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Court : Allahabad

Decided On : Jul-16-1918

Reported in : AIR1918All428; 47Ind.Cas.400

Judge : Henry Richards, C.J. and ;Tudball, J.

Appellant : Anchal

Respondent : Dalip Singh and anr.

Judgement :

1. This appeal arises out of a suit for pre-emption. The plaintiff was, a co-sharer as also were the vendees, hut the plaintiff was own brother of the vendor whilst the vendees were distant connections. The vendees pleaded various defences. They denied the custom; They -denied the plaintiff's preferential right and alleged that the sale was made with the consent and knowledge of the plaintiff The Court of first instance held the custom of pre emption prevailed and that the plaintiff had a preferential right, and it held against the defendants on the issue of the acquiescence. The lower Appellate Court held that the entry in the wajib-ul-arz was insufficient to establish the existence of the custom and, that the weight to be attached to the record was greatly diminished by the fact that a number of other matters were recorded, which could not possibly be customs, in the very same clause.

2. The plaintiff has appealed. We may mention here that the lower Appellate Court has not dealt with the issue of acquiescence on the part of the plaintiff, We think that this issue ought to have been decided and inasmuch as the lower Appellate Court has not decided the issue, we are entitled to decide the issue our-selves. We have already mentioned that the plaintiff is own brother to the vendor. Prima facie, therefore, if the plaintiff had been ready and willing to keep the property, there would be no person to whom the vendor would be more likely to wish to sell the property than to his own brother. It is not pretended that there was any quarrel or dispute between the brothers. In the written statement it was expressly pleaded that the plaintiff had acquiesced in the sale, that he was a man who was heavily in debt, that his property was under mortgage, that he had previously sold a large portion of his property and that five days before the sale deed was executed, he had sold an other portion. The plaintiff, when cross-examined, admitted that he was in debt. He admitted that he had sold a considerable portion of his property and that one sale had taken place almost simultaneously with the sale to the defendants, the vendees in the present suit. Evidence was produced on behalf of the vendees to the effect that the sale to the vendees had been negotiated by the two brothers and that the plaintiff at that very time wanted to sell his own property to the vandee, who explained that they had not sufficient money to buy the shares of both brothers. The witness who deposed to these facts was hardly (if at all) cross-examined in respect to these matters. Bearing in mind the initial probability of this evidence being true having regard to the close relationship that existed between the vendor and the plaintiff, namely, that they were own brothers, we think it extremely surprising that the learned Subordinate Judge who tried this case in the first instance absolutely discarded the evidence. The learned Subordinate Judge says that if the plaintiff knew of the sale, the vendees would have required the plaintiff to be a witness to the sale-deed. The vendees no doubt might have done this had they anticipated roguery on the part of the plaintiff. But if, on the other hand, the evidence be true that the plaintiff was actually asking the vendees to purchase his own property at the very same time, it is hardly surprising if the vendees never anticipated that after they had purchased the other brother's share a suit of this nature would have been instituted. The learned Subordinate Judge says:-- 'it is further urged that the plaintiff is in debt and had not the means to

purchase a share. I do not think this argument plausible. Plaintiff could advance Rs. 1,120 or had sufficient property by selling part of which he could raise Rs. 1,120.'

3. Now in the present case it is admitted by the plaintiff himself that he was in debt, that he had no money and that he was selling his own property, and yet the learned Subordinate Judge thinks that there was no force in the argument that he would in that condition be unwilling to purchase this property. The learned Judge says that the plaintiff could easily have raised the money by selling another portion of his property. This seems to be a very poor argument. It does not appear very reasonable that a man who has no ready money should sell a share which is already in his possession, for the privilege of buying another share which is not in his possession, having of course to meat some expense in connection with the transfer. Under the circumstances of the present case we have not the least hesitation in holding that the plaintiff knew and acquiesced in the sale to the vendees-defendants.

4. We dismiss the appeal with costs.

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