

Dwarka Singh Vs. Anrup Singh and ors.

Dwarka Singh Vs. Anrup Singh and ors.

SooperKanoon Citation : sooperkanoon.com/470823

Court : Allahabad

Decided On : Jun-03-1926

Reported in : AIR1927All103

Appellant : Dwarka Singh

Respondent : Anrup Singh and ors.

Judgement :

1. This is a pre-emption appeal arising out of rather peculiar circumstances.
2. For the disposal of the suit we must take the plaintiff's allegations as correct, for they have not yet been adjudicated upon. The plaintiff's case was that there was a sale some time in 1917 and he brought a suit for pre-emption. After the sale some members of the family of the vendors brought suits to have the sale-deed set aside. Their suits succeeded and by an agreement on account of the success of the suits the pre-emption suit was dismissed. The plaintiff has since discovered that the plaintiffs in the suits for the cancellation of the sale-deed never recovered possession from the vendees and the vendees are still in possession. The inference that the plaintiff draws is that the two suits were collusive as between the relations of the vendor and the vendees. He now claims pre-emption.
3. The Court of first instance heard evidence on the question of custom of preemption and held that no custom of preemption existed under the wajib-ul-arz on which the claim was based. The lower appellate Court upheld this decision.

4. In this Court it is contended that the plaintiffs' suit was unmaintainable, first, because the question of custom is *res judicata*, and secondly, because the case is governed by the Pre-emption Act. There can be no question of *res judicata* because there was no trial of the question of custom and there was no finding in favour of the plaintiff. The suit was in fact dismissed.

5. As to the question whether the suit should be governed by the Pre-emption Act or by the plea of custom raised, we are of opinion that the Pre-emption Act has no application. It applies only with respect to sales that took place after the Pre-emption Act came into force. The transfer in this case took place in 1917. Assuming that all the allegations of fact as regards fraud made by the plaintiff are correct, it is clear that his right to seek pre-emption in 1917 is to be revived for him. In that case the suit would be governed by the old law and he must show by substantive evidence that there was a custom of pre-emption in 1917.

6. The interpretation of the document in question was settled by a Full Bench of the Court in *Randhir Singh v. Rajpal Miser* A.I.R. 1921 All. 321. It is urged that before this Full Bench case the Courts had been consistently holding that the *wajib-ul-arz* was good enough as proving the existence of a custom. This may be so but when a Court comes now to adjudicate on the question of custom, it is bound to follow the Full Bench case and not the old interpretation put before this decision.

7. In our opinion the judgment of the Court below is right and the appeal is hereby dismissed under Order 41, Rule 11.