

(1922) 11 AHC CK 0028
In the Allahabad High Court

Kedar Nath and Another

APPELLANT

Vs

Brij Narain Rai and Sital Prasad and Others

RESPONDENT

Date of Decision : 02-11-1922

Acts Referred:

Citation : (1923) ILR (All) 186

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

Bench : Division Bench

Judgement

Muhammad Rafiq and Lindsay, JJ.—The respondents to the present appeal are admittedly descended from a common ancestor. The defendants respondents Nos. 3-7 were indebted to some one in Calcutta and, at the instance of the creditors, were declared insolvents in 1912. The insolvents were residents of Grhazipur and owned property in the district of Ballia. Under the orders of the insolvency court, their property, situate in the district of Ballia, was made over to the official receiver. The latter disposed of the property by private sale in favour of defendant appellant, Raja Brij Narain Rai, on the; 22nd of September, 1916. The deed was registered on the 30th of September, 1916. The plaintiffs respondents Nos. 1 and 2, who are minors, sued under the guardianship of their mother for the recovery of the said property on the ground of pre-emption. They alleged that they and the insolvents were descended from a common ancestor and were co-sharers in the property in which the shares of the insolvents were sold by the official receiver to the defendant appellant. The claim was resisted on various pleas, with two of which we are principally concerned in this appeal. It was urged, on behalf of the contesting defendant, that the plaintiffs had knowledge of the proposed sale and did not choose to purchase the property in suit and, therefore, they have lost their right of pre-emption. Moreover, the sale made by the official receiver in favour of the defendant Raja was an involuntary sale in respect of which the right of pre-emption would not prevail. The learned Subordinate Judge came to the conclusion, on the evidence in the case, that the plaintiffs had no knowledge of the proposed sale. He was also of opinion that the sale in favour of the contesting defendant, though made by an official receiver,

did not stand on the same footing as a sale at a public auction and would not defeat the right of pre-emption.

2. In appeal before us it is contended strenuously on behalf of the defendant appellant that the evidence shows that the plaintiffs had knowledge of the sale in question and that, in any case, the sale being an involuntary sale, i.e., one under the orders of the court, no claim can be urged on the basis of pre-emption. The evidence on the record with regard to the alleged knowledge of the plaintiffs shows that the official receiver published in the Calcutta papers, both Hindu and English, his intention of selling the property in suit. There is no evidence that the plaintiffs, who are minors now and who were minors at the time of the publication in the Calcutta papers, were old enough to read those papers or that anybody else read the said papers to them. In our opinion the learned Subordinate Judge was right in holding that the plea for the defence that the plaintiffs knew of the proposed sale has not been made out. The second objection based upon the allegation of the sale being involuntary, has also not been established. It is based on the contention that if a vendor does not sell the property himself, but it is sold under the orders of a court; and the sale takes place publicly, no claim based on pre-emption can be brought in respect of that sale. We have been referred to the case of Ghulam Mohi-ud-din Khan v. Hardeo Sahai ILR (1920) All. 402 and special stress is laid upon the passage at page 407. We think that the facts of that case were quite different from the facts of the present case. The principal reason for the decision of that case is given at the bottom of page 407 It was said in that case:

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.

3. In the case before us the sale was not a sale in the sense of a public, auction. It is a fact that notice was given of the intention to sell the property, but as we have remarked above, the plaintiffs never knew of that notice and the sale was not a public; wale. With regard to properties sold at court auctions, there is a mode of pre-emption prescribed which is to be found in Order XXI, Rule 88. In our opinion the plaintiffs cannot be deprived of their right by the fact that the sale was an in voluntary sale. The, appeal, therefore, fails and is dismissed with costs.