Radhakisan Laxminarayan Toshniwal vs Shridhar Ramchandra Alshi And Others on 23 April, 1960

Equivalent citations: 1960 AIR 1368, 1961 SCR (1) 248

Author: J.L. Kapur

Bench: J.L. Kapur, Bhuvneshwar P. Sinha, P.B. Gajendragadkar, K.N. Wanchoo

PETITIONER:
RADHAKISAN LAXMINARAYAN TOSHNIWAL

Vs.

RESPONDENT:
SHRIDHAR RAMCHANDRA ALSHI AND OTHERS.

DATE OF JUDGMENT:
23/04/1960

BENCH:
KAPUR, J.L.
BENCH:
KAPUR, J.L.
SINHA, BHUVNESHWAR P.(CJ)
GAJENDRAGADKAR, P.B.
SUBBARAO, K.
WANCHOO, K.N.

CITATION:
1960 AIR 1368 1961 SCR (1) 248
CITATOR INFO :
RF 1961 SC1747 (15)
R 1969 SC 244 (11,12)
RF 1991 SC1055 (1,5)

ACT:
Pre-emption--Equity if in favour of pre-emptor--Whether Mohamedon Law or personal law can override provision of statute law--To defeat a claim of Pre-emption, whether it is a fraud, Berar Land Revenue Code, 1928.

HEADNOTE:
The vendors executed an agreement for sale in respect of a certain survey number which according to the agreement was

to be diverted to non-agricultural purposes and thereafter a sale deed was to be executed. In pursuance to the said agreement the vendors applied for diversion which was sanctioned subject to the payment of premium and other conditions. Before the sale deed was executed respondent No. 1 Sridhar brought a suit for pre-emption against the appellant on the ground that he had a co-occupancy in the survey number in dispute being the owner of the adjoining survey number. The suit was decreed and on appeal the High Court inter alia held that the transaction was a sale which was subject to pre-emption and that the failure to execute and register a sale deed was a subterfuge to defeat the right of pre-emption.

The question for decision was (1) whether a right of pre-emption had accrued to respondent Sridhar under the provisions of the Berar Land Revenue Code, 1928, and (2) whether the appellant was guilty of fraud in that in order to defeat the right of pre-emption the deed of sale was not executed, but for all intents and purposes the appellant had become the owner of the property.

Held, that the right of pre-emption in Berar did not arise from Mohamedon Law and did not exist till it was brought from Land laws of the Punjab or North West Provinces. The-right of pre-emption under the Berar Land Revenue Code extended to transactions of sale, usufructuary mortgages and leases for 15 years or more and right under Mohamedon Law applies only to sales. The word sale has no wider connotation under s. 176 of the Berar Land Revenue Code than it has in the Transfer of Property Act . After the application of Transfer of Property Act to Berar a transaction of sale could not be effective except through a registered instrument.

The contract of sale in the instant case created no interest in favour of the appellant and the proprietary title did not validly pass from the vendors to the appellant and until that was completed no right to enforce pre-emption arose. The transfer of

249

property, where the Transfer of Property Act applied, had to be under the provisions of the Transfer of Property Act only and neither the Mohamedon Law nor any other personal law of transfer of property could override the statute law. There are no equities in favour of a pre-emptor, whose sole object is to disturb a valid transaction by virtue of the right created by statute.

Held, further that it is neither illegal nor fraudulent for the parties to a transfer, to avoid and defeat a claim for preemption by all legitimate means and a person is entitled to steer clear of the laws of pre-emption by all lawful means.

JUDGMENT:

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 167 of 1955. Appeal by special leave from the judgment and decree dated November 22, 1951, of the former Nagpur High Court in Second Appeal No. 720 of 1945.

S. N. Kherdekar, N. K. Kherdekar and A. G. Ratna. parkhi, for the appellant.

N. C. Chatterjee, S. A. Sohni and Ganpat Rai, for respondent No. 1.

1960. August 23. The Judgment of the Court was delivered by KAPUR J.-This is an appeal by special leave against the judgment and decree of the High Court at Nagpur passed in second appeal No. 1720 of 1945 confirming the decree of the District Judge. In the suit out of which this appeal has arisen the appellant was defendant No. 1 and the respondents were the plaintiff and defendant Nos. 2 and 3 and the dispute relates to pre-emption on the ground of co-occupancy which falls under Ch. XIV of the Berar Land Revenue Code, 1928, hereinafter called the Code.

On April 10, 1943, D. B. Ghaisas and his mother Ramabai entered into two contracts of sale with the appellant, one in regard to Survey Nos. 5, 14 and 16 for a sum of Rs. 10,000 out of which Rs. 2,000 was paid as earnest money and the other in regard to Survey No. 15/1 for Rs. 8,500 out of which Rs. 500 was paid as earnest money. On April 16, 1943, the vendors executed a registered sale deed in regard to Survey No,%. 5, 14 and 16 and the balance of the price was paid before the Registrar. On April 22, 1943, the vendors executed a lease of Survey No. 15/1 for 14 years in favour of Kisanlal and Sitaram who were defendant Nos. 2 and 3 in the suit and are respondents Nos. 2 and 3 in this appeal. On April 24, 1943, the vendors executed a fresh agreement of sale in respect of the same field which according to the agreement was to be diverted to non- agricultural purposes and thereafter a sale deed was to be executed when it was so diverted. The appellant was to pay the costs of the diversion as well as the premium. In pursuance of this agreement the vendors applied to the Deputy Commissioner, Akola, on August 12, 1943, for diver- sion under s. 58 of the Code and sanction was accorded on January 22, 1944, subject to payment of premium of Rs. 9,222 and other conditions. The appellant's case is that as agreed the vendors were paid this money for deposit and it was deposited in the Treasury under Challan No. 68 but there is no finding in favour of the appellant although the trial court and the District Judge seem to have proceeded on the premises that this amount was deposited but in the cir- cumstances of this case it is not necessary to go into this matter. On February 1, 1944, the sale deed was executed by the vendors in favour of the appellant and the consideration in the sale deed was Rs. 17,722.

On September 11, 1943, i.e., before the sale deed was executed the respondent, Sridhar, brought a suit for pre- emption against the appellant on the allegation that he had a co-occupancy in the Survey number in dispute-being the owner of Survey No. 15/2. In the plaint it was alleged that the transaction of contract under the documents of April 10, 1943, and April 24, 1943, constituted a sale and therefore it was subject to respondent Sridhar's prior right of pre- emption. It was also alleged that the price was not fixed in good faith. These allegations were denied. Both the trial court and the District Judge held that respondent Sridhar was entitled to preempt and determined the fair

consideration to be Rs. 3,306. The suit was therefore decreed by the trial court and on appeal by the District Judge. The appellant took an appeal to the High Court which also confirmed the decree of the subordinate courts.

The High Court has held that the transaction was a sale which was subject to pre-emption and that the failure to execute and register a sale deed was a subterfuge to defeat the right of pre-emption. It also hold that the proceedings taken for conversion of agricultural land into non- agricultural land were pendente lite and as the right of preemption had already accrued by subsequent acts of the vendors and the vendee it could not be defeated. The High Court further held that as the order of the Sub-Divisional Officer allowing conversion was a conditional one the land could not be said to have been irrevocably diverted to non- agricultural purposes. The decree of the subordinate courts was Confirmed and against that judgment the appellant has come to this court in appeal by special leave.

The first question for decision is whether a right of pre- emption had accrued to respondent Sridbar under the provisions of the Code. Previous to the cession of Berar by the Nizam of Hyderabad to the British Government in 1853, the Mohammedan rule of preemption was, according to one view, in force in the province of Berar and it continued to be so till the Berar Land Revenue Code of 1896 came into operation as from January 1, 1897. On the other hand, according to the view of two writers on the Berar Land Revenue Code of 1896, the Mohammedan law origin of the right of pre-emption does not seem to be well-founded. In the annotation of the Berar Land Revenue Code of 1896 Mr. E. S. Reynolds wrote in 1896 that although the right of pre- emption in regard to agricultural land on occupancy tenures bad been recognised in Berar the right was not based on Mohammedan law nor did it appear to be ancient and immemorial custom. It seems to have been evolved from a ruling of the Resident acting as the High Court based on r. 10 of the Sub-tenancy Rules. According to Hirurkar (Land Revenue Code, pp. 126-127) also the right of pre-emption was not based on the Mohammedan law and did not originally exist in Berar. It seems to have been brought from the land laws of the Punjab or the North West Provinces. In the Berar Settlement Rules and Berar Sub-tenancy Rules of 1866 the right of pre-emption attached to relinquishment of shares in the case of ryots of joint holdings and applied to co-sharers and this is different from the rule of Mohammedan law.

By s. 205 of the Berar Land Revenue Code of 1896 the right of pre-emption arose when a co-occupant in any Survey number was transferred by sale, foreclosure of mortgage or relinquishment in favour of a specified person for valuable consideration and it vested in every other co-occupant of the Survey number. It will thus be seen that the right of pre-emption, which under Mohammedan law attaches to sales only, was also applicable to foreclosure of mortgages and relinquishment for valuable consideration. In the year 1907 the Transfer of Property Act (IV of 1882) was extended to the province of Berar. In 1928, the Code was re-enacted and it further extended the provisions in regard to pre-emption in Ch. XIV. Under s. 174 pre-emptive rights arise in respect of transfers of unalienated land held for agricultural purposes and before an occupant could transfer the whole or any portion of his interest he had to give notice of his intention to all other occupants. Under ss. 176 to 178, the right of pre-emption arises in the case of transfers by way of sale, usufructuary mortgages, by lease for a period exceeding fifteen years or in the case of final decrees for foreclosure in a case of mortgage by conditional sale. Under a. 183 every occupant in

Survey number shall have the right to pre-empt the interest transferred by civil suit. Under s. 184 the right also arises in the case of an exchange. Thus it will be seen that the right of pre- emption has been by statute extended far beyond what was contemplated under Mohammedan law and also beyond what was recognised in the Berar Settlement Rules, Berar Subtenancy Rules and in the Code of 1896.

The High Court held that the word sale in s. 176 of the Code had a wider connotation than what it had under s. 54 of the Transfer of Property. Act. That was based on the judgment of Vivian Bose, J. (as he then was), in Jainarayan Ramgopal Marwadi v. Balwant Maroti Shingore (1) which had been approved in later judgments of that court. It was also of the opinion that the transaction in dispute gave rise to the exercise of the right of pre- emption under the rule laid down in Begum v. Mohammad Yakub (2) and as in the instant case there was in reality a sale although a registered sale deed had not been executed the right of pre-emption could not be defeated by the device that the vendors and the appellant adopted. According to s. 2 of the Transfer of Property Act which at the relevant time was in operation in Berar s. 54 is not one of the sections within ch. 2 of that Act and therefore it overrides Mohammedan law and the provisions of that section, being exhaustive as to modes of transfer, govern all sales in that province and no title passes on a sale except as provided in that section. Sale is there defined as transfer of ownership for a price paid or promised or part paid or part promised and in the case of sale of tangible immoveable property of Rs. 100/- or more sale can only be made by a registered instrument. That is clear from the language of the section itself where it is stated :-

> Section 54 Sale how made:-" Such transfer, in the case of tangible immoveable property of the value of one hundred rupees and upwards, or in the case of a reversion or other intangible thing, can be made only by a registered instrument ".
>
> It was held by the Privy Council in Immudipattam Thirugnana S. O. Kondema Naik v. Peria Dorasami (3) which was a case of a zamindari estate that it could not be transferred except by a registered instrument. But it was submitted that sale when used in connection with the general law of pre-emption is not to be construed in the narrow sense in which it is used in the Transfer of Property Act and that that had been accepted by the Judicial Committee in Sitaram Bhaurao Deshmukh v. Jiaul Hasan Sirajul Khan(4) where (1) A.I.R. 1939 Nag. 35.
>
> (3) (1900) 28 I.A. 46.
>
> (2) (1894) I.L.R. 16 All. 344.
>
> (4) (1921) 48 I.A. 475.

the observations of Sir John Edge, C. J., in Begum v. Mohammad Yakub (1) had been approved.

In Sitaram Deshmukh's case (2) one of the two Mohammedan co- sharers in Bombay by an agreement dated October 14, 1908, agreed to sell his share to a Hindu. The agreement was expressly

subject to a right 'in the co-sharer to pre-empt. The vendor informed his co-sharer that he had sold his share and the latter thereupon, after the customary formalities on October 15, 1908, claimed to recover the share from the pur- chaser. The sale deed was executed on November 9, 1908, and then a suit was filed by the pre-emptor. It was held that the co-sharer had the right to pre-empt in accordance with the intention expressed by the parties to the sale and that intention was to be looked at to determine what system of law was to apply and what was to be taken to be the date of the sale with reference to which the formalities were performed. The question there really was as to what was to be taken as a sale sufficient to justify the pre-emptor in proceeding at once to the ceremonies and it was in that connection that the following observation of Sir John Edge in Begum v. Mohammad Yakub (1) were quoted :-

> " The Chief Justice, Sir John Edge, there observes, in connection with the question whether the Transfer of Property Act, which required registration, bad altered the principle of the Mohammedan Law, which determined what was a sale for the purposes of the date in reference to which the ceremonies should be performed; " I cannot think that it was the intention of the Legislature in passing Act No. IV of 1882 " (the Transfer of Property Act) " to alter directly or indirectly the Mohammedan law of pre-emption as it existed and was understood for centuries prior to the passing of Act IV of 1882 ".

That at all events is in harmony with the conclusion come to by the High Court at Bombay. The conclusion is, that you are to look at the intention of the parties in determining what system of law was to be taken as applying and what was to be taken to be (1) (1894) I.L.R. 16 All. 344. (2) (1921) 48 I.A. 475.

the date of the sale with reference to which the ceremonies were performed ".

But it was argued for the respondents that the Privy Council had not only approved the observation of Sir John Edge, C. J., in Begum v. Mohammad Yakub(1) but has also approved the view of the Calcutta High Court in Jadu Lal Sahu v. Janki Koer (2). That was a case from Bihar where the right of pre-emption under Mohammedan Law was judicially recognised in regard to Hindus also. The question whether the sale which was to be preempted was the one under s. 54 of the Transfer of Property Act or the one under the principles of Mohmmedan Law does not seem to have been the point raised in that case. It may be pointed out that both in the case which went to the Privy Council (Sitaram Bhaurao Deshmukh v. Jaiul Hasan Sirajul Khan (3) and the Calcutta case Jadulal Sahu v. Janki Koer (2)) sale deeds were executed and registered before the suits to enforce pre-emption were filed. In the latter case the kabala was on July 28, 1904 and the ceremonies were performed after that date. In the Allahabad case, Begum v. Mohammad Yakub (1), there was a verbal sale of a house which was followed by possession but there was no registered document. No doubt there the learned Chief Justice in the majority judgment did say that to import into the Mohammedan Law of pre-emption the definition of the word " sale " with restrictions contained in s. 54 of the Transfer of Property Act would materially alter Mohammedan Law of preemption and afford fraudulent persons to avoid the law of pre-emption; with this view Bannerji, J., did Dot agree. But in our opinion the transfer of property where the Transfer of Property Act applies has, as was held by the Privy Council

also, to be under the provisions of the Transfer of Property Act only and Mohammedan Law of Transfer of Property cannot override the statute law. Mahmood, J., in Janki v. Girjadat (4) though in a minority (four judges took a different view) was of the opinion that a valid and (1) (1894) I.L.R. 16 All. 344.

(2) (1908) I.L.R. 35 Cal. 575.

(3) (1921) 48 I.A. 475.

(4) (1885) I.L.R. 7 All. 482.

perfected sale was a condition precedent to the exercise of the right of pre-emption and until such sale had been effected the right of pre-emption could not arise. Section 17 read with s. 49 of the Registration Act shows that a transfer of immoveable property where it is worth Rs. 100 or more requires registration and unless so registered the document does not affect the property and cannot be received in evidence. The following observations of Mahmood, J., from Janki v.Girjadat (1) are very apposite:-

> " If a valid and perfected sale were not a condi- tion precedent to the exercise of the pre-emptive right, consequences would follow which the law of pre-emption does not contemplate or provide for. In this very case, supposing the so-called vendor, notwithstanding the application of the 15th August, 1882 (which cannot amount to an estoppel under the circumstances) continues or recenters into possession of the property it is clear that the so- called vendee would have no, title under the so-called sale, to enable him to recover possession-the transaction being, by reason of s. 54 of the Transfer of Property Act, ineffectual as transfer of ownership. The right of pre-emption being only a right of substitution, the successful pre-emptor's title is necessarily the same as that of the vendee and if the vendee took nothing under the sale the preemptor can take nothing either; and it follows that if the vendee could not oust the vendor, the preemptor could not do so either, because in both cases the question would necessarily arise whether the sale was valid in the sense of transferring ownership. Again, if notwithstanding a pre- emptive suit such as this, the so-called vendor, who has executed an invalid sale which does not in law divest him of the proprietary right, subsequently executes a valid and registered sale-deed in favour of a co-sharer other than the preemptor or in favour of a purchaser for value without notice of the so-called contract for sale it is difficult to conceive how the preemptor, who has succeeded in a suit like the present, could resist the claim of such purchaser for possession of the property ".
>
> (1) (1885) I.L.R. 7 All. 482.

Under s. 54 of the Transfer of Property Act a contract for sale does not of itself create any interest in or charge on immoveable property and consequently the contract in the instant case created no interest in favour of the vendee and the proprietary title did not validly pass from the vendors to the

vendee and until that was completed no right to enforce pre-emption arose. As we have said earlier wherever the Transfer of Property Act is in force Mohammedan Law or any other personal law is inapplicable to transfers and no title passes except in accordance with that Act. Therefore when the suit was brought there was no transfer by way of sale which could be subject to preemption.

It was next contended that the appellant was guilty of fraud in that in order to defeat the right of the preemptors a deed of sale was not executed although as a matter of fact price had been paid, possession had passed and for all intents and purposes the appellant had become the owner of the property and that conduct such as this would defeat the very law of preemption. The right to pre-empt the sale is not exercisable till a pre-emptible transfer has been effected and the right of pre-emption is not one which is looked upon with great favour by the courts presumably for the reason that it is in derogation of the right of the owner to alienate his property. It is neither illegal nor fraudulent for parties to a transfer to avoid and defeat a claim for pre-emption by all legitimate means. In the Punjab where the right of pre-emption is also statutory the courts have not looked with disfavour at the attempts of the vendor and the vendee to avoid the accrual of right of pre-emption by any lawful means and this view has been accepted by this court in Bishan Singh v. Khazan Singh (7) where Subba Rao, J., observed:-

> " The right being a very weak right, it can be defeated by all legitimate methods, such as the vendee allowing the claimant of a superior or equal right being substituted in his place ".

In the present case the transaction of sale had not (7) [1959] S.C.R. 878,884.

been completed until February 1, 1944, when the sale deed was executed. Anything done previous to it could not ordinarily be said to be a fraud to deprive a pre-emptor, from the exercise of his right of pre-emption. There are no equities in favour of a pre-emptor, whose sole object is to disturb a valid transaction by virtue of the rights created in him by statute. To defeat the law of pre-emption by any legitimate means is not fraud on the part of either the vendor or the vendee and a person is entitled to steer clear of the law of pre-emption by all lawful means. It was then submitted that the sale deed had as a matter of fact, been executed on February 1, 1944; but respondent Sridhar brought the suit not on the cause of action arising on the sale dated February 1, 1944, but on the transaction of April 10, 1943, coupled with that of April 24, 1943, which being mere contracts of sale created no interest in the vendee and there was no right of pre-emption in respondent No. I which could be enforced under the Code. Mr. Chatterji urged that it did not matter if the sale took place later and the suit was brought earlier but the suit as laid down was one to pre-empt a sale of April 1943 when, as a matter of fact, no sale had taken place. If respondent Sridhar had based his right of pre-emption on the basis of the sale of February 1, 1944, the appellant would have taken such defence as the law allowed him. The defence in regard to the conversion of the land from agricultural into non- agricultural site which negatives the right of pre-emption would then have become a very important issue in the case and the appellant would have adduced proper proof in regard to it. The right of pre-emption is a weak right and is not looked upon with favour by courts and therefore the courts could not go out of their way to help the pre-emptor. In our opinion the judgment of the High Court was erroneous and we would therefore allow this appeal, set aside the judgment and decree of the High Court and

dismiss the suit with costs throughout.

Appeal allowed.