

CASE NO.:
Appeal (civil) 661 of 1997

PETITIONER:
FAZLE RAB

Vs.

RESPONDENT:
MOHD. YAKEEN

DATE OF JUDGMENT: 05/02/2002

BENCH:
Syed Shah Mohammed Quadri & S.N. Phukan

JUDGMENT:

Phukan, J.

This appeal arising out of judgment of the High Court of Judicature at Allahabad is by the plaintiff. The parties shall be referred to as arrayed in the suit. The facts are as follows: -

The suit property originally belonged to one Sakhawat Ali. The property is situated in the village Sakrawal. A part of the village was included within the municipal limit of the town of Tanda. Sakhawat Ali transferred the suit property to his wife in lieu of dower debt and the same was sold in the year 1951 to one Mohd. Makin, predecessor of the defendant-respondent who was a stranger to the village. The plaintiff-appellant being a co-sharer filed the present suit claiming right of pre-emption. The suit was contested on the grounds inter alia that only the house was sold and not the land over which plaintiff could have exercised his right of pre-emption and that right of pre-emption ceased to be available once the suit property fell within the limit of municipality of Tanda. The trial court decreed the suit holding that the transfer in question was not confined to the house alone but extended also to the house-site. Relying on four judgments of the courts of the munsif and the subordinate judge for the years 1915, 1924 to 1926, the trial court also held that such a right of pre-emption existed even after the suit property was included within the municipal limit of Tanda. Before the first appellate court a dispute was raised as to whether the suit property was situated within the town of Tanda. The court on the basis of the report of the Commissioner gave a finding that on the date of transfer of the suit property the part of the village on which the suit property was situated ceased to be an agricultural village and it became a part of urban agglomeration by being included within the municipal limits of the said town and this finding has become final. The first appellate court dismissed the appeal. The High Court allowed the second appeal filed by the defendants by the impugned judgment holding inter alia that the custom relating to pre-emption was not available in the town of Tanda and that the plaintiff could not prove the right of pre-emption of a co-sharer in respect of suit property.

Admittedly, Oudh Lands Act 1876 is applicable to the suit land. The Chapter II deals with right of pre-emption. We may extract below clause (b) of Section 7 and Section 8 of the said Act,

which are relevant for the present purpose:

7. Presumption as to its existence.- Unless the existence of any custom or contract to the contrary is proved, such right shall, whether recorded in the settlement-record or not, be presumed-

(a)

(b) to extend to the village-site, to the houses built upon it, to all lands and shares of lands within the village-boundary, and to all transferable rights affecting such lands.

8. Its existence in towns to be proved.- The right of pre-emption shall not be presumed to exist in any town or city, or any sub-division thereof, but may be shown to exist therein and to be exercisable therein by such persons and under such circumstances as the local custom prescribes."

Section 7(a) speaks of a village-site and house built upon it and according to the said section existence of customary right of pre-emption can be presumed whether recorded in a settlement record or not. But under Section 8 right of pre-emption shall not be presumed to exist in any city or town and the person claiming such right of pre-emption in such area has to show and prove existence of such customs and such circumstances as the local customs prescribes.

The customary right of pre-emption has not been looked upon favourably as it operates as a clog on the right of the owner to alienate the property but in view of Sections 7 and 8 of Oudh Laws Act, 1876, legislative recognition has been given to customary right of pre-emption in the area where suit land is situated, the only difference is that in respect of customary right of pre-emption over a village site and house built upon it, presumption will arise but in case of its existence in towns it has to be approved.

Now the question is whether the plaintiff has been able to discharge his burden of proof to the customary right of pre-emption over the suit land. Before the trial court judgments for the years 1915 and 1924-26 have been proved. The courts in these judgments have recognised such a customary right of pre-emption of a co-sharer in respect of town land. It is well settled that judicial decisions recognizing custom are relevant and admissible notwithstanding that they are not 'inter parties'; and such evidence is the most satisfactory evidence. Learned senior counsel for the defendant has contended that the plaintiff did not produce any evidence to show that this custom was continuing on the date the sale deed was executed in 1951. Having proved that the above custom was continuing in respect of town land also and recognized by courts, it was the burden of the defendant to show that this custom was either abandoned or discontinued.

The High Court relying on the decision of Abdul Alim and Others versus Hayat Mohammad and Others [AIR (33) 1946 Oudh 188] held that the customary right of pre-emption ceased to exist in the town. Mr. P.S. Mishra, learned senior counsel for the plaintiff has submitted that the High Court misapplied this decision to the facts of the case. On the other hand Mr. Dinesh Dwivedi, learned senior counsel for the defendants has strenuously urged that the above decision squarely applied to the facts of the present

case and the plaintiff could not prove that the custom was continuing one.

That was a decision in respect of the customs of escheat. The High Court observed it as follows:

"It could still offer a very strong reason for non-application of custom of pre-emption as well to townships on account of complete transformation in the social system prevalent in cities as compared to the one prevalent in villages which must equally hold good for the custom of pre-emption."

In our opinion, the High Court erred in applying the above ratio to the case in hand only on the ground that there was a complete transformation in the social system prevailing in the cities. In view of the fact that courts recognized such customary right of pre-emption in respect of town land, the above reasoning of the High Court is not acceptable to us. The High Court has also recorded that there was no evidence that the custom was a continuing one. This finding is also erroneous inasmuch as the High Court overlooked the fact that this custom was not only prevalent in the town for a long period but there was no evidence from the side of the defendant that this custom was discontinued at any point of time. We, therefore, find considerable force in the submission of Mr. Mishra.

Mr. Dwivedi has further contended that plaintiff was not a co-sharer of the Mohal and the suit was liable to be dismissed on this ground. The contention of the learned senior counsel has to be rejected as on the facts, courts below have found that the plaintiff was a co-sharer. Relying on some provisions of the U.P. Urban Areas Zamindari Abolition and Land Reforms Act, 1957, Mr. Dwivedi has also contended that after enactment of the above Act the concept of pre-emption ceased to exist. This point is never urged either before the High Court or before the subordinate courts and, therefore, we need not examine this point. Moreover, we have perused sections of the Act to which our attention has been drawn by the learned senior counsel and we are unable to accept that after coming into force of the above Act, the customary right of pre-emption ceased to exist in the area in question.

Accordingly, we hold that the plaintiff being a co-sharer has acquired right of pre-emption over the suit property and, therefore, is entitled for a decree. We, therefore, set aside the impugned judgment of the High Court and restore the judgments of the two courts below. Cost on the parties.

...J.

[Syed Shah Mohammed Quadri]

J.

[S.N. Phukan]

February 05, 2002