Chiphur and ors. Vs. Abdul Hakim and ors.

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SooperKanoon Citation : sooperkanoon.com/472897

Court : Allahabad

Decided On : Nov-30-1910

Reported in : 9Ind.Cas.23

Judge : John Stanley, C.J. and ;Banerji, J.

Appellant : Chiphur and ors.

Respondent : Abdul Hakim and ors.

Judgement :

1. This appeal arises out of a suit for pre-emption of a share in the village of Mendhapati in the district of Fatehpur. The vendee is a stranger to the village; while the pre-emptor is a share-holder in a Mahal of the village, but not in the Mahal in which the property which has been sold is situate. A partition of the village was effected in the year 1888, but prior to that partition the Wajib-ul-arz of the village had a provision in regard to pre-emption. The Chapter in it dealing with pre-emption is headed 'Rights of co-sharers as among themselves on the basis of custom or of agreement' and the custom is set forth as follows: 'The custom of pre-emption obtains. In case of sale of property by a co-sharer, another co-sharer in the Mama can bring a suit for pre-emption. If he offers a low price, then the vendor can sell the property to a stranger'. Upon partition of the village, three Mahals were formed and in one of these Mahals the plaintiff is a co-sharer. This Mahal, however, is not, as we have said, the Mahal in which the property sold is situate. Upon partition a new Wajib-ul-arz was framed and it is largely upon the language

of this Wajib-ul-arz that the arguments' before us have been based. It is practically in identical terms with the older Wajib-ul-arz of 1876, so far as regards the custom set forth therein as to the right of pre-emption. The Chapter is headed 'Rights of co-sharers inter se based on custom or agreement,' and the material portion of the paragraph dealing with pre-emption runs as follows: 'The custom of pre-emption prevails. In case one co-sharer sells his share (Haqiat), another co-sharer in the village. (Hissadar sharik mauza)--can claim pre-emption. If he offers a smaller (sic) price, the seller can sell it to a stranger'. Now it has been repeatedly held that the determination of an alleged right of pre-emption must depend upon the particular circumstances of each case and the evidence adduced in support of the pre-emptive right. We apply that rule to the case before us. It is clear that under the older Wajib-ul-arz of 1876 upon the sale of a share in the village, any co-sharer in the village had a right to pre-empt. There was, as it has been said, no gradation of parties to exercise the right. In the later Wajib-ul-arz of 1838, the same right is maintained by the co-sharers in the Mahal in respect of which the Wajib-ul-arz was prepared. The language of the Wajib-ul-arz is clear and explicit. It gives the right of pre-emption in case of a sale to a stranger to a sharer who is a sharer in the village, and to no other party. From its language we gather that it was the intention of the parties that the rule of preemption as it had existed should continue to prevail. In the column for observations are to be found the words 'as before' which indicate that the old custom was to prevail. It has been stated by the learned Counsel for the respondents and not contradicted that the co-sharers in the village in 1876 were Muhammadans belonging to the same family, and that in 1888 the representatives of the same family were the sole proprietors of the village. If this be the case, then it seems to us to throw some light upon the Wajib-ul-arz which is before us. As the entire body of co-sharers in the village were Muhammadans of the same stock and continued so up to the time of partition, it seems very probable that their intention in adopting the custom to be found in the earlier Wajib-ul-arz was to exclude strangers, and to confine the right of pre-emption to the sharers in the village whether they belonged to the same Mahal or not. In view of the language of the Wajib-ul-arz and of the circumstances, we think that the Court below rightly interpreted it.

2. It is very difficult to distinguish the case from that of Janki v. Ram Partap Singh 28 A. 286 : 2 A.L.J. 833 : A.W.N. (1906) 2. In that case in a village which consisted of two pattis or Mahals, the Wajib-ul-arz recorded a custom of pre-emption to the effect that in the case of a sale or mortgage by a share-holder, a claim for pre-emption might be brought by persons mentioned in several categories and ultimately by share-holders in the village. The village was subsequently divided into more Mahals but no new Wajib-ul-arz was framed. It was held, by one of us and by Richards, J., that a co-sharer in the village had a right of pre-emption as against a stranger, even though he did not own a share in the Mahal in which the property sold was situate.

3. For the foregoing reasons, We hold that there is no force in the appeal and we dismiss it with costs including fees in this Court on the higher scale.