
(1990) 10 KL CK 0069
In the High Court Of Kerala
Case No : A.S. No. 4 of 1984

N. Lakshmana Pillai

APPELLANT

Vs

S. Krishnaswami Pillai and Others

RESPONDENT

Date of Decision : 23-10-1990

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 32(5), Order 21 Rule 88, Order 21 Rule 92, Order 21 Rule 94, 65
Kerala Buildings (Lease and Rent Control) Act, 1965 — Section 11(3)

Citation : (1990) 2 KLJ 757

Hon'ble Judges : L. Manoharan, J

Bench : Single Bench

Advocate : P.K. Balasubramanyan, for the Appellant; P. Sukumaran Nayar and A.K. Chinnan, for the Respondent

Final Decision : Allowed

Judgement

L. Manoharan, J.—Second defendant is the appellant. The suit was for enforcement of a right of pre-emption. The facts can be summarised as follows:- First defendant's mother Chempakam Ammal executed Ext. A-1 settlement deed settling properties inclusive of the plaint schedule on her five sons and a grand-son. The plaint schedule is D schedule in Ext. A-1 allotted to the 4th party in the settlement deed. The first defendant, Gopala Pillai the 4th party and Chempakam Ammal executed Ext. A-2 mutual exchange deed under which the D schedule was obtained by the 1st defendant who is the 3rd party in Ext. A-1. The plaintiff was allotted C schedule therein. Chempakam Ammal reserved right of enjoyment on all the items in Ext. A1 except C schedule. According to the first respondent as per clause 10 in Ext. A1, alienation of property allotted under Ext. A-1 could be only to the allottees therein. First defendant entered into an agreement with the appellant to sell the property pursuant to which he instituted Ext. A4 suit for specific performance and the suit was decreed. The first respondent alleged that he is entitled to have the plaint schedule property offered to him and that the first defendant was not entitled to execute sale deed in favour of the appellant

who is a stranger. First defendant died pending suit.

2. The appellant contended that, the first defendant did not have any right of pre-emption under clause 10 of Ext. A1. If at all there is one, the suit is premature. The sale in favour of the first respondent is not a voluntary sale and therefore even if the first respondent has any right of pre-emption that cannot be enforced. It was also contended that at any rate on the death of the first defendant even if there was right of pre-emption in favour of the first respondent that ceased to exist.

3. As already stated Chempakam Ammal reserved right of enjoyment over all items except the C schedule was allotted absolutely to the first respondent. It is claimed that the right of pre-emption is contained in clause 10 of Ext. A1. The case of the appellant is clause 10 does not confer any right of pre-emption on the C schedule's owner, the first respondent. It is now necessary to see the relevant clauses in Ext. A1. Clause 10 cannot be read in isolation That clause is only part of the whole scheme of allotment. The clauses have to be read and understood assigning the natural meaning to the words used therein. The intention of the parties has to be found out from a reading of the clauses and if the clauses do not suffer from any ambiguity the construction would be easier. Clause 10 states that after the death of the executant the respective allottees of all item except C schedule could be in the possession and enjoyment and in case any of the sharers alienates, he can alienate only to a sharer and should not alienate the property to strangers; but after the death of those who are mentioned in the document the property would vest absolutely with the children of the respective sharers. The contention of the appellant is, right of pre-emption is conferred only on allottees except C schedule owner. In clause 8 of Ext. A-1 the executant reserves right of enjoyment till her life on all items except C schedule. Clause 9 states that after her death the owners of A, B, D, E and F schedules could be in possession and enjoyment of the property. It proceeds to state that the respective owners except C schedule can effect mutation.

4. The first part of Clause 10 contains a direction as to what should follow on the death of the executant. In that context the clause states that, the respective allottees except C schedule could be in possession and enjoyment on the death of the executant. It was unnecessary to make such a provision for C schedule as C schedule was given absolutely. In the succeeding part of the said clause the words used is "any of the shares" in contradistinction to "shares except C schedule's owner" used in the first part and mandates that if alienation is made, it should be to the sharers in the document. This is followed by further statement as to the termination of the right of pre-emption where it is stated that on the death of those mentioned herein the property would vest absolutely with the children of the respective sharers. The language used in the clauses adverted early is clear that the executant never wanted to discriminate or exclude the C schedule's owner in matter of right of preemption. In such circumstance, there is no justification to assign a restricted meaning to "any of the shares" mentioned

in the later portion of the said clause to mean "sharers except C schedule's owner". Therefore, it is clear that the first respondent also got right of pre-emption under Ext. A-1.

5. It is contended that the suit is premature inasmuch as at the institution of the suit, no sale deed was executed with respect to the plaint schedule property. As already seen plaint schedule is the D schedule in Ext. A-1 and as per Ext. A2 mutual exchange deed the D schedule was obtained by the first defendant. The first defendant entered into an agreement with the appellant to sell the D schedule. On the allegation that the first defendant did not execute the sale deed as per the agreement appellant instituted Ext. A-4 suit. He got Ext. A--5 decree. Later in execution of Ext. A--5 decree a sale deed was executed by the execution court. It is stated that the sale deed was executed on 23-1-1981. The suit was instituted on 22-7-1980. According to the appellant, as the right to enforce the pre-emption right could arise only on the execution of the sale deed, the suit was premature.

6. It is now necessary to notice the character and qualities of the right of pre-emption. The right of pre-emption is a transient right and it is a personal privilege of the pre-emptor. The right of pre-emption can be by law," custom or contract. The decision in Shri Audh Behari Singh Vs. Gajadhar Jaipuria and Others, held:

Right of pre-emption have, in some provinces like Punjab, Agra and Oudh, been embodied in statutes passed by the Indian Legislature and where the law has been, thus codified it undoubtedly becomes the territorial law of the place and is applicable to persons other than Muhammadans by reason of their property being situated therein.

In other parts of India, its operation depends upon custom and when the law is customary the right is enforceable irrespective of the religious persuasion of the parties concerned. Where the law is neither territorial nor customary, it is applicable only between Muhammadans as part of their personal law provided the judiciary of the place where the property is situated does not consider such law to be opposed to the principles of justice, equity and good conscience.

A part from these a right of pre-emption can be created by contract and such contracts are usually found amongst sharers in a village. And in paragraph 16, it is stated:

It is true that the right becomes enforceable only when there is a sale but the right exists antecedently to the sale, the foundation of the right being the avoidance of the inconveniences and disturbances which would arise from the introduction of a stranger into the land. We agree with Mr. Justice Mahmood that the sale is a condition precedent not to the existence of the right but to its enforceability .

The decision further held:

In our opinion the law of pre-emption creates a right which attaches to the property and on that footing only it can be enforced against the purchaser.

As regards the characteristics of the right of pre-emption the decision in *Bishan Singh and Others Vs. Khazan Singh and Another*, held:

(1) The right of pre-emption is not a right to the thing sold but a right to the offer of a thing about to be sold. This right is called the primary or inherent right. (2) The pre-emptor has a secondary right or a remedial right to follow the thing sold. (3) It is a right of substitution but not of re-purchase i.e., the pre-emptor takes the entire bargain and steps in to the shoes of the original vendee. (4) It is a right to acquire the whole of the property sold and not a share of the property sold. (5) Preference being the essence of the right, the plaintiff must have a superior right to that of the vendee or the person substituted in his place. (6) The right being a very weak right, it can be defeated by all legitimate methods, such as the vendee allowing the claimant of a superior or equal right being substituted in his place.

In this case the suit was instituted before the sale deed was executed.

7. Learned counsel for the respondents maintained that the suit cannot be dismissed on the ground that the same is premature because the court was bound to take notice of subsequent events; in fact the trial court took notice of the subsequent execution of the sale deed to hold that the suit was maintainable. When the defect in institution is of a jurisdictional nature subsequent event cannot cure the same. If there is a statutory prohibition against the institution of the suit within a particular period then an institution within that period would be a defect of jurisdictional nature and consequently subsequent events will not be able to cure such defect in institution. The decision in *Hameed v. Ittoop* (1970 KLT 501 D.B.) considered the said question. In that case a petition was instituted by a land-lord u/s 11(3) of the Kerala Buildings (Lease and Rent Control) Act 1965 within one year of the transfer in favour of the land-lord. The question that arose was whether the institution of the proceedings was valid even though the one year period mentioned in proviso to Section 11 (3) of the Act expired during the pendency of the proceeding. The court noted that Section 11 (3) placed an absolute bar against the filing of an application for eviction on the ground of land-lord's bona fide use before the expiry of one year of the transfer inter vivos; The Rent Control Court had no jurisdiction to entertain an application within the period of one year. In paragraph 7 it is observed:

We do not demur to the proposition that the court has power to take note of subsequent events. But where the defect against institution of proceedings is of a jurisdictional nature and such, we hold to be the effect of the relevant proviso to Sec. 11(3) of the Act subsequent events cannot cure the same.

In the case of a suit for enforcement of right of pre-emption since there is no statutory bar as the one u/s 11 (3) of the Rent Control Act it cannot said that defect is of a jurisdictional nature. Consequently, the suit cannot be dismissed on

the ground that the same is premature.

8. The next contention by the learned counsel for the appellant is that, the right of pre-emption can be enforced only with respect to voluntary alienation, since the sale deed in this case was executed in execution of a decree for specific performance of a contract, the right of pre-emption cannot be enforced. The learned counsel pointed out that, the sale deed having been executed in execution of the decree it is not a voluntary alienation. Reliance was made by the learned counsel on the decision in *Madhavan Nair v. Chinna Kunji & Others* (1971 KLT 159). In that decision it is held that the right of pre-emption cannot be enforced against a court auction purchaser. It is held therein;

A bona fide purchaser for value without notice of the right is bound by the burden but a purchaser at a court auction is bound only to the extent indicated in Rule 88 of Order 21 of the CPC and not otherwise. It follows that the right of pre-emption is not available against a purchaser at court-auction.

The contention of the learned counsel for the appellant is, though the sale in question was not a court auction sale, the sale being in execution of a decree for specific performance the same should stand in the same footing and if so the right of pre-emption cannot be enforced against the appellant. The learned counsel relied on the decision in AIR 1949 Lahore 72 in support of the said contention. It is held in the said decision that sale effected in consequence of a decree for specific performance is different from a voluntary sale for the purpose of pre-emption and therefore the court held that a right of pre-emption cannot be enforced against such a sale. But the decision in *Balbir Singh v. Kulwant Singh* (AIR 1965 Punjab 346) held otherwise. In paragraph 13 of the judgment it is pointed out that an earlier decision in *Rangi Ram v. Mehar Singh* (AIR 1919 Lahore 118) was not considered in *Mohammed Wazir's* case and that in that case the question arose in a suit for specific performance of contract and not in a suit for enforcing right of pre-emption; the question did not arise directly for decision. The court held that a sale deed executed in execution of a decree "for specific performance is pre-emptible. In the decision in *Gopi Nath Das Vs. Namai Charan Das and Another*, Holds the view that, when a sale deed is executed by court in execution of a decree for specific performance the sale deed so executed is on behalf of the party. As per Order 21 Rule 32(5) CPC in execution of a decree for specific performance of a contract the execution court can direct the sale deed be executed by a person appointed by the court for the said purpose. In a suit for specific performance the decree is passed on finding that the defendant committed breach of contract. The court passes the decree in enforcement of the agreement to sell. The consent of the party was there to execute the sale deed when he entered into the agreement to sell. He was not entitled to withdraw the consent and was bound to execute the sale deed. So when the execution court enforces the decree it only performs what the executant agreed to perform and such performance in execution of the decree cannot be said to be without the consent of the concerned party or that it was an in-voluntary sale like a sale in

execution of a decree for money. In court auction sale others can also participate. No title deed need be executed. When the sale is confirmed under Order 21 Rule 92 C.P.C. the sale would become absolute. As per Section 65 C.P.C. on such confirmation the property would vest in the auction purchaser retrospectively as on the date of sale. When the sale becomes absolute the court would grant certificate of purchase under Order 21 Rule 94 C.P.C. The title passes to the auction purchaser by operation of law. But in execution of a decree for specific performance the title passes on execution of the document by the court in favour of the decree holder. It cannot be said, in such circumstance, that a sale in execution of a decree for specific performance is not amenable to pre-emption. Therefore the said argument of the learned counsel for the appellant is not acceptable.

9. The next contention by the learned counsel for the appellant is, on the death of the first defendant the right of pre-emption ceased to exist. According to the learned counsel with due regard to the character and nature of this right in the context of clause 10 of Ext. A-1 the first respondent could not have any right to enforce the right of pre-emption after the death of the first defendant. The primary right though was in existence which would entitle the pre-emptor to have a sale made to him whenever the owner of the pre-emptional property sells it, the secondary right arise only on the sale of the pre-emptional property. The secondary right is the remedial right. Primary right exists before the sale and it runs with the pre-emptive property. The remedial right would arise when the property is sold and the same is a personal right. This is the right to follow the thing sold.

10. Full Bench of the Allahabad High Court in the decision in Mohammed Ismail v. Abdul Rashid (AIR 1956 Allahabad I) pointed out that though the right of pre-emption runs with the land and is not initially personal it assumes a personal aspect for the purposes of enforceability from the time of sale in favour of a stranger till the date of decree in favour of the pre-emptor, the right can be enforced only by a person who was the owner of the preemptive property on the date of sale of the property. Whether the right to enforce pre-emption need subsist only on the date of the sale of pre-emptive property or at the date of institution of the suit for enforcing the pre-emption right or whether it should be subsisting on the date of the decree is the next aspect to be considered. The Privy Council in the decision in Hans Nath v. Ragho Pershad Singh, AIR 1932 PC 57 held that the decisive date as regards the right of the cosharer to pre-empt is the date of the decree. In the decision in Narayana Menoki Vs. Karthiayani, after holding that the law of pre-emption in Mohomedan law can be applied by analogy in other cases because that was the system of law which brought this right to India, it is held that, the ground of pre-emption must continue until the decree is passed, though it is not necessary that the right should be subsisting at the date of execution of the decree or at the date of the decree of the appellate court. Therefore it is necessary-that the right of pre-emption to subsist not only at the institution of the suit but it should subsist on the date of decree by the trial

court. For a plaintiff to succeed in a suit for pre-emption he should show that, he had the right at the time of sale, at the date of the suit and it subsisted at the passing of the decree by the trial court. The first defendant died on 28-5-1982 pending suit. Clause 10 of Ext. A--1 enjoins that on the death of allottees, their respective sharers would vest with their children absolutely; that means thereafter the right of pre-emption would cease. Inasmuch as the right of pre-emption ceased to exist pending suit, the said right cannot be enforced.

The primary right is potential, it becomes dynamic when pre-emptive property is sold and that remedial right which is personal should subsist till the decree is passed; and when right of pre-emption is contractual and it determines before the decree is passed on the happening of the event mentioned in the contract the remedial right also would be snapped. Thus though the 1st respondent had the right at the sale of pre-emptive property, and at institution of the suit since it did not subsist at the passing of the decree he cannot succeed. In that view the judgment and decree of the lower court are liable to be set aside.

In the result the appeal is allowed and the decree and judgment of the lower court are set aside. There will be no order as to costs.