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Court : Allahabad

Decided On : Dec-07-1909

Reported in : 5Ind.Cas.520

Judge : Richards and ;Tudball, JJ.

Appellant : Pargan Singh

Respondent : Ajkumar Singh and ors.

Judgement :

1. This appeal arises out of a suit for pre-emption. The sale took place on the 27th July, 1906, and was made in respect of four villages. The question, which arises in the present appeal, is only in respect of the village Mahori Reman. The wajih-ul-arz provides for pre-emption in the village. A co-sharer in a patti has a preferential right over a co-sharer in the thok and a co-sharer in the thok over a co-sharer in the mahal at the price offered by a stranger. The learned Advocate for the appellant admitted that having regard to certain rulings of this Court, the right to pre-emption only arose on a sale to a stranger and that if the sale in the present case had been made to a co-sharer, even one whose right of pre-emption was inferior to the plaintiff's, no suit could have been brought. At the time of the sale the plaintiff was a co-sharer in the same thok as the property sold. At that time the vendee was a complete stranger. However, on the 20th October, 1906, the vendee by an auction sale acquired a small share in the mahal but in a different thok. It is, therefore, quite clear that if the plaintiff and the vendee were rival pre-

emptors and the sale had been made to a stranger 3rd party, the plaintiff would have had a preferential right over the vendee. The respondent vendee contends, however, that inasmuch as he acquired his right before the institution of the suit, he is to be placed in exactly the same position as he would have been if he had been possessed of the share at the time of the sale. This contention found favour with the learned Subordinate Judge. In support of this contention the case of Bhagwan Das v. Mohan Lal 25 A. 421, is strongly relied upon. In that case the vendee was a stranger at the time of the sale but before the institution of the suit he had also acquired, apart from the share in dispute, the property of a co-sharer who had an equal right with the plaintiff to pre-emption. The learned Judges held applying, what they considered to be the principle of the case of Serh Mai v. Hukam Singh 20 A. 100, that the plaintiff could not disturb the possession of the defendant. Their Lordships say at page 430, the reason, of the rule seems to be that, as the object and cause of the institution of pre-emptive rights is the desire to keep strangers excluded from the co-parcenary body, that reason and object cannot justify a pre-emptive suit by one co-sharer against another, to compel the latter to surrender a share over which his pre-emptive rights are on the same level as those of the plaintiff. In the present case the defendant vendee being a complete stranger acquired his right by an auction sale, which the other co-sharer could not pre-empt, and having got into possession in this way he now asks to remain in possession of the disputed property, notwithstanding the fact that his pre-emptive rights in respect of the share sold are still inferior to those of the plaintiff. We think, to accede to the defendant's contention would be a very serious extension of the doctrine laid down in the case relied on and would tend to defeat the most honest cases of preemption.

2. The only other question which arises in this appeal is the question of price, which the plaintiff must pay as a condition to his being granted a decree for possession. Part of the consideration for the sale was a sum of Rs. 606-4-0. This sum was a debt alleged to be due at one time from the vendor to the vendee. The parties were subject to the Encumbered Estates Act, I of 1903. The claim for this debt came before a Special Judge under the provisions of Section 13 of the Act and it was wholly disallowed. From the moment that the Special Judge adjudicated on this debt, and when no application by way of appeal or revision was filed, the

debt became wholly extinguished. The plaintiff contends that the sum of Rs. 606-4-0 cannot be considered as a part of the real consideration paid by a stranger within the meaning of the wajib-ul-arz. The learned Subordinate Judge has allowed it as a part of the consideration, because he considered that there was a moral obligation to pay it. We cannot agree with the learned Judge. We think for the purposes of this suit the consideration to the extent of Rs. 606-4-0 must be deemed fictitious. We, accordingly, modify the decree of the Court below by allowing the plaintiff's claim to pre-empt the share in the village Mahori Rewan and also by declaring that the price to be paid by the plaintiff as a condition to get in possession shall be Rs. 7,093-12-0. The result is that the plaintiff will have a decree for possession of the shares in all the four villages conditional on his paying Rs. 7,093-12-0 within a period of two months from this date. If the plaintiff fails to deposit the amount within the time fixed then his suit will stand dismissed with costs in both Courts. If he fulfils the condition then he will be entitled to recover costs in both Courts. The costs in the Court will include fees on the higher scale.