Mohammad Umar Vs. Amir Mohammad

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Court : Madhya Pradesh

Decided On : Mar-26-1958

Reported in : AIR1958MP423

Judge : P.K. Tare, J.

Acts : Muhammadan Law; Constitution of India - Article 19 and 19(1)

Appeal No. : Second Appeal No. 68 of 1955

Appellant : Mohammad Umar

Respondent : Amir Mohammad

Advocate for Pet/Ap. : A. Razak, Adv.

Disposition : Appeal allowed

Judgement :

P.K. Tare, J.

1. This second appeal has been filed by the plaintiff, whose suit for pre-emption according to Mohammedan law was dismissed by both the courts below.

2. One Gulam Mohammad sold his house to the defendant-respondent Amir Mohammad by a registered sale deed dated 13-5-1952, for an ostensible consideration of Rs. 1500/-. The plaintiffsrelationship with the vendor is as follows:

SHEIKH MAGTUMBUX

_____|_____

| |

Hayat Mohammad=Umraobi Jan Mohammad

_____|_____ |

| | Gulam Mohammad

Mohammad Mst. Sofiabi (Vendor)

Umar (Plaintiff)

The house originally belonged to Sheikh Magtumbux. It was partitioned in a family partition between Jan Mohammad, Umraobi, Mohammad Umar and Mst. Sofiabi. The plaintiff as a participator in the appendages and as the owner of the adjoining portion of the house (which is divided by a common wall) claimed the right of pre-emption. It was also alleged that the consideration was fictitious and inflated with a view to defeat the plaintiffs right. The real consideration was alleged to be Rs. 700/-. The plaintiff also averred that he had made two demands as required by the Mohammadan Law (namely, Talab-i-Isshad and Talab-i-Mowasibat). He had also served a registered notice dated 30-5-1952 upon the defendant claiming pre-emption. The defendant did not reply to the notice.

3. The defence was that the defendant had no knowledge about the plaintiffs right. The sale deed was not fictitious nor was the consideration inflated. It was further averred that the plaintiff had not made Talab-i-Mowasibat and Talab-i-Isshad.

4. The lower courts upheld all the contentions of the plaintiff, but held against him on the question of the two demands required by the Mohammadan law. Therefore, the suit was dismissed. Although the point was not raised in the pleadings, the learned appellate Judge also held that it was doubtful if such a right of pre-emption could be exercised after the enactment of the Constitution of India 1950 in view of Article 19(1)(f) of the Constitution. The learned appellate Judge, relying on the

cases of of Mubarak Husain v. Kaniz Bano, ILR 27 All 16ft (A) and Sadiq Ali v. Abdul, ILR 45 All 290: (AIR 1923 All 251) (B) held that the plaintiff had failed to prove that he had made the two demands as required by the 'Hedaya.'

5. As regards the law on the subject of preemption, the learned author, Sir D.F. Mulla has dealt with the topic in his book -- 'Principles of Mahomedan Law' 14th (1955) Edition, Section 238 -- page 221, In the case of Mubarak Husain v. Kaniz Bano (A) (supra) a Division Bench of the Allahabad High Court held that at the time of making the Talab-i-Isshad it was absolutely necessary to mention the fact of having made the Talab-i-Mowasibat previously, although the witnesses to the two demands may be the same.

In the case of ILR 45 All 290: (AIR 1923 All 251) (B) another Division Bench of the same High Court held that the failure to mention the previous demand (Talab-i-Mowasibat) at the time of making the second demand (Talab-i-Isshad) was fatal to a pre-emptor's claim. In the case of Shivashankar Chhaganlal v. Laxman Chimanlal, ILR (1943) Bom 441: (AIR 1943 Bom 83) (C), a Division Bench of the Bombay High Court held that it was not necessary that a pre-emptor should make the first demand in the presence of witnesses. The only requirement was that after knowing of the sale, the pre-emptor should make first demand at the earliest opportunity, but at the time of making the second demand, he should mention the fact of the first demand having been made, in the presence of at least two witnesses. In the case of Mst. Mahbooban v. Mst. Fatima Begum, AIR 1952 All 167 (D), Mushtaq Ahmad J. held that if the first demandbe made in the presence of the vendor or the vendee, or on the premises sold and in the presence ofwitnesses, who heard the demand, it was not necessary to mention the fact of the first demand at thetime of the Talab-i-Isshad.

The learned Judge based his view upon the FullBench case of Rujjub Ali v. Chundi Churn, ILR 17 Cal 543 (E). A Division Bench of the Hyderabad High Court in the case of Sonaji v. Narhar, AIR 1952 Hyd 159 (F), expressed the same view as Mushtaq Ahmad J. and further held that the presence of two witnesses was not necessary. The learned Judges opined that after the passing of the Indian Evidence Act and the Hyderabad Evidence Act, even the presence of a single

witness at the first or the second demand, as the case may be, would be sufficient. They held that the matter would not be governed by the customary Mohammedan Law, but by the provisions of the Evidence Act.

In the case of Abdul Gaffar Khan v. Abdul Jikar, ILR 1954 Nag 407: (AIR 1954 Nag 113) (G), the late Rao J. held that for a pre-empter to succeed, he had to make two demands as required by the law, but the two demands could be combined in a single demand, if all the requirements for both (he Talabs were fulfilled. The learned Judge on the authority of Abdul Ajij v. Khairunnisa Begum, ILR (1949) Nag 740 : (AIR 1949 Nag 361) (H), held that where all the parties are Mohammedans, it would not be inequitable to apply the Mohammedan law of preemption. As regards the question about tenability of a claim of pre-emption under the Muslim law in view of Article 19(1)(f) of the Constitution the learned Judge did not think it necessary to pronounce his decision, as it was not necessary. In that case the plaintiff appellant's claim was dismissed, as he had not complied with the formalities of the two demands.

6. Therefore, in the light of the case law referred to above, we have to see if the formalities of the two Talabs were complied with in the present case. The learned appellate Judge, referring to the case of ILR (1954) Nag 407: (AIR 1954 Nag 113) (G), observed that according to the plaintiff, he (pre-emptor) had made the second demand within a few minutes of the first demand.

Therefore the learned Judge failed to see bow the plaintiff could combine the two talabs in one. So the first appellate Court decided to apply an exacting standard by applying 'The normal law of two talabs and not the exception'. It was in this light that the appellate Judge came to the conclusion that the formalities of the two talabs were not strictly complied with. I may only remark that the first appellate Court, without applying his mind to the development of the case law, which the late Rao J. has elaborately discussed, required a much higher standard of proof from the plaintiff than was warranted by the law and also applied an exacting standard more than was warranted by the cases referred to above.

7. The plaintiff's case, as pleaded and brought out in the evidence was a simple one. On learning of the sale, he went to the premises and made a demand from

the vendor and the vendee in the presence of P.W. 2 Abdul Hussain, his agent. Immediately after, he went out and fetched P.W. 3 Abdul Rahman Khan and made the second demand in the presence of the two witnesses. The learned Judge, being of the opinion that the two demands could not be combined in one, field that the formalities as laid down by the cases of ILR 27 All 160 (A) and ILR 45 All 290: (AIR 1923 All 251) (B) had not been complied with.

I fail to see why the second demand could not be made immediately after the first demand. The presence of witnesses is not necessary if the demand be made to the vendor or the vendee or on the premises. The witnesses would be necessary for the second demand only. According to the Hyderabad High Court, even a single witness would be sufficient. The learned appellate Judge was clearly in error in concluding that the plaintiff had failed to mention the fact of the first demand at the time of making the second demand. This is what the plaintiff as P.W. 1 said :

'On 13-5-1952 at about 3 or 4 O'clock I learnt that the defendant had purchased a part of the house. I saw the defendant and Gulam Mohammad taking measurements of the sites. I told them that I shall purchase the portion ..... On going out I saw Abdul Rahman going. I took him on the spot and in the presence of Abdul Rahman and my agent Abdul Hussain, I again made a demand. In the presence of both the witnesses I mentioned the fact of my first demand.'

This is what Abdul Hussain P.W. 2 said :

'I went with the plaintiff on the spot. Gulam Mohammad and Amir Mohammad were taking measurements. The plaintiff said that he was prepared to purchase. ..... After some time Abdul Rahman arrived. The plaintiff again repeated his demand.'

This is what Abdul Rahman P.W. 3 stated :

'The plaintiff said that he was prepared to purchase. ..... The plaintiff also said that beforemy (witness's) arrival he had made a demand. But Amir Mohammad and Gulam Mohammad are notamenable'.

8. I think, no clearer proof about compliance with the formalities of the two talabs could have been given. It is obvious that the learned Judge, influenced by his observations wanted a more exacting standard of proof than was warranted by the provisions of the law. It was on that account that the appellate Judge disposed of the appeal without even a notice to the other side.

It would be interesting to see the conduct of the defendant. He did not reply to the plaintiff's notice dated 30-5-1952. In his deposition as D.W. 1, he tried to make out a new case of waiver by alleging that the plaintiff was present at the time o negotiations, and at the time of taking measurements, but ho never raised any objection. The learned trial Judge correctly overruled that part of the evidence relating to waiver, which was never pleaded. The defendant has mentioned an inflated consideration in the sale deed with a view to encumber the plaintiff's right of pre-emption. It was clear that the defendant was out to defeat the plaintiff's right by any means, fair or unfair.

9. As regards the learned appellate Judge's view that the customary right of pre-emption cannot be exercised in view of Article 19(1)(f) of the Constitution, I am of the opinion that rights conferred by usage or custom are not at all affected by the enactment of the present Constitution. The said Article has to be read along with Clause 5 of the said Article, which is as follows :

'Nothing in Sub-clauses (d), (e) and (f) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, reasonable restrictions on the exercise of any of the rights conferred by the said sub-clauses either in the interests of the general public or for the protection of the interests of any Scheduled Tribe.'

It is, therefore, clear that the fundamental rights guaranteed by Article 19(1)(f) are subject to reasonable restrictions and that it is not an absolute right. Article 13(3)(a) defines 'law' thus :

' law' includes any ordinance, order, bye-law, rule, regulation, notification, custom or usage haying in the territory of India the force of law.'

Article 372 of the Constitution provides for continuance of the existing law, as was in force immediately preceding the enactment of the Constitution. Thus all customary law including the personal law was saved by Article 372 of the Constitution. Any custom or usage having the force of law can only be declared void as per Article 13(1) if it does not comply with the test of reasonableness laid by Article 19(5). If the personal law applicable to persons of all religious faiths, of all sects, and of all colours and races does not stand abrogated by the new Constitution, it would be futile to single out the Muslim customary law of pre-emption and put it to the test of reasonableness. Even on the question of reasonableness, I am unable to sec anything unreasonable, as customary law of pre-emption is prevalent in Punjab as also in other States there is a statutory law of preemption in respect of agricultural holdings. As laid down by their Lordships of the Supreme Court, in the case of Audh Behari Singh v. Gajadhar Jaipuria, 11955-1 SCR 70: (AIR 1954 SC 417) (I), it is a right attached to the property, which goes with the land concerned. If rights in property could be circumscribed from ownership to tenancies, sub-tenancies and annual leases, the right of pre-emption could as well be another type of such circumspection. At least I am unable to see anything unreasonable in the exercise of the customary right of pre-emption. 12, therefore, hold that Article 19(1) is no bar to the customary right of pre-emption exercisable under the Mohammadan law. I may only remark that as observed by his Lordship of the Supreme Court, Patanjali Shastri C. J. in the case of Lachmandas Kewalram v. State of Bombay, AIR 1952 SC 235 (J), a doctrinnaire approach in this matter ought to be avoided. I am aware of the fact that the judgment of his Lordship was a minority judgment, so far as interpretation of Article 14 of the Constitution is concerned and that the law declared is the majority view of their Lordships. But I wish to rely on the said observation, as a general proposition for guidance in the matter of constitutional interpretations.

10. For the reasons aforesaid, the judgmentsand decrees of the Courts below cannot be upheld.They are consequently set aside. The present appealsucceeds and is allowed. The plaintiff appellant'sclaim for pre-emption upon deposit of Rs. 700/-minus the costs awarded within 2 months from todayin the trial Court, is decreed. In default, the appealshall stand dismissed with costs throughout. The appellant shall be entitled to half of the costs incurredin the present appeal, and

the appeal before thelower appellate Court. However, he shall be entitledto full costs of the trial Court. Counsel's fee Rs. 60/-if certified.