

(2001) 12 AHC CK 0025
In the Allahabad High Court
Case No : Second Appeal No. 120 of 1987

Maresh Chand

APPELLANT

Vs

Ajai Sood and Others

RESPONDENT

Date of Decision : 13-12-2001

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 100
Contract Act, 1872 — Section 23
Evidence Act, 1872 — Section 115, 15
Uttar Pradesh Zamindari Abolition and Land Reforms Act, 1950 — Section 154, 336

Citation : (2002) 1 AWC 355 : (2003) 94 RD 172

Hon'ble Judges : B.K. Rathi, J

Bench : Single Bench

Advocate : Pramod Kumar Jain, R.S. Maurya, V.K.S. Chaudhary and R.K. Singh, for the Appellant; Ajit Kumar, Manu Saxena, Mohit Kumar, A.D. Prabhaker, G.N. Verma and S.N. Verma, for the Respondent

Final Decision : Dismissed

Judgement

B.K. Rathi, J.—This second appeal has been preferred against the judgment and decree dated 29.9.1986 passed by Smt. Sadhna Chaudhari, J.S.C.C., Meerut in Civil Appeal No. 480 of 1977.

2. The facts of the case are very simple and almost admitted. One Lala Amba Prasad had four sons, namely, Harish Chandra. Suresh Chandra, Mahesh Chandra and Naresh Chandra. Mahesh Chandra filed Original Suit No. 359 of 1958 against his father and three brothers for partition of Joint properties consisting of urban property and agricultural land. This suit was decreed on 5.12.1959 in terms of the award accepted by all the parties and the award was made part of the decree. The award also contained a clause that in case any party wanted to transfer property allotted to him, then others will have a preferential right to purchase or a right to preempt the sate.

3. Naresh Chandra, respondent No. 3 sold his agricultural land given in his share

in the said partition to respondent Nos. 1 and 2 by sale deed dated 26.10.1967 for Rs. 40,000. After the sale deed, Mahesh Chandra, the present appellant filed Original Suit No. 310 of 1969 claiming the right of pre-emption and for directing the respondents to execute the sale deed of the land in his favour. The suit was decreed by the trial court. However, the above first appeal has been allowed and the suit has been dismissed. Therefore, the plaintiff-appellant has preferred this second appeal.

4. I have heard Sri V. K. S. Chaudhary, Senior Advocate assisted by Sri P. K. Jain, learned counsel for the appellants and Sri Ajit Kumar, learned counsel for respondent Nos. 1 and 2.

5. The partition of the property by the arbitration award and the clause of right of pre-emption in the said award has not been disputed in this case. The only controversy between the parties in this appeal is whether the claim of the present appellant is barred by the principles of estoppel and acquiescence. The appeal has been allowed and the appellate court has held that the claim is barred by estoppel and acquiescence. The appeal was admitted on following substantial questions of law.

(1) Whether the suit is barred by estoppel and acquiescence?

(2) Whether the appellate court has misread the letters written by the plaintiff to his brother Harish Chandra?

6. Both the points are connected and are being dealt together. The finding of estoppel and acquiescence is on the basis of the letters written by the appellant to his brother Harish Chandra. The right of preemption was given by the award which is a part of the decree and has not been challenged. The suit has been dismissed for the reason that the plaintiff-appellant was not ready and willing to purchase the land. Admittedly, since before the sale in question, the appellant was living in Bombay and was working as an architect. He wrote letter paper No. 41-Ka to his eldest brother Harish Chandra on 15.3.1967 intimating that there is no profit in keeping the agricultural land and it is beneficial to sell the agricultural farm. He also mentioned in the letter that he is unable to supervise the agricultural land and requested for the sale of the agricultural farm including his share. Another letter is dated 23.3.1967 written by the appellant to his same brother in which he has mentioned that he agreed for the sale of the agricultural farm. With this letter, he also enclosed an authority letter in favour of Sri Harish Chandra for the execution of agreement of sale with the purchaser on his behalf. The enclosed authority letter is paper No. 45-Ka on the record.

7. Apart from this, Sri Harish Chandra, the elder brother of the appellant to whom the letter was addressed wrote letter paper No. 42-Ka on 25.3.1967 to the broker. In this letter, he expressed that the sale of the agricultural farm be settled. However, it is further mentioned in that letter that he is not ready to sell the farm for less than Rs. 3,40,000.

8. Sri Naresh Chandra transferred his share in favour of respondent Nos. 1 and 2 by sale deed dated 26.10.1967. This sale deed has been signed by Harish Chandra the elder brother of the appellant in token that he has no objection to the sale. It is also mentioned in the sale deed that the appellant has also no objection to the sale as has been intimated by him through the letters. On the basis of this fact, the learned appellate court has held that the appellant was willing to sell his share of the agricultural farm and he mentioned that it is not earning any profit and also expressed inability to look after it ; that, therefore, there was no question for purchase of the said farm by the appellant and, therefore, he cannot claim the right of pre-emption. The appellate court has therefore, held that the claim is barred by the principles of estoppel and acquiescence.

9. It has been argued by Sri V. K. S. Chaudhary, Senior Advocate for the appellant that the appellate court has wrongly applied the principles of estoppel and acquiescence as given in Section 115 of the Evidence Act to the facts of the present case. Besides taking me through the provision of Section 115 of the Evidence Act, the learned counsel has referred to a decision of the Apex Court in Chhaganlal Keshavlal Mehta Vs. Patel Narandas Haribhai, . Reliance has been placed on paragraphs 22 and 23 of the judgment. It was held in paragraph 22 that "it may be pointed out that estoppel deals with questions of facts and not of rights. A man is not estopped from asserting a right which he had not said that he will not assert. It is also a well-known principle that there can be no estoppel against a statute."

10. In paragraph 23 of the judgment, the conditions have been mentioned to bring a case within the scope of estoppel as defined in Section 115 of the Evidence Act. Reliance has been placed on condition Nos. 1, 2 and 8 which are as follows ;

(1) there must be a representation by a person or his authorised agent to another in any form-a declaration, act or omission ;

(2) the representation must have been of the existence of a fact and not a promise de futuro or intention which might or might not be enforceable in contract ;

(3) only the person to whom representation was made or for whom it was designed can avail himself of it. A person is entitled to plead estoppel in his own individual character and not as a representative of his assignee."

11. On the basis of the above observations it has been argued that the principle of estoppel does not apply in the present case for the reason that the right of pre-emption accrued on the execution of the sale deed ; that after the execution of the sale deed when the right accrued to the plaintiff, he did not said that he will not avail of the right ; that, therefore, there can be no estoppel. It has been argued that the assertion u/s 115 of the Evidence Act should be after the accrual of the right, as in the present case, there is no representation that the appellant

will not exercise his right. Therefore, the principle of estoppel will not apply.

12. The other case referred to is P. Dasa Muni Reddy Vs. P. Appa Rao, . The Apex Court has observed that "Abandonment of right is much more than mere waiver, acquiescence or laches. The decision of the High Court in the present case is that the appellant has waived the right to evict the respondent. Waiver is an intentional relinquishment of a known right or advantage, benefit, claim or privilege which except for such waiver, the party would have enjoyed. Waiver can also be a voluntary surrender of a right". It was further held in this paragraph that "there can be no waiver of a non-existent right. Similarly, one cannot waive that which is not one's as a right at the time of waiver."

13. Another case referred to is Provash Chandra Dalui and Another Vs. Biswanath Banerjee and Another, . It was observed in this case that "waiver is distinct from estoppel in that in waiver, the essential element is actual intent to abandon or surrender right, while in estoppel such intent is immaterial. On the basis of above decisions, It has been asserted that there was no representation by the appellant after accrual of the right that he has waived the right ; that, therefore, principle of estoppel u/s 115 of the Evidence Act does not apply in the present case.

14. Learned counsel has also referred to Full Bench decision of this Court in Aulad Ali v. Ali Athar. In which it was held that a contract regarding pre-emption is binding between the parties. However, there is no dispute regarding this fact.

15. As against this, learned counsel for the respondents has referred to the following decisions of the Apex Court :

Dr. Ashok Kumar Maheshwari Vs. State of U.P. and Another, . In this case, the Apex Court dealt with the promissory estoppel. It was held that even though the case would not fall within the terms of Section 115 of the Evidence Act which enacts the rule of estoppel, it would still be open to a party who had acted on a representation made by the Government to claim that the Government should be bound to carry out the promise made by it.

16. The other case referred to is Karan Singh and others, etc., Vs. Bhagwan Singh (Dead) by LRs. and others, etc., . This was a case of preemption. It was held by the Apex Court that "it is hardly necessary to point out that cases of pre-emption are no exception to the rule of estoppel to be found in Section 115, Evidence Act. The plea of estoppel may be grounded on an indefinite variety of facts.

17. It is settled law that a right to claim pre-emption must be available on the date of the sale, the date of suit and the date on which the decree is passed.

18. I have given my thoughtful consideration to the law cited by the learned counsel and the arguments advanced.

19. It is no doubt true, in this case, that there is no waiver of the right by the

appellant after the sale deed when the right of pre-emption arose. However, the law laid down in the cases relied on by the learned counsel for the appellant has absolutely no application in the present case and none of the cases relate to a pre-emption case. In a pre-emption case, the position is little different and even if it is not covered by the principle of estoppel as mentioned in Section 115 of the Evidence Act, the claim may be barred by waiver or by relinquishment or by abandonment or in any manner which shows that the right is not exercised by whatever name it may be called. For example, if X has a right of pre-emption and asked to purchase a property at a particular price and he refuses to purchase that property at that price, thereafter it is sold to Y at the same price, will X have a right of pre-emption after the execution of the sale deed? The answer to the question is clearly that in that case X cannot exercise the right of preemption and relinquished the right as he was not ready to purchase the property. Similar is the facts of the present case. The appellant in an ambiguous terms has stated that he wanted to sell his share of agricultural land as it is not giving any profit to him, and he is also not able to manage the same. If it is so, there is clear relinquishment of his right to purchase the property. He has given his mind in clear terms that he will not purchase the agricultural land. Thereafter, it is sold to respondent Nos. 1 and 2. After the sale deed if the plaintiff is permitted to exercise his right of pre-emption, it will amount to cheating and defrauding the purchasers, respondent Nos. 1 and 2 by vendor and his brothers, the law cannot permit the exercise of such a right.

20. The question whether estoppel as mentioned in Section 115 of the Evidence Act applies or not in the present case may be purely academic. However, it is clear that the principle of promissory estoppel applies against the appellant. He has waived and relinquished his right to purchase the land and, therefore, could not claim the same.

21. I, accordingly, find that the first appellate court has rightly dismissed the suit and there is no reason to interfere in the decree.

22. Apart from this, two legal questions have also been raised before me in this appeal by Sri Ajit Kumar, learned counsel for respondent Nos. 1 and 2. It is contended that the suit is barred by Sections 336 and 154 of U. P. Z.A. and L.R. Act. Before deciding these questions, it is proper to deal with the argument of the learned counsel for the appellant that no such pleas were raised before both the courts below and, therefore, cannot be permitted to raise for the first time in the second appeal. Learned counsel for the appellant on this point has referred to the decision of AIR 1930 57 (Privy Council) It was held in this case that, "where a claim has been never made in the defence presented no amount of evidence can be looked into upon a plea which was never put forward." This authority does not apply in the present case for the reason that it deals with the questions of facts. It is contended by the learned counsel for the respondents that pure question of law can be raised for the first time in the second appeal. Learned counsel in support of his argument has referred to the decision of this Court in

Rewa Ram v. Jhunna Lal 1979 ALJ 665. It was held in this case that point involving question of law can be raised in the High Court in second appeal though not raised in the lower court. I agree with the principle laid down in this case. A pure question of law which does not require any evidence can be raised even in second appeal.

23. Now I consider the question raised by the learned counsel for respondent Nos. 1 and 2. It is contended that right of pre-emption cannot be exercised after enforcement of U.P.Z.A. and L.R. Act as mentioned in Section 336 of the Act. Section 336 of the Act reads as follows :

"(1) Notwithstanding anything contained in any law, custom, usage or agreement, the right of pre-emption shall not exist in respect of any sale of any immovable property in the area to which the Act applies whether made voluntarily or under order of Court ;

(2) All suits for pre-emption pending in respect of any such property in any Court whether of the first instance or appeal or revision shall stand dismissed but award of the costs incurred in any such suit shall be in the discretion of the Court."

24. In reply to this, it is contended that U.P.Z.A. and L.R. Act does not apply to the premises in suit as it is an urban area. The Urban Area Z.A. Act No. 9 of 1957 applies to it and, therefore, the provisions of Section 336 of the Act are irrelevant. This argument of the learned counsel is against the pleadings of the appellant. In paragraph 1 of the plaint, the disputed property has been mentioned as bhumidhari land. The suit was filed in the year 1969 and, therefore, it was bhumidhari land under the U.P.Z.A. and L.R. Act. Therefore, he cannot say that this Act does not apply. It is also contended that Section 336 of the Act applies to immovable property and not to bhumidhari rights. This argument is also not correct. Bhumidhari land is also an immovable property. Therefore, after the Section 336 of U.P.Z.A. and L.R. Act. the suit of preemption does not lie.

25. Last argument of the learned counsel is that Section 154 of U.P.Z.A. and L.R. Act imposes restriction on transfer of any agricultural land whereby the transferee acquires more than 12.50 acres of land. It is not disputed in this case that the award of partition on which the claim is based, the appellant was given about 10 acres of land. The land in dispute is also about 10 acres. In case the suit is decreed for purchase of disputed land, the appellant will hold land measuring about 20 acres which is against the provisions of Section 154 of U.P.Z.A. and L.R. Act.

26. Learned counsel for the appellant in this connection has referred to the decision of the Apex Court in Kripashanker Vs. Director of Consolidation and Others, . It was held that transfer in contravention of Section 154 is not void but voidable only to the extent of excess over and above the prescribed limit. In my opinion, this authority is of no help to the appellant. Section 154 of U.P.Z.A. and

L.R. Act, has been enacted on the basis of public policy. The contract against the public policy cannot be enforced u/s 23 of the Indian Contract Act. The Court cannot pass a decree to enforce a contract which is against the public policy. Therefore, irrespective of the fact whether transfer would be void or voidable, it is certainly against the public policy and cannot be enforced in a court of law. The decretal of the suit will amount to the enforcement of the contract in contravention of the provisions of Section 154. The suit, therefore, can also not be decreed for this reason.

27. No other point arises for decision in this appeal.

28. I, therefore, find that the appellate court has rightly allowed the appeal. The second appeal is without any merit and is hereby dismissed with costs.