Rambaran Prosad vs Ram Mohit Hazra & Ors on 6 September, 1966

Equivalent citations: 1967 AIR 744, 1967 SCR (1) 293

Author: V. Ramaswami

Bench: V. Ramaswami, Vishishtha Bhargava

PETITIONER:
RAMBARAN PROSAD

Vs.

RESPONDENT:
RAM MOHIT HAZRA & ORS.

DATE OF JUDGMENT:
06/09/1966

BENCH:
RAMASWAMI, V.
BENCH:
RAMASWAMI, V.
BHARGAVA, VISHISHTHA
DAYAL, RAGHUBAR

CITATION:
1967 AIR 744 1967 SCR (1) 293
CITATOR INFO :
F 1977 SC 774 (32)
RF 1980 SC1334 (6)

ACT:
Pre-emption-Agreement between parties to give to each other right of pre-emption-Whether binds successors-in-interest-Rule against perpetuities whether offended.

HEADNOTE:
There was a partition suit between two brothers T and K. The matter was referred to arbitration. Under the award the properties were divided into four blocks A, B, C and D. Blocks A and C went to T, and B and D to K. Further according to the award, the parties had agreed that 'any party in case of disposing or transferring any portion of his share, shall offer preference to the other party, that is each party shall have the right of preemption between

each other'. Thereafter T sold Block A to one G after obtaining K's refusal to preempt the same. Next year K sold blocks B and D to certain parties who in turn sold them to the plaintiffs. Some, years later G sold block A to defendant No. 1. The plaintiffs thereupon filed a suit against defendant No. 1 for preempting his aforesaid purchase. While the suit was pending in the trial court, defendant No. I sold block A to defendant No. 2 who was -also impleaded to the suit. The trial Judge held that the covenant of preemption was binding upon the defendants who had notice of that clause and the plaintiffs were entitled to the right of preemption. He further held that the covenant of preemption was not hit by the rule 'against perpetuities and was enforceable -against the assignees of the original parties to the contract. The defendants took the matter in appeal to the High Court which dismissed the appeal. The defendants came to this Court by way of special leave to appeal.

HELD : (i) It is true that the preemption clause does not expressly state that it is binding upon the assignees or successors-in-interest, but, having regard to the context and the circumstances in which the award was made it was manifest that the preemption clause must be construed as binding upon the assignees, or successors-in-interest of the original contracting parties. [295 G]

Section 23, 27(b) and 37 of the Specific Relief Act lay down that subject to certain exceptions a contract in the absence of a contrary intention express or implied will be enforceable by and against the parties and their legal heirs and legal representative including assignees and transferees. In the present case there was nothing in the language of the preemption clause or the other clauses of the award to suggest that the parties bad any contrary intention. On the other hand a reference to the other clauses of the award showed that the parties intended that the obligations and benefit of the contract should go to the assignees and successors-ininterest. [296-H]

The pre-emption clause was based on the ground of vicinage and this circumstance also suggested that the intention of the parties was that the pre-emption clause should be binding upon the heirs and successors-in- interest and the assignees of the original parties to the contract. [298 A]

(ii) The rule against perpetuities does not apply to personal contracts which do not create interest in property. [298 F]

294

Reading s. 14 along with s. 54 of the Transfer of Property Act it is mainfest that a mere contract for sale of immovable property does not create any interest in the immovable property and it therefore follows that the rule of perpetuity cannot be applied to a covenant of pre-emption even though there is no time limit with-in which the option

has to be exercised. [301 H]
Accordingly the covenant for pre-emption in the present case did not offend the rule against perpetuities and could not be considered to be void in law. (302 D]
Case-law referred to.
English law distinguished.

JUDGMENT:

CIVIL APPELLATE JURISDICATION : Civil Appeal No. 609 of 1964.

Appeal by special leave from the judgment and decree dated November 11, 1959 of the Calcutta High Court in Appeal from Original Decree No. 109 of 1954.

Bishan Narain and B. P. Maheshwari, for the appellant. N. C Chatterjee and Sukumar Ghosh, for respondents Nos. 1 and 2.

The Judgment of the Court was delivered by Ramaswami, J. This appeal is brought, by special leave, from the judgment of the Calcutta High Court -dated November 18,1959 in First Appeal No. 104 of 1954 affirming the judgment and decree dated February 27, 1954 of the Subordinate Judge, Fifth Court, at Alipore District 24 Parganas in Title Suit No. 100 of 1952 decreeing the suit for pre-emption in favour of the plaintiffsrespondents Nos. 1 and 2.

Two brothers, Tulshidas Chatterjee and Kishorilal Chatterjee owned certain properties (land and building) on Paharpur Road within Mouza Garden Reach, Khidderpore, in the suburbs of Calcutta. In the year 1938 Kishorilal sued for partition of the properties and eventually the matter was referred to arbitration. On December 16, 1940, the arbitrators filed their award on which a final decree was passed on March 15, 1941 in the partition suit. Under the award, two of the four blocks, A, B, C & D, into which the properties were divided by the arbitrators, namely, blocks A and C, were allotted to Tulshidas and the remaining two blocks, B and D were allotted to Kishorilal. Two common passages marked as X and Y and a common drain Z were kept joint between the parties for their use. In the award there was a clause to the following effect :

> "We further find and report with the consent of and approval of the parties that any party in case of disposing or transferring any portion of his share, shall offer preference to the other party, that is each party shall have the right of pre-emption between each other."

Thereafter, on August 20, 1941 Tulshidas sold his A block to one Nagendra Nath Ghosh. This was done after Kishorilal's refusal to pre-empt the same in spite of Tulshidas's offer to him in terms of he pre-emption clause. On April 22, 1942, Kishorilal sold, by the Kobala (Ex. 1), his two blocks, B and D to Rati Raman Mukherjee and others. On June 21, 1946, the Mukherjees in their turn sold the two blocks B & D to the plaintiffs by the Kobala [Ex. 1(a)]. On September 20, 1952 Nagendra Nath Ghosh sold block A to defendant No. 1 and on December 2, 1952, the present suit was filed by the plaintiffs

against the said purchaser- defendant No. for preempting his aforesaid purchase. On April 7, 1953 while the suit was pending in the trial court, defendant No. I sold the disputed property (block A) to defendant No. 2. The plaintiffs thereafter made an application for amendment of the plaint praying for a decree for pre-emption against defendants Nos. 1 & 2 and calling upon them to execute a conveyance in favour of the plaintiffs on payment of the actual consideration paid for the property in suit. On the conclusion of the trial the Subordinate Judge held that the covenant of pre-emption was binding upon the defendants who had notice of that clause and plaintiffs were entitled to enforce the night of pre- emption., He further held that the covenant of preemption was not hit by the rule against perpetuities and was enfor- ceable against the assignees of the original parties to the contract. Accordingly a decree was granted to the plaintiffs asking them to deposit within one month a sum of Rs. 14,000 for the purpose of preempting the suit property and both the defendants were directed to execute and register a Kobala in plaintiffs' favour within 15 days of the deposit by the plaintiffs. The defendants took the matter in appeal to the Calcutta High Court which dismissed the appeal and affirmed the judgment and decree of the Subordinate fudge.

On behalf of the appellant learned Counsel put forward the argument that the covenant for pre-emption was merely a personal covenant between the contracting parties and was not binding against successors-in-interest or the assignees of the original parties to he contract. We are unable to accept this submission as correct. It is true that the pre- emption clause does not expressly state that it is binding upon the assignees or successors-in-interest, but, having regard to the context and the circumstances in which the award was made, it is manifest that the pre-emption clause must be construed as binding upon the assignees or successors-in-interest of the original contracting parties. Prima Facie rights of the parties to a contract are assignable. section 23(b) of the Specific Relief Act states :

> "23. Except as otherwise provided by this Chapter, the specific performance of a contract may be obtained by-
>
> (a).....
>
> (b) the representative in interest, or the principal, of any party thereto : provided that, where the learning, skill, solvency or any personal quality of such party is a material ingredient in the contract, or where the contract provides that his interest shall not be assigned, his representative in interest or his principal shall not be en-

titled to specific performance of the contract, unless where his part thereof has already been performed Section 27(b) of the Act is to the following effect "27. Except as otherwise provided by this Chapter, specific performance of a contract may be enforced against-

> (a).....
>
> (b) any other person claiming under him by a title arising subsequently to the contract, except a transferee for value who has paid his money in good faith and without notice of the original contract ;"

> Reference should also be made to ss. 37 and 40 of the Indian Contract Act which are to the following effect "37. The parties to a contract must either perform, or offer to perform, their respective promises, unless such performance is dispensed with or excused under the provisions of this Act, or of any other law.
>
> Promises bind the representatives of the promisers in case of the death of such promisers before performance, unless a contrary intention appears from the contract."
>
> "40. If it appears from the nature of the case that it was the intention of the parties to any contract that any promise contained in it should be performed by the promisor himself, such promise must be performed by the promisor. In other cases, the promisor or his representatives may employ a competent person to perform it."

In substance these statutory provisions lay down that, subject to certain exceptions which are not material in this case, a contract in the absence of a contrary intention express or implied will be enforceable by and against the parties and their legal heirs and legal representatives including assignees and transferees. In the present case, there is nothing in the language of the pre-emption clause or the other clauses of the award to suggest that the parties had any contrary intention. On the other hand a reference to the other clauses of the award shows that the parties intended that the 29 7 obligations and benefit of the contract should go to the assignees or successors-in-interest. The following clauses of the award are important :

> "We find and report that 6' six feet wide common passage marked 'X' measuring 12 ch. 36 sq. ft. in the plan -and colored with Burnt sienna shall ever remain as such to all the blocks the owners whereof shall have every right to take underground water pipes electric connections etc. and the parties shall have never any right either to obstruct or to close any part of the same.
>
> The parties shall be at liberty to fill up the tank portion allotted in their respective shares at their own costs. The common walls and structures according to the above allotments shall have to be maintained and kept in proper condition by both parties. We further find and report that the partition line in the inner courtyard shall be drawn east to west as shown in the plan just over the middle of the pit situated at the north west corner of the inner courtyard for the drainage of water. There must be an opening in the partition wall that may be raised thereon over the mouth of the pit in order to have a free access for the drainage of water of both parties through the said pit which shall have to be maintained as such for ever. With the consent of the parties we find and award that the parties shall complete construction of new structures or demolition of any existing structures, in terms of this award within one year from this date, that is 16th day of December, 1940. During this period of one year parties shall remain entitled to use and enjoy the entire property as allotted, but immediately after the expiry of the said period of one year plaintiff shall have every right to close or otherwise obstruct the defendant from enjoyment of that portion of the structure

> privy or land exclusively allotted to him and the defendant shall have the same right as against the plaintiff in respect of his share of structures and land exclusively allotted to his share in terms of the award."

It is obvious that in these clauses the expression "parties" cannot be restricted to the original parties to the contract but must include the legal representatives and assignees of the original parties. There is hence no reason why the same expression should be given a restricted meaning in the pre-emption clause which is the subjectmatter of interpretation in the present appeal. On behalf of the respondents Mr. N. C. Chatterjee rightly argued that the pre-emp-

tion clause was based upon the ground of vicinage and this circumstance would also suggest that the intention of the parties was that the pre-emption clause should be binding upon the heirs and successors-in-interest and the assignees of the original parties to the contract. We accordingly hold that Mr. Bishen Narain on behalf of the appellant is unable to make good his submission on this aspect of the case.

We pass on to consider the next question which arises in this appeal, namely, whether the covenant of pre-emption offends the rule against perpetuities and is therefore void and not enforceable even against the original contracting parties.

> "A perpetuity", as defined by Lewis in his well-known book on "Perpetuities" (p. 164), is 'a future limitation, whether executory or by way of remainder, and of either real or personal property which is not to vest until after the expiration of, or will not necessarily vest within, the period fixed and prescribed by law for the ,creation of future estates and interests'. The rule as formulated falls within the branch of the law of property and its true object is to restrain the creation of future conditional interest in property. The rule against perpetuities is, not concerned with contracts as such or with contractual rights and obligations as such. Thus a contract to pay money to a person, his heirs or, legal representatives upon a future contingency, which may happen beyond the period prescribed would be perfectly valid (Walsh v. Secretary of State for India)(1). It is therefore well-established that the rule of perpetuity concerns rights of property only and does not affect the making of contracts which do not create rights of property.

The rule does not therefore apply to personal contracts which ,do not create interest in property (See the decision of the Court of Appeal in South Eastern Railway Company v. Associated Portland Cement Manufacturers Ltd.)(2), even though the contract may have reference to land. In Witham v. Vane,(3) William Harry, Earl of Darlington sold in 1824 the manor of Hutton Henry and other heriditaments to George Silvertop. In the conveyance there was a covenant that the said Earl, his heirs, executors, administrators or assigns would pay six pence for each chaldron of coal which would be wrought or gotten out of the lands so sold and which would be shipped for sale, to George Silvertop, his heirs, executors, administrators or assigns. The covenant was en- forced in 1883 at the instance of an assignee from the legal representatives of George Silvertop against the executors of the Earl. The Lord Chancellor (Earl of Silborne) overruled the plea that the covenant offended the

rule against perpetuities on the ground (1) (1863) 10 H.L.C. 367; 11 E.R. 1068.

(2) [1910] 1 Ch. 12.

(3) (1883) Challies Law of Real Property, 3rd. Ed., App. V., p. 440.

that, though the covenant had relation to land, it did not amount to a reservation of any interest in land. In English law a contract for purchase of real property is regarded as creating an equitable interest, and if, in the absence of a time limit, it is possible that the option for repurchase might be exercised beyond the prescribed period fixed by the perpetuity rule, the covenant is regarded as altogether void. It has therefore been held that a covenant for pre-emption unlimited in point of time is bad as being obnoxious to the rule against perpetuities. The point was settled by the Court of appeal in London and South Western Railway Company v. Gomm(1) which is the leading English authority on the point. In that case, the plaintiff company conveyed certain lands to Powell in 1865, and Powell covenanted with the company that he, his heirs, and assigns, would at any time, on receipt of Pound 100, reconvey the lands to the company. In 1879, the defendant Gomm purchased the land from Powell's heirs with notice of the above covenant, and in 1880 the company gave the defendant a notice to reconvey the land, and on his refusal brought the suit for specific performance. Kay J. gave the plaintiff a decree, being of the opinion that, as the covenant did not create any estate or interest in the land, it was not obnoxious to the rule against perpetuities. This decision was reversed by the Court of appeal, and it was held that the option to purchase created an equitable interest in the land which attracted the operation of the perpetuity rule. Sir George Jessel M. R. observed, in his judgment, that the right to call for a conveyance of land was an equitable in- terest or equitable estate. There was no doubt about it in an ordinary case of contract for purchase, and an option for repurchase did not stand on a different footing. In the course of his judgment the learned Master of Rolls observed as follows :

> "Whether the rule applies or not depends upon this as it appears to me, does or does not the covenant give an interest in the land ? If it is a bare or more personal contract it is of course not obnoxious to the rule, but in that case it is impossible to see how the present appellant can be bound. He did not enter into the contract, but is only a purchaser from Powell who did. If it is a mere personal contract it cannot be enforced against the assignee. Therefore the company must admit that it somehow binds the land. The right to call for a conveyance of the land is an equitable interest or equitable estate. In the ordinary case of a contract for purchase there is no doubt about this, and an option of purchase is not different, in its nature. A person exercising the option has to do, two things; he has to give notice of his intention to,,
> (1) [1882] 20 Ch. D. 562.

M1 5Sup C1/66-6 purchase, and to pay the purchase money; but as far as the man who is liable to convey is concerned, his estate or interest is taken away from him without his consent, and the right to take it away being vested in another, the covenant giving the option must give the other an interest in land."

In the case of an agreement for sale entered into prior to the passing of the Transfer of Property Act, it was the accepted doctrine in India that the agreement created an interest in the land itself in favour of the purchaser. For instance, in Fati Chand Sahu v. Lilambar Sing Das(1) a suit for specific performance of a contract for sale was dismissed on the ground that the agreement, which was held to create an interest in the land, was not registered under s. 17, cl. (2) of the Indian Registration Act of 1866. Following this principle, Markby J. in Tripoota Soonduree v. Juggur Nath Dutt(2) expressed the opinion that a covenant for pre-emption contained in a deed of partition, which was unlimited in point of time, was not enforceable in law. The same view was taken by Baker J. in Allibhai Mahomed Akuji v. Dada Allis Isaac(3) where the option of purchase was contained in a contract entered into before the passing of the Tranfer of Property Act. The decision of the Judicial Committee in Maharaj Bahadur Singh v. Bal Chanad(4) was also a decision relating to a contract of the year 1872. In that case, the proprietor of a hill entered into an agreement with a society of Jains that, if the latter would require a site thereon for the erection of a temple, he and his heirs would grant the site free of cost. The proprietor afterwards alienated the hill. The society, through their representatives, sued the alienees for possession of a site defined by boundaries, alleging notice to the proprietor requiring that site and that they had taken possession, but been dispossessed. It was held by the Judicial Committee that the suit must fail. The Judicial Committee was of the opinion that the agreement conferred on the society no present estate or interest in the site, and was unenforceable as a covenant, since it did not run with the land, and infringed the rule against perpetuity. Lord Buckmaster who pronounced the opinion of the Judicial Corn- mittee observed as follows "Further, if the case be regarded in another lightnamely, an agreement to grant 'in the future whatever land might be selected as a site for a temple-as the only interest created would be one to take effect by entry at a later date, and as this date is uncertain, the provision is obviously bad as offending the rule against perpetuities, for the interest wouldnot then vest in presenti, but (1) (1871) 9 B.L.R. 433. (2) (1875) 24 W.R.

321. (3) A.L.R. 1931 Bom. 578. (4) 48 I.A.

376. would vest at the expiration of an indefinite time which might extend beyond the expiration of the proper period."

But there has been a change in the legal position in India since the passing of the Transfer of Property Act. Section 54 of the Act states that a contract for sale of immovable property "does not, of itself, create any interest in or charge on such property". Section 40 of the Act is also important and reads as follows :

> "40. Where, for the more beneficial enjoyment of his own immovable property, a third person has, independently of any interest in the immovable property of another or of any easement thereon, a right to restrain the enjoyment in a particular manner of the latter property, or where a third person is entitled to the benefit of an obligation arising out of contract, and annexed to the ownership of immovable property, but not amounting to an interest therein or easement thereon, such right or obligation may be enforced against a transferee with notice thereof or a gratuitous transferee of the property affected thereby, but not against a transferee for

> consideration and without notice of the right or obligation nor against such property in his hands."

The second paragraph of s. 40 taken with the illustration establishes two propositions : (1) that a contract for sale does not create any interest in the land, but is annexed to the ownership of the land and (2) that the obligation can be enforced against a subsequent gratuitous transferee from the vendor or a transferee for value but with notice. Section 14 of the Act states as follows :

> "14. No transfer of property can operate to create an interest which is to take effect after the lifetime of one or more persons living at the date of such transfer, and the minority of some person who shall be in existence at the expiration of that period, and to whom, if he attains full age, the interest created is to belong."

Reading s. 14 along with s. 54 of the Transfer of Property Act its manifest that a mere contract for sale of immovable property does not create any interest in the immovable property and it therefore follows that the rule of perpetuity cannot be applied to a covenant of pre-emption even though there is no time limit within which the option has to be exercised. It is true that the second paragraph of s. 40 of the Transfer of Property Act make a substantial departure from the English law, for an obligation under a contract which creates no interest in land but which concerns land is made enforceable against an assignee of the land who takes from the promiser either gratuitously or takes for value but with notice. A contract of this nature does not stand on the same footing as a mere personal contract, for it can be enforced against an assignee with notice. There is a superficial kind of resemblance between the personal obligation created by the contract of sale described under s. 40 of the Act which arises out of the contract, and annexed to the ownership of immovable property, but not amounting to an interest therein or easement thereon and the equitable interest of the person purchasing under the English Law, in that both these rights are liable to be defeated by a purchaser for value without notice. But the analogy cannot be carried further and the rule against perpetuity which applies to equitable estates in English law cannot be applied to a covenant of are-emption because s. 40 of the statute does not make the covenant enforceable against the assignee on the footing that it creates an interest in the land.

We are accordingly of the opinion that the covenant for pre- emption in this case does not offend the rule against perpetuities and cannot be considered to be void in law. The view that we have expressed is borne out by the decisions of the Calcutta High Court in Ali Hossain Miya v. Raj Kumar Haldar(1), of the Allahabad High Court in Aulad Ali v. Ali Athar(2) and of the Madras High Court in Chinna Munuswami Nayudu v. Sagalaguna Nayudu.(1) Mr. Bishen Narain relied on the decision of the Calcutta High Court in Nobin Chandra Soot v. Nabab Ali Sarkar(4) and the judgment of the Allahabad High Court in Gopi Ram v. Jeot Ram(5). For the reasons we have already stated we hold that the later deci- sions in Ali Hossain Miya v. Raj Kumar Haldar(1) in Chinna Munuswami Nayudu v. Sagalaguna Nayudu,(3) and in Aulad Ali v. Ali Athar,(2) correctly state the law on the point. For the reasons expressed we hold that the decision of the High Court is correct and this appeal must be dismissed with costs.

G. C. Appeal dismissed.

(1) I.L.R. (1943) 2 Cal, 605.

(2) I.L.R. 49 All. 527.

(3) 1. L.R. 49 Mad. 387.

(4) 5 C.W.N. 343.

(5) I.L.R. 45 All. 478.