Before Mr. Justice Norman and Mr. Justice E. Jackson

1869
March 17.

KANTIRAM AND ANOTHER (DEFENDANTS) *v.* WOLI SAHU (PLAINTIFF.)*

Pre-emption among Hindus—Vicinage.

There is no judicial finding to the effect that the custom of pre-emption is recognized among the Hindus of the Province of Behar.

It is doubtful whether even, under Mohammedan law, the owners of two adjacent lakhiraj estates, wholly unconnected with one another, could either of them claim a right of pre-emption on the ground of vicinage. No such right of pre-emption on the ground of mere vicinage has been known to exist among Hindus.

Mr. *C. Gergory* and Baboo *Rajendra Nath Bose* for appellants.

Baboo *Debendra Chandra Ghose* for respondent.

THE facts are sufficiently set forth in the judgment of the Court, which was delivered by

NORMAN, J.—This was a suit for possession of 51 bigas of lakhiraj land in Pergunna Futtehpore Singhya, in the district of Purneah. The plaintiff claims, in respect of an alleged right of pre-emption, as owner of a plot of lakhiraj land forming the northern boundary of the land in dispute. All parties, the plaintiff and the defendants (vendors and purchasers of the land) are Hindus. The case was tried before the Judge of Purneah, Mr. Muspratt. The defendants objected that there is no right of pre-emption amongst Hindus. The Judge raised the issue—"Can the right of pre-emption be ever used by a Hindu within the Province of Behar?" He says that all the parties are Hindus of Chakla Behar. He cites two cases; *Fakir Rawot* v. *Sheikh Emambaksh* (1), and Baboo *Moheshee Lal* v.

* Regular Appeal, No. 179 of 1868, from a decree of the Judge of Purneah, dated the 1st June 1868.

(1) Case No. 1116 of 1861; 28th Sept. 1863.

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Christian (I), and treats it, as decided by these cases, that the Mohammedan custom of pre-emption has been adopted by the Hindus of the Province of Behar, and is therefore, binding on them. He declares that the plaintiff has established his right to pre-emption.

From this decision there is an appeal by the purchaser defendants. We are not aware of any case in which it has ever been judicially noticed, or even found as a matter of fact that, according to the customs of the Hindus in the District of Purneah, a right of pre-emption is recognized as existing amongst them. Neither of the decisions referred to by the Judge bears out his view. The first merely shew that the right where found to be now existing amongst Hindus, is regulated by the rules of the Mohammedan law of pre-emption. The Court expressly say that, "in districts where the existence of the custom has not been "judicially noticed, the custom will be matter to be proved." In the second case the Court directed an issue whether there was such a custom binding on Christians in Bhagulpore.

But even, supposing that a custom of pre-emption can be shown to exist amongst Hindus in Purneah, or in any part of the Purneah District, another question lies behind, *viz.*, whether the custom extends to give a right of pre-emption amongst Hindus on the ground of mere vicinage. We should entertain very grave doubt whether, if the parties were Mohammedans, there would be any right of pre-emption in the present case. The parties are simply owners of adjacent lakhiraj estates, the one wholly unconnected with the other. It is not suggested that the plaintiff would or could sustain any injury, or that his comfort or convenience would be interfered with in any way, if the appellants be permitted to enjoy the property they have bought.

In the Hedaya, Vol. 3, 562, it is said :—"Shafei is of opinion "that a neighbour is not a *Shafi*, because the prophet, has "said *Shaffa* relates to a thing held in joint property, and "which has not been divided off; when, therefore, the pro-

(1) 6 W. R., 250.

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"perty has undergone a division, and the boundary of each "partner is particularly discriminated, and a separate road "assigned to each, the right of *Shaffa* can no longer exist. "Besides, the existence of the right of *Shaffa* is repugnant to "analogy, as it involves the taking possession of another's pro- "perty contrary to his inclination, whence it must be confined "solely to those to whom it is particularly granted by the *law*. "Now it is granted particularly to a partner; but a neighbour "cannot be considered as such; for the intention of the law in "granting it to a partner, is merely to prevent the inconveniences "arising for a division; since if the partner were not to get the "share, which is the subject of the claim of *Shaffa*, a new "purchaser might insist on a division, and thereby occasion him "a great deal of unnecessary vexation. But this argument does "not hold good in behalf of a neighbour; he is, therefore, not "entitled to the privilege of *Shaffa*. We, (*i. e.*, the Hanifites) "on the contrary, allege that the precept of the prophet, already "quoted, is a sufficient ground for establishing the right of *Shaffa* "in a neighbour. Besides, the reason for establishing this right "in a partner, is the circumstance of his property being continu- "ally and inseparably adjoined to that of a stranger, *viz.* the "purchaser, which is injurious to him, because of the difference "of a stranger's position." Amongst Mohammedans, the right of pre-emption on the ground of vicinage may be defeated if a man sells the whole of his house, excepting only the breadth of one yard, extending along the house of the *Shafi*.—Hedaya, Vol. 3, 604.

According to the better opinion, it is applicable only to houses and small pieces of land. See Baillie's Mohammedan Law, page 474, note 1; page 471 note 3; and page 472, note 2. There is a saying of the prophets:—"*Shaffa* affects only houses and gard- "ens. The intention of *Shaffa* being to prevent the vexation "arising from a bad neighbour, it is said to be needless to extend "it to property of a moveable nature."—Hedaya Vol. 3, 591.

In *Abdul Azim* v. *Khondkar Hamid Ali* (1), a Division Bench of this Court held that, even amongest Mohammedans, "the right of pre-emption does not extend to give a party a right to purchase

(1) *Ante* 63,

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a separate estate, merely beacue a part of it is conterminous with that of the *Shafi*."

So far as we know, it has never been decided in any case that any custom prevails amongst Hindus giving a right of pre-emption to the owner of an estate adjacent to that sold on the mere ground of vicinage. In fact, the Courts have repeatedly refused to recognize such a custom; as, for instance, the Sudder Court of the N. W. Provinces in two cases referred to in *Fakir Rawot* v. *Sheikh Emambaksh* (1). The same point was decided in the cases of *Ejnash Kooer* v. *Shaikh Amjudally* (2) and *Nirput Mahtoon* v. *Mussamut Deep Koonwar* (3).

No evidence was given of the existence in Purneah of any custom amongst Hindus giving a right of pre-emption on the ground of such vicinage, and no such custom is even alleged by the plaintiff, and, therefore, we think it unnecessary to remand the case for the trial of an issue on the point.

We reverse the Judge's decree, and dismiss the suit with costs in both Courts.

Before Mr. Justice Norman and Mr. Justice Jackson.

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SARADAMAYI CHOWDHRAIN (PLAINTIFF) *v.* NABIN CHANDRA ROY CHOWDHRY (DEFENDANT.)*

Act VIII. of 1859, *s.* 230--*Dispossession--Adverse Claims.*

Four persons made separate applications to the Court, under section 230, Act VIII. of 1859, alleging that the defendant having obtained a decree against Government for possession of fisheries in a suit to which they were no parties, had in execution dispossessed them of fisheries, of which they were severally in possession. On enquiry it appeared that each and several of the four applicants claimed possession of the same portions of the fisheries. The lower Court, holding that it was impossible for each of several parties setting up adverse claims to the same property to show that it had been *bona fide* his possession, and that he had been dispossessed from it, referred all parties to a regular suit.

* Regular Appeals, Nos. 182, 184, 198, and 213 of 1868, from the decrees of the Judge of Rungpore, dated the 10th July 1868.

(1) Case No. 1116 of 1861; 28th Sept., 1863. (2) 2 W. R., 261. (3) 8 W. R., 3.