

# RAJASTHAN HIGH COURT

Ram Prakash Agarwal

Vs.

Pushpa Agrawal

C.F.A. Nos. 135 of 1999 and 440 of 1998  
(Jitendra Ray Goyal, J.)

08.09.2008

## ORDER

**Jitendra Ray Goyal, J.**

1. Since these two appeals being inter-related and involve one and the same core question of pre-emption in regard to the common property, hence both the appeals are taken up together for hearing and decision vide this common judgment.

2. To avoid the repetition and have clear glance over the matter, the facts of both the cases are narrated as under:-

3. S.B. Civil First Appeal No. 440/98 (Civil Suit No. 18/84 (298/95) :- The plaintiff-appellant Smt. Pukhraj Devi filed a suit of right to pre-emption and permanent injunction against defendant-respondent No. 1 Smt. Pushpa Agrawal (vendee) and defendant-respondent No. 2 Gopi Chand stating therein that she and defendant-respondent No. 2 Gopi Chand (vendor) are the co-sharers of house No. 4310, situated at *Rasta Kundigaron Bherunji, Ghatgate, Jaipur* and they were in possession of their respective shares in the said house but defendant-respondent No. 2 Gopi Chand (vendor) sold out his share (description of which was given in Para 3 of the plaint) to defendant-respondent No. 1 Smt. Pushpa Agrawal on 5-4-1983 by registered sale deed without giving her any legal notice whereas the plaintiff-appellant was having first right to purchase and thus she has been deprived from purchasing the said disputed property.

3.1 The defendant-respondent No. 1 Smt. Pushpa Agrawal (vendee) while denying the averments made in the plaint stated in her written statement that the plaintiff-appellant is not the co-sharer of the disputed property and the description of the disputed

property has wrongly been shown in the plaint. It was also stated that the plaintiff-appellant Smt. Pukhraj Devi does not have a right to pre-emption, otherwise also she was firstly offered to purchase the said property for consideration of Rs. 45,000/- and on her denial the said property in dispute was sold to her (vendee), therefore, the plaintiff- appellant Pukraj Devi was not required to be given the legal notice. It was further stated that after purchase of the disputed property the defendant- respondent No. 1 has spent a sum of Rs. 10,000/- in the repairs of the said property. It was then pleaded that the disputed property is commercial establishment in which jewellery business and manufacturing of stones is being done and therefore the plaintiff appellant has no right to pre-emption.

4. S. B. Civil First Appeal No. 135/99 (Civil Suit No. 297/95) :- The plaintiff-appellant Ram Prakash filed a suit for preemption against defendant-respondent Nos. 1 and 2 Smt. Pushpa Agrawal and Gopi Chand respectively vendor and vendee of the disputed property, description of which was given in Paras 3 and 4 of the plaint. According to the plaint, the plaintiff-appellant and the defendant-respondent No. 2 Gopi Chand (vendor) (since deceased) are the co-sharers of the disputed property-house No. 4310 situated at *Rasta Kundigaron Bherunji, Ghatgate, Jaipur* and they are in possession of their respective shares. The defendant-respondent No. 2 Gopi Chand (vendor) sold his share in the disputed house, as mentioned in Paras 3 and 4 of the plaint, to respondent No. 1 Smt. Pushpa Agrawal on 5-4-1983 and the plaintiff-appellant came to know about this first time on 12-4-1984. Since the plaintiff-appellant Ram Prakash was the co-sharer of the disputed property, therefore, he is having a right to pre-emption. It was also stated that before sale of the disputed property the plaintiff-appellant Ram Prakash was neither given any notice under Section 8 of the Right of Pre-Emption Act, 1966 nor was he offered to purchase the same, therefore, a prayer was made for a decree of pre-emption in his favour. During the pendency of the suit, on the application filed under Order 1, Rule 10 of the Civil Procedure Code (hereinafter to be referred as the Code), defendant-respondent No. 3 Smt. Pukhraj Devi was made as a party. It is also significant to mention here that respondent No. 2 Gopi Chand (vendor) died during the pendency of the suit.

4.1 The plaintiff-appellant Ram Prakash and respondent No. 3. Smt. Pukhraj Devi expired during the pendency of this first appeal, hence their legal heirs were ordered to be brought on record.

4.2 The defendant-respondent No. 1 Smt. Pushpa Agrawal (vendee) while denying the averments made in the plaint reiterated the averments as pleaded in the written

statement to the Suit No. 298/95.

4.3 The defendant-respondent No. 3 Smt. Pukhraj Devi, who is plaintiff in Civil Suit No. 298/95, filed the written statement and stated that no share of the plaintiff Ram Prakash exist in the disputed property and this suit has been filed by him in collusion with Smt. Pushpa Devi (vendee) and Gopi Chand (vondor) and the plaintiff-appellant Ram Prakash is not willing to purchase the disputed property. It was further stated that no steps were taken by the plaintiff-appellant Ram Prakash to bring the legal heirs of the deceased- respondent No. 2 Gopi Chand on record. Therefore, a prayer was made to dismiss the plaint.

5. Since both the suits involved common question of pre-emption in regard to the same property, therefore, both the suits were clubbed by the trial Court. On the basis of the pleadings of the parties following common issues were framed :-

(Vernacular matter omitted -Ed.)

6. On behalf of Smt. Pukhraj Devi (plaintiff in Suit No. 298/95) PW1 Damodar Lal and PW2 Satya Narayan were examined and Ram Prakash (plaintiff in Suit No. 297/95) apart from himself produced PW2 Kunj Bihari in his evidence. The defendant-respondent Smt. Pushpa Devi (vendee) apart from herself as DW1 examined her husband Babu Lal DW2. Plaintiff Smt. Pukhraj Devi (Suit No. 298/95) exhibited as many as 6 documents as Ex. 1 to Ex.6 while the defendant-vendee Pushpa Devi exhibited as many as 50 documents as Ex.A1 to Ex.A-50.

7. The learned Additional District Judge No. 4, Jaipur City, Jaipur having heard the arguments of both the parties dismissed both the suits vide common judgment dated 12-8-1998.

8. Therefore, being aggrieved of the aforesaid judgment, these two appeals have been preferred by the respective plaintiffs in two suits.

9. Heard learned counsel for the parties and perused the impugned judgment and material available on the record.

10. The parties shall be referred as per their ranks in the suits.

11. Both the suits one by Smt. Pukhraj Devi (No.298/1995) and another by Ram Prakash (No.297/1995) were dismissed by the trial Court mainly on the ground that the disputed property was commercial establishment-shop, therefore right of preemption does not accrue by virtue of prohibitory clause contained in Section 5 of

the Rajasthan Pre-Emption Act, 1966 (in short the Act of 1966).

12. Issue No. 1 which is in regard to preferential right of pre-emption over the disputed property, was decided in favor of Ram Prakash plaintiff (Suit No. 297/95).

13. It is not disputed that the plaintiff Ram Prakash (Suit No. 297/95) and another plaintiff Smt. Pukhraj Devi (Suit No. 298/ 95) both were the co- sharers of the building No. 4310 situated at *Bhairon Ji Kundigaran Chaukdi Ghat Darwaja, Jaipur*, of which one portion was sold by the defendant-vendor Gopi Chand to another defendant-vendee Smt. Pushpa Agrawal by registered sale deed. It is also not disputed rather admitted by the plaintiff Pukhraj Devi (Suit No. 298/95) in her written statement filed in the Suit filed by Ram Prakash (297/1995) that Ram Prakash is step brother of vendor Gopi Chand. Plaintiff Ram Prakash PW1 (Suit No. 297/95) in his statement also stated that he is a step-brother of Gopi Chand vendor-defendant. It was not the case of the plaintiff Smt. Pukhraj Devi (298/1995) that she is in any way related with the vendor Gopi Chand, therefore, though both Ram Prakash and Pukhraj Devi are co-sharers in the disputed building being owners of the same class but Ram Prakash has a preferential right of pre-emption being nearer in relationship to the vendor Gopi Chand, therefore, he excludes the right of pre-emption of Pukhraj Devi in view of the provisions contained in Section 6 (3) of the Act of 1966, therefore, on this issue the trial Court has committed no error in holding that plaintiff-Ram Prakash has a preferential right of pre-emption over the disputed property in comparison to Smt. Pukhraj Devi.

14. Now the only point which remained to be answered is whether the disputed property was shop being commercial establishment or the nature of the property was residential one?

15. Learned counsel Mr. R. K. Agrawal and Mr. J. P. Goyal appearing for the appellants contended that building in question Haveli House No. 4310 was not a commercial premises nor the disputed property sold to the defendant-vendee Smt. Pushpa Agrawal was converted into a commercial premises or shop but the building in question was constructed and being used for the residential purposes. It was also submitted that the defendant-vendor Gopi Chand did not file any written statement nor he came in the witness box and the statements of defendant-vendee Smt. Pushpa Agrawal (DW1) and her husband Babu Lal (DW2) are not reliable.

16. Learned counsel Mr. R. K. Agrawal appearing for appellant-plaintiff Pukhraj Devi (Suit No. 298/95) further contended that plaintiff Ram Prakash (Suit No. 297/ 95) was

never interested in purchasing the disputed property but with the calculated strategy and by joining hands with the defendant- vendee Smt. Pushpa Agrawal he also filed a Suit of right to pre-emption. It was then submitted that vendor Gopi Chand was not produced by defendant-vendee Smt. Pushpa Agrawal to support her case but Satya Narayan PW2, son of the vendor-defendant Gopi Chand, was produced by plaintiff Pukhraj Devi (Suit No. 298/95) who categorically stated that the disputed property is being used as a residential house and no part of this building is a commercial establishment and his this statement cannot be disbelieved. It was next submitted that vendee Pushpa Agrawal only examined herself as DW1 and her husband Babu Lal as DW2 who are not only interested but their statements are not worthy to be believed and further no independent witness or any person residing or working in the said building was produced in the witness box as also the documents produced by them are fictitious which were prepared to give strength to their case. It was also submitted that the case of the plaintiff Pukhraj Devi is fully proved by the evidence of Damodar Lal (PW1) who is her husband and power of attorney holder knowing personally all the facts in regard to the nature of the building and also from the evidence of PW 2 Satya Narayan, son of the vendor Gopi Chand. In this situation, the non-appearance of the plaintiff Smt. Pukhraj Devi in the witness box does not affect her case adversely and reliance has been placed on the judgment delivered in the case of *Smt. Ramkubai since deceased by L.Rs. and others v. Hajarimal Dhokalchand Chandak and others*, reported in <sup>1</sup> wherein it was held that non-appearance of the plaintiff herself in the witness box does not affect adversely if other evidence has been led and sufficient to prove the fact in issue. Reliance was also placed on the judgment delivered in the case of *Shanti Kumar and another v. Shikhar Chand (D) by L.R.*, <sup>2</sup> wherein it was held that where a power of attorney holder of the plaintiff who was also collecting the rent on his behalf has been produced in evidence then, even if the plaintiff had not come in the witness box, it does not affect the plaintiffs case.

17. Per contra, learned counsel Mr. B. L. Agrawal, appearing for the defendant-vendee contended that in the year 1975 the disputed property was let out by the vendor-Gopi Chand to Babu Lal (DW2), husband of the vendee-Smt. Pushpa Agrawal and this fact is amply proved not only by the rent note Ex.1 and receipts of the rent Ex.A12 to Ex.A20 but also from the various letters sent to the firm Pushpak Jewellers from government offices and jewellery associations on the address of the disputed property even much prior to its purchase. It was then submitted that the plaintiff-Smt. Pukhraj Devi did not appear in the witness box and her husband Babu Lal gave evasive replies in regard to most of the questions asked in cross-examination. It was also submitted

that Satya Narayan is not truthful witness which is evident from the unimpeachable proved documents and other oral evidence. It was then submitted that the plaintiff-Ram Prakash PW1 (Suit No. 297/95) could not speak lie and admitted that the disputed property was being used as commercial establishment and in the same building some more jewellery shops are also running. Similarly PW2 Kunj Bihari also admitted that the disputed premises is being used as a commercial establishment much prior of its purchase by Smt. Pushpa Agrawal. It was further submitted that house or building where goods are made or prepared for sale and sold or trading activities are being done is a commercial establishment or a shop, therefore, the trial Court rightly dismissed the Suits in view of Section 5(i)(a) of the Act of 1966. Reliance was placed on the judgment delivered in the case of *M/s. Cdchin Shipping Co. v. E.S.I. Corporation, reported<sup>3</sup> in Rajendra Kumar Soni v. Authority Appointed under Section 20 of the Rajasthan Shops and Commercial Establishments Act and others, reported in<sup>4</sup> and Mahesh and others v. Kanwar Lal and others, reported in<sup>5</sup>*

18. I have considered the rival submissions. For appreciating the rival contentions, it would be useful to have a glance over the relevant provisions contained in Section 5 of the Act of 1966.

5. Case in which right of pre-emption does not accrue.- (1) The right of pre-emption shall not accrue-

(a) upon the transfer of a shop, *katra, sarai, musafirkhana, dharmashala*, temple, mosque or other similar buildings : or.....

19. In the Act of 1966 the 'shop' has not been defined. Therefore, assistance could be taken from the dictionary and other local laws wherein 'shop' has been defined. In Wharton's Law Lexicon, 14th Edn., p. 929 'shop' has been defined as under :-

"Shop, a place where things are kept for sale, usually in small quantities, to the actual consumers. By Shops Act, 1912, Section 19, 'shop' includes any premises where any retail trade or business is carried on; 'retail trade or business' includes the business of a barber or hairdresser, but not the sale of programmes, etc., at places of amusement."

Words and Phrases Legally Defined, 2nd Edn., p. 73 :

"Shop' includes dwelling-house and warehouse, or other place of business, or place where business is transacted. 'Shop' includes any premises, and any vehicle, stall or place other than premises, on or in which any retail trade or business is carried on.

According to the Shorter Oxford English Dictionary the expression 'Shop' means 'a house or building where goods are made or prepared for sale and sold'. It also means a 'place of business' or 'place where one's ordinary occupation is carried on. In the Rajasthan Shops and Commercial Establishments Act, 1958 'shop' has been defined as under:-

"Shop" means any premises where any trade or business is carried on or where services are rendered to customers, and includes offices, store-rooms, god owns, or ware-houses, whether in the same premises or otherwise, used in connection with such trade or business but does not include a commercial establishment or a shop attached to a factory where the persons employed in the shop are allowed the benefits provided for workers under the Factories Act, 1948.

Therefore, it can be safely concluded that a 'shop' is a place where the activities connected with the buying and selling of goods are carried on.

20. Here in the instant case, the defendant-vendee Smt. Pushpa Agrawal (DW1) clearly stated that the property in dispute was in the tenancy of her husband-Babu Lal prior to the purchase of the same by her, she also stated that her husband was using the rented premises for jewellery business where manufacturing, processing and selling of jewelry was being done, she also stated that in the same premises there are many other jewellery shops including Om Jewelers which is owned by son of the plaintiff-Smt. Pukhraj Devi and others are Ashiyana Enterprises, MGR Dowatiwala etc., she further stated that they never used this premises as residential one, they reside at their residence situated at *Govind Marg, Moti Doongari Road, Jaipur*, she further stated that correspondence with Pushpak Jewellers was being done on the address of the disputed property since 1975. DW2 Babu Lal also gave the similar statement and stated that the disputed property was with him on rent since 1975. He further stated that he was using the disputed rented premises for sale, purchase and manufacturing of jewellery in the name and style of Pushpak Jewellers. He also stated that other jewelry shops are also working in the same building. He further proved the rent note Ex.A1, various receipts of the rent which were issued by the vendor-Gopi Chand and bills of telephone, letters written by jewelry associations, Reserve Bank and other public offices like assistant collector, customs addressed to Pushpak Jeweller mentioning the address of the disputed property. Contrary to this PW1 Damodar Lal who is husband and power of attorney holder of plaintiff Pukhraj Devi (Suit No. 298/95) though denied that the disputed property was being used for the commercial purposes but during his cross-examination his most of the replies were

evasive. At one occasion he stated that Pushpa Devi is having only this house and she is residing in it after its purchase but on the question that Smt. Pushpa Devi is residing with her family at C-18, Mohan Path, Jyoti Marg he showed his ignorance about this fact. He further showed his inability to answer that prior to purchase of the disputed property by the vendee-Pushpa the said premises was on rent since last eight years. Likewise he could not reply whether Babu Lal was working in the name and style of Pushpak Jewellers since 1975. He was further unable to answer whether manufacturing work was being done in the disputed property. He also could not reply whether other jewellery shops were there in the same building prior to purchase of the disputed property. Another witness PW2 Satya Narayan who is son of defendant-vendor Gopi Chand in his statement though denied about any commercial activities were being done by Babu Lal, husband of the vendee Pushpa, in the disputed property, also denied that the disputed property was given on rent by his father to the said Babu Lal. His statement does not inspire confidence in view of the various letters produced and proved on behalf of defendant-vendee Pushpa Devi which amply prove that the disputed property was on rent with Babu Lal much prior to its purchase by his wife Smt. Pushpa Agrawal and he was doing his jewellery business in the name and style of Pushpak Jewellers in the disputed property, which further finds corroboration even from the statement of plain tiff-Ram Prakash (Suit No. 297/95) who has a preferential right of pre-emption in regard to the disputed property.

21. Thus, from the evidence and material available on record, it has been amply proved that disputed property was being used as jewellery shop commercial establishment much prior and at the time of its sale to defendant vendee Pushpa Agrawal, therefore, in view of restrictions enumerated in Section 5 (1)(a) of the Act, 1966 the plaintiff-appellants Ram Prakash and Pukhraj Devi cannot claim right of pre-emption. The finding recorded by the trial Court on this issue is based on proper appreciation of the evidence available on the record.

22. For the discussion above, both the appeals are hereby dismissed with no order as to costs.

Appeals dismissed.

Cases Referred.

1. AIR 1999 SC 3089
2. Civil Appeal No.7183 of 2001, decided by Hon'ble the Apex Court on 29-11-2007
3. (1992) 4 SC Cases 245: (AIR 1993 SC 252)

4. 1994 (1) WLC (Raj) Page 362: 1994 Lab IC 1218

5. W.L.C. 2007 (Raj.) UC