Supreme Court of India
Krishna Dass Agarwal vs Kanhaiya Lal on 19 July, 1996
Author: B J Reddy
Bench: B.P.Jeevan Reddy, Suhas C.Sen

PETITIONER:
KRISHNA DASS AGARWAL

Vs.

RESPONDENT:
KANHAIYA LAL

DATE OF JUDGMENT: 19/07/1996

BENCH:
B.P.JEEVAN REDDY, SUHAS C.SEN

ACT:

HEADNOTE:

JUDGMENT:

J U D G M E N T B.P. JEEWAN REDDY,J.

Leave granted. Heard the counsel for the parties. This appeal is preferred against the judgment of the learned Single judge of the Madhya Pradesh High Court dismissing the Second appeal preferred by the appellant- plaintiff herein.

On December 5, 1960, the respondent, Kanhaiyalal, purchased the suit house from Ram Chander and others under a sale deed, which was registered on December 10, 1960, for a consideration of Rupees eight thousand. On December 5, 1961, the appellant-plaintiff instituted a suit seeking to enforce his right of pre-emption on two grounds, viz., (1) an agreement said to have been executed by Nath Mal, father of Ram Chander agreeing to give the plaintiff the right of first purchase in the event of sale of the said house and (2) the Gwalior pre-emption Act which created a right of pre-emption in favour of dominant-heritage holder vis-a vis servient-heritage holder/ The plaintiff also relied upon an alleged customary right of pre-emption. The defendant disputed the plaintiff's claim inter alia on the ground that the Gwalior pre-emption Act is unconstitutional and is unenforceable with effect from date of the commencement of the Constitution of India. The Trial Judge decreed the suit on July 31, 1967. the respondent, Kanhaiyalal, preferred an appeal which was allowed by the learned District Judge. The grounds on which the learned District Judge allowed the

appeal are : (i) inasmuch as the Gwalior Pre-emption Act has been repealed pending the said appeal [i/e/. on June 28, 1968], the right of pre-emption claimed by the plaintiff can no longer be enforced. The plaintiff cannot also fall back upon customary right of pre-emption inasmuch as the said right cam to an end with the enactment of the Gwalior Pre- emption Act in Samvat 1992. The said custom does not and cannot revive on the repeal of the said enactment. (ii) The alleged agreement of preemption offended the rule of perpetuity and because the respondent, Kanhaiyalal, was a bonafide purchaser of value without notice of the said agreement, the agreement cannot be enforced against him. The learned District Judge, However, declined to record any finding on the plaintiff's assertion that he is a dominant- heritage holder. The High Court dismissed the second appeal agreeing with the learned District Judge on the effect of repeal of the Gwalior Act pending the appeal. It relied mainly on the language employed in Section 23 of the Gwalior Pre-emption Act for arriving at the said conclusion. The High Court also took the view that Section 10 of the Madhya Pradesh General Clauses Act does not come to the rescue of the plaintiff. The correctness of the view taken by the High Court is challenged in this appeal.

In Bishan Singh v. Khazan Singh [A.I.R. 1958 S.C. 838 =1959 S.C.R 878], Subba Rao, j., speaking for a three judge Bench, observed that "the right (of pre-emption) being a very weak right, it can be defeated by all legitimate methods, such as the vendee allowing the claimant of a superior of equal right being substituted in his place" [See Para 11]". Apart from being a weak right, it is claim which is generally looked upon by courts with certain amount of distaste. That is because it interferes with the freedom of the owner to sell his property to the person of his choice.

The Gwalior Pre-emption Act, which provided for pre- emption on several grounds, also provided as follows in Section 23:

> "23. Effect of loss of right of pre-emptor prior to decree.- No decree for pre-emption shall be passed in favour of any person unless he has subsisting right of pre-emption at the time of the decree but where a decree for pre-emption has been passed in favour of a plaintiff, whether by a court of first instance or of appeal, the right of such plaintiff shall not be affected by any such transfer or loss of his interest accruing after the date of such decree."

The Act was repealed, as stated above, by the Madhya Pradesh Agra-Kraya-Vidhi Nirsan Adhiniyam, 1968, during the pendency of the appeal before the learned District Judge. Section 23 says that the right of pre-emption must subsist "at the time of decree". The High Court has construed the said words as meaning the final and operative decree. In other words, the High Court is of the opinion that inasmuch as an appeal was filed against the decree of the trial court in this case, the decree contemplated by section 23 is the decree to be passed in the appeal, and if a second appeal is filed, the decree to be passed by the High Court, as the case may be. On this reasoning, it held that the right of pre-emption must subsist on the date of the appellate decree/second appellate decree. Since the act was repealed during the pendency of the appeal, it held, the right was not subsisting on the date of the appellant decree. The High Court Relied upon the principle, applicable to civil courts, that appeal is continuation of the original suit, that once an appeal is filed, the decree appealed against loses its finality and that the only effective decree in such a case is the decree of the appellate

court, whether it is one of affirmation, modification or setting aside. Accordingly, it held that when Section 23 speaks of decree, it is the final decree- be it the decree of the trial court, first appellate or the second appellate court, as the case may be. For this proposition, the High Court also placed strong reliance upon the Division Bench decision of the Madhya Pradesh High Court in Nirmala Devi v. Km. Renuka [1972 (21) J.L.J. 453]. That was, of course, a case where the repeal of the said Act took place during the pendency of the suit itself and it is on this ground that Sri Satish Chandra, learned counsel for the appellant, seeks to distinguish the said decision. The said distinction is no doubt valid but the question still remains whether the interpretation placed by the High Court on Section 23 is Unsustainable in law.

Section 23 is in two-parts. The first part say that "no decree for pre-emption shall be passed in favour of the person unless he has a subsisting right of pre-emption at the time of the decree", while the second part, which is in the nature of a proviso, says: "(B)ut where a decree for pre-emption has been passed in favour of a plaintiff, whether by a court of first instance or of appeal, the right of such plaintiff shall not be affected by any such transfer or loss of his interest accruing after the date of such decree". Sri Satish Chandra strongly relies upon the second part while Sri Parasaran, learned counsel for the respondent, emphasises the first part. In our opinion, the second part visualises the situation where, after the passing of the trial court's decree or the first appellate Court's decree, the plaintiff transfers his right and says that such transfer shall not affect the interest which has accrued to the plaintiff under the decree in his favour. This provision is premised upon the assumption that the Act continues to be in force. It does not cover a situation where the Act itself ceases to be in force. Now, coming to the first part, it is possible to take two views. It is possible to construe the words "at the time of the decree" as referring to the decree infavour of the plaintiff against which the appeal is pending; it is equally possible of being construed as referring to the final decree, i.e., the appellate] decree. Having regard to the fact that the right of pre-emption is a weak right and is generally looked upon with distaste and because the High court has taken a particular view of the matter on the interpretation of a local enactment [which is no longer in force] we are not inclined to take a different view. Our disinclination also arises from the fact that the said Pre-emption Act was repealed as far back as 1968.

Sri Satish Chandra place strong reliance upon Section 10 of the Madhya Pradesh General Clause Act, 1957 which is in pari materia with Section 6 of the Central General Clause Act. The applicability of this section was considered by the Division Bench of the Madhya Pradesh High Court in Nirmala Devi. It held, after referring to number of decisions on the subject, That:

> "A right of pre-emption is in the nature of an inchoate right which can be perfected only in accordance with the procedure laid down in the statue, i.e., could not be treated as a right vested in section 10 of M.P. General Clauses Act so as to remain uneffected by the repeal of the Act..... As Pointed out above, the right of pre-emption is a remedial right or in other words a right to take advantage of an enactment for acquiring a right to land, or other property. The right cannot be said to have been acquired or accrued until a decree is provisions of Section 10 of M.P. General Clauses Act. The plaintiff- enforce a right of pre-emption after the repeal of the Pre-emption Act."

The High Court also relied upon the language in Section 23 to support the above the above conclusion. We are not inclined to take a different view even if one is possible regard fact that High Court has taken one possible view on a local law which ha been repealed as far back as 1968. Indeed, it was not even a law made by Madhya Pradesh Legislature but a hang-over from the erstwhile princely state of Gwalior.

The appeal accordingly fails and is dismissed. No order to as to costs.