PRIVY COUNCIL.

P.C.*
1908
Jan. 24.

BAIJNATH RAM GOENKA
v.
RAMDHARI CHOWDHRY
AND
DEO NANDAN PERSHAD
v.
RAMDHARI CHOWDHRY.

[On appeal from the High Court at Fort William in Bengal.]

Mahomedan law—Pre-emption—Ceremonies, due performance of—Talab-i-istishad—Reversal by High Court of decision of First Court on question of fact—Withdrawal from Court by pre-emptors of money paid by purchaser to redeem mortgage on property sold—Waiver of right of pre-emption.

The right of pre-emption under Mahomedan law must be exercised, and the claims necessary to give effect to it must be made, with the utmost promptitude; and any unreasonable or unnecessary delay is to be construed as an election not to pre-empt. Whether there has been such delay is a question to be determined upon the facts of each particular case.

In this case it was held by the Judicial Committee that the grounds stated by the High Court for overruling the decision of the Subordinate Judge, that the ceremony of *talab-i-istishad* had been duly performed without unreasonable delay, were insufficient.

Where the pre-emptors had obtained the transfer of a zurpeshgi mortgage binding the property the sale of which gave rise to the suit for pre-emption, and the purchaser after the sale had paid the mortgage money into Court in accordance with the provisions of the Transfer of Property Act (IV of 1882) for the purpose of redeeming the mortgage:—

Held, that the withdrawal of the money by the pre-emptors was not a recognition of the title of the purchaser, but merely of his right to redeem, and was quite consistent with their right to pre-emption.

Two consolidated appeals from judgments and decrees (20th January 1904) of the High Court at Calcutta, which reversed judgments and decrees (31st March 1900) of the Court of the Subordinate Judge of Monghyr.

*Present: LORD ROBERTSON, LORD COLLINS, AND SIR ARTHUR WILSON.

The representatives of the plaintiffs were the appellants to His Majesty in Council.

The principal question raised in these appeals was whether the appellants were entitled to pre-empt a 4-anna share in certain properties sold in 17th December 1897 by Anupbati Koeri, the second respondent in each appeal, to Nirbhoy Chowdhry the first respondent in each of the appeals, now represented by his sons and grandsons.

The original owner of taluqa Rasulpur Bhatowni, the property the sale of which gave rise to the claims for pre-emption now in dispute, was one Maharaj Singh, who on 3rd March 1873 divided the taluqa equally between his two sons Jugal Pershad Singh, and Kamla Pershad Singh who thereon became the owners in possession of an 8-anna share each.

Jugal Pershad Singh in 1884 mortgaged his 8-anna share to Jowhari Lal and Mangniram the appellants. On his death suits for sale of the mortgaged property were brought against his widow, Rajbati Koeri: in those suits decrees were made on 2nd April 1889 in favour of the mortgagees, and in execution of the decrees the said 8-anna share was, on 12th January 1891, purchased by the appellants who thus became owners, and obtained possession, each of a 4-anna share.

On Kamla Pershad Singh's death he left as his heirs two widows, Sundarbati Koeri and Anupbati Koeri the second respondent: each of the widows obtained separate possession of a 4-anna share in the taluqa. On 9th July 1897 Sundarbati Koeri sold her 4-anna share to the appellants. Anupbati on 17th December 1897 sold her 4-anna share to Nirbhoy Chowdhry; and to enforce their right of pre-emption in connection with the last mentioned sale the appellants, on 30th June 1898, instituted the suits out of which the present appeals arose.

The plaints stated the facts as above showing that at the date of the sale the plaintiffs were co-sharers with Anupbati Koeri, and alleged that previous to the plaintiff's purchase from Sundarbati she and her co-widow Anupbati had, in order to pay debts contracted by their husband, borrowed Rs. 63,000 from Madan Mohan Lal and others of Ulao, and had executed a sudhbharna pottah in their favour on 10th January 1883, mortgaging their

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8-anna share in the taluqa, of which the usufructuary mortgagees remained in possession; that after the sale by Sundarbati to the plaintiffs on 9th July 1897, Anupbati having taken no steps to pay off her share of the sudhbharna debt, the plaintiffs deposited in Court under section 83 of the Transfer of Property Act, the entire debt, Rs. 63,000, and obtained a transfer of the mortgage; that they were willing to purchase the share of Anupbati also, but without their knowledge and consent she sold her 4-anna share to the defendant Nirbhoy Chowdhry. The plaintiffs also alleged that the first information they had of the sale was on 20th December 1897 and 15th January 1898 respectively, that they had duly complied with the requirements of the Mahomedan law for the assertion of their right of pre-emption, and that the amount entered in the deed of sale as the consideration was not actually paid. Each plaintiff made the other a defendant in his suit, and claimed a right of pre-emption over the whole property in suit; but if one was found entitled to only one-half of the property, then it was asked that each plaintiff should be awarded possession of a moiety of the same on depositing the purchase-money in equal shares.

The defence was a denial that the consideration set out in the deed of sale was not paid, and pleas to the effect that the plaintiffs had failed to comply with the formalities required by the Mahomedan law of pre-emption for the due assertion of a right to pre-empt; and that they were estopped by their conduct from claiming the right of pre-emption. The defendants, Nirbhoy Chowdhury and Anupbati Koeri, denied that the 20th December 1897 and 5th January 1898 were respectively the earliest dates on which the plaintiff's had become aware of the sale; and alleged that they had previously known and acquiesced in the negotiations and agreement and execution of the sale deed relating thereto; that the formalities were not carried out at the proper time and place; that the plaintiffs induced Sundarbati to sell them her 4-anna share by promising to pay to her any excess price which Anupbati might obtain; that they refused to purchase Anupbati's share for a higher price than Rs. 36,000; and that they were never ready and desirous to purchase her share at a proper price. The defendant Anupbati further stated that the

plaintiffs while refusing to raise their price, said "that if any other purchaser was willing to pay a higher price" Anupbati should sell to him; and that on account of the plaintiff's refusal to purchase her share she sold it to the defendant Nirbhoy Chowdhry for Rs. 44,850.

Issues were settled on these pleadings of which the following only were now material: (3) When were the plaintiffs aware of the purchase by the defendant Nirbhoy Chowdhry? (4) Whether the ceremonies of *talab-i-mowashibat* and *talab-i-istishad* were duly and legally peformed, and were *bona fide?* (5) Whether the plaintiffs had notice of, and gave consent to, the defendant Anupbati selling the property in suit if she got a higher price than Rs. 36,000? (6) Whether the plaintiffs' right of pre-emption had been lost by reason of their gross negligence, and were they estopped from claiming the same? and (7) For what price was the disputed property sold to the defendant, Nirbhoy Chowdhry, and what consideration did he actually pay for the property?

From the judgment of the Subordinate Judge (who delivered one judgment in the two cases) it appeared that the defendant Nirbhoy Chowdhry deposited in Court the amount of the sudhbharna debt on account of the share of his vendor, Anupbati Koeri, and that the plaintiffs withdrew from the Court subsequently to the institution of the suits the amount so deposited and "gave up possession over the disputed property." The Subordinate Judge found that the plaintiff Jowhari Lal was first informed of the sale on the 20th December 1897, and the plaintiff Mangniram on 5th January 1898, and that both the plaintiffs immediately on receipt of the information declared their intention to claim pre-emption, and thus duly carried out the formality of the *talab-i-mowashibat*. He also decided that the other formality of the *talab-i-istishad* had also been duly peformed and without "unreasonable delay or any act of gross negligence." As to this he found that on the evening of 20th December 1897 Jowhari Lal was told in general terms that a sale had been effected on 17th December: he sent a man to his agent at Gogri to verify the fact of the sale and to obtain a copy of the deed of sale if registered. From the 21st to the 26th December 1897 the office of the Registrar was closed for the Christmas holidays. On 27th

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December 1897 the agent applied for a copy of the deed of sale which he received on 30th December and forwarded by registered post on 31st to Jowhari Lal to whom it was delivered on 4th January 1898. It reached the Monghyr post office on 2nd January but the statement of the postal peon that he went to deliver the cover to Jowhari Lal on the 2nd was incorrect as that day was a Sunday and under the postal rules no registered letter could have been delivered on that day; the peon went to deliver it on 3rd January but found Jowhari not at home and delivered it to him on 4th. On 5th January Mangniram consulted Mr. Scott, a local Barrister. On 6th January both plaintiffs applied for a police guard to protect their agents who were taking the purchase money to tender it to Nirbhoy Chowdhry at Maheshpur, and on 7th January the *talab-i-istishad* was made at his house. On the 8th January 1898 arrangements were made to go to Anupbati's house and to the property sold. The 9th January was a Sunday and no steamers were running. On 11th and 12th January the *talab-i-istishad* was made on the property itself and at the house of Anupbati Koeri.

On the 5th and 6th issues the Subordinate Judge found that there was no satisfactory evidence that Anupbati's sale "was effected with the knowledge and consent of the plaintiffs, tacit or express," nor to show "that they positively declined to make the purchase, or that they told Anupbati to sell her share to any one she liked for a higher price." As to the plea of estoppel by conduct, the Subordinate Judge said: "I find in the first place that there is no reliable evidence to show that Nirbhoy Chowdhry was induced by the plaintiffs to buy the property in dispute, or that they waived their right of pre-emption by any act on their part. The Mahomedan law is and that the waiver relinquishment on the part of the pre-emptor must take place after and not before the sale." He also held that the actual consideration for the sale was Rs. 37,000. In the result he made a decree in favour of each of the plaintiffs for pre-emption of one-half of the property sold, on payment of one-half of the Rs. 37,000.

On appeal the High Court (RAMPINI and PRATT JJ.) agreed with the Subordinate Judge as to the performance of the *talab-i-mowashibat* by both the plaintiff's as soon as they heard of the

sale to the defendant, Nirbhoy Chowdhry, on 20th December 1897 and 5th January 1898 respectively The formalities required for the *talab-i-istishad*, they thought were also duly performed; but they were unable to agree with the Subordinate Judge that,

"They were perrormed with the necessary promptitude: it is clear that it is absolutely essential that this formal demand of the right of pre-emption should be made with the least practicable delay, and in our opinion it was not so performed. Neither of the plaintiffs went to the defendant's house and performed the *talab-i-istishad* until the 7th January 1898. Now, the plaintiff Jowhari Lal explains that he was engaged during this time in getting a copy of the deed of sale and in making arrangements for a police guard for the conveyance of the money which he tendered to the defendant No. 1 when he performed the *talab-i-istishad*. The plaintiff Magni Ram excuses his delay by saying he was absent in Benares up to the 5th January and that he could not go to the defendant No. 1's house on the 6th January, as he was afraid to go without the protection of the police, and so his agent proceeded there, as soon as he got a police guard, which was when the agent of the plaintiff Jowhari went to the defendant's house. But we do not consider these excuses satisfactory. The evidence discloses the fact that there was considerable and certainly sufficient delay to invalidate the *talab-i-istishad* on the part of both plaintiffs. The plaintiff Jowhari Lal instructed his agent Ram Baran Lal to procure a copy of the deed of sale. Ram Baran Lal went to the Registry office at Gogri, where the deed was registered, on the 21st December at 4 o'clock P. M. The office was then closed as it would naturally be, for 4 o'clock P. M. is after office hours. The witness states he went again on the 27th December. The Subordinate Judge observes that this delay was due to the fact that the office at Gogri was closed from the 21st to 26th December. But this was not so. There is no evidence to this effect. We have been referred to a list of the Executive Christmas holidays published by this Court, for the year 1897. From this list it appears that there were executive holidays on the 24th, 25th and 26th December only. There was, therefore, an unnecessary delay of at least three days in making the *talab-i-istishad*, which is fatal. But that is not all. The postal peon, Har Lal Mandar, deposes that he took the envelope containing the copy of the deed of sale to the plaintiff Jowhari Lal on the 2nd January. The Subordinate Judge remarks that this cannot be correct, for the 2nd January 1898 was a Sunday, when registered letters are not delivered. But this does not seem to be a sufficient reason for considering that the peon did not take the letter to the plaintiff Jowhari on the 2nd January. But, even if this conclusion be correct and that the postal peon did not go on the 2nd January, but on the 3rd, there was still delay on the part of the plaintiff, for the peon says he went twice and tendered the letter to the plaintiff and twice the plaintiff refused to take it and told him to take it away and bring it back and he would take it "after thinking over for some time." The plaintiff, according to the peon, only received the letter the third time it was tendered to him, that is, at 4 o'clock P. M. on the 4th January; so that there was clearly at least two days' delay in the receipt by the plaintiff Jowhari of the

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registered copy of the deed of sale. The plaintiff was evidently during these two days trying to gain time for the purpose of reflection. Then, the plaintiff Jowhari Lal was according to his own showing in possession of all the information he required for the *talab-i-istishad* on the 4th January by 4 o'clock P. M. But the *talab-i-istishad* was not made on his behalf till the 7th January, though the purchaser's house was at a distance of only 7 miles. He explains that he was engaged during this time in consulting a Barrister named Mr. Scott, as to how he should procure a police guard and in procuring a police guard and this is also the excuse given by the plaintiff Mangni Ram for his delay from the 5th to the 7th January. But it is unquestionable that this was an unnecessary delay. It is not necessary according to the Mahomedan Law to tender the money at the time of making *talab-i istishad*, so there was no necessity for any police to guard the money. Besides, the agent of the plaintiff, Mangni Ram, took his money in notes, which he could carry on his person, so in his case the police guard was doubly unnecessary. The cases of both plaintiffs must therefore fail on this ground. This being so, it is, strictly speaking, unnecessary for us to consider the other grounds of appeal. But we would wish to record that we are further unable to agree with the findings of the Subordinate Judge that there was no waiver on the plaintiffs' part of the right of pre-emption and that the price paid for the property was not Rs. 44,850 but only Rs. 37,000. . . . . We would only remark in conclusion there is in our opinion no force in the plea that the plaintiffs ratified the sale to the defendant. They may have accepted small sums out of the purchase money in payment of debts due to them, but they never intended, we consider, to ratify the sale, nor can their act be regarded as amounting to ratification. Moreover, this plea was not expressly taken in the written statements of the defendants or pressed in the Lower Court."

The High Court, therefore, decreed the appeals and dismissed the suits.

On these appeals,

DeGruyther and *G. H. A. Branson*, for the appellants, contended that they had duly complied with the provisions of the Mahomedan law in regard to the ceremony of *talab-i-istishad* and made a formal declaration of their intention to pre-empt, without delay; and discussed the evidence on this point to show that this had been done with as little delay as possible, and that the High Court had been wrong in reserving the decision of the Subordinate Judge in the appellants' favour. Reference was made to Baillie's Hamilton's Hedaya page 487; Baillie's Hedaya Vol. III page 569 (1791 Ed.); *Jarfan Khan* v. *Jabbar Meah* (1); Baillie's Digest of Mahomedan Law, page 481

(1) (1884) I. L. R. 10 Calc. 383.

Amjad Hossein v. *Kharag Sen Sahu* (1) where it was held that a reasonable time is allowed for reflection; Baillie's Digest of Mahomedan Law pages 489, 507; and Ameir Ali's Mahommedan Law Vol. I, page 598. The appellants did not acquiesce in the sale to Nirbhoy Chowdhury, nor did they do anything to waive their right of pre-emption; the withdrawal of the money deposited in Court by Nirbhoy Chowdhry after the sale was not a recognition of his title but of the fact that he had a right to redeem. The proper amount of consideration was that found by the Subordinate Judge. Though the parties were Hindus they had adopted the custom of pre-emption, and the Bengal Civil Courts Act (XII of 1887) section 37 shows the law to be applied in such cases.

Jardine, *K.C.* and *Cowell*, for the respondents, contended that the right of pre-emption had always been kept within narrow limits, and was not meant to be extended. It was a personal right and did not extend to the pre-emptor's heirs. The onus was on the appellants to show that the ceremonies were performed with necessary promptitude and the least practicable delay. Reference was made to Baillie's Digest of Mahomedan Law page 489; Ameer Ali's Mahomedan Law, 2nd Ed., Vol I, page 596; Sir Roland Wilson's Mahomedan Law, page 331 and page 335, Art. 379. The evidence in these cases showed that delay occurred in the performance of the *talab-i-istishad*, and the onus on the appellants had therefore not been discharged: *Jamilan* v. *Latif Hossein* (2) was referred to. If the pre-emptor had recognized the purchase in any way he was taken to have acquiesced in it, and waived his right of pre-emption: the right of pre-emption was waived where the pre-emptor has received a benefit by the sale; it was submitted that the application made by the appellants to take out the money deposited in Court by Nirbhoy Chowdhry to redeem the mortgage on the property was a waiver of the right of pre-emption and amounted to a relinquishment of it. Reference was made to *Habibunnissa* v. *Barkat Ali* (3); and Transfer of Property Act (IV of 1882) sections 82, 84.

(1) (1870) 4 B. L. R. (A. C.) 203. (2) (1871) 8 B. L. R. 160: 16 W. R. (F.B.) 13.
(3) (1886) I. L. R. 8 All. 275.

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DeGruyther, in reply, referred to *Jamilan* v. *Latif Hossein*(1).

The judgment of their Lordships was delivered by

SIR ARTHUR WILSON. These two consolidated appeals arise out of two suits, one brought by Mangni Ram, the other by Jowhari Lal, to enforce a right of pre-emption in respect of a share in certain properties comprised in taluka Rasulpur Bhatowni.

By conveyances, dated 28th January 1891 and 9th July 1897, Mangni and Jowhari had become the owners in equal shares of 12 annas of the property. The remaining four annas belonged to the respondent, Anupbati Koeri, who on the 17th December 1897 sold those four annas to Nirbhoy Chowdhry; and that is the sale against which the right of pre-emption is claimed. It has been found that Jowhari first heard of the sale on 20th December 1897, and thereupon he at once made the immediate claim to pre-empt which the law requires. Mangni first heard of the sale on the 5th of January 1898, and at once made his immediate claim. No question therefore arises with regard to the first claim by each of the two men. The principal controversy between the parties, and the point on which the Courts below have differed, is an alleged delay in making the second claim, the claim with witnesses, which also is required by law.

Jowhari, on hearing of the sale, which he did at Monghyr, at once sent to his Agent at or near Gogri to procure from the Registry Office a copy of the sale deed. The Agent obtained that copy and sent it to Jowhari, who actually received it on the 4th January. The High Court, differing from the Subordinate Judge, has found unreasonable delay at two points of these proceedings. It has held, *first*, that the copy from the Registry was not obtained and sent off as soon as it might have been. But an examination of the official calendar shows clearly that the learned Judges were led to this conclusion by a misapprehension as to the time during which the Registry Office was closed for the Christmas vacation. The High Court held, *secondly*, that Jowhari was guilty of wilful delay by his refusal to receive the packet containing the copy of the sale deed from the Post Office

(1) 8 B. L. R. 160, 164: 16 W. R. (F. B.) 13, 14.

peon. This conclusion is based upon the evidence of the peon himself, which the learned Judges believed. But the Judge who had this witness before him disbelieved his story. The story is admittedly inconsistent with the rules of the Post Office; and it finds no support from the witness's own endorsement made at the time. Their Lordships think that the Subordinate Judge was right in rejecting that story, and therefore the second allegation of delay fails.

The more serious case of delay is said to have occurred subsequently, and with respect to it the position of Mangni and Jowhari is identical. On the 5th January they knew everything which it was essential to know. On that day they took the advice of a local barrister, and in accordance with his advice they on the next day, the 6th January, applied to the proper officer for a police guard to protect the messengers and the money, which it was proposed those messengers should tender. This guard they obtained on the 7th, and messengers started. On that day those messengers made the claim (and, as has been found, with due formalities) at the house of Nirbhoy, the purchaser. On subsequent days the claim was renewed at the house of the vendor, and upon the land. The question that arises is, whether the interval that elapsed between the 5th January and the 7th January is a fatal delay. The Subordinate Judge held that it was not; the High Court held that it was.

There is no question of law in the case. It is clear that the right of pre-emption must be exercised, and the claims necessary to give effect to it must be made, with the utmost promptitude, and that any unreasonable or unnecessary delay is to be construed as an election not to pre-empt. And whether there has been such delay is a question to be determined upon the facts of each particular case. It is enough for their Lordships to say that, in their opinion, the grounds stated by the learned Judges of the High Court for overruling the decision of the first Court, on a pure question of fact, were insufficient.

Another point argued on behalf of the respondents arises in this way:—The two plaintiffs Mangni and Jowhari had obtained a transfer of a zerpeshgi mortgage binding the four annas share sold by Anupbati to Nirbhoy. After that sale Nirbhoy paid the

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mortgage money into Court, in accordance with the provisions of the Transfer of Property Act, for the purpose of redeeming the mortgage; after some hesitation the two plaintiffs took out that money. It was contended that by so doing they had recognised the title of Nirbhoy under his purchase and could not claim pre-emption.

Their Lordships cannot agree with this contention. Until a decree for pre emption was made, Nirbhoy owned the land as purchaser, and had a right to redeem. The taking out of the money by the plaintiffs, as mortgagees, was no recognition of anything more than this, and was quite consistent with the claim to pre-empt.

There remains only one other point for consideration, as to which again the Courts in India have differed; and that is as to the amount actually paid by Nirbhoy to Anupbati, the difference being Rs. 7,850. As to this point their Lordships do no find a clear and positive finding by the Subordinate Judge that the full sum named in the deed of sale was not in fact paid; and they are not prepared to dissent upon this point from the judgment of the High Court.

Their Lordships will humbly advise His Majesty that these appeals should be allowed; that the decrees of the High Court should be discharged with costs; that the decrees of the Court of the Subordinate Judge should be varied by directing the price of pre-emption to be calculated on the sum of Rs. 44,850 (the price named in the deed of sale from Anupbati to Nirbhoy) and the amounts to be deposited in the Court of the Subordinate Judge within such times as the High Court or the Subordinate Judge may determine; that subject to these variations and the payment to the appellants of additional costs, if any, the decrees of the Subordinate Judge should be restored; and that the cases should be remitted to the High Court in order that the necessary steps may be taken for the disposal thereof on the above footing.

The respondents who have resisted the appeals will pay the costs thereof.

Appeals allowed.

Solicitors for the appellants: *Watkins and Lempriere.*

Solicitors for the respondents: *A. H. Arnould & Son.*

J. V. W.