

# RAJASTHAN HIGH COURT

Panch Gujar Gaur Brahmans

Vs.

Amarsingh

Second Appeal No. 295 of 1951  
(Wanchoo, C.J., Bapna and Ranawat, JJ.)

20.10.1953

## JUDGMENT

### **Bapna, J.**

1. The respondents 1 and 2 sued the appellants for possession of certain house property situated in the town of Bundi and more fully described in the plaint in enforcement of their right of pre-emption.
2. It was alleged that the house of the plaintiff-respondents No. 1 and 2 was situated adjoining the house property sold by respondents 3 to 5 to the appellants on 27-7-1946 and the plaintiffs as soon as they came to know of the sale offered to pay the same price to the vendees and asserted their rights of pre-emption. It was alleged that the vendors and the vendees failed to comply with the request of the plaintiffs. The suit was instituted on 4-3-1947. The vendors did not put in appearance but the suit was contested by the vendees. They denied that the plaintiffs were owners of the adjoining property. They pleaded that the plaintiffs had failed to perform the requisite Talabs and further alleged that the plaintiffs had declined to purchase the property and were estopped from putting forward their claim.
3. The trial court after evidence found that the plaintiffs had failed to prove that the plaintiffs were the owners of the house property adjoining the one sold. It was further held that the plaintiffs had failed to make necessary demands by Talabas. The suit was accordingly dismissed. On the plea of waiver, however, the court found against the defendants. On appeal the learned Civil Judge of Bundi came to the conclusion that the plaintiffs were owners of the property which was adjoining the house property sold by the vendors to the vendees. The appellate court also found that the plaintiffs had

asserted their rights in good time. The judgment and decree of the lower court was therefore set aside and the suit was decreed in favor of the plaintiffs-respondents 1 and 2 for possession of the property on payment of Rs. 559/- within two months of the date of the decree. The vendee defendants filed a second appeal and one of the grounds argued before the learned Single Judge was that the right of pre-emption in Bundi was based upon custom and the said custom was an unreasonable restriction on the right to acquire, hold and dispose of property guaranteed under Article 19 of the Constitution and was, therefore, invalid. The learned Judge who heard the case sitting singly, made a recommendation that as the question was of a great importance and was involved in many other cases, a larger Bench may be constituted and the present Full Bench was therefore constituted under orders of the Hon'ble the Chief Justice. The learned Judge has referred the following question for answer by the Full Bench.

"Whether the custom of pre-emption is an unreasonable restriction on the right to acquire, hold and dispose of property and is invalid, because it is contrary to the exercise of fundamental rights guaranteed by Article 19, Constitution of India".

4. It was contended that under Article 19(1)(f) every citizen has the right to acquire, and hold property for his own use and the law of pre-emption which entitles some other person to deprive the purchaser of that property is void as it does not come within the four corners of the saving clause which is Clause (5) of that Article.

5. It was contended that the restrictions laid down by the Pre-emption Law were not reasonable or in the interests of the general public and of course they have the concern with the protection of the interests of any scheduled Tribe.

6. The right of pre-emption in Bundi is not created by any enactment but is enforced by custom and this custom is said to be co-extensive with Muhammadan Law of Pre-emption, except in so far as any incidence of that right may have modified by custom. Under the Muhammadan Law three classes of pre-emptions have been recognised 1. Shafi-i-sharik i. e., one who claims pre-emption on the ground of being a co-sharer in the property 2. Shafi-i-khalit i.e., one who claims pre-emption as a participator in immunities and appendages such as a right of way or a right to discharge water, and 3. Shafi-i-jer i.e. one who claims pre-emption as an owner of adjoining immovable property.

7. The law of Pre-emption under which a purchaser of property is compelled to part with his property in favor of some other person is no doubt a restriction on the fundamental right of acquiring and holding property and it only remains to be seen whether that restriction is reasonable and, if so, it is in the interests of the general public. While something can be said in favour of reasonableness of the restriction which may allow a co-sharer or a participator in immunities and appendages to have a right of preferential purchase in respect of the property sold by another co-sharer or participator in immunities and appendages and such a restriction may also be in the interests of the general public which includes a section of the public, the reasonableness of the restriction which may deprive the purchaser of his property on a claim by a neighbor on the sole ground that his property stood adjoining the one sold requires examination. It may be further necessary to inquire whether such a restriction can be said to be in the interests of the general public.

8. Learned counsel for the appellants urged that the entire law of Pre-emption was an unreasonable restriction on the right of citizens to purchase and hold property and in any case was not one in the interests of the general public. It was argued that if the law of pre-emption were allowed to exist, the fundamental right to acquire property would become only a shadow of the right as nobody would be able to purchase so long as there were any of the three kinds of pre-emptors in the field. The existence of pre-emption does not prevent any person from purchasing property but the restriction is on holding the property as if some one of the pre-emptors asserts his right of pre-emption, the purchaser is bound to convey the property to him. But this is only a minor distinction, for, it does not make any difference to the purchaser whether his right is restricted at its inception or the property is taken away from him after he has completed the sale. In either case he is deprived of the property which he has tried to acquire or hold.

9. Now so far as the reconveyance of the property to a pre-emptor claiming as a co-sharer or a participator in immunities and appendages is concerned, there were certain reasons of convenience behind this principle, the chief being to prevent any disturbance by a stranger to the enjoyment of the property by a co-sharer or participator in the immunities and appendages. Phear, J. observed in - '*Nusrut Reza v. Umbul Khyr Bibee*'<sup>1</sup> that the right of pre-emption is founded on the supposed necessities of a Muhammadan family arising out of their minute sub-division, and

inter-division of ancestral property. The right of an adjoining owner to claim the property in case of purchase by a stranger however rests on a different footing, for, the pre-emptor has nothing in common with the property sold beyond the fact that he happens to be an owner of the adjoining property.

10. It may be pointed out that the right of preemption was not recognized among Hindus according to ancient texts on Hindu law. It came to be enforced in later times as based on custom and the courts considered it as being in accordance with justice, equity and good conscience. Even among the Muhammadans, pre-emption is recognized not as one of the branches of Muhammadan Law applicable to them but because it is in accordance with justice equity and good conscience. This is the majority view taken in - '*Gobind Dayal v. Inayatullah*',<sup>2</sup> The Bombay and Madras High Courts are however of opinion that pre-emption was manifestly opposed to justice, equity and good conscience - '*Ibrahim v. Munni Mir Udin*'<sup>3</sup> - '*Mohammad Beg v. Narayan Meghaji*',<sup>4</sup> · While in Northern India the courts enforced a right of pre-emption based on custom, even when there was no statutory law of pre-emption, holding that it was in accordance with justice, equity and good conscience, in Southern India the view taken was that it was opposed to principles of justice, equity and good conscience. The reasonableness of a custom is however not a constant factor and what is reasonable at one stage of the progress of society may not be so at another stage. The custom of pre-emption came to be followed in India after political domination by Muhammadan Rulers who brought with them their own traditions and law and as time went by the inhabitants of India accepted the custom of pre-emption in most parts of India where Muslim domination had been clear and effective. This explains the reason why in the Bombay and Madras Presidencies the right of pre-emption based on custom did not meet with approval as in Northern India and the High Courts in those Provinces had no hesitation in declaring the custom of pre-emption as an unnecessary restriction on the right of sale and purchase of property. Be that as it may, the Sovereign democratic Republic of India has guaranteed certain fundamental rights to every citizen of India and the reasonableness of the custom is now to be judged in the light and unless the restrictions arising out of a recognition of the right of pre-emption based on the ownership of an adjoining property be reasonable and in the interest of the general public, the custom cannot be permitted to prevail. In a society where certain classes were privileged and preferred to live in groups and there were discriminations, on grounds of religion, race and caste there may have been some utility in allowing persons to prevent a stranger from acquiring property in an area which had been populated by a particular fraternity or class of

people and in those times a right of pre-emption to oust a stranger from the neighborhood may have been tolerable or even beneficial. Our Constitution however prohibits discrimination against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them under Article 15 of the Constitution and guarantees a right to every citizen to acquire, hold and dispose of property except by a restriction which may be reasonable and in the interests of general public. Prima facie, we have to lean towards the right guaranteed and keep the restriction within permissible limits and in that light the manners and customs which permitted the division of society into groups and exclusion of strangers from any locality should now be considered as unreasonable. On these principles the enforcement of the right of pre-emption of the third class i.e., as based on ownership of adjoining property is in our opinion not a reasonable restriction on the right to acquire and hold property. It may be pointed out that such a right is only recognized in Hanafi Law but not under the Shia Law and even according to Hanafi Law the claim does not lie in respect of sale of large estates, so that among the Muhammadan Jurists also there was a difference of opinion as to the validity of the right of pre-emption based on vicinity.

11. Learned counsel for the opposite party argued that pre-emption was an incident of property and therefore any person who purchased property took it with that incident. That view has no doubt been held in - '*Gobind Dayal v. Inayatullah*', but in Bombay it has been held in - '*Hamedmiya v. Joseph Benjemain*'<sup>5</sup> that the right of pre-emption is not a right which attaches to the land but is a personal right. The same view has been taken in Calcutta in - '*Koodratullah v. Mohinee Mohun*',<sup>6</sup> With great respect we agree with the reasoning in - '*Hamedmiya's case*' for the right is not one which is in existence prior to the sale but arises only when there is a valid and complete sale and in case of no other alienation. The fact that the ground on which the pre-emptor claims his right of pre-emption should not only exist at the time of sale but at the date of the suit for pre-emption and also up to the time when the decree is passed, supports the view that it is not an incident of the property sold but is a right which comes into existence in persons who have been described as Shall Sharik, Shafi-i-khalit or Shafi-i-jar. According to Muhammadan Law this is a personal right of the pre-emptor, which is lost if the pre-emptor dies without enforcing the same by a suit.

12. It was next contended that a custom was not hit by Article 13 of the Constitution. It declared all laws in force in the territory of India immediately before the commencement of the Constitution to be void in so far as they were inconsistent with

the provisions of that part and to the extent of the inconsistency, but it was argued that the definition of "laws in force" in Sub-clause (b) of Clause (3) of that Article only included such laws as were passed or made by legislature or other competent authority and did not include custom. This argument has no force. In the first place, the definition is not exhaustive but is only illustrative, for, in explaining the meaning of words "laws in force" the word used is "includes" and not "means". Secondly, under Sub-clause (1) of Clause (3) "law" has been defined so as to include "custom and usage having the force of law." Under S. 13, General Clauses Act, a word used in plural has the same meaning as when it is used in the singular form and the context in Clause (1) of Article 13 makes it necessary to interpret "laws in force" so as to include customs and usages, for, it would be absurd to think that all customs or usages which were inconsistent with the provisions of Part 3 of the Constitution which guarantees fundamental rights should continue to exist, although such customs and usages if sanctified by incorporation in any Act, order, bye-law, rule, regulation or notification would become void. In this view, we are supported by the observations of Chagla, C.J. in the - '*State of Bombay v. Narasu Appa Mali*', <sup>7</sup> where, after explaining the definition of the word "law" in sub-clause (1) of Article 13 he went on to say that "it is clear that if there is any custom or usage which is in force in India which is inconsistent with the fundamental rights that custom or usage is void".

13. An ingenious argument was advanced with reference to Article 372 of the Constitution. It was argued that under Article 372(1) of the Constitution, all the laws in force in the territory of India immediately before the commencement of the Constitution were declared to continue in force until altered or repealed or amended by competent legislature or other competent authority. As the "laws in force" in this Article included not only Statute Law but also Personal law and Customary law, the custom of pre-emption was also saved and continued to remain in force. But in declaring the fundamental rights of citizens in Article 19(1)(f) the restrictions imposed upon them by existing law have only been made justifiable and as under Article 366 "existing law" meant only

"any law, ordinance, order, bye-law, rule, or regulation passed or made before the commencement of the Constitution by any Legislative authority or person having power to make such law, ordinance, order, bye-law, rule or regulation,"

a custom which was not thus included in existing law and which was declared to

remain in force under Article 372 could not be questioned on the ground that it imposed unreasonable restrictions on the enjoyment of the said fundamental rights.

14. In the first place, the fundamental rights conferred by the provisions of Part 3 of the Constitution are not conferred, subject to what may be contained in other parts of the Constitution. The restrictions, subject to which the fundamental rights are to be enjoyed, are contained in Part III Itself. Therefore, the fact that Customary law continues to remain in force by virtue of Article 372 will not have it from being declared void if it is hit by Article 13 of the Constitution. Secondly, as the opening words of Article 366 of the Constitution say, the words defined in that Article are to be assigned the particular meaning unless the context otherwise requires. The context in Article 19(5) requires that the words "existing law" should be understood in their broad sense as including any kind of law and there is no doubt that the restrictions imposed by any customary law cannot be more sacrosanct than the restrictions imposed by Statute law and if they are unreasonable they would be void under Article 13 of the Constitution.

15. It was next urged that a custom like the present cannot be said to be inconsistent with the provisions of Part III of the Constitution which deals with fundamental rights as these rights are guaranteed only against the State so that if there is a question as to the rights of parties inter se in which the State is not concerned the question of infringement of the fundamental rights does not arise. Reliance is placed on the following passage in - '*Shamdasani v. Central Bank of India Ltd.*',<sup>8</sup>

"The language and structure of Article 19 and its setting in Part III of the Constitution clearly show that the Article was intended to protect those freedoms against State action other than in the legitimate exercise of its power to regulate private rights in the public interest. Violation of rights of property by individuals is not within the purview of the Article."

16. Those observations have to be read with the context. In that case, the petitioner had sued the Central Bank challenging the validity of sale of certain shares of the defendant in exercise of the Bank's right of lien for recovery of a debt due from the petitioner. The plaint was rejected under Order 7 Rule 11, Civil Procedure Code and the petitioner instead of filing an appeal made a petition under Article 32 of the Constitution. Their Lordships held that the petitioner had misconceived his remedy

and dismissed the petition. The emphasis was that a petitioner who had his remedy in ordinary courts could not come to the Supreme Court under Article 32 of the Constitution unless the infringement of the right was complained against the State. This does not mean that the guarantee given by Article 19 of the Constitution is only against any wrong committed by the State. In the case of a wrong committed by a private individual the remedy would obviously lie in ordinary courts of law.

17. The next case cited is - '*A.K. Gopalan v. State of Madras*',<sup>9</sup> and the following observations of Patanjali Sastri, J. in Para. 115 were relied upon :

"On the other hand, the insertion of a declaration of fundamental rights in the forefront of the Constitution, coupled with an express prohibition against legislative interference with the rights (Article 13) and the provision of a constitutional sanction for the enforcement of such non-interference by means of a judicial review (Article 32) is, in my opinion, a clear and emphatic indication that these rights are to be paramount to ordinary State made laws."

18. The observations have to be read with the context in which they appear. The petitioner A.K. Gopalan challenged the validity of the various provisions of the Preventive Detention Act and the argument of the Attorney General was that Article 21 only purported to grant protection against violation of the rights by the executive and by individuals and the law enacted by Parliament could not be challenged under Article 13 of the Constitution. The observations were in answer to that contention.

19. Part III which enumerates and guarantees fundamental rights contains Articles 12 to 35. In some of the Articles, the guarantee is against interference by the State, as, for example, Article 13(2), Articles 14, 15, 16, 23 and 31. There are other Articles, the matters wherein are connected with the State as, for example, Articles 21 and 22. There are other Articles in which the State is not at all concerned as, for example, Articles 24, 25(1), 26, 27, 28, 29 and 30, Article 19 is, however, a mixed Article where certain rights are guaranteed to the citizens of India, subject to certain restrictions which may be imposed by the State. This Article does not say that a citizen will have no remedy if the right guaranteed under this Article is infringed by other citizens. It may be that if the rights are infringed by other citizens, the remedy would lie in the ordinary law courts while if the infringement is by the State, the remedy may lie both in the ordinary law courts and in the High Court or the Supreme

Court under Articles 32 and 226 of the Constitution. This contention has, therefore, no force.

20. Learned counsel for the respondents drew our attention to two recent cases - '*Abdul Hakim v. Janmohammad*'<sup>10</sup>, in which, the validity of the Agra Pre-emption Act (11 of 1922) was considered and - '*Punjab State v. Inder Singh*',<sup>11</sup>, in which the validity of the Punjab Pre-emption Act was considered. In the Allahabad case the learned Judges held that the Agra Pre-emption Act of 1922 had not become void by virtue of Article 13(1) and 19(1)(f) of the Constitution. It was observed that the Law of Pre-emption was for the welfare of the people, because it avoided litigation and consolidated property and tended to increase the production of wealth. The suit related to a claim for pre-emption on the sale of a portion of the Zamindari property by a co-sharer. This was not a case in which pre-emption might have been claimed merely on the ownership of the adjoining property.

In the Punjab case also the suit related to agricultural property and the right of pre-emption, though held to be a clog or fetter upon the freedom of sale, was upheld on the ground of reasonableness of the restriction in the interest of the general public. It was observed that the sole object of the Punjab Pre-emption Act was to preserve the homogeneity of the village community and to prevent fragmentation of holdings. It would seem that in the Punjab the right of preemption is allowed to lineal descendants of the vendor in order of succession, then to the co-sharers who are agnates in order of succession, next to other persons in order of succession and fourthly to co-sharers. Failing these the rights vest in inferior or superior proprietors when the land is sold to superior or inferior proprietors respectively then in the owners of the patti the owners of the estate and the tenants and finally in the occupancy tenants. That case seems to have been decided on peculiar notions of the homogeneity of the village communities in the Punjab. In any case, it was not one which related to a claim by an owner of an adjoining property.

21. It may be pointed out that a contention was raised by learned counsel for the respondent that as the suit was instituted prior to the enforcement of the Constitution when no fundamental rights existed, the case should be decided according to the rights of the parties as they accrued prior to the enforcement of the Constitution, in other words, according to the rights which existed on the date of institution of the suit unaffected by the provisions of the Constitution. We do not propose to express any opinion on this question as it was not referred to us for answer in this reference.

22. Our answer to the reference, therefore, is that the custom of pre-emption which allows an owner of adjoining property to claim possession of a property sold only on

the ground of being the owner of the adjoining property is invalid as being contrary to the provisions of Article 19(1)(f), Constitution of India.

Reference answered.

Cases Referred.

1. 8 WR 309
2. 7 All 775 (FB)
3. 6 Mad HCR 26 (C)
4. AIR 1913 Bom 255
5. AIR 1929 Bom 206
6. 4 Beng LR 134 (FB)
7. AIR 1952 Bom 84 at p. 88
8. AIR 1952 SC 59
9. AIR 1950 SC 27
10. AIR 1951 All 247
11. AIR 1953 Pun 20