

ShamsuddIn Vs. AllauddIn and ors.

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Court : Allahabad

Decided On : Jun-11-1931

Reported in : AIR1932All138

Appellant : Shamsuddin

Respondent : AllauddIn and ors.

Judgement :

Sulaiman, Ag. C.J.

1. This is a defendant's appeal arising out of a suit for pre-emption under the Mahomedan law. The suit was brought by three persons. It was alleged that the demands were made oh behalf of plaintiff 2 Wahabuddin by his brother. The defendants pleaded that the demands were not in accordance with the Mahomedan law and further alleged that they could not be dispossessed as they were in possession under a usufructuary mortgage deed. The Court of first instance decreed the claim holding that the demands had been made by the manager and a member of a joint family.'

2. As the plaintiffs were Mahomedans the finding is not intelligible. The appellate Court seems to have acquiesced in this finding and treated the demand made on behalf of Wahabuddin as a good demand without any suggestion or finding that he had previously authorized his brother to make the demand. As even the first demand was made by the other brother and the father only it is most unlikely that

he had been previously authorized by Wahabuddin to make the demands on behalf of him in case any sale deed was executed.

3. In our opinion the view taken by the Courts below as regards the right of Wahabuddin to sue is quite wrong.

4. It is contended on behalf of the defendants that not only the claim of Wahabuddin should fail, but that the whole suit should be dismissed. We think that the mere fact that one of the plaintiffs was disqualified from pre-empting because he had not made demands would not make the suit by the other plaintiffs defective. Wahabuddin had a right of pre-emption though he did not follow the proper procedure to exercise it. We may refer to the case of Chotu. v. Husain Bakhsh [1893] A.W.N. 25.

5. The same principle was adopted in a case arising under Section 21, Agra Pre-emption Act : Lal Behari Misra v. Equeen Mohammad Hajjam : AIR1926 All722 . We are therefore of opinion that the claim of the other two plaintiff's cannot fail.

6. The decrees of the Courts below did not make it clear that the plaintiffs will get constructive possession of the equity of redemption subject to the rights if any of the usufructuary, mortgagee to retain possession, that is to say if the usufructuary mortgagee was in possession of this property by virtue of this mortgage before the sale deed, his actual possession could not be disturbed without redeeming him. We accordingly allow this appeal in part and modify the decree of the Court below by dismissing the claim of Wahabuddin plaintiff with costs, but maintain the decree for pre-emption in favour of the other two plaintiffs subject to the reservation mentioned above. Wahabuddin will be liable to pay one-third of the costs of the defendants. As the appeal fails substantially we direct that the appellant shall bear his own costs and pay the costs of the respondents other than Wahabuddin.