

(1981) 10 RAJ CK 0011

In the Rajasthan High Court

Case No : Civil Second Appeal No"s. 204 and 504 of 1970

Bhagwan Sahai and Another

APPELLANT

Vs

Satya Narain and Another
 Bhagwan Sahai and
Another Vs Satya Narain and Another

RESPONDENT

Date of Decision : 30-10-1981

Acts Referred:

Rajasthan Pre-emption Act, 1966 — Section 11, 8, 9

Citation : (1982) RLW 250 : (1981) WLN 589

Hon'ble Judges : D.P. Gupta, Acting C.J.

Bench : Single Bench

Final Decision : Dismissed

Judgement

Dwarka Prasad Gupta, Act. C.J.

1. As both these appeals arise out of the same judgment and decree passed by the learned District Judge, Jaipur District, Jaipur dated November 18, 1969, they have been taken up together for hearing and are disposed of by a common judgment.

2. The only question which arises in these appeals is as to whether a suit for pre-emption could not be filed because the pre-emptor failed to make the customary Talabs.

3. Kalyan Bux filed a suit for pre-emption in respect of certain portions of a house property situated in the city of Jaipur on the basis that he was a co-sharer in the same house and had, therefore, a preferential right of purchase. There was some dispute between the parties as to whether the property in question was sold for a sum of Rs. 6,999/- or for a lesser amount. However, both the courts below came to the conclusion that the plaintiff was a co-sharer and that the property in question was sold for a sum of Rs. 6,999/-. As such, a decree for pre-emption was passed in favour of the plaintiff by the learned Civil Judge, Jaipur District.

4. No question about absence of Talabs was raised in the trial court. However, in the first appeal a question was raised that in the absence of Talabs, the plaintiff could not assert a right of pre-emption and the suit was not maintainable. The learned District Judge, Jaipur District, on the basis of a notification issued by the then Jaipur Government on April 7, 1927 held that the making of Talabs was not necessary for asserting the right of preemption in the case of sales made within the territory comprised in the former State of Jaipur, where the right of pre-emption was based on customary law. On all other questions, the judgment of the trial court was up held and the defendant's appeal was dismissed.

5. In this second appeal, as stated earlier, the only question argued by learned Counsel for the appellant was that making of Talabs was absolutely necessary for asserting the right of pre-emption, as in the City of Jaipur the law of pre-emption was co-extensive with the Mohammedan law and that in the absence of any special custom different from the Mohammedan law the principles of Mohammedan law were applicable as such, even while the parties were the Hindus. Learned Counsel for the appellant relied upon the following observations occurring in the decision of the Full Bench of this Court in Nathu Ram v. Pat Ram ILR 1960 Raj. 443:

We may state at once that under the custom as prevailing in Jaipur City, the right of pre-emption is co-extensive with the Mohammedan law. On this point, we may refer to the case of Ram Rakh v. Mst. Gulab ILR Raj. 650 in which this proposition of law has been accepted.

The question which was before the Full Bench in Nathuram's case ILR 1960 Raj. 443 was as to whether a co-sharer was entitled to share equally with the vendee of the property sold, even if the vendee was also a co-sharer and the pre-emptor had no preferential right. The observations made by their Lordships of the Full Bench in Nathuram's case must be read in the context in which they were made. Their Lordships relied upon the decision in Ram Rakh v. Mst. Gulab (2), while making the observations that the right of pre-emption under the custom prevailing in Jaipur City was co-extensive with the Mohammedan law. In Ram Rakh's case also the question raised was whether the right of pre-emption could be exercised when both the pre-emptor as well as the vendee were co-sharers in the property which was the subject-matter of sale. The following observations was made in Ram Rakh's case ILR Raj. 650:

The claim of pre-emption among the Hindus in the former Jaipur State, in which this case has arisen, was recognized on the basis of custom, the said right being co-extensive with Mohammedan law, unless modified by custom.

On the basis of these observations, the argument has been sought to be made in these appeals that there could be no divergence from the Mohammedan law, so far as the customary law of pre-emption prevalent in Jaipur city was concerned. Of course, so far as the right of the co-sharer pre-emptor was concerned, in respect of property where the buyer was also a co-sharer, the law in Jaipur city

was co-extensive with the Mohammedan law and the right of pre-emption could not be exercised by a co-sharer if the property was sold to any other co-sharer. But in aforesaid two cases the question of necessity of making the Talabs for the purpose of exercising the right of pre-emption was not in dispute and the same was neither considered nor decided.

6. Learned Counsel for the appellant also referred to a decision of their Lordships of the Supreme Court in *Smt. Rajeshwari Devi v. Mukesh Chandra and Anr.* (Civil appeal No. 162 decided on October 31, 1967) wherein it was held that making of Talabs after the sale is completed is not a technical rule of Mohammedan law, but a rule of substance and that in the absence of evidence of special custom different from or not co-extensive with the Mohammedan law of pre-emption, the Mohammedan law must be applied to the sale of a house property situated in a locality where the law of preemption applies by custom. There is no doubt that in the city of Jaipur the law of pre-emption used to be applied by custom prior to the enforcement of the Rajasthan Pre-emption Act, 1966 and the right of pre-emption could be exercised according to Mohammedan law, subject to modification thereof by law or special custom. In *Mathura v. Mst. Kamrano and Ors.*, 10 JLR 39, a Bench of three Judges of the former Chief Court of Jaipur, held that Mohammedan law applied where both the vendee and the pre-emptor happened to be Mohammedans. If a Mohammedan claimed pre-emption in respect of a sale by a Hindu or if the order be reversed, the claim should be Mohammedans If a Mohammedan claimed pre-emption in respect of a sale by a Hindu or if the order be reversed, the claim should be considered as based on custom and not on the Mohammedan law and if the parties, namely, the vendee and the pre-emptor, both were the Hindus then also the Mohammedan law as modified by custom would be applicable. The same situation also was applicable where both the vendee and the pre-emptor were the Hindus. In the aforesaid judgment the following observations were made:

It has been held in a number of cases decided by the old Council and also by the Chief Court that talabs are not necessary when the claim is not based on Mohammedan law.

- (1) *Mehr Chand v. Ratanlal*, decided by the Ijlas, on 30th January, 1913.
- (2) *Mst. Gauran v. Dhaniala*, decided by the Ijlas on the 28th February 1918.
- (3) *Gordhan v. Ram Kishan*, decided by the Ijlas on the 13th February 1924, and
- (4) *Chhoteylal v. Sheo Shankar*, decided by the Chief Court, on the 10th November, 1926.

The omission of talabs does not, therefore, affect the plaintiff's right of pre-emption, as the reciprocity between them and the vendor is on the basis of custom and not of the Mohammedan law.

Thus, it appears that so far as the city of Jaipur was concerned, Mohammedan law was modified by custom, in respect of the question of making of talabs and

the talabs were not considered necessary.

7. However, the position was made clear by a notification No. 2155/J-1-148 dated April 7, 1927 which was issued by the then Government of Jaipur and which runs as under:

Where as it is expedient to give all possible claimants formal notice of a sale, with a view to facilitate their assertion of pre-emptive right without recourse to litigation, the following rules have been passed by the Council of State, and they shall come immediately into force:

(1) When any person proposes to sell any property in respect of which any persons have a right of pre-emption, he shall give notice to the persons concerned of

(a) the property: and

(b) the price at which he is willing to sell it.

Such notice shall be given through the Court within the local limits of whose jurisdiction the property or any part thereof is situate.

(2) Any person having a right of pre-emption in respect of any property proposed to be sold shall lose such right, unless within three months from the date of service such notice he or his agent pays or tenders through the Court the price aforesaid to the persons proposing to sell.

(3) Any person entitled to a right of pre-emption may bring a suit to enforce such right on any of the following grounds (namely):

(a) that no due notice was given as required by Rule 1;

(b) that tender was made under Rule 2 and refused;

(c) that the price stated in the notice was not fixed in good faith.

Even if the decision of the Jaipur Chief Court in Mst. Mathura's case 10 Jaipur Law Reporter 39 may not be taken into consideration then on account of the aforesaid notification dated April 7, 1927 the customary right of pre-emption founded on Mohammedan Law stood modified by law, so far as the area comprised in the favour State of Jaipur was concerned. The notification makes it amply clear that the right of pre-emption would be enforced by bringing a suit in the conditions specified in clause 3 there of, irrespective of the factwhether Talabs were made or not. The aforesaid notification remitted that the person who proposed to sell the property, in respect of which any other person may have a right of pre-emption, should give a notice of his intention to sell the property to the possible pre-emptor through the court which had jurisdiction over the locality in which the property or any part there of was situated. The person who has the right of pre-emption then had the option either to make payment of or tender the price for which the property was proposed to be sold through the Court within a period of three months from the date of the service of such notice or he

could contest that the price stated in the notice was a servant and was not fixed in good faith or he could refuse to make such payment of the price. In the first case, if the proposed sale price was paid to the vendor or tendered through the court then the vendor would have to sell the property to the preemptor for the proposed price. If the price claimed in the notice was contented to be exorbitant and not fixed in good faith, thus the pre-emptor could bring a suit for enforcing his right of pre-emption. In case the person, to whom such a notice was given by the vendor, failed to make payment of or tender the proposed price "within a period of three months through the court and did not contest the proposed price as exorbitant or in bad faith, then such a person completely lost his right of pre-emption in respect of the proposed sale. If the right was lost, as specified in clause (2) of the aforesaid notification, then after the sale was completed, such a right could not be removed merely by making Talabs. If on the other hand the amount was paid or tendered through the court by the pre-emptor, on receipt of the notice, then no section for enforcement of right of pre-emption would be necessary, as the vendor would sell the property to the pre-emptor on making payment of or tendering the amount, as that would amount acceptance of the offer and the contract would become complete. But in case no notice is given by the vendor to the person who could assert a right of pre-emption in respect of the proposed sale, as required by clause (1) of the aforesaid notification, the pre-emptor could enforce the right of preemption by filing a suit and the said right could not be defeated or defeated on the ground that talabs were not made according to Mohammedan law.

8. In second appeal No. 261 of 1971 decided by a learned Single Judge of this Court (J.P. Jain J.) on April 28, 1972, it was held that the notification of 1927 made the Talabs by a pre-emptor unnecessary, in case of a sale governed by customary law of pre-emption applicable to the area comprised in the former State of Jaipur. The same view was taken by another learned Single Judge of this Court (D.R. Sharma J.) in *Gopal and Ors. v. Devi Dutt Sharma* (S.B. Civil Second Appeal No. 221/68 decided on July 24, 1980) and it was held that the customary law of pre-emption founded on Mohammedan law stood modified, so far as the territories comprised in the former State of Jaipur were concerned, by the notification dated April 7, 1927. Learned Counsel for the appellant relied upon certain observations made by another learned Single Judge of this Court (S.N. Modi J.), in a reference order dated August 27, 1973, in the case of *Radhaballabh v. Pushalal* (S.B. Civil First Appeal No. 18 of 1972 decided on August 27, 1973) wherein he expressed doubt about the correctness of the decision of J. P. Jain J. in *Prabhu Narain Patwa's case* (S.B. Civil Second Appeal No. 261 of 1971 decided on April 28, 1972). It was observed by Modi J that:

The provisions of the notification are neither inconsistent nor they are such that they cannot stand together side by side with the customary right of pre-emption founded on the Mohammedan law and according to which making of "talabs" is essential.

9. The view expressed by Modi J. in the aforesaid passage could not be taken to a final decision as they were made in a reference order and not while deciding a case finally.

10. I would, however humbly submit that the provisions of the notification of 1927 could not stand together side by side with" the making of Talabs. The argument which was advanced by learned Counsel for the appellant in this context was that the notification of 1927 related to the giving of a notice prior to the sale, while the necessity of Talabs arose after the sale was completed and as a such they could stand side by side together and were not incossistent. However, as I have already referred to above, if the person to whom the notice was given by the proposed vendor, according to clause (1) of the notification dated April 7, 1927, failed to make payment of or tender through the court, the price at which such vendor was willing to sell the property, within a period of three months and did not contest the price stated in the notice as exhorbitant or excessive, would be considered to have completely lost his right of pre-emption, on the expiry of the period of three months from the date of the service of notice. In such a case after the expiry of three months, the vendor could sell the property to a third person and thereafter if the pre-emptor even made Talabs, the same could not revive his right of pre-emption. If the requirement of making Talabs was still applicable in the said area and did not stand modified by the provisions of the aforesaid notification, then on making of Talabs, the pre-emptor could be entitled to file a suit for pre-emption. According to the principles of Mohammedan law, irrespective of the passing of a period of more than three months of the service of the notice given in accordance with the notification of 1927. But that would be wholly inconsistent with the provisions of clause (2) of the notification of 1927, because a right of preemption, which was lost on account of not responding to the notice given under clause (1) thereof, within a period of three months of the service of such notice, could not be revived merely by making the "Talabs" at a subsequent stage, when the sale was completed and the sale-deed was registered in favour of the vendor. If the notice, as provided in clause (1) was not given or if tender of price made under clause (2) was referred, then the pre-emptor had a right to file a suit to enforce his right of pre-emption and in such cases, the question of not making of Talabs would be rendered wholly superflous. If the price stated in the notice, issued in accordance with the provisions of clause (1) of the aforesaid notification, was claimed by the proposed pre-emptor to be exorbitant and not fixed in good faith, then also the pre-emptor could have brought a suit to enforce his right of pre-emption without making Talabs, as envisaged in Clause 3 of the said notification.

11. Thus I am in agreement with the view taken by J.P. Jain J. in Prabhu Narain Patwa's case and by K. S. Sharma J. in Gopal's case (supra) that the provisions of the notification dated April 7, 1927 are inconsistent with the Mohammedan law, so far as making of Talabs is concerned. In my view, the two decisions referred to above, given by J. P. Jain J. and K. S.-Sharma J. were rightly decided and after the unenforcement of the provisions of the notification dated April 7,

1927, in the Gazette, the principles of Mohammedan law in relation to the right of pre-emption stood modified to extent provided by the aforesaid notification as far the territories comprised in the former State of Jaipur were concerned. The provisions of the notification were obviously inconsistent with the necessity of making Talabs. As a matter of fact, the giving of a notice prior to the completion of the sale of the property in question appears to have been provided by the notification of 1927, in order to obviate the predicament of the pre-emptor of keeping a constant watch and vigil as to when the parties would complete the sale and would present the sale-deed for registration. It may also be observed that the provisions contained in the notification of 1927 are almost similar to the provisions of Sections 8,9 and 11 of the Rajasthan Pre-emption Act, 1966 and it cannot be doubted that after the enforcement of the Rajasthan Pre-emption Act, the requirement of making Talabs stood obrogated. The same position must be considered to have been brought about after the enforcement of the aforesaid notification by its publication on April 15, 1927, as far as the territories comprised in the former State of Jaipur were concerned and in these territories the necessity of making Talabs stood abrogated and the Mohammedan Law of pre-emption stood modified to the extent provided by the aforesaid notification.

12. In my view, inspite of the fact that no Talabs were made in the present case, the right of pre-emption could have been enforced by the co-sharer, as it relates to property situated in the city of Jaipur as the customary Jaw of pre-emption applicable to such area stood modified after the enforcement of the notification of 1927.

13. So far of civil second appeal No. 504/1969 is concerned, learned Counsel drew my attention to the fact that the decree drawn by the trial court was not in accordance with the provisions of Order 20 Rule 14 C.P.C. The trial court, while passing a decree for pre-emption and directing the plaintiff to deposit a sum of Rs. 6,999/- has ordered the defendant on such payment to deposit the title deeds and convey the property to the plaintiff, if so required. The submission of learned Counsel is justified as decree has not been drawn in accordance with the provisions of Order 20 Rule 14 C.P.C. Thus the operative part of the order of the trial court is modified and sub-stituted as under:

Plaintiff's suit for a decree against defendant No. 1, for pre-emption of the property described in para 3 of the plaint, with the direction that both the plaintiff as well as the defendant. The plaintiff shall deposit in court the amount of Rs. 8,699/- in the court and on payment into the court of such amount, the defendant No. 1 shall deliver possessions of the property described in Para 3 of the plaint to the plaintiff whose title there to shall be deemed to have accrued from the date of such payment, it has been submitted by the learned for the parties that the amount as described by the trial court and as modified by the first appellate court has been deposited by the plaintiff in the court and that the defendant No. 1 has expired during the pendency of litigation and their legal representatives have been brought on the record.

14. Learned Counsel for the appellant Bhagwan Sahai drew my attention to the orders of this court dated July, 22, 1970 and April 22, 1974 passed in civil second appeal No. 504 of 1969 According to the earlier order dated July 22, 1970 the defendant was required to deposit a sum of Rs. 20/-per month with effect from July 22, 1970, until the decision of the appeal to be paid to the respondents in the case of dismissal of the appeal. This order was modified on April 22, 1974 and the amount of mesne profits, in respect of the property in question, was raised from Rs. 20/- per month with effect from April 22, 1974. In accordance with the aforesaid two orders, the plaintiff is also entitled to receive interest on the amount of fixed deposit in respect of the sum of Rs. 8,699/-. Thus by virtue of the aforesaid two orders passed by this Court on July 22, 1970 and April 22 1974, the plaintiff is entitled to get interest on the amount of fixed desposit as also a sum of Rs. 20/- per month by way of mesne profits with effect from July 22, 1970 upto April 1974 and thereafter mesne profits at the rate of Rs. 30/- per month from April 22, 1974 until the delivery of possession of the property in question. It may be made be clear that what ever amount has been deposited by the vendee in the court towards mesne profits shall be adjusted towards the amount, which is payable to the plaintiff-pre-emptor on account of mesne profits. The amount of Rs. 8,699/- which has been deposited, by the plaintiff shall be payable to the vendee.

15. No other point was agrued before me. There is no force in these two appeals and the same are dismissed. The parties shall bear their own costs throughout.