

MADHYA PRADESH HIGH COURT

Nirmaladevi

Vs.

Smt. Anardevi

First Appeals Nos. 14 to 17 of 1971
(S.M. N. Raina and K.K. Dube, JJ.)

03.12.1971

JUDGMENT

Raina, J.

1. This Judgment will govern the connected First Appeals Nos. 15/71, 16/71 and 17/71 which have been heard along with this appeal.
2. The appellants in all these appeals are the legal representatives of the deceased Bal Bhimrao Shitole who had instituted four separate suits for pre-emption in the year 1966 out of which these appeals have arisen. The right of pre-emption in each of these cases was claimed in respect of different parts of the same house which were sold on 15-3-65 by separate registered sale-deeds for a consideration of Rs. 20,000/- in each case to different persons. The right of pre-emption was claimed under the Quanoon Haqshafa Riyasat Gwalior (hereinafter referred to as the 'Pre-emption Act') on the ground that passage to the house sold as well as to the house of the plaintiff was common.
3. All these suits have been dismissed by the learned Additional District Judge, Gwalior, on the ground that the right of pre-emption did not subsist after the repeal of Pre-emption Act by the M.P. Agrakrya Vidihi Nirsan Adhiniyam, 1968 (Act No. XIV of 1968). Being aggrieved by this decision the appellants have preferred these appeals.
4. The main point for consideration in all these appeals is whether the appellants are entitled to enforce the right of pre-emption conferred by the Pre-emption Act even after the repealing Act was passed. The main contention of Shri J. M. Anand, learned counsel for the appellants in this connection is that the repeal of the Pre-emption Act

will not affect the appellants' right of pre-emption in view of Section 10 of the M. P. General Clauses Act, 1957, which is reproduced below for facility of reference :-

"10. Effect of repeal - Where any Madhya Pradesh Act repeals any enactment then, unless a different intention appears, the repeal shall not -

- (a) revive anything not in force or existing at the time at which the repeal takes effect; or
- (b) affect the previous operation of any enactment so repealed or anything duly done or suffered there under; or
- (c) affect any right, privilege, obligation or liability acquired, accrued or incurred under any enactment so repealed; or
- (d) affect any penalty, forfeiture or punishment incurred in respect of any offence committed against any enactment so repealed; or
- (e) affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid;

and any such investigation, legal proceedings or remedy may be instituted, continued or enforced and any such penalty, forfeiture or punishment may be imposed, as if the repealing Madhya Pradesh Act had not been passed.

5. It is no doubt true that as the repealing Act merely repeals the Pre-emption Act without saying anything more. As there is nothing to show that a different intention has been expressed full effect must be given to the aforesaid provisions of the General Clauses Act. We have, however, to see what is the nature of the right of pre-emption and what are the conditions requisite for enforcement of the right.

6. Their Lordships of the Privy Council considered the right of Pre-emption under a village custom in *Hans Nath v. Radho Prasad Singh*.¹ Their Lordships held that the decisive date as regards the right of the co-sharer to pre-empt is the date of the decree. The aforesaid decision was followed by a Full Bench of the Lahore High Court in *Madhosingh v. James R. R. Skinner*.² While considering the nature and extent of right of pre-emption under the Punjab Pre-emption Act the following observations in *Gaya Prasad v. Faiyaz Hussain*,³ were quoted with approval :-

"It has however been consistently held in the province of Oudh that although it is incumbent for a pre-emptor to show that he had a preferential right to

purchase at the date of the sale, yet, if events have subsequently happened, which deprive him of this preferential right, he would not be entitled to a decree. This may happen in various ways, for instance, he may sell the property on the basis of the ownership of which he was entitled to pre-empt or by virtue of a subsequent partition, his share might be thrown in patti or mahal other than that in which the share sold is situate. Similarly, if the defendant has acquired property after sale, which has destroyed the right of pre-emption exercisable by the pre-emptor but before the institution of the suit, he should not be entitled to bring the suit." Din Mohammad J. after considering earlier decisions observed as under at page 436 :-

"In my view, the right of pre-emption does not exist independently of its exercise so as to invalidate transactions which take place in defiance of it. It is no doubt a right of preferential purchase but so long as it is held in abeyance, it is ineffective altogether.

7. While dealing with a similar question it was held by the Hyderabad High Court in *Rangnath v. Babu Rao*, as under at p. 123 :-

"But the peculiar feature of the pre-emption law is that the ground for pre-emption must subsist upto the decree. So then, a person who seeks the assistance of the Court with a view to enforce a right of pre-emption is bound to establish that the right existed at the date of sale, at the date of institution of the suit and at the date of the original decree. There is preponderance of authority in support of this principle dating as far back as 1899."

The learned Judge who decided that case further observed as under in paragraph 12 :-

"Thus both on principle and on authority unless the conditions necessary to give to the plaintiff right of pre-emption are present on all the three crucial dates the court of law will refuse to pass a decree."

8. It is, therefore, clear that no decree can be passed where the right of pre-emption does not subsist on the date of decree for any reason whatsoever. Shri Anand tried to distinguish Rangnath's case. AIR 1956 Hyderabad 120 (supra) on the ground that in that case the validity of the pre-emption law after the commencement of the Constitution was affected by its provisions. In that case the question of effect of repeal

of Pre-emption Act in the light of the provisions of the General Clauses Act was not considered. This distinction is no doubt there but the observations made therein are material so far as the general nature of the right of pre-emption and its enforceability are concerned.

9. In *Bishansingh v. Khazan Singh*⁵ while dealing with the right of pre-emption under the Punjab Pre-emption Act their Lordships of the Supreme Court made the following pertinent observations in paragraph 11 :-

"To summaries : (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 repurchase 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."

10. It is, therefore, clear that the right of pre-emption is inherently a very weak right which can be lost by events subsequent to the sale of the property which initially confers the right on the pre-emptor.

11. The Full Bench of the High Court of Jammu and Kashmir considered the nature of the right of pre-emption under the Right of Prior Purchase Act in *Gulam Ahmad v. Ahad*.⁶ and held that the pre-emptor's right must subsist on the date of the sale the date of the suit as well as on the date of the decree. The following observations of their Lordships of the Supreme Court in *Amirsingh v. Ramsingh*,⁷ were relied upon :-

"It is however urged that the law of pre-emption requires that the pre-emptor must possess the right to pre-empt at the date of sale at the date of the suit and at the date of the decree. This position cannot be disputed."

12. From the aforesaid decisions it is clear that the right of pre-emption is a weak

right. It is not a right to property. It is merely a right to the offer of a thing, sold or about to be sold. Thus it is a secondary right or a remedial right to follow the thing sold. The remedy is provided by the statute and the question is whether the remedy can be pursued even after the statute has been repealed.

13. We must make a distinction between a vested right and merely a remedial right. Section 10 of the M. P. General Clauses Act saves the former but not the latter. While dealing with the effect of repeal of the Punjab Alienation Act it was held by a Full Bench of the Punjab High Court in *Amarsingh v. R. L. Agarwal*,⁸ in para 15 :-

"Nobody has a vested right in a statute. An Act may be very beneficial to a particular person, or its repeal may affect him injuriously, the right of the legislature to abrogate an act by repealing it is absolute. In this case, by repeal, the respondent, who is a successor-in-interest of Shera, the vendee, stands to be benefited and the appellant has been injuriously affected. This cannot be helped as the right claimed by the appellant had not vested in him, being still in the process of completion." The following observations in an earlier Punjab case which were quoted with approval in paragraph 14 are pertinent :-

"A right is said to be vested when the right to enjoyment, present or prospective has become the property of some particular person or persons as a present interest, independent of a contingency. It is a right which cannot be taken away without the consent of the owner."

14. A right of pre-emption is in the nature of an inchoate right which can be perfected only in accordance with the procedure laid down in the statute i.e. the pre-emption Act in this case. It could not be treated as a right vested in the plaintiff within the meaning of Section 10 of the M. P. General Clauses Act so as to remain unaffected by the repeal of the Act.

15. A similar question came up for consideration before this Court in *Dolmal Sunderdas v. State of M. P.*,⁹ In that case the effect of Section 10 of the M. P. General Clauses Act on pending applications under Section 162 of the M. P. Land Revenue Code after its repeal was considered. The following observations in paragraph 5 are pertinent :-

"Section 10 of the M. P. General Clauses Act, however, provides an exception that even when the repealing statute is silent all the rights acquired and all the liabilities incurred can be worked out as if the statute was not repealed. But it must be noted that what is unaffected by the repeal of a statute is a right acquired or accrued under it and not a mere 'hope or expectation of. or liberty to apply for acquiring a right. (*Director of Public Works v. Ho Po Sang*, ¹⁰ A distinction is drawn between a legal proceeding for enforcing a right acquired or accrued and a legal proceeding for acquisition of a right; the former is saved whereas the latter is not." The aforesaid observations are equally applicable to the present case. As pointed out above, the right of pre-emption is a remedial right or in other words a right to take advantage of an enactment for acquiring a right to land or other property. The right cannot be said to have been acquired or accrued until a decree is passed, and therefore, is not saved by the provisions of Section 10 of the M. P. General Clauses Act. The plaintiff-appellants are therefore not entitled to enforce a right of pre-emption after the repeal of the Pre-emption Act.

16. It may further be mentioned here that Section 23 of the Pre-emption Act clearly lays down that no decree shall be passed in favor of the plaintiff unless the right of pre-emptor subsists on the date of the decree. The right of pre-emption was a creature of the statute, and cannot be said to subsist after the statute has been repealed. Thus even according to the provisions of Section 23 of the Act, the plaintiffs' suits are liable to be dismissed.

17. We, therefore, hold that the suits of the plaintiffs were liable to be dismissed as they could not enforce their right of pre-emption after the repeal of the Pre-emption Act.

18. It was also urged on behalf of the respondents that the appellants had forfeited their right of pre-emption because after the institution of the suits they had entered into an agreement with Kishanlal and others for sale of the property which they seek to pre-empt for a consideration of Rs. 80,000/-. A Photostat copy of the agreement has been filed on record. The learned counsel for the appellants admitted that such an agreement had been entered into but he contended that the plaintiffs were required to enter into such an agreement because the original plaintiff had died and they were in need of money to be deposited as security in connection with the pre-emption suits.

19. In view of the aforesaid agreement it is clear that the appellants are keen to exercise their right of pre-emption not to retain the property for themselves, but to sell it to others retaining for themselves a margin of profit accruing from the sale. The right of pre-emption is of an exceptional and burdensome nature inasmuch as it infringes upon the ordinary rights of an owner of dealing with his property and can be justified only on the ground that it seeks to avoid the introduction of strangers in the neighborhood of the pre-emptor to his detriment. It would not, therefore, be fair to allow to exercise of this right where the object is otherwise and not the exclusion of a stranger.

20. In *Sarbajitsingh v. Jaikaransingh*,¹¹ a Division Bench of the Oudh Judicial Commissioner's Court held that where a person claiming pre-emption enters into a contract with a stranger to transfer the suit property to him on payment of the pre-emption money, he forfeits his own right of pre-emption. The following observations of Mr. Blennerhassett, Judicial Commissioner of Oudh in *Abdulla v. Mst. Walhidunnissa*,¹² were quoted with approval :-

"A court of law that assisted the plaintiff suing for pre-emption to introduce strangers into the village would be guilty of inconsistent conduct and stultify itself."

21. In *Ratio v. Lalman*,¹³ Mahmood J. while dealing with a case of pre-emption under Muhammadan Law observed as under at page 183 :-

"The very object and basis of the pre-emptive right is to prevent the introduction of strangers as co-sharers in the property; and the right is enforced on the hypothesis that the introduction of a stranger causes inconvenience to the pre-emptive co-sharers. The right is essentially based upon the injury which such inconvenience is supposed to cause. From its very origin and nature, the right of pre-emption is not one which is to be enforced merely as an instrument of capricious power or vindictiveness. It is a transient right in its very conception and nature, and being a personal privilege of the pre-emptor, cannot be made the subject of sale or bargain of any other kind. Any attempt on the part of the pre-emptor to bargain with it is taken to indicate conclusively that the injury of which the pre-emptor complains in suing to enforce pre-emption is unreal, and that the claim is not dictated by *bona fide* motives."

22. No doubt the aforesaid observations were made in the context of Muhammadan Law, but it appears that Pre-emption Act was enacted in the background of Muhammadan Law and as would appear from Section 4 of the Act, the only material departure that was sought to be made was that "talabs" required under the Muhammadan Law were dispensed with. As pointed out above, the very basis of right of pre-emption is the need to avoid the introduction of a stranger and where the plaintiff by his own conduct indicates that this need is non-existent and the motive is different, it would not be proper to enforce the right. We are, therefore, inclined to hold that the plaintiffs' suit is liable to be dismissed, in view of this agreement as well.

23. No other point was pressed before us.

24. All these four appeals, therefore, fail and are hereby dismissed. We allow counsel fee Rs. 200/- in each case subject to certificate.

Appeals dismissed.

Cases Referred.

1. AIR 1932 PC 57.
2. AIR 1941 Lah 433
3. AIR 1930 Oudh 274
4. AIR 1956 Hyd120
5. AIR 1958 SC 838
6. AIR 1970 Jam and Kas 118 (FB)
7. (1963) 3 SCR 884 at p. 891
8. AIR 1960 Pun 312
9. AIR 1971 Mad Pra127
10. 1961-2 All England Reporter 721 at p. 731
11. 79 Ind Cas 950
12. (1898) 1 Oudh Cas 308
13. (1883) ILR 5 All 180