

Pyare Mohan Vs. Rameshwar and ors.

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Court : Rajasthan

Decided On : Feb-09-1979

Reported in : AIR1980Raj116

Judge : N.M. Kasliwal, J.

Acts : Muhammadan Law; [Code of Civil Procedure \(CPC\) , 1908](#) - Sections 100 - Order 1, Rule 10 - Order 22, Rule 1; [Evidence Act, 1872](#) - Sections 101 to 104

Appeal No. : Second Appeal No. 408 of 1967

Appellant : Pyare Mohan

Respondent : Rameshwar and ors.

Advocate for Def. : R.K. Gupta, Adv.

Advocate for Pet/Ap. : P.N. Datt and; K.N. Tikku, Advs.

Disposition : Appeal allowed

Judgement :

N.M. Kasliwal, J.

1. Brief facts leading to this appeal are that the respondents Rameshwar and Radhey Shyam along with their father Kalyan Bux (since deceased) filed a suit for pre-emption against Ram Sukh and Abdul Shakoor (since deceased) (His legal

representatives have been brought on record). According to the allegations as set up in the plaint Ram Kumar Suraj Bux purchased a shop in a court sale in Samvat year 1976. Mangi Lal father of Kalyan Bux (one of the plaintiffs now deceased) was a partner in firm Ram Kumar Suraj Bux. Mangi Lal died in Samvat year 1992 and the partnership dissolved. On dissolution of the partnership, the shop which was purchased in a court sale by Ram Kumar Suraj Bux came to the share of plaintiff Kalyan Bux. Thereafter the plaintiffs had been using the shop as its owner and had been in its possession. On the west of this shop is another shop, the roof of which belonged to Ram Sukh defendant (since deceased) and to the west of this shop there is a common stair-case which leads to the roof of both the shops. On 2nd January, 1957, Ram Sukh sold the roof to Abdul Shakoor for a sum of Rs. 1,200/- by a registered sale-deed. Abdul Shakoor died and his widow Mst. Rehmat sold this roof to Abdul Gani for a sum of Rs. 1,500/- by a registered sale-deed dated 30th Dec., 1957 who in turn sold it to Pyare Mohan present appellant on 30th December, 1959 for Rs. 1,999/-. On 8th May, 1959, the plaintiff filed an application for amendment of the plaint on the ground that they had no knowledge about the sale of the roof to Abdul Gani, and they prayed that Abdul Gani be also added as a defendant. On further transfer by Abdul Gani to the appellant, the plaintiffs again amended the plaint and impleaded the appellant as a party. The plaintiffs claimed the right of pre-emption on the principle of Shafi-a-khalit i.e. a common right in immunities and appendages. The defendant contested this suit inter alia on the ground that the plaintiffs were not the owners of the neighbouring shop. The plaintiffs had no easementary right over the roof, the suit was barred by limitation. The learned trial Court decreed the suit and gave a direction that the plaintiffs shall pay Rs. 1,500/- to Abdul Gani defendant and the plaintiffs should file necessary stamps for the execution of the sale-deed in their favour. The defendants Abdul Gani and Pyare Mohan filed an appeal and the plaintiffs filed a cross-objection. The learned District Judge dismissed the appeal filed by the defendants and accepted the cross-objections and gave the following direction:

'The result is that the appeal is dismissed with costs. The cross-objection is accepted to the following extent:

(1) the plaintiffs are entitled to possession by pre-emption on payment of Rs 1,200/- to defendant No. 10 Pyare Mohan, the last vendee.

(2) There is no necessity for the execution of any sale-deed by the defendants in the plaintiffs' favour. The stamps, if deposited by the plaintiffs, shall be returned to them.

(3) A sum of Rs. 75/- given by the plaintiffs to the guardian of minor defendants No. 3 to 5 under the orders of the court shall be the costs in the suit.' Hence this appeal by the defendant Pyare Mohan.

2. Learned counsel for the appellant has contended that both the lower courts have committed an error of law in holding that the adjacent shop on the basis of which the pre-emption is claimed by the plaintiffs was given to Kalyan Bux son of Mangi Lal by Ram Kumar Suraj Bux in lieu of the share of profits of Mangi Lal in the firm Ram Kumar Suraj Bux. There is no documentary evidence to prove that the shop was given to Kalyan Bux. No entry in the account-books of Ram Kumar Suraj Bux has been produced on record to establish the above fact of transfer in favour of Mangi Lal or Kalyan Bux. Learned counsel drew my attention to the statement of Suraj Bux P. W. 2, Nathu Lal P. W. 3 and Banshidhar P. W. 4 to the effect that there was no entry in the account books of Ram Kumar Suraj Bux. It is further contended that the lower Courts have acted illegally in holding the plaintiffs' claim based on Shafi-a-Khalit as proved. The plaintiffs have utterly failed to prove that they ever used the stairs for approaching the disputed roof in order to reach their own roof as of right for more than 20 years. It is further argued that the suit filed by the plaintiffs was barred by limitation. The disputed roof was sold by the widow of Abdul Shakoor to Abdul Gani vide its sale-deed dated 19th November, 1957 which was registered on 30th Dec., 1957. The original suit was no doubt filed on 2nd Jan., 1958 but Abdul Gani was not made a party. The plaintiffs filed an amendment application on 8th May, 1959, praying for impleading Abdul Gani (which?) will be deemed to have been filed on the date when he was made a party, which admittedly being after 8th May, 1959, was barred by limitation having been filed more than a year after the sale in favour of Abdul Gani. It was also argued that even if it may be admitted for argument's sake that the shop was given

to Kalyan Bux he alone could have filed the suit and Radhey Shyam and Rameshwar being strangers had no right of pre-emption and as the strangers have been joined as co-plaintiffs the suit for pre-emption must fail. It is also submitted that Kalyan Bux died on 13th August, 1961 and the right of pre-emption being a personal right came to an end after his death, as Kalyan Bux died before the passing of the decree by the trial Court, Rameshwar and Radhey Shyam had no right to continue the suit.

3. Learned counsel for the appellant has placed reliance on Ramprasad Dagaduram v. Vijaykumar Motilal AIR 1967 SC 278 in which their Lordships held as under:

'The Court has power to add a new plaintiff at any stage of the suit, and in the absence of a statutory provision like Section 22 the suit would be regarded as having been commenced by the new plaintiff at the time when it was first instituted. But the policy of Section 22 is to prevent this result, and the effect of the section is that the suit must be regarded as having been instituted by the new plaintiff when he is made a party, see Ramsebuk v. Ramlal Koondoo (1881) ILR 6 Cal 815. The rigour of this law has been mitigated by the proviso to Section 21(1) of the Indian Limitation Act, 1963, which enables the Court on being satisfied that the omission to include a new plaintiff or a new defendant was due to a mistake made in good faith, to direct that the suit as regards such plaintiff or defendant shall be deemed to have been instituted on any earlier date. Unfortunately the proviso to Section 21(1) of the Indian Limitation Act, 1963 has no application to this case, and we have no power to direct that the suit should be deemed to have been instituted on a date earlier than Nov. 4, 1958.'

On the basis of the above ruling it is submitted that the suit for pre-emption as regards the sale made in favour of Abdul Gani on 30th December, 1957, will be deemed to have been filed after 8th May, 1959 when Abdul Gani was impleaded as defendant and the suit obviously being filed more than a year after the sale was barred by limitation. I am not convinced with this argument of the learned counsel for the appellant. The plaintiffs had filed the suit on 2nd Jan., 1958 to pre-empt the sale dated 2nd Jan. 1957 made by Ram Sukh in favour of Abdul Shakoore. Pre-

emption is a right of substitution and not of re-purchase. Thus the right of pre-emptor cannot be defeated by subsequently transferring the property in favour of another person. The fact of sale in favour of Abdul Gani came to the knowledge of the plaintiffs on the filing of the written statement by the widow of Abdul Shakoor on 17th December, 1958. Thereafter Abdul Gani was impleaded as a party but the plaintiffs claimed their right of pre-emption against the first sale made by Ramsukh in favour of Abdul Shakoor on 2nd Jan. 1957. In *Kamta Prasad v. Mohan Bhagat*, (1910) ILR 32 All 45, it has been laid down that:

'The right of pre-emption being a right of substitution rather than a right of re-purchase, the vendee of property which is subject to a right of pre-emption cannot defeat the pre-emptive right by subsequently mortgaging the property and thus force the pre-emptor to take the property subject to mortgage so created.'

The learned first appellate Court has also placed reliance on the following observations of *Abdul Rahman Khan v. Muhammad Ayyub Khan* AIR 1924 All 806 in this regard:

'In a case arising under a *wajib-ul-arz* *Kamta Prasad v. Mohan Bhagat* (1910) 32 All 45 it was held that a subsequent transfer by a vendee was subject to the pre-emptor's right of pre-emption. In the case of *Khettar Chandra Basu v. Nalinkali Debi* (1913), 11 All LJ 527, which was a case under a custom governed by the Muhammadan Law, it was pointed out that the second sale must be taken to have been made subject to the right of pre-emption, and the plaintiff was only bound to pre-empt the first sale, making of course the subsequent vendee a party to suit so as to bind him by the proceedings. No authority to the contrary has been cited before us. We are accordingly of opinion that the plaintiff's right to pre-empt the property was complete after the demands had been duly made by him and that it was not at all incumbent on him to make fresh demands when Abdul Aziz transferred the property to Abdul Karim. The sale to Abdul Karim must be deemed to have been effected subject to any right of pre-emption in force by the plaintiff.' In this view of the matter the contention of the learned counsel for the appellant that the suit is barred by limitation has no force. Learned counsel for the respondent also placed reliance on *Razawand Singh v. Dukchhor* AIR 1914 Oudh 216, *Fazal*

Hussain v. Malik Jinda AIR 1914 Lah 402 and Thakurji Maharaj v, Sujan Singh AIR 1939 All 158. It has been held that in a pre-emption suit, a transferee from original purchaser added as a defendant after one year's limitation in a suit against purchaser, the case would be governed by either Article 120 or Article 144 but does not fall under Art. 10 of the Limitation Act,

4. As regards the contention of the learned counsel for the appellant that the plaintiffs have not been able to prove their right of pre-emption claimed on the basis of Shafi-a-Khalil i.e. participator in immunities and appendages, I find no force. Both the lower Courts have held that the plaintiffs had proved their right to go to the roof of their shop through the common stair-case and through the roof of the defendant's shop. This finding of fact cannot be challenged by the appellant in second appeal in this court. Apart from the grounds given by the lower courts in this regard Ex. 7 a notice given by Ram Sukh to Kalyan Bux has also been proved by the plaintiffs in which Ram Sukh has clearly admitted the right of pre-emption of Kalyan Bux on the roof in dispute.

5. Now I shall deal with the next contention of the learned counsel for the appellant that the plaintiffs had not proved that they were owners of the shop on the basis of which right ,of preemption is claimed and Kalyan Bux alone could have filed the suit and Radhey Shyam and Rameshwar being strangers could not have joined as co-plaintiffs with Kalyan Bux and Kalyan Bux having died before the passing of the decree by the trial court, Rameshwar and Radhey Shyam had no right to continue the suit. Reliance is placed by the learned counsel for the appellant on a Full Bench decision of Allahabad High Court reported in Mohd. Ismail v. Abdul Rashid AIR 1956 All 1. It has been laid down that:

'It is true that the right of pre-emption has been stated to be not a personal right but a right attached to property, See -- Gobind Dayal v. Inayatullah, (1885) 7 All 775 (FB) and AIR 1954 SC 417. In Gobind Dayal's case, the question was: In a case of pre-emption where the pre-emptor and the vendor are Muhammadans and the vendee a non-Muhammadan, is the Muhammadan Law of preemption to be applied to the matter in advertence to the terms of Section 24 of the Act VI of 1871', and the question was answered in the affirmative on the ground that pre-

emption was a right which the owner of certain immoveable property possessed as such for the quiet enjoyment of the immovable property to obtain in substitution for the buyer, proprietary possession of certain other immovable property not his own on such terms as those on which such latter immovable property is sold to another person, that the right partakes of the nature of an easement and is in the nature of a legal servitude running with the land and that the right exists before sale and does not come into existence after the sale.

In *Audh Behari Singh's case* (AIR 1954 SC 417) the question was whether the Muhammadan Law of pre-emption which prevailed in the City of Banaras under a custom could be availed of in a case where neither the vendor nor the vendees were the natives of Banaras but were residents of a different province. It was in this connection that it was observed that the right of pre-emptor is a right attached to property and is not a personal right. The question which arises in the present case did not fall to be considered in any of the above cases and the learned Judges were not called upon to consider the circumstances in which the right is lost or becomes unenforceable.

There is nothing illogical in the right being not personal and attached to property and at the same time not being heritable or transferable after the sale has been made to a stranger but before a decree has been passed in favour of the pre-emptor. There are many interests in land which are neither heritable nor transferable and the bare right of pre-emption after the sale has been effected but before it has ripened into a decree of Court seems to be such a right.

The same thing might be put in another way. It can be said that although the right of pre-emption runs with the land and is not initially personal it assumes a personal aspect for the purposes of enforceability in a court of law. From the moment of the sale in favour of the pre-emptor, the right can be enforced only by the person who was the owner of the pre-emptive property on the date of the sale of the property sought to be pre-empted.

During this interval, the right is attached to the person of the owner of the pre-emptive property and he alone can enforce it in a court of law. The right continues to be personal to him so long as a decree is not passed in his favour. During this

interval the right is neither transferable nor heritable. But as soon as a decree is passed in his favour the right ceases to be personal and becomes a proprietary right fit to be transferred as well as to be inherited.'

Learned counsel for the appellant has placed reliance on *Umar Daraz v. Sri Ram Das*: AIR 1925 All 355 and *Rameshwar Lal v. Mst. Nasiban*: 1950 Raj LW 93 on the point that even if Kalyan Bux may be treated as owner of the shop in order to claim a right of pre-emption it was fatal for him to associate Radhey Shyam and Rameshwar in the suit as they were not entitled to pre-emption.

6. Learned counsel for the respondent submitted that the objection regarding the right to sue by Radhey Shyam and Rameshwar was not taken by the defendant in the written statement and as such he cannot be permitted to raise this ground for the first time. It is further submitted that a point not raised should be deemed to have been abandoned and in the absence of such objection being taken in the pleadings, the plaintiffs are seriously prejudiced as this was a mixed question of fact and law and in case this objection would have been raised by the defendant, the plaintiffs would have led evidence to prove that Radhey Shyam and Rameshwar were not strangers and were owners of the property along with Kalyan Bux. It is further submitted that the rule of law enunciated in *Mohd. Ismail's case* (supra) will not apply to the present case inasmuch as Radhey Shyam and Rameshwar were not claiming this property by way of inheritance after the death of Kalyan Bux but had filed the suit from the very beginning along with Kalyan Bux as co-owners. Learned counsel for the respondent also submitted that in para 3 of the plaint the plaintiffs had clearly mentioned that the shop came in the share of Kalyan Bux plaintiff No. 1 and since then all the plaintiffs had been in possession of the property as owners. Kalyan Bux was the father of Rameshwar and Radhey Shyam plaintiffs and they were all living jointly. The defendant-appellant has not denied the above contentions specifically in the written statement and as such Radhey Shyam and Rameshwar being members of the joint Hindu family, were entitled to file the present suit along with Kalyan Bux.

7. The right of pre-emption is a very weak right and can be defeated by a defendant by all lawful means. It has been observed by Tayabji in his book *Muslim*

Law 4th Edition on page 697:

'Pre-emption is not favoured by the law, and any device may be adopted (which is not fraudulent or forbidden by any law for the time being in force) with the object of bringing the right of preemption from arising, or defeating the provisions of the law in favour of the pre-emptor.'

Thus in order to claim a right of preemption it is necessary first of all for the plaintiffs to allege and prove that they were the owners of the property on the basis of which they were claiming any right of pre-emption. Issue No. 1 was also framed by the trial Court under which it was necessary for the plaintiffs to prove their ownership in the property. In the plaint it has not been shown as to how and in what manner Radhey Shyam and Rameshwar became the owners of the property. I may reproduce para 3 of the plaint in this regard which is as follows: (Matter in Hindi omitted -- Ed).

From the above pleadings it is shown that the shop in question came in the share of Kalyan Bux plaintiff No. 1 after dissolution of the firm Ram Kumar Suraj Bux in Samvat year 1993-1994. Admittedly no document of the partnership firm of Ram Kumar Suraj Bux has been produced on record by the plaintiff. Even if the oral statements of the plaintiff's witnesses be accepted that the shop came in the share of Kalyan Bux after the death of his father Mangi Lal and on account of the dissolution of the firm Ram Kumar Suraj Bux, there is no evidence on the record to establish as to how Radhey Shyam and Rameshwar became the owners of the property. It is not alleged in the plaint in para No. 3 that Kalyan Bux transferred this property or treated this property as joint family property or any document was executed by him for this purpose or that Kalyan Bux and Rameshwar and Radhey Shyam had constituted any joint Hindu family. In these circumstances I have no option but to hold that Kalyan Bux alone was the owner of the shop at the time of the institution of the present suit for pre-emption on 2nd January 1958. The rent-deeds Ex. 2, 3 and 4 placed on record also go to prove that the tenants had executed the rent-deeds only in favour of Kalyan Bux. Thus treating Kalyan Bux alone to be the owner of the shop on the date of the institution of the suit, I will have to consider the arguments advanced by the learned counsel for the

defendant. It has also clearly been laid down in Mohammed Ismail's case (supra) that in case of the death of a pre-emptor before passing of the decree, the right does not survive to the heirs. There is no dispute that Kalyan Bux died on 13th August, 1961 during the pendency of the suit in the trial court and the suit was ultimately decided by the trial court on 9th Sept., 1963. On the death of Kalyan Bux an application was filed on 29th September, 1961 for impleading Bhagwani Devi, Naraini Devi daughter of Kalyan Bux and the plaintiffs Rameshwar Lal and Radhey Shyam as legal representatives of deceased Kalyan Bux. This application was opposed by the defendants by objections filed in writing on 5th Oct. 1961 on the ground that the right of pre-emption being a personal right had come to an end after the death of Kalyan Bux, and the plaintiffs Nos. 2 and 3 had no separate right and there being no such custom, the plaintiffs Nos. 2 and 3 namely Rameshwar and Radhey Shyam had no right to continue the suit. The learned trial court heard the arguments and passed the following orders: (Matter in Hindi omitted -- Ed.)

Thereafter the plaintiffs did not lead any evidence and the trial court on 12th January, 1962 passed an order that the daughters of Kalyan Bux cannot be impleaded as legal representatives of deceased Kalyan Bux and the name of Kalyan Bux may be struck off and the question whether Rameshwar and Radhey Shyam can succeed in the suit or not in the capacity of legal representatives of deceased Kalyan Bux will be decided later on. Thus the objection of learned counsel for the respondent that this point was raised for the first time by the appellant in this court and the plaintiffs had no notice about this point and were not given any chance of leading evidence, has no legs to stand. As is clear from the proceedings taken by the learned trial court for deciding the question of legal representatives of deceased Kalyan Bux, an opportunity was given to lead evidence and they could have placed material on record to show that they were owners of the property along with Kalyan Bux and were thus entitled to file a suit for pre-emption. Learned counsel for the respondent has not cited any authority taking a view contrary to the Full Bench decision of Mohammed Ismail's case (supra). In this view of the matter Rameshwar and Radhey Shyam being strangers, also had no right to join as co-plaintiffs along with Kalyan Bux. This is also a fatal defect in a suit for pre-emption as already laid down in Umar Daraz's case (supra) and Rameshwar Lal's case (supra).

8. In the result this appeal succeeds, the judgments and decrees of the learned lower courts are set aside and the suit of the plaintiffs is dismissed. In the facts and circumstances of the case the parties are left to bear their own costs.

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