APPELLATE CIVIL

Before Justice Sir Edward Bennet and Mr. Justice Collister

1939
April, 13

KUBER SINGH (DEFENDANT) *v.* JAINATH SINGH AND OTHERS (PLAINTIFFS)*

Agra Pre-emption Act (Local Act XI of 1922), *section* 9—*Section applies if vendee an ex-proprietary tenant in the mahal —Not necessarily in the land sold or in the same patti—Not necessary that he must have been a proprietor with an equal or superior right of pre-emption—Letters Patent, section* 10 *—Letters Patent appeal from decree in an appeal from order.*

It is sufficient for the defence under section 9 of the Agra Pre-emption Act that the vendee should be an ex-proprietary tenant in any part of the mahal and not necessarily in the particular portion sold or in the particular patti in which the portion sold is situated.

Section 9 of the Agra Pre-emption Act is not governed by section 12 so as to make the defence under section 9 available to the ex-proprietary tenant only in case he was a person who before he became an ex-proprietary tenant had such a right as a co-sharer as would have entitled him to pre-empt under section 12, the right being equal to or superior to that of the plaintiff. There is no reason to suppose that section 9 is to be read in connection with section 12.

The provisions of the Civil Procedure Code have no bearing on the right of appeal under section 10 of the Letters Patent and they can not be invoked in bar of an appeal under the Letters Patent from a decree passed in an appeal from order.

Mr. *Madan Mohan Lal,* for the appellant.

Mr. *A. P. Pandey,* for the respondents.

BENNET and COLLISTER, JJ.:—The plaintiff brought a pre-emption suit and in his plaint he omitted to say in what mahal the property which he desired to pre-empt was situated. He mentioned at the end of the plaint seven mauzas and one patti in those seven mauzas and in paragraph 2 of the plaint he stated that the plaintiff and defendant No. 4 Mst. Hubraji Kunwar, the alleged vendor, were co-sharers in and zamindars of

*Appeal No. 71 of 1937, under section 10 of the Letters Patent.

mauza Naikdeh. Kuber Singh, defendant No. 1, one of the alleged vendees, pleaded in paragraph 18: "The defendant is an ex-proprietary tenant in mauza Rasulpur. Accordingly the plaintiff has no right of pre-emption on this ground as well." On this pleading the trial court framed issue No. 2: "Whether the defendant is an ex-proprietary tenant in the mahal in question and hence the plaintiff's suit for pre-emption is not maintainable?" On this issue the trial court found: "The defendant No. 1 is ex-proprietary tenant in village Rasulpur. There are several pattis in village Rasulpur. The defendant's ex-proprietary tenancy is in a different patti and not in the patti in which the property is situate. The plaintiff is co-sharer in the same patti in which the property in dispute is situate. The plaintiff being co-sharer in the patti in which the property is situate is entitled to pre-empt the property of village Rasulpur also. My finding on this issue is that defendant is ex-proprietary tenant in one appurtenant village only but as the ex-proprietary tenancy is in a different patti from the patti in which the property in dispute is situate and plaintiff is co-sharer, therefore plaintiff is entitled to pre-empt the property of village Rasulpur also."

The trial court therefore granted a decree for pre-emption of the whole property on payment of Rs.100. The defendant Kuber Singh brought an appeal in the court of the District Judge and ground No. 4 was: "The plaintiff has no right to bring a suit for pre-emption." The learned Judge of the lower appellate court held that the Munsif ought to have given his finding whether or not the defendants were ex-proprietary tenants in the mahal and remanded the case to the Munsif for decision on this point. "In the light of this finding he will dispose of the suit. The parties will be given opportunity to file documentary evidence but no fresh oral evidence will be recorded." He therefore

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made a remand specifying the order as made under order XLI, rule 23.

The plaintiff filed a first appeal from order in this Court and the learned single Judge held: "It seems to me that the question whether the defendants were ex-proprietary tenants in the mahal or not is quite irrelevant to the issue. What is of importance is whether the defendants are co-sharers in the patti in which the property is situated. Now the learned Munsif has held that the defendants are not co-sharers in the patti in which the property is situated. In these circumstances the plaintiffs were entitled to succeed and to oust the defendants in whose favour the sale deed had been executed. There was no reason at all for the Munsif to record a finding whether the defendants were ex-proprietary tenants of the mahal." The order of remand was set aside and the decree of the Munsif was restored. The Letters Patent appeal has been brought against this judgment.

Now it is remarkable that throughout these proceedings there has been no reference at all to the section of the Agra Pre-emption Act, Act XI of 1922, which deals with the defence raised by the defendant appellant before us. The section in question is section 9 and it provides as follows: "No right of pre-emption shall accrue on a sale to, or foreclosure by, an ex-proprietary tenant, of any proprietary interest in land in the mahal in which he holds such ex-proprietary tenancy." Learned counsel for the plaintiffs respondents argues that this section means that the defence by an ex-proprietary tenant will only be valid if the sale is of proprietary interest in the same land in which the ex-proprietary tenancy exists. To obtain this interpretation of section 9 he alleges that the word "which" in that section refers to land and not to mahal. In our opinion this is an error in English grammar and this construction cannot be made in correct English. Further, if this had been the intention of the legislature the words "in the mahal" were superfluous and should have been omitted and the

clause would then have run—"of any proprietary interest in land in which he holds such ex-proprietary tenancy". The legislature has inserted the words "in the mahal" and we consider that these words must have some meaning and the meaning in our opinion is that the ex-proprietary tenancy should be one in the mahal and this is sufficient if this is shown.

Learned counsel further argued that section 9 should be read as governed by section 12 and that an ex-proprietary tenant should only have a good defence if he were a person who before he became an ex-proprietary tenant had such a right as a co-sharer as would have entitled him to pre-empt under section 12, the right being equal to or superior to that of the plaintiffs. We see no reason to suppose that section 9 is to be read in connection with section 12 and there is nothing in section 9 to this effect. Apparently the intention of the legislature in making this provision in section 9 was that a person who had at one time been a proprietor in the mahal and who still held an ex-proprietary tenancy in any part of the mahal should not be prevented by a suit for pre-emption from again acquiring the status of a proprietor in the mahal. No ruling was produced on behalf of the plaintiffs respondents to indicate that the very peculiar interpretation of section 9 had ever been accepted by any recorded ruling. On the other hand in *Nasrat Ali* v. *Rudra Nath* (1) a Bench of this Court held that section 9 did apply in the manner in which we interpret it, that is, that it is sufficient for the defence under section 9 that there should be an ex-proprietary tenancy in any part of the mahal and not in the particular portion sold or in the particular patti in which the portion sold is situated.

Some further argument was made that the court below was wrong in directing that the parties should have an opportunity to file documentary evidence. The court did not allow fresh oral evidence. In our opinion the

(1) [1929] A.L.J. 685.

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documentary evidence is necessary because in the extracts filed by the plaintiff of the khewat the plaintiff has omitted to file that portion of the khewat which would show the name of the mahal to which the extracts refer. It is to remedy this omission that the further documentary evidence is necessary.

Some further argument was made that no Letters Patent appeal lay. But learned counsel did not attempt to justify his argument by any reference to the provisions of section 10 of the Letters Patent. On the other hand his argument was by reference to various sections of the Civil Procedure Code. That Code has no bearing on the right of Letters Patent appeal and the argument therefore does not convince us.

Under these circumstances we allow this Letters Patent appeal and restore the order of remand of the lower appellate court. The appellant Kuber Singh will have his costs in both proceedings in this Court from the plaintiffs.

Before Sir John Thom, Chief Justice, and Mr. Justice Ganga Nath

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RAM KALI AND ANOTHER (DEFENDANTS) *v.* MUNNA LAL AND OTHERS (PLAINTIFFS)*

Easement—Customary right—Right of way claimed by a section of the public—User, long continued—Presumption of legal origin—Lost grant, doctrine of—Civil Procedure Code, order I, rule 8—Numerous persons having same interest in subject of suit—Suit by one or more such persons in their own right—Maintainability—Civil Procedure Code, section 91—No bar to suit by some persons in respect of a right of way which is not a public highway.

On the principle of the doctrine of lost grant, when a right has been exercised by a person or persons for a sufficiently long time openly, uninterruptedly and peaceably it can safely be presumed that it had a legal origin.

*Second Appeal No. 795 of 1936, from a decree of S. C. Chaturvedi, Civil Judge of Bareilly dated the 29th of January, 1936, confirming a decree of Mithan Lal, Addit'onal Munsif of Bareilly, dated the 7th of August, 1934.