

(1989) 09 GAU CK 0022

In the Gauhati High Court

Case No : Second Appeal No's. 95 and 96 of 1979

Ajijur Rahman Barbhuiya

APPELLANT

Vs

Haji Moshaid Ali Laskar and Others

RESPONDENT

Date of Decision : 25-09-1989

Acts Referred:

Citation : AIR 1991 Guw 66

Hon'ble Judges : B.P. Saraf, J

Bench : Single Bench

Advocate : S.S. Dey, for the Appellant;

Final Decision : Allowed

Judgement

B.P. Saraf, J.—These two second appeals arise out of the common judgment and decree passed by the Assistant District Judge No. 1, Cachar at Silchar in Title Appeals Nos. 22/1975 and 24/1975. The said two appeals were also directed against the common judgment and decree passed by the Munsiff No. 2, Silchar in Title Suit No. 77 of 1973.

2. The question of law involved in these appeals relates to the right of pre-emption under the Mahomedan Law.

3. The plaintiff filed a suit for preemption against the defendants. His case was the suit land belonged jointly to Musstt. Lalbi Bibi (defendant No. 7), Md. Mantaz Ali (defendant No. 8) and the plaintiff and the same was also jointly possessed by them. All of them belong to Mahomedan community and under the Mahomedan Law, they have right of pre-emption. On 3-6-72, the defendants Nos. 7 and 8, without the knowledge of the plaintiff, sold the suit land for Rs. 2,000/- to six persons (defendants Nos. 1 to 6). On 14-4-73 at about 10 a.m., while the plaintiff was sitting at his outhouse with other four persons and having gossips with them, one Abdul Latif alias Chandu Mia came and reported him that one Hazi Moshaid Ali Laskar and others had purchased the suit land from the defendants Nos. 7 and 8 for Rs. 2,000/-. Hearing this, the plaintiff immediately

shouted pronouncing "Shafi" and expressed that he would purchase the suit land at the same price at which it has been sold by his co-owners to the said purchasers. Thus, according to the plaintiff, he performed the Talabi-Mowasibat" and then he went to the suit land along with the four persons sitting with him and in presence of the said persons as witnesses standing on the suit land he declared and asserted that he was "Shafi" and further declared his intention to purchase the suit land which had been sold by his co-owners to the purchasers. The purchasers did not convey the suit land to the plaintiff accepting from him the price they paid to the vendors. Hence, the plaintiff filed the suit for pre-emption. The purchasers were made the defendants 1 to 6 in the plaint. The co-owners were defendants Nos. 7 and 8. All the defendants including the two co-owners of the plaintiff, contested the suit by filing a joint written statement. They denied the allegations made in the plaint contending that the defendants Nos. 7 and 8, the co-owners of the plaintiff being in dire necessity of money and proposed to sell their share to the plaintiff but on his refusal to purchase sold the same to the defendants Nos. 1 to 6. According to them, the plaintiff never declared or asserted the right of pre-emption in respect of the suit land. In course of trial, it was also brought on record that the plaintiff after asserting his right of pre-emption, during the pendency of the suit, purchased 1/6th share of the suit land from one of the six purchasers, namely, the defendant No. 2, Alauddin Laskar.

4. On the basis of the aforesaid pleadings, five issues were framed. The relevant issues were issues Nos. 2 and 4 which read as follows:

"2. Is the suit maintainable.

4. Is the plaintiff entitled to get the suit land by right of pre-emption?"

5. The learned Munsiff held that the plaintiff exercised his right of pre-emption only against defendant No. 1 as, according to him, the plaintiff was under the impression that the entire suit land was purchased by the defendant No. 1 whereas in fact he purchased only 1/6th share of the same. Accordingly, it was held that no right of pre-emption was exercised in respect of the defendants Nos. 2 to 6. The learned Munsiff, therefore, partly decreed the suit and upheld the claim of the plaintiff based on his right of pre-emption in respect of 1/6th share of the suit land purchased by the defendant No. 1 and dismissed the suit in respect of the balance portion of the suit land purchased by other five defendants.

6. Against the judgment of the learned Munsiff, both the plaintiff as well as the defendant No. 1 filed appeals before the Assistant District Judge Silchar who heard the appeals and held that the plaintiff did not know the formalities of the exercise of the right of pre-emption. This finding was arrived at on the supposition that a layman who never saw the actual observance of the formalities of pre-emption could hardly be expected to observe them correctly. As in the instant case it was found that the plaintiff did never see any exercise of the right of pre-emption nor did he ever exercise such right himself or take any

advice from any person, it was held that it was difficult to believe that such a layman could correctly observe the formalities laid down by law. It was also held that the witnesses were relatives of the plaintiff. The learned appellate Court also considered the purchase of 1/6th share of the suit land by the plaintiff from one of the purchasers (defendant No. 2) during the pendency of the suit and held that by doing so he waived his right of pre-emption. On the basis of the aforesaid finding it was held that the suit was not maintainable.

7. The aforesaid judgment of the learned Assistant District Judge has been challenged in appeal on the ground, inter alia, that the right of pre-emption was exercised by the plaintiff in accordance with law after complying with all the requirements applicable thereto.

8. I have heard Mr. S. S. Dey, learned counsel for the appellant. I have also considered the facts of the case and the law on the subject. The law in regard to the right of preemption has been stated in Mulla's Principles of Mahomedan Law in Section 226 of Chapter XIII as under :

"22. Pre-emption.-- The right of shufaa or pre-emption is a right which the owner of an immovable property possesses to acquire by purchase another immovable property which has been sold to another person".

The classes of persons who may claim preemption have been specified in Section 231 of the said text. The first class of persons named therein is "a co-sharer in the property" (shafi-i-sharik). The manner of making demands for pre-emption has been stated in Section 236 in the following words:

"236. Demands for pre-emption.-- No person is entitled to the right of pre-emption unless -

(1) he has declared his intention to assert the right immediately on receiving information of the sale. This formality is called talab-i-mowasibat (literally, demand of jumping, that is, immediate demand): and unless,

(2) he has with the least practicable delay affirmed the intention, referring expressly to the fact that the talab-i-mowasibat had already been made, and has made a formal demand -

(a) either in the presence of the buyer, or the seller, or on the premises which are the subject of sale, and

(b) in the presence at least of two witnesses. This formality is called talab-i-ishhad (demand with invocation of witnesses)".

From a reading of the aforesaid section which deals with the manner of pre-emption it is clear that the talab-i-mowasibat is spoken of as the first demand, and the talab-i-ishhad is the second demand. The third demand consists of the institution of suit for pre-emption. The talab-i-mowasibat and the talab-i-ishhad are conditions precedent to the exercise of the right of pre-emption. The talab-i-ishhad is as indispensable as the talab-i-mowasibat. The formalities must be

strictly observed and there must be a clear proof of their observance.

9. The talab-i-mowasibat should be made as soon as the fact of sale is known to the claimant. For validity of talab-i-mowasibat it is not necessary that it should be performed in presence of witnesses. It is enough if the pre-emptor makes known his intention in some way. But, it is of the essence of talab-i-ishhad that it should be performed before witnesses. It is also necessary when the talab-i-ishhad is made that the pre-emptor should refer expressly to the fact of the talab-i-mowasibat having been previously made. However, the formal demand called talab-i-ishhad can be made either in presence of the buyer or the seller or "on the premises which are the subject of sale".

10. It is well settled that the law relating to exercise of right of pre-emption is of a highly technical nature. Talab-i-mowasibat and talab-i-ishhad are conditions precedent for exercise of the right of pre-emption. The rules relating to aforesaid two talabs must be strictly complied with. Presence of the witnesses at the time of talab-i-ishhad is also important. It is for the pre-emptor to prove the fulfilment of all the requirements to sustain his claim for pre-emption. However, once the pre-emptor succeeds in adducing satisfactory evidence in regard to fulfilment of the aforesaid requirements, his claim cannot be rejected on hyper technical interpretation of the formalities or on microscopic examination of the evidence to find some fault here or there. In any event, the Court should examine the evidence and materials on record in regard to the observance of the formalities in a judicial manner keeping in view the practical and real state of affairs and also the fact that when the Mahomedan Law has given such a right to a person, it should not be whittled away by insisting hyper-technical and unrealistically strict compliance of the formalities accompanied with its exercise. It must be remembered that "formalities" after all are only formalities intended to serve some ostensible purpose and once that purpose is served, these should not be allowed to be used to take away the legal right of a claimant. "Formalities" in no case should be allowed to operate beyond the field allotted to them by law.

11. In the instant case, the plaintiff (co-owner) went to the suit land and made the formal demand i.e., talab-i-ishhad on the premises which were subject of sale. It is, therefore, not of much relevance for the validity of the same to decide whether one of the purchasers or all the purchasers were present at that time. That is relevant only when the demand is made at some place other than the premises which was subject of sale. In the instant case, it is clear from the evidence that the plaintiff asserted his right of preemption immediately after receipt of the report of the sale by exercising talab-i-mowasibat. Immediately on getting the report of the sale of land he shouted pronouncing "Safi" and expressed that he would purchase the suit land at the same, price at which his co-owners had sold it to other persons (defendants Nos. 1 to 6). He also went to the suit land and in presence of witnesses standing on the suit land declared and asserted that he was "shafi" and that he would purchase the suit land which the defendants Nos. 7 and 8 had sold to the defendants Nos. 1 to 6. Thus, he

completed the formality of talab-i-ishhad. These facts are borne out from the evidence on record. On the face of these facts, it is difficult to hold that the formalities for exercise of right of pre-emption were not strictly observed. There cannot be any presumption that one who had not seen the exercise of right of pre-emption or had not obtained the advice from other person cannot correctly observe the formalities laid down by law. It is difficult to accept such a proposition. Whether the formalities of pre-emption under the Mahomedan Law were complied with or not has to be decided by the Courts on the basis of evidence on record. Once it is established that the formalities were complied with, the Court should hold that there was a valid exercise of right of pre-emption and give effect to it.

12. In view of the aforesaid legal position, I am of the opinion that on the facts and circumstances of the present case, the learned Courts below erred in holding that the right of pre-emption was not validly exercised by the plaintiff and in dismissing the suit on the basis of such a finding, I am also of the opinion that the learned Courts below erred in law in holding that by purchasing 1/6th share of the suit land in respect of which the right of preemption was claimed from one of the six purchasers, the plaintiff waived his right of pre-emption.

13. The plaintiff, despite pendency of the suit based on his right of pre-emption, might so decide to purchase a part of it from one of the purchasers for very many reasons. That cannot be deemed to be waiver of his claim based on his right of pre-emption in respect of balance land not purchased by him. Therefore, the purchase of 1/6th share of the suit land from one of the defendants in the instant case cannot in any way prejudicially affect the suit filed by him so far as it relates to the rest of the land.

14. The appeals are, therefore, allowed. The judgments and decrees passed by the Courts below are set aside. The suit of the plaintiff stands decreed with costs.