Sukhnandan Singh, Etc.

Vs.

Jamiat Singh And Others

Civil Appeal No. 1729 of 1967

(V. Bhargava, I. D. Dua JJ)

18.02.1971

JUDGMENT

DUA, J. -

1. In this appeal by special leave from the judgment and decree of a learned single Judge of the Punjab and Haryana High Court arising out of a pre-emption suit only two question were raised by the learned counsel for the appellants who were vendees-defendants in the Trial Court. The suit was instituted by the three sons of the three vendors who were real brothers, and the two points canvassed in this Court challenge the decisions of the High Court and of the Court of the District Judge on Issues 6 and 7. Those issues are :

> "6. In the suit collusive ? If so, its effect.
>
> 7. In the suit within time ?"

Both these issues were decided by the Trial Court against the plaintiff but the District Judge on appeal reversed the decision of the Trial Court on both the issues and the High Court on second appeal affirmed the decisions of the first appellate court.

2. The relevant facts may now be stated in brief. Kartar Singh, Bachan Singh and Sardara Singh, Sons of Sohel Singh claiming to be co-sharers, agreed on September 19, 1961, to sell 193 Kanals and 15 Marlas of land to Sukhnandan Singh, Sukhminder Singh and Balkar Singh, sons of Gurdev Singh in equal shares, 1/3rd share, Gurminder Singh and Gurpakh Singh, sons of Teja Singh in equal shares, 1/3rd share, Gurdas Singh son of Angrez Singh, 1/3rd share at the rate of Rs. 840/- per bigha. A sum of Rs. 7,000/- was received in cash as earnest moneyt On December 6, 1961, a formal sale deed was executed with some variations in shares and also with the addition of Smt. Chand Kaur, wife of Sardar Inder Singh as one more co-vendee. The sale price was stated to be s. 32,550/-. Possession of the land sold was stated to have been delivered and it was also recited that consolidation proceedings under Section 21(1) of the Consolidation Act had been completed but further proceedings in favour of the vendees would be taken after the proceedings which might be taken under Section 21(2). This sale deed was duly registered on March 9, 1962.

3. The suit for pre-emption by the three vendors was instituted on March 6, 1963. It was contested by the vendees. The pleading of the parties gave rise to several issues but we are only concerned with the issues relating to the pleas of collusive nature of the suit and limitation. The Trial Court disposed of the issues Numbers 5 and 6 relating respectively to waiver of the right of pre-emption by the plaintiffs and to the collusive nature of the suit by dealing with them together. Photographs

showing the plaintiffs and the vendors being together along with the plaintiffs' counsel in the Court compound during the course of this litigation were produced as evidence in the case. Exhibit P-2 a certified copy of the Register of Consolidation Proceedings, produced by the plaintiffs in evidence showed that this copy had been prepared at the instance of Kartar Singh, one of the vendors and father of Jamiat Singh, plaintiff. According to the Trial Court there was also evidence that the plaintiffs and the vendors resided and messed together. On consideration of this material the Trial Court held that the vendors and the pre-emptors resided and messed together and the expenses of the litigation were paid by the vendors. From this it concluded that the suit had been filed by the plaintiffs at the instance of and in collusion with the vendors. The right of pre-emption being a piratical right, according to the Trial Court, to quote its own words "it is necessary that the pre-emptors must not act in collusion with vendors or act in bad faith". The plaintiffs were on this reasoning held to be stopped from exercising their right of pre-emption. On the question of limitation the Trial Court held that the vendors and not their tenants were in possession of the land sold, which had been allotted to them in the consolidation proceedings and the possession of that land was delivered to the vendees on the date of the sale. The suit was accordingly held to be barred by time. The suit was dismissed for all these reasons.

4. On appeal by the plaintiffs the District Judge reversed the conclusions of the Trial Court both on the point of estoppel or collusion and of limitation. According to that court in order to prove collusion the defendant has to prove that the suit was being fought for the vendors' benefit, the normal presumption being that the plaintiff sues for his own benefit. In support of this view several decisions were relied upon by the District Judge. In the present case, according to the learned District Judge, the plaintiff Jamiat Singh had clearly stated that he was pre-empting the present sale with his own earnings and the learned District Judge found no rebuttal to this assertion. Neither the fact that Exhibit P-2 had been obtained by one of the vendors nor the fact that the vendors were present in the Court compound with the plaintiffs and their counsel during the course of litigation indicated that the present suit had necessarily been instituted for the benefit of the vendors. On this reasoning the decision on the collusive nature to the limitation also the learned District Judge concluded, in disagreement with the Trial Court, that a part of the land sold was in possession of tenants and, therefore, it did not admit of physical possession, which means immediate personal possession. In that view of the matter under Article 10 of the Indian Limitation Act, 1908, the terminus a quo was the date of registration of the sale deed. The suit was thus held to have been instituted within one year from the date of registration and, therefore, within limitation under Article 10. The judgment and decree of the Trial Court was reserved and the suit decreed.

5. On second appeal a learned single Judge of the Punjab and Haryana High Court held that there was no clear and reliable evidence that the vendors and their sons were united in mess and estate. The other two circumstances, namely, that the vendors and the plaintiffs along with their counsel were seen together in court compound and that Exhibit P-2 had been obtained by one of the vendors one day before the institution of the suit, were not considered sufficient to establish the collusive nature of the suit. In regard to the statement of Jamiat Singh the High Court undoubtedly felt unimpressed by his statement but we do not think it was open to that court on second appeal to appraise the credibility of the testimony which was believed by the final court of fact when there was no illegality in the appraisal of the testimony by the District Judge and it was open to him to take the view he did. Jamiat Singh had stated that he was separated from his father since about three years and that he was spending on the litigation from what little amount he earned. The matter was not pursued in cross-examination as to what was the source of his earnings. Even after feeling unimpressed by the statement of Jamiat Singh, the High Court came to the conclusion that it was for the vendees to astablish the collusive nature of the plaintiffs' suit. On the evidence produced the

District Judge having come to the conclusion that they had failed to discharge this onus this conclusion was one of fact and not being vitiated by any error of law it was held binding on second appeal.

6. The contention that the District Judge was wrong in holding that a part of the land sold was in possession of the tenant at the time of the sale was also repelled. The conclusion of the District Judge that field No. 24/21 out of the suit land was under the cultivation of Bahadur Singh, a tenant to Rabi 1962 and Kharif 1962 was also held to be a finding of fact binding on second appeal. This document was not shown to have been misread by the first appellate court. On this finding Article 10 of the Indian Limitation Act, 1908, and not Section 30 of the Punjab Pre-emption Act, was held applicable and the suit was thus considered to be within limitation. For this view reliance was placed on two decisions of the Punjab Chief Court and a Bench decision of the Nagpur High Court. The appeal was however, partly accepted by raising the pre-emption money by an additional sum of Rs. 4,133.50.

7. In this Court again the learned counsel for the appellant-vendees-pressed the points of collusion and limitation. We are, however, unable to find merit in either of them. So far as the question of collusion is concerned it was not clarified by the learned counsel how the plaintiffs could be held to have lost their right of pre-emption merely because their fathers either came to the Court with them, which they did openly, or allowed their sons as plaintiffs to sue in Court, copy of a public document procured by the father of one of the plaintiffs. Collusion in judicial proceedings is normally associated with secret arrangement between two persons that the one should institute a suit against the other in order to obtain the decision of a judicial tribunal for some sinister purpose. In such a proceeding the claim put forward is fictitious, the contest feigned or unreal and the final adjudication a mask, designed to give false appearance of a genuine judicial determination, and this is is normally associated with secret arrangement between two third parties. In such a proceeding the contest is a mere sham. In the case of pre-emption it is open to the plaintiffs to find financial aid from any sources he likes. He has a statutory right to pre-empt the sale and it is no concern of the vendees whether he borrows money from someone or otherwise arranges for finances for pre-empting the sale. It is true that it is a personal right and is not capable of being transferred. And the right of pre-emption being a right of substitution, the vendor also cannot in the garb of a Benamidar pre-empt his own sale. But merely because the vendors who are the fathers of the plaintiff-pre-emptors are helping their sons to exercise the statutory right conferred on the sons cannot, without more, deprive them of the right to be substituted for the vendees in exercise of their right of pre-emption. The property-pre-empted, if they are successful, will belong to them and not to their fathers who were the vendors. Even in the wider sense of the word "collusion" which suggests a deceitful agreement or compact between two or more persons to do some act in order to prejudice a third person or for some improper purpose, would not apply to the present case so as to operate as estoppel against the plaintiffs. Whether or not a pre-emptor-plaintiff who is a Benamidar for the vendor or some other party loses his right because of being a Benamidar is a question which does not concern us in this case and we express no opinion thereon. On the facts of the present case there is absolutely no material on which the plaintiffs can be held to have lost their right of pre-emption on the ground of collusion.

8. The next point relates to the plea of limitation. Article 10 of the Second Schedule of the Indian Limitation Act provides a period of one year to enforce a right of pre-emption whether founded on law or general usage or on special contract, the terminus a quo being the date when the purchaser takes under the sale, sought to be pre-empted, physical possession of the whole of the property sold or where the subject of the sale does not admit of physical possession, the date when the instrument

of sale is registered. Section 30 of the Punjab Pre-emption Act applies only when the case does not fall within Article 10. On the finding of the District Judge and of the High Court it is obvious that physical possession of the whole of the property sole was not taken by the vendees, on the date of sale. Therefore, the first part of article does not apply. According to the appellants' counsel the land sold does admit of physical possession and if a part of the land has been taken into possession by the vendees then Article 10 would be inapplicable and Section 30 of the Punjab Pre-emption Act would be attracted. In that case the terminus a quo according to Shri Gosain would be the date on which the vendees took under the sale physical possession of any part of Article 10, in our opinion, covers cases where the subject of the sale, which means the whole of the property sold, does not admit of physical possession and that would be so when a part of the land is in the possession of the tenants. The argument that use of the expression "subject of the sale" suggests that this article would apply only if the entire and not only a part of the land is in the possession of the tenants is not acceptable. The expression "physical possession" came up for considerations before the Privy Council in Batul Began v. Mansur Ali Khan (ILR 24 ALL 17.) Lord Robertson speaking for the Judicial Committee said :

> "What has to be considered is has the High Court accurately formulated, the question, Does the property admit of physical possession ? The word 'physical' is of itself a strong word, highly restrictive of the kind of possession indicated; and when it is found, as is pointed out by the High Court, that the Legislature has in successive enactments about the limitation of such suits gone on strengthening the language used, - first in 1859 prescribing 'possession', then in 1871 requiring 'actual possession' and finally in 1877 substituting the word 'physical' for 'actual', it is seen that word has been very deliberately chosen and for a restrictive purpose. Their Lordships are of opinion that the High Courts are right in the conclusion they have stated. Their Lordships consider that the expression used by Stuart, C. J., in regard to the words 'actual possession' is applicable with still more certainty to the words 'physical possession' and that what is meant is a 'personal and immediate' possession.
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> This view has ever since then been followed by the High Court in India. No decision holding to the contrary was brought to our notice. Indeed, Shri Gosain virtually conceded that there was none to his knowledge. The properties in possession of tenants have on this reasoning to be held to be incapable of physical possession which means personal and immediate possession. It was so held in Ghulam Mustafa v. Shahabuddin. (49 PR 1908 (FB).) In that case the Full Bench of the Punjab Chief Court approved of some of its earlier decisions overruling the dictum in one of the earlier decisions of that Court. This view has consistently held the field in the Punjab and we do not find any cogent reason for disagreeing and upsetting it. If the date of registration of the sale deed be the terminus a quo then indisputable the suit must be held to be within limitation. These being the only two points agitated before us this appeal must fail and is dismissed with costs.

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