PRIVY COUNCIL.

JADU LAL SAHU

v.

JANKI KOER.

P.C.°
1912

Feb. 1, 2 ;
March 20.

[ON APPEAL FROM THE HIGH COURT AT FORT WILLIAM IN BENGAL.]

Mahomedan law—Pre-emption—Customary right—Hindus in Bihar—Right of pre-emption—Co-sharers—Assertion of right of pre-emption, delay in making—Power to perform ceremonies of assertion—Manager appointed by Court of Wards of estate of "disqualified proprietor" under the Court of Wards Act (Ben. Act IX of 1879)—Power and duties of manager under section 40 of Act—Basis of right of pre-emption among co-sharers in undivided mahal—Sanction of Court of Wards.

THE Mahomedan law of pre-emption has long been judicially recognised as existing among the Hindus in Bihar, to which the district of Champaran appertains.

Fakir Rawot v. *Emambaksh* (1) followed.

In a suit for pre-emption in respect of certain undivided shares in a number of villages comprised in a mahal, the estate of the plaintiff was in charge of the Court of Wards as that of a "disqualified proprietor" under Bengal Act IX of 1879, section 40 of which provides that the manager "shall manage the property . . . . diligently and faithfully for the benefit of the proprietor, and shall in every case act to the best of his judgment for the ward's interest, as if the property were his own :—

Held, that the manager appointed by the Court of Wards was, independently of the provisions of section 40 of the Court of Wards Act, competent, on behalf of the plaintiff, to perform the preliminaries essential to the assertion of the right to pre-emption : though if, in that case, the validity of his action depended on the sanction of the Court of Wards, their Lordships were of opinion that section 40 gave him full authority to act as he had done ; and in that view the adoption of his acts by the Court of Wards became unnecessary.

° *Present :* LORD SHAW, LORD ROBSON, SIR JOHN EDGE AND MR. AMEER ALI.

(1) (1863) B. L. R. Sup. Vol. 35 ; W. R. F. B. 143.

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A "mahal" is a unit of property, and though all the villages of which it consists may be separately assessed for revenue purposes, and each of the sharers may not have an interest in them all, the sharers are all co-sharers in the whole mahal, and jointly liable for the Government revenue Each co-sharer, therefore, has a right of pre-emption against the others in respect of any part of the mahal sold by any of them to a stranger. After partition by the Revenue authorities, each share so partitioned becomes a unit of property.

APPEAL from a judgment and decree (31st January 1908) of the High Court at Calcutta, which affirmed a judgment and decree (17th September 1906) of the Second Subordinate Judge of Muzaffarpur.

The contesting defendants (2 to 11) were the appellants to His Majesty in Council.

The suit giving rise to this appeal was brought by the first respondent, Maharani Janki Koer, to enforce the right of pre-emption in respect of certain property which had been sold by one Barkatunnissa (the first defendant, now the second respondent) a Mahomedan, to the appellants (defendants 2 to 11), who were Hindus. The plaintiff was the widow of the late Maharajah of Bettiah, whose estate was after his death placed in charge of the Court of Wards under Bengal Act IX of 1879. She sued by her next friend Mr. J. R. Lowis, the Manager of the estate under the Court of Wards. The property in respect of which it was sought to enforce pre-emption was situate in the Champaran district in Behar, in which the plaintiff, the vendor, the defendant Barkatunnissa, and the remaining defendants (12 to 25, respondents 3 to 16) were co-sharers. The defendants-respondents last named were joined as *pro formâ* defendants, no relief being sought against them.

The property in suit was the share of Barkatunnissa in mahal Motihari which she had sold to the appellants by a deed dated 28th July 1904, they previously having no proprietary interest in the mahal.

Mahal Motihari consisted of 31 villages. The plaintiff Janki Koer had shares in 18 out of these 31 villages. The defendant Barkatunnissa, the vendor, had shares in 24 villages out of the 31, but the plaintiff had shares in only 16 out of those 24 villages. In the assessment of the mahal the revenne derivable from each village was separately stated; but the mahal formed a single estate in the Collectorate rent-roll, and the whole mahal was liable to sale for arrears due from any of the proprietors.

The Subordinate Judge decided in favour of the plaintiff, and his decree was affirmed on appeal to the High Court.

The facts are sufficiently stated in the report of the case on the appeal to the High Court (BRETT and COXE JJ.) which will be found in I. L. R. 35 Calc. 575, and also in the judgment of Mr. Justice Brett at page 583 of the same volume.

On this appeal,

Kenworthy Brown, for the appellants, contended that the plaintiff-respondent had no right, of pre-emption by reason of any custom or territorial law existing amongst Hindus in Champaran, and if she relied on the rule of pre-emption, it was for her to prove that such a law or custom prevailed; there was no evidence of it, and the Courts below had erred in taking judicial notice of the Mahomedan law of pre-emption amongst Hindus in Bihar. Reference was made to Sir R. Wilson's Mahomedan Law, 376, 378: *Fakir Rawot* v. *Emambaksh* (1), and *Kantiram* v. *Woli Sahu* (2). Even if it were in force in Champaran as a rule "of justice, equity and good conscience," it was submitted that the plaintiff was not entitled to enforce it

(1) (1863) B. L. R. Sup. Vol. 35, 47. W. R. F. B. 143.

(2) (1869) 2 B. L. R. 330; 11 W. R. 251.

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under the circumstances of the present case. Proceedings for partition had been taken under the Estates Partition Act (V of 1897), and the order made under section 29 of that Act, had extinguished any right of pre-emption by destroying the relation of co-sharers which might previously have existed between the parties. If partition had taken place, the rule of pre-emption was inapplicable, for the object of pre-emption was to keep the property of the co-sharers together. The plaintiff had also lost her right of pre-emption by the purchase of a portion of the property in February 1905. The plaintiff, moreover, was not entitled to any right of pre-emption in respect of shares in villages sold by the vendor (the first defendant) in which the plaintiff herself had no interest, because in regard to those villages the plaintiff could not be considered to be a co-sharer with the first defendant. In the assessment too the revenue derivable from each village in the mahal was stated separately for revenue purposes; and the fact that the co-sharers were all jointly liable for the revenue was not sufficient for the basis of a right of pre-emption: *Joobraj Singh* v. *Tookun Singh* (1) was referred to. But if the right of pre-emption did exist, the rules and ceremonies of Mahomedan law should have been strictly observed, and it was contended that they had not been so observed. There was delay in performing the *talab-i-mawasibat*, after the plaintiff (through Mr. Lowes, the Manager of the plaintiff's estate under the Court of Wards) became aware of the sale; the circumstances in fact showing that he had been given the option of purchasing the property, and had refused to do so: *Nundo Pershad Thakur* v. *Gopal Thakur* (2). The ceremony of immediate demand for pre-emption was not made by the plaintiff respondent personally, and

(1) (1870) 14 W. R. 476. (2) (1884) I. L. R. 10 Calc. 1008, 1012.

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Mr. Lowis was not authorised to perform the essential ceremonies for a claim to pre-emption under the Mahomedan law. As to the power of the manager of an estate, reference was made to *Mir Sarwarjan* v. *Fakhruddin Mahomed Chowdhuri* (1); the Court of Wards Act (Ben. Act IX of 1879), sections 12, 14, 18, 39, 40, 41, 48, 49, 50 and 80; and *Wajid Ali Khan* v. *Hanuman Prasad* (2). The manager was not specially empowered or authorised to act in the matter, and no sanction of the Board of Revenue or the Court of Wards was obtained. There was no ratification which to be effective must be made at once: *Dibbins* v. *Dibbins* (3), *Bird* v. *Brown* (4), *Lyell* v. *Kennedy* (5) and *Bolton Partners* v. *Lambert* (6); which last mentioned case, though followed in *In re Portuguese Copper Mines, Limited, Ex parte Badman* (7), is said by the author of Fry's Specific Performance (5th Ed.), note A, page 781, to be of doubtful authority and needing reconsideration. If an act is done without power to do it, no ratification can make it valid. Ratification of an unauthorised act cannot be allowed to affect third persons: Cunningham and Shepherd's edition of the Contract Act (IX of 1872), section 200, was referred to.

De Gruyther, K.C., and *E. U. Eddis*, for the first respondent (who were called upon only on the question of the right of pre-emption between co-sharers with regard to their liability to pay revenue to Government), referred to Sir R. Wilson's Mahomedan Law, page 396, sections 377, 378; Hamilton's Hedaya, 548, Book XXXVIII "Right of Shaffa" Chapter I.

(1) (1911) I. L. R. 39 Calc. 232; L. R. 39 I. A. 1.

(2) (1869) 4 B. L. R. (A.C.) 139; 12 W. R. 484.

(3) [1896] 2 Ch. 348.

(4) (1850) 4 Exch. 786, 798; 19 L. J. Exch. 154, 158.

(5) (1889) L. R. 14 A. C. 437.

(6) (1889) L. R. 41 Ch. D. 295, 307.

(7) (1890) L. R. 45 Ch. D. 16.

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All the persons whose lands were within the boundaries of a mahal were co-sharers; both the plaintiff-respondent and the first defendant were therefore co-sharers in the whole of mahal Motihari, and had a right of pre-emption on the sale of any of the land in the mahal by any of the co-sharers to a stranger: see the judgment of BRETT J. at page 586 of I. L. R. 35 Calc. The right of pre-emption was not extinguished until a formal division had been taken defining the share of each co-sharer. Reference was made to *Mahadeo Singh* v. *Zitannissa* (1); *Wajid Ali Khan* v. *Hanuman Pershad* (2); *Joobraj Singh* v. *Tookun Singh* (3); and *Munna Lal* v. *Hajira Jan* (4). [MR. AMEER ALI referred to *Mahomed Hossein* v. *Mohsin Ali* (5)].

Kenworthy Brown replied.

The judgment of their Lordships was delivered by

March 20.

MR. AMEER ALI. The suit out of which this appeal arises was brought by the plaintiff-respondent to establish her right of pre-emption in respect of certain undivided shares in a number of villages comprised in mahal Motihari, situated in the district of Champaran.

The shares in question belonged to a Mahomedan lady named Barkatunnissa, the first defendant to this action, who sold the same to the Sahu defendants by a deed of sale dated the 28th of July 1904. Barkatunnissa owned an interest in 24 out of the 31 villages comprised in the mahal, whilst the plaintiff possesses shares in 18. The vendors had admittedly no proprietary interest in mahal Motihari prior to their purchase from Barkatunnissa.

(1) (1869) 7 B. L. R. 45 note; 11 W. R. 169.
(2) (1869) 4 B. L. R. 139; 12 W. R. 484.
(3) (1870) 14 W. R. 476.
(4) (1910) I. L. R. 33 All. 28.
(5) (1870) 6 B. L. R. 41; 14 W. R. F. B. 1.

The plaintiff claims that as a co-sharer in the mahal she is entitled to the right of pre-emption in respect of the shares sold to the Sahus by the first defendant.

Champaran appears to have been part of the Civil Division of Saran until some time after the institution of the suit. The action was accordingly brought in the Court of the Subordinate Judge of Saran, but owing to the subsequent amalgamation of Champaran with Tirhoot, it was tried before the Subordinate Judge of Muzufferpur (the Suddar station of Tirhoot) who decreed the plaintiff's claim. This decree has been affirmed by the High Court of Bengal.

It has been urged on behalf of the appellants that as the right claimed is a creation of the Mussulman law, and it is not proved that the Mussulman law of pre-emption is in force among the Hindus of the district of Champaran, both the pre-emptor and the vendees being Hindus, the action must fail.

The suit was instituted on the 7th of March 1905, the Sahu defendants filed their defence on the 16th of June, and issues for trial were settled on the 27th of September 1905. It was not, however, until the 11th of July 1906, when as the learned Judges of the High Court observe, "the suit was ripe for hearing," that the Sahu defendants for the first time raised a question as to the existence of the right of pre-emption among the Hindus of Champaran. Both the Courts in India have, in their Lordships' judgment, rightly overruled the defendants' objection.

The law of pre-emption, under which the plaintiff claims the right, was introduced into India with the Mahomedan Government. The Province of Bihar, to which the District of Champaran appertains, was an integral part of the Mahomedan Empire, and consequently it would not be surprising to find that in

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Bihar the right of pre-emption is enforcible irrespective of the persuasion of the parties concerned.

In the case of *Fakir Rawot* v. *Emambaksh* (1), Full Bench of the High Court of Bengal gave judicial recognition to the existence of the right of pre-emption among the Hindus of Bihar. In delivering the judgment the Chief Justice (Sir Barnes Peacock) reviewed the earlier cases bearing on the subject, and held that :—

". . . . . a right or custom of pre-emption is recognised as prevailing among Hindus in Bihar and some other provinces of Western India; that in districts where its existence has not been judicially noticed, the custom will be matter to be proved; that such custom, when it exists, must be presumed to be founded on and co-extensive with the Mahomedan law upon that subject, unless the contrary be shown; that the Court may, as between Hindus, administer a modification of that law as to the circumstances under which the right may be claimed, when it is shown that the custom in that respect does not go the whole length of the Mahomedan law of pre-emption, but that the assertion of the right by suit must always be preceded by an observance of the preliminary forms prescribed in the Mahomedan law, which forms appear to have been invariably observed and insisted on through the whole of the cases from the earliest times of which we have record."

In their Lordships' judgment the decision in *Fakir Rawot's Case* (1) is conclusive on the point raised on behalf of the defendants. Their abstention from taking the objection in a definite and distinct form at the earliest stage of the case was, it may fairly be presumed, due to the explicit enunciation of the law in the ruling referred to.

It has also been contended that the formalities insisted upon by the Mussulman law as essential preliminaries to the assertion of the right, could not be performed by the manager of the plaintiff's estate appointed by the Court of Wards.

It appears that the plaintiff is a "disqualified proprietor" under the Court of Wards Act (Bengal

(1) (1863) B. L. R. Sup. Vol. 35.

Act IX of 1879), having been declared to be incompetent to manage her property, and her estate is in the charge of the Court of Wards. Section 40 of the Act which defines the general duty of managers appointed by the Court of Wards provides that he "shall manage the property committed to him diligently and faithfully for the benefit of the proprietor, and shall in every respect act to the best of his judgment for the ward's interest as if the property were his own."

The Mussulman law insists that the first formality technically called "the immediate demand" should be observed by the pre-emptor or some one on his behalf immediately on receipt of the news of the sale, otherwise the right of pre-emption falls to the ground. The second formality consists in the repetition of the "demand" with as little delay as possible under the circumstances, in the presence of witnesses either before the vendor or the vendee or on the premises. The Courts in India have found that the ceremonies were duly performed by the manager in accordance with the prescriptions of the law. Had he failed in performing either of the ceremonies, he would have caused irreparable loss to the plaintiff, as her right would have been absolutely defeated by his laches. In their Lordships' opinion Mr. Lowis, as manager of the plaintiff's estate, was competent, independently of the provisions of section 40 of the Court of Wards Act, to observe the formalities on her behalf. The section, however, which defines his duties appears to their Lordships to fully clothe him with authority to act as he did; the validity of his action, therefore, did not depend on its subsequent adoption by the Court of Wards. In this view the English cases cited at the Bar have no application to the present case.

It was also urged that the claim to co-parcenary, on which the plaintiff's right of pre-emption was based,

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arose out of the fact that the vendor and pre-emptor were jointly liable for the payment of the Government revenue assessed on the villages comprised in the mahal, and that this joint liability does not constitute the co-parcenary contemplated by the Mahomedan law. This argument seems to proceed on a misconception of the land system of India. A mahal is a unit of property; it may consist of one village or of several villages: it may be owned by one or several proprietors who may have an interest in all or some of the villages comprised in the estate. Their joint liability for the Government revenue arises from the fact that they own undivided interests in the property; and that joint liability does not cease in the case of any co-sharer until his particular share has been partitioned by the Revenue authorities, when the share so partitioned becomes a separate unit of property.

On the whole their Lordships are of opinion that the decree of the High Court should be affirmed, and this appeal dismissed with costs, and they will humbly advise His Majesty accordingly.

Appeal dismissed.

Solicitors for the appellants: *T. L. Wilson & Co.*

Solicitors for the first respondent: *Sanderson, Adkin, Lee & Eddis.*

J. V. W.