

(1909) 04 AHC CK 0046
In the Allahabad High Court

Munshi Makund Sarup

APPELLANT

Vs

Musammat Sarvi Begam and Others

RESPONDENT

Date of Decision : 15-04-1909

Acts Referred:

Citation : 2 Ind. Cas. 65

Hon'ble Judges : John Stanley, C.J.; Banerji, J

Bench : Division Bench

Final Decision : Allowed

Judgement

1. This is a suit for the preemption, of a sale of half shares in three villages carried out by a sale-deed of the 15th of June 1905, in favour of the defendant-appellant Makund Sarup. The consideration mentioned in the sale-deed is Rs. 28,000. The villages comprised in it are Moiyapur, Phulehra and Shahzadpur Kananee. It is admitted that the plaintiffs pre-emptors have no interest in the villages of Moiyapur and Phulehra, but the Court below has given them a decree for pre-emption of these as well as of the third village, on the ground, as stated by it that the sale was jointly made and the properties and their price "could not be separated". The Court below was clearly in error in the view which it took. The plaintiffs having no shares in Moiyapur and Phulehra, are not entitled to pre-empt the sale of those villages. The learned Subordinate Judge's error was this: A pre-emptor is bound to claim pre-emption of all the property over which his right of pre-emption exists he cannot choose out of the properties, the subject of a gale, portion only and claim pre-emption of such portion. He must pre-empt the Whole or none at all. But that does not apply to a case in which along with villages in Which a pre-emptor has a pre-emptive right, other villages in respect of which he has no pre-emptive right are also sold. The pre-emptor cannot obtain a decree for pre-emption of property in respect of which he has no preemptive right at all. Therefore, the appeal must be allowed in respect of the villages of Moiyapur and Phulehra.

2. It remains then to consider the rights of the plaintiff in respect of the third

village Shahzadpur Kananee. In this village the plaintiffs are share-holders and admittedly have a right to pre-empt, but the question is on what terms are they so entitled to preempt. The price mentioned in the sale-deed is, as we have said, Rs. 28,000, but the learned Subordinate Judge came to the conclusion that portion of the sum so mentioned was fictitious and that the real price agreed to was a sum of Rs. 17,110 only. We must, therefore, see whether or not the real price was Rs. 28,000 or any less amount. In the sale-deed Rs. 28,000 is the sum mentioned in the body of the deed and details are given of the items which make up this amount in the schedule to it. The first item is a sum of Rs. 7,890 expressed to have been received by the vendor in cash on account of the consideration, for which a separate receipt was given to the vendee. This item the Court below has disallowed and the grounds on which it has done so are these, that the money might have been paid before the Sub-Registrar and that the only evidence in support of it is an unregistered receipt, dated the 15th of June 1905. Now it appears that the sale-deed was not registered until some time had elapsed after its execution; whereas the sum in question was said to have been paid at the time of execution. We have in support of this item not merely the statement contained in the deed of sale itself, but we have also the contemporaneous receipt which is signed by the vendor and in which not merely is the sum stated to have been renewed, but details are given as to the way in which it was paid. It is stated to have been paid in currency notes and cash, and we find in the receipt that the numbers of the currency notes are given, and the evidence of several witnesses shows how the cash was paid. Shah Tahmas, the husband of the vendor, was examined and he deposed that the consideration for the sale was Rs. 28,000 and that at the time of execution his wife received two currency notes for a thousand each, two for Rs. 100 each, one for Rs. 50 and 376 sovereigns, and gave a receipt for the same. Another witness, Nasir Ahmad Khan, who was an attesting witness to the sale-deed, stated that the money was paid on the day the sale-deed was executed, and that it was paid in currency notes and sovereigns; he also referred to the receipt, and stated that it was attested by one Saiyid Jalal Shah and the general attorney of the vendor. The plaintiff himself was examined and corroborated the evidence of the other witnesses on the subject of the consideration. As regards this sum of Rs. 7,890, we fail to discover any good ground for rejecting the evidence afforded by the sale-deed itself and the receipt for this sum and the evidence of the witnesses to whom we have referred. We think that the learned Subordinate Judge rejected this evidence on wholly insufficient grounds.

3. The next item which has been disallowed, and to which we would refer, is a sum of Rs. 2,000 which in the deed of sale is stated to have been left in deposit with the vendee to meet the expenses of suits relating to partition and mesne profits pending in the Court of the Subordinate Judge of Meerut. A letter was produced from the vendor's husband in support of this item, in which he admits that sums amounting to Rs. 1,450 had been expended on the purposes mentioned in the sale-deed and the defendant himself deposed that he had

applied towards those expenses sums amounting to Rs. 1,500 and that the balance remained with him to satisfy further expenses of the litigation. The learned Sub-ordinate Judge says as to this item that (the partition suit had been settled before the purchase and that the mesne profits case had not then been instituted, and how, therefore, the money could have been spent he was unable to see. On this ground alone, despite the evidence to which we have referred, the Court below disallowed this item of the consideration. We think that in this case too the evidence shows that the item of Rs. 2,000 was a bona fide portion of the price and not fictitious and that it was really left in the hands of the vendee to meet the expenses of the litigation referred to.

4. Another item which has been disallowed by the Court below is a sum of Rs. 1,000 which is said to have been left in the hands of the vendee to pay the salary of Abdul Majid, the attorney of the vendor. As regards this item it is true, as the Court below has pointed out that there is no evidence that any sum was due to Abdul Majid, but the vendee undertook responsibility to pay the Rs. 1,000 to Abdul. Majid and we have no reason to suppose that this entry was made in the details appended to the purchase-deed merely to inflate the purchase-money agreed to by the parties. It is very unlikely that if the parties desired to enter a fictitious sum as the consideration for the document, with a view to raise a difficulty in the way of pre-emption, they would have represented that a small sum such as Rs. 1,000 was left in the hands of the vendee to discharge the pay of Abdul Majid if such payment was not intended. If this item is not fictitious the decree for so inflating the price was clumsy in the extreme. We do not agree with the view expressed by the Court below as to this item. We think that this item must be treated as forming portion of the consideration.

5. This disposes of the three items which the Court below has disallowed. We see no reason for coming to the conclusion that the price agreed to be paid for the property was other than that which is named in the document. evidence of any worth has been given by plaintiff to show that the price named in the deed is higher than the market-value of lauds in the neighbourhood. We, therefore, hold that the price agreed to be paid was Rs. 28,000 and not the sum which the Court below has been pleased to fix. This being so, before we can determine this appeal, we must refer an issue for determination to the Court below. That issue is:

What part of the purchase-money of Rs. 28,000 is attributable to the village of Shazadpur Kananee, regard bring had to the respective values of the three villages the subject-matter of the sale?

6. The Court will determine what the respective values of these villages are and in accordance with these values fix the portion of the purchase-money of Rs. 28,000 which is properly attributable to Shahzadpur Kananee. We accordingly refer this issue to the Court below under Order 41 Rule 25, and direct the Court to take such relevant evidence as the parties may adduce. On return of the finding the usual ten days will be allowed for filing objections.