

SUPREME COURT OF INDIA

Suresh Chand

Vs.

Suresh Chander

C.A.No.482 of 2020

(Dr.D.Y.Chandrachud and Ajay Rastogi, JJ.,)

19.02.2020

JUDGMENT

Dr.D.Y.Chandrachud,J.,

SLP(C) No 11551 of 2011

1. Leave granted.
2. This appeal arises from a judgment and order of the High Court of Judicature of Rajasthan at Jaipur in a second appeal under Section 100 of the Code of Civil Procedure 1908.
3. The issue in the present appeal is whether a right of pre-emption was available to Beni Prasad who is alleged to be a joint owner in possession of the disputed courtyard. This has arisen in the context of the *Rajasthan Pre-emption Act 1966*¹. Briefly stated, the facts which have given rise to the present appeal are thus: A *suit*² for pre-emption was instituted by Beni Prasad in the Court of the Civil Judge, Senior Division, Badi, District Dholpur in Rajasthan. Beni Prasad died during the pendency of the proceedings and is represented by respondents 1 to 13. Beni Prasad and Kirorilal were brothers. Beni Prasad filed the suit for pre-emption, against Devicharan who was impleaded as the first defendant and Kirorilal who was impleaded as the second defendant. The appellants in the present appeal are the sons of Devicharan. A sale deed was executed on 6 January 1990 by Kirorilal in favour of Devicharan by which Kirorilal sold his house along with the disputed courtyard to Devicharan. The basis of the suit was that Beni Prasad and Kirorilal, as brothers were joint owners in possession of the disputed courtyard having a half share each. It was argued that the plaintiff in his capacity as the brother of the second defendant, had a right of pre-emption which would prevail against the first defendant, in regard to the purchase of the house and the courtyard from the second defendant. The suit was contested by the defendants who filed their written statements. The defence was that the original owners of the property Pyare Lal and Baboo Lal had sold the disputed house to Prabhu Lal, who was the father of the original plaintiff and the second defendant. In the written statement, a plea

was taken that on 17 January 1956, a partition had been effected between the members of the family as a consequence of which, the second defendant was allotted the disputed house and the courtyard and the original plaintiff was allotted another property.

4. The Trial Court framed several issues of which specifically issues (iii), (iv) and (vi) have a bearing on the subject matter of the present appeal. Issues (iii), (iv) and (vi) read as follows:

“in) Whether, the plaintiff has the right of pre-emption in the sale deed dated 6th of January, 1990.

iv) Whether, there is common entrance to the ancestral house of the defendant no.1 and house purchased by the defendant no.1 from the defendant no.2. If yes, then what is its effect on the suit.

vi) Whether, the defendant no.1 is also a sharer in the disputed courtyard and he was vested with the right of pre-emption/prior purchase right in respect of the disputed house.”

5. Before the Trial Court, the submission which was urged on behalf of the defendants was that the first defendant, Devicharan himself had a share in the disputed property and was vested with a right of pre-emption. In support of the claim of Devicharan to the use of the common amenity as a courtyard, reliance was placed on a written statement (Exhibit A2) filed on 15 February 1982 and 17 February 1982 by Beni Prasad in another suit instituted against him by his brother Kirorilal. In the course of his written statement, Beni Prasad stated that Devicharan was also the owner of the disputed courtyard. During the course of the cross-examination in the suit out of which these proceedings arise, PW 1, who deposed in evidence, was confronted with the above-mentioned written statement. The Trial Judge, in the course of the judgment, recorded that PW 1 had stated that whatever had been set out in the written statement filed by his father would have been correct. On the basis of the admission contained in the written statement in the suit of 1980, it was urged on behalf of the appellants that Devicharan had an interest in the courtyard which was a common amenity. The legal consequence of this would be that Devicharan also had a right of pre-emption. Hence, the submission was that a right of pre-emption would not be available to Beni Prasad against another holder of the right of pre-emption, equal or inferior. This submission was rejected by the learned Trial Judge as below:

“If by way of an argument it may be assumed that Devicharan was vested with the right of transmigration through the said courtyard, even then as compared to the plaintiff, his right of pre-emption is at lesser level. In this way both of these issues are decided in favour of the plaintiffs and against the defendants.”

6. The suit was decreed by the Trial Court. The above finding was affirmed in first appeal. The first appellate court adverted to the written statement (Exhibit A2), which was filed by Beni Prasad in the earlier suit of 1980. However, the appellate court held that

notwithstanding the fact that Devicharan had a right of passage through the disputed courtyard, the plaintiff, who was the brother of Kirorilal, had a better or a higher right as compared to Devicharan since Kirorilal and Beni Prasad were brothers. The first appeal was dismissed.

7. The High Court has dismissed the second appeal in limine holding that no substantial question of law arose for its consideration.

8. Assailing the judgment of the High Court, Mr Puneet Jain, learned counsel appearing on behalf of the appellants, submitted that:

(i) The provisions of Sections 4, 5(1)(c) and 6(1)(ii) of the Act indicate that a right of pre-emption is not available when the person to whom the property has been sold by the vendor is an individual who has a right of pre-emption whether equal or inferior; and

(ii) Pre-emption is a weak form of a right and the legislature, in the present case, has indicated that the right would not be available where the property is sold to a person who is seized of such a right. In other words, it was urged that whether the right of pre-emption available to Devicharan is equal or inferior would be a matter of no relevance having regard to the provisions of Section 5(1)(c).

9. On the other hand, it was urged on behalf of the respondents by Mr S K Sinha, learned counsel, that both the Trial Court and the appellate court came to the conclusion that Beni Prasad and Kirorilal were brothers. Consequently, the assertion by Beni Prasad of a right of pre-emption, when Kirorilal purported to sell the property on 6 January 1990 to Devicharan, has to be valid. Learned counsel submitted that in the event that the claim of the appellants is accepted in terms of the sale deed, a situation may occur by which the respondents are deprived of the use of the common amenity of the disputed courtyard.

10. In assessing the rival submissions, it is necessary to analyse the provisions of the Act. Section 4 is in the following terms:

“4 Cases in which right of pre-emption accrues. Subject to the provisions contained in section 5, the right of pre-emption shall, upon the transfer of any immovable property, accrue to the persons mentioned in section 6.”

The right of pre-emption accrues on the transfer of any immovable property to the classes of persons mentioned in Section 6. But the opening words of Section 4 indicate that the right of pre-emption which accrues under Section 6 is subject to Section 5.

11. Section 5 provides for cases in which the right of pre-emption does not accrue. For the purposes of the present appeal, clause (c) of sub-section (1) of Section 5, which is relevant, provides as follows:

“5. Case in which right of pre-emption does not accrue - (1) The right of pre-emption shall not accrue -

(a) ***

(b) ***

(c) on a transfer to any of the persons mentioned in section 6, to any person who has an equal or inferior right of pre-emption;”

As a result of Section 5(1)(c), the right of pre-emption does not accrue on a transfer of the property to any of the persons mentioned in Section 6, to any person who has an equal or inferior right of pre-emption. In a case, where a transfer is to a person mentioned in Section 6, the right of pre-emption does not accrue to any person who has an equal or inferior right of pre-emption. In other words, in a case where the vendee also has a right of pre-emption under Section 6, the right of pre-emption will accrue only to a person with a superior right of pre-emption.

12. Section 6(1) specifies the persons to whom the right of pre-emption accrues. Section 6(1)(ii) is in the following terms:

“6. Persons to whom right of pre-emption accrues - (1) Subject to the other provisions of this Act, the right of preemption in respect of any immovable property transferred shall accrue to, and vest in, the following classes of persons, namely:

(ii) owners of other immovable property with a stair-case or an entrance or other right or amenity common to such other property and the property transferred,”

Sub-sections (2) and (3) of Section 6 are as follows:

“(2) Among the different classes of persons mentioned in sub-section (1), persons of the first class will exclude those of the other classes, persons of the second class will exclude those of the third class.

(3) Among persons of the same class claiming the right of pre-emption, he person nearer in relationship to the person whose property is transferred will exclude the more remote.”

13. Under Section 6(1)(ii), a right of pre-emption accrues in respect of an immovable property to owners of other immovable property with a stair-case, entrance or other right or amenity common to such property and the property that is transferred. Where a right of pre-emption enures to the benefit of a person under the provisions of Section 6(1)(ii), a consequence emanates in terms of Section 5(1)(c). The effect of Section 5(1)(c) is that a right of pre-emption does not accrue, on a transfer to any person mentioned in Section 6, to any person who has an equal or inferior right of pre-emption. In other words, where a transfer is to any of the persons mentioned under Section 6, the right of pre-emption to the claimant accrues only if the claimant has a superior right. The right of pre-emption, as Section 4 indicates, is subject to the provisions of Section 5. Consequently, where any of the provisions of Section 5 come into operation, the right of pre-emption would not be available.

14. In a four judge Bench decision of this Court in *Bishan Singh v Khazan Singh*³, Justice Subba Rao (as the learned Chief Justice then was), while dealing with the provisions of the Punjab Pre-Emption Act 1913, summarised the law on pre-emption as follows:

“11. The plaintiff is bound to show not only that his right is as good as that of the vendee but that it is superior to that of the vendee. Decided cases have recognized that this superior right must subsist at the time the pre-emptor exercises his right and that that right is lost if by that time another person with equal or superior right has been substituted in place of the original vendee. Courts have not looked upon this right with great favour, presumably, for the reason that it operates as a clog on the right of the owner to alienate his property. The vendor and the vendee are, therefore, permitted to avoid accrual of the right of pre-emption by all lawful means. The vendee may defeat the right by selling the property to a rival pre-emptor with preferential or equal right. To summarize: (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.”

(Emphasis supplied)

In a Constitution Bench decision of this Court in *Radhakisan Laxminarayan Toshniwal v Shridhar Ramchandra Alshi*⁴, this Court dealt with the question whether a suit for pre-emption could be filed prior to execution of the sale deed. Justice J L Kapur, speaking for this Court held thus:

“13. ...The right to pre-empt the sale is not exercisable till a pre emptible transfer has been effected and the right of pre-emption is not one which is looked upon with great favour by the courts presumably for the reason that it is in derogation of the right of the owner to alienate his property. It is neither illegal nor fraudulent for parties to a transfer to avoid and defeat a claim for pre-emption by all legitimate means...”

(Emphasis supplied)

15. The right of pre-emption is a preferential right to acquire the property by substituting the original vendee. The transfer or sale of an immovable property is a condition precedent to the enforceability of the right. The right of pre-emption is attached to the property and only on that footing can it be enforced against the vendee. Though the right is recognised by law, yet it can be rendered imperfect by the vendor when he transfers the property to

another person who also has a superior right to the plaintiff pre-emptor.

16. In the present case, it has come on the record before the Trial Court that Devicharan, the predecessor of the appellants, had a pre-existing right in respect of the amenity of the common courtyard or sahan. This was admitted in the written statement filed by Beni Prasad in Suit 43 of 1980. PW 1 during his cross-examination was confronted with the above written statement. What emerges from the above admission is that Devicharan had a right in common in respect of the amenity of the courtyard. During the course of proceedings before this Court, it was admitted that the courtyard was shared between Beni Prasad and Devicharan. Therefore, both their rights would fall within the ambit of the provisions of Section 6(1)(ii). In terms of the provisions of Section 5(1)(c), the right of pre-emption would not accrue to any person with an equal or inferior right of pre-emption. Kirorilal executed a sale deed on 6 January 1990 in favour of Devicharan who within the meaning of Section 6(1)(ii) had a right of pre-emption. But the right of pre-emption of Devicharan was inferior to the right which was claimed by Beni Prasad as the brother of Kirorilal. Devicharan's right under Section 6(ii) was subject to a superior right of Beni Prasad by virtue of Section 6(3). Section 6(3) states that even among persons of the same class, the nearer in relationship to the person whose property is transferred excludes the more remote.

17. During the course of the arguments, Mr Puneet Jain, learned counsel for the appellants has raised an argument that the comma appearing in Section 5(1)(c) should be read as "or" and the Section must be interpreted disjunctively. It is argued that Section 5(1)(c) should be read as "the right of pre-emption shall not accrue... on a transfer to any of the persons mentioned in Section 6" or "the right of pre-emption shall not accrue... to any person who has an equal or inferior right of pre-emption". It is urged that the plaintiff (Beni Prasad) would not be covered by the first part as the first defendant (Devicharan) would be covered by Section 6(1)(ii) and the second part would not apply to the plaintiff as he only has an inferior right of pre-emption against the defendant. It is submitted that the plaintiff cannot claim any right of pre-emption where a transfer is affected by a person who is covered by any of the clauses of Section 6. However, the disjunctive interpretation of Section 5(1)(c) as suggested by the counsel of the appellants cannot be countenanced in view of the plain text of the provision. Reading the provision in a manner as suggested would amount to an exercise of legislative re-drafting. This is impermissible.

18. The two segments of Section 5(1)(c) are as follows:

(i) The first segment contains the words "on a transfer to any of the persons mentioned in Section 6; and

(ii) The second segment comprises of the words "to any person who has an equal or inferior right of pre-emption". Both segments are separated by a comma and refer to two separate sets of persons. In the first segment the expression "any of the persons" refers to the vendee. In the second segment, the expression "any person" refers to the claimant. In the present case, the plaintiff (Beni Prasad) had a superior

right of pre-emption by virtue of the provisions of Section 6(3) since he was the brother of the second defendant. Devicharan has an inferior right of pre-emption as compared to Beni Prasad. Hence his claim cannot prevail over the superior right of pre-emption of Beni Prasad.

19. For the above reasons, we are of the view that the concurrent findings of the Trial Judge, the first appellate court and in second appeal, have proceeded on a correct interpretation of the provisions noticed above.

20. We accordingly dismiss the appeal. However, there shall be no order as to costs.

Judgment Referred.

¹ "the Act"

² Civil Suit Case No 71 of 1993

³ AIR 1958 SC 0838

⁴ AIR 1960 SC 1368