RAJASTHAN HIGH COURT

Shanti Devi

Vs.

Ram Narain

Civil Special Appeal No. 3 of 1985
(Shiv Kumar Sharma and Fateh Chand Bansal, JJ.)

12.03.2004

JUDGEMENT

Shiv Kumar Sharma, J.

1. This Special Appeal, preferred by defendant appellants, arises out of the judgment and decree dated November 9, 1984 of the learned single Judge whereby Civil Regular First Appeal of the plaintiff respondents was allowed and suit instituted by them to enforce the right of pe-emption was decreed.

2. Contextual facts depict that suit for pre-emption was filed on October 3, 1960 by plaintiff respondents in the Court of Senior Civil Judge No. 1 *Jaipur City.* The defendant No. 1 in the written statement denied the existence of the custom of pre-emption and in the alternative contended that the plaintiff was estopped from claiming pre-emption as he never expressed his wish to purchase the property when the sale in favor of the defendant was brought to their knowledge nor did they make the necessary Talabs which were indispensable for them to perform for claiming the right of pre-emption. Learned Senior Civil Judge considered the question of Talabsunder two parts (1) whether making of the Talabs was necessary? and (2) whether the Talabs were made by the plaintiffs ? After considering the submissions learned Senior Civil Judge held that the customs of pre-emption as prevalent in the City of *Jaipur* being co- extensive with Mohammedan law, the making of the Talabs was indispensable before assertion of such a right. Since the plaintiff did not make the necessary Talabs which were indispensable for the assertion of the right of pre-emption, the suit was ordered to be dismissed on April 21, 1964. Against the said judgment and decree of the learned Senior Civil Judge, the plaintiffs preferred SB Civil Regular First Appeal No. 56/1964. Learned single Judge after framing two issues sent the case back. The

issues were ultimately decided against the defendant by learned Additional District Judge *Tonk Camp Jaipur* vide judgment dated September 30, 1972. The defendant assailed the decision by filing objections. Since similar matter was pending for decision before the Division Bench, the appeal could not be heard.

3. After the decision rendered by the Division Bench in *RadhaBallabhHaldiya v. PushaLalAgarwal*[1] whereby making of Talab was held unnecessary, learned single Judge vide judgment and decree dated November 9, 1984 and set aside the findings of Senior Civil Judge and decreed the suit instituted by the plaintiffs.

4. At the time of hearing of instant appeal, we permitted learned Senior Counsel for the appellants to raise following points, that were incorporated in the application under Order 41, Rule 2, Civil Procedure Code :-

> (i) That in the track known as Rajputana there were 18 sovereign Indian States on 15th August, 1947 on which day the Indian Independence Act, 1947 came into force and by the provisions thereof the Government of India Act, 1935 was amended and with that the Dominion of India was established and that under the provisions of the Government of India Act, 1935 all the Indian States of Rajputana Acceded to the Dominion of India.
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> (ii) That all the 18 Indian States of Rajputana with the approval and concurrence of the Government of India in various stages integrated themselves to form the United State of Rajasthan. In the first stage, the sovereign Rulers of the 10 Indian States namely Banswara, Bundi, Dungarpur, Jhalawar, Kishangarh, Kota, Mewar, Pratapgarh, Shahpura and Tonk, on or about 18-4-48 integrated their territories into one State by the name of United State of Rajasthan and that with the approval and concurrence of the Dominion of India the Rulers of Alwar, Bharatpur, Dholpur and Karauli integrated their respective territories to constitute the United State of Matsya. It may also be stated that the Rulers of Banswara, Bundi, Dungarpur, Jhalawar, Kishangarh, Kota, Mewar, Pratapgarh, Shahpura and Tonk who had formed the integrated one State by the name of United State of Rajasthan further agreed with the approval and concurrence of the Government of India with the rulers of Bikaner, Jaipur, Jaisalmer and Jodhpur States by reconstituting their State by integrating those 4 states also known as United State of Rajasthan and that the United State of Rajasthan so constituted came into effect on and from 7-4-1949. The Covenant for the formation of the United State of Rajasthan is published in the Rajasthan

Gazette, Extraordinary dated 14-1-1950 and that the same has been reproduced and finds place in Jindal's Rajasthan Local Laws, Second Edition Vol. IV, from pages 634.

(iii) That the Raj Pramukh of the United State of Rajasthan on 7-4-1949 the day on which the integrated United State of Rajasthan with the 14 States including the State of *Jaipur* promulgated the Rajasthan Administration Ordinance No. 1 of 1949 of which Section 3 provided for the continuance of the existing laws as follows :-

"3. Continuance of existing laws.- (1) All the laws in force in any Covenanting State immediately before the commencement of this Ordinance in that State shall, until altered or repealed or amended by a competent Legislature or other competent authority, continue in force in that State subject to the modification that any reference therein to the Ruler or Government of that State shall be construed as a reference to the Raj Pramukh, or, as the case may be to the Government of Rajasthan.

(2) In this Section "Law" means any Act, Ordinance, regulation, rule order of bye-law which, having been made by a competent Legislature or other competent authority in a Covenanting State has the force of law in that State."

Thus only such law which was covered by the aforesaid definition of "Law" provided in sub-section (2) of Section 3, namely such Acts, Ordinances, regulations, rules, orders or bye-laws which having been made by a competent Legislature or other competent authority in the Covenanting State which had the force of law in that State would continue in that part of the territory of the integrating State.

(iv) That the definition of "Law" as given above in Section 3 of the Rajasthan Administration Ordinance No. 1 of 1949 does not provide to include local customs and mercantile usages as might be prevalent in the territory of any of the Covenanting States to be continuing as an existing law.

(v) That thus by defining "Law" to include only any Act, Ordinance, Regulation, Rule, Order or Bye-law which having been made by the competent Legislature or other competent authority in a Covenanting State having the force of law in that State to continue as the existing law it necessarily excluded the custom of pre-emption which might be in existence in the territory of the State of *Jaipur* immediately before the integration of the State of *Jaipur* with

the other States to form the United State of Rajasthan on and from 7-4-1949.

(vi) That it is a well established principle that with the set up of the new sovereign State of the United State of Rajasthan on and from 7-4-1949 by the integration of their respective territories by the erstwhile sovereign Rulers thereof, all the Covenanting States stood dissolved and in the new set up the residents do not carry with them the rights which they possessed as subjects of the ex-sovereign and as subjects of the new sovereign they have only such rights as are granted or recognized by him.

(vii) That thus on and after 7-4-1949 there did not remain into existence the custom of pre-emption for the enforcement of which the present suit was filed.

5. Since the question pressed pertains to the issue of Talab, we at the outset, deem it appropriate to notice the principle of Talab, as is known in Muslim Law. The principle of Talab has three specific facets; the first being 'Talab-E-Muwasibat'literally means demand of jumping. The pre-emptor must assert his claim immediately on hearing of sale and any unreasonable delay will be construed as an election not to pre-empt. The second, being known as 'Talab-E-Ishad'which literally implies the demand which stands witnessed. It is to be made in the presence of two witnesses and also in the presence of either the vendor or the purchasers and the third demand, though not strictly a demand but means initiation of legal action, such an action is called 'Talab-E-Tamlik'or 'Talab-E-Khusumai'.

6. It is contended by Mr. B. P. Agrawal, learned senior Advocate that the Rules dated April 7, 1927 had no force of law as the same were neither an enactment nor any regulation nor the same were issued under any power derived from any enactment or any regulation in force in the *Jaipur* State. They did not emanate from the sovereign Ruler of the *Jaipur* State. The Council of the *Jaipur* State which purports to have passed the said rules was neither sovereign body nor had the authority to issue the rules as law. The said rules could not operate as law in modification of the custom of pre-emption as even the council of State had no right by passing any enactment or regulation to modify the custom so prevalent in the State. The said rules could not be issued in face of the *Jaipur* Laws Act, 1923 which came into force on November 1, 1924 in the State. According to Section 3(a)(i) of *Jaipur* Laws Act, 1923 the custom that was prevalent in the State was to govern the rule of decision by the Courts except insofar as the same had been by the said enactment or any regulation then in force altered or abolished or had modified such custom. According to sub-clause (b) the

regulations which were then in force within the *Jaipur* State and the enactments and the regulations that might thereafter be passed from time to time by the State and published in the Official Gazette were to govern. In absence of custom any regulation or any enactment, the Courts were to act according to justice, equity and good conscience. Under Section 4 all local customs and mercantile usages then in force were declared to be regarded as valid unless the same were contrary to equity, justice and good conscience and had before the passing of that Act been declared to be void by any competent authority. The *Jaipur* Laws Act, 1923 was passed during the minority of the then ruler who had come to occupy the throne of *Jaipur* State on September 7, 1922 and as such by *Jaipur* Laws Act, 1923 the customary law and/or any regulations that were in force were expressly saved except to the extent that the same were modified by the *Jaipur* Laws Act, 1923 or by any regulations then in force. Learned Senior Counsel therefore urged that in view of the custom or pre-emption which was co-extensive with the rules of Mohammedan Law was to govern the rule of decision and the same having not been modified by the *Jaipur* Laws Act, 1923 could not be touched in any manner whatsoever by any other enactment or regulation in derogation of the said custom and even the Council of State had no power to make any law in modification thereof.

7. Learned senior counsel contended that the Council of State had no legislative power as that of the sovereign Ruler of *Jaipur* and was only authorized to carry on the administration with the customary law and/or the regulations as were prevalent and in force on September 7, 1922 the day on which the minor Maharaj took over the reigns of the throne of *Jaipur* except to make modifications by enactment or by making regulations in the existing regulations only. The revised Constitution of the Higher Administration of *Jaipur* State from September 1, 1925 approved by the Government of India the administration of *Jaipur* State was to be guided by the same and in place of the old system of administering the *Jaipur* State by a Cabinet and a Council. The new Council of State was constituted with the fresh powers and that such newly constituted Council of State had no legislative power and was to carry on the administration with the regulations and the customs of the State then in force. There being no legislative powers in the Council of State, the impugned rules had no force of law much less any validity to modify the custom of pre-emption which was co-extensive with the principles of Mohammedan Law. The *Jaipur* Laws Act, 1923 was subject to prerogative of the ruler and as such could not be deemed to have ever had the force of law as the same never received the Assent of the Ruler of *Jaipur* at any time as required by the provisions of clause (1)(a) of Section 3 of the *Jaipur* General

Clauses Act, 1944 (*Jaipur* Act No. VIII of 1944), because the said impugned rules never received the Assent of the ruler nor the rules as contained therein and published were ever either published as an Act nor such Assent of the Ruler thereto was ever published in the *Jaipur* Gazette. The said Rules could not have the force of law as rules because under Section 3(47) of the *Jaipur* General Clauses Act, 1944 such rules could not have the force of law if they could not have been made in exercise of a power conferred by any enactment and not otherwise. There was never any enactment in force in the *Jaipur* State conferring power on the Council of State to pass any rules as contained in the impugned rules in the form of law so as to modify the custom of pre-emption as prevalent in the *Jaipur* State. Reliance is placed on *Smt. Mattoo Devi v. DamodarLal (Dead) by LRs.,* [2]*KantaParihar v. State of Rajasthan,* [3]*Hastimal v. Shanker Dan,* [4]*Gurucharan Singh v. Kamla Singh,* [5]*Krishna Chandra Pallai v. Union of India,* [6]*State of U. P. v. Synthetics and Chemicals Ltd.,* [7]*Shyam Sunder v. Ram Kumar*[8]*S. K. Mohammad Rafiq v. KhalilulRehman,*[9]and *M/s. DalmiaDadri Cement Co. Ltd. v. Commissioner of Income-tax,* [10]

8. An application under Order 41, Rule 27, Civil Procedure Code was filed on July 24, 2003 by the appellants seeking permission to produce the original sale deed dated April 22, 1965, which according to appellants, is highly relevant for the just decision of the case. The respondents submitted reply to the application stating therein that at this belated stage the document cannot be taken on record.

9. Supporting the impugned judgment of learned single Judge, Mr. S. M. Mehta learned Senior Advocate canvassed that ratio indicated in *RadhaBallabhHaldia v. PushaLalAgarwal,* [11] got approval of the Hon'bleSC in *Smt. Mattoo Devi v. DamodarLal ,*[12]therefore it cannot be held that notification dated April 7, 1927 had no force of law. It was further urged that application under Order 41, Rule 27, Civil Procedure Code deserved to be dismissed on the ground of latches.

10. Having pondered over the submissions we find that question before the Division Bench in *RadhaBallabh v. PushaLalAgarwal* (supra) was, whether the making of Talabs was necessary or had become unnecessary in *Jaipur* and what was the effect of notification dated April 7, 1927 which was published in the *Jaipur* Gazette on April 15, 1927. The Division Bench answered the reference as under:-

> "The notification dated April 7, 1927 published in the *Jaipur* Gazette dated April 15, 1927 modified the customary right of pre-emption prevailing in the former *Jaipur* State and made the formalities of making 'Talabs'as unnecessary."

11. Their Lordships of the SC in *Mattoo Devi v. DamodarLal* (supra) took notice of the findings arrived at by the Division Bench in *RadhaBallabhHaldia v. PushaLalAgarwal* and approved the same. It was indicated in paras 10 and 11 as under (at page 2614-1615 of AIR) :-

"10. The notification noticed above seems to have however, a definite impact in the matter in issue and as such the same is detailed herein below in extenso for ascertainment of its true effect, the notification reads as below :

"No. 2155/J1-148 Dated *Jaipur,* the 7th April, 1927

Whereas it is expedient to give all possible claimants formal notice of a sale, with a view to facilitate their assertion of pre-emptive right without recourse to litigation, the following rules have been passed by the Council of State, and they shall come immediately into force:

1. When any person proposes to sell any property in respect of which any person have a right of pre-emption, he shall give notice to the person concerned of -

(a) the property; and

(b) the price at which he is willing to sell it.

Such notice shall be given through the Court within the local limits of whose jurisdiction the property or any party thereof is situate.

2. Any person having a right of pre-emption in respect of any property proposed to be sold shall lose such right, unless within 3 months from the date of service of such notice he or his agent pays or tenders through the Court the price aforesaid to the person so proposing to sell.

3. Any person entitled to a right of pre-emption may bring a suit to enforce such right on any of the following grounds (namely) :-

(a) that no due notice was given as required by Rule 1;

(b) that tender was made under Rule 2 and refused;

(c) that the price stated in the notice was not fixed in good faith;"

11. Incidentally Rajasthan High Court in the case of *RadhaBallabhHaldiya v.*

PushalalAgarwal, [13] upon reference to the notification, answered the reference to the effect that the notification dated 7th April, 1927 as published in the *Jaipur* Gazette dated 15th April, 1927, in fact modified the customary right of pre-emption prevailing to the former *Jaipur* State and made the formalities of making talabs as unnecessary. While coming to the conclusion as above, the High Court in RadhaBallabh's decision (AIR 1986 Rajasthan 88) (supra) stated in paragraphs 69 and 75 of the Reports as below :

> "69. In our considered opinion, the procedural law and substantive law though well defined concept in jurisprudence and there was no watertight compartments for them created by any statute. If we have to make a correct statement of law, we must further mention in unequivocal manner that the matter of substance in contradistinction to the matters of form can be found both in substantive law and procedural law and it would be fallacious to say that all which form in the branch of substantive law are matter of substance and all which form in procedural law are matter of form. It all depends upon the particular statute, its object, its formulation and the effect which is desired to be achieved by the requirement of procedure. We do not propose to deal with this point any further because in our considered opinion the substantive law and procedural law overlap each other more often than not and the proposition of law laid down by us is so patent and well known that it requires no examples, illustrations and citation of decisions, any further.
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> 75. We are of the opinion that this notification is a complete Code in respect of right of pre-emption except that the concept of pre-emption has been left to be deduced from the customary law of the parties and has not been mentioned in it. In other words, the right of pre-emption, as per the customary law is to be found in the customary law but once the right of pre-emption exists either on account of vicinity or otherwise then that right can be enforced only according to the requirement and conditions laid down in this notification of 1927. It is true that 'talabs'have not been distanced with in this notification. We are assuming for the purpose of this reference that the requirement of 'talabs'was necessary under the customary Mohammedan Law before this notification was issued and if there is any doubt on that point, i.e. amply answered by the two judgments of the SC in*Smt. Rajeshwari Devi v. Mukesh Chandra 1967 SC (Notes) 403* (supra) and *Bhagirath Singh Shekhawat v. Ram NiwasBarit* (ibid) later being related to the *Jaipur* State itself."

(Emphasis supplied)

12. After the Hon'bleSC approved the findings of the Division Bench and indicated that notification dated April 7, 1927 was a complete Code in respect of right of pre-emption, there is little scope left for us to appreciate the submission advanced by learned senior counsel for the appellant in regard to validity of said notification. Decision of SC are binding not only under Article 141 of the Constitution but also under the doctrine of binding precedent. The Courts should treat a decision of the SC as an authority not only for what it declares or decides by express enunciation but also for what follows from such declarations by clear implication by way of logical deduction. Where the SC in clear terms states the principle as a rule of law and applies it to the case before it, it cannot be said to be an observation of general character relating to the issue in the case before it. Judicial discipline requires that the said principle should be followed.

13. We thus hold that right of pre-emption could be enforced only according to the requirement and conditions laid down in the notification of 1927 that modified the customary right of pre-emption prevailing in the former *Jaipur* State and made the formalities of making 'Talabs'as unnecessary.

14. That takes us to the application of the appellants made under Order 41, Rule 27, Civil Procedure Code. It is stated in the application that has been filed on July 24, 2003, that Praveen Kumar, one of the appellant who is the son of original defendant late RatanLal, had gone to Jhunjhunu, of which place they are original inhabitants and while he was taking stock of old record of his father, he came across original sale deed dated April 23, 1965 which pertains to the purchase of a room of the suit property from ChhoteLal by later RatanLal. Considering that it may have some relevancy to the suit property, Praveen Kumar brought the said document with him and placed before his counsel Sh. B. P. Agarwal on July 23, 2003. As the said document was highly relevant, it was decided to place it on record.The respondents in the reply to the application averred that RatanLal died in 1971 and it is curious enough that after a lapse of 32 years, Praveen Kumar had gone to take stock of the old record of his father. The respondents further stated that the appellants had no property at Jhunjhunu and RatanLal had been carrying on business in *Jaipur* for the last 50 years. RatanLal, Shanti Devi and Vinay Kumar all died in Jaipur. Thus the whole contention of the appellants appear to have been made with ulterior motive.

15. Having considered the submissions and scanned the document we find that the

sale deed dated April 23, 1965 was registered in the office of Sub- Registrar Jaipur. Defendant RatanLal had been residing in *Jaipur* on the date of institution of suit i.e. on October 3, 1960. Civil Regular First Appeal was filed by RatanLal against the decree and judgment dated April 21, 1964 of the Senior Civil Judge No. 1 *Jaipur* City. The sale deed dated April 23, 1965 got executed during the pendency of the First Appeal and it was very much in the knowledge of RatanLal who was alive till 1971. It is strange and inexplicable as to why the said document which was in the knowledge of RatanLal was not filed in the First Appellant Court. It is difficult to believe that the document which was executed in *Jaipur* on April 23, 1965, was found in Jhunjhunu in 2003. It is unfortunate that First Appeal that was filed in 1964 took 20 long years to reach at the conclusion and the instant Special Appeal has been kept pending for 19 years. It is well settled that the powers under Order 41, Rule 27 Civil Procedure Code should be exercised cautiously and sparingly. In view of the fact that the application moved by the appellants under Order 41, Rule 27, Civil Procedure Code is highly belated and not bona fide. We find ourselves unable to accept it. We accordingly reject the application.

16. For these reasons, the appeal being devoid of merit stands dismissed. The parties shall bear their own costs.

Appeal dismissed.

Cases Referred.

1. (AIR 1986 Raj 88)
2. AIR 2001 SC 2611
3. 1999 (3) WLC (Raj) 593
4. 1951 Raj LW295: (AIR 1952 Raj 7)
5. AIR 1977 SC 5
6. AIR 1992 Orissa 261: (1992 Lab IC 2023)
7. (1991) 4 SCC 139
8. (2001) 8 SCC 24: (IR 2001 SC 2472)
9. AIR 1972 SC 2162
10. AIR 1958 SC 816
11. (AIR 1986 Raj 88)
12. AIR 2001 SC 2611
13. AIR 1986 Raj 88