

# ALLAHABAD HIGH COURT

Kali Charan Singh

Vs.

Janak Deo Singh

(Sulaiman, C.J.)

25.05.1932

## JUDGMENT

### **Sulaiman, C.J.**

1. This is an appeal by defendants 10 and 11 arising out of four pre-emption suits. The suits were consolidated, and that is why there is only one appeal. For purposes of convenience we shall adhere to the serial numbers of the parties in Suit No. 635 of 1926. Defendants 1, 2 and 3 entered into a contract for the sale of certain zamindari property with defendants 10 and 11, who were strangers to the mahal. Subsequently defendants 4, 5 and 6 and the predecessor of defendants 7, 8 and 9 took a sale deed from defendants 1, 2 and 3 apparently with knowledge of the previous contract. A suit for specific performance of the previous contract was brought by defendants 10 and 11, in which the vendees pleaded inter alia that they had a preferential claim for pre-emption. The claim was referred to arbitration, and the arbitrators held that the right of pre-emption was no defense, to the suit for specific performance of the contract, and that if there was such a right, it should be preserved and a separate suit for preemption should be instituted. This clause was embodied in the award. The Court in passing a decree in terms of the award deleted this clause. Unfortunately the judgment of the Court is not before us, but possibly the Court thought that such a clause was out of place. The Court ordered that defendants 4 and 9 should execute a sale deed in favour of defendants 10 and 11. The defendants failed to do so, and the Court got a sale deed executed on behalf of defendants 4 and 9 in favour of defendants 10 and 11. It may be noted that the decree did not order defendants 1 and 3 to execute the sale deed themselves, but their transferees were ordered to execute it.

2. Suits for pre-emption were brought by defendants 4 and 6, by the sons of defendants 4 and 5, by defendants 7 to 9 and by two other co-sharers who are defendants 12 and 13. All these suits have been decreed by both the Courts; hence this consolidated appeal by defendants 10 and 11.

3. It is first urged on their behalf that there could be no right of pre-emption on a transfer effected by a sale deed executed in pursuance of a decree for specific performance. So far as this point

alone is concerned, it is covered by the ruling in *Lal Chand v. Ram Chandar*<sup>1</sup>, 842 where it was held that a transfer of this type was a sale and not a sale in execution of a decree. The next point urged is that the claim for pre-emption must be deemed to have been disallowed in the previous suit, and the present suit is barred by the

<sup>1</sup> AIR 1929 All 462 : (1929) ILR 51 All

principle of *res judicata*. As the preemption accrues only on the sale taking place, and in the present case the sale sought to be pre-empted was effected on 17th December 1925 when the Court executed it, it cannot be said that the question of the right of pre-emption was by implication decided against the present appellants. This point also is covered by the ruling referred to above. It may further be pointed out that the award had expressly reserved the right of pre-emption and the decree though it did not contain the clause, was based entirely upon the award. The right of pre-emption at the stage could not be claimed as of right. It was merely a matter of discretion to dismiss the suit because of such a future right. But the arbitrator did not in this particular case think it fit to do so but left the question open to be fought out subsequently.

4. It is next urged that inasmuch as the arbitrators had made an award that defendants 4 to 9 should execute the sale deed in favor of defendants 10 and 11 and that award was incorporated in the decree, the real vendors are defendants 4 to 9 themselves, and not defendants 1, 2 and 3. It is therefore urged that the vendors themselves cannot be allowed to bring a claim for pre-emption of the sale deed executed on their behalf by the Court. This contention is based on the principle of constructive estoppel. There is no doubt that no difficulty would have arisen if the decree in the suit for specific performance had been in proper form. When a person with knowledge of a previous contract of sale, purchases the property, the purchase is voidable at the option of the prior promisee and the contract with him can be enforced specifically against the subsequent purchaser. In such a suit the Court should declare the second purchase as null and void and cancel it, and order the original promisee to carry out his contract by executing a sale deed in favor of the plaintiff. If the Court does not consider it desirable to go into the claim to pre-emption set up by the purchaser, his right to pre-empt would remain intact because the compulsory transfer would be on behalf of the original vendors.

5. An apparent difficulty has been created in this case because the decree ordered the original vendees themselves to execute the sale deed in favor of the plaintiffs. The decree being based on the award it had to follow the direction given in the award. But inasmuch as the arbitrators had made it clear in their award that they were not going to consider the future right of pre-emption that the original vendees may have and expressly left the question open, we think that the original vendees should not by any principle (of constructive estoppel) be prevented from pre-empting the property. The arbitrator was a layman, and we must not go solely by the form which the operative portion of his award took, but also by the express direction given by him in the body of his award. On the whole we think that in spite of the defective form of the decree, the vendees have not lost their right of pre-emption.

6. We may also point out that when the property transferred had itself been purchased by the vendees and there is no evidence that if it had been thrown into the common stock and had become the joint family property, the sons of the original vendees would not be prevented from claiming pre-emption when they were no parties to the suit for specific performance. We accordingly uphold the decrees of the Courts below and dismiss the appeal with costs.

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