

PUNJAB AND HARYANA HIGH COURT

Suraj Bhan

Vs

Balwan Singh

Civil Revision No. 749 of 1971

(C.G. Suri, J.)

04.11.1971

JUDGMENT

C.G. Suri, J.

1. This revision petition has been filed by the vendees in a pre-emption case against the interim order of the trial Court directing the suit should be proceeded with, even though the plaintiff-pre-emptor, who was the vendor's son, was a major on the date of institution and the suit had been filed on his behalf by the mother as the next friend. The plaintiff had come forward to continue the suit as a major under Order 32, Rule 12 of the Civil Procedure Code long after the expiry of the period of limitation prescribed for the filing of such suits for the enforcement of a personal right. It may further be observed that the ordinary period of limitation provided for filing such pre-emption suits is not enlarged by the minority or other legal disability of the pre-emptor.

2. The sale which is sought to be pre-empted in this case was effected by the plaintiff's father by a registered deed on 17th February, 1968 and the pre-emption suit was filed on 14th February, 1969 that is to say, three or four days before the period of limitation was due to run out. The petitioner-vendees took up the objection in their written statement dated 18th October, 1969 that the plaintiff was a major on the date of institution and that a collusive suit had been filed on his behalf by the parents and that the father was bearing all the expenses. The mother filed a replication on 13th November, 1969 persisting that her son was a minor but the plaintiff made an application the same day seeking permission that he may be allowed to continue the suit on his own. Neither the mother nor the son had given the date of birth in these proceedings filed on 13th November, 1969. Plaintiff's application dated 13th November, 1969 was allowed by the trial Court on 4th May, 1970 and the plaint was ordered to be amended. An appeal was filed by the vendees before the Additional District Judge against this interim order but as it was felt that no appeal was competent, it was withdrawn on 15th October, 1970. Some of the reasons for withdrawing this appeal were that while allowing the amendment of the plaint, the trial Court had observed that the effect of the plaintiff being a major on the date of the institution of the suit could not be left open for decision and that preliminary issues with regard to that objection of the vendees had actually been framed. The trial Court's order deciding these preliminary issues in favour of the plaintiff-pre-emptor has given rise to this revision petition by the vendees.

3. While passing the impugned order, the learned trial Court has relied on a Privy Council ruling in *Mohini Mohun Dass and Others v. Bungsi Buddan Saha Dass and Others*¹, and a Single Bench decision of the Lahore High Court in *Amritsaria v. Gamun*², The Privy Council ruling is not at all applicable to the facts of the present case. The suits in that case had been filed by one of the three joint creditors. The other creditors had been named as co-plaintiffs though they had not signed and verified the plaints. It was held that all the joint creditors became plaintiffs when the plaints were filed in Court and that the question of adding parties did not arise and that the suits when instituted were not defective for want of any necessary parties. The Single Bench decision in Amritsaria's case (supra) was cited in a later ruling of the same High Court in *Ghasi v. Manga and Another*³, but was not followed. The one column judgment in Amritsaria's case does not state the facts and it may appear to have been taken for granted that the mistake made by the plaintiff or his next friend was bona fide. In the later ruling, it had been observed that in Amritsaria's case the question of amendment of the plaint was obiter and that the fact of the amendment had been taken for granted as past history and that the question that had arisen was whether it was necessary for the plaintiff to sign the plaint as a major after mistake had been discovered. The ruling in Ghasi's case (supra) may appear to be more in point. It was given in a pre-emption suit filed under similar circumstances. The trial Court had allowed the plaint to be amended and the order allowing amendment had been maintained on appeal by the learned District Judge. The High Court had set aside that order and had directed that the pre-emption suit should be dismissed. It was observed, amongst other things, that when a person was in fact a major and a suit had been instituted on his behalf as a minor, the plaint could be allowed to be amended only when the mistake was shown to be bona fide. *Bonafide* conduct was held to be a question of fact but the finding on the point of the two Courts below had been set aside in second appeal because it was not based on any evidence. Worthless evidence was taken to be no evidence at all as it established nothing. It was also observed that the burden of proving good faith or bona fides was on the party who wanted the Court to exercise its discretion in his favour. The same view with regard to the burden of proving bona fides or good faith was taken in *Gaya Din and Others v. Emperor*⁴. There is then a long string of rulings to show that amendment of the plaint on these facts could be allowed only if the next friend of the plaintiff had made the mistake in a *bona fide* manner. In this connection, reference could also be made to two other Division Bench rulings of the Madras and Calcutta High Courts in *Shanmuga Chetty v. C.K. Narayana Ayyar*⁵, and *Narayana Chandra Das v. Dulal Chandra Dutta*⁶, respectively.

4. Exactly the same question had arisen before me in *Bhim Sain and Others v. Harish Chander*⁷, On the facts of that particular case, I had found that the plaintiff's mother had filed a pre-emption suit on behalf of her son, who had attained majority long before the filing of the suit and that she had not acted in 'good faith' and that while construing that expression, we have to keep in mind the definition given in the interpretation clause (h) of Section 2 of the Limitation Act. Section 21 of the said Act, which deals with the effect of substitution or addition of a new plaintiff or defendant, uses this expression in the proviso to sub-section (1) and the limitation can be made to run from a date prior to the date of amendment only where the omission was due to a mistake made in good faith. In Shanmuga Chetty's case (supra), the Division Bench of the Madras High Court had exercised its discretion in favour of the plaintiff or his next friend because the minor had attained majority only three or four days before the filing of the suit and no useful purpose could be gained by wrongly showing a major to be a minor. In a pre-emption suit, however, one or both the parents could have an ulterior motive in filing a suit by wrongly showing a major as a minor. In my decision in Bhim Sain's case (supra), I had hinted at a possible motive for practising

this deception on the Courts. One other motive could be that a conscientious son, who had attained the age of discretion, could not be prevailed upon within time to be a party to the enforcement of a piratical right which can be used as an instrument of blackmail to make the vendees part with an amount over and above the one that had been mutually agreed upon under the law of free contract. As observed by Harrison J. in Ghasi's case (supra), even if it is possible to theorise as to why the plaintiff was shown as a minor, I do not think that there is any advantage to be gained in doing so as long as the mistake was not shown to be *bona fide* and there was gross carelessness and the parties concerned had deliberately misled the Court. Pre-emption is a personal right and a person who has attained majority has to assert to enforce this right of his own free will and volition within the time allowed by law and he cannot be hustled in doing so by any overbearing parents. The learned trial Court has not given any cogent reasons for ignoring the entry in the register of births, copy Exhibit D.2. The mother's statement leaves hardly any doubt that this entry relates to the plaintiff. If this birth entry was to be ignored, the next best evidence was furnished by the electoral rolls, copy Exhibit D. 1, according to which the plaintiff was about 23 years of age on the date of the institution of the pre-emption suit. It is difficult to believe that for more than a year, the parents had remained ignorant of the fact that their son had attained majority long before the suit had been filed on his behalf. In the case of a person, who is a free agent or who is sui juris, nobody can act as a guardian or as a next friend and the exercise of such a personal right within time has to be left to the free will and volition of the plaintiff. The vendees' plea that the suit is collusive, therefore, assumes significance in this case. It can be that the young boy, who had recently attained majority, could not be trusted with the extra amount that the parents were hoping to get by launching this piratical instrument of blackmail and that they wanted to retain a control over the litigation which had prospects of being profitable to them. No injustice may seem to be involved in exercising jurisdiction against a plaintiff or his friend where he is seeking to enforce a piratical right. This right is being defeated by the vendees by lawful means and the plaintiff and his parents are being made to suffer the consequences of their own gross carelessness, if not deliberate attempts to mislead the Court.

5. Shri N.C. Jain, the learned counsel for the plaintiff respondent argued that no issue about bona fides or good faith had been framed and that the parties should have an opportunity of producing their evidence on the point. A party, who is seeking to escape the consequence of his mistake or omission, has to state the circumstances under which that mistake had been made. Evidence cannot be led with regard to facts which had not even been pleaded by the party at fault. The mother and son had persisted in taking up the false position in their pleadings filed on 13th November, 1969 that the plaintiff was a minor on the date of the institution of suit. They were not seeking to justify the mistake or omission by pleading any bona fides or good faith. There is, therefore, no question of giving them an opportunity of proving any facts. The good faith or bona fides have first to be averred before a party can claim an opportunity of proving any facts. The good faith or bona fides have first to be averred before a party can claim an opportunity of proving the averments. I, therefore, feel that the trial Court has wrongly exercised its discretion in favour of the plaintiff in allowing the amendment of the plaint.

6. I, therefore, accept the revision petition and dismiss the pre-emption suit filed on behalf of Balwan Singh respondent.

Petition accepted.

Cases Referred.

1 Indian Law Reports (1890) XVII Cal 580

2 AIR 1926 Lah 12

3 AIR 1932 Lah 322

4 AIR 1934 Oudh 124

5 Indian Law Reports (1917) XL Mad 743

6 AIR 1927 Cal 477

7 S.A.O. No. 19 of 1970 decided on 30th November, 1970