
(1924) 02 AHC CK 0072
In the Allahabad High Court

Babu Samar Bahadur Singh and Another and Jit Lal and
Another

APPELLANT

Vs

Ahmad Zaman Khan

RESPONDENT

Date of Decision : 07-02-1924

Acts Referred:

Transfer of Property Act, 1882 — Section 120

Citation : 79 Ind. Cas. 495

Hon'ble Judges : Lindsay, J;Kanhaiya Lal, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

1. The question for consideration in this case is whether a right of pre-emption can be claimed in respect of an exchange. BY an agreement, dated the 21st October 1919 some land situated in the village Ramnagar Gansiari was given by Ahmad Zaman Khan in exchange for other land situated in the village Balika Jalalpur given by Samar Bahadur Singh and Jaduraj Singh. The object of the latter in taking the former property in exchange was to construe a road running from their village through the former village. The plaintiffs claim to be co-sharers of the village Ramnagar Gansiari and seek to pre-empt the land given by Ahmad Zaman Khan for the construction of the road. The wajib-ul-ars of that village provides that any co-sharer wishing to sell or mortgage the whole or part of his property shall, on the receipt of the price offered by a stranger, transfer it first to co-sharers who are descended with him from a common stock and are closely related, then to the other co-sharers of the village, and, on their refusal, to a stranger.

2. The Courts below, relying on the decisions in Niamat Bibi v. Asmab Bibi 7 A. 626 : A.W.N. (1885) 183 : 4 Ind. Dec. (N.S.) 740. and Bhagwan Singh v. Kherag Singh 4 A.L.J. 756 : A.W.N. (1907) 280, came to the conclusion that the custom recorded in the wajib-ul-are was applicable to an exchange ; and they granted a decree for pre-emption subject to the payment of the value of the property

mentioned in the deed of exchange. An exchange implies an interchange of property with another, and, except in so far as the price may not be payable in money, the rights and obligations attaching to an exchange, are analogous to those of a sale. Section 120 of the Transfer of Property Act lays down that save as provided in Chapter VI of that Act, each party to an exchange has the rights and is subject to the liabilities of a seller as to that which he gives, and has the rights and is subject to the liabilities of the buyer as to that which he takes. But those are rights and liabilities, which are enforceable between the parties to the exchange inter se. Third persons cannot be substituted in the place of either of them, because they cannot give what does not belong to them. The intrinsic value of the property given in "exchange, as distinguished from its market-value, would, moreover, vary according to the purpose or necessity for which the exchange was effected. The custom recorded in the wajib-ul-arz is in terms confined to a sale or mortgage; and in either of those cases a money equivalent would be an adequate compensation to the party concerned. The price which a person receives for the property exchanged, is Represented by the value of the property he gives and the convenience which he secures for him self. The latter cannot always be valued in money.

3. Indeed, as pointed out in *Bhagwan Singh v. Bajwanta Kunwar* 38 Ind. Cas. 157. the question for consideration in such a case is whether the incidents of the particular custom set up cover an exchange. The plaintiff in each case must prove not merely that some custom prevails but he must prove a custom under which he is entitled to claim pre-emption. The language used in the wajib-ul-arz in the above case was closely approximate to the language used here.

4. In *Niamat Bibi v. Asmat Bibi* 7 A. 626 : A.W.N. (1885) 183 : 4 Ind. Dec. (N.S.) 740, the language used was much more general. The right of pre-emption was there allowed in the case of a transfer of any kind, whereas in the present case the right is allowed only in the case of a transfer by sale or mortgage.

5. In *Bhagwan Singh v. Kherag Singh* 4 A.L.J. 756 : A.W.N. (1907) 280. the language used was not so general; but the decision in that case must be deemed to be qualified by the latter decision in *Bhagwan Singh v. Rajwanta Kunwar* 38 Ind. Cas. 157.

6. A reference has also been made to the decision in *Daryao Singh v. Jahan Singh* 3 Ind.Cas. 903 : 6 A.L.J. 735 : 31 A. 539, but the language used in in the wajib-ul-ars in that case was similarly more general, and the decision arrived at on the construction of the wajib-ul-ars there relied upon cannot, there fore, apply to the facts established in the present appeal. This appeal must, therefore, be allowed and the claim of the plaintiffs dismissed with costs in all Courts.