

RAJASTHAN HIGH COURT

L. Rs. of Smt. Sirekanwar Maloo

Vs.

Daudas Mantri

C.F.A. No. 23 of 1992

(Bhagwati Prasad and Munishwar Nath Bhandari, JJ.)

01.10.2007

JUDGEMENT

Bhagwati Prasad, J.

1. We are seized of the matter as a referee Court. The reference as made is in the subject-matter of the decision in a first appeal. The matter of *Smt. Kanwar Maloo v. Daudas Mantri* came before the learned single Judge. After examining the case, he was of the opinion that the following question is involved in the appeal.

"Whether co-owner of a wall situated between the two adjacent immovable properties, are co-sharers within the meaning of Section 2(1) of the Rajasthan Pre-emption Act, 1966, read with other Provisions of the Act so as to give right to the co-owner of the party - wall to pre-empt the transfer of other immovable property under Section 6(1) of the Act".

2. Regarding this question the learned single Judge was of the opinion that there exists an apparent diversity of opinion in the decisions of this Court in the matter of *Jagan Nath v. Radheshyam and Anr, reported* ¹ in and a later decision in the matter of *Dharam Pal v. Smt. Kaushalya Devi,* ² The learned single Judge ordered that the matter be placed before the Hon'ble Chief Justice for referring the matter to a larger Bench. The Hon'ble Chief Justice ordered that this case be decided by a larger Bench and hence the matter comes before us.

3. The learned single Judge referred two aforesaid decisions for consideration; therefore, first we take up these two decisions and look into them as to what has been decided in them.

4. First we take up the matter of Jagan Nath (supra). It has been observed in this

judgment:

"Pre-emption was not known to Hindu Law. The law of pre-emption was imported into India by Mohamedan conquerors and was imposed by them in various places so that a right or custom of pre-emption began to be recognized as prevailing amongst Hindus also in some parts of the country. It is settled law that such custom where it exists must be presumed to be founded on and co-extensive with the Mohammedan law on that subject unless the contrary be shown. It is not disputed that the right or custom of pre-emption prevails in *Jaipur City*. The presumption, therefore, is that is founded on and is co-extensive with the Mohammedan Law on that subject."

"A partner in a party wall is a pre-emptor falling in class I, as a co-sharer. So is a partner in the house. Yet a partner in the house is to be preferred over a partner in a party wall, who is not a partner in the house, but only a partner in the mansion and is almost in the same position as a neighbor."

5. Thus, it would be seen that the case of Jagan Nath (*supra*) was decided in the background where there was a custom prevailing in the *Jaipur city*. No Statutory law was available in *Jaipur City* governing Pre-emption. The learned Judge has observed as under:

"It is settled law that the custom of pre-emption where it exists, must be presumed to be founded on and co-extensive with the Mohammedan law on the subject, unless the contrary be shown. There is no custom regarding pre-emption prevailing in *Jaipur City*, which may be at variance with the rules of Mohammedan law."

6. The learned single Judge in the case of Jagan Nath (*supra*) has extensively quoted from the commentaries on the Mohammedan Law to decide the case as there being no statutory law available in *Jaipur* in the relevant span of time. It is also quoted by the learned single Judge that :

"According to Khusafin the neighbor who is postponed to a partner in the night of way is one who is not co-owner of the land on which a party wall stands, and when the neighbor is such a partner he is not to be postponed, but rather to be preferred to a partner in the way. To explain this, suppose that a piece of land belongs to two persons, and that they erect a wall in the midst of it, and then make a partition as to all the rest of the land, so that the wall and the ground on which it stands remains in the joint ownership, the neighbour in such a case is a partner in a part of the thing sold. A partner in the wall, but in nothing besides,

and partnership in the wall, that is, in the mere building, does not confer a right of pre-emption. Koodooree has reported that a partner in the land on which a party wall stands is entitled to pre-emption in the whole of the thing sold by reason of the partnership, according to Moohmmud and one report of Aboo Yoosuf, and is preferred as to whole to a neighbors."

(Emphasis applied)

7. The learned Judge speaking for the Court held that:

"I would like to observe that under the Mohamedan Law even ownership of a part of the same building makes one a co-sharer."

.....

"As has been pointed out above a partner in a party wall is a pre-emptor falling in class I. So is a partner in the house. Yet a partner in the house is to be preferred over a partner in a party wall. That is as it should be. For a partner in a party wall, although he is a co-sharer, is almost in the same position as a neighbor. For no part of his premises overlooks the premises sold. Nor does he share any part of the house used by the residents of the premises sold."

.....

"I accordingly hold that the part of the law of pre-emption which gives preference to a partner in the house over a partner in the mansion and to a partner in the house over a partner in the party wall even when they are both co-sharers belonging to the same class is an eminently reasonable one. It is not hit by Article 14 or 19 of the Constitution.

.....

"The relevant criterion for determining whether a person is only a neighbor or a co-sharer is whether or not a partition of the party wall by metes and bounds has taken place. As no such partition has taken place in the present case defendant No. 1 is a co-sharer being a co-owner of the joint wall. Defendant No. 1 is also a co-sharer on the ground that he owns a flat in the same mansion."

(Emphasis applied)

8. Thus, we see from the aforesaid discussion that the case of Jagan Nath (supra) was decided where there was no statute operating in *Jaipur City* in relation to a right of pre-emption. The concept of pre-emption was brought into existence by relying on Mohammedan law principles. Thus, the case in the matter of Jagannath (supra) came

to be decided. It was held that a partner in the party wall is a pre-emptor and has a right of pre-emption. Though other classes were also mentioned to have a preferential right to an owner of a party wall.

9. The case in the matter of Dharam Pal (supra) was decided after the promulgation of the Rajasthan Pre-emption Act, 1966. The case of Jagan Nath (supra) was decided without there being a statutory law available on the point.

10. The learned single Judge in the case of *Dharam Pal v. Smt. Kaushalya Devi*, reported ³ in has decided about the right of Pre-emption. In this judgment the learned single Judge has considered the observation made in the judgment of Jagan Nath (supra). The learned Judge has also quoted from Amir Ali text book on Mohamman Law 3rd edition page 602:

"A house belonging to two persons is situated in a street which has no thoroughfare and one of the partners sells his share to a stranger, the right of pre-emption belongs first to the partner in a party wall then to all the people in the street equally, and then to the person whose house is behind that which is sold."

11. After quoting this the learned Judge has highlighted the observation in the judgment as under:

"For a partner in a party wall although he is a co-sharer is almost in the same position as a neighbor."

It has further been observed in the judgment that:

"Thus the Supreme Court has already held that a right of pre-emption based on vicinage is unconstitutional."

12. The learned single Judge also quoted a Division Bench decision of the Lahore High Court as under:-

"9. In *Rajendra Singh v. Umraosingh* ⁴ a Division Bench of the Lahore High Court held that co-sharer should signify person owning a share or shares in the whole of the property of which another sharer was the subject of a sale. No authority could be cited for the proposition that person who is a part owner of a small portion of one of the walls of a house, but had no right to any kind in any other part either of the building or of the site is entitled to call himself a co-sharer."

13. Learned single Judge in para 13 of the judgment observed as under:

"13. It is thus clear that rights and obligations appertaining to party-walls are so analogous to easement rights and obligations that it seems convenient and desirable to look upon the law of party walls as part of the law of easements because in such cases cross-easements in favor of each other arise."

14. In the decision of *Nenmal v. Kanmal*, reported in ⁵ this Court was considering the validity of Section 6(1)(iii). It has struck down the same holding that clause (iii) of Section 6(1) is invalid and is violative not only of Article 19(1)(f) and of also Articles 14 and 15 of the Constitution of India. While deciding this case this Court has held that Special Bench decision of this Court in *Nathuram v. Patram*, reported ⁶ in has no bearing on the controversy in relation to the provision of Section 6(1) of the Act, 1966. The Division Bench of this Court in *Nenmal's* case (supra) has quoted Supreme Court decision in *Bahurani's* case as reported in AIR 1962 Supreme Court 1476. The Court noted :

"But the Constitution now prohibits discrimination against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them under Article 15 and guarantees a right to every citizen to acquire, hold and dispose of property, subject only to restrictions which may be reasonable and in the interests of the general public. Though therefore the ostensible reason for pre-emption may be vicinage, the real reason behind the law was to prevent a stranger from acquiring property in any area which had been populated by a particular fraternity or class of people. In effect, therefore, the law of pre-emption based on vicinage was really meant to prevent strangers etc. People belonging to different religion, race or caste, from acquiring property. Such division of society now into groups and exclusion of strangers from any locality cannot be considered reasonable, and the main reason therefore which sustained the law of pre-emption based on vicinage in previous times can have no force now and the law must be held to impose an unreasonable restriction on the right to acquire hold and dispose of property as now guaranteed under Article 19(1)(f), for it is impossible to see such restrictions as reasonable and in the interests of the general public in the state of society in the present day."

"The question as to the constitutionality of a law of pre-emption in favor of a co-sharer has been considered by a number of High Courts and the constitutionality has been uniformly upheld. We have no doubt that a law giving such a right imposes a reasonable restriction which is in the interest of the general public. If an outsider is introduced as a co-sharer in a property it will make common, management extremely difficult and destroy the benefits of

ownership in common. The result of the law of pre-emption in favor of a co-sharer is that if sales take place the property may eventually come into the hands of one co-sharer as full owner and that would naturally be a great advantage. The advantage is all the greater in the case of a residential house and Section 16 is concerned with urban property, for the introduction of an outsider in a residential house would lead to all kinds of complications."

(Emphasis applied)

15. While deciding the case of *Nen Mal* (supra) this Court also noticed the case decided in the matter of *Smt. Prem Dulari v. Smt. Raj Kumari*, reported in ⁷ and held as under:

"This right was upheld on the footing that it was akin to that of a co-sharer even when the common outer entrance was not of common ownership."

16. In *Bahuram's Case* the Hon'ble Supreme Court has recognized the right of co-sharer in the following terms:

"The right of pre-emption given to co-sharers was held to be a reasonable restriction on the right to hold, acquire or dispose of property conferred by Article 19(1)(f) of the Constitution. What has been said there to uphold the right of pre-emption granted to a co-sharer as a reasonable restriction on the right to property applies with the same force to justify the classification of co-sharers as a class by themselves for the purpose of vesting in them the right of pre-emption. We do not think that it is necessary to restate what has been said in that case, we endorse the views expressed therein."

17. In the aforesaid background, we have to see what Section 6(1) has to offer to govern the right of the parties. Section 6(1) quoted as under:

"Persons to whom right of pre-emption accrues - (1) Subject to the other provisions of this Act, the right of pre-emption in respect of any immovable property transferred shall accrue to, and vest in the following classes of persons namely -

- (i) co-sharers of or partners in the property transferred,
- (ii) owners of other immovable property with a staircase or an entrance or other right or amenity common to such other property and the property transferred, and;
- (iii) owners of property servant or dominant to the property transferred.

(Part (iii) has been struck down in Nen Mal's case (supra))

18. According to the provisions of Clause (i) of Section 6(1) co-sharers and partners have been said to have accrued a right in the property transferred. The term co-sharer has been defined in Section 2(1) of the Rajasthan Pre-emption Act, 1966 which is quoted herein below:

"(i) "co-sharer" - used in relation to any immovable property, means any person entitled as an owner or a proprietor to any share or part in such property, whether his name is or is not recorded as such owner or proprietor in the record of right or in any register prepared in accordance with law."

19. By joint reading of these two sections what comes out prominently is that if there is a co-sharer or a partner in the property transferred then he has a right of pre-emption. The term "partner" has not been defined in the Rajasthan Pre-emption Act, 1966 and according to the definition of co-sharer in the Act of 1966 a co-sharer means the person entitled as an owner or a proprietor to any share or part in such property. The question before us is that a person having share in party wall whether can be said to be an owner or proprietor having share or part in such property?

20. Learned counsel Mr. M. R. Singhvi urged that a person having a share in a party wall has never been recognized in any law to be having share or part in the dominant heritage of which the party wall makes a part. He cannot make use of any part of the dominant heritage, his rights are limited to the use of wall. His house has been made by supporting his building with party wall. The term 'co-sharer' has its origin from the Personal Laws that may be Hindu or Mohammdan Law.

21. A co-sharer has much larger role to play with a property than a person having share in the party wall. He lacks an entitlement to use the dominant heritage as an owner or proprietor, he only uses the wall. Thus, a co-sharer or a partner in a party wall as commonly understood, do not have the character of a person who can indulge sharing the whole property. His indulgence is around the wall falling to him in share of the property as such. The Hon'ble Supreme Court decided a case in the matter of *Atam Prakash v. State of Haryana*, reported in ⁹ has observed as under:

"A traditional integrity of the village and the family have now become old waives' tales. Tribal loyalties have disappeared and family ties have weakened. Such is the effect of the march of history and the consequence of industrialization, mechanization of agriculture, development of marketing and trade, allurements of professions and office employment opportunity elsewhere

and so on. The process of history cannot be reversed and we cannot hark back to the traditional rural family-oriented society. Quite apart from the break-up of the integrity of village life and family life, it is to be noticed that the property in respect of which the right of pre-emption is to be exercised is property of which the vendor or the vendors, as the case may be, have rights of full ownership and their kinsfolk have no present right whatsoever. The right of pre-emption is not to be confused with the right to question the alienation of ancestral immovable property which the male lineal descendants of the vendor have under the Punjab Custom (Power to Contest) Act, 1920. The right of pre-emption is now entirely a statutory right and dissociated from custom or personal law.

(Emphasis applied)

22. Learned counsel Mr. M. R. Singhvi further urged that law Lexicon of P. Ramanath Aiyer 1999 Ed. (2) defines owner in following terms:

"Owner: "One who has dominion of a thing, real or personal, corporeal or incorporeal, which he has the right to enjoy and to do with it as he pleases either to spoil or destroy it as far as the law permits unless he be prevented by some law, agreement or covenant which restrains his right": One who owns : the rightful proprietor. See also 34 Cal 257 = 5 CLJ 148.

The popular definition of the word 'owner' is one who has the right to own; exclusive right of possession; legal or just claim or title; proprietorship.

The word 'owner' has always been construed to include and mean equitable owner, as well as the person who holds the legal title.

OWNER AND OCCUPIER, See 34 Cal 257= 5 CLJ 148, INDIAN FACTORIES ACT, Section 3.

"OWNER OR PROPRIETOR" of a property is the person in whom it is for the time being beneficially vested, and who has the occupation, or control, or usufruct, of it.

23. It was further urged that this Court in the case of Nenmal (supra) has critically examined the importance and validity of law of pre-emption. It is held that:

"It is significant that the clear distinction between right of an adjoining owner and that of a co-sharer or a participator in immunities and appendages was indicated to suggest justification for separate classification of the two categories. We have already considered at length the decision by a Special Bench in Nathu Ram case (supra) and indicated how the observations therein cannot be construed as deciding the question of validity of provision relating to

pre-emption by an adjoining owner claiming the right on the basis of easement and not on the basis of any immunity or appendage or right or amenity common to owner of the two properties. Moreover, the decisions of the Supreme Court referred earlier by us which indicate the principles for deciding such a question furnish the guidelines and if there be anything inconsistent with them in Nathu Ram's case (supra), then the same cannot obviously be binding".

(Emphasis applied)

24. Further observing on the right of easement the judgment of Nenmal (supra) has held :

"All that the owner of an easmentary right may reasonably claim is continuation of his easementary right. Now it does not appear that sale of adjoining property endangers the easementary right. Chapter V of the Indian Easements Act enumerates various cases of extinction of easementary right. Mere sale of adjoining property does not extinguish easementary rights. There is, therefore, no good ground why the owner of an easementary right should object to the sale of adjoining property to a stranger..... We consider that the right of pre-emption on the sole ground that the claimant is the owner of the easementary right cannot be recognized as a reasonable restriction in the interest of general public under clause 5 of Article 12....."

25. Thus, the learned counsel has prayed that the law decided by this Court in Dharampal (supra) be held to be a case decided in right perspective. It is a valid interpretation of the relevant statute. The law laid down by Jagan Nath (supra) was only in relation to a custom, based on personal law. The same has lost its relevance after the promulgation of the Rajasthan Pre-emption Act, 1966.

26. Learned counsel for the respondent per contra submitted that the Hon'ble Supreme Court in the case of Bahu Ram's case has clearly recognized that a co-sharer has a right of pre-emption. In the instant case his client being the co-sharer of the wall has a right of pre-emption. He further argued that in Nenmal's case (supra) this Court has recognized the right of the co-sharer, and therefore, the law as decided in the case of Dharampal (supra) is not a correct law.

27. We have heard the learned counsel for the parties and have given our thoughtful consideration.

28. The right of pre-emption has its origin in Mohammadan Law. Some traces of it may be seen in Section 22 of the Hindu Succession Act. In the State of Rajasthan, this

right is presently governed by the Rajasthan Pre-emption Act, 1966.

29. In the reference in hand, question before us is whether a person having share in a party wall will have the status of a co-sharer or a Partner as contained in Section 6(1)(i) and Section 2(1) of the Rajasthan Pre-emption Act, 1966.

30. This Court in the case of Jagannath's case (supra) considered this aspect. At the time the Jagannath's case (supra) was considered, there was no statutory law in force in the area in question. The case was decided with reference to a prevailing custom. Origin of the custom was in Mohammadan Law. A custom is fairly defined parameter, but it lacks the precision of a Statute. The dispute before us is in relation to two judgments, one based on antiquated custom and other on the basis of a statute. In our view, the findings in a case based on custom will have to give way to the findings arrived at after considering a Statute which has been brought in to cover the field.

31. We can see that in the Jagannath's case, the right of an owner of a party wall has also been termed to be of a kind that of a neighbor. Right of a neighbor par take the character of vicinage. A right on the strength of Vicinage has been decided unfavorably by the Hon'ble Supreme Court. Even according to Mohammadan Law, the character of a co-sharer is dependent on the question whether there was a partition of wall by metes and bounds and after considering that only, the status of a neighbor or a co-sharer is determined. Thus, if the antiquated premises is taken in consideration, then also the status of a co-sharer in relation to a party wall is a proposition which is impregnated with many such thoughts which do not support the proposition that a partner in the party wall would be a person on whom a right of pre-emption can be conferred.

32. The foundation of the case of Jagannath's case (supra) being only a custom, based on a personal law. The force of custom being diluted by enactment of a statute, this case loses its binding force. It may at best have a kind of illustrative value. Thus, in our considered opinion, the ratio of the case of Jagannath's case has no binding value for deciding the question in hand. A custom in certain statutes have been recognized to have been continuing value but in the Pre-emption Act, no such saving has been provided for any prevailing custom, therefore also, a custom based on a personal law loses significance altogether.

33. The ratio in the case of Bahu Ram's case (supra) clearly is to the effect that vicinage cannot be a position which will gave the right of pre-emption. In this case, it has been recognized that a co-sharer definitely has a right of pre-emption.

34. What is now to be seen is whether the term co-sharer or Partner as delineated in Section 6(1) (i) engulfs in it a person who has a right in a party wall i.e. when there is a common wall between the two dwellings.

34A. A common wall supports the structure of the two houses. To that extent, is the use of the wall. Both the dwellings being contiguous. It is to be seen whether the two inmates have any commonality of the use of their dwellings. Answer would be in the negative. None of the two houses have anything common except a wall, which is jointly owned and faces the respective dwellings.

35. If the two houses have no other feature which is common to them, then this is certain that their occupant do not share the property when put to use, in any facet, except of course the support of wall. Can that contingency be given a broader definition so as to characterize each of the owner of the wall, be termed to be user of both the houses in its all parameters? The answer will again be in the negative. No one permits a neighbor to get into his house to his detriment. Meaning thereby the co-sharership or partnership does not extend beyond the wall. Thus the owner of the house of both sides are part owner of the common wall.

36. Definition of co-sharer as given in Section 2(1) of the Rajasthan Pre-emption Act, 1966 defines an owner of the part of a premises as a co-sharer. But co-sharer of the nature we are concerned has a handicap, that is most important aspect, that he cannot use any part of the premises of another. If use is restricted to wall only then to what extent his rights are to be recognized?

37. As part owner of the wall two neighbors exclude each other from the use of the respective houses. Thus each one of them is excluded from the use of the dominant part of the main part of the house. If a co-sharer as depicted as a sharer of Party wall is not in a position to use the dominant part of the house, then his rights are confined to the use of the wall of which each one is part owner. A Part owner thus given the right of pre-emption under Section 6(1)(i), will have the capacity to inhibit the free enjoyment of property of other. Such restriction sounds to be an onerous burden.

38. Premises on which the doctrine of right of pre-emption is based is that the vendee should not put the existing owner in a difficult position than the one which was before sale. The wall separates the two dwellings. The respective easements are governed by a separate statute. Those rights cannot be infringed by any sale. These easementary rights have been provided for in a separate statute. Thus, the transfer cannot put the vendee in a position wherein he can cause any interference in the domain of non-

selling part-owner of the wall.

39. With the discussion hereinabove, we find that the findings arrived at by the learned Single Judge in Dharam Pal's case (supra) are more rational and close to the points of view put forward by Hon'ble Supreme Court in the cases of Bahu Ram (supra) and Atma Prakash (supra). The relevant portion of Para 14 of the judgment is reproduced hereinbelow for ready reference:-

"14..... To illustrate, I may point out that there are several plots over which adjoining bungalows or houses belonging to different persons are constructed and they have a common boundary wall which is party wall. If an adjoining house or bungalow is sold and the owner of the adjoining another bungalow having a common boundary wall filed a suit for pre-emption, his claim for pre-emption is simply on the basis of his being a neighbor. The mere existence of a common boundary wall or a party wall in between two bungalows does not make him a co-sharer in the property sold or a person with a common staircase or common entrance or any other common rights or amenity. Substantially he is only a neighbor and so far as party wall is concerned, the rights and obligations of the two neighbors are so analogous to easement rights and obligations that they should be looked upon as part of the law of easements and not as participators in appendages."

(Emphasis applied)

40. If this is also viewed from the point of view of the statutory provision in the Rajasthan Pre-emption Act, 1966, then clause (iii) of Section 6 which has been struck down, engulfs the position of the owner of the house feeling aggrieved by sale, more specifically because the common wall having been partly owned by both the neighbors, can fit in the scheme of Part (iii) of sub-section (1) of Section 6 of the Rajasthan Pre-emption Act, 1966 and thus, the same having been held unconstitutional, no right can be seen in the neighbor, a Part owner of the wall to enforce pre-emption. Thus, in the ultimate conclusion we opine on the question as framed by the learned single Judge as to whether a co-owner of the party wall can pre-empt the transfer of other immovable property under Section 6(1) of the Act, in negative and hold that no such right would accrue to a part owner of a wall, call it by any name co-owner or co-sharer.

41. The question having been answered by us, we would remit the cases to respective Benches for their ultimate decision in accordance with law. We are not entering into

the merits of the cases sent to us for deciding the reference. This will be decided in the light of the law laid down in relation to pre-emption. The rights of the parties may be accordingly decided by the respective Courts in the light of the above discussion.

Order accordingly.

Cases Referred.

1. ILR (1960) 75
2. 1989 (165) RLR 826
3. 1989 (2) RLR 826
4. (AIR 1925 Lahore 23)
5. 1987 (2) WLN 805
6. AIR 1960 Raj125
7. AIR 1967 SC 1578
8. AIR 1967 SC 1578
9. AIR 1986 SC 859