

(1920) 03 AHC CK 0009
In the Allahabad High Court

Ghulam Mohi-ud-Din Khan and Another	APPELLANT
Vs	
Hardeo Sahai and Sheobaran Singh	RESPONDENT

Date of Decision : 13-03-1920

Acts Referred:

Citation : (1920) ILR (All) 402

Hon'ble Judges : Tudball, J; Muhammad Rafiq, J

Bench : Division Bench

Judgement

Tudball and Muhammad Rafiq, JJ.—This and the connected appeal No. 27 of 1917 arise out of two suits for preemption brought by two pre-emptors Hardeo Sahai and Sheobaran Singh, on the basis of a sale, dated the 8th of December, 1914. The facts of the case are as follows:

One Rai Bahadur Sri Kishan Das was the owner of the property in dispute which is a 15 biswa share in the village of Gokalpur Piplot. This man became insolvent. One of his creditors applied to the Bombay High Court and on the 26th of September, 1913, he was adjudged an insolvent. His entire property including the property in dispute was vested in the official assignee of Bombay. That officer decided to sell the property, now in dispute, by public auction through Messrs, Crawford and Company, auctioneers of Bombay. The sale was originally fixed by the auctioneers for the 25th of October, 1914, at Aligarh. The village in question is a village lying in the Aligarh district. It was not, however, carried out on that date and the 8th of November, 1914, was fixed for it. On the 8th of November, the sale was held, but the official assignee refused to accept the bid made and the property was ordered to be again put up for auction. The 6th of December, 1914, was fixed for the sale. The affidavit filed by the auctioneer Albless in the High Court at Bombay in proceedings which were subsequently taken there by one Sheoraj Singh shows that the sale was advertised in local papers at Delhi; Aligarh, Cawnpore and Lucknow, also, that handbills were prepared and circulated so as to give as wide publicity as possible to the impending auction. It has also been established in the case that the sale was notified in the Aligarh

District Gazette. At the auction on the 6th of, December, the highest bid was that of Sheoraj Singh for Rs. 40,000. The sale was subject to confirmation by the receiver. Apparently, other persons, before that confirmation could be made, made other offers to the auctioneer of Rs. 40,500 and Rs. 41,000, the latter being by the present defendants appellants. These, offers were communicated to Sheoraj Singh and he was given an opportunity of making a higher bid if he wished to do so. He was allowed up to 11-30 on the 8th of December 1914, for this purpose. Within the time allotted he failed to make any offer and so the sale to the defendants appellants was confirmed by the official assignee and the sale was closed.

2. Sheoraj Singh subsequently wished to make another offer, but he was told that it was too late. He went down to Bombay, and there in the High Court he objected to the sale in favour of the defendants and asked the Court to set it aside. This the Court refused to do and his objections were disallowed. The sale. was thus clearly confirmed by the High Court in Bombay.

3. The two present plaintiffs, Hardeo Sahai and Sheobaran Singh, who are co-sharers in the village, took no objection whatsoever in the High Court in Bombay to the sale in favour of the defendants appellants. The sale deed in favour of the defendants appellants was executed on the 22nd of February, 1915; it was registered on the 8 h of March, 1915. The two present plaintiffs waited until the 8th of March, 1916, the extreme limit of the period of limitation and then they brought the two present suits to pre-empt the property. They based their claim on village custom, according to which they pleaded that they, had a prior right of purchase, the defendants being strangers to the village. They sought to pre-empt the pro-property for the sum of Rs. 18,000. Each claimed the whole property. Each was made party to the suit brought by the other. The official assignee was made a party to the case, but was subsequently exempted from the suit.

4. The defendants denied that there was any custom of preemption in the village at all. They further pleaded that the custom, if any, could not operate in the circumstances of the present case, as the sale was by order of a court. They further maintained that the full sale consideration of Rs. 41,000 should be paid by the pre-emptors, if they had a right.

5. The lower court found that the custom of pre-emption prevailed and that in the circumstances the plaintiffs were entitled to exercise their right of preemption. He found that Rs. 35.000 was the true consideration for the property and also expressed his opinion, that these two suits had really been brought by Sheoraj Singh in the name of these two plaintiffs in order that he might get hold of the property, which he could not obtain through his objections made in the Bombay High Court.

6. The defendants have appealed. The points pressed before us are: First of all, that there is no custom of pre-emption. Secondly, that if there be any custom, it cannot operate in the circumstances of the present case, the property having

been sold by compulsory sale under the order of the court. Thirdly, that if the custom does apply, still the two plaintiffs had sufficient notice of the sale; that they did not attempt to offer any bids at the auction sale though one of them was present through his agent; and that therefore they have lost their right to a decree for pre-emption by reason of their refusal to purchase.

7. No objection has been taken to the amount of Rs. 35,000 fixed by the court below. For the purposes of our decision we may assume that the custom of pre-emption does exist in this village though we, by no means, hold so. It seems to us that, assuming that the custom is as set out in the *wajib-ul-arz*, such a custom has no application to the circumstances of the present case. The *wajib-ul-arz* merely sets out that each co-sharer has a right to sell his property to whomsoever he pleases, but that he should transfer it first to a co-sharer who is the descendant of a common ancestor, and in case of refusal on his part, to other co-sharers in the village, and if they also do not take, then to any one he may like. If there is any dispute between the transferor and the person having a right of pre-emption as to the amount of price, then it will be decided with reference to the rate at which property is sold in the neighbourhood. Now in the circumstances of the present case, this being the custom, it is clear that no co-sharer has sold his share at all. The owner of the property, Rai Bahadur Sri Kishan Das, was declared an insolvent, not on his own application but on the application of one of his creditors and apparently against his will. His pro party was seized and taken from him by the court, was made over to an official assignee who thereupon set to work to realize his assets and distribute them among his creditors. It seems to us not only impossible but absurd to hold that the custom set out in the *wajib-ul-arz*, if there be one, could ever have been intended to apply to circumstances such as these. It is true that in sales carried out by a court in execution of decrees if a co-sharer is present at the auction and bids an equal amount with the next highest bidder, he is entitled under the Code of Civil Procedure, to take the property. But it is necessary for him to attend and to bid and to claim his right there and then. It is also true that under the rules of procedure such compulsory sales take place after public proclamation, which is taken to be sufficient notice to the pre-emptors along with the public to come forward and purchase the property. It seems to us that these remarks apply with equal force to the circumstances of the present case where the receiver publicly notifies the intended sale, fixes a date and invites the public, including all pre-emptors, to attend and to exercise their rights. In the present case we have it clearly proved that on the 6th of December, the date fixed for the auction, Murari Lal, the agent of the plaintiff Sheobaran Singh; was actually present at the sale. His nephew and his nephew's son were also present. Karan Singh actually bid for the property, also did Kalyan Singh. Murari Lal, the agent, could have, if he had wished to do so, made bids on behalf of his master. He is a person who holds a general power of attorney from Sheobaran Singh. He made no bids whatsoever. As for the plaintiff Hardeo Sahaj, he did not appear at all either in person or by agent. Out of sixteen persons whose presence at the sale

was noted, eight at least were either co-sharers of the village or persons connected with the village, so that it is evident that the notification of the sale by the auctioneers on behalf of the official assignee had been a very thorough one and ample notice, had been given, and that the plaintiff, who was vicariously present, made no attempt to exercise his right to purchase the property. We have not the slightest doubt that they received ample notice of the sale and we have no doubt whatsoever that Murari Lal attended the sale on behalf of his master. There has, therefore, in the present case, been no difference whatsoever practically between the procedure adopted in the case of a sale in execution of a decree and the procedure adopted in the present case. The sale was a sale against the wish of the owner by the court, a compulsory sale. It was duly notified and one of which we are satisfied that the plaintiffs appellants had full knowledge. They neither of them bid for the property or attempted to purchase it.

8. Our attention has been called to a decision of a Bench of this Court in *Kanhai Lal V Kalka Prasad* ILR (1905) .A11.,670. We may point out that there is one material difference between that case and the present case. In that case no public auction whatsoever was held, no opportunity was given to the pre-emptors to come forward and bid. There was a private sale carried out by the Collector. The two cases are, therefore, not on all fours. The one is, therefore, no authority for the other, although we may say we find it difficult to accept the correctness of the decision in that case. We find it impossible to hold the view that a Village custom which refers only to a voluntary sale by one co-sharer of his property can in any way apply to the case of an involuntary sale carried out against his wishes by a court through a Collector or an official assignee or any body else. The custom clearly never contemplated circumstances such as these. We, therefore, think that the custom, assuming it to exist, does not apply to the circumstances of the present case and that the plaintiff's suit on this ground at least ought to have been dismissed. But over and above that we think that the plaintiffs are out of court for another reason. They had full notice of the intention of sale. They were publicly invited to the auction. One did not appear, the other appeared through an agent and made no attempt to purchase. This action on their part was in our opinion tantamount to a refusal to purchase, and if it was necessary for the official assignee to follow the custom laid down in the *wajib-ul-arz*, he actually did follow that custom, for he publicly invited these co-sharers to purchase and they publicly refused to purchase.

9. We are asked to hold that even after such a sale as this it was incumbent upon the official assignee to offer the property to the pre-emptors at the price fixed upon, between him and the other purchaser and we are asked to adopt the view which was also expressed on this point in *Kanhai Lal V. Kalka Prasad* ILR (1905) All. 670. The more recent decisions of this Court differ from the ruling quoted and we see no reason to go back to the old opinion that was held. We think that where a property has been offered to a co-sharer at a certain price, and he has refused to purchase or to purchase it at that price it is no longer incumbent upon the vendor to go back to him and give him a second chance

when he has once found a purchaser for the property at the price at which he offered it to his co-sharer or a higher one. There are several rulings on this point and we see no reason to go behind the more recent rulings of this Court and refer to an old opinion which is no longer held in this Court. In the present case it is true that the actual sale made was carried out on the 8th of December, two days after the auction sale of the 6th of December, but that the sale was for a price still higher, than what was bid on the 6th of December, and on the 6th of December, the two plaintiffs had clearly by their actions notified their refusal to purchase at all, much less at a higher price than Rs. 40,000.

10. The point is raised by the appellants that the suits are barred by limitation. We do not think there is any force in that contention. The property is clearly one which is not) capable of physical possession. The registration took place on the 8th of March, 1915, and, the- suits having been brought on the 8th of March, 1916, were clearly within time. We think, however, that the plaintiff suits ought to have been dismissed on the two other points which we have already discussed above. We agree with the court below that these are not bond fide suits but have been brought by the plaintiffs for the benefit of Sheoraj Singh. Hardeo Sahai is a man of straw. Sheobaran Singh did not attempt to purchase when he had the opportunity. We, therefore, allow the appeals and set aside the decrees of the court below. The plaintiffs' suits will stand dismissed with costs in both courts.