RAJASTHAN HIGH COURT

Siremal

Vs.

Kantilal

Civil First Appeal No. 21 of 1951
(Wanchoo, C.J. and Dave, J.)

22.04.1954

JUDGMENT

Wanchoo, C. J.

1. This is an appeal by Siremal and others against the judgment and decree of the Civil Judge, Pali.

2. A suit was brought by Kantilal plaintiff respondent against Siremal and others for preemption of a house sold by Takhatmal defendant respondent to Siremal and his three sons for Rs. 9,001/-. The plaintiff appellant is the minor son of Takhatmal vender. The case of the plaintiff was that he was living separate from his father, and was not a member of the joint family with his father, and the house was not joint Hindu family property. The plaintiff, therefore, claimed pre-emption under the second clause to Section 3, Marwar Pre-emption Act of 1922.

3. The suit was resisted by the vendees defendants, and their case was that the plaintiff was a member of the joint Hindu family along with his father, and that the house sold was joint family property belonging to the vendor and the plaintiff. As such the plaintiff was not entitled to pre-empt as the sale was made by the manager and karta of the family on behalf of himself and his minor son.
It was also urged that the plaintiff had filed this suit mala fide for the benefit of another person and not for his own benefit, and the suit should be dismissed for this reason. Takhatmal vendor defendant also filed a written statement in which he practically support the stand taken by the vendee defendants.

4. The trial court framed a number of issues, and came to the conclusion that the

property was the joint Hindu family property of the plaintiff and his father Takhatmal. It held that even so the plaintiff was entitled to preempt the property. It further held that no question of mala fides could be raised in a suit of this nature. It, therefore, decreed the suit.

5. The vendee defendants have come in appeal, and only three points have been urged on their behalf before us. They are:

> (1) As the plaintiff and his father were members of a joint Hindu family, and the property was joint Hindu family property, the plaintiff must be held to be a vendor along with his father who was the Karta and manager of joint Hindu family consisting of himself and his son, and therefore being also a vendor could not pre-empt.
> (2) As the plaintiff had really brought this suit for the benefit of a third person, he could not maintain it.
> (3) The second clause of Section 3, Marwar Preemption Act is ultra vires, under Article 14 and Article 19 of the Constitution, and therefore the suit should fail.

This last is a new point urged in this Court, and was not raised in the court below. We have, however, heard learned counsel on this point also, as it raises a pure question of law.

6. The finding of the trial court that the plaintiff and his father Takhatmal are members of a joint Hindu family, and that the property sold was joint family property, and Takhatmal was the Karta and manager of the joint Hindu family has been assailed by the plaintiff respondent. We agree with the trial court's finding that the plaintiff and his father are members of a joint Hindu family of which Takhatmal is the karta and manager. This is clear from the statement of Takhatmal himself and other evidence which we see no reason to disbelieve in this connection. As to the house being ancestral property, the facts are that the house was originally ancestral property, and on division, it fell to the share of Takhatmal's brother who sold it for Rs. 6,000/- to Bhurmal after the partition. Thereafter, Takhatmal wanted to pre-empt the property, and consequently Bhurmal sold it to Takhatmal. As Takhatmal had no money, he borrowed Rs. 6,000/- from Hazarimal, and mortgaged this house to him for the purpose. Thereafter, Takhatmal sold the house to Siremal in order to pay off the mortgage in favor of Hazarimal. It is admitted by Takhatmal that he has been doing

nothing since about 1940. In these circumstances, the question is whether the house can be held to be joint family property of Takhatmal and his son. Takhatmal claims it as his personal property. Since there was division between Takhatmal and his brother, and this property went to the share of his brother, it ceased to be joint Hindu family property of Takhatmal and his son. Takhatmal purchased it from Bhurmal, but the entire purchase money was found by borrowing from Hasarimal. It is clear, therefore, that the house was not purchased by Takhatmal out of any joint family funds. There is nothing to show that Takhatmal ever intended this house to be thrown into the hotchpot. In the sale deed he mentioned it as his personal property. In these circumstance, we are of the view that the court below was wrong in treating this house as joint family property of Takhatmal and his son it must be the personal property of Takhatmal. As such the plaintiff cannot be said to have any share in this property by virtue of his being joint with Takhatmal, and cannot be held to be a vendor of this property. He would, therefore, have a right to pre-empt it under the second clause of Section 3 of the Marwar Pre-emption Act.

7. The next question is whether the plaintiff can maintain this suit, if it is found that he brought it in reality for the benefit of a third person. In this connection, reliance is placed on the evidence of Takhatmal who says that the suit had bean brought for the benefit of Hazarimal who was the mortgagee and who was paid off by executing this sale in favour of Siremal and others. Even if this is so, the *bona fides* or otherwise of the plaintiff are not material in a suit of this kind. Reliance in this connection was placed on - *'Brij Nath v. Jita',*[1] That was a Division Bench case, and one of the learned Judges, Bullock, J., was of opinion that if the plea that the suit was not brought for the benefit of the plaintiff, but is for the benefit of some other third person, is established, the plaintiffs suit must fail on the ground that the right of pre-emption being a personal privilege, which cannot be transferred, it can only be exercised by and for the person in whom it resides. The other learned Judge Benton did not quite agree with this view. We are of opinion that the question of *bona fides* and mala fides is of no importance in a suit of this nature. The suit is brought by the plaintiff for pre-emption, and it is not for the court to enquire where he gets the money from except perhaps in a case where a member of a joint Hindu family is in a position to pre-emption the sale of the joint Hindu family property by the Karta or the manager. This is, however, not the case here, for we have held the property as personal property of Takhatmal, and the plaintiff has no share in it, and cannot be held to be a co-vendor with Takhatmal. In these circumstances, it is unnecessary to enquire from where the plaintiff would find

money to pay the purchase price. There is, therefore, no force in this contention.

8. We now come to the last point, namely that the second clause of Section 3, Marwar Per-emption Act, is ultra vires of the Constitution. The relevant portion of Section 3 is as follows:-

> "The right of pre-emption in respect of house or a building plot shall belong to the under mentioned in the following order :
> 1st to the joint owner of the house or building plot.
> 2nd to person related within, three degree to the vendor of the house or building plot.
> Provided that the nearer in degree shall have priority over one more remote.
> 3rd to a person owning immovable property touching the house or building plot in respect of which pre-emption is claimed.
> . . . . . .

The suit is based on the second clause of the section. The contention on behalf of the appellant is that this clause imposes an unreasonable restriction on the right of the purchaser to hold the property which he has acquired by purchase, and is thus hit by Article 19(1)(f) of the Constitution, and is not saved by Article 190 as reasonable restriction. Further, it is urged that this particular form of pre-emption is to be found only in Marwar and not in other parts of the State of Rajasthan, and therefore it is void under Article 14.

9. We shall first consider whether this clause imposes an unreasonable restriction on the right of the purchaser to hold property which he has purchased. A similar question with respect to what is known in Mohammedan Law as Shafi-i-jar and which is covered by the third clause of this section, came up for consideration before a Full Bench of this Court, and it was decided in - *'Panch Gujar Gaur v. Amarsingh',* [2] that the restriction put by the customary law of pre-emption based on contiguity was an unreasonable restriction on the right to hold property. The reasons given in that case, in our opinion, apply with full force to the clause of Section 3 where mere relationship is sufficient for purposes of pre-emption. It was urged that this restriction was reasonable inasmuch as the intention of the law is that the property should remain in the family. We are, however, not impressed by this argument because as explained in - *'Gulab Chand v. Gambheer Mal',* [3] the right of pre-emption is given to all relations within three degrees, and such relations cannot be called members of the family. For example, it will be possible, under this clause, for the vendor's mother's sister's son to

pre-empt, though the two could not by any stretch of reasoning, be called members of the same family. We are, therefore, clearly of the opinion, for reasons given in the Full Bench case mentioned above, that the restrictions put by the second clause on the right of the purchaser to hold property are not reasonable restrictions, and this clause Is now void under Article 13(1) of the Constitution.

10. We are further of opinion that this clause offends against Article 14 of the Constitution. It permits, so far as that part of the State of Rajasthan is concerned, which was included in the former State of Marwar, mere relationship as the basis of pre-emption with respect to house property. The former Marwar Stats seems to have been unique in having such a wide law of pre-emption with respect to house property, and so far as we know, no other part of Rajasthan has such a wide law. We have been able to lay our hands on the law of pre-emption as it prevails in some of the former States of Rajasthan, and an examination of those laws shows that mere relationship was not the basis of preemption in those areas. The Alwar State Pre-emption Act. (No. VII) of 1946 provided for pre-emption of urban immovable property by Section 16. There are six clauses in Section 16 and in none of them is mere relationship enough for pre-emption of urban house property. The law in the former Jaipur State was coextensive with the Mahommedan Law of pre-emption, and is to be found summarized in - *Malilal v. Ram Gopal',*[4] It recognizes three classes of pre-empters, namely co-sharers in the property, participators in immunities and appendages, and neighbours by contiguity. There was no pre-emption possible merely on the ground of relationship in the former Jaipur State. In the Mewar State also, the law was co-extensive with the Mohammedan Law, and was of the same kind as in the former State of Jaipur. Reference may be made to - *'Ahmed Bus v. Ramvilas',* [5] where this law, is fully laid down. In the former Bikaner State, there is the Pre-emption Act of 1919. Section 10 of that Act provided for pre-emption of buildings, and there also near relationship within three degress was not sufficient to give the right of pre-emption. It is clear, therefore, that the law of pre-emption by mere relationship as put down in the second clause of Section 3, Marwar Pre-emption Act, is not prevalent in any other part of Rajasthan. No special reason has been shown to us why this distinction should be made between that part of Rajasthan which was formerly in the Stats of Marwar, and the remaining parts of Rajasthan. The Principles, which were laid down in - *'Rao Manohar Singhji v. Stats of Rajasthan'.* [6] apply with full force to this case also, and it must be held that the' second clause to Section 3 is hit by article 14 also.

11. We may refer to Section 16 of the Punjab Pre-emption Act also in this connection. That section prescribes the conditions on which pre-emption arises in respect of urban immovable property, and there is no provision for pre-emption merely on the ground of relationship within three degrees. In the Uttar Pradesh also pre-emption of urban house property is based on customary law, which in turn is founded on Mohammedan Law, and there is no pre-emption, so far as we know, merely on the basis of relationship.
Section 12 of the Agra Pre-emption Act, which relates to agricultural property, also does not recognize pre-emption merely on the basis of relationship, though preference is given to relations where there are a number of pre-emotions in the same class mentioned in Section 12. This review of the law in various other parts of Rajasthan and in the Punjab and in Uttar Pradesh is another argument that the wide restriction placed by the second clause of Section 3 of the Marwar Pre-emption Act is not to be found any where else in India, and is thus an unreasonable restriction on the right of the purchaser to hold the property which he has purchased.

12. We, therefore, hold that the second clause of Section 3 of the Law of Pre-emption in Marwar of 1922 (hereinbefore called the Marwar Pre-emption Act) became void on 26-1-50. In this view of the matter, the suit, based as it is on the second clause of Section 3, must be dismissed, as that provision had become void before the date of the decree. However, as this point was not raised in the trial court, and was raised, for the first time, before us, and the appellants have succeeded on this point alone, we are of opinion that the parties should bear their own costs of this litigation.

13. We, therefore, allow the appeal set aside the decree of the court, below, and dismiss the suit of the plaintiff respondent. We order parties to bear their own costs of this litigation throughout.

Appeal allowed.

Cases Referred.

1. 139 Pun Re 1894
2. AIR 1954 Raj 100
3. AIR 1953 Raj 31
4. 1949 Jai LR 11

5. ILR (1952) 2 Raj 147
6. AIR 1953 Raj 22