

(2018) 12 GAU CK 0057

In the Gauhati High Court

Case No : Regular Second Appeal No. 55 Of 2013

Rejia Sultana

APPELLANT

Vs

Nasif Khan And 8 Ors

RESPONDENT

Date of Decision : 21-12-2018

Acts Referred:

Citation : (2018) 12 GAU CK 0057

Hon'ble Judges : Prasanta Kumar Deka, J

Bench : Single Bench

Advocate : K Baruah

Final Decision : Allowed

Judgement

Heard Ms. D. Borgohain, the learned counsel for the appellant and Mr. A. Sattar, the learned counsel for the respondent Nos. 1 & 2. The names of proforma defendant Nos. 3 to 9 were struck off vide order dated 15.10.2014 of this Court.

1. Title Suit No. 41/05 was initially filed by Md. Azad Ahmed as the plaintiff No. 1 and Md. Nasif Khan against his brothers and sisters, the defendant Nos. 1 to 8 and the defendant No. 9, Mustt. Rejia Sultana for enforcing the right of pre-emption with respect to a plot of land purchased by the said defendant No. 9 who is the present appellant in this second appeal. The respondents herein this appeal are one Nasif Khan, the plaintiff-respondent No. 1 and one Mustt. Runuma Begum the proforma-defendant No. 10 in the suit. The plaintiff-respondent No. 1 Md. Azad Ahmed withdrew vide order dated 07.10.2005 from the suit as plaintiff thereby leaving the present plaintiff-respondent No. 1 as the sole plaintiff.

2. The facts pleaded by the plaintiff-respondent No. 1 that land measuring 8.9 lechas covered by Dag No. 1117 Periodic Patta No. 946 of town Nagaon Kissam forms the subject matter of the suit. One Malekan Nessa, mother of the plaintiff-respondent No.1 and the defendant Nos. 1 to 7 along with proforma defendant No. 10 was the original owner of the land who were possessing and residing in

the same house. On her death the said land devolved upon the legal heirs and regarding share of the legal heirs thereon, a dispute arose and Title Suit No. 118/96 was filed by the defendant Nos. 1, 2, 3, 4, 5, 6 and 7 and proforma defendant No. 10. Therein it was decided that no partition took place amongst the legal heirs of Malekan Nessa and all the legal heirs are entitled as shareholders of the said land. The plaintiff-respondent No.1 along with the other plaintiff expressed their willingness to purchase the share of other co-sharers at the market price. On 22.03.2005 the defendant No. 9 i.e. the present appellant along with others came to the land and tried to enter into the house as the said defendant-appellant purchased the land. On enquiry the plaintiff-respondent No.1 came to know that defendants No. 1, 2, 3 sold their shares by Registered Sale Deed No. 3261/04. The plaintiff-respondent No. 1 expressed his willingness to purchase the share of the defendants sold by them to the defendant appellant. The plaintiff-respondent No. 1 also came to know that vide Sale Deed No. 3260/04 the defendant Nos. 4, 5, 6 and 7 sold their shares of land measuring 5.2 lechas to the defendant appellant. The plaintiff-respondent No. 1 claimed his right of pre-emption to be enforced over the said land. The said defendants sold a part of undivided property left by Malekan Nessa and the plaintiffs respondents are co-sharers of the land and the plaintiff-respondent No.1 resides on the back portion of the land. The plaintiffs respondents have pre-emptory right over the undivided shares of the defendant No. 1 to 7 and accordingly the plaintiff-respondent No. 1 sought for declaration and enforcement of his pre-emptory right over the suit land.

3. The defendant No. 9-appellant jointly filed her written statement along with defendant Nos. 5, 7 and 8 contesting the suit stating inter alia, that there is no cause of action for the suit and the same is also not maintainable. The case of the defendants is that the entire land in the suit originally belonged to Malekan Nessa. Referring to the declaration made in the decree of the Title Suit No. 118/96, the defendants claimed that they have equal right and interest over the land left by Malekan Nessa. The plaintiff-respondent sold 19 1/3 lechas of land to one Mamoni Hazarika vide Sale Deed dated 20.07.1994 and delivered possession of the land. After selling of the land by the plaintiff-respondent No. 1 along with the other brother to a stranger they cannot ask for pre-emptory right over the land sold to the defendant /appellant by defendant Nos. 1 to 7. Accordingly, they sought for dismissal of the suit.

4. Based on the pleadings following issues were framed:-

1. Whether there is any cause of action for the suit?
2. Whether the suit is maintainable in its present form?
3. Whether the plaintiffs have got right of preemption over the suit land against the defendants?
4. Whether the plaintiffs have exercised their right of preemption over the suit land before the sale of the land by the defendants?

5. Whether the plaintiffs have waved their right of preemption over the suit land by transferring their share in the suit Patta vide Sale Deed No.-3297/94 to a stranger?

6. Whether the plaintiffs are entitled to the relief as prayed for in the suit?

5. The plaintiff-respondent side examined three witnesses and the defendant - appellant side examined only one witness. The learned trial court after hearing the parties dismissed the suit vide judgment and decree dated 29.11.2012. The learned trial court decided issue No. 3 in favour of the plaintiff-respondent thereby holding that he has the right of pre-emption over the suit land against the defendants. However, the issue No. 4 was decided against the plaintiff-respondent No.1. The learned trial court while deciding issue Nos. 3 and 4 jointly though held the issue No. 3 in favour of the plaintiff-respondent, but while deciding the issue No. 4 held as follows:-

"Considering the above principles of law, it is apparent that the talab-i-moswaibat and talab i. ishhad are condition precedent to the exercise of the right of pre-emption i.e. the person who claims the right of pre-emption in respect of any property, he must have fulfil these two conditions otherwise he is not entitled to make any such demand of pre-emption.

In this case, although the plaintiff has claimed his right of pre-emption over the suit land but he failed to comply with the rules of Mohammedan law aforementioned. That apart the plaintiff has failed to examine the witnesses before whom he expressed his intention of purchasing the suit land in order to prevent inconvenience. The preponderance of probabilities is not in favour of the plaintiff. That apart the evidence of PW3 Nanda Gupta is also not sufficient to form an opinion that the plaintiff able to prove the right of pre-emption. This being so it can not be said that the plaintiff has asserted his right of pre-emption over the suit land before the sale made out by the defendant.

Considering the facts and circumstances of the case and materials available in the record, the issue No. 3 is answered in favour of the plaintiff but the issue No:4 is answered against the plaintiff."

6. The plaintiff-respondent No. 1 filed Title Appeal No. 2/09 challenging the judgment and decree dated 20.02.2009 of the learned trial court and vide judgment and decree dated 29.11.2012 the said appeal was decided in favour of the plaintiff-respondent thereby reversing the findings of the trial court in issue No. 4. The defendant No. 9/appellant alone has preferred this second appeal challenging the judgment and decree passed by the First Appellate Court in Title Appeal No. 02/09 and this second appeal was admitted on 05.11.2014 on the following substantial questions of law:-

i) Whether the finding of the learned First Appellate Court that plaintiff fulfilled the condition precedent for pre-emption under Mohammendan law is perverse?

ii) Whether the plaintiff discharged burden of Talab-e-ishad so as to establish his

right of pre-emption over the suit property?

7. Ms. Borgohain, the learned counsel for the appellant submits that the learned trial court has rightly appreciated the evidence on record inasmuch as, it is mandatory on the part of the plaintiff-respondent to prove the conditions required under Section 236 (Mulla's Principles of Mahomedan Law) prescribing the requisites for making a demand for pre-emption. It is the submission of the learned counsel that it is mandatory to prove that at first the plaintiff-respondent has to assert the right on receiving information of the sale which is called Talab-i-moswaibat. Thereafter the plaintiff-respondent is to prove that he without delay affirm the intention referring expressly to the fact that the Talab-i-moswaibat had already been made and has made a formal demand either in the presence of the buyer or the seller or on the premises which are the subject of sale and in the presence of at least two witnesses. The said formality is called Talab-e-ishad. Referring to the evidence on record Ms. Borgohain submits that there is no mention of the second witness who was present at the time of Talab-e-ishad. nor there is any pleading to that effect naming the persons who were present at that relevant point of time. The plaintiff-respondent himself failed to prove the date on which he completed Talab-i-moswaibat. The PW-2 who claimed to witness the performance of the both Talab-i-moswaibat and Talab-e-ishad by the plaintiff respondent No. 1 stated that on the date on which the appellant (defendant No. 9) visited the land so sold to her there was commotion in the locality. But on the other hand the PW-1, the plaintiff-respondent No.1 in his cross-examination deposed that there was no such commotion on that particular date. The said evidence was rightly appreciated by the trial court but on the other hand the first Appellate Court failed to consider the said evidence in its true perspective to assess its evidentiary value. Accordingly, the learned counsel for the appellant sought for deciding the substantial questions of law in favour of the appellant.

8. Mr. Sattar, on the other hand made a reference to the evidence on affidavit of the sole witness of the defendant-appellant DW-1 wherein the said witness, one of the sellers of the land to the defendant-appellant admitted the fact that the plaintiff-respondent demanded enforcement of his right of pre-emption. It is further submitted that the purchaser, the defendant-appellant did not even grace the witness box though she filed the written statement jointly with her vendors. Mr. Sattar further states that the right of pre-emption ought to have been challenged by the appellant and to that effect she ought to have filed her written statement on her own. Regarding the presence of the required two numbers of witnesses while performing the formality of Talab-e-ishad, Mr. Sattar submits that the PW-2 in his evidence deposed that he witnessed the said formalities when there was commotion and there were various persons present who witnessed the said formalities. On a specific query as to fulfillment of the condition as per the mandate of Section 236, for enforcing the pre-emption right, Mr. Sattar submits that it is sufficient that the PW-2 had deposed that leaving aside him there were various persons who noticed the observance of the said formalities. The evidence on affidavit by the DW-1 itself negates the substantial

question of law no. 1 which requires no further argument. Accordingly, Mr. Sattar submits that the second appeal requires to be dismissed.

9. Considered the submissions of the learned counsel. Perused the records and the evidence. Section 236 (Mulla's Principles of Mahomedan Law) prescribes the required conditions before enforcement of the right of pre-emption which is reproduced hereinbelow:-

"Demands for pre-emption.- No person is entitled to the right of pre-emption unless-

1) he has declared his intention to assert the right immediately on receiving information of the sale. This formality is called talab-i-mowasibat (literally, demand of jumping, that is, immediate demand): and unless

2) he has with the least practicable delay affirmed the intention, referring expressly to the fact that the tala-i-mowasibat had already been made, and has made a formal demand- (a) either in the presence of the buyer, or the seller, or on the premises which are the subject of sale, and (b) in the presence at least of two witnesses. This formality is called talab-i-ishhad."

10. The PW-1 is the plaintiff-respondent No. 1. In his cross-examination he deposed that his elder brother and himself sold their respective shares of land to one Moromi Hazarika by way of a Registered Sale Deed. He also stated Mazid, one of the brothers also sold the land to Rezia after the decree was passed in the earlier suit. Leaving aside his share rest land was sold to Rezia without informing him. He cannot say the date on which he demanded to purchase the land at the time of selling Mazid's land. He did not demand to purchase the same as there was no money at that relevant point of time. Now as he has money so he decided to purchase and informed the same on 29.03.2005 at about 10:30 a.m. At the time of observing the formalities his elder sister Nazima Begum was present. He claimed that the proforma defendant No. 10 Runuma was present. About one year back from the date of deposition there was no commotion nor any disturbances for breaking of lock in the house standing over the land so sold. At the time of the demand made by him, there were many persons whom he knew like Nanda Gupta, Awal. But he does not know the names of other persons. PW-2 is Nanda Gupta, who in his cross-examination deposed that about 10/11 months back there was commotion over the land as the lock of the house standing over the suit land was tried to be broken which was resisted by the plaintiff-respondent No. 1. After the said incident again after one week and on another date about fifteen days thereafter he visited the suit land but he does not remember the date. He cannot name the neighbours residing thereon. On the said dates he witnessed various persons but he could not name them. On the date of incident he saw 10/15 number of persons. The PW-3 A. K. Md. Sazzad who except the devolution of the interest of the land upon the plaintiff-respondent did not depose anything with respect to the observance of the formalities by the plaintiff-respondent No.1 before enforcement of his right of pre-

emption.

11. From the aforesaid evidence on record and in absence of pleadings in respect of the names of the witnesses who were present while asserting the demand as required under Section 236 (Mulla's Principles of Mahomedan Law) referred hereinabove, it cannot be held that the plaintiff-respondent No. 1 discharged the burden of complete observance of Talab-e-ishad in order to establish his entitlement for enforcing his right of pre-emption over the suit land. The right of pre-emption is a weak right which normally requires evidence of such nature that no second thought is required to bring the preponderance of probabilities of facing inconvenience out of the sale to a person other than the one outside from the family. The material facts must be pleaded and proved. Performance of each and every conditions required to be fulfilled as prescribed under the mandate of the Mohamedan Law must be proved. For that purpose it is obligatory on the part of the person claiming enforcement of the said right to name the persons who witnessed performance of the pre-conditions as stipulated under the law not in the evidence only but in the pleadings also. Casual pleadings will not entitle a person to that relief inasmuch as a lawful purchaser has to be denied the right accrued on him/her on the basis of the lawful purchase over the land. But in the present case the plaintiff-respondent No.1 failed even to plead the names of the witnesses who were present at the time of performance of the pre-conditions for his entitlement to the right of pre-emption. Further the presence of two persons while performing Talab-e-ishad is a mandatory requirement. Failure to name such witness in the pleadings will carry an adverse inference against the person seeking enforcement of his pre-emptory right and the Court quite naturally would be reluctant to accept the preponderance of probabilities of observance of the mandatory requirements to its satisfaction.

12. Accordingly, the substantial question of law Nos. 1 and 2 are decided in favour of the defendant-appellant. This second appeal thus stands allowed. No costs. Send back the LCR. Prepare a decree.