

RAJASTHAN HIGH COURT

Kamla

Vs.

Amar Chand

Civil First Appeal No. 15 of 1989

(C.M. Totla, J.)

06.03.2009

ORDER

C. M. Totla, J.

1. Respondent No. 1 plaintiffs suit for pre-emptory right bearing No. 87/ 84 (6/81) before the Court of District Judge, Sirohi is decreed and challenged is the decree.
2. R1 is plaintiff, R2 defendant No. 1 is the purchaser, R3 the defendant No. 2 whose name because of his death is deleted vide order dated 22-10-2007.
3. Adjacent were the properties of P and D2 and P instituted a suit averring that (1) D2 without any notice to P, sold his house at south of plaintiffs property - sold vide registered sale deed dated 17-1-1980 and handed over possession to D1. Claimed preemption averring that wall between these adjacent houses from east to west of about 46 ft. is common of joint ownership. (2) This wall constructed by the original owner of these both houses. (3) On the first floor of P's house in one room, are two ventilators of one 1.25 x 2.5 ft. and for other room is ventilator of 1.5 x 2 ft. "similarly are too Mukhijas towards property of D2 uninterrupted air and light to plaintiff for more than 20 years and thus, is a easement, (3) Roofs of both the houses are on and supported by this common wall, (5) In rooms of first floor of P in this southern common wall are several almirahs, (6) Plaintiff seeks iron girder of roof rest on this common wall. Similarly, six wooden slippers of the one room rest on this common wall. Averring as above joint ness and ownership of wall and also easementary right, P claims right of preemption and further averred that plaintiff was and is ready to pay consideration amount of Rs. 18,500/- and as sale made without notice to plaintiff and so is intimated to defendants by registered notice dated 6-1-81, requested for decree of pre-emption and sale in plaintiffs favor on payment of Rs. 18,500/-.

4. The suit was instituted on 17-1-81 and soon after appellants making application, disclosed sale by D1 in their favor on 16-1-81 and following replies etc., plaintiff impleaded as defendant No. 3. It is alleged and admitted that property is sold by purchaser the defendant No. 1 to defendant No. 3 to 7 (trustees of **Gurudwara** Darbar Saheb on 16-1-81) without any notice to plaintiff.

5. Plaintiffs amending their plaint claimed pre-emption against respondents also on above grounds and also averred that right of defendant No. 3 to 7 is of inferior decree in relation to right of plaintiff and sale to defendant is only to defeat the right of plaintiff. Accordingly, claimed right of preemption and decree also against defendants No. 3 to 7 the appellants.

6. Appellants averred that property is purchased by "**Gurudwara** Saheb" and towards south of this property, is common joint wall of D2 and "Darbar Saheb" who have better right of pre-emption in relation to plaintiff, Appellants further averred that plaintiff has neither easementary right nor the wall is joint wall and so as such no pre-emptory right, Denied any ventilator, girder or slipper as is averred by the plaintiff. Plaintiff totally denying plaintiffs averments claim that southern wall which is sold property and northern wall of "Darbar Saheb" is one and the same constructed upon equal portions of land of the parties - in the wall towards "Darbar Saheb" are eight almirahs and also are many ventilators (cemented "Jaali") for more than 20 years and roof of these properties is supported by common wall so plaintiff suit is not maintainable.

7. Following issues were framed:-

(Vernacular matter omitted.....Ed.)

Plaintiff examined himself and witnesses Devilal P.W. 2 and Brij Mohan P.W. 3 for defendants, statements of D.W. 1, D.W. 2, D.W. 3 and D.W.4, were of the documents exhibited, Ex. 1 is the copy of the purchase deed DD 359 of northern portion sold property in favor of plaintiff-Ex. 2 is copy of notice and Exs. 3 and 4 A.D. Receipts - Ex. 5 plan of property - Exs. 6 to 10 positive photographs - Ex. 11 copy of revenue record and Ex. 12 copy of registered sale deed in favour of D. 1 - and Ex. 17 copy of sale in favor of "Gurusangat Darbar Saheb". For defendants exhibited are photographs Exs. A1 to A7.

8. Learned Judge deciding issues No. 1 to 5 in favor of plaintiff and issues No. 6, 7, 8 against the defendants decreed suit of pre-emption and directed sale in favor of

plaintiff on payment of consideration amount of Rs. 18,500/-.

9. Learned counsel for the appellants argued that (1) not any how proved is joint or common wall not proved, (2) no common or joint use of wall, (3) No easementary right, (4) No such ventilation or like thing be in use continuously uninterrupted to create easementary right (5) and even if any or all such elements or rights exist, then even no pre-emptory right can be in favor of the plaintiff, Argued that provisions of Section 6 are not applicable and appellants for this property if not better than at least at par with P for basics necessary for alleged pre-emptory rights and appellants having purchased, no right whatsoever of plaintiff is.

10. As above, basic arguments on behalf of the appellants is that no pre-emptory right for either alleged joint ownership/co-sharer or easementary rights can be Relying on (1) *LRs of Smt. Saire Kanwar Maloo v. Shri Daudas Mantri*; ¹ and (2) *Satya Narain v. Ismile others*, ² submitted that law and such questions stand settled and the appeal deserves to be accepted.

11. Learned counsel for the respondents argued that plaintiffs' pre-emptory right is recognized and enforceable as per provisions of Section 6 (3) of the Pre-emption Act. Argued that plaintiff and D2 are not only co-owner and co-sharers of the work but it is being jointly used by them and in addition respondent-plaintiff has easementary rights as his ventilators open towards this property and that roof and ceiling supports too also is on this wall. In sum and substance, argument of the respondent is that it is not only right over and in the wall, but these rights are coupled with easementary rights and that creates right of pre-emption.

12. Learned trial Judge, analyzing the evidence and for the reasons mentioned, has arrived at conclusion that the wall in between property is common and of joint ownership. Conclusion is also that the walls between property sold and property of Sri Darbar Saheb (appellant) also is common of joint ownership and use. But not proved that property sold by D2 and of plaintiff- in past owned by same person whereas properties of P and the one sold by D2 belonged to one and same so pre-emptory right of P (D2).

13. Thus, between property of plaintiff and related one and similarly between related property of plaintiff also, is a wall. Thus, three adjacent properties are and in middle is this property with both neighbors claiming pre-emption. Sale alleged is first on 17-1-80 in favor of D1 by D2 - then by D1 in favor of P on 16-1-81.

14. Considering oral evidence, P.W. 1 states that walls between the properties "*Sri Darbar Saheb*" are common and he has never observed the wall from other side. Plaintiff also accepts that on and in this wall between **Gurudwara** and disputed house, three wooden slippers are inserted. From oral evidence - and as per photos produced from either side, it clearly appeared that in wall between property of P and disputed property are some plaintiffs' almirahs and ventilators towards disputed property and wall is one for half properties, but similar is position for wall between disputed property and that of "*Shri Darbar Saheb*" and in that wall, are also some almirahs etc. So position of northern wall of disputed property in relation to plaintiff appears to be similar to that of southern wall of disputed property in relation to "*Gurudwara*", but property of P and D2 belonged to same person. But property in dispute and of "*Gurudwara*" not proved to have belonged to same person. So for rights whatsoever, if any, the basis are little more in favor of the plaintiff.

15. Section 6(1) of the Act is under:-

"Section 6(1). Persons to whom right of pre-emption accrues - (1) Subject to the other provisions of this Act, the right of preemption 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 stair case 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."

16. According to Section 6(1) of the Act, co-sharer or partner in the property may have a right of pre-emption. Meaning of co-sharer as per definition appearing in Section 2(i) is as under:-

"Section 2(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."

In the above definition, co-sharer is one who is owner, or proprietor (as) entitled to any share or part of property.

17. Here, in the instant case, plaintiff claims himself to be co-owner of the wall and also easementary rights based substantially on this wall - the wall is in between

plaintiffs property and this sold one property. On the one side of the wall, it's plaintiffs property and on other side is sold one property. Discussing various propositions held is that mere a co-ownership of the wall does not give right to pre-emption the transfer of adjacent immovable property. Plaintiff is claiming only a right on the basis of co-owner - no right in the property in any wall is even averred or involved. As above, it is only co-sharer or partner who is given right as per Section 6 but right only in the well between cannot be akin to a right in the "property" transferred. A sharer in the partition wall cannot be said to be a owner of share or partner for the property transferred. Plaintiff (if at all) can only be held to be entitled to use the wall which obviously does not entitle him to use of the property (transferred).

18. Averred rights of support to existing or to be made constructions on and over in the wall can best be a right to use the wall. Such easementary rights are provided by and protected by separate statutes and such right is in relation to the property, irrespective of ownership. Looking to above position and considering settled position a co-owner of only a wall situated in between two immovable properties have no right to preempt/disposal of property.

19. Argument that right as of co-sharer plus easementary right creates right to preemption too, does not sound merit. If a co-sharer cannot have pre-emptory right, the same cannot be with the help of the easementary right as easementary right by itself does not create any such right.

20. The suit was instituted on 17-1-81. As per plaint and as is also apparent by copy of sale-deed Ex. D2 property sold and transferred to B1 on 17-1-80 and as the subsequently disclosed and as per amended plaint property further transferred by D1 to D3 - the appellant on 16-1-81, that is just a day prior to institution of suit. As per findings of the learned trial Judge, common wall is in between property of plaintiff and the property involved and also exists a common wall between this property transferred and prior held adjacent property to be subsequent vendee (the appellant) Sri Guru Sangat Darbar Saheb. Thus, the appellants and plaintiffs both claim pre-emption on the basis of walls between their and this sold property. According to findings of the learned trial Court which are based on cogent reason, and no reason to interfere in the wall between the property of plaintiff and sold one and also for the wall between the property of appellant and property sold one position (including easement etc.) is almost the same. Thus, the property is transferred prior to institution of suit to a person having sound basis of a equal right of pre-emption. In such a contingency, as per provisions of Section 19 of the Act, the suit cannot lie.

21. For the above reasons, the appeal is to be accepted and is accepted. The decree dated 14-12-88 passed in Civil Suit No. 871 84 by the District Judge, Sirohi is set aside and the suit of plaintiff is dismissed. The parties to bear their own costs throughout.

Appeal allowed.

Cases Referred.

1. 2007 (3) DNJ (Raj) 1661: (AIR 2008 Raj13)
2. 2008 (2) RJT 1183