

Nen Mal and Etc. Etc. Vs. Kan Mal and Etc.

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SooperKanoon Citation : sooperkanoon.com/750886

Court : Rajasthan

Decided On : Sep-02-1987

Reported in : AIR1988Raj33; 1987(2)WLN805

Judge : J.S. Verma, C.J. and; Milap Chandra, J.

Acts : Rajasthan Pre-emption Act, 1966 - Sections 6(1); [Constitution of India](#) - Articles 14, 15 and 19(1)

Appeal No. : Civil First Appeal No. 7 of 1977 and Civil Special Appeal Nos. 76 and 77 of 1981

Appellant : Nen Mal and Etc. Etc.

Respondent : Kan Mal and Etc.

Advocate for Def. : H.C. Jain and; B.L. Purohit, Advs.

Advocate for Pet/Ap. : H.M. Parekh, Adv.

Disposition : Appeal allowed

Judgement :

I.S. Verma, C.J.

1. This judgment shall also dispose of Special Appeal No. 76 of 1981 and Special Appeal No. 77 of 1981. The common question involved for decision in all these

three matters relates to the constitutional validity of Clause (iii) of Sub-section (1) of Section 6 of the Rajasthan Pre-emption Act, 1966.

2. Plaintiff Kanmal filed Civil Suit No. 10 of 1974 in the Court of District Judge, Jodhpur, claiming a decree for pre-emption on the basis of his right of pre-emption contained in Section 6(1)(iii) of the Rajasthan Pre-emption Act, 1966 on the ground of easement of light and air. This suit has been decreed on Oct. 13, 1976 by the Additional District Judge No. 2, Jodhpur, granting a decree for pre-emption to the plaintiff on payment of the sale price of Rs. 13,000/- together with Rs. 9,285/- as cost of improvement of the property incurred by the defendant. Defendant Nen Mal has filed this appeal (First Appeal No. 7 of 1977) against the decree for pre-emption granted in plaintiffs favour, while the plaintiff has filed a cross-objection against the direction to pay Rs. 9,285/- as the cost of improvement incurred by the defendant. The question of constitutional validity of Section 6(1)(iii) of the Rajasthan Pre-emption Act raised by the defendant in the suit is the only point reiterated in this appeal.

3. The other two matters, namely Special Appeal Nos. 76 of 1981 and 77 of 1981 arise out of two other suits filed by plaintiff Moti Lal in the Court of District Judge, Jodhpur. One of these suits was against Paru Lal and Smt. Vilashwati, while the other suit is against Smt. Shanti and Smt, Vilashwati. Both these suits are for pre-emption on the basis of right of pre-emption contained in Section 6(1)(iii) of the Rajasthan Pre-emption Act, 1966 on the ground of easement of light and air and passage of dirty water. The defendants raised the question of constitutional validity of Section 6(1)(iii) of the Rajasthan Pre-emption Act therein and applied for referring the question under Section 113, C.P.C. to the High Court for its decision. The application was rejected by the Additional District Judge No. Z Jodhpur, who is trying these suits. Thereafter the defendants filed application in this Court for deciding this question under Article 228 of the Constitution. A learned single Judge of this Court by common order dated Oct. 1, 1980 has rejected the applications and held that the said provision is valid. That decision is reported in Parulal v. Motilal, AIR 1981 Raj 119. Aggrieved by the order of the learned single Judge, the defendant in each case has preferred a special appeal under Section 18 of the Rajasthan High Court Ordinance, 1949. Hence these two special appeals involving

the same question.

4. The relevant portion of Section 6 of the Rajasthan Pre-emption Act, 1966, is as under : --

'Section 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-sharers of or partners in the property transferred,

(ii) owners of other immovable property with a staircase or an entrance or other right or amenity common to such other property and the property transferred, and

(iii) owners of property servient or dominant to the property transferred.'

In short the contention of Shri H. M. Parekh, learned counsel for the appellants in all these cases is that Clause (iii) of Sub-section (1) of Section 6 is constitutionally invalid, since the right of preemption contained therein is nothing except a right of pre-emption based merely on vicinage, which has been struck down by the Supreme Court in *Bhau Ram v. Baij Nath Singh*, AIR 1962 SC 1476. In reply Shri H. C. Jain and Shri B. L. Purohit, appearing for the respondents in these matters have contended that the right of pre-emption given by the above Clause (iii) is based on easement and not merely on vicinage and, therefore, the provision is not invalid. It is urged that in a sense every right of pre-emption is based on vicinage inasmuch as the right of a co-sharer or partner in the property or of a person enjoying the benefit of use of any right or amenity common to the two properties is also based on vicinage or neighbourhood and, therefore, it is not correct to say that a right of pre-emption claimed on the basis of easement is a right based merely on vicinage. Learned counsel for the respondents contended that an identical provision was upheld as valid by a Special Bench of this Court in *Nathuram v. Patram*, AIR 1960 Raj 125; and a similar provision in the Punjab Pre-emption Act, 1913 was upheld in *Kesar Devi v. Nanak Singh*, AIR 1958 Punjab 44, which decision has been affirmed in *Bhau Ram's case* (supra) on account of which the

point is no longer open. Learned counsel for the respondents, therefore, urged that we should uphold the validity of the provision following these decisions.

5. We may mention at the out set that if learned counsel for the respondents are right in contending that the constitutional validity of an identical provision has been upheld by a larger bench of this Court in Nathuram's case (*supra*) and/or a similar provision in the Punjab Act was upheld by the Supreme Court in Bhau Ram's case (*supra*) by affirming the decision in Kesar Devi's case (*supra*), then our task is simplified and all that we are required to do is to follow these binding precedents. Accordingly, we propose to consider this aspect of the argument at the threshold.

6. We shall first refer to the decision by a Special Bench of this Court in Nathuram's case (AIR 1960 Raj 125) (*supra*), which, according to learned counsel for the respondents, considered and decided this question upholding the constitutional validity of an identical provision contained in the Alwar State Pre-emption Act, 1946. Learned counsel for the respondents referred to the facts stated in para 5 of the decision to say that this point arose for decision and then relied on the observations contained in para 21 to contend that an identical provision in the Alwar Act relating to a right of pre-emption based on easement was held to be valid. No doubt the facts stated in para 5 of the decision mentioned that the suit for pre-emption was based on the ground that the plaintiff had his spouts and windows towards that land which was in his vicinity and, therefore, the plaintiff had a right of pre-emption. This has, however, to be read with para 35 of the judgment, wherein it was mentioned that it had been held by the single Judge that it was not now open to the plaintiff to press his case that he had spouts and windows towards the land which was the subject of pre-emption. It is, therefore, clear that the decision of the Special Bench does not relate to the right of preemption claimed on the basis of any easement or the existence of spouts and windows in the plaintiff's property in the vicinity of the property subject to pre-emption. The facts of the other two matters in respect of which the common judgment was given by the Special Bench are contained in paras 2 and 8 of the judgment and they indicate that in neither of them the right of pre-emption was claimed on the basis of easement. It is, therefore, obvious that there was no occasion for the Special Bench in Nathuram's case (*supra*) to consider and decide

the validity of the right of pre-emption claimed on the basis of easement, which is the point arising for decision before us. The entire judgment of the Special Bench including the general observations contained in para 21 of the decision have, therefore, to be construed and understood in this light. No doubt in para 21 it has been said that the right of pre-emption in urban immovable property is upheld as given in all the provisions of Section 16 except the last which provides that the persons who own immovable property contiguous to the property sold should enjoy the right of preemption. This may imply that the provision based on right of easement in Section 16 was also upheld as valid. However, as earlier indicated, the question relating to validity of the right of pre-emption based on easement did not arise for decision by the Special Bench and, therefore, these general observations in para 21 cannot be read as deciding that point. It is significant that even in a later single Bench decision in *Ladu Ram v. Kalyan Sahai*, AIR 1963 Raj 195, *Nathuram's case*, (AIR 1960 Raj 125) (supra) was not understood as deciding this point and following *Bhau Ram's case*, (AIR 1962 SC 1476) (supra) right of preemption based on easement of light and air founded on custom was held to be unenforceable. We will refer in detail to this decision later.

7. We shall now refer to the decision in *Kesar Devi's case* (AIR 1958 Punjab 44) (supra), appeal against which was dismissed by the Supreme Court in *Bhau Ram's case*, (AIR 1962 SC 1476) (supra). It is in this manner that this Punjab decision is treated to be affirmed by the Supreme Court. It is obvious that dismissal of the appeal by the Supreme Court would not amount to affirmance of every reason given in the Punjab decision unless the same was considered by the Supreme Court. Section 16 of the Punjab Act giving the right of pre-emption contained six clauses of which the fifth clause was in *pan materia* with Section 6(1)(iii) of the Rajasthan Preemption Act, 1966. The sixth clause related to the right of pre-emption based on ownership of contiguous property, while the first clause related to co-sharers, and the third and fourth clauses related to enjoyment of some right or amenity common to the two properties. The Punjab High Court took the view that the first five clauses of Section 16 were of the same category relating to property in common use of the pre-emptor and the vendor, while the last clause was based on contiguity of property. The relevant portion of the Punjab decision is as under : --

'The reason is the fact that the property is in common use of the pre-emptor and the vendor, whether as a whole or only in part, and the introduction of a stranger in such property would more often than not lead not merely to inconvenience but to breach of the peace. Thus the provisions of Section 16 with regard to first five classes of persons, who are entitled to enforce a right of pre-emption in regard to urban immoveable property, provide a reasonable restriction on the right to acquire, hold and dispose of property and that is in the interest of general public. In this cases the restriction being reasonable, the provisions of Section 16 are saved by Sub-article (5) of Article 19.

Same consideration cannot apply to the sixth class of persons referred to in Section 16 for their right is based not on any common use of the property but merely on the ground of contiguity. Such persons occupy or are in possession independently of their properties without interference by their adjoining or contiguous neighbour. So if property contiguous to them is sold then does not directly or immediately interfere with their quiet enjoyment of their own property or their privacy. In such a case apparently there is no basis for any breach of the peace. Thus the right of pre-emption in their favour cannot be said to secure public order and to be in the interest of general public. In so far as this class of persons are concerned the restriction imposed by the right of pre-emption in their favour cannot be described reasonable restriction within the scope of Sub-article (5) of Article 19.'

8. The Supreme Court in Bhau Ram's case (supra) dismissed the appeal against this decision. We shall refer to this decision at some length later and at this stage reference is made for the limited purpose of showing that this decision cannot be construed as affirming the view of the Punjab High Court that clause 'fifthly' in the Punjab Pre-emption Act, 1913 was held to be valid by the Supreme Court. It is in paras 9 to 14 of this decision that the Supreme Court has dealt specifically with the Punjab Pre-emption Act, 1913. It is only the first clause giving right of pre-emption in favour of a co-sharer and the third and fourth clauses where there is common enjoyment of some right or amenity common to the two properties which have been expressly considered and held to be valid on the ground that the right therein is that of a co-sharer or akin to it. The sixth clause based on contiguity of property

or vicinage was held to be invalid on the ground that preemption based on vicinage is invalid. Nothing was said by the Supreme Court about the fifth clause with which we are concerned. Mere dismissal of the appeal against the Punjab decision cannot, therefore, be construed as affirming the Punjab view that fifth clause gives a right akin to that of a co-sharer and is, therefore, valid. We regret our inability to read this Supreme Court decision as holding that the fifth clause of the Punjab Act which is similar to Section 6(1)(iii) of the Rajasthan Act was considered and held to be valid by the Supreme Court in this decision.

9. The above extract from the Punjab decision itself shows that distinction between the right of pre-emption claimed on different grounds was drawn on the basis of common use of the property or any part thereof by the pre-emptor and the vendor. In a case of easement of light and air there is no question of common use of the property or any part thereof. It is, therefore, difficult to appreciate how this test is satisfied for treating the right of pre-emption based on easement as akin to that of a co-sharer. However, as already stated, the Supreme Court in Bhau Ram's case (AIR 1962 SC 1476) (*supra*) made no mention of such a right and so the Punjab decision cannot be taken as approved on this point. The result is that the point for our decision not being concluded by any of these binding precedents, we have to consider and decide it on merits.

10. It is well known that the right of preemption has origin in the Mohamedan law and has, therefore, been more prevalent in the northern part of India. The classification of the right of pre-emption in Mohamedan law as indicated in Section 231 of Mulla's Principles of Mohamedan Law, Eighteenth Edition is as under : --

'231. Who may claim pre-emption. -- The following three classes of persons and no others are entitled to claim pre-emption, namely : --

(1) a co-sharer in the property (shafi-i-sharik).

(2) a participator in immunities and appendages, such as a right of way or a right to discharge water (shafi-i-khalit) and

(3) owners of adjoining immovable property (shafi-i-jar).'

The Supreme Court in Bhau Ram's case (supra) has held that a right of pre-emption based on vicinage is unconstitutional, but is valid when it is based on co-ownership or a right akin to that of a co-sharer e.g. sharing of a right or amenity common to the two properties. This conclusion flows from the fact that in Bhau Ram's case apart from the first clause in Section 16 of the Punjab Act giving the right of pre-emption to a co-sharer the third and fourth clauses giving such a right to owner having the use of a common staircase or common entrance were upheld on the ground that the third and fourth clauses stood on the same footing practically as the first ground relating to co-sharers, and the sixth clause giving the right to owner of contiguous property was struck down on the ground that it was based on vicinage. It is, therefore, obvious that where the right on which pre-emption is claimed is based merely on ownership of adjoining immovable property (shafi-i-jar) it is unconstitutional being based merely on vicinage and not on the ground relating to co-sharer or akin to it. Where the pre-emptor is merely owner of an adjoining immovable property and does not also share at least in some right or amenity common to the two properties, the right of pre-emption claimed by such an owner of the adjoining immovable property is based merely on vicinage (shafi-i-jar) and it cannot be upheld as valid. The decision in Bhau Ram's case (supra) has been consistently followed as we shall show hereafter by referring to the later decisions of Supreme Court. It is in this background that the point raised before us has to be decided.

11. In Civil Suit No. 10 of 1974, Kanmal v. Nenmal, giving rise to First Appeal No. 7 of 1977, the plaintiff is owner of adjoining urban immovable property and he claims the right of pre-emption on the ground of easement of air and light under Section 6(1)(iii) of the Rajasthan Pre-emption Act, 1966. The other two special appeals arise out of suits, which, according to learned counsel for the respondents, are converse cases, but the right of pre-emption is claimed only on the basis of easement of light and air and discharge of dirty water. In none of these three cases the pre-emptor is either a co-sharer in the property or a common staircase or entrance or other right or amenity of common use to the two properties. In other words, the pre-emptor is neither a co-sharer nor sharer of a common right or amenity having a right akin to that of a co-sharer. The question, therefore, is whether a pre-emptor of this kind can enforce the right of pre-emption

claimed under Section 6(1)(iii) of the Rajasthan Preemption Act, 1966. Admittedly the plaintiffs' claim in all the three suits is based only on Clause (iii) of Sub-section (1) of Section 6 of the Rajasthan Act.

12. A perusal of all the clauses contained in Sub-section (1) of Section 6 would show that Clause (iii), according to the scheme of this section, covers only the category of 'shafi-i-jar' and not the other two namely, 'shafi-i-sharik' and 'shafi-i-khalit'. Clause (i) unambiguously applies to co-sharers or partners in property i.e. 'shafi-i-sharik'. Clause (ii) covers the category of persons having common enjoyment of a staircase or an entrance or any other right or amenity common to the two properties. It is, therefore, obvious that the category covered by Clause (ii) in addition to the category covered by Clause (i) is different from the category covered by Clause (iii). In other words, not only co-sharers of the property, but also owners enjoying the benefit of common use of any part of the property or any right or amenity therein are outside the ambit of Clause (iii). It is only the right of pre-emption claimed on the grounds similar to those in Clauses (i) and (ii) which were upheld as valid in Bhau Ram's case, (AIR 1962 SC 1476) (supra) treating them to be in substance the rights of a co-sharer of the property.

13. The right based on easement of air and light or discharge of dirty water claimed by owner of the adjoining or contiguous immovable property cannot be construed as the right of a co-sharer or akin to it. As already indicated, to fall in the category of co-sharer even according to the extended definition of co-sharer applied in Bhau Ram's case, there must be common enjoyment of at least some right or amenity of common use to the two properties. In the present cases the easement of air and light or discharge of dirty water claimed as the foundation of the right of pre-emption cannot by any stretch of imagination be construed as co-sharers right in any property or part thereof or even sharing of any right or amenity common to the two properties.

14 The underlying principle of excluding strangers where transfer is of any property or part thereof which is of common enjoyment between co-sharers has no application in a case like the present. The transfer of the servent or the dominant heritage carries with it all the incidents thereof and the vendee steps into the

shoes of the vendor without the rights or liabilities by virtue of the easement being either enlarged or diminished. The only difference as a result of the transfer is substitution of the vendee for the vendor and no more. There being no sharing of any part of the property or right or amenity therein by the earlier owner, his replacement by another has no consequence on the easementary right, since no common management was involved at any stage. The very basis for upholding the co-sharer's right of pre-emption is non-existent in such a case. It is for this reason that the right of pre-emption based on vicinage or ownership of contiguous immovable property is held to be unconstitutional in *Bhau Ram's case* (AIR 1962 SC 1476) (*supra*).

15. Applying this test that there can be no doubt that the right claimed by the plaintiffs in these cases is in substance merely the right of owner of contiguous property and, therefore, is based merely on vicinage. To this category of persons, the right of preemption given by Clause (iii) of Sub-section (1) of Section 6 of the Rajasthan Pre-emption Act, 1966 must be held to be unconstitutional. We have already indicated that Clause (iii) applies only to owners of such property who are neither co-sharers falling under Clause (i), nor owners of any other immovable property enjoying common use of a staircase or an entrance or other right or amenity common to the two properties.

16. There is no dispute that in view of the decision in *Waman Rao v. Union of India*, AIR 1981 SC 271 (para 12) the question of constitutional validity of Section 6(1)(iii) of the Rajasthan Pre-emption Act, 1966 has to be adjudged also in the light of Article 19(1)(f) which was deleted by the Constitution (Forty-fourth Amendment) Act, 1978 with effect from June 20, 1979 since the Rajasthan Act was enacted much earlier in 1966. However, in our opinion Clause (iii) of Sub-section (1) of Section 6 of the Rajasthan Act also violates Arts. 14 and 15 of the Constitution inasmuch as there is no reasonable basis to classify the owner of an immovable property claiming right or preemption on the ground of easement alone with a co-sharer of the property instead of an owner of adjoining property who does not share any common right or amenity with the other owner. This is so because the change of ownership of either the servient or the dominant heritage in such a case does not in any manner affect either property or its enjoyment; and

there is no common management of any property or any part thereof involved to which the outsider is inducted. In our opinion the right to equality contained in Articles 14 and 15 is violated and this too is a ground to strike down Clause (iii) of Sub-section (1) of Section 6 as invalid. We shall show hereafter that this part of our conclusion is also supported by the Supreme Court decision.

17. We shall now refer to the several decisions which relate to this point.

18. The decision in *Bhau Ram's case* (AIR 1962 SC 1476) (*supra*), which is the sheet-anchor of the rival contentions before us, was a decision by a Constitution Bench. The right of pre-emption conferred by statutory provision in different States came up for consideration therein. Broadly stated the right of pre-emption claimed as a co-sharer in a property and on the basis of sharing in enjoyment of some right or amenity common to the two properties was treated as akin to a co-sharer's right and upheld as valid. On the other hand, a right of pre-emption based on vicinage was held to be invalid. Para 9 of the decision makes it clear that validity of only the first, third, fourth and sixth clauses of Section 16 of the Punjab Pre-emption Act, 1913 was raised, considered and decided in *Bhau Ram's case* and not also the fifth clause. In addition the broader aspects of the provisions relating to pre-emption by vicinage were also considered in the light of Article 15 of the Constitution and it was pointed out that even though the pre-emption based on the right of a co-sharer or a right akin to it permitted separate classification of that category of persons, there was no reasonable or rational basis to classify with them persons claiming pre-emption on the ground of vicinage and therefore, Article 15 also was likely to be violated by upholding the right of pre-emption based on vicinage. In this context the real reason behind the law of pre-emption based on vicinage was also indicated for showing the unreasonableness of a classification including claimants of right of pre-emption based on vicinage along with those claiming the right as a co-sharer. Relevant extract from *Bhau Ram's case* (*supra*) indicating the emphasis also on Article 15 of the Constitution in addition to Article 19(i)(f) is as under : -

'.....But the Constitution now prohibits discrimination against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them under

Article 15 and guarantees a right to every citizen to acquire, hold and dispose of property, subject only to restrictions which may be reasonable and in the interests of the general public. Though therefore the ostensible reason for pre-emption may be vicinage, the real reason behind the law was to prevent a stranger from acquiring property in any area which had been populated by a particular fraternity or class of people. In effect, therefore, the law of pre-emption based on vicinage was really meant to prevent strangers i.e. people belonging to different religion, race or caste, from acquiring property. Such division of society now into groups and exclusion of strangers from any locality cannot be considered reasonable, and the main reason therefore which sustained the law of pre-emption based on vicinage in previous times can have no force now and the law must be held to impose an unreasonable restriction on the right to acquire, hold and dispose of property as now guaranteed under Article 19(1)(f), for it is impossible to see such restrictions as reasonable and in the interest of the general public in the state of society in the present day.'

19. Similarly the real reason for upholding separate classification of persons claiming pre-emption as a co-sharer was indicated as under :

'...the question as to the constitutionality of a law of pre-emption in favour of a co-sharer has been considered by a number of High Courts and the constitutionality has been uniformly upheld. We have no doubt that a law giving such a right imposes a reasonable restriction which is in the interest of the general public. If an outsider is introduced as a co-sharer in a property it will make common management extremely difficult and destroy the benefits of ownership in common. The result of the law of pre-emption in favour of a co-sharer is that if sales take place the property may eventually come into the hands of one co-sharer as full owner and that would naturally be a great advantage. The advantage is all the greater in the case of a residential house and Section 16 is concerned with urban property, for the introduction of an outsider in a residential house would lead to all kinds of complications. The advantages arising from such a law of pre-emption are clear and in our opinion outweigh the disadvantages which the vendor may suffer on account of his inability to sell the property to whomsoever he pleases. They ended also cannot be said to suffer much by such a law because he is merely

deprived of the right of owning an undivided share of the property. On the whole it seems to us that a right of pre-emption based on co-sharership is a reasonable restriction on the right to acquire, hold and dispose of property and is in the interest of the general public.'

20. The provisions giving a right of preemption where there was a right of use to a common staircase, entrance or other similar right or amenity was then upheld on the ground that these rights stood on the same footing practically as the ground relating to a co-sharer.

21. In *Sant Ram v. Labh Singh*, AIR 1965 SC 314, another Constitution Bench of the Supreme Court followed the decision in *Bhau Ram's case* (AIR 1962 SC 1476) (supra) to strike down as void a right of pre-emption based on vicinage claimed under a custom. It was held that the reasons to hold statute law void apply equally to customs. Yet another Constitution Bench of the Supreme Court followed the decision in *Bhau Ram's case* (supra) in *Smt. Prem Dulari v. Smt. Raj Kumari*, AIR 1967 SC 1578 to uphold as valid a right of pre-emption claimed on the basis of the right to use a common outer entrance. This right was upheld on the footing that it was akin to that of a co-sharer even when the common outer entrance was not of common ownership.

22. A recent Constitution Bench decision of the Supreme Court in *Atam Prakash v. State of Haryana*, AIR 1986 SC 859 : (1986) 2 3CC 249 re-affirms the view taken in *Bhau Ram's case* while dealing with a right of preemption based on consanguinity. The right of pre-emption based on consanguinity was declared to be void as offending Arts. 14 and 15 of the Constitution after an earlier challenge based on Article 19(1)(f) had been repelled in *Ramsarup v. Munshi*, AIR 1963 SC 553. The decision in *Bhau Ram's case* (supra) was read as indicating that the statutory provision relating to pre-emption by vicinage not only offended Article 19(1)(f), but also appeared to offend Article 15 of the Constitution. The Supreme Court in this decision has ultimately struck down the provision relating to pre-emption based on consanguinity as offending Articles 14 and 15 of the Constitution even if it did not offend Article 19(1)(f). The reason given is that such a classification permitting a broader right of purchase to a person claiming the right

by vicinage is not a reasonable classification to justify placing him along with co-sharers in a category distinct from that of the rest.

23. Accordingly, independent of the question of restriction on the right to acquire or dispose of property, the classification not being reasonable and there being no rational basis to justify the same, such a provision offends Articles 14 and 15 of the Constitution. It must, therefore, be taken as the settled law that a provision conferring a right of preemption on a basis which does not justify separate classification along with co-sharers is void being unreasonable since it violates Articles 14 and 15 of the Constitution.

24. The Constitution Bench in *Atam Prakash's case* (AIR 1986 SC 859) (*supra*) after reiterating that a right of pre-emption is an archaic right which the Courts should be slow to uphold in modern times on account of changed circumstances, pointed out that the validity of such a provision has to be examined with reference to Articles 14, 15, 19(1)(d) and (g) in the background of the Preamble to the Constitution and Article 39(c) of the Directive Principles of the State Policy, even after deletion of Article 19(1)(f). It has also been emphasised that the question has to be primarily answered with reference to Article 14. Obviously it is so since reasonableness is a pre-dominant feature of Article 14 conferring the right to equality and any extraordinary right which cannot be called reasonable in the existing circumstances would violate Article 14 and be invalid for this reason alone. It would be useful to quote a relevant extract from this decision which indicates the background in which the question has to be answered. It is as under :--

'.... Whatever article of the Constitution it is that we seek to interpret, whatever statute it is whose constitutional validity is sought to be questioned, we must strive to give such an interpretation as will promote the march and progress towards a Socialistic Democratic State. For example, when we consider the question whether a statute offends Article 14 of the Constitution we must also consider whether a classification that the legislature may have made is consistent with the socialist goals set out in the preamble and Directive Principles enumerated in Part IV of the Constitution. A classification which is not in tune with the Constitution is

per se unreasonable and cannot be permitted. With these general enunciations we may now examine the questions raised in these writ petitions.'

We may also refer to an extract from this decision which expressly states that concurrence with the decision in Bhau Ram's case (AIR 1962 SC 1476) (supra) was based not only on the provision contained in Article 19(1)(f), but also the right to equality contained in Articles 14 and 15. While concurring with the view taken in Bhau Ram's case (supra) it was stated as under : --

'In the first case, (Bhau Ram case), the right of pre-emption given to co-sharers was held to be a reasonable restriction on the right to hold, acquire or dispose of property conferred by Article 19(1)(f) of the Constitution. What has been said there to uphold the right of pre-emption granted to a co-sharer as a reasonable restriction on the right to property applies with the same force to justify the classification of co-sharers as a class by themselves for the purpose of vesting in them the right of pre-emption. We do not think that it is necessary to restate what has been said in that case. We endorse the views expressed therein.'

25. This decision of the Supreme Court clearly shows that the conclusion reached in Bhau Ram's case (supra) is equally sustainable on the basis of Articles 14 and 15 and not merely Article 19(1)(f) of the Constitution.

26. We shall now refer to the decision of this Court. The decision in Panch Gujar Gaur Brahman v. Amarsingh, AIR 1954 Raj 100 was by a Full Bench of this Court. The only relevant part of this decision for our purpose is contained in para 9, which reads as under : --

'Now so far as the reconveyance of the property to a pre-emptor claiming as a co-sharer or a participator in immunities and appendages is concerned, there were certain reasons of convenience behind this principle, the chief being to prevent any disturbance by a stranger to the enjoyment of the property by a co-sharer or participator in the immunities and appendages. Phear J. observed in -- Nusrut Reza v. Umbul Khyr Bibee, 8 W.R. 309 that the right of pre-emption is founded on the supposed necessities of a Mohammendan family arising out of their minute sub-division and inter-division of ancestral property. The right of an adjoining

owner to claim the property in case of purchase by a stranger however rests on a different footing for, the pre-emptor has nothing in common with the property sold beyond the fact that he happens to be owner of the adjoining property.'

It is significant that the clear distinction between right of an adjoining owner and that of a co-sharer or a participator in immunities and appendages was indicated to suggest justification for separate classification of the two categories. We have already considered at length the decision by a Special Bench in Nathuram's case (AIR 1960 Raj 125) (supra) and indicated how the observations therein cannot be construed as deciding the question of validity of provision relating to pre-emption by an adjoining owner claiming the right on the basis of easement and not on the basis of any immunity or appendage or right or amenity common to owners of the two properties. Moreover, the decisions of the Supreme Court referred earlier by us which indicate the principles for deciding such a question furnish the guidelines and if there be anything inconsistent with them in Nathuram's case (supra), then the same cannot obviously be binding.

27. A Single Bench decision of this Court in Ladu Ram's case (AIR 1963 Raj 195) (supra) is also of significance. The question therein related to pre-emption based on the right of easement of light and air. It was held that such a right did not amount to 'shafi-i-khalit' and was, therefore, not enforceable. This decision was subsequent to Nathuram's case (AIR 1960 Raj 125) (supra) and was based on Bhau Ram's case (AIR 1962 SC 1476) (supra). With respect, we concur with the view taken in this decision.

28. Reference may now be made to Full Bench decision of Allahabad High Court in Jagdish Saran v. Brij Raj Kishore, AIR 1972 All 313. It was held that a right of easement in plaintiffs favour does not make him a 'shafi-i-khalit'. This conclusion is based on the decision in Bhau Ram's case (supra). The facts of the Allahabad case being distinguishable, we need not express any opinion about the same.

29. The general principles emerging from the Supreme Court decisions have already been mentioned by us. We are confining our decision to a right of easement of light and air or discharge of dirty water (in which there is no common enjoyment of any right or amenity by the owners of the two properties.) which

category is covered only by Clause (iii) and not Clause (ii) of Sub-section (1) of Section 6 of the Rajasthan Act; Cases of common enjoyment of any right or amenity etc. by the two owners falling within the ambit of Clause (ii) of Sub-section (1) of Section 6 do not arise for consideration before us.

30. Reference may be made to the decision in *Mahboob Hasan v. Ram Bharosey Lal*, AIR 1966 All 271, wherein right of preemption was claimed on the basis of easement and it was held to be invalid. *Bhau Ram's case* (AIR 1962 SC 1476) (supra) was followed for reaching this conclusion. The nature of an easementary right in this context was indicated as under : --

'All that the owner of an easementary right may reasonably claim is continuation of his easementary right. Now it does not appear that sale of adjoining property endangers the easementary right. Chapter V of the Indian Easements Act enumerates various cases of extinction of easementary right. Mere sale of adjoining property does not extinguish easementary rights. There is, therefore, no good ground why the owner of an easementary right should object to the sale of adjoining property to a stranger.....We consider that the right of pre-emption on the sole ground that the claimant is the owner of the easementary right cannot be recognised as a reasonable restriction in the interest of general public under Clause (5) of Article 19.....'

In our opinion, the true nature of the easementary right such as that of light or air, or discharge of dirty water is correctly indicated in the above extract and we respectfully concur with this enunciation of the principle relating to such an easementary right.

31. We may now refer to the decisions of the Jammu & Kashmir High Court on which strong reliance was placed by learned counsel for the respondents in addition to *Kesar Devi's case* (AIR 1958 Punjab 44) (supra). We have already dealt with the decision in *Kesar Devi's case* (supra) the appeal against which was dismissed in *Bhau Ram's case* (AIR 1962 SC 1476) (supra). There the suit was based only on the grounds contained in the first, third, fourth and sixth Clause of Section 16 of the Punjab Act as mentioned in para 5 of the Supreme Court decision and there was no occasion for the High Court to consider the validity of

the fifth clause. For this reason the Supreme Court did not consider or decide the validity of the fifth clause. The decisions of the Jammu and Kashmir High Court are *Tara Chand v. Mehta Durga Dass*, AIR 1963 J&K; 27; *Sewanath v. Faqir Chand*, AIR 1965 J&K; 62 (FB), and *Habib Ullah v. Gh. Ahmed Baba*, AIR 1980 J&K; 23 (FB). The view taken by the Jammu & Kashmir High Court is based on the reading by the learned Judges of the decision in *Bhau Ram's case* (supra). We have already indicated the manner in which we read *Bhau Ram's case* (supra) and this we have done by also indicating the manner in which it was read by the Supreme Court itself recently in *Atam Prakash's case* (AIR 1986 SC 859) (supra). According to the Jammu & Kashmir High Court the Supreme Court in *Bhau Ram's case* (supra) by not specifically considering the fifth clause in the Punjab Act is deemed to have approved the Punjab High Court view that the same is valid. With respect we are unable to concur with this view for the reasons already given. The observations of the Punjab High Court regarding validity of the fifth clause were obiter since the suit was not based on it and for this reason the Supreme Court did not consider or decide its validity. We may also mention that the Jammu & Kashmir High Court did not examine the question with reference to the right to equality contained in Articles 14 and 15 of the Constitution and upheld the right of preemption based on easement merely with reference to Article 19(1)(f) of the Constitution. We have already indicated that even apart from Article 19(1)(f) of the Constitution such a provision is bad as violating Articles 14 and 15 of the Constitution. For these reasons we regret our inability to concur with the view taken by the Jammu & Kashmir High Court.

32. As a result of the above discussion, it follows that Clause (iii) of Sub-section (1) of Section 6 of the Rajasthan Pre-emption Act, 1966 is invalid being violative not only of Article 19(1)(f) but also of Articles 14 and 15 of the [Constitution of India](#). In view of this conclusion reached by us, the suits in all the three cases must fail on the short ground that the right to pre-emption claimed by the plaintiffs in each case is founded only on Section 6(1)(iii) of the Rajasthan Pre-emption Act, 1966. It is unnecessary for us to consider at any length the cross-objection in First Appeal No. 7 of 1977 filed by the plaintiff. However, we may add that even on merits the cross-objection must fail, because there is no ground to interfere with the finding of the trial court that improvement was made by the defendant by incurring expenses

to the extent of Rs. 9,285/- and that the defendant is entitled to payment of the same in equity if the property is to be sold to the plaintiff who gets benefits of this improvement. We affirm this finding of the trial Court in the alternative.

33. Consequently, First Appeal No. 7 of 1977 is allowed. The judgment and decree of the trial Court are set aside and the cross-objection filed by the plaintiff is rejected. Special Appeals Nos. 76 of 1981 and 77 of 1981 are allowed. The common order passed by the learned single Judge in both these special appeals is set aside. The trial Court will decide the two suits on the basis of the above conclusion. In the circumstances of the case, the parties in all the three appeals are left to bear their own costs throughout.

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