
(1940) 08 PAT CK 0006
In the Patna High Court

Rai Krishna Bahadur

APPELLANT

Vs

Ganga Prasad Sah and Others

RESPONDENT

Date of Decision : 15-08-1940

Acts Referred:

Bengal Tenancy Act, 1885 — Section 3(2)

Citation : AIR 1941 Patna 35

Hon'ble Judges : Harries, C.J.; Fazl Ali, J

Bench : Full Bench

Judgement

Harries, C.J.—This is a plaintiff's second appeal from concurrent decrees of the Courts below dismissing his claim for pre-emption. This second appeal was first heard by Dhavle, J. A number of Bench decisions, which, it was argued, were conflicting, were cited to him and he accordingly thought that it would be better if the matter were heard by a Bench. The case, has accordingly been placed before this Bench.

2. The plaintiff brought this suit against; the defendants claiming to pre-empt certain property, which had been sold by defendants 3 and 4 to defendants 1 and 2. According to the plaintiff, he and defendants 3 and 4 owned lands in village Dhariawganj appearing in khatas Nos. 273 and 190. Defendants 3 and 4 owned a half share in these lands and had sold the same to defendants 1 and 2. The plaintiff claimed that he had a; right to pre-empt these lands so sold to; defendants 1 and 2 who were outsiders and; not previously interested in the land. The, defendants by their defence admitted the: transfer in question but contended that that plaintiffs had no right of pre-emption. When" the case came before the learned Munsif," this preliminary point was raised, and the learned Munsif came to the conclusion that; the plaintiff had no right of pre-emption and accordingly dismissed the suit. On appeal the learned Subordinate Judge upheld the decision of the learned Munsif and dismissed", the appeal with costs.

3. Before this Bench it has been argued that both the Courts were wrong in coming to the conclusion that the plaintiff had no right of pre-emption. It is

common ground that the land in question consisted of some old parti land and a mango orchard. The vendors were not the proprietors of the land, and there is no doubt that the proprietor was one Rai Babu Raghunath Prasad Sahu and that is clear from the copy of the khatian which was filed in this case. In short the vendors were tenants of this land and not the owners. Both the Courts below were of opinion that persons holding tenancy" interests did not have a right to pre-empt" and accordingly dismissed the claim.

4. Mr. Hareshwar Prasad Sinha, who has" said everything that can be said in this case, has urged that a person in the position of an" occupancy tenant or a tenant of a garden or an orchard has a right to pre-empt. According to Mr. Sinha, he is, to all intents and purposes, an owner and has sufficient interest in the land to give him a right to pre-empt." He has urged that this Court in a recent decision held that a person holding rent-free lands could pre-empt, and he relies upon this case in support of his argument.

5. The case upon which he relies is *Chariter Dusadh v. Bhagwati Pandey* AIR 1934 Pat. 596 in which it was held that a person may be an owner of property so as to be entitled to pre-empt and yet not be a proprietor according to the definition of the term in Section 3(2), Ben. Ten. Act. "Brit" is a rent-free grant and may be an absolute gift. The fact that a britdar is treated as a tenant in the Record of Rights is not incompatible with the conception of his ownership of the land.

6. In that case a Bench consisting of Fazl Ali and Saunders JJ. came to the conclusion that a britdar had a right to pre-empt, but they based their decision on the ground that the britdar in that case was, to all intents and purposes, the owner of the property, and they are careful to point out that the fact that he was recorded in the Record of Rights as a tenant did not materially affect his position. The britdar apparently held all the rights in the land and therefore the Bench came to the conclusion that he was an owner and had a right of pre-emption. This case is no authority for the contention that a mere tenant can pre-empt. In fact it is an authority to the contrary. It has been laid down for many years that the person claiming a right to pre-empt must be an owner. At p. 473, Baillie's Digest of Mahomedan Law, the law is stated in this way:

There must be milk or ownership of the shuftee, or pre-emptor, at the time of the purchase, in the mansion on account of which he claims the right of pre-emption. So that he has no right on account of a mansion of which he is merely the tenant for hire, or that he has sold before the purchase, or has converted into a musjid, or place of worship. And if his right of property in the mansion on which his claim of pre-emption is founded is disputed by the purchaser, he must prove his title to it before he can take possession of that to which his claim of pre-emption is applied.

7. The rule as laid down by Baillie was approved of by a Bench of the Calcutta High Court in *Gooman Singh v. Tripool Singh* 8 W.R. 437, where it was laid down

that the Mahomedan law nowhere recognises the right of pre-emption in favour of a mere tenant upon the land. This view has been accepted by this Court in a number of cases. It is only necessary for me to refer to the last of these cases in which the earlier cases are discussed. In *Phul Mohammad Khan and Another Vs. Qazi Kutubuddin and Another*, a Bench of this Court held that there cannot be any right of pre-emption with regard to a mukarrari or raiyati interest. In this case the earlier authorities of this and other Courts are discussed, and it appears to me that it is now too late to contend that a tenant, be he an occupancy tenant or not, has a right of pre-emption.

8. As I have stated, one of the plots of land, which was the subject-matter of this sale, is described as old parti. It was apparently some old waste land, and it is admitted that the plaintiff and the vendors were not the proprietors of this property. They were at most tenants, whose rights were very strictly guarded and protected. The plaintiff, not having any proprietary interest in the property, could not, in my view, pre-empt the sale of this old parti land. To permit him to do so would be acting contrary to all the cases of this and other Courts to which I have made reference.

9. Another portion of the property was a mango orchard, and it has been strongly urged by Mr. Hareshwar Prasad Sinha that the plaintiff and the vendors, who were interested in this property, must be regarded as the owners. They had the rights in the trees; but even so the owner undoubtedly was Rai Babii Raghunath Prasad Sahu. They were tenants and though they had very wide rights they had no rights of ownership.

10. Mr. Sinha has urged that they could do what they liked with this property; but clearly they could not use the property except for the purposes for which it was let. They had no milk in the property, and that being so the plaintiff had no such interest as would give him a right to pre-empt the sale. As pointed out by Pazl Ali J., in argument, if tenants have a right to pre-empt a sale of this kind so also would the landlord, because he undoubtedly has a proprietary interest in the land. There would then be a conflict of rights and how would such a conflict be decided? It appears to me that the right of pre-emption has always been restricted to persons who have the proprietary interest, and that being so the plaintiff's claim in this case was rightly dismissed by the Courts below.

11. In the result therefore I would dismiss this appeal with costs.

Fazl Ali J.

I agree.