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Mithan Lal Vs. Sultan Singh Etc.

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Court : Delhi

Decided On : Apr-26-1974

Reported in : ILR1974Delhi375

Judge : S.N. Andley and; Yogeshwar Dayal, JJ.

Acts : Punjab Preemption Act, 1913 - Sections 5

Appeal No. : Regular First Appeal No. 95D of 1963

Appellant : Mithan Lal

Respondent : Sultan Singh Etc.

Advocate for Def. : Mr. Raizada

Advocate for Pet/Ap. : Sultan Singh and; D.N. Raizada, Advs

Judgement :

Yogeshwar Dayal, J.

(1) This judgment will dispose of two connected appeals: R.F.A, 95-D/63 (Mithan Lal v. Sultan Singh etc.) and R.F.A. 98-D/64 (Mithan Lal v. Maya Rani etc.) which arise out of two consolidated suits. Both these suits were dismissed by a common judgment and decree, dated 30th March, 1973, passed by a Subordinate Judge, First, Class, Delhi: The Plaintiff, Mithan Lal, claimed a decree for possession by

pre-emption of property bearing Municipal Nos. 1744-1745 and 1747-1748 which is a double storeyed building in two separate suits; one relating to ground floor and the other relating to first floor.. So far as the suit for ground floor was concerned, it related to a sale by respondent Sumati Devi, in favow of Sultan Singh for Rs. 6,0001- and so far as the suit relating to firs; floor was concerned, that related to a sale by the same vendor in favor of Maya Rani, wife of Sultan Singh, for Rs. 4,000/ The plaintiff-appellant's case regarding ground floor was that Sumati Devi owned a double storeyed building mentioned above in Kucha Lattu Shah, Dariba Kalan, Delhi, and in between was a passage of the appellant's house No. 1746 which adjoined property in dispute at the back. It was pleaded that the vendor Sumati Devi by sale deed dated 25-3-1960 registered on 20-6-1960 had sold the ground floor to respondent. Sultan Singh, which consisted of four godowns bearing Municipal Nos. 1744, 1745 and 1748 in Kucha Lattu Shah, Dariba Kalan, Delhi. It was further pleaded that the custom of pre-emption prevailed in Delhi and in the Locality where the property sold was situate. The appellant claimed the right of pre-emption only under clauses fourthly, fifthly and sixthly of section 16 of the Punjab Preemption Act. as extended to Delhi. Clause sixthly was not pressed as the said clause was declared ultra virus of the Constitution by the Supreme Court. The remaining grounds for pre-emption were thus pressed under clauses fourthly and fifthly which were described as under:

(I)The sale is of property having a common entrance from the street with the property of which plaintiff is the owner.

(II)The sale is of a serviant property and the plaintiff is the owner of the dominent property or vice versa.

(III)The karis-and-beams of the plaintiff rest on the common wall and the water and spout of the plaintiff's property passes through property sold and the door of his room opens and his Chhajja overhangs on the passage and lic has right of easements in respect to these over the property sold.

(2) In the connected suit in respect of the first floor, the same grounds were urged for claiming pre-emption except that the property was described as upper storeyed of the building. It was pleaded that the vendor had recently sold the whole property

to Sultan Singh but as a matter of ingenuity got prepared a separate sale deed for that portion.

(3) So far as the suit relating to ground floor is concerned, the plea of the defendant was that the description of the property given in the plaint was not correct and the two storeyed buildings comprised four shops on the ground floor and offices and residential portions in the first and second floors. The custom of pre-emption was also denied. it was further pleaded that the plaintiff-appellant was estopped from contesting the description of the property as mentioned in the sale deed, namely, four shops; the ownership of the plaintiff was denied. It was pleaded that since the property consisted of shops it was not pre-emptible under section 5 of the Act.

(4) The vendor, Smt. Sumati Devi, filed a separate written statement in both the suits. In the suit against Sultan Singh with respect to the ground floor, she admitted the allegation the plaintiff that the property sold included four godowns and at the same time mentioned that the property sold was such as described in the sale deed. The factual averments of the plaintiff which gave him the right of preemption were also admitted.

(5) In the other suit, the vendee, Maya Rani, filed her own written statement as defendant No. 1 and she denied the ownership of the plaintiff and also pleaded that property sold to her was also commercial in nature. The prevalence of custom of pre-emption was also denied. On merits it was further pleaded that the alleged Chhajja does not belongs to the plaintiff. It was pleaded that the Chhajja is the property of the answering defendant, Maya Rani and the question is resjudicata in view of the decision dated 25-3-1927 in Appeal No. 145 of 1926(Mithan Lal v. Bala Parshad) decided by Mr. D. Johnstone, District Judge, Delhi, wherein it was decided that Mithan Lal was not the owner of the said Chhajja, but Bala Prashad, predecessor-in-interest of the vendor was the owner. The defendant further pleaded that even if the plaintiff be held to be the owner of the house at the back of the property in suit. he had no preferential right of pre-emption. It was pleaded that the preferential right of pre-emption, if any, vested in Sultan Singh, the owner of the shops, on the ground floor just below the premises in question. The other

grounds on which pre-emption was claimed were also denied. The second suit also which was against Maya Rani, the preferential ground for cvlaiming pre-emption were admitted by Smt. Sumati Devi.

(6) The trial court framed various issues in both the suits but the only points on which arguments were addressed related to the question of the ownership of the adjacent property by the plaintiff; the question of nature of the property both on the ground floor and first floor and the question whether the plaintiff has superior right to claim pre-emption under clause fourthly and fifthly of section 16 of the Act. The trial court inter alias held that the property was situated within the walled town of Delhi and thereforee the custom of preemption applied to the property. This finding was not challenged before us. The trial court also held that the ground floor consisted of shops and thereforee in view of section 5 of the Act, the building was not subject to the law of pre-emption. The trial court upheld the ownership of the plaintiff but decided the question of right of pre-emption against the plaintiff.

(7) The respondent seriously challenged the finding of the trial court that the plaintiff is the owner of house No. 1746, Kucha Lattu Shah, There is a mass of evidence like house-tax bills right from the very beginning and entries in the Survey Register of the Municipal Committee prepared more than 60 years earlier and entries in the house tax register which show the plaintiff as the owner of the aforesaid house. Even Bala Parshad, the predecessor-in-interest of the vendor and the vendees had been litigating with Mithan Lal on the basis of his ownership of the adjacent property and it is too late in the day for the respondent to challenge the ownership of the plaintiff. We see no reason to interfere with the finding of the trial court upholding the ownership of the plaintiff qua his own property.

(8) Mr. Sultan Singh, learned counsel for the appellant has strongly contested the finding of the trial court that ground floor consisted of shops. According to the learned counsel, the ground floor consisted of merely godowns which were not 'shop' within the meaning of section 5 of the Act and thereforee they were subject to the law of pre-emption. In support of his submission that ground floor consisted of godowns, the learned counsel relied mainly on the statements of Bhagwan Singh, Advocate (Public Witness 1); Ambay Dayal Mathur, Advocate (Public

Witness 2); Raghbir Dayal (Public Witness 6) ; Ram Samp (Public Witness 8) ; Ram Gopal (Public Witness 10) ; Amar Nath (PWI 1) and the Plan prepared by Phool Chand Goyal (Public Witness 4) besides the written statement filed on behalf of Sumati Devi, vendor, wherein the vendor had admitted the fact that the ground floor consisted of godowns and her own statement in court.

(9) Mr. Sultan Singh further submitted that the Court is not bound by the recitals as to the nature of the property mentioned in the sale deed, and the Court can determine of its own the true nature of the property. It was submitted that in order to determine whether the property is a shop or not, one should see what was the user of the premises at the time of the sale or prior to it and the length of such user and the main purpose of the property, besides locality and situation of the property. It was further urged that before the property reached the hands of Sumati Devi, the vendor, no description of shops was given in the earlier sale deeds. Various rulings were cited to show how the main purpose of the building has to be determined and the meaning of the word 'shop', particularly the case reported as Bhamba Ram and another v. Allah Bakhsh (69 P.R. 1915) (1) decided by Shadi Lal and LeRossignol, JJ. and followed in Wadhawa Mal v. Lachman Das and others (A.I.R. 1924 Lahore 213) (2) decided by Martineau, J. It has been held in the aforesaid judgments that the wond 'shop connotes the place where the business of sale and purchase takes place and is different from a place which is merely used as godown or for other business activities. We respectfully agree with this proposition of law, but the question is of its applicability to the facts of the present case.

(10) Mr. Raizada, learned counsel for the respondent relied on various documents to show that the property in the ground floor has been used and treated as 'shops' for a very long time before the sale. He relied on plan. Exhibit D-22, which was a plan filed by the plaintiff, Mithan Lal himself in a suit instituted on April 10, 1928, against Bala Parshad showing the ground floor as 'shops'; Exhibit D-9, a plan filed by the vendor, Maya Rani, in a suit filed by her on February 27, 1958, against Jogi Dass (father of Sultan Singh); Exhibit D-l, a rent receipt dated 20th June, 1960, showing tenancy premises of Jogi Dass executed by the vendor, Sumati Devi, which mentions the details of the accommodation as 'EK Dukan Uper Kl Sari

MANZIL'; Exhibit D-4, an entry from the accounts books of Jogi Dass which shows rent of Rs. 8/4.00 paid for shop for one month to Lala Bala Pershad, predecessor-in-interest of the vendor; Exhibit D-2, a rent note executed by Ram Gopal (Public Witness 10) which shows Ram Gopal having taken on rent a shop of two doors as late as 27th November, 1931. Besides the aforesaid documentary evidence, the learned counsel also relied upon the description of the property given in the sale deeds which is the subject-matter of the suit wherein the ground floor property has been described as 'shops' and also the Inspection Report of the trial court which also disclosed that there are four shops on the ground floor. The Inspection Report further state's that the shops in question are situated in a lane where all the premises in the nighbourhood are being used as shops. The plan, Exhibit D-l, was got prepared by the defendants which shows certain other shops in the lane where the property in dispute is also situated. Pw 1 Bhagwan Singh Advocate did not depose anything about the property in dispute being a shop but he admits existence of various business houses situated in Kucha Lattu Shah. Essentially this witness was produced to prove the prevalence of the custom of pre-emption. Public Witness -2, Ambay Dayal Mathur is again a witness to prove prevalence of custom of pre-emption though he also deposed that there is no retail shop in Kucha Lattu Shah. He however, admitted that he last visited the lane only about 20 years before the impugned sales deeds were executed.

(11) Public Witness 6, Raghbir Dayal is a witness as to the nature of the property in dispute. In cross-examination this witness admitted that four or five persons were doing electric work and the work of goldsmith in Kucha Lattu Shah and that the tea vendors, sit in the lane outside the house. He, however, stated that there were no shops of electric goods in the building in dispute but there were godowns. He also stated that he had not seen Jogi Dass running the shop, but Jogi Dass had been dealing in caps and had been doing this business for the last 25 years in the upper portion of the house in dispute in the Katra, that customers used to visit him upstairs, and the ground floor is a godown. This witness was produced by the plaintiff only to prove his adoption as a son of Sanwal Dass, but appears to be an interested witness and his statement that there are no shops but only godowns on the ground floor appears to be incorrect. In the plan prepared by Public Witness 4, Phool Chand Goyal which has been filed as Exhibit Public Witness 4/2, the ground

floor has been described as a 'baithak' which is not even the case of the plaintiff, but that plan also describes numerous properties in the lane as factories or shops.

(12) Public Witness 8, Ram Sarup, is a resident of Kucha Lattu Shah and essentially a witness to prove the preferential right of pre-emption of the .plaintiff, though he makes a statement that there is no shop in the property in dispute. He goes to the extent of saying that he lias not seen Jogi Dass doing the business of caps and has seen no shop of Jogi Dass. He admits that now he has been running a retail shop in the house for the last two years. He has tried to show his independence by saying that plaintiff's father was not personally known to him and goes on to suggest that plaintiff personally came to invite him and one fails to understand how a person can personally go to invite somebody unless he knows him well. This witness appears to be going out of his way to show that he is not known to the plaintiff and as such does not appear to be a truthful witness.

(13) Public Witness 10, Ram Gopal executed the rent note, Exhibit D-2, as early as November 27, 1931, in favor of Bala Parshad, predecessor-ininterest of Smt. Maya Rani, which expressly describes the property let as shop but he goes to the extent of saying that he was to have a godown for glass and wood and the same was taken for that purpose. He also appears to be a totally false witness who tries to get over his own rent note which describes the premises in dispute as shop.

(14) Public Witness 11, Amar Nath is the next witness relied upon by the plaintiff and is the husband of the vendor. He states that the proprietor of Parbhat Electric had been using one of the ground floor premises as godowns but in the same breath mentions that one shop has been leased out to picture dealers and they used the same as godown. Then we have the statement of Mithan Lal plaintiff himself as Public Witness 13 who deposed that Kucha Lattu Shah is a residential lane and not a Bazar and that he never saw any retail shop there and the property in dispute has been used either as a godown or as office or as a 'baithak'. He, however, admits that for the last few years there are factories in the lane.

(15) The vendor, Maya Rani, was examined on commission and she gave a very guarded statement. In one breath she said that there is no retail shop in the Gali and also stated that she never saw the ground floor premises being used as retail

shop. But then, again, she described the property on the ground floor as four shops and named the persons in occupation of she said shops, including Jogi Dass who was alleged to be in occupation ef the shop since 1925 and had been doing business therein since the No other evidence was led by the plaintiff to prove the nature and description of the property.

(16) To summarise, the defendant vendees have tried to establish the nature of property as shops from numerous documents including the plan filed by the plaintiff himself in his suit against Bala Parshad, predecessor-in-interest of the vendor, as v/ell as the plan filed by Smt. Maya Rani herself in a suit against Jogi Dass, father of one of the vendees, which show and describe the property on the ground floor as shops; and the rent deeds in favor of Ram Gopal (Public Witness 10) as also the receipt, Exhibit P-l and the entry Exhibit P-4 of the accounts books besides the description of the property in the sale deeds. Exhibits D-38 and D-40 as shops together with the plan attached thereto showing the property as shops. In view of this mass of documentary evidence produced on behalf of the vendees no rereliance can be placed on the oral testimony of the witnesses produced by the plaintiff, who appear to be highly interested in him. After considering the entire evidence, we have no hesitation in holding that the description of the property given in the sale deeds in dispute as shops is correct and is sufficiently corroborated by other independent evidence. It is the own evidence of the plaintiff that the first floor is being used as office for the business of caps and apparently the first floor is used for purposes incidental to the shops on the ground floor.

(17) In the case of Lal Chand and others v. Mt. Begam A.I.R. 1923 Lah 262 (3) a Division Bench of the Lahore High Court, consisting of Broadway and Campbell, Jj, held that the question whether a building is a shop or a residential house must be decided with reference to the Chief or most important purpose to which the building is devoted. Where the two principal rooms of the house had been made into shops and the primary value of the building lay in those shops and the rest of the house was neglected and was of comparatively insignificant value, and the shops opened into a regular bazar full of other shops, and they had been occupied contignuously as shops for many years, it was held by the said Division Bench that the building thus became a block of shops, and the mere fact that the owner or

owners continued to live in the uncared-for upper storey which could not be put to commercial use docs not take away from the building such a charactov, and although the upper storey may not be occupied by the lessees of the shops, it is none-the-less a mere appendage to the shops in its present condition.

(18) Another Division Bench of the Chief Court of Lahore in Raman Mal v. Bhagat Ram (17 Punjab Record 1895), (4) consisting of Stogdon and Chatterjee, JJ., held that a shop in a bazar cannot be pre-empted as a hoiase, merely because there is an upper storey to it which is used as a residence. Again, another Division Bench of the Punjab Chief Court, consisting of Robertson and Harris, JJ., in the case of Hakim Rai v. Muhammad Din and others (93 Punjab Record 1901)(5) held that a baithak on the top of two shops, does not alter the nature of the property, which property could not in consequence be considered a residential house and it continued to be shops and exempted from pre-emption.

(19) In the present case we have already held that the ground floor consists of four shops. It was the evidence oi the plaintiff himself that the first floor is being used for the business of caps by Jogi Dass, who was a tenant in one of the shops on the ground floor and also had the upper floor in his tenancy. The upper floor was also being used partly for the residence of the tenants of the shops. It will thus be seen that the upper floor was incidentally being used for the same business which was being carried on on the ground floor as also for residence. In these circumstances it must be held that the building itself had the character of shops and the whole house will be exempt from pre-emption, in view of section 5 of the Act.

(20) The learned counsel for the appellant relied on the case of Dayal Singh V. Bakhshish Singh (21 Punjab Record 1907) (6). But the facts of this case do not resemble the facts of the present case. In that case a portion of the ground floor was a dwelling house and had been converted into a shop but the shop was not being used continuously as such and was not so used at the time of sale which occasioned the suit for pre-emption.

(21) In view of our aforesaid finding, it is not strictly necessary to deal with the question of preferential right of the plaintiff, but we have thought it proper to deal

with it. The claim to the preferential right of the plaintiff can be sub-divided under three headings:

(I)Common entrance.

(II)Karis and beams of the plaintiff resting on the common wall; and

(III)Water and spout of the plaintiff's property passing through the property sold and the Chhajja over hanging on the main passage.

(22) So far as the first ground of common entrance is concerned, it is apparant that the entrance to the property in dispute and the plaintiff's property is common from the street but on the question of Karis of the plaintiff's property resting on the common wall, it is to be seen that there is, in fact, no common wall. This is clear from the proceedings of the suit No. 1017/368 filed by Mithan Lal against Bala Parshad on 5-8-1927. It is clear from the judgment and the decree based on compromise Exhibits D-14, D-15 and D-16, that the alleged common wall was deemed to be adjoining wall of the property and Mithan Lal was directed to remove the beams and Karis resting then on a portion of the wall belonging to Bala Pershad. It is further clear from Exhibit D-17, an order passed on execution application filed by Bala Pershad for removal of Karis resting on the adjoining walls, that the parties made a statement that the execution application may be ordered to be consigned to record room as the decree had been performed. It appears that the said statement was made as Bala Pershad had obtained warrants of arrest of Mithan Lal for not complying with the decree and Mithan Lal immediately filed an application. Exhibit D-9, staling that the warrants of arrest may be withdrawn and he will immediately comply with the orders to the Court. In view of this mass of evidence it must be held that there is no common wall. Again, about the Chhajja of the plaintiff overhanging the property in dispute, it has to be mentioned that it has already been held by the judgment dated 28th March, 1927 (Exhibit D-20) passed by the District Judge, Delhi, that the Chhajja in dispute belongs to Bala Pershad i.e. the predecessor-in-interest of the vendees. As regards the other ground, namely, water and spout of the plaintiff's property falling on the defendant's property, no such question can arise so far as the first floor is concerned. thereforee, the only ground of pre-emption which the plaintiff-appellant

has successfully established being the ground of common entrance has to fail as the property has been held to be shops and is thereforee not pre-emptible.

(23) We accordingly dismiss both these appeals with costs.

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