

Smt. Shanti Devi

Vs

Smt. Bimla Devi

Civil Appeal No. 3097 of 1988

(Sabyasachi, S. Ranganathan JJ)

31.08.1988

JUDGMENT

RANGANATHAN, J. -

1. Special leave granted. The appeal is also disposed of after hearing both counsel as it involves a very short question.
2. The appellant purchased certain land in village Barara, District Ambala, from one Smt. Diwan Devi by a registered sale deed on August 23, 1979. The respondent, the daughter of the vendor and a co-sharer with her in respect of the land in question filed a suit in the court of learned Sub-Judge, Ambala City for possession. She claimed that she was entitled to pre-emption in respect of the land in question. This claim of pre-emption was accepted by the learned Sub-Judge and this confirmed on appeal by the learned Additional District Judge and the High Court.
3. The contention of the petitioner in the special leave petition is that the suit land, though originally rural immovable property has become non-agricultural urban immovable property by reason of a notification of the State Government dated April 16, 1981 and that the respondent is not entitled to rights of pre-emption in respect thereof. It was submitted that the courts should have taken judicial notice of the notification and dismissed the respondent's claim for pre-emption.
4. However, when the appeal came on for hearing before us, learned counsel for the petitioner submitted that the respondent cannot exercise any rights of pre-emption inasmuch as Section 15 of the Punjab Pre-Emption Act, 1913 (1 of 1913), in certain respects, has been declared invalid and ultra vires by a decision of this Court. Our attention was drawn to the decision in *Atam Prakash v. State of Haryana* ((1986) 2 SCC 249) as further clarified by the later decision in *Jagdish v. Nathi Mal Kejriwal* ((1986) 4 SCC 510). Since the counsel for the respondent contests the correctness of this contention, it is necessary to set out a few relevant details.
5. The Punjab Pre-emption Act, 1913 confers a right of pre-emption in certain persons in respect of sales of agricultural land and village immovable property. It is sufficient for the purposes of this case to set out the provisions of Section 15 :

15. Persons in whom right of pre-emption vests in respect of sales of agricultural land and village immovable property. - (1) The right of pre-emption in respect of agricultural land and village immovable property shall vest -

(a) Where the sales is by a sole owner, -

First, in the son or daughter or son's son or daughter's son of the vendor;

Secondly, in the brother or brother's son of the vendor;

Thirdly, in the father's brother or father's brother's son of the vendor;

Fourthly, in the tenant who holds under tenancy of the vendor the land or property sold or a part thereof;

(b) where the sale is of a share out of joint land or property and is not made by all the co-sharers jointly -

First, in the sons or daughters or sons' sons or daughters' sons of the vendor or vendors;

Secondly, in the brothers or brother's sons of the vendor or vendors;

Thirdly, in the father's brothers or father's brother's sons of the vendor or vendors;

Fourthly, in the other co-sharers;

Fifthly, in the tenants who hold under tenancy of the vendor or vendors the land or property sold or a part thereof;

(c) where the sale is of land or property owned jointly and is made by all the co-sharers jointly, -

First, in the sons or daughters or sons' sons or daughters' sons of the vendors;

Secondly, in the brothers or brother's sons of the vendors;

Thirdly, in the father's brothers or father's brother's sons of the vendors;

Fourthly, in the tenants who hold under tenancy of the vendors or any one of them the land or property sold or a part thereof.

(2) Notwithstanding anything contained in sub-section (1) -

(a) Where the sale is by a female of land or property to which she has succeeded through her father or brother or the sale in respect of such land or property is by the son or daughter of such female after inheritance, the right of pre-emption shall vest, -

(i) if the sale is by such female, in her brother or brother's son;

(ii) if the sale is by the son or daughter of such female, in the mother's brothers or the mother's brother's sons of the vendor or vendors;

(b) where the sale is by a female of land or property to which she was succeeded through her husband, or through her son in case the son has inherited the land or property sold from his father, the right of pre-emption shall vest, -

First, in the son or daughter of such husband of the female;

Secondly, in the husband's brother or husband's brother's son of such female.

6. In *Atam Prakash case* ((1986) 2 SCC 249) this Court held that the clauses entitled 'First', 'Secondly', and 'Thirdly' of Section 15(1)(a), 'First', 'Secondly' and 'Thirdly' of Section 15(1)(b), and clauses 'First', 'Secondly' and 'Thirdly' of Section 15(1)(c) and the whole of Section 15(2) are ultra vires the Constitution.

7. The argument of the learned counsel for the respondents is that since the vendor in this case is a female, the right of pre-emption, if any, could have been exercised under Section 15(2). However, since Section 15(2) has been declared ultra vires, the respondent can base her claim on Section 15(1)(b). It is submitted that clauses 'First', 'Secondly' and 'Thirdly' of Section 15(1)(b) alone have been declared to be ultra vires. The respondent, therefore, is entitled to base her claim, where she is a co-sharer under clause 'Fourthly' in Section 15(1)(b). Previously, when clauses 'First', 'Secondly' and 'Thirdly' were on the statute book, the words "other co-sharers" in clause 'Fourthly' would have meant any co-sharer who did not fall within the purview of the clauses 'First', 'Secondly' and 'Thirdly'. However, since those three clauses have been declared ultra vires any co-sharer - even one who falls within the purview of the first three clauses - can claim the right of pre-emption under clause 'Fourthly', which is quite valid and enforceable.

8. Attractive as this argument is, we find that this cannot be accepted in view of the later decision of this Court in *Jagdish v. Nathi Mal Kejriwal* ((1986) 4 SCC 510), where this precise contention has been negated. After setting out the contention and the provisions of Section 15(1)(b) in paragraph 3 of the judgment, the learned Judges observed : (SCC p. 512, para 3)

It is argued by the learned counsel for the petitioners that since the suit land belonged to the joint family and it had not been sold by all the co-sharers they were entitled to claim the right of pre-emption under clause 'Fourthly' of Section 15(1)(b) of the Act because they happened to be the non-alienating co-sharers. Although there is no specific finding that the property is the joint property in this case, we shall assume for purposes of this judgment that the suit land was joint property. In order to understand the meaning of the words 'other co-sharers' in Section 15(1)(b) we have to read the Act as it stood before the decision in *Atam Prakash case* ((1986) 2 SCC 249). It is seen that the expression 'other co-sharers' in clause 'Fourthly' of Section 15(1)(b) of the Act refers to only those co-sharers who do not fall under clause 'First' or 'Secondly' or 'Thirdly' of Section 15(1)(b) of the Act. Since the petitioners admittedly fall either under clause 'First' or under clause 'Secondly' of Section 15(1)(b) of the Act they are clearly outside the scope of clause 'Fourthly'. Therefore, the petitioners cannot claim the right of pre-emption under clause 'Fourthly'. We do not, therefore, find any substance in this contention which was urged for the first time before the High Court.

We are, therefore, of the opinion that the respondent is not entitled to any right of pre-emption in respect of the property in question. The suit, therefore, should have been dismissed. It is true that the contention now urged on behalf of the petitioner was not available at the earlier stages, where the controversy really turned round the question whether the property in question was agricultural village immovable property or not. However, the contention now urged before us has become available to the petitioner in view of the decision of this Court in *Atam Prakash case* ((1986) 2 SCC 249). Being a pure question of law, we think that the petitioner should be allowed to urge the same, particularly as it raises a question as to the vires of the section on which this Court has already rendered a decision.

9. For the reasons set out above, the appeal is allowed. The judgments of the courts below are set aside and the suit filed by the respondent will stand dismissed. However, in view of the circumstances, we do not make any order as to costs in this appeal.

</html