

Bhanwar Lal Vs. Shankar Lal and ors.

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Court : Rajasthan

Decided On : Mar-23-2000

Reported in : 2000(2)WLN134

Judge : Shiv Kumar Sharma, J.

Appeal No. : S.B. Civil First Appeal No. 55 of 1981

Appellant : Bhanwar Lal

Respondent : Shankar Lal and ors.

Disposition : Appeal allowed

Judgement :

Shiv Kumar Sharma, J.

1. The defendant appellant seeks to quash the decree and judgment dated December 19, 1980 of the learned District Judge Tonk whereby the suit for pre-emption in respect of suit property came to be decreed. The parties shall be referred hereinafter in the same manner as they were arrayed in the plaint.

2. As per the averments made in the plaint the suit property was sold by the second defendant Bajrang Lal to the first defendant Bhanwar Lal through a registered sale deed executed on November 2, 1978. The plaintiff claimed that his house situated towards the north side of suit property and there is only one way

which leads to the suit property and the house of the plaintiff. On account of right of easement the suit property ought to have been sold to the plaintiff but it was sold to the first defendant and thus right of the preemption of the plaintiff was affected. The plaintiff therefore sought a decree of pre-emption in respect of suit property. The defendants in the written statements pleaded that the plaintiff had no right of pre-emption in respect of suit property. The property was purchased by the first defendant after obtaining oral consent of the plaintiff and the plaintiff was estopped from challenging the sale and right of pre-emption. As the plaintiff gave the consent, question of serving written notice did not arise at all.

3. From the pleadings of the parties as many as eight issues were framed which have been incorporated in the impugned judgment. The plaintiffs examined Shanker Lal PW. 1, Shanker Lal PW. 2, Sultan Mohammed PW. 3 and Ladu PW. 4, Whereas the defendants produced Bhairav Lal DW. 1, Krishna Kumar Tiwari DW. 2, Narendra Kumar Jain DW. 3 and Mohan Lal DW. 4. In rebuttal the plaintiff again examined himself. Learned court below after hearing the rival submissions decreed the plaintiffs suit as indicated hereinabove.

4. I have reflected over the rival submissions and carefully weighed the material on record. I have also heard the counsel in respect of application of the first defendants under Order 41 Rule 22 C.P.C.

5. It is well settled that right of pre-emption is lost by estoppel and acquiescence therefore I proceed to consider issue No. 6 which was framed thus-

Whether the first defendant obtained consent in respect of purchase of suit property and what is its effect on the suit.?'

6. As said before, the defendants in their written statements averred that the property was purchased by the first defendant after obtaining oral consent of the plaintiff and the plaintiff was estopped from pleading the right of the pre-emption. The witness Bhairav Lal (D W. 1) in the examination in chief categorically stated that he went to the shop of plaintiff and asked plaintiff Shanker Lal whether he had any objection if suit property is purchased by the first defendant (Bhanwar Lal) to which Shankar Lal replied that he did not want to purchase the suit property. At

that time Krishna Kumar Tewari was present. I have closely scrutinised the cross examination of Bhairav Lal DW. 1 but he was not cross examined in this regard. Krishna Kumar Tewari (D W. 2) in the examination in chief stated that before purchasing the suit property Bhanwar Lal had a talk with plaintiff Shankar Lal but Krishna Kumar Tewari was also not cross examined to this respect. Narendra Kumar Jain Advocate (D W. 3) also stated that in the month of January 1978 he entered into an agreement with Bajrang Lal (second defendant) in regard to purchase of suit property. Shankar Lal (plaintiff) himself informed him about the suit property and asked him that he has no objection if the suit property is purchased by Narendra Kumar Jain, Plaintiff Shankar Lal (P W. 1) admitted in his statement that he knew Krishna Kumar Tewari being his friend.

7. Mr. N.K. Maloo, learned Counsel appearing for the plaintiff canvassed that the argument that due to lack of cross examination on same point the court is bound to accept the defendants plea, is not tenable. It was contended by the learned Counsel that the plea is totally false, improbable and after thought as much as it is difficult to believe that Narendra Kumar Jain and Ram Pal Sharma both advocates who had actually done every thing in the transaction would have taken the risk of verbal conversation rather than issuing notice under Section 8 of the Raj as than Pre-emption Act. Therefore in the facts of the case the plea of estoppel is totally false and unbelievable. Reliance was placed on The Commissioner of Income Tax v. Durga Prasad More : [1971]82ITR540(SC) , Sachindra Nath v. Nalima : AIR1970 Cal38 , Sukhraj v. Calcutta Transport Corporation : AIR1966 Cal620 , Ambika Singh v. State : AIR1961 All38 .

8. On the other hand Mr. S.M. Mehta, learned Senior Counsel placed reliance on Indra Bai v. Nand Kishore : AIR 1991 SC1055 and A.E.G. Carapiet v. A.Y. Derderian : AIR1961 Cal359 .

9. Undeniably, the plaintiff had failed to cross examine the witness Bhairav Lal (DW. 1) and his witness Krishna Kumar Tewari (D W. 3) in respect of their deposition that the defendant Bhanwar Lal obtained oral consent of the plaintiff Shanker Lal before purchase of suit property. Division Bench of Calcutta High Court in A.E.G. v. A.Y. Derderian (supra) observed that 'wherever the opponent

has declined to avail himself of the opportunity to put his essential and material case in cross examination, it must follow that he believed that the testimony given could not be disputed at all. This is not merely a technical rule of evidence. It is a rule of essential justice.'

10. The Division Bench of Calcutta High Court in Sachindra Nath v. Nilima (supra) indicated that failure to cross examine a witness on a point stated in the evidence in chief will not amount to acceptance of the testimony thereon when such testimony is inherently incredible. Allahabad High Court in Ambika Singh v. State (supra) propounded that the court is not precluded from assessing veracity of witness even in absence of his cross examination.

11. I have assessed the veracity of statements of witnesses Bhairav Lal (D W. 1) Krishna Kumar Tewari (D W. 2) and Narendra Kumar Jain (D W. 3). Krishna Kumar Tewari is the friend of plaintiff Shanker Lal as admitted by Shanker Lal in his statement. Bhairav Lal (DW. 1) deposed that he had a talk in the presence of Krishna Kumar Tiwari with Shanker Lal in respect of suit property. Krishna Kumar Tewari supported the statement of Bhairav Lal. Narendra Kumar Jain Advocate stated that Shanker Lal asked him to purchase the suit property and Shanker Lal had no objection if the property is purchased by Narendra Kumar Jain. The suit property was not purchased by Narendra Kumar Jain but his statement throws light on the conduct of plaintiff Shanker Lal. The testimony of these witnesses could be shattered in the cross examination but they were not cross examined in this regard. The testimony of these witnesses is not inherently incredible and I have no option but to believe them.

12. Their Lordships of the Supreme Court in Indira Bai v. Nand Kishore (supra) propounded that the right of pre-emption is a weak right and it can be defeated by estoppel. Even in Muslim Law, which is the genesis of this right as it was unknown to Hindu Law and was brought in wake of Mohammedan Rule, it is settled that the right of pre-emption is lost by estoppel and acquiescence. Estoppel is a rule of equity flowing out of fairness striking on behaviour deficient in good faith. It operates as a check on spurious conduct by preventing the inducer from taking advantage and assailing forfeiture already accomplished. It is invoked and applied

to aid the law in administration of justice. But for it great many injustice may have been perpetrated. It was further held that 'legal approach of the High Court that no estoppel could arise unless notice under Section 8 of the Rajasthan Pre-emption Act, 1966 was given by the seller and pre-emptor should have had occasion to pay or tender price, ignores the fallacy that estoppel need not be specifically provided as it can always be used as a weapon of defence. In the Privy Council decision, referred earlier, the court was concerned with Oudh Laws Act (18 of 1876 which too had an identical provision for giving notice by seller. No notice was given but since pre-emptor knew that the property was for sale and he had even obtained details of lots he was precluded from basing his claim on pre-emption.'

13. The Privy Council AIR 1929 PC 259 too, applied this principle to non-suit a pre-emptor who knew that the property was in the market for long but offered to purchase only one out of many blocks. It held:

Assuming that the prior completed purchase by the appellant would under other circumstances, have given him the right of pre-emption in respect of the blocks in the suit, he must be taken by his conduct to have waived this right and that it would be inequitable to allow him now to re-assert it.

14. In *Indira Bai v. Nand Kishore* (supra) their Lordships of the Supreme Court considered the provisions of the 'Rajasthan Pre-emption Act, 1966 and observed, that failure to serve a notice as required in the said Act does not render the sale *ultravires*. The Act does not provide that in case no notice is given the transaction shall be void. The object is to intimate the pre-emptor who may be interested in getting himself substituted. The Act does not debar the pre-emptor from giving up his right.

15. Thus in view of the evidence adduced by the defendants I hold that the plaintiff gave the consent to the first defendant to purchase the suit property. It is not necessary therefore to discuss and decide other issues and even if it is believed that the plaintiff had right of pre-emption over the suit property, he cannot be permitted to re-assert the said right as he had waived it by giving his consent to the first defendant to purchase the property. Under these circumstances if notice under Section 8 of the Rajasthan Pre-emption Act, 1966 was not given, it was not

fatal. Learned court below has committed grave illegality in deciding issue No. 6 against the defendants. I decide issue No. 6 in favour of the defendants and hold that the first defendant had obtained the consent of the plaintiff before the purchase of suit property and the plaintiff after waiving his right as pre-emptor could not be permitted to re-assert the same by instituting the suit. The decision of issue No. 6 goes in to the root of the case.

16. Resultantly, the appeal succeeds and is accordingly allowed, the impugned judgment and decree dated December 19, 1980 stand set aside and the suit of the plaintiff is dismissed. The parties are directed to bear their own costs.

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