

LAHORE HIGH COURT

Mool Chand

Vs

Ganga Chand

(Bhide, J.)

21.02.1930

JUDGMENT

Bhide, J.

1. The points referred to the Full Bench for decision are:

(1) Does the rule of lis pendens apply when during the pendency of a pre-emption suit, the vendee transfers the property which is the subject matter of litigation to a person possessing a right of pre-emption equal to that of the pre-emptor in recognition of such person's preemptive right.

(2) If not, is the plaintiff entitled to share the property with tin second vendee according to the rule laid down in Section 17, Punjab Preemption Act, 1913, or should his suit be dismissed?

2. The material facts for the purpose of this reference are very briefly as follows. During the pendency of a pre-emption suit with respect to the sale of certain land, the defendant vendee sold the land to one Kuramal who had a right of preemption equal to that of the plaintiff and Kura Mal in his turn sold it to one Gangadhar who possessed a similar right. Both these transfers took place before the expiry of the period of limitation for instituting a pre-emption suit with respect to the original sale and it has been found that the sales were made in recognition of the preemptive rights of Kura Mal and Gangadhar. The Courts below have held following the law as laid down in *Mahmud Khan v. Khuda* and *Sunder Singh v. Sajjan Singh*¹ that the doctrine of lis pendens does not apply and dismissed the plaintiff's suit. In second appeal it was contended for plaintiff that the law was not correctly laid down in the aforesaid rulings, that the doctrine of lis pendens does apply to the present case, and that the plaintiff was at any rate entitled to share the property equally with Gangadhar under Section 17, Punjab Pre-emption Act.

3. The respondent was not represented at the hearing, but we had the advantage of hearing the able argument addressed by Mr. Mehr Ghand Mahajan, who appeared as "amicus curiae," along

with that of Mr. Tirath Ram who appeared for the appellant.

4. As regards the first question, the doctrine of lis pendens, as explained by the Lord Chancellor in the leading English case *Bellamy v. Sabine*² is briefly

¹[1911] 53 P.R. 1911

²E.R. 44 Ch. 842

this that:

pendente lite neither party to the litigation can alienate..the property so as to affect his opponent. In other words, the law does not allow litigant parties pending the litigation to transfer their rights to the property in dispute so as to prejudice the opposite party.

5. Turner, J. has further pointed out in the same case, that the rule is not founded on any peculiar tenets of a Court of equity as to implied or constructive notice. It is a doctrine common to Courts both of law and equity and rests, on this foundation that it would be plainly impossible that any action or suit could be brought to a successful termination if alienations pendente lite were permitted to prevail.

6. The principle of lis pendens has been embodied in the statutory provisions of Section 52, Transfer of Property Act in India and although that Act is not in force in this province, the principles underlying its provisions have been held to be applicable to this Province. The principle of lis pendens being applicable to pending suits in general, the learned Counsel for the appellant as well as Mr. Mehr Chand were agreed that there is no good reason why the doctrine should not apply to pre-emption suits. A careful perusal of *Muhammud Khan v. Khuda*³ as well as *Sundar Singh v. Sajjan Singh*⁴ will show that what these rulings lay down in effect is not that the doctrine of lis pendens does not apply to pre-emption suits but only this that in the case of pre-emption suits the doctrine does not affect the validity of a sale pendente lite, made by the original vendee in favor of a person possessing a superior right of pre-emption in recognition of such right. The reason given is that such a sale does not really offend against the true rule of lis pendens. The real point for consideration, therefore, is whether the aforesaid rulings are correct in so far as they lay down that doctrine of lis pendens does not affect the validity of such sales.

7. It has been held in the above mentioned rulings that a sale pendente lite in favour of any person in recognition of his pre-emptive right is not affected by the doctrine of lis pendens because the sale does not really create any new rights. All that the vendee does in such a case is to take the bargain in the assertion of his pre-existing pre-emptive right, and hence the sale does not offend against the doctrine of lis pendens. The learned Counsel for the appellant conceded the correctness of the above interpretation of the doctrine of lis pendens in respect of a sale in favour of a person having a right of pre-emption superior to that of the plaintiff, but contended that a sale in favour of a person in possessing an equal right of pre-emption stands on a different footing owing to the provisions of Section 17, Punjab Pre-emption Act. I do not, however, see how the provisions of that section can affect the decision of this question at all. Once it is conceded that the doctrine of lis pendens does not affect the validity of a sale pendente lite, if it is

made in recognition of a right of pre-emption superior to that of the vendee, it becomes immaterial, whether that right is superior or inferior or equal to that of the pre-emptor. The sale will stand and the plaintiff will have to make out a case as against the subsequent vendee.

³[1908] 26 P.R. 1908

⁴[1911] 53 P.R. 1911

8. Before stating my answer to the first question, it may be pointed out that the language of the question is not perhaps quite accurate. The first question is to the effect whether the rule of lis pendens applies to a sale of the description mentioned therein. It is, however, clear from the referring order that the real question intended to be referred is whether the rule applies so as to affect the validity of the sale in question. Similarly, the words "if not" at the beginning of the second question are evidently equivalent to if the doctrine of lis pendens does not apply so as to affect the validity of the sale in question.

9. Taking the question in this sense my answer to the first question is that the rule of lis pendens applies to pre-emption suits but it does not affect the validity of a sale of the kind specified in the question as such a sale does not really offend against the rule.

10. The next question referred to the Full Bench for decision is whether in the case of a sale of the above description, the plaintiff is entitled to share the property equally with the second vendee according to Section 17, Punjab Pre-emption Act or his suit should be dismissed.

11. The answer to this question must depend on the interpretation of Section 17. Apart from that section, there seems to be nothing in the Act to enable pre-emptors with equal qualifications to share the property equally. It is well established that the right of pre-emption is a right to acquire the whole of the property sold in preference to other persons and the right cannot be claimed in respect of a portion of the property. When the right vests in a group of persons, they may exercise the right jointly or severally according to the provisions of Section 13. But a person cannot claim a portion of the property on the ground that there are other persons with equal qualifications. Nor is there anything in the Act to compel a vendor to sell property in equal shares to such persons. Section 17 appears to contain the only exception to this general rule and it must, therefore, be seen whether that section applies to the present case. Section 17, Punjab Pre-emption Act, 1913 begins as follows:

When several pre-emptors are found by the Court to be equally entitled to the right of pre-emption, the said right of pre-emption shall be exercised etc. etc.

12. Then follow Clauses (a), (b), (c), (d) and (e) which lay down the manner in which the property is to be divided in different cases under those clauses. It will appear from the above that the section only applies where (1) the right has yet to be exercised and (2) the pre-emptors are found by a Court to be equally entitled to exercise the right. It has been suggested that the word "pre-emptor" in this section may be taken to include, a person who has already purchased

property out of Court in the exercise of his right of pre-emption. No authority has been cited in support of this interpretation and it seems to me to be opposed to the ordinary meaning of the word as understood generally as used in the Act, as well as to the context. The right of pre-emption means the right to acquire property in preference to others (Vide Section 4, Punjab Pre-emption Act) and the word "pre-emptor" is, I believe, ordinarily understood to mean a person who seeks to acquire property in this manner. A person who has exercised the right is no longer described as a "pre-emptor" but a "vendee." That the term "pre-emptor" has been used in the above sense in the Punjab Pre-emption Act 1913, will also appear from the language of Sections 11, 19, 25 and 26 in which the word occurs. The suggested interpretation, moreover, seems to me to be clearly incompatible with the context, for the opening clause of Section 17 presupposes as already pointed out (1) that the right of pre-emption has yet to be exercised and (2) that the person claiming the right are found by a Court to be equally entitled to exercise it. It would thus appear that the word 'pre-emptor' is used in Section 17 in the sense of a person seeking to enforce his right of pre-emption through a Court.

13. The proposed interpretation of the word 'pre-emptor' as stated above would involve the further result that even when a property has been transferred to a second vendee ante litem the plaintiff will be able to claim a share in it. For, if the term 'pre-emptor' is to be taken to include a person who has already purchased property in the exercise of the right of pre-emption, there is no reason why the term should be confined to a person who exercises the right during the pendency of the suit. The net result will practically be to confer a right of equal division in all cases on persons with an equal right of preemption. The pre-emption Act does not, however, seem to recognise any such right generally.

14. For reasons given above, the suggested interpretation of the word pre-emptor as used in Section 17, Punjab Pre-emption Act seems to me to be untenable. In my opinion the plaintiff is not a 'pre-emptor' within the meaning of that section and is, therefore, not entitled to share the property equally with the second vendee. His suit should, therefore, be dismissed, I would answer the second question accordingly.

Broadway, J.

15. The following questions, as amplified in the light of the referring order, were referred to the Full Bench:

1. Does the rule of lis pendens apply when, during the pendency of a preemption suit, the vendee transfers the property which is the subject matter of litigation to a person possessing a right, of pre-emption equal to that of the pre-emptor in recognition of such person's pre-emptive right, (so as to affect the validity of the sale)?
2. If (the doctrine of lis pendens does) not (apply so as to affect the validity of the sale in question), is the plaintiff entitled to share the property with the second vendee according

to the rule laid down in Section 17, Punjab Pre-emption Act 1913, or should his suit be dismissed.

16. I have had the advantage of reading, the differing judgments my learned colleagues are about to deliver and have consulted the following authorities, *Muhammad Khan v. Khuda Bakhsh* [1908] 26 P.R. 1908(Supra), *Sundar Singh v. Sajjan Singh* [1911] 53 P.R. 1911(Supra), *Muhammad Khan v. Sardar*⁵ *Mt. Prabhi v. Hamira*⁶ *Karam Illahi v. Hira*⁷ *Lachmin Narain v. Koteswar Nath*⁸ *Manpal v. Sahib Ram*⁹ *Faiyaz Hussain Khan v. Prag Narain*¹⁰ *Gyasitay v. Gobind Das*¹¹ *Kamta Prasad v. Ram Jag*¹² *Bhikki Mal v.*

⁵[1910] 7 P.R. 1910

⁷[1911] 74 P.L.R. 1911

⁹[1905] 27 All. 544

⁶[1919] 1 L.L.J. 209

⁸[1878] 2 All. 826

¹⁰[1907] 29 All. 339

¹¹[1908] 30 All. 467

¹²36 All. 60

*Debi Sahai*¹³, *Bachan Singh v. Bijai Singh*¹⁴, *Bhagwan Sahai v. Nanak Chand*¹⁵, and *Ramakrishna Mudali v. Official Assignee of Madras*¹⁶ and *Bellamy v. Sabine* E.R. 44 Ch. 842(Supra).

17. After very careful consideration it appears to me clear that the doctrine of lis pendens applies to pre-emption suits. Indeed there is no dispute as to this. The difference of opinion is in relation to the effect of this doctrine in cases in which the sale effected pendente lite is to a person having a right of preemption equal to that of the plaintiff pre-emptor.

18. I am in agreement with my learned colleagues in holding that Section 17, Punjab Pre-emption Act 1913 does not, in terms afford the plaintiff pre-emptor any assistance.

19. Now the sale does not, and cannot, improve the position of the purchaser pendente lite, but as pointed out by Johnstone, J., in *Muhammad Khan v. Sardar* [1910] 7 P.R. 1910(supra), such a purchaser can claim that the sale to him does not occasion, any detriment to the rights that were already his. He can therefore defend his title on the ground of his pre-existing right and the result would be that if that right was inferior to the plaintiff pre-emptor's the suit would be decreed, if it was superior the suit would be dismissed.

20. Up to this point I think we are all in agreement. In *Sundar Singh v. Sajjan Singh* [1911] 53 P.R. 1911(Supra) it was held that if the right of the purchaser pendente lite was equal to that of the plaintiff pre-emptor the suit should be dismissed.

21. The decision was presumably based on the ground that as Section 14 (now Section 17) did not apply, the right of the purchaser pendente lite should prevail, as he could defend his title by invoking a right pre-existing in him which would have afforded a good defence had he been the original purchaser. It seems clear that a plaintiff pre-emptor can only succeed if he can show a right of pre-emption superior to that possessed by the vendee and in these circumstances I am inclined to the view that the position taken up in *Sundar Singh v. Sajjan Singh* [1911] 53 P.R. 1911(suupra), was correct, more especially since the legislature chose to leave matters in their existing state when the Punjab Preemption Act of 1913 was enacted.

22. I would therefore answer the first question in the negative as the sale under consideration does not conflict with the doctrine of lis pendens.

23. My answer to the second question is that, as Section 17, Punjab Pre-emption Act does not apply, the suit should be dismissed.

Dalip Singh, J.

24. Two questions were referred to the Full Bench in this case which were not entirely correctly worded. I have really little to add to my referring order which should be

¹³ AIR 1926 All 179

¹⁵ AIR 1927 All 336 : (1927) ILR 49 All 516

¹⁴ AIR 1926 All 180: (1926) ILR 48 All 221 : 90 Ind. Cas. 238

¹⁶ A.I.R. 1922 Mad. 290

taken as part of the present judgment.

25. It seems to me clear that where A has sold land to B and C brings a suit for pre-emption and B during the pendency of that suit sells the land to D in the exercise of D's right of pre-emption, and D's, right of pre-emption is equal to that of C, than the mere fact that D has managed to induce B to acknowledge his right of pre-emption cannot better D's position against C any more than C can better his position against D merely because C brought a suit before D exercised his right of pre-emption. It seems to me that the Pre-emption Act clearly recognises that certain classes of persons have equal rights to pre-empt certain property, if sold. Now, where the law confers equal rights on any group of persons before the persons choose to exercise their right, all must be held to be jointly entitled to the property. I am, therefore, unable to see how C's right to be jointly entitled to be substituted for B, the original vendee, along with other persons, can be cut short at the choice of B, the vendee, who has no right to retain the property as against either G or D. It would follow, therefore, that all persons who chose to exercise the right, whether they did it by way of suit or whether they did it by private arrangement, could not possibly defeat each others rights in the matter and, therefore, would be entitled to hold equally with each other. The reason why I prefer to apply the terms of Rule 17 even in a case where the sale to the second person was a private sale, is that it seems so me to be rather curious that if both persons brought suits, the law should fix certain proportions qua their shares, and if one brought a suit and the other managed to induce the vendee to recognise his right, the shares should then become equal in all cases. However, I agree with the judgment of Bhide, J., that Section 17 does not in terms apply to such a case. It seems to me still to be a needless subtlety, but if it is a case of *casu omissus* then to my mind it is clear that the parties must share equally. I regret, therefore, that I am unable to agree with my learned brother that in such a case the suit of G must be dismissed. I agree in holding, as stated before by me, that the doctrine of *lis pendens* does apply to pre-emption suits, but the application of that doctrine cannot invalidate D's prior existing right to be substituted for the vendee in the original sale.