Badri Datt And Ors. vs Shrikishan And Ors. on 10 August, 1953

Equivalent citations: AIR1954ALL94, AIR 1954 ALLAHABAD 94

JUDGMENT

Malik, C.J.

1. This is a Letters Patent appeal against a judgment of a learned single Judge who dismissed the appeal but granted leave to file an appeal before a Division Bench.

2. According to the allegations in the plaint the property in suit belonged to one Madhwa Nand who died about 24 or 25 years back leaving a widow Srimati Madhav Sundari who was impleaded as defendant 2. On 17-12-1943, Srimati Madhav Sundari sold certain shares in three villages, 'mauza' Bamanpuri, 'mauza' Bamanpuri Genth and 'mauza' Har to defendant 1, Sri Krishan Upadhyay for Rs. 1,500/-. It was alleged in the plaint that no amount was paid but the plaintiffs were willing to pre-empt the property on payment of Rs. 1,500/- or such other sum as the Court might find reasonable. The suit was filed by six plaintiffs, Badri Dutt, Hansa Dutt Upadhyay, Shambhu Dutt, Jai Krishn, Durga and Tika Ram.

3. The suit was contested on several points, one of the points raised being that three of the plaintiffs were strangers and had no right to claim pre-emption those three being Hansa Dutt, Durga Dutt and Tika Ram and the whole suit must therefore fail.

4. The learned Munsif framed two issues, the first issue being "whether the plaintiffs are cosharers in the village in which the land is situated". After the evidence in the case had been recorded, arguments heard and judgment reserved three of the plaintiffs, Hansa Dutt, Durga Dutt and Tika Ram, filed an application on 4-5-1945 for permission to withdraw irom the suit. According to the applicants they wanted to withdraw to obviate all difficulty raised on behalf of the defendants by their plea that the other three plaintiffs having joined: three strangers as plaintiffs to the suit they had forfeited their right to claim pre-emption. This application was granted. The three remaining plaintiffs Jai Krishn, Badri Dutt and Shambhu Dutt were recorded co-sharers in the three villages and there could be no dispute that they were co-sharers.

5. The learned Munsif did not go into the question of the effect of joining three strangers to the suit and decreed the suit on payment of Rs. 1.500/-.

6. The defendant, vendee, appealed. The lower appellate Court dismissed the suit on the finding that the three remaining plaintiffs having joined fn the suit three strangers their right to claim pre-emption was extinguished. The same view was accepted by the learned single Judge.

7. Two points have been raised by learned counsel. The first is that there should have been an enquiry and a finding whether Hansa Dutt, Durga Dutt and Tika Ram were strangers or were co-sharers. No such plea appears to have been raised before the lower Courts or before the learned single Judge and we do not think it will be proper at this late stage to allow a point of fact to be raised which might not have been raised before as there was no substance in it. The suit for pre-emption was filed in 1945 and eight years have now elapsed since then.

8. The other point raised by learned counsel is that when. Hansa Dutt, Durga Dutt and Tika Ram got their names removed from the record by an amendment of the plaint there was no bar to the remaining plaintiffs getting a decree for pre-emption. Learned counsel has urged that some of the decisions of this Court on the point either do not lay down the correct law or that the point now raised by him did not directly arise in those cases.

9. The argument in fact is that at the worst by joining three strangers the co-sharer plaintiffs may be said to have made a mistake or an error in a matter of procedure which the Court was entitled to rectify under Order 1, Rule 9 or 10, Civil P. C. and, as soon as the rectification was made, the substantive right of the co-sharer-plaintiffs to claim pre-emption could not be taken away and a decree should have been passed in their favour.

10. The consistent view, however, of this Court has been that a pre-emptor must have a right of preemption on three dates; firstly, the date of sale, secondly, the date of suit and, thirdly, the date of decree. It is also well-settled that pre-emption is a weak right and the rules have therefore, to be strictly enforced. Both under Mohammedan Law as well as under customary rules regulating pre-emption the rules were always strictly followed.

11. In -- 'Bhawani Prasad v. Damru', 5 All 197 (A), the question first arose as to the effect of a plaintiff joining a stranger in a suit for pre-emption and the rule was thus laid down by Mah-mood J. to which Tyrrell J. also agreed. The rule is that "a person cannot claim a right which he has himself violated, nor can he be allowed to complain of an injury in which he has himself acquiesced."

The learned Judge went on to hold that "as a co-sharer entitled to pre-emption forfeits the benefit of the right by joining a stranger in purchasing the property, so a pre-emptor loses his right of enforcing pre-emption by joining in his claim persons who are as much strangers as the vendee."

So far as we know this view has been consistently followed in this Court and in a decision by Banerji J. and Aikman J. in -- 'Bhupal Singh v. Mohan Singh, 19 All 324 (B), it was observed that:

> "If these ladies, who had not the right of preemption by reason of their not being co-sharers in the village, were granted a decree in this case, the result would be that a share of the village would pass into the hands of the personal heirs of these ladies, who might be entire strangers to the village. As to the argument that the defect in the plaint could be remedied by an amendment, we may observe, as held in the cases above referred to, that the very fact of a person having the right of pre-em tion

> joining with himself strangers, i.e. persons who have not a right of pre-emption, is in itself sufficient to estop him from asserting his claim. An amendment of the plaint therefore would not be of any avail to the other plaintiffs."

The very next year, however, the point arose before a Division Bench of the Judicial Commissioner's Court at Lucknow in -- 'Abdulla v. Mt. Wahidun-nisa', 1 Oudh Cas 308 (C). In that case Chamier A. J. C. discussed the decision of Mahmood J. in 'Bhawani Prasad's case, (A)', cited above and, though the learned Judge agreed with the enunciation of the principles, he thought that its ap-

plication to the case was not correct. The reason given by the learned Judge was that while in the case of a vendee associating with himself a stranger the act of associating a stranger as a party to the sale was an act which was incapable of being undone, an error in the array of parties by including a stranger as a plaintiff to the suit could be remedied under an order of the Court.

The learned Judge also went on to say that a plaintiff may make a 'bona fide' mistake without realising that the co-plaintiff is a stranger. The same argument of a 'bona fide' mistake can, however, be advanced in favour of a vendee who may have in ignorance of the real position allowed a stranger to join as co-vendee with him. The other learned Judge dealt at some length with the law as regards estoppel and the law as regards acquiescence and held that the doctrine of estoppel and acquiescence did not apply.

12. The rule, however, is not based on the doctrine of either estoppel or acquiescence. If the reasoning in -- 'Abdulla v. Mt. Wahidunnisa', (C), is to be applied then there can be no difficulty In the Courts decreeing the suit of a plaintiff who was a co-sharer and dismissing the suit of a plaintiff who was a stranger. As we have already said above, the law of pre-emption is technical and has got its rules according to which the law has to be applied. It is a weak right and any infringement of those rules takes away the right and defeats the claim. No doubt the rule enun-'ciated by Mahmood J. in 'Bhawani Prasad's case, (A)', was based on equity, justice and good conscience on the ground that a plaintiff pre-emptor should be in the same position as a co-sharer vendee who had purchased the property along with a stranger. This rule of justice, equity and good conscience has not only been observed in a series of decisions of this Court bub has also been recognised by the Legislature in the Agra Preemption Act (No. 11 of 1922). Section 21 of that Act provides that:

> "Where a person having a right of pre-emption sues jointly with a person not having such right, he shall lose his right; and where a pre-emptor of a higher class sues jointly with a pre-emptor of a lower class, he shall have no higher right than the person with whom he so sues."

From the wording of Section 21 it is clear that the right is lost by the fact of the person having joined a stranger.

13. The view in 'Bhawani Prasad's case, (A)', has been followed in several decisions of this court. We have already referred to -- '19 All 324 (B)'. The other cases to which reference has been made are: -- 'Umar Daraz v. Sri Ram Das'. AIR 1925 All 355 (D), a judgment of Lindsay and Kanhaiya Lal JJ,

where it was held that "It is fatal for a plaintiff in a pre-emption suit to associate with him in that suit any person who is not entitled to pre-emption."

And again "We do not think we are entitled to resort to any powers of amendment which we have under the Code of Civil Procedure in order to allow an amendment in a case of this kind."

No doubt in that case the amendment was asked for at a late stage, that is, in the High Court, 'but the observations are general and the Oudh case of --'Abdulla v. Mt. Wahidunnisa', (C) was cited 'but was not followed.

14. In -- 'Shanker Lal v. Kirari Mal', AIR 1924 All 81 (E), Lindsay and Sulaiman JJ. took the same view and held that by joining in the suit persons who are strangers to the property situated in Mahal Bagi Manda these plaintiffs disquali-

fied themselves from suing for pre-emption, of the property in that mahal.

15. The last case on the point is -- 'Sheo Balak v. Ram Saran', AIR 1933 All 788 (P), but as that case was after the Agra Pre-emption Act had come into force the decision cannot be of much assistance.

16. Some reliance has been placed on the observations of the learned Chief Justice in -- 'Karan Singh v. Muhammad Ismail Khan', 7 All 860 (G). There also certain persons were joined as strangers and the suit, had failed. The appeal was dismissed and the learned Chief Justice Sir Comer Petheram observed:

> "One of them, Musammat Lado, is not entitled to claim pre-emption, and the other plaintiff therefore cannot claim pre-emption entirely on his own account without amending the plaint. Under a Full Bench ruling of this Court --'Damodar Das v. Gokal Chand', 7 All 79 (FB) (H), the plaint cannot be amended at this time of day; with the petition of plaint as it now stands, the plaintiffs cannot succeed."

It is urged by learned counsel that these observations should be interpreted to mean that in case the plaint could have been amended, the learned Judge's decision would have been different. We are not prepared to accept that interpretation. That was only one reason given by the learned Chief Justice for the dismissal of the appeal and it does not necessarily follow from the observation that he had applied his mind to the question and has held that if the plaint had been amended the suit could be decreed.

17. Reliance is also placed on the provisions of Order 1, Rules 9 and 10, Civil P. C. Rule 9 of this Order provides that;

> "No suit shall be defeated by reason of the mis-joinder or non-joinder of parties, and the Court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it."

and Rule 10 gives the Court the power to correct an error in the array of parties or to allow a fresh party to be added or the name of a person already on the record to be removed if that is necessary for the determination of the real matter in dispute. The only limitation, it is said, is contained in Clause (5) of Rule 10 that such amendment will be made subject to the provisions of the Indian Limitation Act, 1908, Section 22, the proceedings as against any person added as defendant being deemed from the date of the service of the summons. We do -not think Order 1, Rules 9 or 10 can help the appellant. It is not a "case here of the suit being dismissed for mis-joinder or non-joinder of parties. The reason for the dismissal is different.

Here on the date of the suit the plaintiffs should have a cause of action to claim pre-emption. By joining with them certain strangers to the suit they had forfeited that right. By reason of the subsequent amendment by removal of the strangers impleaded as co-plaintiffs that right cannot be revived and there is no reason why a plaintiff who joined a stranger should be in a better position than a vendee who has joined a stranger as a vendee in the transfer deed in his favour. In any case the view of this Court has consistently been in favour of 'Bhawani Prasad's case, (A)', being followed and on the ground of 'stare decisis' also it is not desirable that we should meke a change.

18. The result, therefore, is that this appeal fails find is dismissed but as no one appears on the other side we make no order as to costs.