

(1971) 01 KL CK 0011
In the High Court Of Kerala
Case No : A.S. No. 244 of 1966

Padmanabha Pillai Madhavan Nair

APPELLANT

Vs

Chinna Kunji and Others

RESPONDENT

Date of Decision : 29-01-1971

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 88

Citation : AIR 1972 Ker 17

Hon'ble Judges : T.C. Raghavan, J;P. Unnikrishna Kurup, J

Bench : Division Bench

Advocate : G.K. Sivasankara Panicker, D. Narayanan Potti, P.G. Parameswara Panicker, N. Govindan Nair and T.A. Narayanan Nair, for the Appellant; S.A. Nagendran, for the Respondent

Final Decision : Allowed

Judgement

Raghavan, J.—The fifth defendant is the appellant in this appeal against second appeal and the plaintiffs the contesting respondents.

2. The suit property is a portion of a non-residential building, which belonged to the toward of plaintiffs 1 and 2 and defendants 1 and 3. Under Ex. P1 of 15th October 1949 there was a partition; and the partition deed contained a covenant that, if any sharer were to sell his share, it must be offered to the other sharers for a fair price and only after they refused in writing to purchase could it be sold to a stranger. The fourth defendant, a stranger to the toward, instituted a suit on promissory notes executed by defendants 1 and 2, obtained a decree charged on the suit property and in execution thereof purchased the property too. The sale was confirmed; and thereafter, the fourth defendant assigned his right to the fifth defendant (the appellant).

3. The plaintiffs filed the suit which has given rise to the appeal for pre-emption in terms of Ex. P1. The lower courts found that the covenant for pre-emption was valid but was not available against defendants 4 and 5, who were purchasers at

court auction. And the suit was dismissed. One of the plaintiffs and the legal representatives of the other plaintiff came up in second appeal to this Court; and Madhavan Nair, J, allowed the second appeal on two grounds--that there was no waiver or acquiescence of the right of pre-emption on the part of the plaintiffs and that the right of pre-emption was available even against purchasers in court auction. It is against the said decision in second appeal that this appeal has been preferred. (The decision of Madhavan Nair, J, in second appeal is reported as Chinna Kunji, Kadukayil Vilakathu Veedu and Others Vs. Kesavan Kochukrishnan and Others, .

4. We are not considering the question whether the second appellate Judge was right in his conclusion that there was no waiver or acquiescence on the part of the plaintiffs. We proceed on the basis that there was no waiver. And we proceed, therefore, to consider the next question--whether the right of pre-emption is available against a purchaser in court auction.

5. Madhavan Nair, J, has observed in his short judgment on this question that, on the question of the availability of the right of pre-emption against involuntary sales, there is no precedent in our Court and that the precedents in the other High Courts are not uniform. The learned Judge has then referred to Ramapurath Pullankot Illath Cheria Krishnan Nambudri v. Ramapurath Pullankot Illath Vishnu Nambudri ILR (1882) Mad 198 and Vasudevan v. Keshavan ILR (1884) Mad 309 of the Madras High Court and Bail Nath v. Sital Singh ILR 1913 All 224 of the Allahabad High Court and has observed that these two High Courts differed in their views. Ultimately, the learned Judge has followed the Madras view, because, in his opinion, that view was supported by the decision of the Supreme Court in Shri Audh Behari Singh Vs. Gajadhar Jaipuria and Others, The learned Judge has extracted a passage from the decision of the Supreme Court which contains the following observation of Mukherjea. J.

"The crux of the whole thing is that the benefit as well as the burden of the right of pre-emption run with the land and can be enforced by or against the owner of the land for the time being although the right of the pre-emptor does not amount to an interest in the land itself,"

The passage continues to state that the right of pre-emption is not merely a personal right enforceable against the vendee and concludes--

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

(Purchaser here is a bona fide purchaser for value without notice of the right). Madhavan Nair, J, has concluded from the aforesaid line of reasoning of the Supreme Court--

"If a covenant for pre-emption runs with the land I see no reason why court-sales or other involuntary sales where there is no warranty of title should be excluded from its ambit. All that a purchaser at a court-sale would get is the

right, title and interest of the judgment-debtor subject to all legal embargo thereon. If bona fide purchase in a private sale with warranty of title cannot avail against a claim for pre-emption, it is difficult to conceive how a purchase in a court-sale where there is no warranty of title can avail against it.

It is on this reasoning that the learned Judge has preferred the Madras view.

6. Two important facts do not appear to have been brought to the notice of the learned Judge. The first is that the two decisions of the Madras High Court relied upon by him were considered by the same High Court in the later Full Bench decision in *Vasudevan Moosad v. Ittirarichan Nair* ILR 41 Mad 582 : AIR 1919 Mad 1173 (FB). Sir John Wallis, C. J., after considering all the decisions of the Madras High Court then available, has observed that in none of those cases has the question been considered how far a right of pre-emption can be exercised in the case of court and revenue sales consistently with the provisions of the statute law regulating such sales and has accepted the opinion of Mahmood. J. on the question in the Allahabad decision already referred to.

The second fact which was not brought to the notice of Madhavan Nair, J, is the effect of Rule 88 of Order 21 of the Code of Civil Procedure--whether the intention in enacting the said provision was to exclude or not to recognise the right of pre-emption of a co-owner in other respects.

7. Wallis, C. J. has considered not only the two decisions of the Madras High Court we have already referred to but other decisions like *Kanharankutli v. Uthotti* (ILR (1890) Mad 490, *Ammotti Haji v. Kunhayen Kutti*, ((ILR1892 Mad 480), *Kanaran Nair v. Raman Nambiar*. 1894) 4 Mad LJ 46) and *Mam-mali v. Kunhipakki Haji* ILR 38 Mad 67 : AIR 1916 Mad 743). The learned Chief Justice has observed:--

"On a careful consideration of the question I agree with the law as laid down by Mahmood, J. I find it quite impossible to reconcile the statutory provisions of the Civil P. C. as to sale in execution of decrees with the ottidar's right of pre-emption as now claimed."

His Lordship has then gone on to consider Section 60 of the CPC and Order 21, Rules 89, 90, 91 and 92. And ultimately, the learned Chief Justice has observed:--

"There is a very limited recognition of the right of pre-emption in Rule 88 (of Order 21 of the Code of Civil Procedure), and if any further recognition had been intended, it would have been expressly provided. Having regard to the course of the decisions and the importance of the right of pre-emption in Northern India. I can only infer that the omission to make such provision was deliberate. In *Manchester Ship Canal Co. v. Manchester Race Course Co.* (1901 2 Ch 37) it was contended on the one side and not denied on the other that a right of pre-emption was quite incompatible with a sale by auction."

8. We shall now refer to the two or three decisions of the Supreme Court brought to our notice. The first decision is *Shri Audh Behari Singh Vs. Gajadhar Jaipuria*

and Others, , already referred to. In this case Mukherjea, J, has considered the historical background of the law of pre-emption in India. The law of pre-emption was introduced in India by the Mahomadians, that during the Mughal times the law was administered as a rule of common law of the land in those parts of India which came under the domination of the Mahomadan rulers and that the rule was applied alike to Mahomadians and others. Later on, the rule was adopted as a custom by the Hindus. But, after the establishment of British rule in India, Mohomadan law ceased to be the general law of the land, and since the law of pre-emption was not one of the matters respecting which Mahomadan law was expressly declared to be the rule of decision where the parties to a suit were Mahomadians, the courts in British India applied the law of pre-emption between Mahomadians only on grounds of justice, equity and good conscience. Even here, there was no uniformity among the High Courts; and the Madras High Court definitely held that the law of pre-emption could not be regarded to be in consonance with principles of justice, equity and good conscience. The result was that the right was not recognised in the Madras Presidency even among Mahomadians excepting on the footing of custom.

9. In Provinces like the Punjab, Agra and Oudh, the right of pre-emption was embodied in statutes, so that the law became the territorial law of those Provinces and used to be applied to persons other than Mahomadians by reason of their property being situated in the said Provinces. In other parts of India, the operation of this principle depended upon custom: and when the law was thus customary, it was applied to all parties concerned irrespective of the religious persuasion of the parties. The law of pre-emption was also applied between Mahomadians as part of their personal law, provided the judiciary of the place did not consider such law to be opposed to principles of justice, equity and good conscience. And lastly, the right was applied in cases where the parties created such right by contract.

10. Mukherjea, J. has also indicated that the right of the pre-emptor does not amount to an interest in the property sold: still, the benefit as well as the burden of the right run with the land and could also be enforced by or against the owner of the land for the time being. The learned Judge has indicated further that a bona fide purchaser for value without notice of the right would also be bound by it. Again, the learned Judge has observed that the right exists antecedently to the sale, and the sale is a condition precedent not to the existence of the right but to its enforceability.

11. The next decision of the Supreme Court brought to our notice is Bishan Singh and Others Vs. Khazan Singh and Another, , where Subba Rao, J., speaking for the Court, has summarised:--

"(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 into 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."

12. And the third decision of the Supreme Court is *Sunder Singh and Others Vs. Narain Singh and Others*, , where the earlier two decisions have been referred to and followed.

13. The reasoning of *Madhavan Nair, J.* is that, since the Supreme Court has observed in *Shri Audh Behari Singh Vs. Gajadhar Jaipuria and Others*, that the right of pre-emption is available even against a bona fide purchaser for value without notice, such right must all the more be available against a purchaser at court auction, because the latter does not even have a warranty of title as he is purchasing only the right, title and interest of the owner of the land sold unlike a bona fide purchaser for value. The Supreme Court has said that the right is available against a bona fide purchaser for value without notice: the Supreme Court has also observed that the burden and the benefit of the right are annexed to the land and such burden and benefit run with the land too. But the Supreme Court has not stated anything which goes against the principle laid down by *Wallis. C. J.*, in the decision of the Madras Full Bench and by *Mahmood, J.*, in the Allahabad decision. As pointed out by the learned Chief Justice, having regard to the course of the decisions and the importance of the right in Northern India, the limited recognition of the right in Rule 88 of Order 21 of the Code necessarily indicates the inference that the omission to make the provision wider was intentional. In the language of *Wallis. C. J.* "the omission to make such provision was deliberate."

14. The legal position is this. The right of pre-emption is not a mere personal right for the pre-emptor to compel the vendee to sell the property to him: it is a right to pursue the property. The right is not an interest in property: still, the burden and the benefit run with the land. The right exists even prior to the sale: but the occasion to exercise it arises only on the sale. The right is not a right to the thing sold: it is a right to the offer of the thing about to be sold. 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.

15. Therefore, we hold that the right of pre-emption is not available against a purchaser at court auction.

16. The appeal is allowed, the second appellate decision is set aside and the suit is dismissed. The appellant will get his costs of this appeal and of the second appeal from the plaintiff-respondents; and regarding the costs of the other two

courts, we do not pass any order.