OUDH HIGH COURT

Ram Rathi

Vs

Dhiraji

(Kidwai, J.)

07.08.1946

JUDGMENT

Kidwai, J.

1. This second appeal arises out of a suit for pre-emption brought by the appellant in the Court of the Munsif, North Sultanpur.

2. The facts which gave rise to the suit are that the defendants-respondents 2 to 5 who are co-sharers in mahal Meopur Dalha in village Qamarpur, district Sultanpur, transferred 12 plots measuring 4 Bighas 14 Biswas in the said mahal to respondent 1 on 410-1938. The transfer was effected by means of a lease which carved out under-proprietary rights and transferred them on payment of a premium of L 300, reserving an annual rent of L 8-8-0. The plaintiff who is also a co-sharer in the same mahal brought the suit for pre-emption on the allegation that the transferee was a stranger.

3. All the defendants filed a joint written statement in which they denied the plaintiff's preferential right to pre-emption and they alleged that the suit was barred by limitation. They also pleaded that the plaintiff himself took a lease of another portion of land in the same mahal from the same transferors on the same day, and that the plaintiff and defendant 1 had agreed between themselves about the two leases and had thereafter jointly negotiated both the leases, with the transferors. They, therefore, pleaded that the plaintiff was estopped from claiming preemption.

4. The trial Court held that the suit was within time and that the plaintiff had a preferential right but it held that the plaintiff knew that the property in respect of which he had a right of preemption was being transferred for a definite price and he failed to assert his rights: consequently he was estopped from claiming preemption at a later stage. The suit was accordingly dismissed.

5. The plaintiff appealed and the Civil Judge, Sultanpur, has upheld all these findings. The plaintiff has come up to this Court in second appeal and his learned Counsel has urged (1) that mere knowledge of the sale and failure to protest is not sufficient to give rise to a plea of estoppel, (2) that, although the case reported in *Ekram Husain v. Pheru Husain*[1] to a certain extent supports the respondents' contention, it is not wholly applicable to the present case and the

other decisions upon which the lower appellate Court relied are also distinguishable, and (3) that estoppel can only be pleaded if the following elements are present:

> (a) offer of the property to the intending preemptor at the price for which it is eventually sold,
> (b) refusal by the pre-emptor to purchase it and
> (c) consent by the pre-emptor to the purchase of the property by the vendee. He also urges that estoppel will only arise if there is an element of fraud in the conduct of the person against whom it is pleaded.

6. Stated in the abstract these propositions are unexceptionable. The difference only arises when we come to consider how the various elements set forth above are to be proved. Mr. Moti Lal Tilhari invites me to hold that express consent must be proved and that it is no fraud if a person knowing that he has a right of preemption in respect of a sale, keeps quiet and allows the vendee to spend his money in the purchase and then subsequently sues for pre-emption.

7. In support of his contention he has cited a large number of decisions of the Judicial Commissioner's Court and of this Court, a consideration of which leads me to the conclusion that the rigour of the law relating to notice has gradually been relaxed.

8. Section 10, Oudh Laws Act requires that notice should be given in writing through a Court and the earlier decisions held that no evidence of an oral notice could be given and that the mere omission or refusal to accept an oral offer of sale does not, of itself and without some positive act of the pre-emptor by way of discharging the vendor, constitute a waiver of the right of pre-emption or dispense with performance of the obligation to serve a written notice." vide *Maryam Begam v. Tika*[2]

9. Then came the case in *Bhagwat Singh v. Nazir Husain*[3] upon which the appellant's learned Counsel chiefly relied for this part of his argument. In this case it is stated, at p. 397 of the report, as follows:

> There is thus a series of cases in which it has been held that, although notice in writing is not given by the vendor, the plaintiff may be estopped from claiming: pre-emption, but in all the cases in which the plaintiff has been held to be estopped it has been proved that the property was offered to him at a certain price, that he refused to purchase at that price and that he expressly consented to the purchase of the property by the defendant.

10. This view of the law was reiterated in *Bank of Upper India v. Munshi Alopi Prasad*[4] Then came the case of *Hanuman Singh v. Adiya Prasad*[5] which made a considerable departure from the previously existing position. In that case no notice as required by Section 10 of the Oudh Laws Act was given. At p. 327 of the report the learned Additional Judicial Commissioners say:

> It will clear the ground if we state that we cannot concur with the learned
> Subordinate Judge in finding that the defendants were bound to prove by direct evidence, that the conduct of the plaintiff induced them to conclude the purchase. If it can be proved

> that the plaintiff had assented to the sale to the three defendants then it may be presumed that the defendants were relying on his acquiescence and were induced by it to complete the purchase. We cannot presume that they would, apart from any acquiescence by the plaintiff, have purchased the property and incurred the risk of a preemption suit.

11. The cases reported in *Bhagwat Singh v. Nazir Husain (02) 5 O.C. 395(Supra)* and *Bank of Upper India v. Munshi Alopi Prasad (07) 10 O.C. 257(Supra)* were then mentioned and the learned Additional Judicial Commissioners proceed at pp. 328 and 329 of the report, as follows:

> The general principle of these rulings appears to us correct, namely, that if acquiescence is pleaded it must be an intelligent acquiescence by a person who is cognizant of all the material facts, which of course will include the person to whom the vendor proposes to sell. We are not prepared to dissent from the view that, where estoppel by acquiescence as distinct from estoppel by the prescribed notice is pleaded, it will be necessary to show that the pre-emptor had full knowledge of what was going on and not merely the knowledge that there was a proposal to sell the property to some one or another for a certain price. We do not, however, think that a formal offer to the pre-emptor is necessary when it is obvious from the attendant circumstances, as in this case, that the pre-emptor is neither willing nor able to say the purchase price.
>
> Thus this decision is authority for the proposition that waiver and acquiescence may be inferred from the circumstances, and that there need not be an offer and refusal or express consent to the sale.

12. In *Jagannath Pershad v. Chandi Pershad* all the previous law was reviewed and it was laid down that "it is now too late in the day to call in question the applicability of the rule of estoppel by acquiescence in cases of pre-emption in the Province of Oudh." In that case particular mention was made of the decision in *Hanuman Singh v. Adiya Prasad A.I.R. 1919 Oudh 1(Supra)* and acquiescence was based upon the refusal of the pre-emptor to purchase.

13. Their Lordships of the Judicial Committee recognised the same principle in *Pateshwari Partab Narain Singh v. Sitaram*[6] and they refer to the cases reported in *Bhagwat Singh v. Nazir Husain (02) 5 O.C. 395(supra). Bank of Upper India v. Munshi Alopi Prasad (07) 10 O.C. 257(Supra)* and *Hanuman Singh v. Adiya Prasad A.I.R. 1919 Oudh (Supra)1* as establishing that principle. In the case before them, the vendor had divided the property to be sold into blocks and separate plans etc. were prepared of each block. The pre-emptor had obtained a list of all the blocks and their prices and had definitely stated to the agent of the vendor that he would purchase one of the lots only. There was, however, no express consent to a sale to the actual purchaser.

14. The same view was taken by a Pull Bench of this Court *in Gur Bukhsh Singh v. Harnam Singh*[7], in which also the only requisites for the operation of estoppel were said to be the offer of his property at the price at which it is eventually sold and refusal to purchase.

15. In none of these cases, either of the Judicial Commissioners' Court, or of the Privy Council or of the Chief Court was the presence of 'fraud' held necessary to found a plea of estoppel, though

in B*hagwat Singh v. Nazir Husain (02) 5 O.C. 395* (Supra)and *Bank of Upper India v. Munshi Alopi Prasad (07) 10 O.C. 257(supra)* express consent was held necessary.

16. Then came the case reported in *Ekram Husain v. Pheru Husain 1937 O.W.N. 1113(Supra)* in which the consent and the refusal to purchase was inferred from the conduct of the parties. This was followed by *Ram Avadh Pande v. Ghisa Pande*[8] in which all the previous decisions are reviewed and approved and then occurs at p. 729 a passage upon which the appellants' learned Counsel founds his argument that fraud must be proved to justify estoppel. As has already been remarked in none of the previous cases was any question of fraud raised and moreover the kind of fraud contemplated in the case under discussion is clearly established in the present case. In the quotation given in that case from the judgment of Fry J. the elements which constitute 'fraud' when estoppel by acquiescence is pleaded are as follows:

> (1) The plaintiff must be mistaken as to his legal rights;
> (2) The plaintiff must have expended some money or done some act on the faith of the mis-taken belief;
> (3) The defendant, the possessor of the legal right must know of the existence of his own right;
> (4) The defendant must know of the plaintiff's mistaken belief; and
> (5) The defendant must have encouraged the plaintiff in his expenditure of money or in the other acts which he has done "either directly or by abstaining from asserting his legal right

17. In the present case if the word "defendant" is substituted for "plaintiff" and vice versa since estoppel is pleaded against the plaintiff all the above elements are to be found.

18. Firstly defendant 1 obviously thought that he had a right to purchase, since the plaintiff, who could preempt was not objecting; secondly defendant 1 spent money in getting a sale deed and in stamp duty and registration etc., thirdly, the plaintiff was aware of the existence of his right to pre-empt; fourthly, the plaintiff was aware that defendant 1 was taking the sale thinking that he was entitled to take such sale and, lastly, the plaintiff abstained from asserting his legal right and thus encouraged defendant 1 in his expenditure of money.

19. The Courts below have found as a fact, on evidence which exists on the record, that the plaintiff was present at the time when the lease in favour of defendant 1 was written and executed and also when it was registered and that the rate at which the

plaintiff himself purchased land by a deed of the same date was the same as that paid
by the defendant. Prom these findings the Courts below have come to the conclusion that the refusal of the plaintiff to purchase at the ascertained price and his consent to the purchase by the defendant may be inferred. On the analogy of the case reported in *Ekram Husain v. Pheru Husain 1937 O.W.N. 1113(supra)*, the Courts below were perfectly justified in coming to this conclusion and I see no reason for interfering with the judgment of the Courts below. The appeal, therefore, fails and is dismissed with costs.

Cases Referred.

[1] 1937 O.W.N. 1113
[2] (98) 1 O.C. 254
[3] (02) 5 O.C. 395
[4] (07) 10 O.C. 257
[5] A.I.R. 1919 Oudh 1
[6] A.I.R. 1929 P.C. 259
[8] A.I.R. 1941 Oudh 611
[7] AIR 1933 Oudh 134