

Jagad Bandhu Chatterjee

Vs

Smt. Nilima Rani and Others

Civil Appeal No. 2170 of 1967

(J.C. Shah, V. Ramaswami-I, A.N. Grover JJ)

17.10. 1969

JUDGMENT

GROVER, J. -

1. This is an appeal by certificate from a Judgment of the Calcutta High Court arising out of a petition filed by the appellant under Section 26-F of the Bengal Tenancy Act, 1885 claiming a right of pre-emption over certain lands purchased by Respondent No. 1.

2. The facts may be briefly stated. On July 23, 1950, the appellant purchased certain portion of land in C. A. Dag No. 3605 of Mouza Kasba from the occupancy raiyats Respondents Nos. 2 and 3 and one Bhabesh Chandra Kundu deceased. By another deed the appellant purchased from the said vendors another plot of land measuring 3.1/2 acres. By a Kabala, 2 dated October 8, 1950 the said vendors sold 10 acres of land in the same Dag number to Respondent No. 1 for Rs. 2,700/-. The appellant filed an application before the Second Subordinate Judge, Alipore district 24 parganas under Section 26-F of the Bengal Tenancy Act claiming the right of pre-emption over the land purchased by Respondent No. 1. The latter took up the position that the appellant was not a co-sharer in the land which had been purchased by her and that he along, with his uncle Dinabandhu Chatterjee had acted as brokers in the transaction and received Rs. 300/- as brokerage; the appellant had thus waived his right of pre-emption. The learned Trial judge disbelieved the case set up by Respondent No. 1 and allowed the application of the appellant for pre-emption. Respondent No. 1 filed an appeal in the Court of the Additional District judge, Alipore. He held that the appellant's claim for pre-emption was barred owing to waiver on his part. The appellant filed a petition for revision in the High Court but the same was dismissed on the ground that it was open to the appellant to waive his right and that there had been actual waiver.

3. The main point which was sought to be raised before us was that waiver could be brought about only, by a contract and since no consideration had passed it could not be said that there had been any waiver in the present case. Moreover waiver could not be proved by estoppel. Learned counsel for the appellant relied on the observations of Lord Russell of Killowen in Dawson's Bank Limited v. Nippon Menkwa Kabushiki Kaisha.(62 IA 100, 108.) While stating the distinction between estoppel and waiver, it was said, that "waiver is contractual, and may constitute a cause of action; it is an agreement to release or not to assert a right". According to the appellant all that had been found was that by his act and conduct he had waived his right of pre-emption. It was pointed out that there was no evidence for any consideration having moved from Respondent No. 1 in the matter of abandonment of the appellant's right of pre-emption.

4. In the well-known work of Sir William P. Anson "Principles of the English Law of Contract",

22nd Edn., it has been stated at p. 107 that at Common Law the waiver of existing obligations does not appear to require the presence of detriment in order to make it effective.

5. In India the general principle with regard to waiver of contractual obligation is to be found in Section 63 of the Indian Contract Act. Under that section it is open to a promisee to dispense with or remit, wholly or in part, the performance of the promise made to him or he can accept instead of it any satisfaction which he thinks fit. Under the Indian law neither consideration nor an agreement would be necessary to constitute waiver. This Court has already laid down in *Waman Shrinivas Kini v. Ratilal Bhagwandas & Co.* (1959 Supp 2 SCR 217, 226.) that waiver is the abandonment of a right which normally everybody is at liberty to waive. "A waiver is nothing unless it amounts to a release. It signifies nothing more than an intention not to insist upon the right". It is well-known that in the law of pre-emption the general principle which can be said to have been uniformly adopted by the Indian courts is that acquiescence in the sale by any positive act amounting to relinquishment of a pre-emptive right has the effect of the forfeiture of such a right. So far as the law of pre-emption is concerned the principle of waiver is based mainly on Mohammedan Jurisprudence. The contention that the waiver of the appellant's right under Section 26-F of the Bengal Tenancy Act must be founded on contract or agreement cannot be acceded to and must be rejected.

6. A faint attempt was made to assail the finding of the High Court that on the facts which had been proved waiver had been established. We find no reason or justification for interfering with the conclusion of the High Court on the point.

7. The appeal fails and it is dismissed with costs.

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