Sukhnandan Singh Etc vs Jamiat Singh & Ors on 18 February, 1971

Equivalent citations: 1971 AIR 1158, 1971 SCR (3) 784, AIR 1971 SUPREME COURT 1158

Author: I.D. Dua

Bench: I.D. Dua

PETITIONER:
SUKHNANDAN SINGH ETC.

Vs.

RESPONDENT:
JAMIAT SINGH & ORS.

DATE OF JUDGMENT18/02/1971

BENCH:
DUA, I.D.
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DUA, I.D.
BHARGAVA, VISHISHTHA

CITATION:
1971 AIR 1158 1971 SCR (3) 784
1971 SCC (1) 707

ACT:
Pre-emption Suit for-Collusion-Suit by sons of Vendors for pre-emption-Plaintiffs and vendors residing and messing together and expenses of litigation being paid by vendors-If sufficient to establish collusion.
Limitation Act 1908-Article 10-Suit for Pre-emption-Limitation-Parr of the land sold in the hands of tenants-Starting point of Iimitation-"Physical possession", meaning.

HEADNOTE:
In a suit for pre-emption by the sons of the vendors of certain land the vendees pleaded collusive nature of the suit and limitation. The trial ,court found that the vendors and the plaintiffs resided and messed together and the expenses of the litigation were paid by the vendors. From this it was concluded that the suit had been filled by

the plaintiffs at the instance of and in collusion with the vendors and therefore the plaintiffs were held 'to he estopped from exercising their right of pre-emption. On the question of limitation the trial court held that the vendors, and not their tenants. were in possession of the land sold, that possession of the land was delivered to the vendees on the date of the sale and therefore the suit was barred by limitation. The first appellate Court reversed the finding of the trial court on both the pleas. In regard to the plea of limitation it held that a part of the land sold was in possession of tenants and, therefore, it did not admit of physical possession which meant immediate personal possession. In that view of the matter, under Section 10 of the Limitation Act, 1908 the terminus a quo was the date of registration of the ,ale deed and therefore within the one year limitation under Article 10. The High Court affirmed this decision. In appeal to this Court,

HELD : dismissing the appeal,

(i) On the facts of. the present case there was absolutely no material on which the plaintiffs could be held to have lost their right of preemption on the ground of collusion. Merely because the vendors. the fathers of the plaintiffs, were helping their sons to exercise the statutory right conferred on the sons could not without more, deprive them of the right to be substituted for the vendees in exercise of their right of pre-emption. '[788 F]

(ii) On the finding of the District Judge and the High Court physical possession of the whole of the property sold was not taken by the vendees on the date of sale. Therefore the first part of Article 10 of the Limitation Act does not apply. The second part of Article 10 covers cases where the subject of the sale, which means the whole of the property Sold,does not admit of physical possession and that would be so where a part of the land in the possession of tenants. The argument that use of the expression "subject to the sale" suggests that this Article would apply only if the entire and not only a part of the land is in the possession of the tenants is not acceptable. [789 C]

In the present case the properties in the hands of tenants have to he held to be incapable of "Physical possession" which means personal and immediate possession.

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Botul Begam v. Mansur Ali Khan, I.L.R. 24 All-17 and Ghulam Mustafa v. Shahabuddin, 49 P.R. 11908, referred to.

JUDGMENT:

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 1729 of 1967.

Appeal by special leave from the judgment and decree dated October 17, 1967, of the Punjab and Haryana High Court in Regular Second Appeal No. 822 of 1965.

K. L. Gosain and Naunit Lal, for the appellants. Purushottam Chatterjee and D. D. Sharma, for the respondents.

The Judgment of the Court was delivered by Dua, J. In this appeal by special leave from the judgment and decree of a learned single Judge of the Punjab and Haryana High Court arising out of a pre-emption suit only two questions were raised by the learned counsel for the appellants who were vendees-defendants in the trial court. The suit was instituted by the three sons of three vendors who were real brothers, and the two points canvassed in this Court challenge the decisions of the High Court and of the court of the District Judge on issues 6 and 7. Those issues are "6. Is the Stilt collusive ? If so, its effect.

7. Is the suit within time Both these issues were decided by the trial court against the plaintiffs but the District Judge on appeal reversed the decision of the trial court on both the issues and the High Court on second appeal affirmed the decision of the first appellate court.

The relevant facts may now be stated in brief. Kartar Singh, Bachan Singh and Sardara Singh, sons of Sohel Singh, claiming to be co-sharers, agreed on September 19, 1961, to sell 193 kanals and 15 marlas of land to Sukhnandan Singh, Sukhminder Singh and Balkar Singh sons Gurdev Singh in equal shares. 1/3rd share, Gurminder Singh and Gurpakh Singh sons of Teja Singh in equal shares, 1/3rd- share, Gurdas Singh son of Angrez Singh. 1/3rd share at the rate of Rs. 840/- per bigha. A sum of Rs. 7,000/- was received in cash as earnest money. On December 6, 1961 a formal sale deed was- executed with some variations in shares and also with addition of Smt. Chand Kaur, wife of Sardar Inder Singh as one more co-vendee. The sale price was stated to be Rs. 32,550/-. Possession of the land sold was stated to have been delivered and it was also recited that consolidation proceedings under s. 21 (1) of the Consolidation Act had been completed but further proceedings in favour of the vendees would be taken after the proceedings which might be taken under s. 21(2). This sale deed was duly registered on March 9, 1962.

The suit for pre-emption by the three sons of three vendors was instituted on March 6, 1963. It was contested by the vendees. The pleadings of the parties gave rise to several issues but we are only concerned with the issues relating to the pleas of collusive nature of the suit and limitation. The trial court disposed of the issues nos. 5 and 6, relating respectively to waiver of the right of pre-emption by the plaintiffs and to the collusive nature of the suit by dealing with them together., Photographs showing the plaintiffs and the vendors being together along with the plaintiffs' counsel in the court compound during the course of this litigation were produced as evidence in the case. Exhibit p-2 a certified copy of the Register of Consolidation Proceedings, produced by the plaintiffs in evidence showed that this copy had been prepared at the instance of Kartar Singh, one of the vendors and father of Jamiat Singh, plaintiff. According to the trial court there was also evidence that the plaintiffs and the vendors resided and messed together. On consideration of this material the trial court held that the vendors and the pre- emptors resided and messed together and the expenses of the litigation were paid by the vendors. From this it concluded that the suit had been filed by the

plaintiffs. at the instance of and in collusion with the vendors. The right of pre-emption being a priratical right, according to the trial court, to quote its own words "it is necessary that the pre-emptors must not act in collusion with vendors or act in bad faith." The plaintiffs were on this reasoning held to be estopped from exercising their right of pre-emption. On the question of limitation the trial court held that the vendors' and not their tenants were in possession of he land sold, which had been allotted to them in the consolidation proceedings and the possession of that land was delivered to the vendees on the date of the sale. The suit was accordingly held to be barred by time. The suit was dismissed for all these reasons.

On appeal by the plaintiffs the District Judge reversed the conclusion of the trial court both on the point of estoppel or collusion and of limitation. According to that court in order to prove collusion the defendant has to prove that the suit was being-fought for the vendor's benefit, the normal presumption being that the plaintiff sues for his own benefit. In support of this view several decisions were relied upon by the District Judge. In the present case, according to the learned District Judge, the plaintiff Jamiat Singh had clearly stated that he was pre-empting the present sale with his own earnings and the learned District Judge found no rebuttal to this assertion. Neither the fact that Ex. P-2 had been obtained by one of the vendors nor the fact that the vendors were present in the court compound with the plaintiffs and their counsel during the course of litigation indicated that the present suit had necessarily been instituted for the benefit of the vendors. this reasoning the decision on the collusive nature of the suit which must result in its dismissal was reversed. In regard to the limitation also the learned District Judge concluded, in disagreement with the trial court, that a part of the land sold was in possession of tenants, and, therefore, it did not admit of physical possession, which means immediate personal possession. In that view of the matter under Art. 10 of the Indian Limitation Act, 1908 the terminus a quo was 'the date of registration of the sale deed. The suit was thus held to have been instituted within one year from the date of registration and, therefore, within limitation under Art. 10. The judgment and decree of the trial court was reversed and the suit decreed.

On second appeal a learned single Judge of the Punjab and Haryana High Court held that there was no clear and reliable evidence that the vendor and their son were united in mess and estate. The other two circumstances, namely, that the vendors and the plaintiffs along with their counsel were seen together in court compound and that Ex. P-2 had been obtained by one of the vendors one day before the institution of the suit, were not considered sufficient to establish the collusive nature of the suit. In regard to the statement of Jamiat Singh the High Court undoubtedly felt unimpressed by his statement but we do not thinking was open to that court on second appeal to appraise the credibility of the testimony which was believed by the final court of fact when there' was no illegality in the appraisal of the testimony by the District Judge and it was open to him to take the view 'he did. Jamiat Singh had stated that he was separated from his father since about three years and that he was spending on the litigation from what little amount he earned. The matter was not pursued in cross- examination as to what was the source of his earnings. Even after feeling unimpressed 'by the statement of Jamiat Singh, the High Court came to the conclusion that it was for the vendees to establish the collusive nature of the plaintiffs' suit' On the evidence produced the District Judge having come to the conclusion that they had failed to discharge this onus this conclusion was one of fact and not being vitiated by and error of law it was held binding on second appeal.

The contention that the District Judge was wrong in holding that a part of the land sold- Was in possession of the tenant at the time of the sale was also reppled. The conclusion of the District Judge that field no. 24/21 out of the suit land was under the cultivation of Bahadur Singh a tenant at will, as was clear Ex. X-4, a copy of Khasra Girdwari relating to Rabi 1962 and Kharif 1962 was also held to be a finding of fact binding on second appeal. This document was not shown to have been misread by the first appellate court, On this finding Art, 10 of the- Indian Limitation Act, 1908, and not S. 30 of the Punjab Pre-emption Act, was held applicable and the suit, was thus considered to) be within limitation. For this view reliance was placed on two decisions of the Punjab Chief Court and a Bench decision of the Nagpur High Court. The appeal was, however, partly accepted by raising the pre-emption money by an additional sum; of Rs. 4, 133.50.

In this Court again the learned counsel for the appellant,- vendees pressed the points of collusion and limitation. We, are, however, unable to find merit in either of them' So far as the question of collusion is concern it was not clarified by the learned counsel how the plaintiffs could be held to have lost their right of pre-emption merely because their fathers either came to the court with them, which they did openly, or allowed their sons as plaintiffs to use in court, copy of a public document procured by the father of one of the plaintiffs. Collusion in judicial proceedings is normally associated with secret arrangement between two persons that the one should institute a suit against the:

> other in order to obtain the, decision of a judicial tribunal',for some sinister purpose., In such a proceeding the claim put forward is fictitious, the contest-feigned or unreal and the final adjudication a mask designed to give false appearance of, a genuine judicial determination, and this is generally done with the- object of confounding third parties. In such a proceeding the contest- is a mere sham. In the case of pre-emption it is open to the plaintiff to find financial aid from any source he likes. He has a statutory right to preempt the sale and it is no concern of the vendees whether the borrows money from someone or otherwise arranges for finances for preempting the sale. It is true that it is a personal right 'and is not capable of being transferred. And the right of pre- emption being A right of substitution the vendor also cannot in the garb of a benamidar pre-empt his own sale-.' But merely because the vendors who are the fathers of the plaintiff preemptors 'are helping their sons to exercise the statutory right conferred on the sons cannot, without more deprive them of the right to be substituted for the vendees in exercise of their right- of pre-emption. The property pre-empted, if they were, successful, will belong to them and not to their fathers who were-the vendors. Even, in the wider sense of the word "collusion", which suggests a deceitful agreement or compact between two or more persons to do some act in order to prejudice a third Persons or for some improper purpose would not apply to the present case so as to operate as estoppel against the plaintiffs. Whether or not a preeptor-plaintiff who is a benamidar for the vendors or some other party losses his right because of being a benamidar is a question which does not concern us in this case and we express no opinion thereon.On the facts of the present case there is absolutely no material on which the plaintiffs can be held to have lost their right of pre-emption on the ground of collusion. The next point relates

to the plea of limitation. Article 10 of the Second Schedule of the' India Limitation Act provides a period of one year to enforce a right of pre-

emption whether founded on law or general usage or on special contract, 'the terminus a quo being the date when the purchaser takes under the sale, sought to be preempted, physical possession of the whole of the property sold or where the subject of the sale does not admit of physical possession, the date when the instrument of, sale is registered. Section 30 of the Punhjab Pre-Emption Act applies only when the cases does not fall within Art. 10. On the finding of the District Judge and of the High Court it is obvious that physical possession of the whole of the property sold was not taken, by the vendees, on the date of sale. Therefore, the first part of article does not apply. According to the appellants' counsel the land sold does admit of physical possession and if a part of the land has been taken into possession by the vendees then Art. 10 would be inapplicable and S. 30 of the Punjab Pre-emption Act would be attracted. In that case the terminus a quo according to Shri Gosain would be the date on which the vendees took under the sale physical possession of any part of such land. The argument in our view in misconceived. The second part of Art. 10, in our opinion, covers cases where the subject of the sale, which means the whole of the property sold, does not admit of physical possession and that would be so when a part of the land is in the possession of the tenants. The argument that use of the expression "subject of the sale" suggests that this article would apply only if the entire and not only a part of the land is in the possession of the tenants is not acceptable. The expression "physical possession" came up for construction before the Privy Council in Batut Begam v. Mansur Ali Khan(1) Lord Robertson speaking for the Judicial Committee said "What has to be considered is as the High Court accurately formulated, the question, does the property admit of physical possession ? The word "physical" is of itself a strong word, highly restrictive of the kind of possession indicated; and when it is found as is pointed out by the High Court, that the Legislature has in successive enactments about the limitation of such suits gone on strengthening the language used,-first in 1859 prescribing "possession" then in 1871 requiring "actual possession" and finally in 1877 substituting the,word "physical" and "actual", it is seen that that word has (1) I.L.R.C4 All. 17 been very deliberately chosen and for a restrictive purpose. Their Lordships are of opinion that tile high Courts are right in the conclusion' they have stated., their Lordships consider that the expression used by Stuart, C.J., in regard to the words "actual possession is applicable with still more certainty to the words "physical possession " and that what is meant is a "personal and immediate" possession."

This view has ever since then been followed by the High Courts in India. No decision holding to the contrary was brought to our notice. Indeed, Shri Gosain virtually conceded that there was none to his knowledge. The properties in possession of tenants have on this reasoning to be held to be incapable of physical possession which means personal and immediate possession. It was so held in Ghulam Mustafa v. Shahabuddin(1). In that case the Full Bench of the Punjab Chief Court approved of some of its earlier decision overruling the dictum is one of the earlier decisions of that Court. This view has consistently held the fold in the Punjab and we do not find any cogent reason for disagreeing and upsetting it. If the date of registration of the sale deed be the terminus a quo then indisputably the suit must be held to be within limitation. These being the only two points agitated before us this appeal must fail and is dismised with costs.

R.K.P.S. Appeal dismissed.

(1) 49 P.R. 1908 (F.B.).