

Sumitra Devi Vs. Rameshwar Dayal and ors.

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Court : Delhi

Decided On : Jul-29-1988

Reported in : 36(1988)DLT217

Judge : D.P. Wadhwa, J.

Acts : [Limitation Act, 1963](#) - Sections 5; Punjab Preemption Act, 1913 - Sections 16; [Delhi Laws Act, 1912](#); Punjab Pre-emption (Repeal) (Amendment) Act, 1973; [Evidence Act, 1872](#) - Sections 57

Appeal No. : Regular Second Appeal No. 24 of 1974

Appellant : Sumitra Devi

Respondent : Rameshwar Dayal and ors.

Advocate for Def. : Mr. Gupta

Advocate for Pet/Ap. : G.N. Aggarwal and; P.D. Gupta, Advs

Judgement :

D.P. Wadhwa, J.

(1) This is defendant's second appeal. She failed in a suit for pre-emption filed by the respondents-plaintiffs in the trial court as well as in the first appellate court.

(2) It is unnecessary to give the facts in detail suffice to note that plaintiffs, the three brothers, as co-sharers filed a suit for possession by way of pre-emption in respect of 1/4th share of house No. 2256 (old)/4529-30 (new) Daiwara, Nai Sarak, Delhi, which was purchased by the defendant by a sale deed which is dated 8th January, 1969. The suit was filed on 6th January, 1970. The whole of this house belonged to four brothers. Three of them by different also deeds dated 16th August, 1967, 26th August, 1967 and 13th February, 1969 sold their respective shares to the three plaintiffs who, as noted above, are again brothers. The fourth brother of the original owners sold his 1/4th share to the defendant for a consideration of Rs. 8000.00 . This led to the filing of the present suit. On pleadings of the parties the trial court framed the following issues :

1. Whether the plaintiffs have superior right of pre-emption Opp 2. Whether the plaintiffs are estopped from filing the suit by their own acts and conduct Opd 3. Whether the suit is not properly valued for purposes of court fee and jurisdiction Opd 4. Whether the sale has not been for consideration's noticed in the sale deed Opp 5. Relief.

By judgment and decree which is dated 24th August, 1972 the trial court decreed the suit. It held all the issues in favor of the plaintiffs. The defendant appealed. There was no serious challenge to the 3rd and 4th issues. The first appellate court affirmed the judgment and decree of the trial court by its judgment dated 15th October, 1973. The defendant then filed this second appeal.

(3) This second appeal was filed on 14th January, 1974. The appeal was returned with the objection that the court fee was deficient by 75 paise. When this deficiency was made good at that time the Registry raised an objection that the appeal had become barred by limitation. The defendantappellant, therefore, filed an application under Section 5 of the Limitation Act, it being C.M. No. 213/74. There has been no opposition to this application. In the circumstances also I find there is sufficient cause for the condensation of delay. The application is, therefore allowed. Then a second application under Section 5 of the Limitation Act was also filed by the appellant, it being C.M. No. 688/74 It was on the ground that certified copy of the judgment of the trial court could not be filed in time though

when the appeal was a true copy of the judgment was filed along with the appeal which also bore a court fee stamp of Rs. 2.00 . Not only that certified copy was filed late but it was pointed out during the course of arguments that it did not bear any court fee of Rs. 1.25 as required under the law. Mr. Aggarwal said that the court fee stamp affixed on the true copy should be taken to have been affixed on the certified copy. This argument was countered by Mr. Gupta, learned counsel for the respondents, and he said that the certified copy should have been separately stamped with requisite court fee. In support of his contention he referred to a decision of this court in *Sh. Phalwant Singh v. Sh. Jai Narain Tripathi* 1980 (2) Rlr 303. I need not, however, resolve the controversy on this point. I find that this appeal has been pending for the last 15 years and it would be much unrealistic to dismiss the same on the ground that the certified copy did not bear the court fee stamp. I would, therefore, not only condone the delay in filing the certified copy of the judgment but permit the appellant to affix the requisite court fee on it. This application C.M. 68S/74 thus also stands allowed.

(4) The argument of Mr. Aggarwal has been that the Punjab Preemption Act, 1913 (for short 'the Act') has since been repealed by the Punjab Pre-emption (Repeal) Act, 1973, and as such the suit was incompetent. It is difficult to appreciate the argument of Mr. Aggarwal. The Act was extended to the Union Territory of Delhi under the [Delhi Laws Act, 1912](#) by a notification issued in May, 1939. Repeal of this Act in Punjab by the Repealing Act of 1973 would have no bearing on the applicability of the Act to Delhi. The repeal of the Act in Punjab does not automatically repeal the Act as in force in Delhi. Mr. Aggarwal conceded that he was unable to lay hand on any judgment in support of the proposition canvassed by him. Rather the following observations of Sarkar J. in *Bhau Ram v. Baij Nath Singh and others* : AIR 1962 SC1476 would be quite relevant:

'THE learned counsel for the appellant referred to various Acts which have gradually abolished the right of pre-emption. He pointed out that by Act X of 1960 of the Punjab Legislature Section 16 has in fact been repealed as a whole and has been substituted by a provision creating a right only in a tenant to preempt the property held by him when the landlord desires to sell it. Punjab Act X of 1960 however has not been extended to Delhi and here the Punjab Pre-emption Act of

1913, the Act with which we are concerned, still applies'.

(Italics supplied.)

(5) Admittedly the plaintiffs are co-sharers in the property in question. They have a right of pre-emption. In Bhau Ram's case the court struck down the 6th ground 'vicinage', in Section 16 of the Act for vesting the right of pre-emption in respect of urban immovable property as unconstitutional. Right of pre-emption based on co-sharership was held to be a reasonable restriction on the right to acquire, hold and dispose of property and was held to be in the interest of general public. Validity of the law of pre-emption on the ground of co-sharership is, therefore, beyond any challenge. Thus it could not be disputed that the plaintiffs were entitled to a right of pre-emption when sale in question had been completed and they could bring the suit to enforce those rights. Then, Mr. Aggarwal said even if law of pre-emption was held to be applicable in Delhi, it had to be seen whether there was any such custom in the locality in which the suit property was situated. He said there was no such evidence and that onus to prove such a custom was on the plaintiffs. Also according to Mr. Aggarwal custom must be alleged in precise terms and it must be established on the basis of the pleadings and further that there should be satisfactory evidence for that purpose. In paragraphs 3 and 4 of the plaint the plaintiffs did state that there was a custom in the locality that a co-sharer would have a preferential right to purchase the share of the other co-sharer and further the premises in question were situated in old city of Delhi in Daiwara, Nai Sarak within the boundary walls of old Delhi where the customs of pre-emption had judicially been noticed and recognised and further that the Punjab Pre-emption Act, 1913 was applicable to Delhi. In support of this contention Sh. Ganpat Rai, the father and attorney of the plaintiffs, appeared as a witness. He deposed about the right of pre-emption in the co-sharer as prevalent in the locality. He, however, stated that he did not remember any instance in the locality where sale of undivided share might have been pre-empted by the co-sharer but he said he had read many judgments of the Courts in that regard and also said that the judgments pertained to the properties situated in Ballimaran and other localities nearby. The defendant in her evidence made no such averments that there was no such custom. Even in the written statement there was a bare denial of the custom

pleaded by the plaintiffs. Learned lower appellate court referred to a few reported decisions wherein it had been held that customs of pre-emption prevailed generally throughout the city of Delhi bounded by the city walls constructed during the Mughal period. Reference was made to a judgment in *Nawal Kishore and others v. Amir Khan* and On. 1907 Plr 282. In this judgment the custom of pre-emption in the Nai Sarak area was specifically recognised. In fact, no dispute was raised that such a custom did not prevail in that area. Reference to 'Egerton Road' in that judgment would mean Nai Sarak, as the road is now known, though again it is 'stated that its name has been changed. The plaintiffs have therefore, been able to prove the customs as alleged. In *Bhau Ram's case* (supra) the Supreme Court recognised the law of pre-emption as existing in Delhi Under Section 57 of the Evidence Act all customs, general or otherwise have to be proved. There is, however, ample authority for the proposition that when a custom had been repeatedly recognised by the court it passed into the law of the land and the proof of that custom then became unnecessary. As noted above, reference by the courts below had been made to various pronouncements recognising the customs of pre-emption as prevalent in the walled city of Delhi. Since, the custom relating to right of pre-emption has been repeatedly recognised by the courts it became entitled to judicial notice. (See *Ujagar v. Singh Mst. Jeo*, : AIR 1959 SC1041). It, therefore, has to be held that custom of pre-emption existed in the locality in question and the plaintiffs had the right of pre-emption.

(6) Then, Mr. Aggarwal concentrated his attack on the second issue. He said that the conduct of the plaintiffs was such as to debar them from claiming any relief in the suit. In the written statement in the additional pleas the appellant-defendant had contended that the plaintiffs and their father had no means to purchase her share and they had informed her so. In fact, according to the appellant-defendant she had been induced by the plaintiffs and their father to buy the share in the house. She further claimed that the negotiations for purchase of the share by her were through the intervention of the plaintiffs themselves. Then, she said that but for the inducement from the plaintiffs she would not have purchased the share in question. This plea of estoppel was to be proved by the appellant-defendant.

(7) The first appellate court held that Laxmi Narain, the vendor, who sold his share in question to the appellant-defendant had offered to sell his share to Ganpat Rai, father of the plaintiffs, who declined to purchase for certain reasons. But the court also held that any representations made to Ganpat Rai or his conduct could not be imputed to the plaintiffs. Mr. Aggarwal said that in fact the purchase of shares in the house earlier by the plaintiffs also subsequently after the sale of share by Laxmi Narain to the appellant-defendant was benami and that actual owner was Ganpat Rai. In this connection he referred to power of attorney (Ex. PW-3/1) executed by Rameshwar Dayal, one of the plaintiffs, in favor of his father Ganpat Rai. But, then there is no term in this document whereby Ganpat Rai could be said to have been authorised by Rameshwar Dayal to accept any notice on behalf of Rameshwar Dayal or do any other act on his behalf so as to operate as an estoppel against Rameshwar Dayal. Mr. Aggarwal also said that court fee stamp for filing the suit and the non-judicial stamp for purchase of shares in the house were purchased by Ganpat Rai. Thrust of his argument was that Ganpat Rai was actually the owner and that any representations made by him should be taken to be those of the plaintiffs. I am afraid I cannot agree to this submission. There is no such plea in the written statement. No such ground is also taken in the grounds of appeal. Mr. Aggarwal cannot plead an altogether different case. There has to be pleading and evidence in support thereof for any particular plea.

(8) It was then contended that since none of the plaintiffs appeared as a witness an adverse presumption should be drawn against them and whatever was stated by the appellant-defendant in the written statement, on the plea of estoppel should be accepted. He said if the plaintiffs or any one of them had come in the witness box, he would have shown that the plaintiffs had no money to buy the share in question and that they induced the appellant-defendant to buy the share and that they had full knowledge of the purchase of the share by the appellant-defendant. Mr. Aggarwal did refer to a few decisions as to when presumption should be raised against the party not appearing as a witness. I cannot accept this contention as well. No such plea was raised in either of the court below or even in the grounds of appeal before me. Then, under Order 18, Rule 2 of the Code of Civil Procedure, as amended by the Punjab Amendment, as applicable to Delhi,, the appellant-defendant could have asked the court to require the plaintiffs to examine

themselves as witnesses in the case. Explanationn I and II were added to Rule 2 of Order 18 of the Code and are as follows :-

'Explanation I- Nothing in this rule shall affect the jurisdiction of the court, of its own accord or on the application of any party for reasons to be recorded in writing, to direct any party to examine any witness at any stage. Explanationn II-This expression 'witness' in Explanationn I shall include any party as his own witness.'

After the amendment of the Code in 1976 sub-rule (4) was added to rule 2 and it is as under :-

'(4) Notwithstanding anything contained in this rule, the Court may, for reasons to be recorded, direct or permit any party to examine any witness at any stage.'

The appellant-defendant filed no application in the court for any direction to the plaintiffs to examine themselves as witnesses. She, therefore, cannot take any advantage from the fact that none of the plaintiffs appeared as a witness. Ganpat Rai their father and attorney, appeared as a witness and was cross-examined. It was not suggested to him that the plaintiffs were not appearing as their witnesses for any particular reason. No presumption can be raised against the plaintiffs for their non-appearance as witnesses as Mr. Aggarwal would like me to do. Reference may also be made to Section 19 of the Act which provides giving of notice to a person having a right of pre-emption. The notice is to be given by the person proposing to sell his share. The notice is to be given through the court having jurisdiction over the area in which the property in question is situate. Admittedly, no such notice was given. I will note that Laxmi Narain who sold his 1/4th undivided share in the house to the appellant-defendant was also impleaded as a co-defendant in the suit.

(9) I do not find any reason for me to differ from the findings of the courts below that the plaintiffs had means to buy the share of the appellantdefendant. Indeed in my view no fault could be found in the appreciation of the evidence by the courts below. The second issue has to be decided against the appellant-defendant.

(10) Accordingly, the appeal is dismissed with costs and the judgment and decree of the courts below are affirmed.

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