BOMBAY HIGH COURT

Dashrathlal Chhaganlal

Vs

Bai Dhondubai

(John Beaumont, Kt., C.J. Divatia and Sen , JJ.)

06.12.1940

JUDGMENT

John Beaumont, Kt., C.J.

1. This is a second appeal from the Extra Assistant Judge of Ahmedabad. In the suit the plaintiff seeks to exercise a right of preemption in respect of the suit property, which is situate in the Bhadra division of Ahmedabad. The plaintiff seeks to exercise the right of pre-emption by reason of her owning property adjacent to the suit property. So that we are only concerned in this case with the right of a neighbour to exercise the right of pre-emption, and not with the right of other parties, like co-owners.

2. Pre-emption is a part of the Mahomedan law, and, so far as is necessary for the purpose of the present appeal, one may say that it is the right of an owner of property to acquire from the purchaser of adjacent property such property at the price and on the conditions at and on which he has bought it. The object of the law, as explained in the Hedaya, was to enable landowners to avoid the advent of an undesirable neighbour, and the Prophet laid down that the neighbour has a right superior to that of a' stranger in the land adjacent to his own. So that, under Mahomedan law, a neighbour can acquire property, which has been sold, from the purchaser, provided he observes certain formalities, and in this case the lower Courts have held that the formalities were duly complied with, and that is a finding of fact which cannot be challenged in second appeal.

3. It is rather curious, having regard to the antiquity of this doctrine, to find that even at the present time there is considerable doubt as to some of its important features, and in particular as to whether the rights and burden of pre-emption are incidents annexed to the land, like an easement, or whether they are personal to the owners of the lands affected. This Court in a case, to which I will refer later, in the year 1928 held that in all cases pre-emption is a mere personal right, depending on the community of the parties; but Mr, Justice Mahmood in the judgment which he delivered as a member of a full bench of the Allahabad High Court in *Gobind Dayal v.*

Inayatullah[1] discusses exhaustively the whole question of pre-emption, and comes to the conclusion that the right is in the nature of an easement, that it is annexed to the land under Mahomedan law, and that the right comes into existence on the completion of the sale. The person from whom the land must be acquired by the neighbour is the purchaser, but, as Mr. Justice Mahmood points out, that is because, until the sale is actually effected, it cannot be said that the owner of the land in question has unequivocally elected to part with it. But as soon as he has sold, the right of the neighbour to be substituted for the purchaser arises. I agree with the view expressed by Mr. Justice Mahmood that this right of pre-emption was originally under Mahomedan law a right attached to the land. No doubt, at the present time, as between Mahotnedans in British India it has become part of their personal law, but that is because the law of pre-emption is no part of the general law of British India, and since Mahotnedans are scattered about over India and are not segregated in particular localities, unless this rule be regarded as part of their personal law, they would cease to enjoy the benefit of it. But in this case we are not dealing with Mahomedans. The parties are all Hindus. The plaintiff is a Deccani Brahmin, and one argument of the appellants is that this right of pre-emption is personal, and does not apply to Deccani Brahmins. For the reasons I have given, I think that that argument has no substance in it, and that if the right affects the land in suit, the plaintiff can exercise it.

4. It is clear from many cases that although the right of pre-emption does not apply to British India generally, it has been adopted by custom in certain localities, and it is said that it has been adopted by custom in Ahmedabad. I am clearly of opinion that the custom as adopted in a particular locality must be in accordance with the law as it originally was, and I think, therefore, that in places in which the law of pre-emption exists by custom, it must be regarded as a right attached to the land, and not as a mere personal right. In my opinion, the Privy Council in *Sheobatan Singh v. Kulsum-un-Nissa*[2] have really decided that point. They were dealing there with a case in which the parties were Hindus, and the owner of the land in respect of which the right of pre-emption was sought to be exercised had become insolvent, and the land had vested in the Official Assignee. It was held by the Privy Council that the Official Assignee took the land with all its benefits and all its burdens, including the obligation of having this right of pre-emption exercised against him. It seems to me to follow from, that decision that the Privy Council regarded this right, where it exists by custom, as a right annexed to the land, because if it were a mere personal right, depending on the religious persuasion of the parties concerned, it could hardly pass to an Official Assignee.

5. The appellants have taken three points on this appeal, apart from the point which I have mentioned that the plaintiff, being a Deccani Brahmin, is not entitled in any case to exercise the custom. They say, first of all, that no custom is alleged, or proved, in the plaint. The answer: to that, made in both lower Courts, is that this custom has been judicially recognized as applying to

Ahmedabad; and, no doubt, it is the law that if a custom is known, and has been judicially recognized, it is not necessary to allege or prove it; it has become part of the local law of which the Court takes judicial notice. Putting it shortly, the authorities on this point come to this. In *Gordhandas Girdharbhai v. Prankor*[3] it was asserted by a division bench that the custom was recognized in the) whole of Gujarat, though it was not necessary for the purposes of that decision to go as far as that. In *Dahyabhai Motiram v. Chunilal Kishordas*[4] which was a case relating to the Kaira district which is in Gujarat, the Court considered that there was no justification for the view that this custom prevailed throughout Gujarat, and they held that it did not apply in the Kaira district. That case undoubtedly very much weakened the authority of Gordhandas Girdharbhai v. Prankor. It was held in *Mahomed Beg Amin v. Narayan, Meghaji*[5] that the custom did not apply to Khandesh district. Then comes *Motilal Dayabhai v. Harilal Maganlal*[6] in which it was held that the custom existed amongst Hindus in Ahmedabad, and then there is *Hamedmiya v. Benjamin*[7] (which I have mentioned) in which the Court held that, assuming the custom to exist in Ahmedabad, it did not extend to the vendee in that case, who was a Bene Israelite. The Court expressed the view that this right was purely personal, and for the reasons I have given I think that the ratio decidendi in Hamedmiya v. Benjamin cannot be supported. However, it is not in any case a direct authority for the proposition that the custom exists in Ahmedabad. For that one has to go back to Motilal Dayabhai v. Harilal Maganlal, In that case the learned Chief Justice Sir Norman Macleod says that the trial Judge referred to a number of decisions both of the High Court and of the Courts at Ahmedabad, in which the custom had been considered, and he says that the custom was not disputed, but was assumed to exist, and that the effect of the decisions is that the custom of pre-emption amongst Hindus in Ahmedabad must be recognized. One criticism which arises on that decision is that "Ahmedabad" is a very vague expression. Ahmedabad is a city, and not a district, and in recent times the limits of Ahmedabad city have very much extended. Generally speaking, a local custom must be certain as to the locality in which it operates, and I do not myself know of any authority for saying that a local custom can apply within the limits of a city for the time being, and that it will expand or contract with the growth or shrinkage of the city. However, it is not disputed in this case that the lands in question are within the ancient city of Ahmedabad as it existed in the time of the Moghuls when, no doubt, this custom originated, and, it may well be that the custom within the walled city of Ahmedabad does exist. It is not necessary in the view I take of the case to express any final opinion on that subject.

6. Then another objection which has been taken by the appellants is that the suit property in this case is an open site, and all the cases in which this, custom has been recognized in Ahmedabad have been cases of house property. In *Jagjivan Haribhai v. Kaliidas Mulji*[8], which was a case dealing with the custom in Surat, and in Ram *Chand Khanna v. Goswami Ram Puri*[9] which was

a case dealing with the custom in the city of Benares, the Courts pointed out that the custom had been shown to exist in respect of house property in the districts concerned, but they declined to extend it to open sites, I agree with the view expressed in those cases that this custom is not one which should be extended. The law may have been a beneficial one as applied to village communities in ancient times by ensuring that a man did not get an unpopular neighbour, but it obviously is less suitable to conditions of life in a city where people come and go frequently, and a man may well not know his neighbour by sight. It is moreover difficult to reconcile the custom with, modern views as to the desirability of free disposition of immoveable property. Therefore, I am certainly not disposed to extend the custom, but Mr. Desai for the respondent points out that the general rule as laid down by the Privy Council in *Jadu Lal Sahu v. Janki Koer*[10] *on appeal from (1908) I.L.R. 35 Cal. 575* is that where this right of pre-emption is introduced by custom amongst Hindus, the right must be co-extensive with the right as it existed under Mahomedan law, and under Mahomedan law it seems to have been applicable both to land and houses. That is clearly stated in Hamilton's Hedaya at p. 548. I doubt if the custorn can be confined to house property, but again it is not necessary to express any decided opinion on that second point.

7. The third point taken, which seems to me to be fatal to the respondent, is that this custom of pre-emption only exists as between freeholders, that is to say, the neighbouring land in respect of which the custom is claimed must be freehold, and the land sought to be pre-empted must also be freehold. Now, in this case the learned Extra Assistant Judge held that the defendants' interest was a leasehold interest up to July 31, 1950. That is clearly wrong. When one looks at the sanads, under which the defendants hold, they are in the form given in sch. "H" to the Bombay Land Revenue Code with certain modifications, and I think the result of the sanads is to show that the defendants are given a permanent right of occupancy, but subject to the right of Government at any time on a year's notice to resume possession of the property on payment of certain compensation, which varies according to whether the resumption takes place before or after July 31, 1950. The right of Government to resume possession at any time on a year's notice is plainly inconsistent with the view that the land is owned by the defendants as freehold. There is no evidence, nor is there any allegation, as to what the plaintiff's title is, but it is common knowledge that within the district of Bhadra all properties are held on the same footing as the property of the defendants. I think we must assume that the title of the plaintiff is of that nature, but, at any rate, the plaintiff has failed to establish that she is the full owner of the property.

8. The question then arises, whether this right of pre-emption exists as between parties who have got something less than the full freehold interest. Mr. Desai admits that there is nothing in the Hedaya which lays it down that the right exists in respect of anything less than the freehold interest, but he says that there is also nothing which restricts the right to freehold interest. Since in ancient times the Mahomedan law did not recognize leases, although it recognized the hire of

land for purposes of user, it is not surprising that the matter is not discussed in the Hedaya. But in Baillie's "Digest of Mahomedan Law", Part I (2nd edn.), in which the author sets out the conditions on which the right of pre-emption can be exercised, the 6th condition at p. 477 is in these terms:--

6th. There must be milk or ownership of the shufee, or pre-emptor, at the time of the purchase, in the mansion on account of which he claims the right of pre-emption. So that he has no right on account of a mansion of which he is merely the tenant for hire, or that he has sold before the purchase, or has converted into a musjid, or place of worship.That is a definite assertion that the pre-emptor, at any rate, must have the full ownership, and in *Sheikh Mohammad Jamil v. Khub Lal Rout*[11] which has been followed recently in Patna in *Phul Mohammed Khan v. Quazi Kutubuddin*[12]*, the* learned Judges held, relying on that condition as showing that the pre-emptor must have the full ownership, that so also must there be full ownership in the land pre-empted, because otherwise there would be no reciprocity, and reciprocity is essential for the existence of this right of preemption. Those cases also follow *Baboo Ram Golam Singh v. Nursing Sahoy*[13] in which it was held that the right of pre-emption did not arise on the sale of a leasehold interest in land. I see no reason for differing from those authorities. I think the cases were rightly decided, and as I have already indicated, I am certainly not disposed to extend this custom beyond the limits within which up to now it has been recognized.

9. In my judgment, on that ground the appellants must succeed. The plaintiff has not shown that she possesses land which entitles her to exercise this right of pre-emption. She seems also to have claimed in the trial Court to exercise a right of purchase by contract, and issue No. 6 in the trial Court related to that matter. That issue was reserved. If the parties wish to have that issue tried, the matter will have to go back to the trial Court for trial of that issue alone.

10. All costs in the trial Court, except costs of issue No. 6, and costs in the District Court and this Court must be paid by the respondent.

11. Cross-objections dismissed with costs.

Divatia, J.

12. I agree that the appeal should be allowed on the ground that the right of pre-emption attaches under the Mahomedan law only to sales of proprietary interest in the land and the suit property is held not in proprietorship but under a precarious leasehold tenure.

13. It may be taken for the purpose of this appeal that the custom exists among the Hindus of Ahmedabad to exercise the right of pre-emption with regard to sales of house properties, and speaking for myself, I have no doubt about the existence of such a custom from beyond legal

memory. It is a kind of custom which is so long known and so well known as not to require any proof at the present time. As early as 1823 it had been judicially recognized and it was also recognized in *Motilal Dayabhai v. Harilal Maganlal*[14] If some decisions have proceeded on the admission of the custom, it was because the custom as admitted could not have been successfully challenged in a Court of law. Whether the custom extends beyond the original city walls of Ahmedabad, it is not necessary to decide in this case as the suit property is situated in Bhadra which is a part of the ancient city of Ahmedabad and within its walls. It is, however, clear that all cases in which pre-emption has been allowed are those relating to houses of absolute ownership of the parties. The origin of the custom is due to the natural desire of acquiring the adjacent property for the growing needs of the family especially where one house with its peculiar structure for the accommodation of one family is partitioned into different parts between its co-owners. It is also partly due to the desire of preventing an outsider from breaking up the homogeneous character of the locality. The only law recognising the right of pre-emption being the Mahomedan law which governed a large part of the population of Ahmedabad, the Hindus also conveniently adopted it as a customary right. It would not, however, be quite correct to say that the custom was adopted by the local Hindus as their personal law. It was more in the nature of a local custom attached to property than a part of the personal law of the Hindus. It is true that in *Hamedmiya v. Benjamin*[15] the custom was not recognised in the case of a Bene Israel vendee at Ahmedabad on the ground that it was proved to exist only among the Hindus of that city. But I think it is more logical to recognise the custom as attaching to property in a local area than to regard it as a personal custom. The recognition of the custom as applying to the Hindus of Ahmedabad was due to the fact that when it was being established there were few non-Mahomedans in the city who were not Hindus. Although, therefore, the custom is held applicable to Hindus, it should be not regarded as having a personal origin but as attaching to houses situated within the city of Ahmedabad.

14. But whether the custom be regarded as attaching to persons or to property, it is clear that both under the Mahomedan law and the customary law, the right of pre-emption can be exercised only with respect to property in which proprietary rights could be and have been transferred. The terms of the sanad granted for the suit property make it absolutely clear that it was given to the holder as a tenant-at-will, although it is provided that he may not be ejected without a year's written notice. It is also stated that the holder can at any time be ejected after the requisite notice was given, and he may be compensated for the land as well as the building in different ways depending upon its resumption before or after 1950. It is further stated that what was to be paid for the land to the Government was certain annual rent for its occupation and that the rent was to be paid so long as the Government did not resume the said land. It is, therefore, clear that the holder of the land was not granted absolute rights of ownership in it but certain rights created

under a leasehold tenure under which the tenant could be ejected at any time after a year's notice. There is no decision either under the Mahomedan law or under the custom of pre-emption which lays down that the right of pre-emption would attach to property held under such a leasehold tenure. On the other hand, there are several decisions of the Calcutta, Allahabad as well as Patna High Courts which clearly show that the right of pre-emption cannot be exercised with respect to property transferred under mukarrari tenure or leases granted in perpetuity. The decisions in *Baboo Ram Golam Singh v. Nursingh Sahoy*[16] *Sheikh Mohammad Jamil v. Khub Lal Rout*[17] *Sakina Bibi v. Amiran*[18] *and the latest decision in Phul Mohammad Khan v. Quazi Kutubuddin*[19] are relevant on this point. It is, however, urged on behalf of the respondent that the texts in the Mahomedan law do not specifically say that the right of pre-emption could not be exercised in respect of leasehold land. But the word used in the texts is "milkiat" and the Hedaya uses that term only in the sense of a proprietary right. It is not only the property for which pre-emption is claimed that must be held in absolute proprietorship but as held in Sakina Bibi v. Amiran the pre-emptor also must have vested ownership in the tenement for which the right of pre-emption is exercised. That seems to be consistent with the reason of the law of pre-emption. A person requires the right of pre-emption either because of his permanent interest in his property he wishes to prevent an undesirable person from becoming his neighbour, or because he wants to enlarge his house by purchasing the adjacent property. But there would be no meaning in granting such a right to a person whose tenure is so precarious that he is liable to be ejected at any time by the superior holder from his own house or from the house acquired by pre-emption.

15. It would be a question also whether the right of pre-emption would attach to an open piece of land. So far as agricultural lands are concerned, it has been rightly doubted by our Court in *Jagjivan Haribhai v. Kalidas Mulji*[20] as to whether the right of pre-emption would attach to such lands, and the Allahabad High Court has in the case of Hindus in Benares expressly held that the right of pre-emption attaches to houses only but not to open land.

16. There is no doubt that the rule of pre-emption, which puts fetters on the unrestricted right of transfer and enjoyment of property and is against the rule of justice, equity and good conscience, should be strictly applied, especially when it is sought to be relied upon as a part of custom, and in the present case I am ssof the opinion that the right of pre-emption based on custom should not be extended to transfers of leasehold property in respect of which it has not been exercised in the past.

17. It must, therefore, be held that the plaintiff has no right of pre-emption with regard to this land held under a leasehold tenure. It may be open to her to prove the oral agreement which she has set up, but that would rest upon a special contract and not upon the ground of custom.

18. I, therefore, agree that the appeal should be allowed.

Sen, J.

19. I agree and have nothing to add.

Cases Referred.

1(1885) I.L.R. 7 All. 775, F.B
2(1927) L.R. 54 I.A. 204, s.c. 29 Bom. L.R. 877
3(1869) 6 B.H.C.R. (A.C.J.) 263
4(1913) I.L.R. 38 Bom. 183, s.c. 15 Bom. L.R. 1136
5(1915) I.L.R. 40 Bom. 358, R. 75, s.c. 18 Bom. L.R. 81
6(1919) I.L.R. 44 Bom. 696, s.c. 22 Bom. L.R. 806
7(1928) I.L.R. 53 Bom. 525, s.c. 31 Bom. L.R. 374
8(1920) I.L.R. 45 Bom. 604, s.c. 23 Bom. L.R. 81
9(1923) I.L.R. 45 All. 501
10(1912) L.R. 39 I.A. 101, s.c. 14 Bom. L.R. 436
11(1920) 5 P.L.J. 740
12(1937) I.L.R. 16 Pat. 519
13(1875) 25 W.R. 43
14(1919) I.L.R. 44 Bom. 696, s.c. 22 Bom. L.R. 806
15(1928) I.L.R. 53 Bom. 525, s.c. 31 Bom. L.R. 374
16(1875) 25 W.R. 43
17(1920) 5 P.L.J. 740
18(1888) I.L.R. 10 All. 472
19(1937) I.L.R. 16 Pat. 519
20(1920) I.L.R. 45 Bom. 604, s.c. 23 Bom. L.R. 81