

RAJASTHAN HIGH COURT

Prahlad Kumar

Vs.

Kishan Chand

S.B.C.F.A. No. 156 of 1992

(Narendra Kumar Jain, J.)

17.02.2009

ORDER

Narendra Kumar Jain, J.

1. Defendant No. 2-appellant Prahlad Kumar has preferred this Regular First Appeal under Section 96 of the Civil Procedure Code challenging the impugned judgment and decree dated 9th July, 1992 passed by the Additional District Judge, Bayana, in Civil Suit No. 7/89 whereby the trial Court has decreed the suit for pre-emption in respect of the disputed property filed by the plaintiff-respondent No. 1 Kishanchand.

2. Briefly stated the facts of the appeal are that on 1st March, 1989 the plaintiff filed a suit for pre-emption in respect of disputed property against the defendants in the trial Court wherein it was pleaded that the plaintiff and defendant No. 3 Tilluram are real brothers and their ancestral residential house of their ownership is situated in *Mohallah Sunar Gali, Bayana*; the boundaries of which were mentioned in para 1 of the plaint. The division of their house took place in between them about one year ago and after the division a common wall was raised in between their respective portions. It was further pleaded that there is one 'gali' (lane or narrow street), of common ownership and in the possession of the plaintiff and defendant No. 1, situated towards northern side of the portion of plaintiffs house. The said 'gali' was common property of the plaintiff and the defendant No. 1 and both are co- sharers to the same. The drains, windows, ventilators of ground and first floor of the house of the plaintiff have opening in the 'gali'. The said 'gali' is the source of light and air to the house of the plaintiff and he has been enjoying the same since long. The waste-water of sewage, latrine and bathrooms, which have been constructed on projecting eaves at the first floor of the plaintiff's house covering the said 'gali', also passes through the said 'gali'.

The drain of water of the house of the defendants also there in the said common 'gali'. Therefore, this narrow space is a common 'gali' of the plaintiff and the defendant No. 1. It was further pleaded that the defendant No. 1 secretly sold his house on 9th February, 1989 to the defendant No. 2 Prahlad Kumar for a sum of Rs. 25,000/- and got the sale-deed registered on 10th February, 1989. The description of the house of the defendant No. 1 was given in para 5 of the plaint. The plaintiff has a right of pre-emption over the house belonging to the defendant No. 1 as the plaintiff and the defendant No. 1 both are co-sharer of the common 'gali' situated in between their houses; the plaintiff was and is willing to purchase the said house for a sum of Rs. 25,000/-; the defendant also did not give any notice to the plaintiff under Section 8 of the Rajasthan Pre-emption Act, 1966 (for short 'the Act of 1966'), therefore, the present suit was filed with a prayer that a decree of pre-emption be passed in favor of the plaintiff and against the defendants No. 1 and 2 and further the defendants No. 1 and 2 may be directed to handover the possession of the disputed house after payment of Rs. 25,000/- by the plaintiff.

3. The defendants No. 1 and 2 filed their joint written-statement on 27th September, 1989 wherein the contents of the plaint, as pleaded, were denied and it was pleaded that the house, the description of which were mentioned in para 1 of the plaint, belongs to the plaintiff and the defendant No. 3 Tilluram. The house of the defendants is situated towards northern side of the house of the plaintiff and there is common narrow space (gali/lane) and defendant's land in between the houses of both the parties. It was denied that the drains, windows and ventilators of the plaintiff's house have opening in the said common 'gali' since long, but they have been there for the last 8 to 10 years. Earlier there was only one or two drains in the 'gali'. It was admitted that the defendant No. 1 Kundanlal had executed a sale-deed on 9th February, 1989 in favors of the defendant No. 2 Prahlad Kumar and the same was got registered on 10th February, 1989; the possession thereof has also been handed over to the defendant No. 2; the sale was not made secretly and it was in the knowledge of the plaintiff and other residents of the said locality. The measurement of the common gali as pleaded in suit was denied and, right measurement was mentioned in the written-statement. The right of Pre-emption of the plaintiff was denied. It was pleaded that the common gali is separated from the property which has been sold. There are properties of both the parties towards northern and southern side of each other; and drains, windows, ventilators of both the parties have opening in said common 'gali' the right of Pre-emption of the plaintiff over the disputed property, on the basis of the said common gali, was denied and it was pleaded that no such right is available under Section 6 of

the Act of 1966. The plaintiff was not ready and willing to purchase the disputed property for a sum of Rs. 25,000/-; the defendant No. 1 Kundanlal had offered the plaintiff and his brother to purchase the disputed property but they refused to purchase the same and thereafter the defendant No. 1 Kundanlal sold it to the defendant No. 2 Prahlad Kumar. It was also pleaded that earlier the disputed property was belonging to one Uttamchand, which was sold to the defendant No. 1 Kundanlal through registered sale-deed dated 16th April, 1986 and at that time also the said 'gali' was in existence towards the southern side of the disputed property but the plaintiff did not claim his right of preemption nor he was ready and willing to purchase it nor he filed any suit for preemption in this regard. The said sale was in the knowledge of the plaintiff and his brother defendant No. 3 Tilluram. The defendant No. 3 Tilluram is one of the witnesses to the said sale-deed. The house, on the basis of which plaintiff claimed his right of pre-emption, was a joint property of the plaintiff and Tilluram (defendant No. 3), therefore, it is wrong to say that the present sale-deed was executed secretly by the defendant No. 1 in favour of the defendant No. 2. It was also pleaded that there was no need of any notice under Section 8 of the Act of 1966, as at both the times the plaintiff and defendant No. 3 Tilluram were offered to purchase the house and only after they refused to purchase it, the defendant No. 1 sold it to the defendant No. 2. The signature of Tilluram is there as a witness on the sale-deed dated 16th April, 1986 (Exhibit A-1) executed by Uttamchand in favour of the defendant No. 1 Kundanlal. In the additional pleas, it was also pleaded that the property in dispute has been purchased for commercial use i.e. for establishing an industry, hence no right of pre-emption has accrued to the plaintiff in view of Section 5 of the Act of 1966. The principle of estoppel/waiver is also applicable in the facts and circumstances of the present case and the suit is liable to be dismissed on this ground also. Therefore, it was prayed that the suit of the plaintiff be dismissed.

4. On the basis of the pleadings of the parties, the trial Court framed nine Issues on 31st July, 1990, which are reproduced in the judgment of the trial Court. The main Issues, which were argued by both the parties are Issue Nos. 1 and 6. The Issue No. 1 is as to whether the right of pre-emption is accrued to the plaintiff in respect of the property in dispute which has been sold by the defendant No. 1 to the defendant No. 2. The issue No. 6 is as to whether the principles of estoppels, acquiescence's and waiver are applicable against the plaintiff. The plaintiff, in support of his case, got examined P.W. 1 Kishanchand and P.W. 2 Omprakash s/o Shiv Dayal and also produced documentary evidence. The defendants got examined D.W. 1 Prahlad. D.W. 2 Kundanlal, D.W. 3 Omprakash s/o Mangilal, D.W. 4 Chandra Mohan Kakkar and also

produced documentary evidence.

5. The learned trial Court, after considering the submissions of both the parties, their pleadings and evidence available on the record, decreed the suit of the plaintiff.

6. During the pendency of this appeal, the learned counsel for the appellant filed an application under Order 41, Rule 27, Civil Procedure Code, on 10th April, 2008, and annexed therewith three documents i.e. conveyance-deed dated 31st March, 1961, Notice dated 3rd March, 2006 and sale-deed dated 9th November, 1959 with a prayer to take the same on the record as they are material and relevant for adjudication of the case. The deed of conveyance dated 31st March, 1961 (Annexure-1) is a certified copy issued by the Government office; Annexure-2 is a Photostat copy of the Notice and Annexure-3 is also a Photostat copy of the registered sale-deed. It was contended that there cannot be any doubt on genuineness of these documents. The original copy of sale-deed dated 9th November, 1959 was also referred during the course of arguments.

7. The respondent No. 1 filed reply to the application under Order 41, Rule 27, Civil Procedure Code and raised an objection that the application is highly belated and at this stage the same cannot be allowed. This Court, vide its order dated 16th May, 2008, directed that the application will be considered at the time of final hearing of the appeal itself.

8. The learned counsel for the appellant Sri G.K. Garg contended that the trial Court has committed a serious illegality in decreeing the suit of the plaintiff for preemption in respect of the disputed property; according to him, the case of the plaintiff does not fall under any of the category of Section 6 of the Act of 1966; he contended that as per clause (i) of sub-section (1) of Section 6, the right to pre-emption in respect of any immovable property transferred shall accrue to, and vest in, to co-sharer or partner in the property transferred. "Co-sharer" has been defined in clause (i) of Section 2 of the Act of 1966, which means that "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 rights or in any register prepared in accordance with law. He contended that from the oral and documentary evidence available on the record it is not established that the plaintiff was co-owner of the so-called common 'gali' on the basis of which the right of pre-emption is being claimed. The trial Court while referring clause (i) of sub-section (1) of Section 6 of the Act of 1966 has interpreted the word 'co-sharer in the

property transferred' without referring the definition of 'co-sharer' as defined in Clause (i) of Section 2 of the Act of 1966, which means - any person entitled as an owner or a proprietor to any share or part in such property. The finding of the trial Court on Issue No. 1 makes it clear that the definition of 'co-sharer' was not referred and considered along with Section 6(1)(i) of the Act of 1966. He, therefore, submits that the finding of the trial Court on Issue No. 1 is contrary to the facts and law, both, and the same is liable to be set-aside. In support of his submissions, he referred *Krishna v. State of Haryana*,¹ *Radhey Shyam v. Smt. Prem Kanta*,² and *Mohan Lal v. Thakurji Shri Shyam Sunderji*,³ He also referred *Sire Kanwar Maloo v. Shri Daudas Mantra*,⁴ and contended that, on reference, a Division Bench of this Court, while considering interpretation of Section 6(1)(i) read with Section 2(i) of the Act of 1966, held that co-owner of a party wall (common boundary wall) situated between the two adjacent immovable properties are not the co-sharers and have no right to pre-empt the transfer of other immovable property under Section 6(1) of the Act, as the co-share ship or partnership does not extend beyond the wall.

9. Shri G.K. Garg, the learned counsel for the appellant, also contended that the disputed property was sold by one Uttamchand to defendant No. 1 Kundanlal by registered sale-deed dated 16th April, 1986, and it bears the signature of Tilluram, the real brother of plaintiff Kishanchand, as a witness, and, despite having knowledge about it, neither they raised any objection nor they filed any suit at that time for preemption, therefore the principle of estoppel or waiver is applicable in the present case and the plaintiff is now estopped to file such a suit in respect of same property on the basis of sale-deed dated 9th February, 1989 executed by the defendant No. 1 in favour of the defendant No. 2. In support of his contention he referred *Bhanwar Lal v. Shankar Lal*,⁵ *Kutina Bibi v. Baikuntha Chandra Dutta*,⁶ and *Ghanshyam v. Chand Bihari*,⁷

10. Shri G.K. Garg, the learned counsel for the appellant, in support of his submission in respect of his application under Order 41, Rule 27, *CPC* referred *Hanuman Mal v. Jaskaran*,⁸ *Nagar Palika Bulandshahar v. Hanuman Prasad*,¹⁰

11. Shri R.P. Garg, the learned counsel for the respondents, contended that the plaintiff is co-sharer and co-owner of the common 'gali', a narrow space in between the houses of the plaintiff and the defendants No. 1 and 2, and, on that basis, he has a right of pre-emption under Section 6 of the Act of 1966. He referred the pleadings and evidence in this regard and contended that the trial Court has rightly decided Issue No. 1 in favors of the plaintiff and rightly decreed the suit. He also contended that the

principle of waiver is not applicable in the facts and circumstances of the present case. He contended that the defendant No. 3 Tilluram was residing separately from the plaintiff Kishan Chand, therefore, his signature on the sale-deed dated 16th April, 1986 cannot bind the plaintiff. He also contended that the pleading of the plaintiff in the plaint about co-owner has not been denied specifically, therefore, it should be assumed to have been admitted in view of Order 8, Rule 5 of the Civil Procedure Code. So far as the application under Order 41, Rule 27, Civil Procedure Code filed by the appellant, is concerned, he contended that the same is highly belated and at this stage it should not be allowed. So far as right of pre-emption being a weak right is concerned, he contended that although it is correct that right of pre-emption is a weak right but his right is under the statute i.e. Rajasthan Pre-emption Act, 1966 and till the provisions of the said Act are declared ultra-virus, he is entitled to invoke his right through the Court. He therefore contended that the appeal of the defendant may be dismissed.

12. I have considered the submissions of the learned counsel for the parties and examined the impugned judgment as well as the record of the trial Court.

13. Before dealing with the submissions of the learned counsel for the parties in the light of various rulings cited at the Bar, I think it fit and proper to consider the relevant provisions of law and citations referred at the Bar.

14. For ready reference, sub-section (1) of Section 6 of the Rajasthan Pre-emption Act, 1966 is reproduced as under :-

"6. 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-sharer or partner in the property transferred;

(ii) Owners of other immovable property with a stair-case or any entrance or other right or amenity common to such other property and the property transferred, and

(iii) Owners of property serving or dominant to the property transferred."

15. The definition of co-sharer as defined in Clause (i) of Section 2 of the Act of 1966 is also reproduced as under :-

"2. Definitions.- In this Act, unless the subject or context requires otherwise.-

(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 rights or in any register prepared in accordance with law."

16. In *Krishna v. State of Haryana*¹¹ the Hon'ble Apex Court considered the law of pre-emption relating to the State of Punjab and Haryana, where there was no definition of co-sharer but still the Hon'ble Apex Court held that the absence of definition of co-sharer does not provide any reason to reconsider the four Constitution Bench decisions (viz. *Atam Prakash*, *Bhau Ram*, *Sant Ram* and *Ram Sarup*) because the lack of definition of co-sharer has no material bearing inasmuch as from what has been stated in *Ram Sarup* case it is apparent that the word 'co-sharer' has to be taken as interchangeable with co-owner. As to who would be co-owner would depend upon who would have succeeded to the property. So far as the present case is concerned, it is relevant to mention that in Rajasthan Pre-emption Act, the definition of co-sharer has been defined in clause (i) of Section 2 thereof, which has been reproduced above, which makes it clear that the word 'co-sharer' used in relation to any immovable property, means any person, entitled as any owner or a proprietor to any share or part in such property. Therefore, the decree of pre-emption cannot be granted only on the basis of co-sharer in the common 'gali' but the plaintiff is further required to prove that he is co-owner of it.

17. In *Radhey Shyam v. Smt. Prem Kanta*,¹² this Court held that in order to establish a right of pre-emption it is not alone necessary for the plaintiff to mention that he is claiming a right on the basis of being a co-sharer but he must also mention as to in what property and in what manner he is claiming the right of joint ownership. In the absence of any case of joint ownership pleaded in the plaint and even not supported by his own statement during the trial and not supported by the contents of sale-deed Ex. 2, any oral evidence led by the plaintiff of other witnesses is of no avail.

18. In *Sire Kanwar Maloo v. Shri Daudas Mantri*,¹³ a Larger Bench of this Court answered a reference in negative and held that co-owner of a party wall (common boundary wall) situated between the two adjacent immovable properties are not the co-sharers and have no right to pre-empt the transfer of other immovable property under Section 6(1) of the Act of 1966 Paras 1 and 32 to 39 of the judgment are reproduced as under

"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. Sire 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 to 31.....

32. 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.

33. 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.

34. 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 determinant. Meaning thereby the co-sharer ship or partnership does not extend beyond the wall. Thus the owner of the house of both sides are part owner of the common wall.

35. 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?

36. 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 or 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.

37. 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.

38. 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, (AIR 1962 Supreme Court 1476) (supra) and Atma Prakash, (AIR 1986 Supreme Court 859) (supra). The relevant portion of para 14 of the judgment is reproduced herein below 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 preemption 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 stair case 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)*

* (*Emphasis not found in certified copy...Ed.)

39. 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."

19. In *Indra Bai v. Nand Kishore*,¹⁴ the Hon'ble Apex Court considered the provisions of the Rajasthan Preemption Act and held that it is weak and inequitable right and it can be defeated by estoppel. It was also held that failure to serve notice under Section 8 of the Act of 1966 by vendor on pre-emptor does not render sale void. Paras 1 to 3 of the judgment are reproduced as under :-

"1. Is Estoppel a good defence to 'archaic',¹⁵ *Atama Prakash v. State of Haryana*, right of pre-emption which is a 'weak right',¹⁶ *Bishen Singh v. Khazan Singh*, and can be defeated by any 'legitimate' method *Radha Kishan v. Sridhar*.¹⁷

2. Barring High Court of Rajasthan and erstwhile, *Jethmal v. Sajanumal*,¹⁸ most of the other High Courts, namely, Allahabad, *Naunihal Singh v. Ram Rati Lal, Oudh*,¹⁹ *Ram Rathi v. Mt. Dhiraji*,²⁰ *Gopinath v. R.S. Nand Kishore, Bhopal*,²¹ *Abdul Karim v. Babulal, and Lahore*,²² *Kanshi Ram Sharma v. Lahori Ram*, 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.

3. Estoppel is a rule of equity flowing out of fairness striking on behavior deficient in good faith. It operates a check on spurious conduct by preventing the inducer from taking advantage and assailing forfeiture already

accomplished. It is invoked and applied to aid the law in administration of justice. But for it great many injustice may have been perpetrated. Present case is a glaring example of it. True no notice was given by the seller but the trial Court and appellate Court concurred that the pre-emption not only came to know of the sale immediately but he assisted the purchaser-appellant in raising construction which went on for five months. Having thus persuaded, rather misled, the purchaser by his own conduct that he acquiesced in his ownership he somersaulted to grab the property with constructions by staking his own claim and attempting to unsettle the legal effect of his own conduct by taking recourse to law to curb and control such unwarranted conduct the Courts have extended the broad and paramount considerations of equity, to transactions and assurances, express or implied to avoid injustice."

20. In *Nen Mal v. Kan Mal*,²³ a Division Bench of this Court held that Section 6(1)(iii) of the Rajasthan Pre-emption Act, 1966 provides right of pre-emption to owners of property servient or dominant to the property transferred. Such pre-emptor who claims right to pre-emption on ground of easement of air and light and discharge of dirty water is neither a co-sharer nor sharer of a common right or amenity having a right akin to that of co-sharer. It was held that such pre-emptor cannot enforce right of pre-emption claimed under Section 6(1)(iii) of the Act of 1966. The Division Bench also struck down Section 6(1) (iii) of the Act of 1966 being violative not only of Article 19(1)(f) but also of Articles 14 and 15 of the Constitution.

21. In *Ladu Ram v. Kalyan Sahai*,²⁴ this Court held that claim of right of pre-emption based on khaleet (literary means - mixed up) of light and air cannot be recognized.

22. In *Mahboob Hasan v. Ram Bharosey Lal*,²⁵ a Division Bench of the Allahabad High Court held that an owner of an easementary right cannot object to the sale of adjoining property to a stranger.

23. In *Jagdish Saran v. Brij Raj Kishore*,²⁶ a Full Bench of the Allahabad High Court, while considering the case of customary law of pre-emption, held that plaintiffs right to rest his beams on shops sold is an easementary right and does not make the plaintiff a shafi-i-khalit; it was further held that plaintiff's right to flow rain water through a common spout, does not give him a right of pre-emption.

24. In *Akbar Ali v. Ambalal*,²⁷ this Court held that if the lane serves a common right of way and entrance to the plaintiffs' house as well as the properties sold, it cannot be made the basis for claiming any right of pre-emption under clause (ii) of sub-section

(1) of Section 6 of the Rajasthan Pre-emption Act. The relevant portion of para 7 of the judgment is reproduced as under:-

"7.....If the lane serves a common right of way and entrance to the plaintiffs' house as well as the properties sold, in my opinion, it cannot be made the basis for claiming any right of pre-emption under clause (ii) of sub-section (1) of Section 6 of the Act....."

25. In *Bhanwar Lal v. Shankar Lal*,²⁸ this Court while considering the provisions of Rajasthan Preemption Act, held that where plaintiff gave consent to first defendant to purchase the suit property then he waives his right of preemption. It was further held that failure to serve a notice under Section 8 of the Act does not render sale ultra vires.

26. In *Kutina Bibi v. Baikuntha Chandra Dutta*,²⁹ the Assam High Court held that where by a prior sale, the shares of the plaintiffs co- sharers in the suit property were transferred by the other co-sharers, so long as that sale-deed subsists, the plaintiffs cannot claim to have any interest or to be co-sharers in the suit property, and without claiming any relief for the cancellation of that prior sale deed, they can claim no right to pre-empt the subsequent sale of the suit property by the transferee to third persons.

27. In *Ghanshyam v. Chand Bihari*,³⁰ in the facts and circumstances of that particular case, held that where portion of same property earlier purchased by stranger and father of plaintiffs not asserting or enforcing his right at that time, then the plaintiff must be deemed to have waived his right of preemption.

28. In *Hanuman Mal v. Jaskaran, and Others*³¹ this Court held that the Order 41, Rule 27, Civil Procedure Code is an enabling provision for production of oral and documentary evidence which was not produced or not admitted in evidence before trial Court; if all the conditions are satisfied then the Appellate Court has jurisdiction to permit additional evidence under Order 41, Rule 27, Civil Procedure Code.

29. In *Nagar Palika Bulandshahar v. Hanuman Prasad*,³² the Allahabad High Court permitted filing the documents under Order 41, Rule 27, Civil Procedure Code as additional evidence at appellate stage.

30. In *Savitaben Ishverlal v. Surat Municipal Corporation, Surat*,³³ the Gujarat High Court held that the power to call for additional evidence in the interest of justice is recognized under Order 41, Rule 27 of the Civil Procedure Code. It is not only to enable the Court to pronounce judgment but also for any substantial cause which may include when Court considers the interest of justice that something remaining

obscured should be filled up so that it can pronounce judgment in a more satisfactory manner though it may be able to pronounce the judgment in the State of record as it is.

31. So far as the application filed by the appellant under Order 41, Rule 27 of the Civil Procedure Code is concerned, I am of the view that although it has been filed at a latter stage but the genuineness of the documents is not in dispute and, in the facts and circumstances of the case, the documents annexed with the application are relevant and go to the root of the case and are helpful in deciding the present controversy in between both the parties, hence the said application is allowed and the documents are taken on the record.

32. Now coming to the merits of the case, the plaintiff, in his plaint, pleaded that he is a sharer and co-owner of the common 'gali' situated in between the house of the plaintiff and the defendant No. 1. The defendants, in their written-statement, stated that the common 'gali' is separate from the property in dispute. Plaintiff P. W. 1 Kishan Chand, in his entire statement, has not stated that he is the co-owner of the common 'gali' situated in between the houses of both the parties. No documentary evidence has been placed on the record by the plaintiff to prove that he is co-owner of the common 'gali'. From the pleadings on the record, it is borne out that both the parties have admitted that it is a common 'gali' and the same is being used by both the parties to drain the waste water of rain, bathroom, latrine etc. and the windows and ventilators of their houses have the opening in it; both the parties are also enjoying the air and light through this common 'gali'. The trial Court, while considering the Issue No. 1, only referred clause (i) of sub-section (1) of Section 6 of the Act of 1966 and only on the basis of it, decided Issue No. 1 in favors of plaintiff. From the finding of the trial Court, it is clear that the definition of "co-sharer", which has been defined in clause (i) of Section 2 of the Act of 1966, has not been considered at all, which says that '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. From the documents placed on the record by the plaintiff annexed with the application under Order 41, Rule 27, Civil Procedure Code, it is borne out that the plaintiff was not the co-owner of the common 'gali' situated in between the houses of both the parties. Thus, from the plaintiff's pleadings and evidence, it is not proved that the plaintiff was co-owner of the common 'gali' which has been made basis for the right of pre-emption by the plaintiff. Although 'co-sharer' has been defined in the Rajasthan Pre-emption Act, 1966 but the Hon'ble Supreme Court considered the law of pre-emption relating to the State of Punjab and Haryana where 'co-sharer' was not defined and held that absence

of definition of co-sharer does not provide any reason to reconsider the four Constitution Bench decisions (viz. Atam Prakash, Bhau Ram, Sant Ram and Ram Sarup) because the lack of definition of co-sharer has no material bearing inasmuch as from that was been stated in Ram Sarup case it is apparent that the word 'co-sharer' has to be taken as interchangeable with co-owner. In the present case, although the plaintiff pleaded in para 3 that he is co-owner of the common '*gali*' but the said fact was denied by the defendants in their written-statement and it was stated that common '*gali*' is separate from the property in dispute. The plaintiff, in his statement, has not stated even a word before the Court that he is the co-owner of the common '*gali*' on the basis of which a right of pre-emption is being claimed in respect of property sold in 1989 by the defendant No. 1 in favors of the defendant No. 2. In these circumstances, I am of the view that the learned trial Court has committed a serious illegality in deciding Issue No. 1 and the finding of the trial Court in this regard is liable to be reversed, hence Issue No. 1 is decided in favor of the defendants and against the plaintiff.

33. So far as another submission is concerned, the trial Court framed a specific Issue No. 6 in respect of estoppel/waiver. It is an admitted fact in between both the parties that earlier the property in dispute was sold by one Uttamchand to defendant No. 1 Kundanlal vide sale-deed (Exhibit A-1) dated 16th April, 1986 and the defendant No. 3 Tilluram, the real brother of the plaintiff Kishan Chand, put his signatures thereon as a witness. The sale-deed (Exhibit A-1) was executed by Uttamchand in favour of the defendant No. 1 Kundanlal on 16th April, 1986. Whereas, in para 1 of the plaint, the plaintiff Kishan Chand has pleaded that he and the defendant No. 3 Tilluram are real brothers; in para 2 of the plaint it has been pleaded that a division of property in between them (the plaintiff and defendant No. 3 Tilluram) took place about one year ago; the suit was filed on 1st March, 1989 meaning thereby the division of the property in between the plaintiff and the defendant No. 3 took place in the year 1988. Although, no documentary evidence showing division of property in between the plaintiff and the defendant No. 3 has been placed on the record but from the pleadings of the plaintiff itself it is borne out that the division in between them in respect of their ancestral property took place in 1988 whereas Exhibit A-1 was executed in the year 1986, and at that time the plaintiff Kishanchand and the defendant No. 3 Tilluram, both, were residing together in their undivided property. The defendant No. 3 Tilluram is one of the witness to the sale-deed (Exhibit A-1) dated 16th April, 1986, therefore, it is clear that defendant No. 3 Tilluram had knowledge about the sale of the property in dispute by Uttamchand to Kundanlal and defendant No. 3 Tilluram was residing

with the plaintiff therefore it can very well be presumed that the plaintiff had knowledge about the said deal; however, neither Tilluram nor Kishan Chand raised any objection to it nor they claimed their so-called right of preemption in respect of this property at that time. The trial Court did not consider the fact that they were living together in 1986 and Tilluram was one of the witness to the sale- deed dated 16th April, 1986 (Exhibit A-1). In these circumstances it can easily be inferred that Kishan Chand, who is real brother of Tilluram and at the relevant time was living with him, had knowledge about this transaction; and even if it is assumed that right of pre-emption accrued to them but they did not claim their right of preemption at that time. Therefore, in the facts and circumstances of the present case, it is clear beyond doubt that the plaintiff is now estopped to claim his right of pre-emption in respect of property in dispute as he waived his right in the year 1986 itself when the property in dispute was first sold by Uttamchand to Kundanlal. Hence, I am of the view that the trial Court committed a serious illegality in deciding the Issue No. 6 in favour of the plaintiff and against the defendants and the same is decided in favour of the defendants.

34. In view of the above discussion, it is clear that the plaintiff has failed to prove his right of pre-emption under Section 6 of the Act of 1966 and even if his right is assumed to have been established, though it is not established in the present case, he is estopped to claim his right of pre-emption as he waived his right in the year 1986 when the property in dispute was sold by Uttamchand to the defendant No. 1 Kundanlal vide sale-deed dated 16-4-1986 (Exhibit A-1).'

35. In the result, the appeal is allowed; the impugned judgment and decree dated 9th July, 1992 is set-aside and the plaintiff's suit is dismissed with no order as costs.

Appeal allowed.

Cases Referred.

1. (1994) 4 SCC 703: (AIR 1994 SC 2536)
2. 1982 RLW 345: (AIR 1982 (NOC) 244)
3. 2007 (2) RLW 969
4. 2008 (1) CT (Raj) 407: (AIR 2008 Raj 13)
5. 2000 (3) RLW (Raj) 1757
6. AIR 1961 Ass 1
7. 2008 (3) WLC 21: (AIR 2008 (NOC) 1651)
8. RLW 2002 (1) Raj 613

9. (1996, AIHC 3148) (All) Corporation, Surat, AIR 19
10. 9 85 Gujarat 174
11. (1994) 4 SCC 703: (AIR 1994 SC 2536)
12. 1982 RLW 345: (AIR 1982 (NOC) 244)
13. 2008 (1) CT Raj) 407: (AIR 2008 Raj 13)
14. AIR 1991 SC 1055
15. AIR 1986 SC 859
16. AIR 1958 SC 838
17. AIR 1960 SC 1358
18. 1947 Mewar Law Reports 36
19. ILR 39 All 127: (AIR 1917 All147) AIR Oudh 81
20. AIR 1952 Ajmer 26
21. AIR 1953 Bho 26
22. AIR 1938 Lah 273
23. RLR 1987 (II) 278: (AIR 1988 Raj 33)
24. RLW 1963 (Raj) 336: (AIR 1963 Raj 195)
25. AIR 1966 All 271
26. AIR 1972 All 313
27. 1982 RLW 113: (AIR 1982 Raj 263)
28. 2000 (3) RLW (Raj) 1757
29. AIR 1961 Assam 1
30. 2008 (3) WLC 21: (AIR 2009 (NOC) 1651)
31. RLW 2002 (1) Raj 613
32. (1996 AIHC 3148)
33. AIR 1985 Guj174