

Privy Council Appeal No. 140 of 1920.

Sabz Ali Khan - - - - - *Appellant*

v.

Khair Muhammad Khan and others - - - - - *Respondents*

FROM

THE CHIEF COURT OF THE PUNJAB.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE
PRIVY COUNCIL, DELIVERED THE 17TH JANUARY, 1922.

Present at the Hearing :

LORD BUCKMASTER.

LORD CARSON.

SIR JOHN EDGE.

MR. AMEER ALI.

SIR LAWRENCE JENKINS.

[*Delivered by* LORD BUCKMASTER.]

The question raised upon this appeal is whether the appellant has proved his right to exercise the privilege of pre-emption conferred by Section 12 of the Punjab Pre-emption Act, 1905. The material part of that section is in these terms :—

“ 12. Subject to the provisions of Section 11, the right of pre-emption in respect of agricultural land and village immovable property shall, vest—

(a) In the case of the sale of such land or property by a sole owner or occupancy tenant, or, when such land or property is held jointly, by the co-sharers, in the persons who but for such sale would be entitled to inherit the property in the event of his or their decease, in order of succession ; ”

It is important to notice that the section does not contemplate merely inheritance by one person or even by a group of people who at the critical moment would be together equally entitled to inherit the property sold, if the vendor were dead, but it assumes that there will be different priorities as between the different claimants and that such priorities shall be determined in

due order of succession. The meaning of the rather obscurely worded Section 12 (a) is made clear by Section 25 of the Act, which is as follows:—

“ 25. When more suits than one arising out of the same sale are pending, the plaintiff in each suit shall be joined as defendant in each of the other suits, and in deciding the suits the Court shall in each decree state the order in which each claimant is entitled to exercise his right.”

There may be several claimants for pre-emption in respect of the same sale, those with inferior rights to pre-empt trusting that those whose rights are superior to theirs may be unwilling or unable to pay the pre-emption price decreed.

To be in a position to enforce by suit a claim to pre-empt under the Act the claimant must under Section 17 of the Act have given a notice within a limited time of his intention to enforce his right of pre-emption. It is obvious that a claimant to be successful need not have been at the date of the sale or at any time the heir-presumptive of the vendor. The heir-presumptive may not have the means to purchase or for any reason may not be desirous to purchase, and may have omitted to give within the time limited a notice of his intention to pre-empt.

In *Jang Bahadar Khan v. Karam Khan and Others* (Punjab Record of 1908, vol. 43, Civil Judgment No. 21, p. 132), which was a suit to enforce a right of pre-emption on a sale of agricultural land, the vendor had sons and brothers, who had not claimed to pre-empt, and who were admittedly nearer in succession to the vendor than the plaintiff was, the Chief Court of the Punjab (Rattigan and Lal Chand, JJ.) held “ that clause (a), Section 12 (of the Punjab Pre-emption Act, 1905) is applicable to the case, though the nearer heirs have not sued for pre-emption.” The Punjab Pre-emption Act, 1905, was repealed by the Punjab Pre-emption Act, 1913, which received the assent of the Governor-General on the 1st March, 1913, and in Section 15 (a) of the latter Act, Section 12 (a) of the former Act is re-enacted in clearer language and in conformity with the decision of the Chief Court above referred to.

It is now necessary to consider what were the facts in the suit in which this appeal has arisen and upon which it depends. The transaction which has been rightly held by each of the Courts below to have been a sale of agricultural land to which the Punjab Pre-emption Act, 1905, applied, took place on the 19th January, 1912, and this suit was brought on the 13th January, 1913. The suit was brought within the period allowed for bringing a suit for pre-emption. It is probable that the plaintiff had delayed to bring his suit in order to see whether any person with a preferential right would bring a suit for pre-emption. The vendors of the land in question were Khair Muhammad Khan, who is a respondent to this appeal, and his nephew Haidar Khan, who died before suit and is represented in the suit by his minor son Mauj Ali Khan under the guardianship of the respondent Khair Muhammad Khan. At the date of the sale the respondent Mauj Ali Khan was

about 7 years of age. The vendors were members of an agricultural tribal family, and were Bugti Bilochis. The plaintiff alleged that he was a member of that family. The vendee was not a member of that tribal family. The plaintiff, who is the appellant here, duly made his claim to pre-empt. The only other claimant to pre-empt was Mussammat Izzat Khatun, who was a daughter of Piran Khan, deceased, who had been a brother of Khair Muhammad Khan and an uncle of Haidar Khan. She had made her claim to pre-empt, and she brought her suit to enforce that claim, and was joined as a defendant in this plaintiff's suit. By agreement it was arranged that the evidence recorded in either suit should be treated as evidence in the other. Evidence was recorded which strongly went to prove that in the tribal family of which Mussammat Izzat Khatun was a member there was a custom by which females were excluded from inheriting so long as there was a male member living. Mussammat Izzat Khatun abandoned her suit, as the Trial Judge believed, because she knew that she could not prove that she as a female was an heir entitled to inherit, and her suit was dismissed.

When Mussammat Izzat Khatun's suit was dismissed, Sabz Ali, the plaintiff, became the only person claiming the right to pre-empt. His case was and is that he and the vendors were descended in male line from one Mirza Khan, and consequently that he was a person in whom was vested by Section 12 (a) of the Act a right of pre-emption in the property which had been sold on the 19th January, 1912. There is no contest as between Sabz Ali Khan and others who might be nearer in point of relationship. The sole question is whether he has proved his position of male relationship to the vendors. The learned District Judge before whom the case was tried thought that he had; but the Chief Court thought otherwise, and from their decree the present appeal proceeds.

The point thus raised is difficult for determination, because it must be remembered that the persons in relation to whom this question arises are not people among whom there are accessible records of births and deaths, nor with whom these events are preserved in written family memorials. It is therefore necessary to depend upon oral tradition, and this requires close scrutiny, but their Lordships see no reason why in such circumstances this tradition should be regarded as weak and unsatisfactory merely because it may in one or two respects fail to satisfy the strict conditions that would be necessary for proving a pedigree where records and documents could be used. A pedigree was in fact prepared, and it purported to show that the appellant, Sabz Ali Khan, was a descendant equally with the vendors from Mirza Khan. As to it Sabz Ali, the plaintiff, who was called as a witness for the defendants, stated, "The pedigree-table which has been filed along with the petition of plaint has been prepared by me. It was dictated to me by the (my) father. He had dictated it from his memory. We, Biloches, commit to memory the names of our

ancestors . . . names of ancestors are recited on the occasions of marriages. Those names are made mention of at the time of betrothal." The first witness was one of the vendors, who said in general words that Sabz Ali Khan was a "yakjaddi," which means that they were both descended from one ancestor, and he specified the two sons of Mirza Khan through whom the descent took place. It is true that he interposed a generation in his own branch of the family, which found no place in the pedigree prepared by the plaintiff; but beyond that his statement of his descent agreed with the pedigree, but he did not prove the exact descent and relationship of Sabz Ali Khan. The next witness, Mehran Khan, who is also a relation of the vendor, again declared that the appellant was their agnatic relation, and he knew the name of Sabz Ali Khan's grandfather, but he appeared to know no more. Jia Khan, who was also descended from the same stock, again referred in general terms to the relationship, and gave some more specific evidence. He spoke as to two sons of Mirza Khan, and traced down the descent to the vendor Khair Muhammad, but he also introduced a further generation beyond that shown in the pedigree. He asserted in general terms that Mirza Khan's son, Mehran Ali, was the ancestor of Sabz Ali Khan and himself. Muhammad Bakhsh gave definite evidence to the same effect, but he traced Sabz Ali Khan back to Mirza Khan in accordance with the pedigree put forward. Pir Bakhsh, who was a relation, gave detailed evidence to the same effect, and traced the appellant's descent in exact agreement with the pedigree; but he again introduced a further generation in the vendor's descent, and it is probable that the pedigree needs to be amended in this respect. The learned Judges of the Chief Court disregarded the evidence of this witness on the ground that he had stayed with an interested party, and this is doubtless a matter for consideration, but they also regarded his pedigree as inexact, and this is only accurate so far as the omission of the one step is concerned.

Two Sardars, Sardar Bahadur Mahrab Khan and Khan Bahadur Sardar Gauhar Khan, whose authority and credibility no one has ventured to question, both said that Sabz Ali Khan belonged to their family, although they were not personally acquainted with him, and his degree of relationship was remote. This evidence satisfied the District Judge, but in the Chief Court of the Punjab the evidence was considered insufficient, because a part of it does not agree in detail, as has already been pointed out, with the pedigree table propounded by the plaintiff.

With regard to some of the witnesses, the learned Judges of the Chief Court say that the knowledge of details is unreliable, and they comment upon the fact that the relationship is supported by no documentary evidence at all, the relationship between the defendants and the plaintiff being, in their opinion, too visionary to support the claim. Their Lordships are much impressed with the importance of showing that claims of this character which disturb a *bona-fide* purchaser in the quiet possession

of his property should not be based on untrustworthy evidence ; but it must be remembered that the Legislature has conferred these rights, and that if they are to be enjoyed by people where formal records cannot be expected to exist, reliance can only be placed upon memory and tradition, and in this case they think the evidence satisfies the necessary test. Their Lordships therefore think that the plaintiff has established his relationship, and that accordingly this appeal ought to be allowed, the decree of the Chief Court set aside with costs, and the decree of the District Court restored, with this variation, that the date when payment into Court of the sum decreed should be made shall be extended to the 1st July, 1922, or to such later date as the District Judge of Dera Ghazi Khan may fix. The appellant will have his costs of this appeal.

Their Lordships will humbly advise His Majesty accordingly.

In the Privy Council.

SABZ ALI KHAN

v.

KHAIR MUHAMMAD KHAN AND OTHERS.

DELIVERED BY LORD BUCKMASTER.

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