

## Abhey Ram vs Tilka And Ors. on 30 October, 1950

**Equivalent citations: AIR1951ALL76, AIR 1951 ALLAHABAD 76**

JUDGMENT

Malik, C.J.

1. Two questions stated below have been referred to this Bench in the following circumstances.
2. A suit for pre-emption was brought by six persons. It is not denied that five of them were co-sharers who had a right to pre-empt the sale on all material dates. Plaintiff 6, Malkhan, had refused to purchase the property when it was offered to him. He filed an application on 11-1-1946, to the effect that the property had been sold after he had refused to purchase the same, that he did not, therefore, wish to proceed with the suit, that his name might be removed from the array of plaintiffs and that the suit might be dismissed. Malkhan came into the witness-box and affirmed the application just mentioned.
3. The learned Munsif dismissed the suit on the ground that the other plaintiffs having joined Malkhan as a co-plaintiff had lost their right to pre-empt the sale by reason of the provisions of Section 21, Agra Pre-emption Act, and the suit must, therefore, fail. He relied on a decision of this Court in *Liaquat Khan v. Abdul Majid Khan*, 1944 A. L. J. 354: (A.I.R. (31) 1944 ALL. 284). The plaintiffs filed an appeal and the lower Court relying on two earlier decisions of this Court in *Lal Behari v. Equeen Mohammad*, A.I.R. (13) 1926 ALL. 722 : (97 I.C. 340) and *Suraj Prasad v. Oudh Behari*, 1931 A.L.J. 204: (A. I. R. (18) 1931 ALL. 216), allowed the appeal and decreed the suit. A second appeal against this decree came up for hearing before a Bench of this Court which referred the questions given below to a larger Bench for decision. The questions are :
  - "1. If a person, who has a right of pre-emption, joins as a co-plaintiff with a person who is estopped from claiming pre-emption by reason of his having refused to purchase the property which was offered to him, does he also lose his right to pre-empt by reason of the provisions of Section 21, Agra Pre-emption Act?
  2. Does it make any difference if the right of such other co-plaintiff is extinguished by reason of the provisions of Section 15, Agra Pre-emption Act ?"
4. The question of the effect of joining as co-plaintiff a person who was a stranger and had no right to pre-empt the sale was well-settled before the Agra Pre-emption Act was passed in the year 1922. The reason behind the dismissal of the claim of a co-sharer who had joined as a co-plaintiff a stranger having no right to pre-empt was stated by Mahmood J. in *Bhawani Prasad v. Damru*, 5 ALL. 197 : (1882 A. W. N. 217) in these words :

"The rule of law by which a person, entitled to preemption, forfeits his right is based upon the principles of equitable acquiescence, which forms one of the most important elements of restrictions imposed upon the vindictive or capricious exercise of the right of preemption..... 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."

5. The point was well-settled that the joining of a person as co-plaintiff, who had a right of pre-emption but had lost that right, either by acquiescence or by omission to perform the necessary talabs would not affect the right of the other plaintiffs, but the joining of a stranger who had no right to pre-empt the property, as co-plaintiff would extinguish the rights of the others. On a parity of reasoning it was held that a co-sharer, who had purchased the property along with others who were strangers, could not resist the claim for pre-emption even though he was a co-sharer. In the referring order the reason behind the rule was stated thus :

"If a plaintiff joined with himself a stranger and had no objection to a decree being passed in his favour there was no reason why he should be allowed to object to the sale in favour of a stranger vendee."

I agree with this view and, unless Section 21 of the Act clearly provides that, where a co-sharer plaintiff has acquiesced in the sale and thereby lost his right of pre-emption, the suit of other co-plaintiffs, not so disqualified, must also fail. I would prefer to answer the first question in accordance with the well established rule mentioned above.

6. In 1922 the Agra Pre-emption Act was passed to consolidate and amend the law relating to pre-emption in the Province of Agra. Section 12 of the Act sets out the various classes of pre-emptors, Section 14 provides for a registered notice by the vendor or the vendee to a person, who has a right of pre-emption, asking him to purchase the property, if he so desires, at the price settled, and Section 15 lays down the effect of such a notice. I may usefully quote the relevant portions of the two sections which are as follows :

"14. (1) When a co-sharer or petty proprietor proposes to sell any land in any case in which such sale would give rise to a right of pre-emption, he may give notice by registered post to all persons having a right of pre-emption in respect of such sale.

15. The right of pre-emption of any person to whom a notice has been issued under Section 14, shall be extinguished unless such person within the period of one month of the receipt of the notice (and in case of pre-emptors being out of India three months), communicates by registered post his intention to purchase the property."

Section 21 of the Act is as follows :

"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."

7. The point for decision is whether the words 'a person not having such right' in Section 21 mean a person not coming within any of the classes in Section 12 or do they also mean a person who had lost his right of pre-emption by reason of his refusal to respond to a notice under Section 14.

8. Learned counsel for the defendant, relying on Section 15, has contended that the effect of non-compliance with a notice under Section 14 is to extinguish the right of pre-emption, and he had urged that, if a person had no right of pre-emption on the date of the suit because the right was 'extinguished' under Section 15, then it must be held for the purposes of Section 21 that others who, as co-plaintiffs, had joined in the suit, had also lost their rights.

9. Though Sections 19 and 20 get out the point of time at which the right of pre-emption should exist or a transfer should be made to defeat the right of pre-emption, Section 21 makes no reference to any particular date on which a co-plaintiff should have no right of pre-emption. There is thus a certain amount of ambiguity in the language of the section.

10. In the first case in which this point arose, Lal Behari v. Equeen Mohammad, A. I. R. (13) 1926 ALL. 722 : (97 I. C. 340), Sulaiman and Boys JJ. observed as follows:

"We do not think that Section 21 was intended to alter the previous law. Under Section 21 where a person having a right of pre-emption sues jointly with a person not having such a right, he shall lose his right. The question is as to the scope of the phrase 'with a person not having such a right', that is whether a person who had had such right and lost it by acquiescence is included in the category of persons not having such right, or whether that phrase only means 'persons not included in the category of recognized pre-emptors'. Even if the language of the section were ambiguous we would prefer to give it the interpretation which would be in accord with the previous view, but we think that there is really no ambiguity and the section does not contemplate persons who are disqualified in equity from claiming it."

11. The same point arose in a later Bench decision in Suraj Prasad v. Oudh Behari, 1931 A. L. J. 204 : (A. I. R. (18) 1931 ALL. 216) to which also Sulaiman J., was a party. Reliance was placed in that case on Section 15 and it was urged that, while the effect of a refusal to purchase the property was to estop the person refusing from claiming pre-emption, the effect of a notice under Section 14, when not responded to, is to extinguish the right of pre-emption and if a person having such a right joins with himself another who has not so responded, then the person first mentioned also loses his right to pre-empt. As that was in fact a case in which no notice under Section 14 had been given, the learned Judges did not express any opinion as to what would be the position in a case where such a notice had been given. The point, however, directly arose in Liaqat Khan v. Abdul Majid Khan, 1944 A. L. J. 354 : (A. I. R. (31) 1944 ALL. 284) where Allsop and Hamilton JJ. were of the opinion that a person to whom a notice under Section 14 had been given but who has not expressed his intention to purchase the property lost his right of pre-emption and as such was a person "not having such

right", and further that under Section 21, Agra Pre-emption Act, if such a person was joined as a co-plaintiff by others who had a right to pre-empt, the whole Suit was liable to be dismissed. As was observed in the referring order :

"a co-sharer is likely to know who the other co-sharers are, but a co-sharer may not always be in a position to know whether any of the other co-sharers had been offered the property and had refused to purchase the same; it therefore does not appear to be fair to penalise a co-sharer for having joined as co-plaintiff, a person who had refused to purchase the property."

I am not satisfied that it was ever intended by enacting Section 21, Agra Pre-emption Act, that the law as regards the effect of joinder of a stranger should be changed.

12. After 1922 the question arose whether Section 14 was exhaustive and a co-sharer would be estopped from claiming a right of pre-emption only if a registered notice under Section 14 was given. It was held in a number of cases and the point is now well-settled that Section 14 was not intended to be exhaustive and that, apart from such a notice, circumstances could exist on which a successful plea of estoppel could be taken. The result of accepting the view expressed in Liaquat Khan's case, (1944 A. L. J. 354 : A.I.R. (31) 1944 ALL. 284) would be that, in a case where a registered notice was given, the person to whom such notice was given but who had not expressed his intention to purchase the property would become a total stranger and the joining of such a person would defeat the whole suit, while the earlier decisions as regards the effect of joining of persons who had merely refused to purchase the property but to whom a notice under Section 14 had not been given would be still good law. I see no reason to make any distinction between these two classes of cases.

13. The language of Section 21 also does not compel this distinction. No particular date appears in Section 21. If the interpretation in Liaquat Khan's case, (1944 A. L. J. 354 : A.I.R. (31) 1944 ALL. 284) is correct, it will amount to putting in the words "on the date of suit" after the words "not having such right." On the other hand, no violence would be done to these words if they are interpreted to mean a person who never had the right of pre-emption i.e., one who is not enumerated in Section 12. This would also be in consonance with the law as it existed before 1922 which Section 21 was not intended to alter.

14. Further, if the interpretation in Liaquat Khan's case, (1944 A. L. J. 354 : A.I.R. (31) 1944 ALL. 284) is correct, it may always be possible for an intending purchaser to defeat the right of pre-emption if he could only win over one co-sharer on his side, give him a notice under Section 14 to which no response is made and persuade him to keep quiet and pretend to be friendly with other co-sharers and join them, in the suit for pre-emption. Such an evasion of the law of pre-emption could not possibly have been intended by these words in Section 21.

15. My answers, therefore, to both the questions are in the negative.

Wanchoo, J.

16. I agree and do not wish to add anything.

Mustaq Ahmad, J.

17. I respectfully agree with what has fallen from the lips of my Lord the Chief Justice. I wish only to add a few words.

18. As had been observed by the learned Chief Justice there was never any doubt, in cases outside Sections 14 and 15, Agra Pre-emption Act, about the right of pre-emption of a co-sharer, even though he had joined, as a co-plaintiff, another co-sharer who had refused to purchase the property.

19. A slight complication, however, has arisen where a notice under Section 14 of the Act was given to a co-sharer who did not respond to it but who is a co-plaintiff in a suit for pre-emption along with another co-sharer to whom no such notice was given. The question of the effect of such a notice on the right of the other co-sharer was considered in the case of Liaqat Khan v. Abdul Majid Khan, 1944 A. L. J. 354 : (A.I.R. (31) 1944 ALL. 284).

20. Having given my best consideration to the question I do not see why a different rule should be followed to the prejudice of an innocent pre-emptor in cases where a notice under Section 14 is found to have been given to a particular co-plaintiff who remained altogether irresponsive to it. As implied in the referring order the principle is that a co-sharer claiming pre-emption should not have himself done anything affecting his right of pre-emption. If anything is found to have been done by another co-sharer, a co-plaintiff in the suit, for which the other co-sharer plaintiff is not to blame, surely the latter cannot be made to suffer.

21. In the case of a stranger being joined as a co-plaintiff the co-sharer plaintiff entitled to pre-empt can be said to have wrongly associated with himself a person not entitled to pre-empt despite his knowledge of the absence of such a right. But in the case of a co-sharer having joined in the suit another co-sharer who has already lost his right of pre-emption by his subsequent inaction or omission the former cannot on any juristic ground be visited with a disability involving a forfeiture of his own right. For aught I know he may not be aware of any thing that the other co-sharer may have done or omitted to do. And, if in spite of his ignorance of what the other co-sharer may have done or not done, we hold that he has lost his right, we shall be holding him answerable for something not done by himself but by another individual. This would be highly inequitable and outside the range of legal sanction.. I do not see how in such a case the innocent plaintiff can be penalised for no fault of his own. I, therefore, agree that the answers to the questions referred should be in the negative.