

(2008) 09 BOM CK 0011
In the Bombay High Court
Case No : Second Appeal No. 214 of 1989

Rama Nana Zinzurke

APPELLANT

Vs

Pralhad Damodhar Kulkarni and Another

RESPONDENT

Date of Decision : 19-09-2008

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 16, 17
Constitution of India, 1950 — Article 13(1), 19(1)
Limitation Act, 1963 — Article 97

Citation : (2009) 2 BomCR 375

Hon'ble Judges : Borde R.M., J

Bench : Single Bench

Advocate : C.S. Deshmukh, for the Appellant; K.C. Sant, for the Respondent

Final Decision : Allowed

Judgement

Borde R.M., J.—This is an appeal by original defendant No. 2 raising exception to the judgment and decree passed by the Second Additional District Judge, Beed on 18-3-1989 in Regular Civil Appeal No. 116/80.

2. Suit was instituted by plaintiff being Regular Civil Suit No. 105/75 claiming decree of possession in respect of agricultural land founded upon exercise of preferential right of purchase by him in respect of disputed property. According to plaintiff, he is entitled to exercise his right to purchase the property for consideration of Rs. 10,000/- which according to him is the real consideration amount offered by defendant No. 2 in favour of defendant No. 1. It is the case of plaintiff that originally one Laxmibai Kulkarni was the owner of land survey No. 6/2 of Village Dhamangaon and had alienated the same in favour of plaintiff and defendants jointly for consideration of Rs. 9,500/- on 29-10-1965. According to plaintiff, he is holding the property jointly with defendant No. 1. It is alleged that defendant No. 1 executed a sham and bogus sale-deed in respect of his half joint share on 10-4-1973 for consideration of Rs. 3,000/- in favour of one Kantilal Kaswa. According to plaintiff, said Kantilal Kaswa was never put in possession of

the suit property. However, subsequently, said Kantilal Kaswa again re-transferred the land purchased by him in favour of defendant No. 1 for consideration of Rs. 3,000/- by executing sale-deed on 22-3-1974. It is further alleged that defendant No. 1 on the very next day alienated half share in Survey No. 6/2 in favour of defendant No. 2 for consideration of Rs. 10,000/- by executing sale-deed on 25-3-1974. Sale-deed was registered on 19-6-1975. He being the co-sharer of the property, has preferential right to purchase. According to plaintiff, the amount of consideration shown in the sale transaction between defendant No. 1 and 2 to the tune of Rs. 20,000/- is double the amount of actual consideration paid by defendant No. 2. According to plaintiff, therefore, he is entitled to exercise his preferential right in respect of purchase of property from defendant No. 1 by paying consideration of Rs. 10,000/-. According to plaintiff, he protested the action of defendant No. 1 and made demand in presence of ponchos and further expressed his willingness to pay consideration amount of Rs. 10,000/-. Second demand, according to plaintiff, was made on 28-6-1975. However, defendant No. 1 refused to accept the demands made by plaintiff and failed to execute the sale-deed in his favour on accepting consideration amount. Hence, plaintiff was constrained to file suit. Plaintiff has also pleaded in the plaint that in Marathwada region formerly under Hyderabad State governed by Nizam, customary law in respect of pre-emption was prevailing and as such right is available to him.

3. Defendants resisted the suit by presenting written statement. According to defendant No. 1, plaintiff and defendant No. 1 although purchased the property jointly, they remained in joint possession till March 1968. It is contended by defendants that there is separation of share amongst plaintiff and defendant No. 1. Execution of sale-deed in favour of Kantilal Kaswa and re-transfer of property by Kantilal Kaswa in favour of defendant No. 1 is admitted. However, contention raised by plaintiff that sale consideration shown in the transaction with defendant No. 2 by defendant No. 1 being double the actual price, is specifically denied. Contention raised by plaintiff in respect of demands made by him is also denied by defendant. According to defendants, suit claiming right of pre-emption is not entertainable. Sale-deed according to defendant No. 1 was executed on 26-3-1974 on which date possession was delivered by defendant No. 2. Sale-deed was registered on 19-6-1975. According to defendants, suit presented by plaintiff on 9-7-1975 is beyond the period of one year from the date of delivery of possession by defendant No. 1 and hence, is liable to be dismissed.

4. Learned Civil Judge, Jr. Dn., Ashti, at conclusion of the trial found that plaintiff has failed to establish his case and as such by judgment and decree dt. 29-4-1980 was pleased to dismiss the suit. Appeal presented by plaintiff raising challenge to the judgment and decree passed by the trial Court came to be allowed by Second Additional District Judge, Beed on 18-3-1989. Being aggrieved by judgment and decree passed by the first Appellate Court, defendant No. 2 has approached this Court by presenting instant second appeal.

5. Although at the time of admission, no substantial question of law was framed, however, on perusal of judgment, I find that following substantial questions of law arise for consideration in the appeal:

1. Whether preferential right of purchase is available to the plaintiff which is based on customary right prevailing in the Marathwada region?

2. Whether the suit presented by plaintiff is within limitation?

3. Whether the first Appellate Court was justified in holding that plaintiff has proved making of two demands as required by the custom in respect of exercise of his preferential right to purchase the property?

4. Whether the first Appellate Court was justified in reversing the finding of fact recorded by trial Court based on appreciation of evidence?

6. Heard arguments advanced by Smt. C.S. Deshmukh, learned Counsel for the appellant and Shri K.C. Sant, learned Counsel for the respondents. It is vehemently contended by learned Counsel appearing for appellant that right in respect of pre-emption is not available to the plaintiff in view of pronouncement of the Supreme Court in judgment reported in Bhau Ram Vs. B. Baijnath Singh, , and AIR 1965 S.C. 814 . Reliance is also placed on Full Bench judgment reported in Moti Bai v. Kand Kari Channaya 1954 Hyderabad 161. In a judgment reported in Bhau Ram Vs. B. Baijnath Singh, in the matter of Bhau Ram v. Baij Nath Singh it has been held by the Apex Court as:

Restrictions placed by law of pre-emption based on vicinage do not have any effect on the restrictions imposed in respect of alienation of property, on the right to acquire, hold and dispose of the property as guaranteed under Article 19(1)(f) of the Constitution of India.

However, so far as right in respect of co-sharer is concerned, the Apex Court has made exception and such instances are saved. In para No. 11, the Apex Court has observed thus:

11. This brings us to the consideration of the first ground which gives a right of pre-emption to a co-sharer in the property sold. The question as to the constitutionality of a law of pre-emption in favour of a co-sharer has been considered by a number of High Courts and the constitutionality has been uniformly upheld. We have no doubt that a law giving such a right imposes a reasonable restriction which is in the interest of the general public. If an outsider is introduced as a co-sharer in a property it will make common management extremely difficult and destroy the benefits of ownership in common. The result of the law of pre-emption in favour of a co-sharer is that if sales take place the property may eventually come into the hands of one co-sharer as full owner and that would naturally be a great advantage. The advantage is all the greater in the case of a residential house and Section 16 is concerned with urban property, for the introduction of an outsider in a residential house would lead to all kinds of complications. The advantages arising from such a law of pre-emption are clear

and in our opinion outweigh the disadvantages which the vendor may suffer on account of his inability to sell the property to whomsoever he pleases. The vendee also cannot be said to suffer much by such a law because he is merely deprived of the right of owning an undivided share of the property. On the whole it seems to us that a right of pre-emption based on co-sharership is a reasonable restriction on the right to acquire, hold and dispose of property and is in the interest of the general public.

It is further observed by Apex Court in para No. 16 thus:

16. Therefore, the law of pre-emption in Section 174 of the Code applies to those who are co-sharers or akin to co-sharers and results in consolidation of holdings generally upto about thirty acres, thirty being the general extent of a survey number. The right of preemption is further restricted u/s 184 which provides that no right of pre-emption would arise on an exchange of land with the occupant of another survey number. In effect therefore the Code creates a right of pre-emption in the holder of an interest in a survey number only when an occupant having an interest in that survey number sells it or there is foreclosure or a usufructuary mortgage, or a lease exceeding fifteen years is created in favour of a stranger subjected to the land being unalienated land held for agricultural purposes. Considering therefore the nature of the right created under the Code, we have no hesitation in coming to the conclusion that this right is in reality in favour of a co-sharer strictly so-called or some one who is akin to a co-sharer, and the reasons which we have already indicated when dealing with the Punjab Act relating to co-sharer will apply with full force to the right created under the Code with this addition that this being agricultural land there will be farmer advantage inasmuch as the right of preemption would result in consolidation of holdings within a survey number which as we have said is generally of an extent of thirty acres. We are therefore of opinion that the view taken in *Ramchandra v. Janardan* AIR 1955 Nag. 225 (FB), to the effect that the law of pre-emption provided in Chap. XTV of the Code does not infringe Article 19(1)(f), is correct. This being the only point urged before us in the appeal, we are of opinion that the appeal must fail.

Reliance is also placed on judgment reported in A.I.R 1965 Sc 814 wherein the Apex Court has ruled that preemption on the ground of vicinage by Custom imposes an unreasonable restriction. It is observed by Apex Court that

In so far as statute law is concerned *Bhau Ram Vs. B. Baijnath Singh*, decides that a law of pre-emption based on vicinage is void. The reasons given by the Supreme Court to hold statute law void apply equally to a custom. Custom as such is affected by Part III of the Constitution dealing with fundamental rights and particularly Article 19(1)(f).

In a judgment reported in AIR 1954 Hyd 161 it has been held by the Full Bench thus:

The law of pre-emption as enforced by the courts in Hyderabad State prior to the

Constitution violates the fundamental right under Article 19(1)(f) of the Constitution and, therefore, has become void and unenforceable under Article 13(1) after the coming into force of the Constitution of India.

On consideration of the judgment reported in Bhau Ram Vs. B. Baijnath Singh, it is clear that right of pre-emption so far as it relates to the co-sharers in property is saved and it imposes reasonable restriction on right to acquire property and as such cannot be considered as unconstitutional. In a judgment reported in Rakhamabai Misal and Others Vs. Asruba Dajiba Wanve and Others, , in the matter of Bhau Ram Vs. B. Baijnath Singh, has ruled that

So far as co-sharers or a person who are akin to co-sharers are concerned, they have right to pre-emption in respect of land of their co-sharer.

This Court has further ruled placing reliance on the reported judgment of the Apex Court as:

Pre-emption based merely on the ground of vicinage is void. However, so far as co-sharers are concerned, right is available.

In view of the above discussion, first objection raised by the appellant that suit instituted by plaintiff claiming preferential right of purchase is not entertainable, cannot be accepted. The suit is entertainable and plaintiff would be entitled to relief, if he satisfied other legal requirements.

7. It is urged by the appellant that as plaintiff has failed to make demand when the property was alienated for the first time in favour of Kantilal, he is not entitled to enforce his right now. Defendant in order to controvert the contentions has stated that earlier transaction between defendant No. 1 and Kantilal Kaswa was sham and bogus. There was no real intention to alienate the property. It appears that defendant No. 1 executed sale-deed in favour of Kantilal Kaswa in respect of his half share in the property for consideration of Rs. 3,000/- on 10-4-1973. Defendant No. 1 again re-purchased the property alienated to Kantilal Kaswa by getting sale-deed executed in his favour on 22-3-1974 for same consideration amount i.e. Rs. 3,000/-. Defendant contends that property was alienated in favour of Kantilal Kaswa in the year 1973 and same was repurchased for same amount of consideration after one year. This itself indicates that transaction is not a just and out sale. It is further contended by plaintiff that he was not obliged to make first demand when there was transaction between Kantilal Kaswa and defendant No. 1. Trial Court found that there is no material to arrive at conclusion that transaction between Kantilal Kaswa and defendant No. 1 was bogus as contended by plaintiff. However, the first Appellate Court has reversed the findings recorded by the trial Court in that regard and has held that defendant No. 1 has failed to establish that transaction between him and Kantilal Kaswa is genuine transaction of sale. Infact, it is the contention of plaintiff that earlier transaction between Kantilal Kaswa and defendant No. 1 is sham and bogus and therefore, burden lies on him to establish the contentions raised by him in his pleadings. First Appellate Court has

erred in shifting the burden on defendant No. 1 to prove the nature of transaction between him and Kantilal Kaswa. It was open for the plaintiff to examine Kantilal Kaswa to establish his case. However, the first Appellate Court has erred in placing the burden of proof on defendant and further proceeding to hold that defendant No. 1 has not discharged his burden. The factum that amount of consideration in respect of transaction of sale and purchase which has occurred in 1973 and 1974 remains same, in itself cannot be said to be a circumstance to arrive at conclusion that transaction must be a nominal one. Defendant No. 1 was therefore justified in contending that plaintiff ought to have made demand in respect of exercise of his preferential right of purchase in the year 1973 when the sale-deed was executed by him in favour of Kantilal Kaswa.

8. It is also contended by defendant that although consideration amount shown in the instrument of sale executed in favour of defendant No. 2 on 26-3-1974 appears to be Rs. 20,000/-, actually, the property has been sold for Rs. 10,000/- and in order to deprive the plaintiff of his preferential right to purchase, inflated amount of consideration has been recorded in the instrument of sale. There is absolutely no material to arrive at conclusion that property has not been sold for the consideration amount as has been recorded in the instrument of sale. Registered instrument executed on 26-3-1974 records consideration amount as Rs. 20,000/-. Analogy applied by Appellate Court to arrive at conclusion that amount of consideration shown is inflated one is that in the earlier transaction which was entered into between Kantilal Kaswa and defendant No. 1, transaction amount was shown as Rs. 3,000/- in respect of the property in dispute. However, earlier transaction between Kantilal Kaswa and defendant No. 1 which records purchase price of Rs. 3,000/- cannot itself be a factor to arrive at conclusion that actual consideration amount was Rs. 10,000/- and not Rs. 20,000/-. There is also no logic in recording finding that consideration amount must be Rs. 10,000/- and not any other amount. Even if, it is accepted that earlier transaction which was entered into a few days prior to the impugned transaction, records consideration amount as Rs. 3,000/-, there was no logic in fixing the amount of Rs. 10,000/- in respect of the impugned transaction. Amount of consideration would have been any amount between Rs. 3,000/- to Rs. 20,000/- and there is absolutely no basis for accepting the contention raised by plaintiff that real consideration amount for which the property has changed hands is Rs. 10,000/-. Finding recorded by the first Appellate Court in that regard therefore does not appeal to the common sense and is not sustainable.

9. It is urged by appellant that suit instituted by plaintiff is beyond prescribed period of limitation and as such ought to have been dismissed. In view of the provisions of Article 97 of the Limitation Act, limitation provided for enforcement of right of pre-emption founded on law or general usage or on special contract is one year from the date when the purchaser takes under the sale sought to be impeached, physical possession of the whole or part of the property sold, or, where the subject-matter of the sale does not admit of physical possession of the whole or part of the property, when the instrument of sale is registered. In the

instant matter, instrument of sale is registered on 19-6-1975 whereas sale-deed is executed on 26-3-1974. It is specifically recited in the sale-deed that possession of disputed property has been handed over on the day of execution of sale-deed. Therefore, in view of provisions of Article 97 of the Limitation Act, suit has got to be instituted within a period of one year when the purchaser takes possession under the sale which is sought to be impeached. Suit therefore ought to have been presented within one year from 26-3-1974. Plaintiff has presented the suit on 9-7-1975 which is clearly beyond prescribed period of limitation. It is urged by learned Counsel for respondent/ original plaintiff that as the instrument of sale is registered on 19-6-1975, suit presented on 9-7-1975 which falls within one year from the date of registration of sale shall be construed as having been filed within prescribed period of limitation. It is difficult to accept the preposition as the same is contrary to the provisions of Article 97 of the Limitation Act. It is specifically recited in the instrument of sale that possession has been handed over to the purchaser and there is no evidence to the contrary placed on record by the plaintiff to establish that on the day of execution of the sale-deed, possession was infact not handed over inspite of there being recital in the instrument of sale. In these circumstances therefore, it cannot be construed that starting point of limitation is the date of registration of sale i.e. 19-6-1975. Suit presented by plaintiff is therefore clearly beyond prescribed period of limitation and was rightly dismissed by the trial Court. The Appellate Court has erred in reversing the finding recorded by trial Court in that regard.

10. In the result, for the reasons stated above, appeal deserves to be allowed and the same is accordingly allowed. Judgment and decree passed by the IInd Additional District Judge, Beed on 18-3-1989 in Regular Civil Appeal No. 116/80 is quashed and set aside and the suit presented by plaintiff stands dismissed. However, in the facts and circumstances of the case, there shall be no order as to costs.

11. Pending civil application, if any, stands disposed of.