Bhagwati Prasad Sah and Others

Vs

Bhagwati Prasad Sah and Another

Civil Appeal No. 672 of 1962

(P. B. Gajendragadkar, K. Subba Rao, Rghuvar Dayal, K. N. Wanchoo, J. C. Shah JJ)

10.10.1963

JUDGMENT

SUBBA RAO J. –

This appeal by special leave is directed against the judgment of the High Court of Judicature at Patna and raises mainly the question of the scope of the right of pre-emption under the Mohamedan law as applied by custom in Bihar.

The facts lie in a small compass. On June 17, 1930, Chathilal Sah of Sahebganj, who was the owner of a house and two golas bearing holdings Nos. 184 and 185 situated in mahalla Sahebganj, executed a will bequeathing the said property to his daughter Parbati Kuer and nephew Ram Swarup in equal shares. Under the said will Ram Swarup was to get the entire property in case Parbati Kuer died unmarried or issueless. On July 18, 1940, Ram Swarup sold one-half of the said property to the plaintiff-respondent 1. On July 27, 1942, the plaintiff-respondent 1 acquired under a patta some lands adjoining the said property. On October 10, 1949, defendant 3 (respondent 3 herein), alleging to be the husband of the said Parbati Kuer, sold the remaining half of the disputed property to defendants 1 and 2. It may be mentioned at this stage that the land on which the said house and golas stand is Dih-Basgit Lagani (rent-paying) land. On December 10, 1949, respondent 1 filed Title Suit No. 214 of 1949 in the First Court of the Munsif at Chapra for a declaration that he has a right to pre-empt the property purchased by appellants 1 and 2 and for directing them to transfer the said property to him. To that suit, the first appellant and his two sons were made defendants 1, 2 and 2A and their vendor was made defendant 3. The defendants contested the suit, inter alia, on the ground that the ceremonies of pre-emption were not performed and that under the Mohamedan law the plaintiff was not entitled to pre-emption, as the land on which the said house and golas stood was "rent-paying" land. The learned Munsif dismissed the suit. But, on appeal the Subordinate Judge of Chapra allowed the appeal and granted a decree for pre-emption in favour of the plaintiff-respondent 1. On appeal, the High Court agreed with the Subordinate Judge and dismissed the appeal. Defendants 1, 2 and 2A have preferred the present appeal by special leave against the Judgment of the High Court.

Mr. Varma, learned counsel for the appellants, raised before us the following four points : (1) the right of pre-emption infringes the fundamental right of a citizen under Art. 19(1)(f) of the Constitution and it is not saved by cl. (5) thereof : (2) the first respondent failed to establish his title and, therefore, his suit should have been dismissed on that ground; (3) the ceremonies of pre-emption were performed only on October 11, 1949 whereas the sale deed in favour of the appellants

was executed and registered on October 20, 1949 and, as the said performance of the ceremonies was premature, they having been performed before the sale was completed, the right of pre-emption could not be enforced; and (4) there is no right of pre-emption in respect of leasehold interest and, therefore, there cannot be a right of pre-emption in respect of a house standing on such land, as Mohamedan law does not recognize a right of pre-emption in mere super-structure.

Mr. Sarjoo Prasad, learned counsel for the respondents controverts the correctness of the said propositions. We shall deal with his arguments in the course of the judgment.

To appreciate the first contention, some dates may be recapitulated. Respondent 1 purchased one-half share of the property by a sale deed dated July 18, 1940. Appellants 1 and 2 purchased the other half of the property on October 10, 1949. The suit was filed on December 10, 1949. The Munsif dismissed the suit on April 14, 1953. The Constitution came into force on January 26, 1950. The appellants had no fundamental right on the date when they purchased the property. But it is said that under the law of pre-emption a person who seeks the assistance of a court with a view to enforce the right of pre-emption is bound to establish that the right existed on the date of the sale, on the date of the institution of the suit, and also on the date of the decree of the primary court - See Nuri Mian v. Ambica Singh ([1917] I.L.R. 44 Cal. 47.) and, therefore, the restriction on the appellants' fundamental right to acquire the property was not finally imposed before the Constitution, but became crystallized into an irrevocable restriction only at the time of the passing of the decree which was subsequent to the coming into force of the Constitution. We need not express our opinion on this question, as it has been held by this Court in Bhau Ram v. Baij Nath (A.I.R. 1962 S.C. 1476.) that a right of pre-emption vis-a-vis co-sharers was not an unreasonable restriction on the fundamental right of a person to acquire, hold and dispose of property. But learned counsel contends that that decision should be confined to a case of co-sharers who are related to each other, and should not be extended to co-sharers who are not related to each other. Reliance is placed upon the following observations in that judgment found at p. 1483 :

> "If an outsider is introduced as a co-sharer in a property it will make common management extremely difficult and destroy the benefits of ownership in common."

This sentence does not, in our view, sustain the distinction sought to be made by the learned counsel between co-sharers who are relatives and co-sharers who are not relatives. The word "outsider" in the said passage can only mean a person who is not a co-sharer. The judgment of this Court finally settled the question as between co-sharers. Following the decision we hold that the law of pre-emption vis-a-vis co-sharers does not infringe the fundamental right conferred under Art. 19(1)(f) of the Constitution.

The second question, namely, that of the plaintiff's title does not call for consideration by us. It was not raised in the courts below, and it being a pure question of fact, we cannot allow it to be raised for the first time before us. We, therefore, disallow it.

The next point raised by the learned counsel is that the ceremonies of pre-emption performed in this case were premature, as the sale was completed only on October 20, 1949 whereas the ceremonies were performed on October 11, 1949. This Court, by a majority, held in Ram Saran v. Domini Kuer (A.I.R. 1961 S.C. 1747.) that the registration under the Registration Act is not complete till the document to be registered has been copied out in the records of the Registration Office as provided in s. 61 of that Act. Learned counsel contends that a perusal of the sale deed dated October 10, 1949, ex facie shows that it was copied only on October 20, 1949. The question as to when a

document was copied out in the concerned register is certainly a question of fact. The argument was not raised either before the trial court or before the first appellate court. No issue was framed on the point. It was raised for the first time before the High Court. The learned Judges of the High Court pointed out that if the appellants wanted to take advantage of the said point, it was their duty to have raised it either in the trial court or in the first appellate court and to have adduced evidence by calling for the register from the registration department to show on what date the actual copying of the record was made under s. 61 of the Registration Act. In the circumstances, the learned Judges refused to allow the appellants to raise the point. The High Court, in our opinion, was certainly right in disallowing the appellants from raising the question of fact for the first time in second appeal. If the plea had been taken at the earliest point of time, the respondents might have had many defences and might have explained the various dates found on the documents. We cannot allow the appellants to raise the said plea.

Now we come to the substantial point raised in the appeal. The right of pre-emption is sought to be enforced in respect of a rent-paying land with a house thereon. Learned counsel for the appellants contends that the right of pre-emption does not arise on the sale of a leasehold interest in land and that in the absence of such a right there cannot be a right of pre-emption in respect of the super-structure alone. Learned counsel for the respondents, on the other hand, contends that under Mohamedan law the right of pre-emption exists in the case of akar i.e., a house or mansion, to enable the co-sharer to have peaceful enjoyment thereof and that the fact that there is no right of pre-emption in respect of a leasehold interest in land does not in any way detract from that right. He further contends that whatever might have been the strict incidents of the right of pre-emption under Mohamedan law, this Court cannot ignore the modern evolution of law recognizing the transferability and heritability of leasehold interest in land.

Before we consider the problem thus presented for our decision, it would be convenient at the outset to notice certain general principles relevant to the present enquiry. It has not been disputed that Hindus in the Province of Bihar came to adopt the Mohamedan law of pre-emption as a custom. This was because under the Muslim rule the law of pre-emption under the Mohamedan law was administered as a rule of common law of the land in those parts of the country which came under their domination. We must, therefore, look to Mohamedan law to ascertain the incidents of the right of pre-emption unless it is established in a particular case that by custom the said law has been modified to any extent. Being a customary law, it is not permissible for courts to extend the custom beyond the limits within which upto now it has been recognized. The concept of rationalization is out of place in the ascertainment of the customary incidents of the right of pre-emption. This Court in Bishan Singh v. Khazan Singh ([1959] S.C.R. 878.) considered the law on the subject and laid down the propositions flowing from the discussion. The following propositions are relevant to the present enquiry; (1) The right of pre-emption is simply a right of substitution, but not of re-purchase i.e., the pre-emptor takes the entire bargain and steps into the shoes of the original vendee; (2) it is a right of acquire the whole of the property sold and not a share of it; and (3) the right being a very weak right, it can be defeated by all legitimate methods, such as the vendee allowing the claimant of a superior or equal right being substituted in his place. It is, therefore, settled law that the pre-emptor must take the entire bargain : he cannot split up the bargain and claim to be substituted in respect of a portion of it either on the ground that he does not require a part of it or for the reason that he is entitled to claim pre-emption only in respect of a part of it. Further, the right being a weak one, a court need not be astute to rationalize the doctrine so as to make it fit into modern trends of property law. Indeed, it should be reluctant to extend it beyond the incidents clearly recognized by Mohamedan law or by custom.

With this background let us now turn to the question that arises in this case. The subject can conveniently be considered under three heads : (i) the pre-emptor; (ii) the vendor; and (iii) the property in respect of which the right is claimed. In Baillie's "Digest of Moohummudan Law" the following passage appears at p. 478 :

> "When it is said that akar (such as mansions, vine-yards and other kinds of land) are proper objects of the right of pre-emption, it is by virtue of a right of milk, or ownership, that they are so."

Mahmood J. in Gobind Dayal v. Inayatullah ((1885) I.L.R. 7 All. 775.) observed at p. 779 thus :

> "Pre-emption is a right which the owner of certain immovable property possesses, as such, for the quiet enjoyment of that immovable property, to obtain, in substitution for the buyer, proprietary possession of certain other immovable property, not his own, on such terms as these on which such latter immovable property is sold to another person."

The same learned Judge in Sakina Bibi v. Amiran ((1888) I.L.R. 10 All. 472, 477.) states that in the pre-emptive tenement (the tenement by the ownership of which the pre-emptor wants to exercise his right of pre-emption), the pre-emptor should have vested ownership and not a mere expectancy of inheritance of a reversionary right, or any other kind of contingent right, or any interest which falls short of full ownership. Beaumont C.J. in Dashrathlal v. Bai Dhondubai (A.I.R. 1941 Bom. 262.), after considering the law on the subject, accepted the view that the custom of pre-emption only exists as between freeholders, that is to say neighbouring lands in respect whereof the custom is claimed to apply must be freehold and that the land sought to be pre-empted must also be free hold. This Court, in Shri Audh Bihari Singh v. Gajadhar Jaipuria ([1955] 1 S.C.R. 70, 80.), has laid down the correct legal position thus :

> "..... the benefit as well as the burden of the right of pre-emption run with the land and can be enforced by or against the owner of the land for the time being although the right of the pre-emptor does not amount to an interest in the land itself."

This legal requirement of the full ownership of the pre-emptor may be traced either to the fact that "in ancient times Mohamedan law did hot recognize leases although it recognized hire of land for the purpose of user, or to the circumstance that the right was conferred to enable the pre-emptor to prevent an undesirable person from becoming his neighbour" which would not be the case if he was only a temporary occupant of the property in respect whereof the right arose. Whatever may be the reason, it may safely be held now that the pre-emptor must be the owner of the property in respect whereof he claims the right of pre-emption.

The next question, namely, the quantum of interest which the vender shall possess in the land sought to be pre-empted depends upon the doctrine of reciprocity. Unless the land in respect of which the custom is claimed and the land sought to be pre-empted are freeholds, the principle of reciprocity will be defeated. To illustrate : "A" has full ownership in a land in respect of which he claims the right of pre-emption; the co-sharer vendor has only a leasehold interest in respect of the land sought to be pre-empted; if the pre-emptor had sold the land earlier, the vendor having only a leasehold interest in his land, could not have claimed the right of pre-emption in respect of his land, for he had no full ownership in the land. The absence of this reciprocity gives an advantage to one of the sharers which the Mohamedan law does not permit. This doctrine of reciprocity has been succinctly

stated by Mahmood J. in Gobind Dayal v. Inayatullah ([1885] I.L.R. 7 All. 775.) in the passage we have extracted earlier. In Mt. Bibi Saleha v. Amiruddin ([1929] I.L.R. 8 Pat. 251.) the said doctrine was restated. It was held therein that a mukarraridar holding under a co-sharer had no right to pre-empt as against another co-sharer and as a mukarraridar could not claim pre-emption, the co-sharer on the doctrine of reciprocity, which is well understood in the Mohamedan law, could not claim pre-emption against the mukarraridar. A Full Bench of the Bombay High Court in Dashrathlal v. Bai Dhondubai (A.I.R. 1941 Bom. 262.) has given its approval to the said principle. This Court in Shri Audh Behari Singh v. Gajadhar Jaipuria ([1955] 1 S.C.R. 70, 80.) succinctly put the legal position in the following words :

> "The crux of the whole thing is that the benefit as well as the burden of the right of pre-emption run with the land and can be enforced by or against the owner of the land for the time being although the right of the pre-emptor does not amount to an interest in the land itself."

That leasehold interest is not subject to the law of pre-emption has been well settled : see Baboo Ram Golam Singh v. Nursingh Sabey ([1876] 25 W.R. 43.), Mohammad Jamil v. Khub Lal Raut ([1921] 5 Pat. L.J. 740.); Sakina Bibi v. Amiran ([1888] I.L.R. 10 All. 472, 477.); Phul Mohammad Khan v. Qazi Kutubuddin (A.I.R. 1937 Pat. 578.); Moorooly Ram v. Baboo Hari Ram ([1867] 8 W.R. 106.); Rameshwar Lal v. Ramdeo Jha (A.I.R. 1957 Pat. 695.); and Nathuni Ram v. Gopinath (A.I.R. 1962 Pat. 226 (F.B.)). Indeed this legal position has not been controverted by learned counsel for the respondents.

Now let us address ourselves to the main contention of the respondents, namely, that the right of pre-emption exists in the Mohamedan law in respect of akar which includes a building, that the main purpose intended to be served by the said right is to prevent an undesirable person from becoming the sharer of the house and that, therefore, it would be unrealistic to negative that right in the case of a house on the ground that the land on which the house stands is a leasehold interest. Reliance is placed upon the following passage in Charles Hamilton's "The Hedaya", 2nd Edn., at p. 558 :-

> "It is observed, in the abridgment of Kadooree, that Shaffa does not affect even a house or trees when sold separately from the ground on which they stand. This opinion (which is also mentioned in the Mabsoot) is approved; for as buildings and trees are not of a permanent nature, they are therefore of the class of movables."

Relying upon this passage it is contended that, as in the present casea the house was sold along with the ground, the doctrine of "Shaffa" applies to the house. But this passage must be understood on the assumption that the right of pre-emption exists in respect of the land on which the house stands. In Baillie's "Digest of Moohummudan Law", the legal position is made clear. Therein the author says at pp. 479-480 :

> "When a person has purchased a palm-tree to cut it down, or when he has purchased it absolutely, there is no right of pre-emption in it. But if it be purchased with its roots and the ground on which it stands, it is liable to the right. The rule is the same with regard to buildings purchased for removal, and the same buildings purchased with their foundations; and there is no pre-emption in the former case, while there is in the latter."

This passage indicates that a building sold as a super-structure is not subject to the right of pre-

emption, for it would be in effect a sale of a movable. Unless the house is sold with its foundations, that is to say with the land on which it stands, there is no right of pre-emption in regard thereto. Though it may be said that in the present case the house was sold with its foundations, the same principle will have to be applied, for the right of pre-emption cannot be invoked in the case of a leasehold interest. In effect and substance the right is sought to be invoked in the case of the building debors the foundations which the law does not permit. Reliance is placed upon the proposition found in para. 370 of Wilson's Anglo-Muhammadan Law, which reads :

> "If a house is sold apart from the ground on which it stands with a view to being pulled down, so that it is in fact a sale of the materials, no right of pre-emption arises with respect to it. If it is sold for occupation as a house, then pre-emption can be claimed on the ground of vicinage by the owner of any adjoining land or house (and perhaps by the owner of the site itself, supposing him to be a different person from the vendor of the house, even though he should happen to own no land except that covered by the house)."

It is said that the words in the brackets conceding the right of the owner of a site to pre-empt the house sold as a house indicates that the real principle is whether the house is sold as a habitate or only as materials and that in the former case irrespective of the ownership of the land or the existence of the right of pre-emption in respect thereof, the sale of the house can be pre-empted. The opening word of the passage, namely, "perhaps", shows that the author himself is not sure of the legal position. That apart, the illustration only deals with a land in respect of which there can be a right of pre-emption, i.e., the owner of the land has freehold interest therein. Strong reliance is placed upon the decision of a Division Bench of the Allahabad High Court in Zahur v. Nur Ali ((1880) I.L.R. 2 All. 99.). There, a dwelling house was sold as a house to be inhabited as it stood with the same right of occupation as the vendor had enjoyed, but without the ownership of the site. It was held that the right of pre-emption under the Mohamedan law attached to such house. The judgment is not a considered one. The learned Judges observed at p. 100 thus :

> "The seller not only sold the materials of the house, but such interest as he possessed as an occupier of the soil. The house was sold as a house to be inhabited on the spot with the same right of occupation as the seller had enjoyed."

The learned Judges distinguished the texts cited on the ground that they applied only to the sale of the materials of a house or a house capable of and intended to be removed from its site. This judgment no doubt supports the contention of learned counsel for the respondents; but the learned Judges have not considered the well settled principle that there cannot be a right of pre-emption in respect of a land over which the vendor has no full ownership. The decision suffers from the infirmity that the said well settled principle has escaped the attention of the court. Reliance is also placed on the decision of a Division Bench of the Patna High Court in Chariter Dusadh v. Bhagwati Pandey (A.I.R. 1934 Pat. 596.). There, the question was whether the pre-emptor had the milkiyat or ownership in the property on account of which he claimed the right of pre-emption. The pre-emptor was birtdar though he was described as a tenant in the Record-of-Rights for a particular purpose. The Court held that he was a full owner. This decision does not really support the respondents. There is a direct decision of a Full Bench of the Patna High Court on the question now raised, in Nathuni Ram v. Gopinath (A.I.R. 1962 Pat. 226 (F.B.)). There, as here, a right of pre-emption was claimed in respect of a house which stood on a leasehold land. After a full discussion of the subject, Choudhary J., speaking for the Full Bench, came to the following decision, at p. 229 :

> "On a careful consideration of the authorities and the principle of law involved in the case, my concluded opinion is that, in case of a sale of different properties, the right of pre-emption cannot be exercised with respect to one or some of them only if the enjoyment thereof is dependent on the property over which that right is not and cannot be exercised in law and consequently, where the land is sold with a house thereon, pre-emption cannot be allowed with respect to the house only apart from the land over which the right could not be exercised on account of its being a leasehold property. The sale of a house for inhabitation or occupation, without the sale of its foundations and the land over which the foundations stand, is inconceivable, except, as pointed out in Hedaya, in case of the sale of the upper storey of a house."

We agree with the conclusion. As this judgment has considered the earlier decisions on the subject, we need not again refer to them.

To summarize : A right of pre-emption is annexed to full ownership of property of co-sharers. It is not attached to property held on subordinate tenure, such as leases etc. It is an incident of the co-sharer's property operating both as a right and as a burden in different situations. It is a right of substitution taking in the entire bargain. It must take the whole or nothing. It does not matter if the inability to take the whole arises out of a voluntary act or out of a legal limitation inherent in the nature of the property transferred. It is reciprocal in operation, that is, if the situation was reversed and the vendor became the pre-emptor, he should be in a position to pre-empt the co-sharer's whole bargain. The two doctrines which may, for convenience, be referred to as "entire bargain" and "reciprocity" cannot operate unless both the co-sharers are full owners of their respective properties. Akar or a house standing on a freehold land is subject to the right of pre-emption, but a house on a leasehold land stands on a different footing. As there is no right of pre-emption in respect of a land held on a subordinate tenure, the right of pre-emption cannot be enforced against the house either, as the pre-emptor cannot be substituted for the entire bargain. The right must fall also on the ground that the super-structure disannexed from the land would be movable property and it is well settled that the right of pre-emption cannot be enforced in respect of movables.

We, therefore, hold that the first respondent has no right to pre-empt the sale executed in favour of the appellants. In the result, the appeal is allowed, the decrees of the Subordinate Judge's Court and the High Court are set aside and that of the trial Court is restored. The appellants will have their costs throughout.

RAGHUBAR DAYAL J. –

I agree that the law of pre-emption regarding co-sharers does not infringe the fundamental right conferred under Art. 19(1)(g), that the pre-emptor must be the owner of the property in respect whereof he claims the right of pre-emption, that the vendor must have proprietary right in the property sold and sought to be pre-empted, that the sale of lease-hold interest is not subject to the law of pre-emption and that the sale of the super-structure of a house is not pre-emptible. I also agree that the pre-emptor must pre-empt for the entire property sold if that be pre-emptible. I would, however, not like to express an opinion upon the point whether, in certain circumstances, the pre-emptor can or cannot pre-empt part of the property sold. There have been cases where partial pre-emption has been allowed. Some of the exceptional cases have been referred to at p. 778 of 'Muslim Law as Administered in India & Pakistan' by K. P. Saksena, IV Edition.

In Zainab Bibi v. Umar Hayat Khan (1936 A.L.J. 456.) the pre-emptor was allowed to pre-empt that

part oaf the property sold which was pre-emptible and in support of the decision it was stated at p. 457 :

> "So far as the Mohammedan Law is concerned, there is no doubt that where several properties are sold in portions of which a pre-emptor has the right of pre-emption, he is entitled to pre-empt that portion only on payment of a proportionate price. On this point there was a consensus of opinion among the three Imams as quoted in the Fatawa Alamgiri, referred to in Omur Khan v. Mooras Khan (1865 N.W.P., H.C.R. 173, 174)"

This Court did express an opinion in Bishan Singh v. Khazan Singh ([1959] S.C.R. 878, 884.) :

> "The general law of pre-emption does not recognize any right to claim a share in the property sold when there are rival claimants. It is well-established that the right of pre-emption is a right to acquire the whole of the property sold in preference to other persons (See Mool Chand v. Ganga Jal : ILR 11 Lah. 258, 273)"

In that case the dispute lay between two rival pre-emptors and arose in these circumstances. One pre-emptor pre-empted the entire sale and obtained the decree on condition that he would deposit a certain amount within a certain time. But, before he could deposit the amount, the rival pre-emptor instituted another suit for the pre-emption of the entire property sold and impleaded in that suit the first pre-emptor. The rights of the two pre-emptors were found to be equal. The entire property sold was clearly pre-emptible. It was, in this context, that the observation was made. It would be a matter for consideration at the appropriate time whether there can be any exception to this general rule that the entire property sold must be pre-empted by the pre-emptor in his suit.

I would therefore rest my decision on the facts that the sale of the lease-hold interest in land is not pre-emptible and that the super-structure of the house is also not pre-emptible and that therefore the plaintiff-pre-emptor cannot pre-empt the sale of the property sold. I therefore agree that the appeal be allowed, the decrees of the Subordinate Judge and the High Court be set aside and that of the trial Court be restored and that the appellants would have their costs throughout.

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