

Prem Dulari

Vs

Raj Kumari

(CJI K. Subha Rao, M. Hidayatullah, R. S. Bachawat, J. M. Shelat, C. A. Vaidialingam JJ)

23.03.1967

JUDGMENT

SHELAT, J.

Respondent No. 1 filed a suit in the Court of Additional District Judge, Jammu for possession of the house in dispute, owned by the second respondent and sold by her to the appellant. The cause of action pleaded was that respondent No. 1 had a right of prior purchase under section 15 (fourthly) of the Right of Prior Purchase Act, 11 of 1993 as her house and the house in question had a common outer entrance within the meaning of that clause. The trial court and the High Court on evidence held that the two houses had a common outer entrance and decreed the suit on respondent No. 1 paying the sale price of Rs. 13,000/- Hence this appeal by special leave.

On behalf of the appellant, the vendee, Mr. Misra raised two questions (1) that on a proper construction of s. 15 (fourthly) this was not a case of the two houses having a common outer entrance as that clause requires that such an entrance must be owned jointly by the owners of such two houses, and (2) that section 15 (fourthly) is ultra vires as it offends Art. 19(1) (f) and constitutes an unreasonable restriction on the appellant's right to property.

The evidence shows that the entire property consisting of these two, together with other houses in the vicinity were owned at one time by witness Mohinder Nath and one Uttam Chand. Subsequently they sold some of them. To give to these houses access to the public road, called the Secretariat Road, they retained to themselves the ownership of the lane but granted a right of way thereon to the said vendees. The lane ends as a blind alley where the two houses are situate. The plan produced during the trial shows that there is first a common outer entrance through which one enters into this lane from the Secretariat Road and at a distance of about 10 yards there is another such entrance marked 'common entrance' in the plan through which one enters into the alley and on which the doors of these and certain other houses open. During the course of the trial, the trial Judge made local inspection and recorded his inspection note which was admitted by the parties as correct. The inspection note is as follow :-

"On spot I find that there is a common outer entrance from the street to number of houses and then again about 10 yards from the common outer entrance there is another common outer entrance of six houses and there is a street which ends at the houses of the plaintiff and the suit house. At the end of the street the outer door of the plaintiff and the suit house shut."

There is thus no room for dispute that the said passage leading to the said Secretariat Road has two common entrances, one where it opens on to the said Road and the other at a distance of about 10 yards therefrom. Apart from the inspection note, the parties led oral and documentary evidence on a

consideration of which the trial Judge recorded the following finding :-

"Both the parties agree with this note and they admit that there is a common outer entrance from the Municipal Street to the plaintiff's house and the suit house. The difference between the plaintiff's case and the defendant's case as made out by the considered is that the plaintiff's house and the both open into the blank alley and the same alley opens some more houses. The plaintiff has not shown that the alley was the private property of the owners of the houses which shut on that. According to the statement of Pt. Mohinder Nath that alley belongs to him and Pt. Uttam Chand. The owners of the houses which shut in that alley are entitled to right of way over it. As they are not owners of the alley so according to the counsel for defendant No. 1 the plaintiff is not entitled to right of prior purchase the basis of their having a common outer entrance. The words used in the sub-clause are that the property sold and the property on the basis of which the right is exercised must have a common outer entrance. It is not essential that the street which leads from outer entrance to the houses of the plaintiff and the defendant should be owned by them."

The High Court also came to similar finding and held that once it had been shown that the owners of the four houses abutting on that alley had exclusive right of way over it, it was enough to vest in them the right of pre-emption. The High Court also held that it was not necessary to prove that the common outer entrance was jointly owned by the owners of the houses. It is therefore clear that the question raised by the appellant was not that there was no common outer entrance to the two houses but that on a proper construction of s. 15 (fourthly), such a common outer entrance would not give rise to a right of prior purchase unless the owner claiming such a right and the owner of the house in question jointly own the common outer passage.

The construction urged before the trial court and the High Court and rejected by both of them was once again urged before us by Mr. Misra. The language of s. 15 (fourthly) is plain. The section in unambiguous language provides that "the right of property purchase..... shall vest :-

Fourthly : Where the sale is of property having a common outer entrance with other properties in the owners of such properties"

The section clearly says that where the sale is of property having a common outer entrance with other properties the right of prior purchase shall vest in the owners of such properties. There is nothing in the section to warrant the construction that such a right would vest only if the common outer entrance with other properties, the right of prior purchase shall vest in the owners of such properties. There is nothing in the section to warrant the construction that such a right would vest only if the common outer entrance is jointly owned by the owners of such houses. What the section requires is the existence of a common outer entrance which need not be owned by the person claiming the right of pre-emption. Whether L5 Sup. CI/67-5

there is such a common outer entrance which would attract the provisions of s. 15 (fourthly) would, therefore depend upon the facts proved in each case. In the present case, both the trial court as also the High Court came to the conclusion from the evidence for both the houses. Nothing has been shown by Mr. Misra from the evidence which would justify our disagreeing with that conclusion.

Let us now turn to the decision relied upon by Mr. Misra. In *Naba and others v. Piara Mal and another* (1) the High Court of Punjab held that the entrance to the alley in question was not 'a

common entrance from the street' of the pre-emptor and the emption Act, 1905. The decision, however, turned on the facts and the situation of the alley which was said to be the common entrance to the houses in question. The High Court found that the evidence led by the plaintiff was insufficient to prove that the said alley was the private property of the owners of the houses opening on to it or that none except the owners thereof had free at one time constituted one building and were subsequently subdivided and that the privacy of those houses was ensured by the blind alley as it ordinarily would be by the existence of a common entrance. In *Nanak Chand v. Tek Chand and others* (2) the right of pre-emption was claimed on the ground that there was a step leading to a thara which formed part of the plaintiff's house and the house in question. The High Court held that the step could not be called either a 'staircase' or a common entrance from the street within the meaning of s. 13 (1) (fifthly) of the Punjab Pre-emption Act, 1905. In *Asa Nand v. Mahmud* (3), the dispute was between two parties claiming the right of pre-emption and the High Court rejected the defendant's claim on the ground that he had not even the right of way over the compound and his use of it was only permissive. In *Ram Chand v. Ram Jowaya* (4), the Punjab Chief Court held that a public street leading from the main road to two houses cannot be considered a common entrance from the street and that to bring a case within s. 13 (1) (fifthly) it would not be subsequent to prove that the street into which the house sold and the house of the person claiming pre-emption opened was common to the two properties or that each had an entrance from the street. There must be an entrance from the street which is common to both properties.

None of these decisions, in our view, can assist, for, each turned on its own facts which determined whether there was in fact a common entrance within the meaning of the Punjab Act.

In the instant case, there is the admitted evidence that the alley, at the blind end of which the two houses, are situate, has a common entrance which opens a passage of about 10 yards where there is again another common entrance opening on to the public road. It is also not in dispute that the entire passage is owned by the original owners of the houses opening into this passage and that at the time of the sales of some of these houses they had granted a right of way over this passage to them so that the said houses may have access from the public road. The said passage, therefore, is the private property of the said Mohinder Nath and Uttam Chand, and the right of way over it is enjoyed only by the owners of the houses opening on to it. The appellant did not raise any dispute with regard to these facts. Indeed, the only question raised by her was that in order to constitute a common outer entrance under s. 15 (fourthly) such an entrance must be owned jointly by the owner of the house in question and the owner claimed pre-emption. As aforesaid, both the courts negatived the suggestion construction and we think that they were right for the plain words of the section do not justify such a construction.

The question next is whether s. 15 (fourthly) providing for the right of prior purchase amounts to an unreasonable restriction. There can be no doubt that such a provision amounts to a restriction in the sense that a person purchasing such a property has to give way to the person claiming such a right. The nature of the right is expressed in felicitous language by Mahmood J. in *Govind Dayal v. Inayatullah* (1). The right of pre-emption, he observed : "is simply a right of substitution, entitling the pre-emptor, by means of a legal incident to which sale itself was subject, to stand in the shoes of the vendee in respect of all the rights and obligations arising from the sale, under which he derived his title. It is, in effect, as if in a sale deed the vendee's name were rubbed out and pre-emptor's name inserted in its place". This statement was approved by this Court in *Bishan Singh v. Khazan Singh* (2), and the Court summarising the incidents of the right observed :

"That the right of pre-emption is not a right to the thing sold but a right to the offer

of a thing about to be sold. This right is called the primary or inherent right. The pre-emptor has a secondary right or a remedial right to follow the thing sold. It is 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".

That being the nature of the right, the next question is whether the restriction, on the vendee's right of property created by s. 15 (fourthly) can be used to be an unreasonable restriction. A similar question in regard to a similar provision in section 16 of the Punjab Pre-emption Act, 1913, arose in *Babu Ram. v. Baijnath* (1). Section 16 of that Act provided for pre-emption on six grounds, the first, third, fourth and sixth grounds being on favour of co-shares, owners of common entrance from a street and owners of contiguous property. The Court held that the first, third and fourth grounds of pre-emption did not offend Articles 19(1) (f) and 14 and were valid. The Court observed that the law under the first ground providing for pre-emption by co-sharers imposed reasonable restriction in the interest of the general public on the right under Art. 19 (1) (f). If an outsider was introduced as a co-sharer in a property it would make common management extremely difficult and destroy the benefits of ownership in common. The advantage of excluding a stranger in the case of a residential house was all the greater as it would avoid all kinds of disputes. The third ground which applied in a case where the property sold had a staircase common with other properties stood practically on the same footing as that of co- sharers. Regarding properties having a common entrance from the street with other properties, the Court held that the grounds was similar to the first and the third grounds. At page 741 dealing with the fourth ground, the Court observed that the buildings were in a common compound and perhaps were originally put up by members of one family or one group with a common private passage from the public street. In such a case the owners of the buildings would stand more or less in the position of co-sharers, though actually there might be no co-sharership in the house sold. Such a case would approximate to cases of a common staircase and co-sharers and, therefore, the right of pre-emption in such a case was sustainable. The reasoning employed in upholding the validity of the fourth ground is s. 16 of the Punjab Act would apply with equal force to the provisions of s. 15 (fourthly) before us. Consequently, the contention that the impugned provision amounts to an unreasonable restriction cannot be sustained.

Both the contentions raised by Mr. Misra fail. The appeal is dismissed with costs.

V. P. S. Appeal dismissed.

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