

(1941) 08 CAL CK 0016
In the Calcutta High Court
Case No : Letters Patent Appeal No. 17 of 1939

Bepin Chandra Saha Roy and Others	Vs	APPELLANT
Kailesh Chandra Malo and Others		RESPONDENT

Date of Decision : 21-08-1941

Acts Referred:

Citation : (1941) 08 CAL CK 0016

Final Decision : Dismissed

Judgement

Mitter, J.—The property in suit originally belonged to Defendant No. 1 and another in equal shares. It was purchased by the Plaintiffs in a sale held in enforcement of a certificate filed against the said Defendant No. 1 and another. This was before November, 1931. After the Plaintiffs had acquired by the aforesaid sale this property, there was an arrangement between them and Defendant No. 1 and his co-sharer. Defendant No. 1 and his co-sharer proposed to exchange the said property with some other property that belonged to them. That proposal was accepted and the arrangement was put in a registered deed, dated the 3rd of November, 1931. The Plaintiffs conveyed the land in suit to Defendant No. 1 and his co-sharer and as consideration of the said transfer, Defendant No. 1 and his co-sharer conveyed another piece of land to the Plaintiffs. In this deed there is a covenant for preemption which runs thus:--

If it becomes necessary for any of us of the first party (the first party included Defendant No. 1) to sell or mortgage the lands of Schedule II (the property in suit), we would inform you, the second party (the Plaintiffs) and if you, the second party, do not keep the same for a proper consideration within two months of our intimation to sell or mortgage, we would be competent to transfer or mortgage the property to others. If we do not do so, the sale or the mortgage, as the case may be, will be invalid. We the first party down to our heirs and legal representatives shall remain bound by these terms.

Thereafter, on the 31st of January, 1936, Defendant No. 1, who owned half share in the property in suit, sold his share to Defendants Nos. 2 to 4 without offering

the same to the Plaintiffs in the first instance. Thereupon the Plaintiffs instituted this suit against Defendant No. 1 and the said purchasers Defendants Nos. 2 to 4 claiming specific performance of the contract as embodied in the covenant that we have recited above. Defendants Nos. 1 and 2 to 4 raised a common defence, namely, that the aforesaid covenant could not be enforced in law as it offended the rule against perpetuities. A special defence was taken by Defendants Nos. 2 to 4 and it was that the Plaintiffs could not claim specific performance as they were purchasers for value without notice of the said contract on which the Plaintiffs had relied in their plaint. The learned Munsif came to the conclusion that the said covenant could not be enforced in law, it being a covenant which offended the rules against perpetuities. He also came to the conclusion that Defendants Nos. 2 to 4 were bond fide purchasers for value without notice. He accordingly dismissed the suit. An appeal was taken by the Plaintiffs to the learned District Judge. The District Judge agreed with the Munsif in his conclusion on the point of law, but he did not record any finding on the special defence raised by Defendants Nos. 2 to 4, namely, whether they were purchasers for value without notice. As he agreed with the learned Munsif that the covenant was unenforcible in law he dismissed the appeal. A Second Appeal was taken by the Plaintiffs to this Court which was heard by Mr. Justice S.K. Ghose sitting singly. He came to the conclusion that the covenant was unenforcible in law. He then noticed the finding of the learned Munsif to the effect that Defendants Nos. 2 to 4 were bond fide purchasers for value without notice and observed that the learned District Judge was silent on the point. From the latter fact, he came to the conclusion that the point about notice must have been abandoned by the Plaintiffs Appellants before the District Judge and in that view of the matter he held that the finding of the learned Munsif that Defendants Nos. 2 to 4 were bond fide purchasers for value without notice must stand. We do not think that the question about notice has been dealt with properly by Mr. Justice S.K. Ghose. There were no materials to show that the Plaintiffs acquiesced in the finding of the learned Munsif and did not contest the learned Munsif's finding on that point before the learned District Judge. A specific ground was taken by them in the memorandum of appeal which they filed before the learned District Judge. If the conclusions on the point of law arrived at were not sound, we would have had no option but to remand the case to the learned District Judge to record a finding on the question as to whether Defendants Nos. 2 to 4 were bond fide purchasers for value without notice. But inasmuch as we have come to the conclusion that the question relating to the validity of the aforesaid covenant has been rightly decided, a remand is not necessary.

2. Two points have been urged before us by Mr. Das for the Plaintiffs Appellants. The first is that there can be no scope for the application of the rule against perpetuities to such a covenant "for preemption, because such a covenant does not create any interest in immovable properties. For that purpose he relies upon sec. 54 of the Transfer of Property Act and on the cases decided in other High Courts, for instance, *Aulad Ali v. Ali Athar* ILR 49 All. 527 (F.B.) (1927). and

Munuswami v. Sagalaguna ILR 49 Mad. 387, 3891 (1925). The second contention is that even if it be taken that such a covenant creates an interest in the immovable property the covenant entered into in this case does not, in fact, offend the rule against perpetuities.

3. The covenant in this case is that if the Defendant and his co-sharer desired to sell the property they would have to offer the same for sale to the Plaintiffs in the first instance. A right of preemption is thus created in favour of the Plaintiffs. The contract is not merely a contract for sale by the Defendants in favour of the Plaintiffs, and the terms of sec. 54 would not apply. We are not prepared to take the view that any interest in the property is created in favour of the preemptors. The question is to be discussed not only with reference to the provisions of the Transfer of Property Act but also to the Specific Relief Act and Trusts Act, as has been pointed out by Mr. Justice Mukerji and Mr. Justice Basu in *Kalachand Mukherji v. Jatindra Mohan Banerji* ILR 56 Cal. 487 496 (1928). We agree with the observations made therein and hold that the contracts of the description which we have in the case before us stand in a class by themselves and that the rule against perpetuities would be applicable to such contracts. In any event, we are not prepared to dissent from the view expressed by this Court in *Kalachand's* case (3) ILR 56 Cal. 487 at p. 496 (1928). referred to above and other cases. The first point is accordingly overruled.

4. The second point is whether the covenant which we have set out in the earlier part of our judgment, does, in fact, offend the rule against perpetuities. The exercise of the right conferred upon the second party to the said contract is not limited in point of time. The fact that not only the first party but their heirs also would have to make the offer in the first instance to the second party, indicates that the parties did not intend to limit the operation of the contract in point of time. The mention of the heirs indicates that the parties contemplated that the right could be exercised at any time in future, however remote that time may be. According to the tenor of the covenant the right of pre-emption would arise not only if the second party, namely Defendant No. 1 and his co-sharers, desired to sell the property but also if their Heirs, however remote, desired to sell the same. These heirs may not be persons who were living at the date of the contract. The time when the heirs may form the desire of selling the property may be beyond the life-time of a person alive at the time of the contract and beyond 18 years thereafter. That may be a possibility on the terms of this covenant. We accordingly hold that this covenant offends the rule against perpetuities and is not enforceable in law and we therefore affirm the judgment of Mr. Justice S. K. Ghose on this point.

5. The result is that this appeal is dismissed with costs.

Akram, J.

I agree.