1938

JAI NARAIN LAL v. BECHOO LAL

The question which now remains to be decided is what amount the defendants should be called upon to pay before avoiding enforcement of the mortgage. Obviously they must pay the principal plus a reasonable rate of interest. A reasonable rate would be 12 per cent per annum simple interest; but the rate contracted for in the mortgage bond, though compoundable, works out at less than this. The rate, therefore, at which the defendants will be required to pay interest cannot be less than the contractual rate. We accordingly modify the decree of the lower appellate court in this way that the defendants are allowed six months in which to repay to the plaintiff the principal plus interest at the rate contracted for in the mortgage bond. If the money is paid within the period allowed, the mortgage bond will not be enforced. If it is not paid, a preliminary decree will therefore be prepared under order XXXIV, rule 4, of the Civil Procedure Code. The plaintiff is entitled to his costs of this appeal.

Before Mr. Justice Bennet and Mr. Justice Verma

DIN DAYAL (DEFENDANT) *v.* SHEO PRASAD (PLAINTIFF)*

1938 *March*, 8

Agra Pre-emption Act (Local Act XI of 1922), sections 4(1); 12(1) class V—"Co-sharers in the village"—Village comprising several mahals—Co-sharer in one such mahal—Right to pre-empt sale of land in another such mahal—"Petty proprietor"—Ownership of a particular plot of abadi land, not liable to pay any land revenue—Interpretation of statutes—Statement of objects and reasons—Proceedings of Legislative Council.

The owner of a share in a mahal or the sole proprietor of a mahal has a right of pre-emption in a different mahal in the same village, as coming under class V, "Co-sharers in the village", of section 12(1) of the Agra Pre-emption Act, read with the definition of "co-sharer" in section 4(1) of the Act.

The statement of objects and reasons of the Agra Pre-emption Act, and the proceedings of the legislative council

*First Appeal No. 462 of 1933, from a decree of B. D. Kankan, Additional Civil Judge of Moradabad, dated the 25th of September, 1933.

1938

DIN DAYAL v. SHEO PRASAD

relating to the passing of the Act, were referred to, for the purpose of elucidating the intention of the legislature in enacting class V of section 12(1), the language of which was not very clear.

The owner of a specific plot of abadi land, not liable to pay any land revenue and having no interest in the joint lands of the mahal, is a petty proprietor as defined in section 4(7) of the Agra Pre-emption Act.

Dr. *S. N. Sen*, Sir *Syed Wazir Hasan* and Mr. *S. N. Seth*, for the appellant.

Messrs. *P. L. Banerji* and *Govind Das*, for the respondents.

BENNET J.:—This is a first appeal by Din Dayal, defendant No. 1, against a decree in favour of the plaintiff Sheo Prasad for pre-emption. The sale in question was by defendant No. 2, Raghunath Prasad, and defendant No. 3, Bhagwat Prasad, in favour of Din Dayal, on the 8th of December, 1930, of the whole of mahal Safed in mauza Sadarpur Matlabpur with the exception of a specific plot No. 32. The plaint sets out that on the 30th of November, 1930, there had been a fictitious deed of exchange by which this No. 32, area 1·9 acres, had been exchanged by Raghunath Prasad and Bhagwat Prasad, having been given to Din Dayal, and in exchange Din Dayal had given them a plot of waste land of 166 square yards situate in muhalla Kisrol in the Moradabad city. The plaint alleged that the two documents were in fact one single transaction and that the deed of sale was fictitious and under the same no party acquired any right separately. The plaintiff set out that he himself was the owner of ·16 acres of land known as Dera situate in 507/1 mahal Safed Tafazzul Ali Khan and that he was also the sole owner of mahal Sabz Syed Meherban Ali Khan along with his brother Jagannath Prasad in the village in suit. In paragraph 10 of the plaint, setting out his right of pre-emption, the plaintiff stated that he was a co-sharer in mahal Safed and sir land. He therefore claimed to pre-empt the 20 biswas in mahal Safed

Tafazzul Ali Khan which was transferred by defendants 2 and 3 to defendant 1. The written statement of defendant 1 denied that the deed of exchange was a part of the transaction of sale and alternatively in paragraph 8 of the additional statements alleged that if the two transactions form part of one single transaction then they would not amount to a sale at all and no suit for pre-emption would lie. In paragraph 7 it was alleged that the deed of exchange was a genuine deed of exchange and that after making the exchange defendants 2 and 3 got a pucca well made for drinking purposes in the land which they had acquired in Moradabad city. The question of the genuineness or otherwise of the alleged exchange was a matter which the former Bench, of which one of us was a member, considered should be elucidated and accordingly a remand was made of an issue on the point to the trial court. The trial court has now carefully considered the matter on the admission of further evidence and has come to a finding that the exchange of the 30th of November, 1930, was a genuine transaction. . . . We consider that the finding of the court below was correct on that point.

Now the case, however, does not seem to be advanced very far for defence on this finding. The particular portion transferred by the exchange to defendant No. 1 is land No. 32 comprising 1·9 acres, bearing a rent of Rs.5-9-6, out of the land comprising 334·2 acres zamindari property with revenue, known as mahal Safed, 20 biswas, situate in mauza Sadarpur Matlabpur, entered as khata khewat No. 1. Now this is clearly a particular plot. The rent of Rs.5-9-6 is not revenue but it is admitted that this is rent which the occupancy tenant paid to the owner of the plot. The deed of exchange does not provide that any land revenue is to be paid by defendant No. 1 on taking this plot. The revenue courts have dealt with this matter in mutation by providing that the whole of 20 biswas shall be entered for defendant No. 1, and these entries in mutation were made

1938

DIN DAYAL v. SHEO PRASAD

Bennet, J.

long after and there was only an interval of 8 days between the deed of exchange and the sale deed. We have been referred to a ruling of their Lordships of the Privy Council in *Ramjimal* v. *Riaz-ud-din* (1) in which their Lordships set out on page 977: "The sale deed in favour of the plaintiff makes it clear that he acquired only certain specific fields, the total area of which amounts to 38 bighas and 14 biswas; and the courts in India are agreed that he had no interest in the joint lands of the mahal. The trial court also found that he did not take part in the administration of the affairs of the mahal, but the learned Judges of the High Court observe that 'there is no evidence to show that he has not any right to take part in the administration of the affairs of the mahal.' They themselves, however, point out that 'the burden of proving that he is a co-sharer and that he has a right to take part in the administration of the mahal undoubtedly lies on the plaintiff who comes to court.' There is not a scrap of evidence to discharge that onus, and the decision of the court of first instance on this point must, therefore, be affirmed." The present case is even stronger than the case before their Lordships of the Privy Council as the present area was a single khasra number allotted to a tenant. In our opinion the defendant by the deed of exchange only acquired a particular number, that is a particular field in a mahal, and came under the definition of petty proprietor in section 4, sub-section (7) of the Agra Pre-emption Act. We therefore think that the claim of the defendant that he was a co-sharer in the mahal when the sale deed was made in his favour on the 8th of December, 1930, is a claim which is incorrect.

Learned counsel for the defendant appellant also put forward an argument based on the pleading of the plaint in paragraph 7 where it was set out that the deed of exchange and the sale deed were parts of one single transaction. The plaint, however, went on to say that

(1) [1935] A.L.J. 973.

1938

DIN DAYAL v. SHEO PRASAD

Bennet, J.

the deed of exchange was simply fictitious. . . The court below has found that it was the intention of the parties that 166 square yards of land in muhalla Kisrol of Moradabad city mentioned in the deed of exchange of the 30th of November, 1930, should pass from Din Dayal to Raghunath Prasad and Bhagwat Prasad. After hearing learned counsel in this Court, we have come to the conclusion that that finding is correct and that the deed of exchange was a genuine document. We consider therefore that on the 30th of November, 1930, this deed of exchange was executed and from that date the right in the two items of property mentioned in the deed was transferred. When the sale deed, the subject of the pre-emption suit, was executed on the 8th of December, 1930, then no question remained as regards the deed of exchange and, in our opinion, it was quite a separate transaction. Therefore, as it is a sale deed, there is no objection to the pre-emption of the sale deed of the 8th of December, 1930.

The case for the plaintiff in regard to his right to pre-empt is based on his being a co-sharer in mahal Safed, in paragraph 10 of the plaint. Mahal Safed is a mahal of which the 20 biswas were transferred by defendants 2 and 3 to defendant 1 with the exception of the No. 32 plot which had been transferred a few days previously by the deed of exchange. The ownership of the plaintiff and his brother in this mahal Safed is ·16 acres known as Dera situate in plot No. 507/1. This Dera apparently means a building and the small area is apparently abadi land, otherwise the plaintiff would not have had any plot in the mahal of other proprietors. This is shown as abadi in the khasra. The actual history of this ·16 acres is given in paragraphs 1 and 2 of the plaint. Piare Lal and Banarsi Das, two brothers, bought mauza Sadarpur Matlabpur with the "milak" of Aulad Husain. Under a deed of partition of the 20th of September, 1921, out of the said village the mahal Sabz known as Syed Meharban Ali and ·08 acres known as Dera in plot No. 507/1

1938

DIN DAYAL v. SHEO PRASAD

Bennet, J.

in mahal Safed Tafazzul Ali Khan fell to the share of Piare Lal, and to the other brother, Banarsi Das, was assigned the mahal Safed with the exception of this small area of ·08 acres and also the "milak" of Aulad Husain. After the death of the two brothers, under a sale deed of the 6th of November, 1924, defendants 2 and 3, sons of Banarsi Das, sold the remaining ·08 acres of land called Dera in plot No. 507/1 mahal Safed to the plaintiff and his brother. This recital shows that the plaintiff has only acquired the ·16 acres of the particular plot No. 507/1 known as Dera because it was land which was a house, and the ownership of such a plot of abadi land would, in no way, make the plaintiff a co-sharer in mahal Safed. In the Agra Pre-emption Act section 4 defines in sub-section (1) "co-sharer" as meaning "any person, other than a petty proprietor, entitled as proprietor to any share or part in a mahal or village whether his name is or is not recorded in the register of proprietors"; and in sub-section (7) "petty proprietor" means "the proprietor of a specific plot of land in a mahal, who as such is not entitled to any interest in the joint lands of the mahal, or to take part in the administration of its affairs." The case of the plaintiff's ownership of ·16 acres in plot No. 507/1 mahal Safed agrees with the definition of petty proprietors, inasmuch as the plaintiff is the proprietor of a specific plot of land in a mahal, and he is not as such entitled to any interest in the joint lands of the mahal or to take part in the administration of its affairs. The plaintiff, therefore, cannot sustain the cause of action which he alleges in paragraph 10 of the plaint as, in our opinion, he is not a co-sharer in mahal Safed in which the property in question is situate.

It was, however, argued by learned counsel for the plaintiff respondent that his case might be based on his ownership of mahal Sabz in which he and his brother owned 20 biswas. We may note that this was not the basis of his claim for pre-emption in paragraph 10 of the

plaint, but we think that this mere omission may be excused as in paragraph 3 of the plaint the plaintiff set out the existence of his right of ownership of mahal Sabz along with his brother and it does not appear that the defendants had been in any way misled. The claim of the plaintiff is that he is entitled to pre-empt, as owner of a half share in mahal Sabz, this property which is in mahal Safed in the same village. He bases his right as coming under the Agra Pre-emption Act (Act XI of 1922), section 12(1), class V, "Co-sharers in the village". One of us had a difficulty in regard to the language used in this class V, "Co-sharers in the village". No doubt, on reading the section it does appear that one proceeds from smaller divisions up to a mahal and then to a village, but to apply the class V, "co-sharers in the village", does involve a difficulty in the case of a village which like the present is divided into a number of mahals. The more correct wording for class V would have been, after having dealt with the mahal in class IV, to proceed to other mahals and to state "co-sharers in, or owner of, another mahal in the same village". To get over the difficulty of the use of the word "co-sharer" in class V reference is made to section 4, sub-section (1) which states: "'Co-sharer' means any person, other than a petty proprietor, entitled as proprietor to any share or part in a mahal or village whether his name is or is not recorded in the register of proprietors." One of us finds again a difficulty here in the definition of co-sharer as the proprietor of any share or part *in a village* as applying to the present case because the plaintiff is not the owner of a share or part in the village but the owner of a share or part in a separate mahal. Now in a well known Full Bench ruling of this Court, *Dalganjan Singh* v. *Kalka Singh* (1), STRACHEY, C.J., in considering a case like the present where the plaintiff pre-emptor was the owner of a share in one mahal in a village but claimed to pre-empt a share in another mahal on the

(1) (1899) I.L.R. 22 All. 1.

1938

DIN DAYAL v. SHEO PRASAD

Bennet, J.

ground that there had been a wajib-ul-arz before partition which gave a right to *hissadar deh*, stated as follows on page 29: "It is now sought to apply the custom for the benefit of the plaintiff, who stands in a totally different relation to the village, to the vendor, and to the property sold. He is not a co-sharer of the entire village. He is not a member of the class who exercised the right of pre-emption at the time when the custom was recorded. He is a member of a class which only came into existence through the partition—*persons who have shares in a particular sub-division of the village*. He is not even a co-sharer of the vendor. To allow him to pre-empt under the old wajib-ul-arz would be, in my opinion, to change the custom while professing to apply it." On page 28 he stated: "If so, the subsequent words '*hissadaran deh*' mean 'co-sharers of the undivided village', not 'owners of shares in any sub-division of the village'." The argument which had been used for the pre-emptor in that case is given on page 3: "Upon the construction of the particular wajib-ul-arz in question, *hissadar* means a shareholder and not necessarily a co-sharer. The plaintiff still holds a share in the village, and upon that account he is entitled to claim pre-emption." Now the expression "a share in the village" is what is given in section 4, sub-section (1) as part of the definition of a co-sharer, and in the opinion of one of us what the learned CHIEF JUSTICE laid down in the words "He is a member of a class which only came into existence through the partition—persons who have shares in a particular sub-division of the village" is a finding which implies that the plaintiff did not hold a share in the village at all but only a share in a particular sub-division of the village. This dictum of the CHIEF JUSTICE was followed by all the Judges in that ruling. Later, when the matter came before their Lordships of the Privy Council in *Digambar Singh* v. *Ahmad Sayed Khan* (1), there was a similar case where a plaintiff claimed to pre-

(1) (1914) I.L.R. 37 All. 129.

empt land in a different mahal of the village and it was held that the appellant plaintiff had not shown either on the construction of the wajib-ul-arzes, or by other evidence, that the custom of pre-emption for *hissadar deh* which obtained in the unpartitioned mauza survived a partition, so as to give the plaintiff, a sharer in one of the new mahals, a right to pre-empt property in another of those mahals in which he was not a sharer. These two rulings laid the burden of proof on the pre-emptor to show that in such a case the right to pre-empt would survive a partition.

Now, although it is not usual to refer to the origin of Acts of legislature, we consider that it is necessary to do so in the present case. The statement of objects and reasons of the Agra Pre-emption Bill of 1922 is published in the *U. P. Gazette,* dated the 1st of April, 1922, part VIII, page 245, and Dr. *N. P. Asthana,* a learned advocate of this Court, set out in his report that two stipulations had been made by Government to the committee, one of which was that the proposed legislation should not result in extending the rule of pre-emption to places where it does not at present exist, and (2) that due regard should be paid to the rulings of the Special Bench of the High Court. In regard to clause 12, he states that the committee recommended the recognition of four classes of pre-emptors only and the draft bill on page 240 shows that clause 12(1) stopped at class IV, "Co-sharers in the mahal". Now when the bill was before the Legislative Council, the proceedings of the Legislative Council of the United Provinces, volume IX for 1922, shows on page 509 that the Hon'ble member Rai Sita Ram Sahib moved that a new "Class V" be added, namely "Co-sharers in the village" to clause 12, sub-clause (1). On page 510 he stated the case of three brothers who divided their village into three separate mahals, and said: "If the right of pre-emption is not given to co-sharers in the village, the result would be that if one brother, who is the proprietor of one mahal,

1938

DIN DAYAL v. SHEO PRASAD

Bennet, J.

wishes to sell away a portion of his property, say out of a desire to injure his other brothers or on account of some family dispute, he would be perfectly at liberty to admit a stranger in the village." He therefore intended that this class V should give the right to a sole owner of another mahal or a co-sharer in another mahal in the same village. He claimed also: "So that if you stop short with the co-sharers in a mahal and do not give them the right of pre-emption, which is recognized by the rulings of the High Court and which is also provided for in the various wajib-ul-arzes of the village, I think you will be disturbing the harmony of the village community." The other Hon'ble members who spoke showed by their speeches that they considered that the amendment was to give the right which the plaintiff now claims. Subsequently the section 4, sub-section (1) was amended by the addition of the words "or village" to the definition of co-sharer. The intention of the legislature clearly appears from these speeches but it is to be noted that the section 12, sub-section (1), class V, "Co-sharers in the village", has introduced the very phrase which in the vernacular expression of *hissadar deh* was held by the Full Bench ruling of this Court to be inapplicable to a case of partition, except there was some proof that a custom was intended to survive the partition. It would have been much clearer if the legislature had used a more natural expression, "Co-sharer in, or owner of, another mahal in the same village." The present expression will mislead even lawyers of great experience. We may mention that one of the learned counsel for the plaintiff respondent to-day expressed his opinion that the class as it stands would not cover the case of the sole owner of another mahal, although it was the intention of the mover of the amendment that this case should be covered. Although no definite ruling on the point has been shown to us, we consider that the intention of the legislature was that the owner of a share in a mahal or the sole proprietor of a mahal should have a right of pre-emption

in a different mahal in the same village. Accordingly therefore the plaintiff has a clear right of pre-emption in the present suit.

As regards the single plot No. 32 which formed the subject of exchange the court below held the exchange was a fraudulent document. We have held that it is a genuine document but that it confers only the right of a petty proprietor on the appellant, which right will remain unaffected in this particular No. 32, and we have also held that this right has nothing to do with 20 biswas ownership of the mahal.

Accordingly we consider that the decree of the court below was correct in granting pre-emption to the plaintiff of 20 biswas in this mahal and we dismiss this first appeal with costs. The pre-emptor plaintiff is allowed three months from the present date within which he should deposit the pre-emption money, otherwise his suit will stand dismissed with costs in all the courts.

VERMA, J.:—I entirely agree in dismissing the appeal. As my learned brother has pointed out, the language of section 12(1), class V, "Co-sharers in the village", is inappropriate and if it had stood alone, I would have found it difficult to hold that the plaintiff was entitled to pre-empt. It seems to me, however, that the definition of the word "co-sharer" given in section 4(1) of the Act removes the difficulty and in view of that definition I have no hesitation in holding that the plaintiff is a person who comes within class V, section 12(1) of the Act.