

APPELLATE CIVIL

Before Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Heaton.

1919.

December 10.

MOTILAL DAYABHAI (ORIGINAL DEFENDANT), APPELLANT v. HARILAL
MAGANLAL AND OTHERS (ORIGINAL PLAINTIFF), RESPONDENTS.*

Pre-emption—Custom of pre-emption amongst Hindus in Ahmedabad.

In Ahmedabad, a custom of pre-emption exists amongst the Hindus.

Umbaram v. Rughoonath Laldas⁽¹⁾, referred to.

FIRST appeal against the decision of G. M. Pandit, additional First Class Subordinate Judge at Ahmedabad in Suit No. 49 of 1916.

Suit to enforce a right of pre-emption.

The plaintiffs who were Jains residing at Ahmedabad sued to enforce their right of pre-emption in respect of a house bearing municipal No. 857 of Ahmedabad. They contended that the house No. 857 was close to their houses Nos. 856 and 857; that the wall between their house No. 856 and the suit house was common; that they had been getting light and air for over 20 years from the windows in their wall, which overlooked the suit house; that when they came to know that the house was being sold, they offered to purchase it for Rs. 7,000 but the vendor declined the offer; that on the date of the sale deed, they asserted their right of pre-emption and made a first demand according to law; that after the sale the plaintiffs in the company of two pleaders made a second demand in the presence of defendant's father and wife; that they were thus entitled to pre-emption; and that the custom of pre-emption amongst the Hindus at Ahmedabad was recognised from ancient times.

* First Appeal No. 112 of 1918.

(1) (1823) 2 Borr. 402.

The defendant, *inter alia*, contended that the alleged custom of pre-emption did not exist; that before the house was sold to the defendant, it was offered to plaintiff No. 3 but he refused to pay more than Rs. 4,500 and declared that it might be sold to another if it fetched more value; that the suit was, therefore, not tenable.

The Subordinate Judge held that the custom of pre-emption set up in the plaint was proved by the authority of several decisions the earliest of which was *Umbaram v. Rughoonath*⁽¹⁾; and by recitals in certain documents and oral testimony of witnesses.

The defendant appealed to the High Court.

B. J. Desai with *K. H. Kelkar* and *M. T. Telivala*, for the appellant.

Jinnah with *G. N. Thakor*, for the respondents.

MACLEOD, C. J. :—The plaintiffs sued to enforce their right of pre-emption in respect of the plaint house which is situated in Ahmedabad. An issue was raised whether the custom entitling a neighbour to pre-empt which was set up in the plaint was proved. The learned Judge found that it had been proved and passed a decree for pre-emption. The learned Judge has referred to a number of decisions both of this Court and of the Courts at Ahmedabad, the earliest case being that of *Umbaram v. Rughoonath*⁽¹⁾. With regard to all these decisions it may be remarked generally that it does not seem to have been ever disputed that the custom did not exist. The cases seem all to have been heard and decided on the basis that the custom did exist, the only dispute between the parties being as to whether on the facts of each case there was a right to pre-empt, and whether the proper ceremonies had been

⁽¹⁾ (1823) 2 Borr. 402.

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performed. Such being the case, as we have no evidence on the record adduced by the appellant to the contrary, it seems clear that for very many years it has been accepted as a fact in Ahmedabad that amongst Hindus a custom of pre-emption exists, and it is impossible for us on the evidence in this case, or rather in the absence of any evidence to the contrary, to hold that the appellant is right in his contention that there is no such custom. Therefore the appeal fails. The decree of the lower Court must be upheld with costs.

Decree confirmed.

J. G. R.

APPELLATE CIVIL.

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SATAGAUDA APPANNA ATAGOUDANAVAR (ORIGINAL PLAINTIFF)
APPELLANT v. SATAPA BIN DARIGAUDA GENAPNAVAR, DECEASED,
HIS HEIR DARIGOUDA BIN SATYAPA GENAPNAVAR AND OTHERS
(ORIGINAL DEFENDANTS), RESPONDENTS. *

Civil Procedure Code (Act V of 1908), Order XXXIV, Rule 1—Mortgage—Redemption—Parties in possession claiming independently of the mortgage, whether necessary parties.

The plaintiff as a purchaser of the equity of redemption filed a suit for redemption of a mortgage in favour of defendant No. 1. To this suit defendants Nos. 2 and 3 were added as parties in possession under Order XXXIV, Rule 1, Civil Procedure Code, 1908. These defendants were not in possession through defendant No. 1 and they claimed independently of the mortgage. A question being raised whether defendants Nos. 2 and 3 were necessary parties;

Held, that as these defendants claimed independently of the mortgage and against both the mortgagor and the mortgagee they could not be proper parties to the suit which was a redemption suit.

* Second Appeal No. 1068 of 1918.