M/s American Furnishing House and another v. Udai Ram

Khanna, J.

an application is made to set aside an *ex parte* decree to a Court of Small Causes, but also when an application is made to the High Court to set aside the *ex parte* decree granted by the High Court in a revision-petition under section 25 of the Act, the proviso cannot be held to be applicable to the latter contingency. I would, therefore, hold that it is not essential for the defendant to deposit the decretal amount or to furnish the security in accordance with the proviso to sub-section (1) of section 17 of the Act before the *ex parte* decree is set aside.

The *ex parte* decree is, accordingly, set aside. It is further directed that the main revision petition should be set down for hearing at an early date.

*B.R.T.*

APPELLATE CIVIL

*Before Harbans Singh, J.*

RAM KISHAN AND OTHERS,—*Appellants.*

*versus*

JAGDISH KHATAR AND OTHERS,—*Respondents*

Regular Second Appeal No. 581 of 1964.

1966.

February 16th

*Punjab Pre-emption Act* (*I of* 1913)—*S.* 17-*A*—*Ostensible vendee—Whether can plead that he is benamidar for another person—Real purchaser—Whether to be made party—Pre-emptor—Whether must prove his pre-emptive right to be superior to the real purchaser also—Punjab Security of Land Tenures Act* (*X of* 1953) S. 17-*A*—*Sale in favour of tenant—Whether pre-emptible.*

*Held,* that it is not uncommon in India for parents to purchase property in the name of their children or for the husband to purchase property in the name of his wife. Unless it can be established that some fraud was intended or involved, generally speaking there is no reason why the real facts may not be allowed to be brought on the record. The ostensible vendee, therefore, can take a plea that the real purchaser is somebody else and he is only a benamidar and once that plea is taken, it is the duty of the Court to find out the truth of this plea and if it is found that someone else is the real purchaser, normally such a purchaser should be made a party and in any case the pre-emptor can succeed only if he can establish that even as against the real purchaser, he has a superior right of pre-emption.

*Held*, that by virtue of section 17-A of the Punjab Security of Land Tenures Act, a sale in favour of a tenant is not pre-emptible.

*Second Appeal from the decree of the Court of Shri Ved Parkash Sharma, Senior Sub-Judge, Gurgaon, invested with enhanced appellate powers, dated the 26th day of December, 1963, affirming with costs that of Shri Rajinder Lal Garg, Sub-Judge, 1st Class, Gurgaon, dated the 31st August, 1963, granting the plaintiff a decree for possession by pre-emption on payment of Rs 2,000 and further ordering that after deducting the amount already deposited by the plaintiff, the remaining amount would be paid by him to the vendees defendants or the same would be deposited in the Court on or before 1st October, 1963, failing which the suit would stand dismissed, but the parties would bear their own costs in both the events and further ordering that the possession would be delivered between 12th November, 1963 and 15th December, 1963.*

PREM CHAND JAIN, ADVOCATE, for the Appellants.

BALRAJ BAHAL, H. L. SARIN AND MISS KOHLI, ADVOCATES, for the Respondents.

JUDGMENT

HARBANS SINGH, J.—The facts giving rise to this second appeal may briefly be stated as under :— Harbans Singh, J.

The land in dispute measuring 1 *bigha* and 14 *biswas* bearing *khasra* Nos. 1532/939 and 990 *min* was sold by D. B. Sham Lal on his own behalf as well as on behalf of his brothers who were co-sharers with him for a sum of Rs. 2,000 in favour of five sons of Bakhtawar Singh. This sale was sought to be pre-empted by Jagdish son of the vendor claiming to have a preferential right being the son of the vendor and the vendees being complete strangers. The plea taken on behalf of the vendees was that in fact the real purchaser was their father, that they were merely *benamidars* for their father and that their father was a necessary party and should be impleaded. An application was made later on by Bakhtawar Singh also for being impleaded, but that application was dismissed and the following issues were settled :—

(1) Has the plaintiff a pre-emptive right of pre-emption *qua* the vendees?

Ram Kishan and others
*v.*
Jagdish Khatar and others

Harbans Singh, J.

(2) Are the vendees the real purchasers, and if so, its effect?

On behalf of the vendees oral as well as documentary evidence was led to show two things; first that the real purchaser was Bakhtawar Singh, their father and secondly that Bakhtawar Singh was a tenant under the vendor at the time of the sale and continues to be as such thereafter. Both the Courts below came to the conclusion that as against the ostensible vendees, the plaintiff had a superior right of pre-emption and that finding is not challenged. In issue No. 2, again both the Courts came to the conclusion that the real purchaser was Bakhtawar Singh and that the entire sale consideration was provided by him. However, mainly following the decision of the Oudh Court reported as *Mansur Ali and another* v. *Sultan and another* (1) and placing reliance on observations in *Maghi* v. *Narain and others* (2), and *Sukhram Dubey* v. *Lal Partap Singh and others* (3), the Courts came to the conclusion that the pre-emptor is concerned only with the ostensible vendees and they cannot be allowed to take the plea that the real owner was a different person. The lower appellate Court further held that inasmuch as Bakhtawar Singh took part in the execution of the sale deed and in payment of the consideration he was estopped by his own conduct and must be taken to have waived his right of pre-emption. The vendees have come up in appeal.

There can be no manner of doubt that evidence on the record clearly establishes the fact—and that is also the concurrent finding of the Courts below—that the entire consideration was paid by Bakhtawar Singh. It is further clear that out of the vendees only Ram Kishan is major and the remaining four vendees are minors. According to the statement of Bakhtawar Singh, P.W., who appeared on behalf of the defendant-vendees, at the time of the sale even Ram Kishan had no independent source of income. He was not cross-examined on any one of these points and, therefore, there is an irresistible inference to be drawn from these facts that the entire consideration was provided by Bakhtawar Singh and he was the real purchaser. As was

(1) (1927) 106 I.C. 539 : A.I.R. 1927 Oudh. 509.
(2) 6 P.R. 1914.
(3) A.I.R. 1945 All. 343.

observed by Iqbal Ahmad, J. in *Sankatha Prasad* v. *Mt. Rukmani and others* (4), the decision of the present appeal also "depends on the answer to the questions whether or not it is open to an ostensible vendee to plead in a pre-emption suit that he was a mere *benamidar* for a co-sharer (here, a tenant), against whom the plaintiff had no right of pre-emption and whether on proof of the fact that the real purchaser was such a co-sharer the suit for pre-emption must fail?" I may first refer to the observations in *Maghi* v. *Narain and others* (2), on which the lower appellate Court seems to rely. The argument of the lower appellate Court was that any such real owner who got the sale deed executed in the name of the ostensible owners other than the real owner, cannot be allowed to allege his own baseness and take the benefit thereof. *In Maghi* v. *Narain and others* (2), the only point involved was whether a sale which purported to be a joint sale, was in fact a separate sale in favour of different vendees and it was observed as follows :—

> "that persons who by clothing their transaction in a particular form, have induced a pre-emptor to come forward and claim pre-emption in respect of the transaction as a whole, cannot be allowed to turn round thereafter and claim to show that their real intention was something quite different."

There it was further held that—

> "where the purchase-money for a sale is paid in a lump sum without specification of the amounts paid by the various vendees, the transaction must be regarded as indivisible, though the shares to be taken by the various vendees may have been specified in the deed."

This case has no bearing on the question whether the ostensible vendees are *benamidars* for the real purchaser. I do not understand what fraud can possibly be involved in a person having a transaction in the name of somebody else. It is not uncommon in India for parents to purchase

(4) A.I.R. 1939 All. 81.

Ram Kishan and others
*v.*
Jagdish Khatar and others

Harbans Singh, J.

property in the name of their children or for the husband to purchase property in the name of wife. Unless it can be established that some fraud was intended or involved, generally speaking there appears to be no reason why the real facts may not be allowed to be brought on the record.

This matter whether it is open to the ostensible owner to plead that somebody else was the real owner, has been the subject-matter of a number of decisions in the Allahabad High Court and it would be useful to start with *Sheikh Muhammad Ismail* v. *Sheikh Abdul Gafoor and others* (5). In this case the property was purchased in the name of the wife. In a suit for pre-emption the wife pleaded that the husband was the real owner. It was held by a learned Single Judge that the real owner must be made party when his name is disclosed and furthermore the real owner is not estopped under section 115 of the Indian Evidence Act from raising the plea of equal right to the pre-emption and it was further held that in a pre-emption suit the real purchaser is not estopped from setting up the fact of his being a co-sharer in the village as a defence to the suit, merely because he caused a *benami* purchase to be made in the name of his wife who was not a co-sharer in the village; that there was no estoppel involved as envisaged under section 115 of the Evidence Act. This case was followed in *Harsaran* v. *Musammat Dilraji and another* (6). Here again the finding of the Court was that husband was the real purchaser and the suit of the pre-emptor was dismissed because it was found that the husband was a co-sharer in the estate and, therefore, the pre-emptor had no superior right. However, it was directed that inasmuch as the conduct of the defendants in entering into this *benami* purchase had given rise to the litigation, the plaintiff was entitled to get part of his costs from the defendant. The plaintiff pre-emptor, therefore, was allowed the costs of the trial Court. In *Mt. Ram Sakhi Kaur* v. *Lachmi Narain Lal* (7), a Division Bench of the Allahabad High Court presided over by Sulaiman, J. as he then was, confirmed this

(5) 4 I.C. 488.

(6) 8 I.C. 527.

(7) A.I.R. 1924 All. 802.

view and followed the view taken in *Harsaran* v. *Musammat Dilraji and another* (6) and it was held as follows:—

> "The plaintiff cannot be allowed by keeping the real purchaser out of the record to enforce a right against an ostensible vendee which he would not have been entitled to enforce against the real purchaser had he been brought on the record. Where the plaintiff was not entitled to any preference as against the real vendee in a matter of pre-emption, he could not claim pre-emption by confining his action to the *benamidar* alone."

Mr. Justice Iqbal Ahmad, as he then was, in *Sankatha Prasad* v. *Mt. Rukmani and others* (4), posed the question which I have reproduced above. He referred to the decision of the Oudh Chief Court (which has been relied upon by the Courts below) in *Mansur Ali and another* v. *Sultan and another* (1), and observed as follows:—

> "But a diametrically opposite view was expressed by the Oudh Chief Court in *Mansur Ali and another* v. *Sultan and another* (1). It was held in that case that the Court should only look as to who is the transferee according to proper construction of the deed and the suit for pre-emption would lie against such transferee.
>
> That *benami* transactions are common in this country cannot be disputed and it is well settled that it is always open to a party to a suit to plead and prove that an ostensible vendee under a sale deed is not the real purchaser and is a *benamidar* for some third person. That being so, it is open to a *benamidar* to plead and prove that he is not the real transferee under the deed and the transferee is someone other than him. No question of estoppel arises in such a case .....".

The learned Judge however, granted leave to appeal under the Letters Patent and the view taken by him was confirmed by Division Bench in the Letters Patent Appeal reported as *Sankatha Prasad* v. *Mt. Rukhmani and others* (8). After considering *Harsaran* v. *Musammat Dilraji and*

(8) A.I.R. 1940 All. 97.

Ram Kishan and others
*v.*
Jagdish Khatar and others

Harbans Singh, J.

*another* (6), and the Oudh ruling mentioned above, the Division Bench observed as follows:—

> "Upon a consideration of these authorities and on general principles, we are of the opinion that the pre-emption against a vendee who is a *benamidar* for the person who has a prior right of pre-emption to the plaintiff does not lie. It is the duty of the Court in such a suit to discover who is the real purchaser, i.e., who takes the proprietary and beneficial interest under the sale. As pointed out in the decision of the Privy Council in *Ch. Gur Narayan* v. *Sheolal Singh* (9), the *benamidar* may have no beneficial interest in the property or business standing in his name but he represents in fact the real owner and is in the legal position of such representative."
>
> In the present suit the vendees under the sale deed represent the real owner; the real owner is a co-sharer against whom the plaintiff has no right of pre-emption. The plaintiff's suit therefore must fail."

There is no case apart from *Mansur Ali and another* v. *Sultan and another* (1), taking the opposite view mentioned above which has not been approved in these Allahabad cases and in which hardly any argument is given in favour of the contrary view taken.

So far as *Sukhram Dubey* v. *Lal Partap Singh* (3), is concerned, I am afraid the Courts below did not properly appreciate the decision in this case. It is to be noted that the Court approved its earlier decisions in *Harsaran* v. *Mst. Dilraji and another* (6) and *Mt. Ram Sakhi Kaur* v. *Lachmi Narain Lal* (7). In *Harsaran* v. *Musammat Dilraji and another* (6), the only point involved was that the ostensible owners wanted the suit of the plaintiff to be dismissed on the sole ground that the pre-emptor had not made the real owner party to the suit. It is obvious from the facts of that case that even against the real

---

(9) A.I.R. 1918 P.C. 140.

owner, the pre-emptor had a superior right of pre-emption. What was held in this case was that the suit cannot be dismissed on the mere ground that the real purchaser was not made a party, because so far the pre-emptor is concerned, *prima facie* the vendees mentioned in the deed must be taken to be the real purchasers unless the contrary is proved. This decision, therefore, is no authority for the proposition that the vendees cannot be permitted to plead that someone else is the real purchaser.

From the above it is clear that once the plea is taken by the ostensible purchaser that somebody else is the real purchaser, it is the duty of the Court to find out as to the truth of this plea and if it is found that someone else is the real purchaser, normally such a purchaser should be made a party and in any case the pre-emptor can succeed only if he can establish that even as against the real purchaser, as found above, he has a superior right of pre-emption.

In the present case as already stated, the concurrent finding of fact for which there is ample evidence on the record is that the real owner is Bakhtawar Singh because the entire consideration money moved from him. So far as the trial Court is concerned, it has given a further finding that Bakhtawar Singh was the tenant of the property in dispute under the vendor at the date of the sale. No clear finding on this point has been given by the lower appellate Court but the matter has been put beyond dispute with reference to Exhibit D. 2, the *khasra girdawari* for the *kharif*, 1961. *Girdawari* for *kharif*, 1961 was made in November. The *kharif* crop for which this *girdawari* was made must have been sown in June and therefore, it is obvious that on 7th of August, 1961, the date of the execution of the sale deed, Bakhtawar Singh was a tenant of the vendor and by virtue of section 17-A of the Security of Land Tenures Act, a sale in favour of a tenant is not pre-emptible. For the reasons given above, therefore, I accept this appeal and set aside the judgment and decree of the Court below and dismiss the suit of the pre-emptor. However, as in *Harsaran* v. *Mst. Dilraji and another* (6), the pre-emptor has been led to pursue this litigation in view of the ostensible vendees having been mentioned as the purchasers. Therefore, the plaintiff will

Ram Kishan and others
*v.*
Jagdish Khatar and others

Harbans Singh, J.

have his costs of the trial Court while the costs in the lower appellate Court and in this Court will be borne by the parties.

*R.S.*

SALES TAX REFERENCE

*Before D. Falshaw, C.J. and Daya Krishan Mahajan, J.*

M/S PREM PAYARI AGGARWAL,—*Appellants*

*versus*

PUNJAB STATE,—*Respondent.*

**General Sales Tax Reference No. 4 of 1965.**

1966.
February 16th

*Central Sales-tax Act (LXXIV of 1956)—S. 6—Goods sent from Punjab to Uttar Pradesh per V.P.P. and thus sold—Whether liable to Central Sales Tax—S. 3—Inter-State sale—Essentials of.*

*Held*, that in a sale by V.P.P., there is an order placed by the buyer on the seller. The seller despatches the goods by postal parcel and the goods are to be delivered by the postal authorities to the buyer on payment of their price. In some cases goods may even be sent by V.P.P. without an order. The property in the goods sent by V.P.P. will pass to the buyer and the sale will be complete on the buyer paying the price of the goods and not before that. Therefore where the buyer does not accept the goods and returns them there is no sale and the question of levying any sales-tax thereon does not arise. The question of levy of sales-tax only arises in those cases where the goods have been accepted by the buyer and the postal parcel have been paid for. In such a case the sale takes place in the State where the parcel is received and its value paid to the post office.

*Held*, that for the purposes of law, it hardly matters whether the goods move before the sale is completed or after the sale is completed. In order to be an inter-State sale, the sale must answer the definition of the same in section 3 of the Central Sales Tax Act, that is, there must be movement of goods in connection with the sale. Two things must co-exist—a sale of goods and the movement of goods from one State to another. In the present case both the requirements of section 3 are satisfied and the sale is an inter-State sale. The goods sent by V.P.P. from Punjab to Uttar Pradesh are, therefore, liable to Central Sales tax and such tax is leviable by Punjab authorities as the goods moved from this State.