

RAJASTHAN HIGH COURT

Praveen Sahani

Vs.

Sushila Devi

S.B.C. F.A. No. 238 of 1999

(A.C. Goyal, J.)

11.03.2004

JUDGEMENT

A. C. Goyal, J.

1. The defendants-appellants seek to quash the judgment and decree dated 3-7-1999 whereby the learned Additional District Judge No. 1, *Jaipur City, Jaipur* decreed the suit of pre-emption in respect of the suit property. The parties shall be referred hereinafter in the same manner as they were arrayed in the plaint.
2. The plaintiff Smt. Sushila Devi filed a civil suit on 24-1-1996 with the averments that three storied house No. 515 is situated at *Namak-ki-Mandi, Kishanpole Bazar, Jaipur*, which has been shown in the map annexed to the plaint. The property shown in yellow color in the annexed map belongs to the plaintiff, the property shown in red color belongs to the defendant No. 2 Smt. Prem Devi, the property shown in green color belongs to one Sh. Kaluram and the area shown in blue color belongs jointly to the plaintiff, the defendant No. 2 and Kaluram. The property shown in the red colour was sold by the second defendant to the first defendant, Kumari Praveen Sahni vide a registered sale deed dated 8-3-1995 for a consideration of Rs. 1,40,000/-. The plaintiff claimed that she has got a right of pre-emption on account of having common portions in the said house and no notice as provided under Section 8 of the Rajasthan Pre-emption Act, 1966 (in short the Act) was given to her by the defendant No. 2. The plaintiff, thereafter, prayed for a decree of pre-emption in respect of the suit property.
3. The defendants in their joint written statement while admitting that the plaintiff had a right of pre-emption in respect of the suit property pleaded that the plaintiff was asked to purchase the suit property by the defendant No. 2 but she refused to purchase it. A public notice was also published in Rajasthan Patrika on 4-9-1994 for selling the

said property and a copy of the said newspaper was also sent to the plaintiff. This property was sold with the knowledge of the plaintiff since beginning and she was aware of the fact that the defendant No. 1 is going to purchase the suit property from the defendant No. 2. It was also pleaded that the defendant No. 1 has spent a sum of rupees about 50,000/- in repair and construction after purchase, hence the plaintiff is estopped to claim her right of pre-emption.

4. On the basis of the pleadings of the parties as many as six issues were framed which have been incorporated in the impugned judgment. The plaintiff examined herself, P.W. 2 Dinesh Kumar Jain, P.W. 3 Sh. Leelaram and P.W. 4 Sh. Prem Chand Jain. Whereas both the defendants were examined as D.W. 1 and D.W. 4 and they produced D.W. 2 Sh. GhanshyamChawla and D.W. 3 Sh. Brijmohan. Having considered the rival submissions, the learned trial Court decreed the plaintiff's suit as indicated hereinabove.

5. I have heard learned counsel for the parties and carefully gone through the material on record.

6. It is not in dispute that the plaintiff had a right of pre-emption and it is also not in dispute that the vendor i.e. the defendant No. 2 did not give notice to the pre-emptor the plaintiff as required under Section 8 of the Act. The important question for consideration in this appeal is whether the entire action of sale/purchase of the suit property took place in full knowledge of the plaintiff, hence she is estopped on the ground of waiver and acquiescence ?

7. Learned counsel for the defendants placing reliance upon *Ram Rathi v. Mt. Dhiraji*, ¹*Kanshi Ram Sharma v. Lahori Ram*, ²*PateshwariPartabNarain Singh v. Sitaram*, ³*RadhakishanLaxminarayanToshniwal v. ShridharRamchandraAlshi*, ⁴ and *Indira Bai v. Nand Kishore*, ⁵ contended that in view of these decisions, it is well settled that right of pre-emption is lost by estoppel and acquiescence in case the pre-emptor had knowledge of the transaction in question. In *Indira Bai's* case (supra), the Hon'bleSC in para Nos. 1 and 2 held as under:-

"Is estoppel a good defence to 'archaic', ⁶*AtamPrakash v. State of Haryana*, right of pre-emption which is a 'weak right', ⁷*Bishen Singh v. Khazan Singh* and can be defeated by any 'legitimate' method, *RadhaKishan v. Sridhar*.⁸

Barring High Court of Rajasthan and erstwhile Mewar State, ⁹*Jethmal v. Sajanumal*,

most of the other High Courts, namely, Allahabad, ¹⁰*Naunihal Singh v. Ram Rati Lal, Oudh*,¹¹*Ram Rathi v. Mt. Dhiraji, Ajmer*. ¹²*Gopinath v. R.S. Nand Kishore*, ¹³*Abdul Karim v. Babu Lal*,¹⁴*and Lahore, Kanshi Ram Sharma v. Lahori Ram*, ¹⁵ have answered the issue in the affirmative. The Privy Council, AIR 1929 PC 259, too, applied this principle to non suit a pre-emptor who knew that the property was in the market for long but offered to purchase only one out of many blocks. It held:

"Assuming that the prior completed purchase by the appellant would under other circumstances, have given him the right of pre-emption in respect of the blocks in suit, he must be taken by his conduct to have waived this right, and that it would be inequitable to allow him now to re-assert it."

Even in Muslim Law which is the genesis of this right, as it was unknown to Hindu Law and was brought in wake of Mohammedan Rule, it is settled that the right of pre-emption is lost by estoppel and acquiescence."

It was also held in para 5 of this judgment that failure to serve notice as required under the Act does not render the sale made by vendor in favor of vendee ultra virus. The Act does not provide that in case no notice is given the transaction shall be void. The Act does not debar the pre-emptor from giving up his right. Rather in case of non exercise within two months, may be for the financial reasons, the right stands extinguished.

8. To prove that the plaintiff had full knowledge about this sale, three kinds of evidence has been produced on behalf of the defendants. First is that the sale of suit property was advertised in Rajasthan Patrika on 4-9-1994 which is Ex. A1 but the plaintiff did not contact the vendor even though full address of the house and name of the vendor's husband was given therein. According to learned counsel for the plaintiff. Ex. A1 does not amount to notice to the plaintiff as provided under Section 8 of the Act and further there is no evidence to prove that the contents of Ex. A1 came to the notice of the plaintiff. As far as the first objection is concerned that is not acceptable in view of the settled legal position as stated hereinabove and with regard to second objection, the evidence of the parties has to be looked into. D.W. 4 Smt. Prem Devi deposed that proposed sale of the house was got published in the newspaper by her husband. D.W. 1 Praveen Sahni gave similar statement. She also stated that this newspaper was received by the plaintiff. In cross- examination, she stated that since she had a talk with the plaintiff, she knew that the plaintiff got this news. The plaintiff Smt. Sushila Devi stated that no newspaper containing the said advertisement was sent

to her by the defendants. In cross-examination, she stated that they did not have any newspaper. She admitted this fact that her son (P.W. 2) is an advocate but she pleads ignorance as to whether her son reads the newspapers or not. It was also admitted by her that her family consists of eight members herself, her husband, four sons and two daughters. P.W. 2 Sh. Dinesh Kumar is son of the plaintiff. He in examination-in-chief though denying any prior intimation about this sale did not state about knowledge of Ex.A1, but in cross- examination he pleaded ignorance about the publication of the news Ex. A1 in Rajasthan Patrika. He admitted this fact that he sometimes reads the newspapers and the Rajasthan Patrika is the main newspaper. P.W. 4 Sh. Prem Chand husband of the plaintiff did not give any statement with regard to any knowledge of Ex. A1. Having considered the entire evidence, it appears probable that this news item came to the notice of the plaintiff. The sale deed was executed on 8-3-1995 i.e. after a period of more than 6 months of Ex. A1. Plea of ignorance by the plaintiff in her statement about the reading of the newspapers; the statement of P.W. 4 Sh. Prem Chand Jain that he came to know the name of the husband of the vendor for the first time when copy of the sale deed was received by him in view of this admitted position that they were residing in the same building and ignorance about the publication of this news item by P.W. 2 Dinesh Kumar goes a long way to show that the plaintiff knew about Ex. A1.

9. Second kind of evidence is that the plaintiff was orally informed by the defendants with regard to proposed sale of the suit property. The defendant No. 2 Smt. Prem Devi stated that prior to sale deed in favor of Praveen Sahni she had a talk with the plaintiff Smt. Sushila Devi, her husband and son but they declined to purchase it by saying that they don't require the suit property. In cross-examination, she stated that the date and month of conversation with the plaintiff is not remembered by her. It was also stated that she had some dispute with the plaintiff but they were on speaking terms. The defendant No. 1 Ku. Praveen Sahni deposed that she also contacted the plaintiff but the plaintiff denied to purchase this house by saying that neither she requires this house nor she has enough money to purchase it. She further stated that this transaction was carried out through broker Sh. GhanshyamChawla and he also contacted the plaintiff. In cross-examination, she stated that she contacted the plaintiff in presence of her own brother Brij Mohan (D.W. 3) who was a tenant in the suit property. D. W. 2 Sh. GhanshyamChawla is the broker. While stating that he did not know the plaintiff, the defendant No. 1 approached him and thereafter, he visited this house about five to six times and the plaintiff had full knowledge about sale of this house. In cross-examination, he admitted that he received a sum of Rs. 4,000/- as his brokerage,

though he did not get any license as broker. D.W. 3 Sh. Brij Mohan while corroborating the statement of her sister D.W. 1 stated that he was a tenant in the suit property about one and half year prior to its sale. He further stated that he had a talk with the plaintiff with regard to sale of this house but she declined to purchase it. The plaintiff Smt. Sushila Devi stated that neither the defendants nor any broker contacted her about purchase of this house and she came to know about this sale transaction for the first time when the defendant Praveen Sahni came to reside in Sept. 1995 and on making a query by her she disclosed that this property has been purchased by her. In rejoinder filed by the plaintiff, it was denied in para 1 that Brij Mohan or any other person was a tenant in the suit property, but this fact was denied by her in cross-examination. P.W. 2 Dinesh Kumar admitted that Sh. Brij Mohan was residing in this house as a tenant. According to his statement, this house was purchased by the defendant No. 1 in Sept. 1995 and they came to know about this fact in Sept. 1995 while the sale deed is dated 8-3-1995. P.W. 3 Sh. Leela Ram deposed that he often used to go to this house but he did not notice any person residing as a tenant in the suit property. But as stated hereinabove, it was admitted even by the plaintiff's son Dinesh Kumar that Brij Mohan was residing there as a tenant. P.W. 4 Sh. Prem Chand Jain also stated that the defendants did not inform them about this transaction and they came to know for the first time in Sept. 1995 when the defendant No. 1 came to reside there.

10. The learned trial Judge did not rely upon the evidence adduced on behalf of the defendants mainly on account of some discrepancies in their statements and that the witnesses did not specify dates and month of their conversation with the plaintiff. Of course, evidence on this point on behalf of the plaintiff would be negative and this fact was to be proved by the defendants by positive evidence. Keeping in view the entire oral testimony as mentioned hereinabove along with some other important circumstances in the instant case, the trial Court failed to appreciate the evidence in a proper manner as the same could not have been discarded merely on account of some minor discrepancies as to who were present when the defendant No. 1 or the defendant No. 2 had conversation with the plaintiff and that dates and month of the conversation were not specified. The statement of the broker Sh. GhanshyamChawla was mainly disbelieved on the ground that he did not know the plaintiff. But this statement of D.W. 2 Sh. GhanshyamChawla was in this context that he did not know the plaintiff prior to this transaction and further non obtaining the license of broker was also not a good ground to discard his statement. At the cost of the repetition, it is significant to say here that the plaintiff and the defendant No. 2 were occupying the respective

portions in this house shown in yellow and red colour, the properties show in blue colour on the ground floor as well as on first and second floor were common, the open Chowk, Poli (entrance gate), Stairs, Balkoni, Toilet etc. were commonly used by the plaintiff as well as the defendant No. 2, the proposed sale of the suit property was published way back in Sept. 1994 and in para 5 of the plaint, it is pleaded that the plaintiff came to know about this registered sale deed in Sept. 1995, but source of the knowledge has not been disclosed in the plaint. The fact that D.W. 3 Brij Mohan was residing in the suit property as a tenant much prior to this sale was denied in the rejoinder but was admitted in the oral testimony by the plaintiff and her son. In para 6 of the written statement, it is pleaded that the plaintiff wanted to sell her own portion in this house. But in cross-examination, she firstly denied such suggestion but in the next breath she admitted that she wanted to sell her portion in this house but after having purchased one. Thus, in view of these circumstances taken together, the evidence produced by the defendants was sufficient to hold that the plaintiff had full knowledge of this proposed sale. It is also significant to say here that when according to the plaintiff herself she came to know about this transaction in Sept. 1995, then in that case there is no reason not to express her desire by intimating to the defendant No. 2 and not taking any step in this regard prior to filing the present suit on 24-1-1996. Learned counsel for the plaintiff relied upon *Mattoo Devi (Smt.) v. DamodarLal (deceased) by LRs.*¹⁶ wherein it was held that limitation period is one year for filing the pre-emption suit and the burden is upon the defendants to prove that the plaintiff refused to purchase the house offered. He also placed reliance upon *Smt. Kala Devi v. RadhaKishan*¹⁷ wherein it was held by this Court that notice under Section 8 of the Act should be given by the vendor and not by her husband. It is not in dispute that the limitation period is one year for filing the pre-emption suit and the burden was upon the defendants. The judgment of this Court delivered in *Smt. Kala Devi's case (supra)* is now not relevant in view of the decision of the Hon'bleSC delivered in *Indira Bai's case (supra)*.

11. Third kind of evidence is that according to the statement of defendant Praveen Sahni, she spent a sum of Rs. 50,000/- in repair of this house to the knowledge of the plaintiff with no objection. It was also stated that the repair work was got done by her father and Ex. A2 and Ex. A3 are the statements of the repairs and expenditure. In cross-examination, she contrary to her statement in examination in chief stated that repair work was got done by her brother. According to her own statement, she has no personal knowledge about Ex. A2 and Ex. A3. Ex. A3 is only a receipt of a sum of Rs. 4,000/- charged by Sh. GhanshyamChawla as his commission and Ex. A2 records the

presence of one labour Ramnath and one unnamed Baildar and price of some construction materials purchased. Thus, these documents are not material to prove these facts. According to the statement of D.W. 3 Sh. Brij Mohan her sister Praveen Sahni got the house repaired by spending rupees about 50,000/- . He deposed that repair work was got done by his father who has expired. His statement is also quite vague on this point and no such conclusion can be drawn that the defendant No. 1 spent a sum of rupees about 50,000/- and that to the knowledge of the plaintiff. Learned counsel for the plaintiff placed reliance upon Radha Devi v. Godawari Devi, 1992 (1) WLC (Raj) 57. In para 13 of this judgment it was held that mere silence of the plaintiff over mere construction of stair case by spending Rs. 2,000/- does not take away the right of pre-emption. However, in the instant case, the defendants failed to prove that any such amount was spent in repairs, addition and alteration of the suit property.

12. Thus, in view of the evidence adduced by the defendants it is clear that the entire action of sale/purchase of the suit property took place in full knowledge of the plaintiff and she did not at any point of time assert her right of pre-emption over the suit property, she cannot be now permitted to re-assert the said right as she had waived it by acquiescence.

13. Resultantly, the appeal succeeds and is accordingly allowed, the impugned judgment and decree dated 3-7-1999 stand set aside and the suit of the plaintiff is dismissed. The parties are directed to bear their own costs.

Appeal allowed.

Cases Referred.

1. AIR 1947 Oudh 81
2. AIR 1938 Lah 273
3. AIR 1929 PC 259
4. AIR 1960 SC 1368
5. AIR 1991 SC 1055
6. AIR 1986 SC 859
7. AIR 1958 SC 838
8. AIR 1960 SC 1368
9. 1947 Mewar LR 36
10. ILR 39 All127: (AIR 1917 Allahabad 47)

11. AIR 1947 Oudh 81
12. AIR 1952 Amjer 26
13. AIR 1953 Bho 26
14. AIR 1953 Bho 26
15. AIR 1938 Lah 273
16. (2001) 6 SCC 330: (AIR 2001 SC 2611)
17. 1977 WLN 302: (AIR 1977 Raj203)