Sheikh Mohammad Rafiq

Vs

Khalilul Rehman and Another

Civil Appeals Nos. 691 and 692(N) of 1967

(K. S. Hegde, A. N. Grover JJ)

03.05.1972

JUDGMENT

GROVER, J. -

1. These appeals have been brought by special leave from a common judgment of the Allahabad High Court whereby the dismissal of the suit for specific performance filed by the appellant was maintained and the decree for possession by pre-emption in favour of respondent No. 1 was confirmed.

2. One Gauhar Ali was the owner of a pucca two storeyed house in the city of Moradabad. On his death he left behind as his heirs his widow Musammat Begum, two sons Liaqat Ali and Ishtiaq Ali and four daughters Sughara Begum, Kubra Begum, Mehmooda Begum and Chhoti Begum. In 1941 the heirs of Gauhar Ali partitioned the property. According to the partition the house in dispute was divided longitudinally east and west. The western portion was allotted to the widow and sons and the eastern portion came to the share of the four daughters. Respondent No. 1 purchased the western portion of the house from the widow and the sons. On August 19, 1952, he also entered into an agreement with the four daughters for the purchase of their part of the house, namely, the eastern portion. The period in which the sale-deed was to be executed was three months but it appears that the sale was not completed. On August 11, 1953 all the four daughters executed an agreement of sale in favour of the appellant. Musammat Chhoti Begum, however, changed her mind and executed a sale-deed in favour of respondent No. 1 on August 14, 1953. The other three daughters, however, did not go back on the agreement entered into with the appellant and they got a sale-deed transferring their share registered in favour of the appellant on August 17, 1953. This sale was, however, actually registered in the books of the Sub-Registrar on October 6, 1953.

3. On September 9, 1953, the appellant filed a suit against respondent No. 2 (Chhoti Begum) for specific performance of her part of the agreement. Respondent No. 1 also filed on February 6, 1954, a suit for possession by pre-emption on the allegation that he had become a co-sharer with the other three daughters by virtue of the sale effected in his favour by Chhoti Begum of her share in the eastern portion of the house. Both the suits were tried and disposed of by the Trial Court which held that respondent No. 1 was not a bona fide purchaser for value but since he had a right of pre-emption the suit for specific performance was dismissed and the suit relating to pre-emption was decreed in favour of respondent No. 1. The appellant filed appeals before the first appellate court which failed. He preferred two appeals to the High Court which upheld the decree of dismissal in the suit for specific performance filed by the appellant. As regards the suit for pre-emption it was held that the ground of vicinity was no longer available in view of the judgment of this court in Bhau Ram v. B. Baijnath, Singh (1962 Supp 1 SCR 724 : AIR 1962 SC 1476 : (1963) 1 SCA 411.).

The High Court, however, came to the conclusion that respondent No. 1 was a sharer in the appendages - common gate and common passage - and therefore he was entitled to pre-emption.

4. In the appeal arising out of the suit for pre-emption the sole contention raised by Mrs. Chagla is that under the Mahommedan Law no right of pre-emption accrues unless a demand for pre-emption is made and such a demand can only be made after the completion of the sale of the property sought to be pre-empted. For the purpose of finding out whether the sale had been completed the court had to consider the provisions of the Transfer of Property Act, 1882, and the Registration Act, 1908, and not the Principles of Mahommedan Law. Our attention has been invited to a decision of this Court in Ram Saran Lall and Others v. Mst. Domini Kuer and Others ((1962) 2 SCR 474 : AIR 1961 SC 1747 : (1963) 1 SCJ 646.). There a sale-deed had been executed on January 31, 1946 and presented for registration on the same date. On coming to know of the execution of the sale-deed the pre-emptor made a talab-i-mowasibat on February 2, 1946. But the deed was actually copied out in the registration books on February 9, 1946. The suit for pre-emption had been resisted on the ground that the talab (demand) had been made prematurely. By a majority this Court held that the sale was completed only on February 9, 1946, when the registration was complete and that the talab was made prematurely and, therefore, the suit must fail.

5. No Prima facie it would appear that in accordance with the above decision the sale sought to be pre-empted by respondent No. 1 could not be regarded as having been completed until October 8, 1953, when the sale-deed was copied out in the books of the Sub-Registrar. The talab had been made according to the evidence which was accepted by the courts below on August 17, 1953, namely, the day on which the sale-deed in favour of the appellant by the three daughters was got registered by the Sub-Registrar, but the registration of which was not completed in the books of the Sub-Registrar till October 6, 1953. Mr. Chagla has contended strenuously that the only demand alleged to have been made was on August 17, 1953 and the suit for pre-emption was bound to fail as being premature according to the ratio of the decision of this Court in Ram Saran Lall's case (supra).

6. The difficulty in the way of the appellant is that a wholly new case is now being set up on his behalf by Mr. Chagla. In the plaint it was stated in Para 14 that as soon as the plaintiff came to know about the purchase of the property by defendant No. 1 he fulfilled the condition of the pre-emption according to Mahommedan Law and sent message to defendant No. 1 and also served a notice that he must take from the plaintiff the sum of Rs. 3,750 paid by him and transfer to the plaintiff the portion purchased by him from defendant Nos. 2 to 4 but he did not pay any heed. In the written statement in para 4 it was asserted by defendant No. 1, the present appellant that the plaintiff did not fulfil any condition of pre-emption nor did he ever place any demand orally or in writing before the contesting defendant regarding the purchase and reconveyance of the property in respect of which pre-emption was sought. The allegation of the plaintiff that he had fulfilled any demand according to the Mahommedan Law was totally incorrect and against the facts. On the above pleadings on the point the issue was framed in the following terms :

> "Whether necessary demands of pre-emption as required by Hanafi Law were performed by the plaintiff ?"

7. The Trial Court discussed the evidence led on the above issue and held that demands had been properly performed in accordance with law. The evidence related mainly to what happened on August 17, 1953, when the plaintiff was informed of the sale-deed which had been executed in favour of defendant No. 1. That was the first demand and a second demand was also performed later. The date on which the second demand was made is, however, not mentioned in the judgment

of the Trial Court. In the appeal against the decree of pre-emption reference was made to the evidence led on the question of demand and this is what the learned Additional District Judge said :

> "Again addressing Haji Nisar and Mehruddin witnesses he said that he performed the first demand in their presence and the second demand was again performed before them and that if it was necessary they would be summoned as witnesses."

8. Now this judgment was delivered on February 13, 1959, by which time the law laid down by this Court in Ram Saran Lall's case (supra), could naturally not have come to the notice of the counsel for the parties and the same could not have been referred to before the Additional District Judge. But by the time the appeal came to be decided by the High Court - the judgment was delivered in July, 1966 - the law had been settled by this Court and if the appellant wanted to rely on the argument which has been raised before us there is no reason or justification for not having done so at the stage. It must be remembered that the entire litigation had proceeded on the basis that the rules of Mahommedan Law relating not only to pre-emption but also to the point of time when the sale is completed were being applied by the courts. After the pronouncement in Ram Saran Lall's case (supra), it became settled that the necessary demands in a pre-emption suit had to be made after the sale had been completed not by execution or registration of the sale-deed but by the sale-deed having been copied out in the Sub-Registrar's books and it would be the date entered in that book which was to be considered as the date of sale. According to Mr. Chagla the demands on the evidence of the respondent himself, were made before October 6, 1953, and not afterwards. This was a question of fact which was never investigated by any of the courts. Even if the argument canvassed before us had been raised before the High Court that could have gone into the matter and considered the evidence on the record to find out when the demands were made. Our attention has been called to a registered notice having been served on the appellant by the respondent. There is mention of such a notice in Para 14 of the plaint. This notice, Ext. 10, was sent after October 6, 1953, its date being November 30, 1953. After giving the details necessary for showing the right of pre-emption of the plaintiff it was stated that the demand had already been made and that for the purpose of avoiding any dispute before filing the suit for pre-emption the vendee was being informed that he should accept the amount of consideration and give the property to the plaintiff. Mr. Chagla says that this notice could hardly be regarded as a proper demand according to the requirements of Mahommedan Law.

9. The Mahommedan Law relating to demand before filing a suit for pre-emption is of a highly technical nature. It is stated in the Principles of Mahommedan Law by Mulla, 16th Edn. that the talab-i-mowasibat is spoken of as the first demand and the talab-i-ishad as the second demand. The third demand consists of the institution of the suit for pre-emption. Both the talabs are conditions precedent to the exercise of the right of pre-emption. The first talab should be made as soon as the fact of the sale is known to the claimant. Any unreasonable or unnecessary delay will be construed as an election not to pre-empt. In some of the cases referred to a delay of 24 hours or even 12 hours was considered too long and it was held that there has been so much delay the pre-emptor was not entitled to sustain his claim for pre-emption. There are other highly technical rules about the presence of witnesses and the nature of evidence which they should give with regard to the second demand, the view of the High Courts being conflicting in the matter; (See Pages 242, 243).

10. It seems to us that a strict compliance with all the requirements of the two demands which are necessary before pre-emptor can succeed in a suit for pre-emption under the Mahommedan Law may become very difficult, particularly, on the question of the promptness and avoidance of delay with regard to the first demand. As stated before a sale shall be deemed to be completed only after

the sale-deed has been copied in the books of the Sub-Registrar. If the demand has to be made after such completion it would be virtually impossible or at any rate extremely difficult for any pre-emptor to make the first demand as promptly as required under the principles of Mahommedan Law. It cannot be expected that a pre-emptor should keep a perpetual watch and go on making constant inquiries with regard to the point of time when the office of the Sub-Registrar would copy out the sale-deed in the prescribed book. However, that is a matter on which legislation may become necessary and that is for the Parliament to consider and not for us.

11. It would be abundantly clear from what has been stated above that the question of demand has not been examined by any of the courts keeping in view the law laid down by this Court and the principles to which reference has been made. Obviously it was the appellant who was to blame for not agitating these matters at least before the High Court. The point whether the demands made were premature or complied with the rules of Mahommedan Law could only be determined by reference to entire evidence and is not a pure question of law. It is surprising that even in the petition for special leave to this Court the points which Mr. Chagla has raised were not canvassed. In the statement of the case only the matter was put in these words :

> "Further, the respondent could not claim pre-emption as a co-sharer (Shafi-e-Sharik) he had not become owner of the one-fourth share in the eastern portion before the sale-deed in favour of the appellant. The sale-deed in his favour was registered on August 17, 1953, some time after the three sisters registered the deed in favour of the appellant. As held by this Hon'ble Court in the case reported in 1962 (2) SCR 474 the demand made by the respondent at 4 or 5 p.m. on August 17, 1953, was not valid."

12. Mr. Chagla, while fairly and properly admitting that all these infirmities are present, has maintained that we should give a decision on the question of demand in the light of his argument and that the pre-emptor whose right is weak and is of a piratical nature should not be allowed to succeed unless he satisfies the court that he has strictly complied with the requirements of law relating to pre-emption. In our judgment adjudication of this matter which is a mixed question of law and fact should have been invited from the courts below and in the absence of any such decision it will not be just and proper for us, at this stage, to allow the matter to be re-opened and to entertain the contention of Mr. Chagla on the question of the invalidity of the demand or demands made by the respondent before filing the suit for pre-emption.

13. Accordingly the appeal arising out of the suit for pre-emption fails and it is dismissed. But the parties will bear their own costs throughout.

14. In the other appeal arising out of the suit specific performance it had been decided by the first appellate court that the preliminary condition specified in the agreement Ext. A-3 which had been executed by Mussammat Chhoti Begum and her three sisters in favour of the respondent about getting the premises vacated from the tenant had not been satisfied and therefore the agreement had not lapsed. Respondent No. 1 could have enforced that agreement and the appellant had no right to bring a suit for specific performance against Chhoti Begum by virtue of the subsequent agreement, dated August 11, 1953. The suit for specific performance was liable to be dismissed both on the ground that the respondent had a right of pre-emption and that the appellant could not enforce the agreement, dated August 11, 1953, in the presence of the earlier agreement, dated August 19, 1952. The High Court had affirmed that view. On behalf of the appellant an attempt was made by Shri M. C. Chagla to assail the above decision but we are unable to find any error in the judgment of the first appellate court or the High Court of a nature which would justify interference by us. Therefore

the appeal arising out of the suit for specific performance also fails and it is dismissed. In that appeal the parties will bear their own costs in this Court.

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