

Supreme Court of India

Mohd.Noor vs Mohd. Ibrahim on 19 July, 1994

Equivalent citations: 1995 AIR 398, 1994 SCC (5) 562

Author: R Sahai

Bench: Sahai, R.M. (J)

PETITIONER:

MOHD.NOOR

Vs.

RESPONDENT:

MOHD. IBRAHIM

DATE OF JUDGMENT 19/07/1994

BENCH:

SAHAI, R.M. (J)

BENCH:

SAHAI, R.M. (J)

HANSARIA B.L. (J)

CITATION:

1995 AIR 398

1994 SCC (5) 562

JT 1994 (5) 429

1994 SCALE (3) 350

ACT:

HEADNOTE:

JUDGMENT:

The Judgment of the Court was delivered by R.M. SAHAI, J.- The short and the only question that arises for consideration in these appeals is whether a co-sharer of Khatedari rights of agricultural land is entitled to claim pre-emption under the Rajasthan Preemption Act, 1966 (hereinafter referred to as 'the Act').

2. Right of pre-emption has not been looked upon favourably as it operates "as a clog on the right of the owner to alienate his property". In Radhakishan Laxminarayan Toshniwal v. Shridhar Ramchandra Alshi<sup>1</sup>, it was observed that "to defeat the law of pre-emption by any legitimate means" was not fraud. Therefore, availability of this weak or archaic right has to be construed strictly. In the Act, there is no provision extending the benefit of pre-emption to agricultural holdings. A person claiming preemption, therefore, has to squarely fall within the four corners of the provisions contained therein.

3. The right of pre-emption is defined in Section 3 to mean "a right accruing under Section 4 of the Act upon transfer of any immovable property to acquire such property and to be substituted as the transferee thereof in place of and in preference to the original transferee". Section 11 of the Act entitles a person to bring a suit for pre-emption when a transfer has been completed. Transfer under clause (viii) of Section 2 of the Act means "a sale, or a mortgage where the final decree for foreclosure in respect thereof has been passed". A transfer of immovable property for purposes of the Act, therefore, must be a transfer or mortgage. Sale has been defined by clause (vii) of Section 2 to mean "a transfer of ownership in immovable property in exchange for a price paid or promised or partly paid and partly promised". A co-sharer under Section 2(i) of the Act is entitled to claim pre-emption by filing a suit under Section 11 of the Act. Since factually there was no dispute that each of the appellants are co-sharers in the khatedari rights of the land transferred the entire dispute that shall clinch the issue if the sale of the land amounted to transfer of ownership within meaning of Section 2(vii) of the Act.

4. To determine this it is necessary to examine the nature of khatedari rights and if a transfer of such right amounts to transfer of ownership. A khatedar tenant is one of the tenants mentioned in clause (a) of Section 14 of the Rajasthan Tenancy Act, 1955 (hereinafter referred to as 'the Tenancy Act') and clause (c) defines the circumstances in which a person may become a khatedar tenant. Such a tenant has a right to bequeath his interest under Section 59 of the Tenancy Act and transfer his interest under Section 41 of the same Act on conditions specified in Sections 42 and 43. His interest is heritable under Section 40 as well. Is that sufficient in law to make him owner of the property? Is the transfer made by a khatedar tenant a transfer of ownership? A khatedar tenant, admittedly, is a person by whom rent is payable under Section 43 of the Tenancy Act. The effect of it in law is that such a person cannot be deemed to be an absolute or unlimited owner which is necessary before the right of pre-emption can be exercised. In Butterworth's Words and Phrases Legally Defined, 2nd Edn., Vol. 4, page 61, 'ownership' has been defined as under:

"Ownership consists of innumerable rights over property, for example, the rights of exclusive enjoyment, of destruction, alteration, and alienation, and of maintaining and recovering possession of the 1 AIR 1960 SC 1368 : (1961) 1 SCR 248 property from all other persons. Such rights are conceived not as separately existing, but as merged in one general right of ownership." Salmond summed up the concept of ownership as under\* "Summing up the conclusion to which we have attained, we may define the rights of ownership in a material thing as the general, permanent and inheritable right to the uses of that thing."

5. Austin in his book Jurisprudence, 3rd Edn., page 817, defines the "right of ownership" as-

"a right indefinite in point of user, unrestricted in point of disposition, and unlimited in point of duration over a determinate thing."

The theoretical concept of 'ownership', therefore, appears to be that a person can be considered to be owner if he has absolute dominion over it in all respects and is capable of transferring such ownership. Heritability and transferability are no doubt some of the many and may be most

important ingredients of ownership. But they by themselves cannot be considered as sufficient for clothing a person with absolute ownership. Their absence may establish lack of ownership but their presence by itself is not sufficient to establish it. The ownership concept does not accord with the status of a person who is paying the rent. A tenant under various legislations either urban or rural property, agricultural or otherwise, enjoys right of heritability and transferability. At the same time, he does not become owner of the property. Transfer of ownership is distinct and different from transfer of interest in the property. A licensee or even a tenant may be entitled by law to transfer his interest in the property but that is not a transfer of ownership. For instance, a lessee from a corporation or a local body or even State Government to raise building may have heritable and transferable right but such a person is not an owner and the transfer in such a case is of his interest in the property and not the ownership. In *Inder Sen v. Naubat Singh*<sup>2</sup> it was held that absolute ownership is an aggregate of compendium of rights such as right of possession, the right of enjoying usufruct of the land and so on and so forth. The ownership, therefore, is a sum total of various subordinate rights. The right to transfer the subordinate right either under general law or statutory law does not make it transfer of ownership. Section 6 of the Transfer of Property Act, 1882 permits transfer of any property. It may be transfer of absolute or subordinate right. The Tenancy Act permits transfer of agricultural land, therefore, a khatedar tenant is entitled to transfer his tenancy land. But a co-sharer can claim the right of pre-emption only if it is a sale of ownership. In other words the tenancy legislation visualizes transfer of subordinate right but the Act recognises transfer of absolute right only. Transfer of khatedari rights being transfer of subordinate right only no right of pre-emption exists in such transfer. It is true that after abolition of zamindari in various States the tiller of the soil has become owner of the land. But it cannot be disputed that the proprietorship of the land vests in the State to whom the rent is payable. It is not uncommon that a person in 2 ILR 7 All 553 (FB) : 5 AWN (1885) 108 possession of an agricultural holding even as an owner cannot put his land to any use as he desires. For instance, if the land has to be converted from agricultural use to non-agricultural use then the tenure-holder is required to obtain permission of the State Government or the appropriate authority appointed by it. All these indicate that even though a khatedar tenant is an owner for all practical purposes but his ownership is limited and, therefore, the transfer by a khatedar tenant of an agricultural holding does not give right to a co-sharer to claim right of pre-emption. The submission that the ownership of the State was a mere fiction cannot be accepted. Right of preemption is a right of substitution in ownership either of land or house. It is not available in transfer of tenancy.

6. In the result, all these appeals fail and are dismissed.

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