Chand in favour of Phul Chand was with respect to entire khewat No. 2 and that Shugan Chand had no proprietary right left in any portion of that khewat. I have however dismissed Second Appeal No. 278 on the ground that Phul Chand not being in possession was not entitled to the declaratory decree granted to him by the trial Court and that his remedy was to file a suit for possession. The question then arises as to how does the decree passed by me in Second Appeal No. 278 affect the decision of Second Appeal No. 279. It is contended on behalf of Dharam Chand (son of Shugan Chand) respondent that as his name is still recorded in the khewat as a cosharer of khewat No. 2 and as Phul Chand's suit for a declaration of his right to the 6 biswas in khewat No. 2 stands dismissed, the consideration of Second Appeal No. 279 must be approached on the assumption that he (Shugan

Chand) is still the owner of a portion of khewat No. 2 and being a near relation of the vendor has a preferential right of pre-emption as against Phul Chand. In my judgment this argument is without force. In view of my finding in Second Appeal No. 278 it is clear that the position of Dharam Chand as regards the 6 biswas recorded in his name in the revenue papers is that of a pure trespasser. The sale deed by Shugan Chand in favour of Phul Chand was executed in the year 1929 and there is yet ample time left for Phul Chand to bring a suit and to obtain a decree for possession of the 6 biswa land.

6. The mere fact that the name of Shugan Chand is entered in the revenue papers does not make him a cosharer in the mahal for the simple reason that he has no proprietary right left in the mahal. A trespasser notwithstanding the entry of his name in the khewat remains a trespasser till he matures a prescriptive title by adverse possession for more than 12 years. Dharam Chand, as already stated, has not yet prescribed such a title. The word 'cosharer' is defined by Section 4(1), Pre-emption Act, as meaning

any person, other than a petty proprietor, entitled as proprietor to any share or part in a mahal or village whether his name is or is not recorded in the register of proprietors.

7. This definition puts it beyond doubt that in order to be a cosharer within the meaning of the Act a person must be 'entitled' as proprietor to some share in the mahal. It is clear from my finding in Second Appeal No. 278 that Dharam Chand has not the shadow of a title to any portion of the mahal. His position is therefore that of a complete stranger. The mere entry of the name of a person as a proprietor in the revenue papers does not entitle him to exercise the right of pre-emption unless he is, as a matter of fact, the rightful owner of some share in the mahal. It follows that Dharam Chand was not entitled to a decree for pre-emption and his suit was rightly dismissed by the trial Court.

8. Accordingly I allow this appeal, set aside the decree of the lower Appellate Court and restore the decree of the trial Court with costs in all Courts. I extend the time for payment of the pre-emption money to three months from to-day's date. Leave to appeal under the Letters Patent is granted.

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