SUPREME COURT OF INDIA

Smt. Mattoo Devi

Vs.

Damodar Lal (D) by Lrs

C.A.No.5816 of 1994

(A.P. Misra and Umesh C. Banerjee JJ.)

18.07.2001

JUDGMENT

U.C.Banerjee, J.

1. Whilst an appeal has been taken against the judgment and decree passed by the learned Civil Judge, Jaipur in favour of Respondent No.1 & 2 on deposit of Rs.4657/- on the basis of the doctrine of Pre-emption in the court before a specified date and the High Court dismissed the appeal on the ground of there being no material for interference with the finding of the Civil Judge, Jaipur and a special leave petition was filed against the same (being Civil Appeal No.5816/1994), the learned Advocate in support of the Appeal only restricted his submission on the issue of the principle of talab, as is known in Muslim Law.

2. The principle of talab in Muhammadan Law has three specific facets: the first being talab-e muwäthaba: Talab in common parlance means and implies a demand and talab-e muwäthaba literally means the demand of jumping. The idea is of a person jumping from his seat, as though startled by news of the sale (See in this context Wilson on Mohammadan Law). In Talab-e-muwathaba the pre-emptor must assert his claim immediately on hearing of sale though not before and law stands well settled that any unreasonable delay will be construed as an election not to pre-empt. The second, being popularly known as the Second Demand, is talab-e ishhäd, which literally speaking mean and imply the demand which stands witnessed. The second demand thus must be in reference to the first demand and it is so done in the presence of two witnesses and also in the presence of either the vendor (if he is in possession) or the purchaser and the Third Demand though not strictly a demand but comes within the purview of the Principal and means initiation of legal action. It is however not always necessary since it is available only when one enforces his right by initiation of a civil suit such an action is called talab-e tamlïk or talab-e khusümat. In this form of Talab the suit must be brought within one year of the purchaser taking possession of the property and a suit or claim for pre- emption must relate to whole of the interest and not a part of the estate.

3. Needless to record that right of pre-emption (shufa) is the right which the owner of immovable property possessess to acquire by purchase of any immovable property which had

been sold to another person. Whereas the High Courts at Bombay and Calcutta held that the right of pre-emption is a right of re-purchase from the buyer and a mere personal right; the Allahabad High Court held that it is an incidence of property. This Court, however, in the case of *Shri Audh Behari Singh v. Gajadhar Jaipuria & Ors.*[1] has held that the right of pre-emption is an incidence of property and attaches to the land itself. Detailing the judgments of the Calcutta High Court in *Sheikh Kudratulla v. Mahini Mohan*[2] as also the Allahabad and Patna High Courts view, this Court observed:

4. In our opinion it would not be correct to say that the right of pre-emption under Muhammadan Law is a personal right on the part of the pre-emptor to get a re- transfer of the property from the vendee who has already become owner of the same. We prefer to accept the meaning of the word Tajibo used in the Hedaya in the sense in which Mr. Justice Mahmood construes it to mean and it was really a mis-translation of that word by Hamilton that accounted to a great extent for the view taken by the Calcutta High Court. It is true that the right becomes enforceable only when there is a sale but the right exists antecedently to the sale, the foundation of the right being the avoidance of the inconveniences and disturbances which would arise from the introduction of a stranger into the land. We agree with Mr. Justice Mahmood that the sale is a condition precedent not to the existence of the right but to its enforceability. We do not however desire to express any opinion on the view taken by the learned Judge that the right of pre-emption partakes strongly of the character of an easement in law. Analogies are not always helpful and even if there is resemblance between the two rights, the differences between them are no less material. The correct legal position seems to be that the law of pre-emption imposes a limitation or disability upon the ownership of a property to the extent that it restricts the owners unfettered right of sale and compels him to sell the property to his co-sharer or neighbour as the case may be. The person who is a co-shares in the land or owns lands in the vicinity consequently gets an advantage or benefit corresponding to the burden with which the owner or the property is saddled; even though it does not amount to an actual interest in the property sold. The crux of the whole thing is that the benefit as well as the burden of the right of pre-emption run with the land and can be enforced by or against the owner of the land for the time being although the right of the pre-emptor does not amount to an interest in the land itself. It may be stated here that if the right of pre-emption had been only a personal right enforceable against the vendee and there was no infirmity in the title of the owner restricting his right of sale in a certain manner, a bonafide purchaser without notice would certainly obtain an absolute title to the property, unhampered by any right of the pre-emptor and in such circumstances there could be no justification for enforcing the right of pre-emption against the purchaser on grounds of justice, equity and good conscience on which grounds alone the right could be enforced at the present day. In our opinion the law of pre-emption creates a right which attaches to the property and on that footing only it can be enforced against the purchaser.

5. Before adverting to the contentions raised, though not strictly relevant, the contextual facts ought to be noticed at this juncture for proper and effective appreciation of the matter in issue.

6. Briefly stated, the facts depict that defendants Nos.2 and 4 has sold their house situated in Gali Chaudharian Chowkri Bisheshswarji, to defendant No.1 on 30th July, 1962, for a sum of Rs.4,499/- by a registered sale deed. The plaintiff, Damodar Lal (since deceased) and his son Satya Narain filed a suit in the Court of Addl. Munsiff No.1, district Jaipur on 23rd July, 1963. The case of the plaintiff is that 3/4th portion of the house is owned and possessed by them and defendant Nos.2 to 4 sold their portion in the said house to defendant No.1 on 30th July, 1962. The plaintiffs claimed that they have a right of pre-emption as they are co-sharers. It was further contended by the plaintiffs that when they came to know of the sale on 12th September, 1962, they informed Matto Devi about their right of pre-emption and asked to sell the property to them. But she paid no heed to it. It is also alleged in the plaint that in the sale-deed, certain portions exclusively belonged to the plaintiffs. The plaintiffs, therefore, sought declaration that certain portions of the property belong to them and the sale to that extent in any event is null and void. The appellant Smt. Matto Devi, being the vendee, however denied the allegations, though the character of the plaintiff as co-sharer was not denied. It was alleged that no talabs were made by Damodar Lal and Satya Deo, the plaintiffs. It was also alleged that an option to purchase the property was given to the plaintiffs, but they did not avail of the same and as a matter of fact they waived their right from enforcing the right of pre-emption. The records however depict that the plaint was amended for making an assertion that talabs were made on 12th November, 1962, in the presence of Kalyah and Satya Narain witnesses; but the property was not sold to them. The learned Munsiff, after trial held that the right or custom of pre-emption was prevalent in the city of Jaipur and the plaintiff had a right to pre-empt. It was also held that the plaintiffs had shown their inability to purchase the property and, thus, they have waived their right to pre-emption. The learned trial court also held that the suit was not maintainable as it was for partial pre-emption and as regards talabs it was the finding of the learned trial court that no talabs were made by the plaintiffs. Consequently, the suit of the plaintiffs was dismissed by the learned Munsiff. Being aggrieved by the judgment and decree passed by the learned Additional Munsiff Magistrate No.1, Jaipur dated 12th January, 1973, an appeal was preferred before the learned District Judge, which was transferred to the Court of the learned Civil Judge, Jaipur. The learned first appellate Court allowed the appeal setting aside the judgment and decree passed by the learned trial court and thus consequently, the plaintiffs suit for pre-emption was decreed with costs. The plaintiffs were directed to deposit in the trial court a sum of Rs.4667/- on or before 18th April, 1975, and it was directed that on payment of such amount in the court, Smt. Matto Devi, defendant No.1, shall deliver possession of the property to the plaintiffs whose title to the property shall be deemed to have accrued from the date of such payment. It was also directed that if the said amount is not so paid, the suit shall stand dismissed. Aggrieved by the judgment and decree passed by the learned first appellate court, the second appeal preffered by Smt. Matto Devi, however did not yield any be nefit in favour of the defendant and hence the petition before this Court.

7. As noticed above, the question pressed pertains to the issue of talab only and it is in that perspective, the effect of a notification dated 7th April, 1927 ought to be noticed.

8. Before however, proceeding with the scope and effect of the notification, it would be convenient to note the observations of Subba Rao, J. in *Bishan Singh & Ors. v. Khazan Singh*

& Anr.[3] wherein the learned Judge relied upon the statement of law as given by Plowden, J in *Dhaninath v. Budhu*[4] as below:

9. A preferential right to acquire land, belonging to another person upon the occasion of a transfer by the latter, does not appear to me to be either a right to or a right in that land. It is jus ad rem alienum acquirendum and not a jus in re aliiena. A right to the offer of a thing about to be sold is not identical with a right to the thing itself, and that is the primary right of the pre-emptor. The secondary right is to follow the thing sold, when sold without the proper offer to the pre-emptor, and to acquire it, if he thinks fit, in spite of the sale, made in disregard of his preferential right.

10. On the basis of the aforesaid, Subba Rao, J, with his usual felicity of expression observed that the general law of pre-emption does not recognise any right to claim a share in the property sold when there are rival claimants and pre-emption is a right to acquire the whole of the property sold in preference to other persons. The learned Judge further relied upon the decision in the case of *Gobind Dayal v. Inayatullah*[5] as also the decision of the Lahore High Court in the case of *Mool Chand v. Ganga Jal*[6] and summarised the law pertaining to the right of pre-emption in the manner as below:

> "(1) The right of pre-emption is not a right to the thing sold but a right to the offer of a thing about to be sold. This right is called the primary or inherent right. (2) The pre-emptor has a secondary right or a remedial right to follow the thing sold. (3) It is a right of substitution but not of re- purchase, i.e., the pre-emptor takes the entire bargain and steps into the shoes of the original vendee. (4) It is a right to acquire the whole of the property sold and not a share of the property sold. (5) Preference being the essence of the right, the plaintiff must have a superior right to that of the vendee or the person substituted in his place. (6) The right being a very weak right, it can be defeated by all legitimate methods, such as the vendee allowing the claimant of a superior or equal right being substituted in his place."

11. In the recent past this Court in the decision of *Indira Bai v. Nand Kishore*[7] while dealing with the issue of estoppel and the rule of equity stated as below:

> "3. Estoppel is a rule of equity flowing out of fairness striking on behaviour deficient in good faith. It operates a check on spurious conduct by preventing the inducer from taking advantage and asailing 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 a glaring example of it. True no notice was given by the seller but the trial Court and the 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 arise unless notice under Section 8 of the Rajasthan Pre-emption Act (in brevity 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 be 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 for giving notice by seller. No notice was given but since pre-emptor knew that the property was for sale and he had even obtained details of lots he was precluded from basing his claim on pre-emption."

12. The notification noticed above seems to have however, a definite impact in the matter in issue and as such the same is detailed hereinbelow in extenso for ascertainment of its true effect. The notification reads as below: No.2155/J-I-148 Dated Jaipur, the 7th April, 1927 Whereas it is expedient to give all possible claimants formal notice of a sale, with a view to facilitate their assertion of pre-emptive right without recourse to litigation, the following rules have been passed by the Council of State, and they shall come immediately into force:

1. When any person proposes to sell any property in respect of which any person have a right of pre- emption, he shall give notice to the persons concerned of (a) the property: and (b) the price at which he is willing to sell it.

Such notice shall be given through the Court within the local limits of whose jurisdiction the property or any party thereof is situate.

2. Any person having a right of pre-emption in respect of any property proposed to be sold shall lose such right, unless within 3 months from the date of service of such notice he or his agent pays or tenders through the Court the price aforesaid to the person so proposing to sell.

3. Any person entitled to a right of pre-emption may bring a suit to enforce such right on any of the following grounds (namely):-

(a) that no due notice was given as required by Rule 1;

(b) that tender was made under Rule 2 and refused;

(c) that the price stated in the notice was not fixed in good faith;

Incidentally Rajasthan High Court in the case of *Radha Ballabh Haldiya & Ors. v. Pushalal Agarwal & Ors.*[8] upon reference to the notification, answered the reference to the effect that the notification dated 7th April, 1927 as published in the Jaipur Gazette dated 15th April, 1927, in fact, modified the customary right of pre-emption

prevailing to the former Jaipur State and made the formalities of making talabs as unnecessary. While coming to the conclusion as above, the High Court in Radha Ballabs decision (supra) stated in paragraphs 69 and 75 of the Report as below:

> 69. In our considered opinion, the procedure law and substantive law though well defined concept in jurisprudence and there was no watertight compartments for them created by any statute. If we have to make a correct statement of law, we must further mention in unequivocal manner that the matter of substance in contradistinction to the matters of form can be found both in substantive law and procedural law and it would be fallacious to say that all which form in the branch of substantive law are matter of substance and all which form in procedure law are matter of form. It all depends upon the particular statute, its object, its formulation and the effect which is desired to be achieved by the requirement of procedure. We do not propose to deal with this point any further because in our considered opinion the substantive law and procedural law overlap each other more often than not and the proposition of law laid down by us is so patent and well known that it requires no examples, illustrations and citation of decisions, any further.
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> 75. We are of the opinion that this notification is a complete Code in respect of right of pre-emption except that the concept of pre-emption has been left to be deduced from the customary law of the parties and has not been mentioned in it. In other words, the right of pre-emtption, as per the customary law is to be found in the customary law but once the right of pre-emption exists either on account of vicinity or otherwise then that right can be enforced only according to the requirement and conditions laid down in this notification of 1927. It is true that talabs have not been distanced with in this notification. We are assuming for the purpose of this reference that the requirement of talabs was necessary under the customary Mohammedan Law before this notification was issued and if there is any doubt on that point, i.e. amply answered by the two judgments of the Supreme Court in *Smt. Rajeshwari Devi v. Mukesh Chandra*[9] (supra) and Bhagirath Singh Shekhawat v. Ram Niwas Barit (ibid) later being related to the Jaipur State itself.

13. Turning on to the contextual facts the main issue which fell for consideration before the High Court has been as to whether the plaintiffs after the execution of the agreement to sell, expressed their inability to purchase the house and after the execution of the sale deed, refused to purchase the house for Rs.4499/- plus expenses for registration and, therefore, the plaintifs waived their right of pre-emption?

14. Obviously, the burden of the issue was upon the defendants and the defendants were required to prove that the plaintiffs after execution of the agreement to sell, expressed their inability to purchase the property and also after execution of the sale-deed, refused to purchase the property for a sum of Rs. 4,499/-. The High Court upon consideration of the evidence came to the conclusion as below:

15. I have myself gone into the entire evidence and my conclusion is that the finding arrived at by the learned first appellate Court is clear and based on evidence that there was no evidence before the learned Munsiff to hold that the plaintiffs showed their inability to purchase the house, or had refused to purchase the same. The defendants have failed to prove their case that the plaintiffs after the execution of the agreement to sell expressed their inability to purchase the house and that after the execution of the sale-deed refused to purchase the house for a consideration of Rs.4,499/- plus expenses for registration. Thus, the question of waiver of right of pre-emption by the pre-emptor does not arise at all.

16. The learned Advocate appearing in support of the appeal very strongly contended that the evidence on record does not lend any credence to the case of the Respondents herein and as such the High Court was in gross error in the matter in issue. Incidentally the finding of fact arrived at upon consideration of the evidence on record ought not to be interfered with unless there is a total perverse view of the matter in issue. On perusal of the records, we do not find any such perversity so as to attribute the judgment of the High Court, otherwise not sustainable. In our view the High Court has dealt with the issue in its proper perspective having due regard to the language used in the notification and as such question of any interference under Article 136 of the Constitution of India would not arise. In that view of the matter this appeal fails and is dismissed without however any order as to costs.

[1](1955 (1) SCR 70) *[2](4 Bengal Law Reporter 134)* *[3](1959 SCR 878)*
[4](136 PR 1894 at page 511) *[5](1885 ILR 7 Allahabad 775)* *[6](1930 ILR 11 Lahore 258)*
[7](AIR 1991SC 1055) *[8](AIR 1986 Rajasthan 88)* *[9](1966 SC Notes 403)*