

Indira Bai

Vs

Nand Kishore

Civil Appeal No. 105 of 1990

(K. Jagannatha Shetty, R. M. Sahai JJ)

05.09.1990

JUDGMENT

R. M. SAHAI, J. -

1. Is estoppel a good defence to 'archaic' (Atam Prakash v. State of Haryana, (1986) 2 SCC 249 : AIR 1986 SC 859) right of pre-emption which is a 'weak right' (Bishan Singh v. Khazan Singh, AIR 1958 SC 838 : 1959 SCR 878) and can be defeated by any 'legitimate' method (Radhakishan Laxminarayan Toshniwal v. Sridhar Ramchandra Alshi, AIR 1960 SC 1368 : (1961) 1 SCR 248) ?

2. Barring High Court of Rajasthan and erstwhile Mewar State (Jethmal v. Sajanumal, 1947 Mewar LR 36) most of the other High Courts, namely, Allahabad (Naunihal Singh v. Ram Ratan, ILR 39 All LJ 1138), Oudh (Ram Rathi v. Mt. Dhiraji, AIR 1947 1947 Oudh 81 : 1946 OWN 291), Ajmer (Gopinath v. R. S. Nand Kishore, AIR 1952 Ajmer 26 : 1952 Bh LR Aj 11), Bhopal (Abdul Kareem v. Babulal, AIR 1953 Bhopal 26), and Lahore (Kanshi Ram Sharma v. Lahori Ram, AIR 1938 Lah 273 : 40 PLR 10) have answered the issue in the affirmative. The Privy Council (Pateshwari Pratab Narain Singh v. Sitaram, AIR 1929 PC 259 : 56 IA 356 : 4 Luck 421), too, applied this principle to non-suit a pre-emptor who knew that the property was in the market for long but offered to purchase, only, one out of many blocks. It held :

"Assuming that the prior completed purchase by the appellant would under other circumstances, have given him the right of pre-emption in respect of the blocks in suit, he must be taken by his conduct to have waived this right, and that it would be inequitable to allow him now to re-assert it".

Even in Muslim law which is the genesis of this right, as it was unknown to Hindu law and was brought in wake of Mohammedan rule, it is settled that the right of pre-emption is lost by estoppel and acquiescence.

3. Estoppel is a rule of equity flowing out of fairness striking on behaviour deficient in good faith. It operates as a check on spurious conduct by preventing the inducer from taking advantage and assailing forfeiture already accomplished. It is invoked and applied to aid the law in administration of justice. But for it great many injustice may have been perpetrated. Present case is glaring example of it. True no notice was given by the seller but the trial court and appellate court concurred that the pre-emptor not only came to know of the sale immediately but he assisted the purchaser-appellant in raising construction which went on for five months. Having thus persuaded, rather misled, the purchaser by his own conduct that he acquiesced in his ownership he somersaulted to grab the property with constructions by staking his own claim and attempting to unsettle the legal effect of

his own conduct by taking recourse to law. To curb and control such unwarranted conduct the courts have extended the broad and paramount considerations of equity, to transactions and assurances, express or implied to avoid injustice.

4. Legal approach of the High Court, thus, that no estoppel could unless notice under Section 8 of the Rajasthan Pre-emption Act (in 'the Act') was given by the seller and pre-emptor should have had occasion to pay or tender price ignores the fallacy that estoppel need not specifically provided as it can always be used as a weapon of defence. In the privy Council decision, referred earlier, the court was concerned with Oudh Laws Act (18 of 1876) which too had an identical provision giving notice by seller. No notice was given but since pre-emptor knew that the precluded from basing his claim on pre-emption.

5. Exception to this universal rule or its non-availability, is not due to absence of any provision in the Act excluding its operation but welfare of society or social and general well-being. Protection was, consequently, sought not on the rationale adopted by the High Court that in absence of notice under Section 8 of the Act estoppel could not arise but under cover of public policy. Reliance was placed on *Shalimar Tar Products Ltd. v. H. C. Sharma* ((1988) 1 SCC 70 : AIR 1988 SC 145) a decision on waiver, and *Equitable Life Assurance Society of the United States v. Reed* (1914 AC 587 : 111 LT 50), which laid down that there could be no estoppel against statute. Equity, usually, follows law. Therefore that which is statutorily illegal and void cannot be enforced by resorting to the rule of estoppel. Such extension of rule may be against public policy. What then is the nature of right conferred by Section 9 of the Act ? In *Bishan Singh v. Khazan Singh* (*Atam Prakash v. State of Haryana*, (1986) 2 SCC 249 : AIR 1986 SC 859) this Court while approving the classic judgment of Mahmood, J. in *Gobind Dayal v. Inayatullah* (ILR 7 All 775 (FB) : 1885 AWN 228), 'that the right of pre-emption was simply a right of substitution' observed that, 'courts have not looked upon this right with great favour, presumably, for the reason that it operated as a clog on the right of the owner to alienate his property'. In *Radhakishan Laxminarayan Toshniwal v. Shridhar Ramchandra Alshi* (AIR 1960 SC 1368 : (1961) 1 SCR 248), this Court again while repelling the claim that the vendor and vendee by accepting price and transferring possession without registration of sale deed adopted subterfuge to defeat the right of pre-emption observed that, 'there were no equities in favour of a pre-emptor, whose sole object is to disturb a valid transaction by virtue of the rights created in him by statute. To defeat the law of pre-emption by any legitimate means is not fraud on the part of either the vendor or the vendee and a person is entitled to steer clear of the law of pre-emption by all lawful means'. Such being the nature of right it is harsh to claim that its extinction by conduct would amount to statutory illegality or would be opposed to public policy. The distinction between validity and illegality or the transaction being void is clear and well known. The former can be waived by express or implied agreement or conduct. But not the latter. The provision in the Act requiring a vendor to serve the notice on persons having right of pre-emption is condition of validity of transfer, and therefore a pre-emptor could waive it. Failure to serve notice as required under the Act does not render the sale made by vendor in favour of vendee ultra vires. The test to determine the nature of interest, namely, private or public is whether the right which is renounced is the right of party or public is whether the right which is renounced is the right of party alone or of the public also in the sense that the general welfare of the society is involved. If the answer is latter then it may be difficult to put estoppel as a defence. But if it is right of party alone then it is capable of being abnegated either in writing or by conduct. The Act does not provide that in case no notice is given the transaction shall be void. The objective is to intimate the pre-emptor who may be interested in getting himself substituted. The Act does not debar the pre-emptor from giving up this right. Rather in case of its non-exercise within two months, may be for the financial reasons, the right stands extinguished. It does not pass on to anyone. No social disturbance is caused. It settles in purchaser.

Giving up such right, expressly or impliedly cannot therefore be said to involve any interest of community or public welfare so as to be in mischief of public policy.

6. Even otherwise on facts found that the respondent knew of the sale deed, assisted the appellant in raising the construction and after the construction was completed in the month of June he gave the notice in month of July for exercise of the right and filed the suit in January would itself demonstrate that the conduct of the respondent was inequitable and the courts in this country which are primarily the courts of equity, justice and good conscience cannot permit the respondent to defeat the right of appellant and invoke a right which has been called a weak and inequitable right.

7. In the result this appeal succeeds and is allowed. The order of the High Court is set aside and that of the first appellate court is restored. The appellant shall be entitled to his costs.

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