PATNA HIGH COURT

Rameshwar Lal Marwari

Vs

Pandit Ramdeo Jha

A.F.A.D. No. 197 of 1949

(Rai and Kanhaiya Singh, JJ.)

03.01.1957

JUDGMENT

Kanhaiya Singh, J.

1. This is a defendant's Second Appeal from the concurrent decree of the Courts below decreeing the plaintiff's suit for pre-emption. Two holdings bearing nos. 169 and 179 situate in Mohalla Sarayaganj in the town of Muzaffarpur adjoin each other, holding no. 169 being adjacent south of holding no. 179. Mosammat Parbati Kuer was the owner of these two holdings. Pandit Ramdeo Jha, the plaintiff, purchased holding no. 169 from her by a registered sale deed dated 17-2-1942, exhibit 4. She gave him the other holding also, namely, no. 179, in mortgage by conditional sale, by a registered deed, D/-24-10-1942, Ex. 2. In 1943 Ram Surat Sah, defendant second party, purchased holding no. 179 at an auction sale in execution of his money decree and obtained delivery of possession through Court. It is this holding which is the subject matter of the present litigation. Ramsurat Sah transferred holding no. 179 to Rameshwar Lal Marwari by a registered deed of sale dated 14-3-1946. The plaintiff brought the suit upon the defendants claiming to preempt holding no. 179 which had been sold by Ramsurat Sah to defendant first party. The plaintiff claimed that by virtue of his possession of the contiguous holding no. 169, he had a right to pre-empt holding no. 17g sold to defendant first party. His case was that this sale took place on 14-3-1946 when he was away from Muzaffarpur. He returned to Muzaffarpur on 17-3-1946 and learnt from Jugeshwar Prasad (P. W. 3) at about 9-30 a.m. on the same day that holding no. 179 had been transferred to Rameshwar Lal Marwari by Ramsurat Sah. He was simply startled to hear of the sale and performed the two essential ceremonies which are pre-requisite to the exercise of the right of pre-emption, namely Talab-i-Mowasibat and Talab-i-Ishad. He performed the first in presence of Jugeshwar Prasad immediately after learning of the sale and the other immediately thereafter in presence of P. Ws. 4 and 5 near the disputed holding no. 179. He then made a demand upon Rameshwar Lal Marwari to sell the disputed holding to him for the consideration which he had paid for it. When Rameshwar Lal Marwari expressed his dissent, he brought the present suit to enforce his right.

2. Rameshwar Lal Marwari, the appellant, was the main contesting defendant. Ramsurat Sah, his vendor, supported his defence. The main pleas taken by him by way of defense were that the

plaintiff had no right of pre-emption, that he purchased the disputed holding with the knowledge of the plaintiff and that the two ceremonies were not performed by the plaintiff.

3. Both the Courts found that the plaintiff had a right of pre-emption. They also concurrently found that the two ceremonies, Talab-i-mowasibat and Talab-i-Ishad, were duly performed. On these findings they allowed the plaintiff's claim for pre-emption.

4. Before this Bench it has been argued by Mr. Untwalia that both the Courts were wrong in coming to the conclusion that the plaintiff had a right of pre-emption. His contention is that both the holdings in dispute constitute occupancy holdings of the pre-emptor and the seller, and a mere tenant cannot in law pre-empt. The argument put forward by him is that the right of pre-emption is not available to a tenant, but only to a proprietor. His contention is well-founded, and is supported by several decisions of this Court. There is no dispute that the holdings, nos. 169 and 179, constitute occupancy holdings. In the sale-deeds in respect of these two holdings, namely, the sale deed in favor of the plaintiff and the one in favor of defendant first-party, they are described as kaemi kasht. It must, therefore, be taken as granted that the two holdings are occupancy holdings, and the occupiers, namely, the plaintiff and defendant first party, are tenants, respectively of holdings nos. 169 and 179. It has been held in several cases that the persons holding tenancy interest do not have a right to pre-empt. In the case of *Mohammad Jamil v. Khub Lal*[1], a Division Bench of this Court has held that the doctrine applies only to the sale of proprietary interest and, therefore, does not apply to the sale of the Mokarrari interest. The person holding Mokarrari interest is in no better position than a tenant, and if a mokarridar has no right of pre-emption, much less an occupancy rayat has such a right. A similar view was taken in the case of *Dhirakshan Singh v. Triloki Prasad Singh*[2], It was held there that the milkiat or the ownership of the property was a sine qua non for the exercise of the right of pre-emption, and that the pre-emptor must have the milkiat or ownership in the property on account of which he claims the right of pre-emption. Their Lordships have further pointed out that as a corollary to the above principle it follows that no right of pre-emption arises in respect of property leased in perpetuity, that is to say, there is no right of pre-emption in mokarrari land. Again, after a review of all the cases, it was held by a Division Bench of this Court in the case of *Bibi Saleha v. Haji Amiruddin*[3], that a mokarraridar holding under a co-sharer had no right to pre-empt as against another co-sharer. The question of the right of pre-emption in respect of occupancy holding was only a step further and this was specifically held in the case of *Phul Mohammad Khan v. Qazi Kutubuddin*[4] In this case, along with the sale of two tauzis some mokarrari as well as the rayati lands were transferred by the same transaction. Their Lordships held that the suit for pre-emption in respect of milkiat rights only was maintainable. They have held further that there can be no right of pre-emption with regard to a mokarrari or rayati interest. The last case which concludes the point at issue is the case of *Raj Krishna Bahadur v. Ganga Prasad Sah*[5], In this case also the previous cases were considered, and it has been held that the right of pre-emption has always been restricted to persons who have the proprietary interest, and consequently a person in the position of a tenant of an occupancy holding or a tenant of a garden or an orchard has no right of pre-emption. The rule, so far as this High Court is concerned is thus well settled that a tenant, be he an occupancy tenant or not, has no right of pre-emption, and it is now too late to contend to the contrary.

5. There is no difference in principle whether the right of pre-emption is claimed by a co-sharer in the property or by a neighbour on the ground of vicinage. The important thing to remember is

that the right of pre-emption under the Mohammadan law, which by custom applies to Hindus also, is not a personal right on the part of the pre-emptor to get a retransfer of the property from the vendee who has already become owner of the same. It is a right annexed to the lands belonging respectively to the vendor and the pre-emptor. The legal position was thus laid down by their Lordships of the Supreme Court in the case of *Audh Behari Singh v. Gajadhar Jaipuria*[6] The correct legal position seems to be that the law of pre-emption imposes a limitation or disability upon the ownership of a property to the extent that it restricts the owner's unfettered right of sale and compels him to sell the property to his cosharer or neighbour as the case may be. The person who is a cosharer in the land or owns lands in the vicinity consequently gets an advantage or benefit corresponding to the burden with which the owner of the property is saddled, even though it does not amount to an actual interest in the property sold. The crux of the whole thing is that the benefit as well as the burden of the right of preemption run with the land and can be enforced by or against the owner of the land for the time being although the right of the pre-emptor does not amount to an interest in the land itself." It follows that the question of the right of pre-emption, whether on the ground of vicinage or on the ground of co-partnership, cannot be considered independent of the nature of the land in respect of which the right is claimed. If the land is a rayati land, there is no right of pre-emption, as held in a series of cases, and therefore, whether this right is claimed on the ground of co-ownership or on the ground of vicinage, as in the present case, there is no right of preemption if the land is a rayati land. \

6. Considered from any point of view, the plaintiff has no right of pre-emption in this case.

7. Mr. Untwalia also urged that the law of pre-emption was unconstitutional, since it offends against Article 19 of the Constitution as it places a restriction on the right of a person to dispose of his property. In the view I take of the case, it is not necessary to express any concluded opinion on this point.

8. In the result, the appeal is allowed, the decrees of the Courts below are set aside and the suit is dismissed. In the circumstances, there will be no order for costs throughout.

Rai, J.

9. I agree.

Appeal allowed.

Cases Referred.

[1] 5 Pat LJ 740
[2] AIR 1923 Pat 217
[3] ILR 8 Pat 251
[4] AIR 1937 Pat 578
[5] AIR 1941 Pat 35
[6] AIR 1954 SC 417