LAHORE HIGH COURT

Sant Kaur

Vs

Teja Singh

Achhru Ram, J.

01.06.1945

JUDGMENT

Achhru Ram, J.

1. On 22nd October 1942, Jagir Singh defendant in the suita which have given rise to these two petitions for revision sold the suit land to Kala Singh, another defendant in the said suits. Two suits were brought to preempt this sale on 21st October 1943, one by Teja Singh and another by Labh Singh, each of them being cross impleaded in the suit of the other plaintiff. While the two suits were pending, Kala Singh sold a portion of the land purchased by him to one Sadhu Singh an Indian soldier serving under special conditions, by means of a sale-deed dated 26th October 1943. On 15th December 1943, Kala Singh sold the rest of the land purchased by him to Mt. Sant Kaur widow of Ujjagar Singh, a collateral of the vendor, the sale-deed reciting that the land had been transferred to her in recognition of her superior right of preemption. On 21st December 1943, Mt. Sant Kaur applied to the Court to be added as a defendant in both the suits. Her applications were dismissed on 10th April 1944, on the ground that she would be bound by the decrees passed in the suits of Teja Singh and Labh Singh, without having been impleaded as a defendant thereto, by reason of the operation of the rule of lis pendens. Mt. Sant Kaur filed these two petitions for revision of the orders passed in the two suits rejecting her applications to be impleaded as a defendant.

2. My brother Din Mohammad who heard the two petitions in Chambers has referred the following two questions to a Full Bench:

> (1) Whether a sale by a vendee in favor of a Superior preemptor during the pendency of a suit for preemption but after the expiry of the period of limitation entitles the subsequent transferee to be impleaded as a party to the suit so as to be able to defeat the right of preemption claimed by the plaintiff?
> (2) Whether the fact that the subsequent transferee has, as a result of the sale in his favor, obtained possession of the property in suit is in any way material to the consideration of this matter?

3. The answer to both these questions, in my view, depends on the answer to the question-

whether the rule of lispendens hits the subsequent transfer visualised therein.
The rule, as stated in the leading English case in *Bellamy v. Sabine*[1] is that the law does not allow litigant parties pending the litigation, to transfer their rights to the property is dispute so as to prejudice the opposite party. In this country the rule has received legislative recognition in Section 52, Transfer of Property Act, which reads as follows:

> During the pendency in any Court having, authority in British India, or established beyond the limits of British India by the Governor-General-in Council, of any suit or proceeding which is not collusive and in which any right to immovable property is directly and specifically in question, the property cannot be transferred or otherwise dealt with by any party to the suit or proceeding so as to affect the rights of any other party thereto under any decree or order which may be made therein, except under the authority of the Court, and on such terms as it may impose.

4. The logical effect of the rule as enunciated in *Bellamy v. Sabine (1857) 44 E.R. 842(SUPRA)* and in the aforesaid section of the Transfer of Property Act is that the transferee pendente lite is bound by the result of the suit even though he is not impleaded as a party thereto and had even no notice thereof. A suit for preemption being a suit to enforce a right to purchase immovable property in preference to the actual purchaser and to have, by enforcement of that right, the plaintiff substituted for such purchaser in the ownership of that property, there can be no reason why the rule of lis-pendens should not apply to a transfer of such property by the defendant pendente lite. All the reported cases in this Court as well as elsewhere have consistently taken the view that the rule does apply to such suits. So far as this Court is concerned the matter is concluded by a Full Bench judgment in *Mool Chand v. Ganga Jal*[2] Indeed, Mr. Sawhney who argued the case on behalf of the petitioners did not question the applicability of the rule of lis pendens to preemption: suits.

5. An exception has, however, been made in the above mentioned Full Bench judgment, and some other cases, in favor of a sale to a person with a right of preemption, either equal or superior to that of the plaintiff, in recognition of such right. The reason for this exception is thus stated in *Mahmud Khan v. Khuda Bakhsh*[3]

> Put broadly and briefly the doctrine of lis pendens forbids creation on new rights over property already the subject of suit pendente lite which are calculated to injure the rights of the claimant. It does not, and if we consider for a moment, we see that it could not, apply to the assertion of rights which existed prior to the institution of the pending suit. It has been clearly laid down that a pre-emptor is in no worse position when asserting his right privately than when he asserts it by suit: *Amirullah Shah v. Tabe Hussain*[4] *Mahtab-ud-Din v. Karam Elahi*[5] and *Sen Mal v. Hukam Singh*[6]

6. Then with reference to the facts of the particular case the learned Judges observed:

> There the appellant asserts his right not only privately but by suit, and that suit

[1](1857) 44 E.R. 842
[2] A.I.R. 1930 Lah. 356
[3](08) 26 P.R. 1908 at p. 145
[4](84) 138 P.R. 1884
[5](98) 73 P.R. 1898
[6](98) 20 All. 100

> was compromised in his favor so that he allowed it to be dismissed in default. No doubt he gets no further rights as against the respondent by the deed of sale per se, but he can maintain that sale if he can prove a pre-existent right to have it executed in his favor. So far only does the doctrine of lis pendens apply that the sale could create no new right in his favor having its birth subsequent to the suits of the respondent, but obviously he is not debarred from asserting any pre-existent right he may have had against the vendor and the vendee by the mere fact that some one else had brought a claim against them in reference to the same property.
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> The law of lis pendens is laid down in *Bellamy v. Sabine (1857) 44 E.R. 842(SUPRA)* briefly thus. It affects him (i.e. the subsequent purchaser) because the law does not allow to litigate parties and give to them pending the litigation rights in the property in dispute so as to prejudice the opposite party. In claims for preemption the right of any particular claimant is not prejudiced, qua own right by the assertion by another claimant of his own pre-existing rights.

7. In *Karam Ali v. Sultan*[7] Johnstone and Chevis, JJ., in defining the scope of this exception, held that the exception in favor of the transferee having an equal or superior right of pre-emption would not avail a transferee whose suit to enforce such right had already become barred by limitation at the time of the transfer. The reason for thus limiting the scope of this exception was stated to be that the transfer to a person who could no longer enforce his right of pre-emption by means of a suit could only be regarded as a voluntary one and not as a transaction in which he was enforcing his right of preemption. The same view of law was taken by Campbell, J. in *Jan Muhammad v. Nasir Khan*[8] and by Martineau J., in *Dharam Singh v. Kirpal Singh*[9] In Allahabad in *Kamta Prasad v. Ram Jag*[10], Sir Henry Richards, Knight, Order J., and Tudball J. arrived at the same conclusion. In *Asa Singh v. Naubat*[11] another Bench of the same Court of which Tudball J., was a member re-affirmed this view. In *Jus Rai Juniwal v. Gokal Chand Jaini*[12] a case decided by Addison and Din Mohammad JJ., my brother Din Mohammad who wrote the judgment of the Division Bench gave expression to a similar, opinion although the appeal was actually disposed of on other grounds.

8. In Regular First Appeal No. 68 of 1941 another Division Bench of this Court, consisting of Dalip Singh and Beckett, JJ., had to deal directly with this question. In that case, during the pendency of the suit for preemption in respect of the sale of a residential house, and after the expiration of the period of limitation for a preemption suit, the vendee re-transferred the property purchased by him to a person claiming to have a right of preemption equal to that of the original plaintiff, and, on an application made by the plaintiff, the subsequent vendee was added as a party to the suit. The suit was decreed by the Court of first instance and the subsequent vendee appealed to this Court. In appeal it was contended on his behalf that the subsequent vendee, even though the transfer in his favor had been made at a time when he could not have brought a suit to enforce his own right of preemption, could defeat the plaintiff's suit

[7] (11) 30 P.R. 1911
[8] A.I.R. 1925 Lah. 614
[9] A.I.R. 1923 Lah. 31
[10] AIR 1914 All 356 : (1914) ILR 36 All 60
[11] A.I.R. 1921 All. 105
[12] A.I.R. 1935 Lah. 808

inasmuch as the latter was bound to prove that he had a better title than the defendant at the time of the decree.

9. It was further contended, that even though he could not sue to enforce his preemptive right by reason of lapse of time, he could successfully resist the plaintiff's suit on the strength of that preemptive right, the law of limitation having no application to defendant's pleas and being confined in its operation, unless the provisions of Section 28, Limitation Act were shown to be applicable, only to a plaintiff's suit. It was also contended that Section 28 of the Act did not in terms apply to a preemption suit. These are also substantially the arguments put forward on behalf of the petitioners in the present petitions. In dealing with these contentions Dalip Singh, J. observed as follows:

> As I look at the matter, the doctrine of lis pendens would certainly apply in favor of the pre-emptor as against a second vendee who had not acquired the property in exercise of any superior right of preemption but had acquired it merely in the course of transactions from the original vendee. The learned Counsel for the appellants appears to contend that no matter how the second vendee has acquired the property, once he has so acquired it, whether during the pendency of the suit or not, he can defeat the preemptive suit on the short ground that his right to preempt the property sold was equal to or superior to the right of the pre-emptor but this appears to me to confuse the right of preemption with a title paramount and the two things are by no means the same. A right of preemption is not a right in the property and no question, therefore, of title paramount arises. It is true that had the second vendee substituted himself for the first vendee by the first vendee recognizing his superior right of preemption then whether, this was in a suit or by private arrangement the decisions of this Court hold that he can defeat the pre-emptor's right but I am not aware of any case in which it has been held that quite apart from acquiring the property in the exercise of the right of preemption, the mere fact that he could have so acquired it is sufficient to defeat the pre-emptor's suit. To give a simple illustration, if A sells property to B and the property is found in possession of C, C can defeat a suit brought by any pre-emptor of the sale by A to B by pleading that B had given up the property to him in recognition of his superior right of preemption. This is but logical when one considers that O might have brought a suit within the period of limitation, the two suits of A and B would then have been tried together and if G had a superior right of preemption to A, A's suit could only be decreed subject to the rights of 0 to preempt the property. If C has already preempted the property without a suit brought by the acquiescence of B, it would be extraordinary that A's suit against B should then succeed without a reference to the rights of Order But no such question arises when C has not acquired the property in the exercise of the right of preemption, but has acquired it from B as the owner of the property. In such a case ipso facto it appears to me that C has recognized the title of B, in other words, has recognized the sale by A to B and therefore, has not exercised his right of pre-emption and may be taken to have waived it. If the transaction has taken place during the pendency of the suit of the pre-emptor to preempt the sale by A to B, then I am unable to see why the doctrine of lis pendens should not apply to the case and A's suit must succeed even as against C, though had C exorcised his

> right of preemption the matter might have been otherwise. Prom this way of looking at the matter, it becomes quite unnecessary to consider whether the right of preemption is or is not lost by the expiry of one year or whether the position of the vendee improving his position during suit is in logic identical with the position of a second vendee acquiring the property with a superior right of preemption to the preemptor.

10. The following observations made by Beckett, J. in dealing with the same matter may also be quoted with advantage:

> The reason given in *Jus Rai Juniwal v. Gokal Chand Jaini A.I.R. 1935 Lah. 808(SUPRA)* was that the doctrine of lis pendens would still apply, and this appears to be in accordance with the rule as stated in the leading English case in *Bellamy v. Sabine (1857) 44 E.R. 842(SUPRA)* that 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. It seems dear to me that the rule would be infringed by recognizing the second transfer in the present suit whether or not the right of preemption remains alive for bringing a suit after the period of limitation to enforce it has expired. The fact remains that the additional defendants could not have brought a suit to enforce it and the effect of transferring the property in suit during the litigation would be to destroy the claim of the plaintiff pre-emptor altogether, if it could be recognized as a defense. This is a fact which arises directly out of the transfer itself and not out of the right which originally existed.

11. The reason for not applying the rule of lis pendens to the case of a subsequent transferee who himself had a right of preemption either equal or superior to that of the plaintiff is that if he had brought a suit to enforce his preemptive right, even though subsequent to the institution of the suit by the plaintiff, his right to get a decree and to acquire the property on due compliance with the terms of the decree could not be affected by the fact of the plaintiff having instituted his suit earlier, and there is no reason why he should be placed in a worse position if without the necessity of a suit the original vendee is prepared to admit his claim and to agree to his substitution for himself in the original bargain. Where the subsequent vendee has still the means of coercing, by means of legal action, the original vendee into surrendering the bargain in his favor, a surrender as a result of a private treaty, and out of Court, in recognition of the right to compel such surrender by means of a suit cannot properly be regarded as a voluntary transfer so as to attract the application of the rule of lis pendens. The correct way to look at the matter, in a case of this kind, is to regard the subsequent transferee as having simply been substituted for the vendee in the original bargain of sale. He can defend the suit on all the pleas which he could have taken had the sale been initially in his own favor.

12. However, where the subsequent transferee has lost the means of making use of the coercive machinery of the law to compel the vendee to surrender the original bargain to him, a re-transfer of the property in the former's favor cannot be looked upon as anything more than a voluntary transfer in the former's favor of such title as he had himself acquired under the original sale. Such transfer has not the effect of substituting the subsequent transferee in place of the vendee in the original bargain. Such a transferee takes the property only subject to the result of the suit. Even if

he is impleaded as a defendant in such suit, he cannot be regarded as anything other than a representative-in-interest of the original vendee, having no right to defend the suit except on the pleas that were open to such vendee himself. He not being entitled to be regarded as a party to the original sale, which is being preempted, it is not against him but against the original vendee, through and under whom he claims, that the pre-emptor has, in order to succeed, to prove a superior preemptive right. The comparison, even at the date of the decree, has to be between the status of the plaintiff and that of the original vendee and not between that of the plaintiff and the subsequent transferee.

13. It is thus obvious that it can make no real difference to the position of such transferee if he is impleaded as a party to the preemption suit pending which the property in suit has been transferred to him. Even on being so impleaded, he will not have any right to defeat the suit by reason of his own qualifications which gave him an equal or better right of preemption qua the original sale. If the plaintiff's right of preemption is found to be superior to that of the original vendee at all the material times, the circumstance that by the time the suit comes up for final decision, hut subsequent to the institution of the suit and after the expiration of the period of limitation prescribed for a suit to enforce a right of preemption, the property has changed hands by reason of a re-transfer by the vendee will not affect his right to a decree of his claim irrespective altogether of the qualification possessed by the subsequent transferee who cannot defeat the plaintiff's suit on the ground of his own preemptive right in respect of the original sale being equal or superior to that of the former.

14. For the above reasons, I would answer the first question referred to the Full Bench in the negative. The answer to the second question follows as a necessary corollary and must also be in the negative. The subsequent transferee cannot by virtue of the transfer pendente lite acquire any title to the suit property capable of affecting, in any manner, the rights of the plaintiff. It can make no difference to the operation of the rule of lis pendens, which is responsible for this being the 4egal position of the subsequent transferee, that such transferee has entered into possession of the property in pursuance of the transfer. His possession of the property, as against the plaintiff, can only be regarded as held without any title. By the re-sale in his favor he does not acquire any title which he may plead in bar of the preemption suit already pending, and the possession being of quite recent origin cannot by itself confer on him any title on the strength whereof, quite independently of the re-sale, he may successfully resist the-suit. Whether the plaintiff will, in such a case, be able to dispossess the subsequent transferee in execution proceedings, ever though, he has not been impleaded as a party to the suit culminating in the decree, is a question on which we are not called upon to express any opinion in this case.

15. However, if I had to answer this question I should feel no hesitation in holding that he should be able to do so. Section 146, Civil Procedure Code, expressly provides that where any proceeding may be taken or application may be made by or against any person, the proceeding may be taken or the application may be made by or against any person, claiming under him. Section 47 provides for all questions, arising not only between the parties to the suit in which the decree was-passed but also between the representatives-of such parties, or between one of the parties-and the representatives of the other party, and relating to the execution, discharge or satisfaction of the decree, being determined by the Court executing the decree.

There is abundant authority for the view that the word "representative" as used in this

> section has a much wider meaning than the words "legal representative" and includes not only a legal representative but any; representative-in-interest, i.e., any transferee of the interest of a party, whether by assignment, succession or otherwise, who so far as such interest is concerned is bound by the decree.

16. A Full Bench of this Court had, quite recently, in *Bhikumal v. Firm Ramchandar Babu Lal reported in*[13] to deal with the question of the interpretation of this sect Wand fully endorsed this view. A transferee from a defendant pendente lite being the representative-in-interest of such defendant and being bound by the decree eventually passed in the suit, by reason of the operation of the rule of lis pendens, there does not appear; to be any reasonable doubt as to the decree-holder's right to execute the decree against' him in the same manner and to the same extent as he could execute it against the original defendant. Be that as it may, even if it will not be possible for the decree-holder in the preemption suit to dispossess the subsequent transferee in execution proceedings and he will have to bring a regular suit for the purpose, for obvious reasons such transferee will not be able to resist the suit on the ground that he himself had a better right of preemption in respect of the sale successfully preempted by the decree-holder and a decree for his dispossession will follow as a matter of course on the ground of his possession being without any lawful title whatsoever.

17. A more cautious pre-emptor may even implead him in the original suit on being made aware of the transfer in his favor. However, on being so impleaded he will, as explained above, be limited only to the defences available to the original vendee and will not be entitled to resist the suit on the strength of his own superior right which he might have exercised but did not exercise.

Din Mohammad, J.

18. I agree that both questions be answered in the negative.

Teja Singh, J.

19. So do I.

[13] A.I.R. 1946 Lah. 134 (F.B)