

Kailash Chandra and ors. Vs. Smt. Gyarsi Devi and ors.

Kailash Chandra and ors. Vs. Smt. Gyarsi Devi and ors.

SooperKanoon Citation : sooperkanoon.com/758773

Court : Rajasthan

Decided On : Aug-29-1986

Reported in : 1987(1)WLN10

Judge : Surendra Nath Bhargava, J.

Appeal No. : S.B. Civil Second Appeal No. 516 of 1974

Appellant : Kailash Chandra and ors.

Respondent : Smt. Gyarsi Devi and ors.

Disposition : Appeal dismissed

Judgement :

Surendra Nath Bhargava, J.

1. This is plaintiffs' second appeal arising out of a suit for pre-emption.
2. Defendant Nos. 2 to 8 sold a portion of the Haveli situated at Bordi-ka-Rasta, Jaipur in Chowkri Modikhana, to defendant No. 1, Smt. Gyarsi Devi, by a sale deed dated 7-8-1962 for a sum of Rs. 6,000/-. The plaintiff being a co-sharer in the house had a preferential right of preemption as against the vendee, Smt. Gyarsi Devi who had no share in the said Haveli. It was further asserted in the plaint that the amount of Rs. 6,000/- stated in the sale deed was fictitious, and in fact, only Rs. 4,000/- were paid but since in the sale deed it had been shown that Rs.

4,500/- were paid in the presence of Registrar, the plaintiff was prepared to pre-empt the property for a sum of Rs. 4,500/- and therefore, the present suit was filed for a decree of pre-emption against the defendants on payment of Rs. 4,500/-.

3. The suit was contested by defendant No. 1, Smt. Gyarsi Devi. She asserted that she paid full price of Rs. 6,000/-; that there was no custom of pre-emption prevalent in the area in which the Haveli was situated and that inspite of a registered notice served upon the plaintiff, Shri Inder Lal Shashtri, the predecessor in title of the present appellant, he having refused to purchase the property, had lost his right of pre-emption, if any.

4. Defendant Nos. 3 to 5 also filed a similar written statement, supporting the defendant No. 1.

5. The trial court after framing issues and recording evidence, dismissed the suit, holding that the consideration for the sale deed was Rs. 6,000/-and further that the plaintiff was Shafi-a-Sharik and also Shafi-a-Khalif and thus, had a right of pre-emption and that the Taleb did not affect the right of pre-emption which was based on custom, but ultimately dismissed the suit.

6. On appeal, the learned Additional District Judge, confirmed the findings of the trial court, and hence, this appeal.

7. Learned Counsel for the respondents has raised a preliminary objection that since the pre-emptor Inderlal Shastri died during the pendency of the first appeal, no decree for pre-emption could be passed in the case and in this connection, he has placed reliance on a full bench decision in Mohd. Ismail v. Abdul Rasheed : AIR1956 All1 where in it has been observed that under the Hanifi School of Mohd. Law, right of pre-emption does not survive to the heirs if the pre-emptor dies before obtaining a decree in his favour. This full bench decision of Allahabad High Court, approved the earlier view of that court in Mohd. Hussain v. Niyamatunnisa (ILR 20 All 148. He has also placed reliance on Hazari v. Neki : [1968]2SCR833 in which case, their Lordships of the Supreme Court had noticed the above observations in Mohd. Hussain (supra) but did not express any opinion on the point. He has further placed reliance on Pyare Mohan v. Rameshwar AIR 1980

Rajasthan 116 in which it was observed as under:

It has also clearly been laid down in Mohd. Ismail's case that in case of the death of a pre-emptor before passing of the decree, the right does not survive to the heirs.

Both the parties in the above case were Hindus.

8. Hon'ble B.P. Gupta, J. as he then was, in Bhagwan Sahai v. Satya Narain 1982 RLW 250 had observed that so far as the territories comprised in the former State of Jaipur were concerned, Mohammedan Law of preemption stood modified to the extent provided by the notification published on 15-4-1927, and before observing so, he had noticed the observations made by Justice J.P. Jain, in S.B. Civil Second Appeal No. 261/71 and by Justice M.B. Sharma, in Gopal and Ors. v. Hari Dutt Sharma (S.B. Civil Second Appeal No. 271/68.)

9. Therefor, he has submitted that the Hanifi Law applies to the former State of Jaipur. He has further placed reliance on a judgment of Hon'ble G.M. Lodha, J. dated 1-10-1985, in Civil Second Appeal No. 3/74 Gopi Chand v. Kewal Chand wherein he had discussed most of the above cases and had come to the conclusion that 'the appeal abates as after the death of the sole plaintiff, Gopichand so far as the right to claim the decree based on preemption on the basis of the custom which was prevalent earlier coming into force of the Rajasthan Act, is concerned, the legal heirs of Gopi Chand cannot claim it and continue to sue.'

10. On the other hand, learned Counsel for the appellants has submitted that the suit had been filed on 29-1-1963 and during the pendency of the suit, the Rajasthan Pre-emption Act, 1966 had come into force on 10-2-66 and it applied even to the pending cases. According to him, the Rajasthan Pre-emption Act contained both procedural as well as remedial provisions.

He has further submitted that PW 1 Inder Lal has stated in cross examination that the Haveli belonged to their fore-fathers and was ancestral property and therefore, the legal representatives of Inder Lal have also a right in the said property. He has

further submitted that the observations made in Mohd. Ismail (supra) should not apply to the facts of the present case, as that was a case between Mohammedans, where as in the present case, both the parties are the Hindus. He has further submitted that the Supreme Court in Hazari v. Neki (supra) also did not express any opinion on the subject and on basis of the Punjab Pre-emption Act, it held that the right of preemption does not abate on the death of pre-emptor and it can be exercised by the legal representatives when they are brought on record. He has also placed reliance on Gurdev Kaur v. Chanan Kaur AIR 1971 P & H 416 wherein a division bench of the Punjab High Court followed the view taken by their Lordships of the Supreme Court in Hazari v. Neki (supra) and held that right of pre-emption runs with the land and hence, legal representatives of the deceased pre-emptor could continue the suit filed by him. Reliance was also placed on Avadh Bihari Singh v. Gajadhar Jaipuria : [1955]1SCR70 . Lastly, he has placed reliance on a decision of this court in Kewal Chand v. Kunj Behari 1985 RLR 824 where in it has been observed that right recognised under the Mohammedan Law or under the Rajasthan Preemption Act, runs with the land and is not personal, though it becomes personal for purpose of enforceability. It is a right of substitution and not of re-purchase. It was also held that the Rajasthan Pre-emption Act is not only consolidating but also amending law relating to pre-emption in Rajasthan, and relying on Section 18 of the Rajasthan Pre-emption Act and Order 22, Rule 3 CPC, the learned Single Judge has come to the conclusion that right to continue a suit for pre-emption survives after the death of the pre-emptor; the suit does not abate and legal representatives could continue the suit. He has also drawn my attention to Section 306 of the Indian Succession Act, 1925 which provides that all rights to prosecute or defend any action or special proceeding existing in favour of or against a person at the time of his death, survives.

11. On merits also, he has challenged the findings of the first appellate court and has submitted that the property was sold for a sum of Rs. 4,500/- at the most as this amount is alleged to have been paid before the Registrar, and that plaintiff had been always ready and willing to pay the amount of Rs. 4,500/-. The figure of Rs. 6,000/- mentioned in the sale deed is fictitious. He has further submitted that the notice (Ex. 1) dated 24-8-1960, was served by Gulab Chand to Inder Lal. Gulab Chand died on 16-12 61 and the sale deed was executed by legal heirs of

Gulabchand on 7-8-1962 and no notice was given by the legal heirs of Gulab Chand before executing the sale deed. He has further submitted that Inderlal had given a reply to the notice (Ex. 1) but the same has not been produced by either of the parties. He has also challenged the notice (Ex. 1) on the ground that since it was not in the form and the manner prescribed vide notification dated April 7, 1927, it was of no avail. Even the property was not specified; description of the property was not given and the exact amount was also not mentioned. He has further submitted that after the coming into force of the Rajasthan Pre-emption Act, two procedures, one under the Mohammedan Law and another under the Rajasthan Act cannot apply in a case relating to pre-emption. He has placed reliance on a division bench judgement of this court in *Radha Vallabh v. Pusa Lal* 1985(1) WLN 468) where in the division bench has held that the requirements of Talab in the area of former Jaipur State had become unnecessary after the notification dated April 7, 1927 published in the Jaipur Gazette, dated 15-4-1927 and to this extent this notification had modified the customary right of pre-emption as prevailing in the former Jaipur State in respect of Talabs.

12. He has further submitted that the findings of the courts below regarding waiver are also not correct as the pleadings with regard to waiver were not very specific, and very strong evidence is required for waiver. In this connection, he has placed reliance on *Associated Hotels of India v. Ranjeet Singh* AIR 1968 SC 933. There can be no waiver unless the person against whom the waiver is claimed had full knowledge of his rights and of facts enabling him to take effectual action for the enforcement of such rights. He has also placed reliance on *Mishrilal v. Laxmi Narain Kishan Lal* : AIR 1958 MP412 where in it has been observed that 'in a suit for preemption of a house, to support the plea of waiver of his claim to pre-empt, by the plaintiff it is incumbent on the vendor and the vendee to establish that they had concluded an agreement of sale and the plaintiff was approached and asked to purchase the house for the consideration for which the vendee was going to purchase the house. Reliance was also placed on *Mohd. Ismail v. Abdul Gani* AIR 1950 Rajasthan 1), *Kesri Singh v. Nand Kumar* 1948 Jaipur Law Reporter 270 and *Ramsaran v. Domini Kuer* : [1962]2SCR474 .

13. I have given my thoughtful consideration to the whole matter and have also perused the authorities cited at the bar.

14. Admittedly, the present suit was filed on 29-1-1963 and the suit was dismissed on 4-6-1966. An appeal was filed by the plaintiff Inderlal Shashtri in 1970. The Rajasthan Pre-emption Act came into force on 10-2-1966 before the suit was decided. Inder Lal Shashtri plaintiff died in 1970 and an application for substitution was moved on 11-1-1971, and the legal representatives were brought on record by order dated 22-5-1971. No objection with regard to the maintainability of the appeal was even taken in the first appellate court. It is here for the first time that this objection has been raised by the learned Counsel for the respondents. It is also not disputed that in the former State of Jaipur, there was a custom of pre-emption which was founded on the Mohammedan Law but it stood modified only with regard to making of Talab by the notification dated 7-4-1927. The law of pre-emption was introduced in this country by the Mohammedans. There is no indication of any such concept in the Hindu Law & the subject has not been noticed or discussed either in the writings of the Smriti writers or later entreaters. During the period of Mughal emperors, the law of pre-emption was administered as a rule of common law of the land, and was applied alike to the Mohemmedans and the Hindus, and in course of time the law of pre-emption was adopted as a custom. Right of pre-emption runs with the land and can be enforced by or against the owner of the land for the time being, although the right of the pre-emptor does not amount to interest in the land itself. Initially, it is not personal but it assumes personal aspect for the purpose of enforceability in a court of law. Right of pre-emption is a very weak right and can be defeated by a defendant by all lawful means. In order to claim a right of pre-emption, it is necessary for the pre-emptor plaintiffs to allege and prove that they are the owners of the property on the basis of which they are claiming the right of pre-emption and then, the pre-emptor must continue to possess his right of pre-emption so long as decree is not passed by the court in his favour. If he loses his right before that event happens, he cannot claim himself to be entitled to a decree. The full bench decision of Allahabad High Court in Mohd. Ismail's case (supra) was followed by this court in Pyare Mohan's case (supra) and it was held that in case of the death of a pre-emptor before passing of the decree the right of pre-emption does not survive to the heirs. Bharat

Singh v. Kalu Singh 1966 Current Law Journal (Punjab) 124, also took the view that the right of preemption is purely a personal right and it comes to an end on the death of the pre-emptor & it was held that the legal-representatives cannot continue suit for pre-emption & relying on these authorities, another Single Judge, Justice G.M. Lodha, has also taken the same view in Gopi Chand's case(supra) and has held that the appeal abates as after the death of sole plaintiff Gopichand, the legal heirs could not continue the suit and the appeal was dismissed solely on this ground. Justice N.M. Kasliwal, while deciding Civil Revision petition Kewal Chand (supra), has of course observed that in view of Section 18 of the Rajasthan Pre-emption Act, if the plaintiff dies at any time before the decree has become final, the suit was not abated for the cause of action subsists and in that case, he had observed the cases of Avadh Behari Singh, Hazari v. Neki and Gurdev Kaur (supra). In the later full bench decision of Punjab & Haryana High Court in Chandra Roop Singh v. Data Ram) the earlier decision of the Punjab High Court in Gurdev Kaur (supra) has been over-ruled and since Justice N.M. Kasliwal in Kewal Chand (supra) was considering a case which was instituted after the coming into force of the Rajasthan Pre-emption Act, the observations made there in are of no help to decide the present case. I am also in agreement with the view expressed by Justice N.M. Kasliwal in Pyare Mohan (supra) and that of Justice G.M. Lodha in Gopi Chand's case (supra) and I hold that the right to sue for pre-emption does not survive to the heirs. Since the plaintiff pre-emptor had died, his legal representatives could not have continued the proceedings whether in suit or in appeal and they are not entitled to a decree for pre-emption.

15. In view of my above finding, I do not think it necessary to consider other arguments of the learned Counsel for the appellants, on merits. Moreover, this is a second appeal, and it is not possible for this court to interfere with the concurrent findings of the courts below.

16. In the result, this appeal is dismissed. The suit of the plaintiff also stands dismissed but looking to the facts and circumstances of the case, the parties are left to bear their own costs throughout.