
(1959) 12 BOM CK 0008
In the Bombay High Court
Case No : Second Appeal No. 147 of 1955

Narayan Balaji Patil

APPELLANT

Vs

Babarao Baliram Bobde

RESPONDENT

Date of Decision : 01-12-1959

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 103
Constitution of India, 1950 — Article 19

Citation : (1960) 62 BOMLR 406

Hon'ble Judges : Raju, J;Kotval, J

Bench : Division Bench

Judgement

Raju, J.—This is a second appeal by the original plaintiff who had filed a suit for pre-emption. The relevant facts are: On February 1, 1952, defendant No. 3 sold the suit, field No. 81/4 of Malkhed, Taluq Darwha, District Yeotmal, measuring 5 acres and 13 gunthas to defendants Nos. 1 and 2. Plaintiff" Narayan, who is a co-occupant in survey No. 81, filed the suit for pre-emption in respect of the suit field. The trial Court decreed the suit for pre-emption on condition that the plaintiff deposited Rs. 1,600 by way of pre-emption price. The first appellate Court raised the pre-emption price to Rs. 3,600 and against this decision the present second appeal has been preferred by the original plaintiff and his contention is that the pre-emption price should not be Rs. 3,600 but should be Rs. 1,600. The respondents have not filed any cross-objections. As they have not filed cross-objections their contention that the suit for pre-emption should have been dismissed on the ground that the right of pre-emption offends Article 19 of the Constitution cannot be considered. The only question for decision in this second appeal is whether the pre-emption price¹ was rightly increased from Rs. 1,600 to Rs. 3,600 by the first appellate Court. Questions relating to the constitutionality of the right of pre-emption do not, therefore, arise for decision in this second appeal.

2. Questions regarding burden of proof, the exact nature of the right of preemption and the meaning of the expression "fair consideration," the question

in what circumstances the pre-emption is for the price fixed in the sale-deed and in what circumstances the pre-emption is for a fair consideration have been canvassed* at length at the Bar.

3. Chapter XIV of the Berar Land Revenue Code deals with pre-emption and certain sections in this chapter confer the right of pre-emption, namely, Sections 176r 177, 178, 182, 183 and 184. Sections 176, 177 and 178 confer the right of preemption in cases where notice is given to the other occupants of the survey number, intimating the price at which the interest is proposed to be sold or the principal amount of the mortgage or the premium, if any, and the rent and the period in the case of a lease, the extent of the interest foreclosed in the case of a mortgage by conditional sale and the amount declared to be due by the final decree. In all these cases the other occupants of the survey number have a right to deposit the amount specified in the notice within two months from the service of the notice. These three Sections 176, 177 and 178, therefore, give the right of pre-emption for the amount specified in the notice. In such cases Section 182, however, gives an additional right to pre-empt, not for the amount stated in the notice but for a fair consideration. In the cases falling u/s 176, or 177 or 178, notwithstanding that the specified amount is stated in the notice, the occupant having the right of pre-emption can sue to enforce his right of pre-emption not for the amount stated in the notice but for a fair consideration, but he can do so only if the grounds specified in Clauses (a) to (b) and (c) of Sub-section (1) of Section 182 are satisfied. Clause (a) provides that in the case of a proposed sale, the price stated in the notice must not have been fixed in good faith. If the right of pre-emption falls u/s 177, namely, in the case of foreclosure, the ground on which the right of pre-emption can be claimed for a fair consideration, is that the amount stated in the notice was not due by the terms of the final decree or that it exceeds the market value of the interest foreclosed. In cases falling u/s 178, i.e. where the right of pre-emption is in respect of a usufructuary mortgage or a lease, the grounds on which pre-emption can be claimed for a fair consideration is that stated in clause (c) of Sub-section (7) of Section 182, namely, that the principal amount or the premium or the rent stated in the notice was not fixed in good faith. In all these three cases although a specified sum is stated in this notice, if any of these conditions are satisfied, the person having the right of pre-emption can sue for the right to pre-empt not for the sum stated in the notice but for a fair consideration, but the conditions mentioned in Clauses (a), (b) and (c) must be satisfied. In two of these cases reference is made to good faith, namely, cases falling under Sections 176 and 178. In these cases, therefore, if a person claims a right of pre-emption for a fair consideration he has to prove that the amount stated in the notice was not fixed in good faith. Sub-section (4) to Section 182 provides that the Court shall presume that such price etc. was not fixed in good faith when it is proved that any price, principal amount etc. exceeds the figure for which the interest sold is mortgaged or leased. Sub-section (4), therefore, enumerates the circumstances in which the Court can draw a presumption of absence of good faith in cases where the absence of good faith

has to be proved by the person claiming the right of pre-emption. Such an absence of good faith must be proved only in cases falling under Sections 176 and 178 and not in cases falling u/s 177.

4. It is, therefore, clear that Section 182 itself explains clearly when the plaintiff has to prove the absence of good faith and how the absence of good faith can be presumed by the Court. If any of the conditions stated in Clauses (a), (b), or (c) of Section 182(7) are satisfied, then the occupant gets the right of pre-emption for fair consideration. The right given in Section 182 is, therefore, a different right, of pre-emption, namely, the right to pre-empt for a fair consideration to be fixed by the Court if the plaintiff satisfies the requirements of either Clause (a) or Clause (b), or of Clause (c). All these four sections, namely Sections 176, 177, 178 and 182 refer to the right of pre-emption in cases where a notice has been given.

5. The section applicable to cases where no notice is given is Section 183. It provides that when no notice has been given the other occupants of the survey "number shall have a right to pre-empt the interest transferred. The section does not say that the other occupants shall have the right to pre-empt for the price mentioned in the instrument of transfer. But Sub-section (2) provides that such a right of pre-emption may be enforced and that in all such cases the Court shall have power to examine the transaction and fix the fair consideration for the interest to be pre-empted. In other words, when no notice has been given and a suit is filed to enforce the right of pre-emption, the Court has to fix a fair consideration for the interest to be pre-empted and for doing so, i.e. for fixing a fair consideration the Court has power to examine the transaction.

6. The question whether Section 183 has to be read with Sub-section (4) of Section 182 has been considered in some cases and it has been urged that both the sections must be read together. Sub-section (4) of Section 182 explains when the Court is to presume absence of good faith in cases where the person claiming a right of pre-emption has to allege and prove absence of good faith. Section 183 does not require the proof of any absence of good faith. It was, therefore, unnecessary for the Legislature to explain the circumstances in which the absence of good faith should be presumed for purposes of Section 183. Sub-section (4) of Section 182 is, therefore, independent of the provisions of Section 183 and vice versa. This was the view taken by Padhye J. in *Rajaram Maroti Marathe v. Mahadaji Danaji Marathe* (1947) Second Appeal No. 437 of 1943, decided by Padhye J., on February 21, 1947 (Unrep.). This view of Padhye J. was referred to by Pollock J. in *Dattatraya Jairam Bithodkar v. Narayan Kondba Sonar* (1948) Second Appeal No. 447 of 1944, decided by Pollock J., on "April 2, 1945 (Unrep.). It was observed that Padhye J. drew a distinction between a case u/s 182 where a co-occupant sues for preemption on the ground that the price stated in the notice was not fixed in good faith and the case u/s 183 where he has not been given notice and he sues for pre-emption for a fair consideration. With respect, the distinction is clear and correct. Pollock J. also referred to other

remarks of Padhye J. that the principles on which a fair consideration must be fixed u/s 182 do not apply to cases u/s 183, and Pollock J. observed, that in his opinion the distinction appeared to him to be unjustifiable. If Padhye J. was referring to the general principles on which the fair consideration must be fixed, with great respect, I would agree with Pollock J. because what is a fair consideration would not depend on whether notice had or had not been given to the person claiming pre-emption. What is fair consideration must always be determined after considering all the relevant factors and no rules can be laid down as to what is fair consideration. The principles for determining what is fair consideration in cases falling u/s 182 where notice had been given must be the same as those applicable to the cases falling u/s 183 where notice is not given. But if Padhye J. was referring to the pre-requisite conditions in Section 182, which are pre-requisites before a person can sue to pre-empt, for a fair consideration, then with great respect, in my opinion Padhye J. is right when he says that the pro-requisite conditions in Section 182 do not apply to cases falling u/s 183. If the intention of the Legislature was that the prerequisite conditions enumerated in Section 182 should apply also to cases falling u/s 183, the Legislature would have expressly stated so in Section 183 also. Therefore, in cases falling u/s 183, the question of good faith does not fall for determination, but the Court has to fix the fair consideration for the interest to be pre-empted, and for that purpose the Court has the power to examine the transaction. As observed by Pollock J. in *Dattalraya Jairam, Bithodkar v. Narayan Kondba Sonar*, in cases u/s 183 the Court is not specifically directed to consider whether the price has been fixed in good faith, for it is not essential for the plaintiff to establish that it was not fixed in good faith in order to succeed, but the Court is required to examine the transaction and then fix the fair consideration. The view that u/s 183 the Court has to fix the fair consideration irrespective of the presence or absence of good faith has thus the support of Pollock J. and also of my learned brother Mudholkar J. in *Dattairaya v. Shriram* [1957] N.L.J. 348. The observations of Pollock J, have also been referred to with approval by my learned brother Tambe J. in *Narayan Bhaurao Bhagat v. Kisan Ananda Munde* (1959) Second Appeal No. 772 of 1955, decided by Tambe J., on 14/20 November, 1959 (Unrep.). When a suit is filed u/s 183 for enforcing the right of pre-emption in cases where no notice has been given, the Court has, therefore, to fix the fair consideration for the interest to be pre-empted and for doing so the Court has the power to examine the transaction. In such cases there is no burden on the plaintiff to prove absence of good faith or to prove that the consideration stated in the sale-deed or the instrument of transfer is above the market value. As to how the Court should decide the fair consideration is a matter which depends on the facts and circumstances of each case and no principles can be laid down to regulate the discretion of the Court or its sense of fairness and reasonableness. But, of course, all relevant factors have to be considered in deciding what the fair consideration is and some of the important factors to be considered are the price fixed in the sale-deed or the instrument of transfer, the market value of the property, the relations of the vendor and vendee and the urgency on the part of

the vendee to purchase the land in question, and also the factor that an occupant of the neighbouring land is always willing to pay more than the market value of the land for fields adjoining his own land. In cases falling u/s 182, the Court can determine the fair consideration only if one of the conditions (a), (b), or (c) in Section 182(7) is satisfied. But in cases falling under Section 183 the Court has to fix the fair consideration irrespective of whether the conditions specified in Clauses (a), (b) and (c) of Section 182(1) are proved to exist or not, and in such cases there is no burden of proof on the plaintiff to prove absence of good faith or the fair consideration or the market value.

7. In the instant case, both the plaintiff and the defendant have adduced evidence. The trial Court rejected the evidence of the plaintiff as not conclusive and cogent, and in the opinion of the trial Court the fair consideration was Rs. 300 per acre. The Court, therefore, fixed Rs. 1,600 as the fair consideration. The first appellate Court while starting with the observation that the only points for determination in the first appeal were whether the price stated in the sale-deed dated February 1, 1952, was not fixed in good faith, and if so, what should be the fair consideration for pre-emption, concluded by observing that the plaintiff's burden having not been discharged to show that the market value of the suit field was less than Rs. 3,600 as stated in the sale-deed, the Court was not called upon to fix fair consideration for pre-emption. As already observed, in cases falling u/s 183 the only question to be decided by the Court is what is the fair consideration for the interest to be pre-empted. The first appellate Court's approach to the whole question as well as to the question of burden of proof is not the right one and the finding of fact by the first appellate Court, which would ordinarily be binding in second appeal, is thus vitiated by wrong approach to the problem. But u/s 103, Civil Procedure Code, as there is evidence on record to decide this question, the question can be decided in second appeal.

[The rest of the judgment is not material to this report.]