

(1960) 11 MP CK 0009
In the Madhya Pradesh High Court
Case No : First Appeal No. 114 of 1958

Mulla Qamruddin Naib Mulla Abdul Ali	APPELLANT
Vs	
Brijmohandas Shrikishandas and Others	RESPONDENT

Date of Decision : 30-11-1960

Acts Referred:

Specific Relief Act, 1963 — Section 22
Transfer of Property Act, 1882 — Section 15, 52, 54

Citation : AIR 1962 MP 25 : (1961) ILR (MP) 97 : (1961) 6 MPLJ 480

Hon'ble Judges : T.C. Shrivastava, J; S.P. Bhargava, J

Bench : Division Bench

Advocate : A.P. Sen and A.H. Saifi, for the Appellant; R.S. Dabir and V.S. Dabir for Respondents 1 to 3, for the Respondent

Final Decision : Dismissed

Judgement

Shrivastava, J.

This first appeal is filed against the judgment and decree of the Additional District Judge, Bhopal, in Civil Suit No. 6 of 1954. That suit was filed by respondents 1 to 3 against respondent No. 4 Ghulam Abbas as defendant No. 1 and the appellant Qamruddin as defendant No. 2 for specific performance of a contract of sale of a house.

The appellant and respondent No. 4 are brothers who owned half a share each in a house in Bhopal. Respondent No. 4 Ghulam Abbas contracted to sell his part of the house for Rs. 40,000/- on 5-4-1954. Rupees 3,000/- out of the consideration was paid immediately, Rs. 25,350/- was to be adjusted towards a mortgage debt and the balance was to be paid at the time of registration. The agreement was in writing, but has not been filed.

The plaintiffs alleged that about a week later, Ghulam Abbas agreed to modify the agreement by contracting to sell the portion in two lots for Rs. 30,000/- and Rs. 10,000/- respectively. On 17-4-1954, a sale deed for Rs. 30,000/- was

executed by respondent No. 4, but the deed has been retained by him. On 18-4-1954 the respondent refused to execute the sale deed for Rs. 10,000/-. The house was later sold to defendant No. 2 (appellant) on 29-4-1954, that is, two days after the present suit for compelling specific performance had been filed.

Defendant No. 1 admitted the contract, but denied that there was any modification thereof. He admitted receipt of Rs. 3,000/- as earnest money. He pleaded that after the contract of sale, the other defendant (appellant) served him with a notice on 24-4-1954 claiming a right of pre-emption and in compliance he sold the house to him on 29-4-1954. He was, therefore, unable to perform the contract and was not liable, as the sale was made in favour of the appellant in exercise of a legal right.

The appellant as defendant No. 2 pleaded that as soon as he came to know about the contract of sale in favour of the plaintiffs, he gave a notice to them not to purchase the house, as he was exercising his right of pre-emption to purchase it. He purchased the house on 29-4-1954 as a pre-emptor and was not, therefore, liable to convey the house to the plaintiffs nor could specific performance be enforced against the first defendant.

The learned Judge of the trial Court held that the contract was modified as alleged by the plaintiffs. He agreed that defendant No. 2 had a right of pre-emption and had purchased the property in exercise of that right; but held that as the sale was taken pendente lite, it did not bind the plaintiffs. He further held that as the stage at which the right of pre-emption could be asserted was not reached, the exercise of the right of preemption was premature and could not give any rights to the appellant. He left the question of pre-emption to be decided in future in a suit by defendant No. 2 to enforce the right. In the result, he decreed the suit for specific performance against defendant No. 1 alone and passed no decree against defendant No. 2 (appellant).

The defendant Ghulam Abbas (respondent No. 4) compromised the claim with the plaintiffs and they both applied on 18-2-1955 to have the compromise recorded. Defendant No. 1 stated in Court that he had entered into the compromise and was willing to convey the property in two lots. In fact, he admitted the claim in full.

The first point that arises for decision in this appeal is whether the plaintiffs and Ghulam Abbas had modified the agreement of sale a week after it was entered into. As admitted by Brijmohan (P.W. 1), the object of this modification was to get round the law relating to pre-emption. Shri A.P. Sen for the appellant contends that as the modification was thus intended directly to defeat the rights of the appellant, it should not be given effect to as has been observed in *Bishan Singh and Others Vs. Khazan Singh and Another*, the right of preemption is a weak right and may be defeated by all legitimate methods.

In *Hans Nath v. Ragho Pershad Singh*, AIR 1932 PC 57, it was held that the right of pre-emption was defeated even when the defendant obtained a gift during the

pendency of the suit to enforce the right of pre-emption which gave him the status of a co-sharer. Modification of an agreement of sale is not prohibited by law. The means thus adapted to defeat the right of preemption were legitimate and the agreement cannot be attacked on that ground.

The trial Court has found that such an agreement had taken place. It is true that the plaintiff Brijmohandas (P.W. 1) is Unable to give the details of the modification, as he cannot say who were intended to be shown as purchasers in the modified sales. There is some discrepancy as to the details of obtaining signatures of defendant No. 2 on the applications to purchase stamps as also about the signing of the two draft sale deeds.

However, it is found from the statements of the plaintiffs' witnesses Ganpatrai (P.W. 3) and Hukuni-chand (P.W. 4) that Ghulara Abbas had agreed to execute two sale deeds. Rajjoolal (P.W. 2), who is the treasury-clerk, states that Ghulam Abbas had signed two challans in his presence for remitting two sums of Rs. 300/- and Rs. 100/- for purchase of two stamps.

The trial Court has believed these witnesses and we do not see any weighty reasons to differ from the appreciation of evidence made by it. The parties have not examined Ghulam Abbas; but his admission of the compromise and the truth of the plaintiffs' case are sufficient to show that he must have agreed to the modification of the contract. We hold that the contract of sale entered on 5-4-1954 was modified within a week by an agreement to have the sale of the house in two portions.

That brings us to the second point raised on behalf of the appellant. It is urged that the sale in favour of the appellant was in exercise of the right of pre-emption and is therefore binding on the plaintiffs even though it was made while the suit for specific performance was pending. Strong reliance is placed on *Ramdeo v. Gangubai* ILR 1951 Nag 830 : (AIR 1952 Nag 51), in which it has been held by a Full Bench of this Court that under the Berar Land Revenue Code a superior pre-emptor can obtain a good title to defeat an inferior pre-emptor by a private sale from the vendee and this effect would follow even if that sale was *pendente lite*.

The reason for the decision is that the Chapter on pre-emption does not prohibit exercise of the right of pre-emption by private negotiation and has prohibition in Section 174 that the right shall be enforced Only by the manner prescribed in the Code refers only to enforcement of the right by coercive process. It has been similarly held in *Malik Singh and Others Vs. Shiam Lal and Others and Sharif Hussain v. Nur Shah* AIR 1929 Lah 589, that such a sale in favour of a superior pre-emptor is good enough to defeat an inferior pre-emptor even if it is found that there is want of good faith and sale is taken with notice of the contract.

We find that these decisions deal with cases where the sale is taken from the vendee and that, in our opinion, distinguishes the present case where the sale is from the vendor. All the three decisions dealt with cases in which the sale was

completed in favour of the vendee and thus by his consent the substitution of the superior pre-emptor was brought about. The right of superior pre-emptor was held to exist prior to the suit and hence it was held that the transfer was not hit by the doctrine of *lis pendens*.

In the instant case, the vendee has not consented to the sale. On the other hand, he is opposing it. We do not agree that the vendor alone can defeat the contract by a deed of sale in favour of the pre-emptor. The agreement of both the vendor and the vendee would be needed to bring about this effect while the matter is in the stage of agreement; though after the sale is completed, the vendee alone can surrender his rights. Shri Sen was unable to cite a single decision in which the vendor alone was held entitled to convey the property to a pre-emptor to the prejudice of the vendee. We hold that the sale in favour of the appellant was not, therefore, in enforcement of his right of pre-emption. In this view, it would be an independent conveyance and would be hit by Section 52 of the Transfer of Property Act.

Then, Shri Sen contended that specific performance of a contract of sale should not be decreed when the vendor has sold the property to a person having a right of pre-emption. This contention finds support from the decisions in *Hahibar Rahaman v. Ali Azahar* AIR 1936 Cal 1237 and *Saheb Dayal Singh v. Mahabir Singh*, AIR 1930 All 166. The reasoning adopted is that as the pre-emptor is entitled to enforce his right after the sale deed is executed on a decree for specific performance, such a course would avoid a multiplicity of suits and the discretion to grant specific relief u/s 22 of the Specific Relief Act should, therefore, be exercised against the plaintiff claiming specific performance. The assumption underlying this reasoning is that a right of pre-emption exists even before the completion of the sale by a formal registered document.

This was the view taken by this High Court in *Jamarayan v. Balwant* AIR 1939 Nag 35, under the Berar Land Revenue Code. A similar view prevailed in other High Courts. However, the matter has been recently considered by the Supreme Court in *Radhakisan Laxminarayan Toshniwal Vs. Shridhar Ramchandra Alshi and Others*, , and it has been laid down that sale must be complete according to Section 54 of the Transfer of Property Act before a right to pre-empt can arise. On this view, it was held that the suit of the pre-emptor to enforce his right of pre-emption before the completion of the sale was premature.

After this decision, it is no longer possible to hold that the right of pre-emption exists prior to the sale. In the Bhopal Pre-emption Act, 1934, the term "right" has no doubt been used indiscriminately in Section 15 in the context of the stage of notice before sale. However, Section 6 provides that the right of pre-emption arises only on sale and sale must now be held to mean sale according to Section 54 of the Transfer of Property Act.

That being the position, the word "right" in Section 15 must be read to mean an inchoate right which is likely to mature into a full right on sale and likely to be

extinguished if proper action after notice is not taken by the person claiming preemption. We conclude that no right of pre-emption exists before the completion of sale. That being the position, sale in favour of the so-called pre-emptor should not be enough to refuse exercise of discretion in granting specific performance.

In this view, the question of the right of the appellant to pre-empt the sale must be left for a future suit. The question arose indirectly in "the present suit and we make it clear that we have not said anything in this decision on the merits of such a right.

As the claim of the plaintiffs was compromised by defendant No. I Ghulam Abbas, and as the appellant has no right of pre-emption at present, there was no impediment to passing a decree in terms of the compromise.

In the result, the appeal is dismissed with costs.