Hazari & Ors

Vs

Neki & Ors

Civil Appeals Nos. 1148, 1656 and 2341 of 1966

(J. C. Shah, V. Ramaswami – I, V. Bhargava JJ)

25.01.1968

JUDGMENT

RAMASWAMI, J. –

These appeals are brought by special leave on behalf of the defendants against the judgment of the Punjab High Court dated 27th July, 1965 in Letters Patent Appeals Nos. 13 and 14 of 1965.

Dhara Singh, respondent No. 2, executed three sale deeds with regard to lands at village Bhadani, Tahsil Jhajjar, Rohtak in favour of the appellants in all the three appeals. The first sale was of land measuring 27 kanals and 4 marlas dated September 20, 1960, the second was of land measuring 36 kanals and 19 marlas dated November 23, 1960 and the third was of land measuring 33 kanals and 18 marlas dated March 6, 1961. Neki deceased, who was the father's brother of Dhara Singh, vendor, instituted three suits in the court of Subordinate Judge at Jhajjar for possession of the aforesaid lands covered by the three sales on the ground that he had a superior right of pre-emption on the basis of his relationship with the vendor as against the appellants under section 15(1)(a) of the Punjab Pre-emption Act, 1913 (Punjab Act 1 of 1913). These suits were contested by the appellants. After hearing the contentions of the rival parties, the Subordinate Judge granted decrees in all the three suits in favour of the plaintiffs. In suit No. 311 of 1961 the decree stipulated that the plaintiff should deposit the amount of Rs. 3,500/- in court on or before 15-1-1963. In suit Nos. 368 and 369 of 1961 the condition was that the plaintiffs should make the deposit of Rs. 5,000/- and Rs. 7,000/- respectively in court on or before 15-1-1963. The appellants took the matter in appeal before the Senior Subordinate Judge who by his judgment dated 30th January, 1963 dismissed the appeals against the decrees in suits Nos. 313 and 369 of 1961 and modified the decree in suit No. 368 of 1961 to the extent that the plaintiff was called upon to deposit a further sum of Rs. 2,000/- on or before 1-3-1963. The appellants preferred regular Second Appeals Nos. 280, 281 and 282 of 1963 in the High Court against the decrees and judgment of the Senior Subordinate Judge, Rohtak. The plaintiffs also preferred in the High Court appeal No. 830 of 1963 against the increase made in the price of the land by the Senior Subordinate Judge, Rohtak in the appeal arising out of decree in suit No. 368 of 1961. While the appeals were pending in the High Court, Neki plaintiff died on April 7, 1963. After his death, the appellants vendors in the three regular appeals moved applications under O. 22, r. 1 of the Civil Procedure Code to bring on record of the appeals the legal representatives of Neki, deceased plaintiff, namely, Dhara Singh, Ramkishan and Balbir Singh. All the four appeals were heard and dismissed by Mr. Justice Khanna by his judgment dated 17th September, 1964. The appellants preferred appeals under the Letters Patent which were dismissed by a Division Bench of the Punjab High Court by a common judgment dated 27th July, 1965.

The claim of Neki for pre-emption was based on ss. 14 and 15(1)(a) of the Punjab Pre-emption Act

1913 (Punjab Act 1 of 1913). Section 14 states :-

> "No person other than a person who was at the date of sale a member of an agricultural tribe in the same group of agricultural tribes as the vendor shall have a right of pre-emption in respect of agricultural land sold by a member of an agricultural tribe".

Section 15(1)(a) reads as follows :-

> "The right of pre-emption in respect of agricultural land and village immovable property shall vest -
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> (a) where the sale is by a sloe owner :
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> FIRST, in the son or daughter or son's son or daughter's son of the vendor;
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> SECONDLY, in the brother or brother's son of the vendor;
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> THIRDLY, in the father's brother or father's brother's son of the vendor;
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> FOURTHLY, in the tenant who holds under tenancy of the vendor the land or properly sold or a part thereof."

The Punjab Pre-emption Act, 1913 was amended by Punjab Act 10 of 1960 and s. 6 of the amending Act inserted a new s. 31 in the Principal which states as follows :-

> "No court shall pass a decree in a suit for pre-emption whether instituted before or after the commencement of the Punjab Pre-emption (Amendment) Act, 1960, which is inconsistent with the provisions of the said Act".

It is necessary also to refer at this stage to the provisions of O.22 r. 1 and O. 22, r. 11 which are to the following effect :-

> "O.22, r. 1 : The death of a plaintiff or defendant shall not cause the suit to abate if the right to sue survives".
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> "O.22, r. 11 : In the application of this Order to appeals, so far as may be, the word 'plaintiff' shall be held to include an appellant the word 'defendant' a respondent, and the word 'suit an appeal".

In support of these appeals, learned counsel put forward the argument that the right of pre-emption claimed by Neki deceased plaintiff was a personal right which died with him upon his death and the legal representatives of Neki were not entitled to be granted a decree for pre-emption. The argument was that the statutory right of pre-emption under the Punjab Act was not a heritable right and no decree for pre-emption should have been passed by the lower court in favour of the legal representatives as representing the estate of Neki. We are unable to accept the argument put forward by the appellants. It is not correct to say that the right of pre-emption is a personal right on the part of the pre-emptor to get the re-transfer of the property from the vendee who has already become the

owner of the same. It is true that the right of pre-emption becomes enforceable only when there is a sale but the right exists antecedently to the sale, the foundation of the right being the avoidance of the inconveniences and disturbances which would arise from the introduction of a stranger into the land. The correct legal position is that the statutory law of pre-emption imposes a limitation or disability upon the ownership of a property to the extent that it restricts the owner's right of sale and compels him to sell the property to the person entitled to pre-emption under the statute. In other words, the statutory right of pre-emption though not amounting to an interest in the land is a right which attaches to the land and which can be enforced against a purchaser by the person entitled to pre-empt. In the present case, Neki obtained decrees for pre-emption in all the three suits against the appellants and these decrees were confirmed by the first appellate Court. While the second appeals were pending in the High Court, Neki died and the question is whether under the provisions of O.22, r. 1 and O.22, r. 11 of the Code of Civil Procedure, the right to sue survived after the death of Neki. In this context, it is necessary to consider the provisions of s. 306 of the Indian Succession Act XXIX of 1925. This section expresses a qualification of the maxim actio personalis mortiur cum persona to the extent that the section indicates that, amongst causes of action which survive, are included some actions of a personal nature, that is to say personal actions other than those expressly excluded by the section itself. It is true that the right of pre-emption under s. 15(1)(a) of the Punjab Act of 1913 is a personal right in the sense that the claim of the pre-emptor depends upon the nature of his relationship with the vendor. But under s. 14 of the Act, the pre-emptor must be a member of an agricultural tribe in the same group of agricultural tribes as the vendor and the land of which pre-emption is sought must be in respect of agricultural land sold to a member of the agricultural tribe. We are of opinion that if an involuntary transfer takes place by inheritance the successor to the land takes the whole bundle of the rights which go with the land including the right of pre-emption. The view which we have taken is supported by the language of s. 306 of the Indian Succession Act and it follows therefore that the claim of Neki for pre-emption did not abate upon his death and that the legal representatives of Neki were properly brought on record of the second appeals under the provisions of O.22, r. 1 read with O.22, r. 10 of the Code of Civil Procedure. The view that we have expressed is borne out by a decision of the Punjab High Court in Faqir Ali Shah v. Ram Kishan & Ors. [133 P.R. 1907]. The question that arose for determination in that case was whether the right to sue for pre-emption under s. 12 of the Punjab Laws Act upon a cause of action which accrued to a person in his life-time passed at his death to his successor who inherited the property through which the right had accrued. The view of the Full Bench as regards the transfer by inheritance was that the general principle applied and that the right of pre-emption passed with the land and the learned Judges distinguished the transfer by inheritance from the transfer of property by some voluntary act of the parties. At p. 641 of the Report, Clark, C.J. observed :

> "While, therefore, there is good reason why voluntary transfers should not pass a right of pre-emption as regards properties previously sold, those reasons do not apply to transfers by inheritance. As regards transfers by inheritance, the general principle should apply that the right of pre-emption passes with the land.

Mr. Grey laid great stress on sections 13 and 16 of the Punjab Laws Act urging that the father was the person on whom the notice had to be served, and that it was he who had the right to sue and that the right was thus a personal one that could not be inherited by the son. The right was no doubt a personal one in the father based on his land, but I can see no reason why such right cannot be inherited by the son. If the father had waived or otherwise disposed of his right this would no doubt be binding on the son, as the father was representing the whole estate.

Where, however, the father has done nothing of the kind, but has simply taken no steps in the

matters, there seems to me no reason why the son should not step into the shoes of his father and take the same action as the father could have done. The son inherits the other causes of action belonging to his father and why not this one ? Nor do I see why the son cannot come in under Section 16, simply alleging that no notice as required by section 13 was served on his father".

A similar view was expressed by the Full Bench of the Allahabad High Court in Wajid Ali & Ors. v. Shaban & Ors. [I.L.R. 31 All. 623]. It was held that where a right of pre-emption exists by custom as recorded in the village Wajib-ul-arz, the right having once accrued did not of necessity lapse by the death of the pre-emptor before making a claim, but descended along with the property in virtue of which it subsisted to the heir of the pre-emptor.

It is necessary to emphasize that we are dealing in this case with the statutory right of pre-emption under Punjab Act 1 of 1913 and its subsequent amendment and not with the right of pre-emption under the Mohammedan Law. In regard to the latter right it has been held that according to the Mohammadan law applicable to the Sunni sect if a plaintiff in a suit for pre-emption has not obtained his decree for pre-emption in his life-time the right to sue does not survive to his heirs. - (See Muhammad Husain v. Niamet-un-nissa and Ors.) [I.L.R. 20 All. 88]. It is not necessary for us to express any opinion on this point in the present case.

On behalf of the respondent it was alos pointed out that after the passing of the decree by the trial court, Neki complied with the terms of the decree and made payments within the time given. It was said that under the terms of s. 14 and s. 15(1)(a) the title to the land in the pre-emption suits must be deemed to have accrued to Neki from the date of such payment. It was argued that before his death, Neki became the owner of the lands which were the subject matter of pre-emption and the legal representatives of Neki were substituted in his place as representing the estate of Neki. In support of this proposition counsel relied upon the language of O.20 r. 14(1) which states :

> "Where the court decrees a claim to pre-emption in respect of a particular sale of property and the purchase-money has not been paid into Court, the decree shall -
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> (a) specify a day on or before which the purchase-money shall be so paid, and
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> (b) direct that on payment into Court of such purchase-money, together with the costs (if any) decreed against the plaintiff, on or before the day referred to in clause (a) the defendant shall deliver possession of the property to the plaintiff, whose title thereto shall be deemed to have accrued from the date of such payment, but that, if the purchase-money and the costs (if any) are not so paid, the suit shall be dismissed with costs."

In this connection counsel referred to the decision of the Punjab High Court in Ganga Ram & Ors. v. Shiv Lal [66 P.L.R. (1964), 251] where it was held that the title to the pre-empted property passes to the pre-emptor under a pre-emption decree on deposit of the purchase-money in terms of the decree and was deemed to pass to him from the date of the deposit. So far suit No. 368 is concerned, there is a dispute as to whether or not Neki deposited the amount under the decree within the time prescribed but as regards suits Nos. 311 and 369 of 1961, it is admitted that the deceased Neki made the payment of the amount under the two decrees within the time prescribed. So far as these two decrees are concerned, the deposit of the purchase money is an additional reason for holding that the legal representatives of Neki were properly substituted in his place in the proceedings of the second appeals.

It was finally urged on behalf of the appellants that, in any event, s. 31 of the Punjab Act 1 of 1913 as amended by Punjab Act 10 of 1960 stood as a bar to the granting of a decree in favour of the substituted respondents. The argument was stressed that s. 31 of the Punjab Act 1 of 1913 was in plain words retrospective in character and Dhara Singh and his two sons as legal representatives of Neki could not be granted a decree for pre-emption. In our opinion, this argument is wholly irrelevant. The reason is that the Amending Act came into force on February 4, 1960 and Neki instituted the present suits for pre-emption long after this date. Even the three sales of land were effected after the promulgation of the Amending Act. Reliance was placed on behalf of the appellants on the decision of this Court in Ram Sarup v. Munshi & Ors. [66 P.L.R. (1964), 251] but the material facts of that case are quite different. It appears that the claim of pre-emption in that case was based upon s. 15(c) 'thirdly' of the Punjab Pre-emption Act 1913 which states :

> "Subject to the provisions of s. 14 the right of pre-emption in respect of agricultural land and village immoveable property shall vest -
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> (a) where the sale is by a sole owner or occupancy tenant or, in the case of land or property jointly owned or held, is by all the co-sharers jointly, in the persons in order of succession, who but for such sale would be entitled, on the death of the vendor or vendors, to inherit the land or property sold;
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> (b) where the sale is of a share out of joint land or property, and is not made by all the co-sharers jointly, - firstly, in the lineal descendants of the vendor in order of succession; secondly, in the co-sharers, if any, who are agnates, in order of succession;
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> (c) If no person having a right of pre-emption under clause (a) of clause (b) seeks to exercise it :-
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> #.....
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> thirdly, in the owners of the estate;....."

By s. 4 of the amending Act (Act 10 of 1960) s. 15 of the parent Act was repealed and in its place was substituted a new provision which omitted to confer a right of pre-emption in the case of persons 'owning land in the estate' as the original s. 15(c) 'thirdly' had done. Retrospective effect was given to the provision by the insertion of a new s. 31 in the parent Act. The question for consideration was that whether by reason of this amendment in the law the respondent was entitled to the benefit of the decree which he obtained under the previously existing enactment. It was the case of the plaintiff that he owned land in the 'estate' whereas the vendee did not own land there. The defendant while not disputing that the plaintiff owned land in the village or the correctness of the allegation that the land was in an 'estate', sought to prove that he too owned land in the same village and 'estate' but in this he failed. As the case of the plaintiff was directly covered by the terms of the statute his suit was decreed by the trial court on November 8, 1951, and an appeal and second appeal therefrom were also dismissed. The question was whether the respondent was entitled to a decree in view of s. 31 of the Punjab Pre-emption Act 1913 as amended by Punjab Act 10 of 1960 which came into force on February 4, 1960. It was held by this Court that in view of the plain language of s. 31, the substantive law enacted by the legislature in the amended s. 15 of the Pre-emption Act should be applied and the decree for pre-emption in favour of the first respondent

should be set aside. It is manifest that the material facts of the present case are different and the ratio of the decision of this Court in Ram Sarup v. Munshi & Ors. [[1963] 3 S.C.R. 858] has no application to the present case. In Ram Sarup's case [[1963] 3 S.C.R. 858] the right of the plaintiff to pre-empt was extinguished retrospectively; in the present case Neki's right to sue has not been extinguished. Neki had the right of pre-emption under the Amended Act at the time he instituted the suit and Neki's right was not extinguished on his death but passed to his legal representatives.

For the reasons expressed above, we hold that these appeals have no merit and must be dismissed with costs. There will be one set of hearing fee.

Appeals dismissed.

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