

HIGH COURT OF JAMMU & KASHMIR AND LADAKH
AT JAMMU

CFANo. 04/2019

Reserved on : 14.03.2024
Pronounced on : 1.5.2024

Roop Singh S/o Lal Singh R/o
Chakk Sheikan, Tehsil & District
Kathua

.... Appellant(s)

Through:- Mr. Abhishek Wazir, Advocate

V/s

1. Pritam Singh
S/o Dhian Singh
2. Veena Devi
W/o Angrez Singh
3. Meenakshi Devi
D/o Angrez Singh
All R/o Village Govindsar Tehsil
& District Kathua
And eight proforma respondents.

.....Respondent(s)

Through:- Mr. Anirudh Sharma, Advocate vice
Mr. Rahul Pant, Sr. Advocate

CORAM : HON'BLE MR. JUSTICE VINOD CHATTERJI KOUL, JUDGE

JUDGMENT

01. This appeal has been directed against the judgment and decree dated 19.03.2019 passed by the Principal District Judge, Kathua (hereinafter to be referred to as 'trial Court') whereby the suit of the appellant/plaintiff seeking declaration that the plaintiff has a right of prior purchase of land measuring 04 Kanals 07 Marlas comprising Survey No. 164/15-min, Khata No. 83-min and Khewat No. 28-min of village Chak Sheikhan, Tehsil & District Kathua sold by Hira Singh S/o Lal Singh R/o Chak Sheikhan, to defendant Nos. 1 to 3 by virtue of Sale Deed executed

on 05.09.2000 and registered by the Sub-Registrar Kathua on the same day and for Permanent Prohibitory Injunction restraining defendant Nos. 1 to 3 not to cause any interference of whatever nature by whatever mode in the suit land sold, has been dismissed.

02. The appellant challenges the decree so passed dismissing his suit precisely on following grounds: -

- (i) The Trial Court erred while deciding Issue No.5 with respect to possession against the appellant ignoring the relevant evidence, i.e., PW Jagdev Singh office Quango as well as PW Arun Kumar Patwari. Both these witnesses proved the revenue record, i.e., copy of Mutation No.5 dated 25.08.1988 wherefrom it is established that the plaintiff and Hira Singh were conferred ownership rights over the land allotted to them including the suit land and they are in the possession of the same. PW Arun Kumar proved Jamabandi for the year 1969-70 as well as Khasra Girdawari pertaining to Rabi 2000 to Kharief 2001, wherefrom it is established that the appellant and Hira Singh were owners and in possession of the land including the suit land. Thus, the observations of the trial Court that the appellant failed to prove his possession are contrary to the record, incorrect.
- (ii) The trial court has committed a clear error which is apparent from the judgment impugned as well as the record available on the file. The appellant claimed the consequential relief being relief of Permanent Prohibitory injunction restraining

respondentNos.1 to 3 to cause any interference in the suit land, considered the said consequential relief to be the appropriate relief available to the appellant at the time of filing the suit and it was obligatory for the trial Court to grant opportunity to the appellant (plaintiff) to amend his plaint as to include the prayer for appropriate consequential relief, from the bare perusal of the judgment impugned, the trial Court has not granted any opportunity to the appellant to amend his plaint.

- (iii) The trial Court has wrongly applied Proviso to Section 42 of the Specific Relief Act in the suit and Proviso to Section 42 of Specific Relief Act is not attracted in the present case, because of the fact that no opportunity to amend the plaint was granted to the appellant, thus, judgment and decree of the trial Court is not sustainable.
- (iv) The judgment and decree of trial Court suffer from material illegalities and irregularities which are apparent on the face of the record and the observation and finding recorded by the trial Court, that relief of possession was the appropriate relief in the suit, the appellant having claimed permanent injunction has the appropriate/consequential relief, in such situation the trial Court was under obligation to provide a reasonable opportunity to the appellant to take steps permissible under law for seeking the consequential relief for possession, which opportunity was required to be given to the

appellant but having not given by the trial Court, thus, the dismissal of the suit on this count by the trial Court is not justified.

03. Heard learned counsel for the parties and perused the record on file.

04. The plaintiff/appellant has claimed himself to be the co-owner/co-sharer along with the vendor, who has executed the Sale Deed in respect of suit land in favour of the respondents. The Sale Deed as per the plaintiff was executed by his brother and co-sharer and the said Sale Deed was registered. As per the provisions contained in Section 44 of the Transfer of Property Act, where one of two more than two co-owners of immovable property legally competent in that behalf, transfers his share of such property or any interest therein, transferee acquires the share or interest so transferred. Thus, for a co-sharer to transfer his share, there is no bar. A co-sharer is competent to transfer land to the extent of his share.

05. The trial Court has dismissed the claim of the plaintiff/appellant on the ground that he has not sought recovery of possession. The plaintiff in case of a suit for pre-emption has to claim possession, hence to claim his substitution for the vendee and has also to show his willingness to pay the sale consideration. The suit will show that nowhere the plaintiff has sought substitution or recovery of possession or have shown his willingness to purchase the land inconsideration of the amount which had been paid by the vendee to the vendor.

06. The suit of the plaintiff was dismissed and decree for pre-emption was refused. Now the question arises, whether such right of the plaintiff/appellant would survive at present in view of the judgement of the Supreme Court in **Punyadeo Sharma and others etc. v. Kamla Devi and others etc.** reported as **2022 LIVELAW (SC) 22.**

07. The Act, i.e., the **Jammu and Kashmir Right of Prior Purchase Act, SVT. 1993** stands repealed.

08. In **Punyadeo Sharma**(supra), it has been held as under :

8. This Court in **Shyam Sunder** was examining the question as to the right of pre-emption given to the co-sharer was taken away or not by the Haryana Amendment Act as substituted by Haryana Act No. 10 of 1995. The substituted Section 15 reads thus:

“15. Right of pre-emption to vest in tenant. – The right of pre-emption in respect of sale of agricultural land and village immovable property shall vest in the tenant who holds under tenancy of the vendor or vendors the land or property sold or a part thereof.”

9. This Court held that the legal principles that emerge in respect of the right of pre-emption are as under:

“1. The pre-emptor must have the right to pre-empt on the date of sale, on the date of filing of the suit and on the date of passing of the decree by the court of the first instance only.

2. The pre-emptor who claims the right to pre-empt the sale on the date of the sale must prove that such right continued to subsist till the passing of the decree of the first court. If the claimant loses that right or a vendee improves his right equal or above the right of the claimant before the adjudication of suit, the suit for pre-emption must fail.

3. A pre-emptor who has a right to pre-empt a sale on the date of institution of the suit and on the date of passing of decree, the loss of such right subsequent to the decree of the first court would not affect his right or maintainability of the suit for pre-emption.

4. A pre-emptor who after proving his right on the date of sale, on the date of filing the suit and on the date of passing of the decree by the first court, has obtained a decree for pre-emption by the court of first instance, such right cannot be taken

away by subsequent legislation during pendency of the appeal filed against the decree unless such legislation has retrospective operation.”

10. In view of the aforesaid circumstances, since the Haryana Amendment Act has not taken away the right of pre-emption with retrospective effect, it was held that the amendment is prospective. This Court held as under:

“17. In modern times, the right of pre-emption based on statutes is very much a maligned law. During hearing of these appeals, such rights have been characterised as feudal, archaic and outmoded and so on. But its origin which was based on custom and subsequently codified was out of necessity of the then village community and society for its preservation, integrity and maintenance of peace and security. In changed circumstances, the right of pre-emption may be called outmoded, but so long it is statutorily recognized...

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37. We are in respectful agreement with the view taken in Moti Ram v. Suraj Bhan [AIR 1960 SC 655 : (1960) 2 SCR 896] . The right of pre-emption may be a weak right but nonetheless the right is recognised by law and can be allowed to be defeated within the parameters of law. A statute which affects the substantive right has to be held prospective unless made retrospective either expressly or by necessary intendment...

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47. The result of the aforesaid discussion is that the amending Act being prospective in operation does not affect the rights of the parties to the litigation on the date of adjudication of the pre-emption suit and the appellate court is not required to take into account or give effect to the substituted Section 15 introduced by the amending Act.”

11. The judgment in **K. Govindaraj** was considering the amendment to Rule 8(8) of the Tamil Nadu Minor Mineral Concession Rules, 1959 as to whether such amendment will have a retrospective effect or not. Such an amendment in the Rules was not retrospective but the period of lease for quarrying stones in respect of virgin areas which have not been subjected to quarrying shall be ten years. Since the Rules were not specifically said to be retrospective, it was only in respect of virgin areas that the period of lease stands enhanced to ten years whereas in respect of the other areas the period of lease continues to be

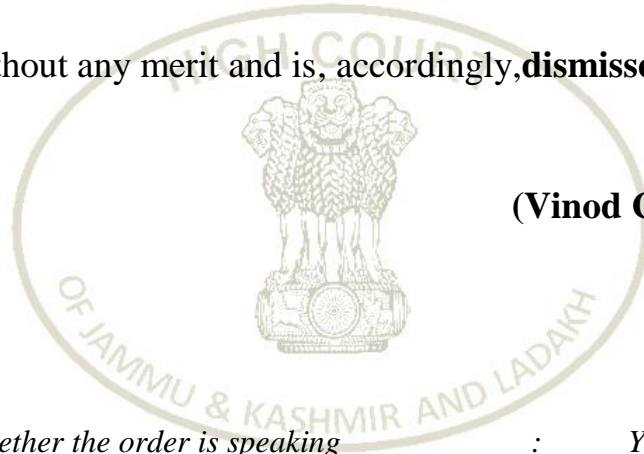
of five years. This was a substantive amendment. This Court held that there was no concept of “virgin areas” in the unamended Rule which has been introduced for the first time by way of aforesaid amendment, therefore, the Rule cannot be said to be procedural.

12. In **Shyam Sunder**, the right of pre-emption was said to be maligned law. Such rights have been characterized as feudal, archaic and outmoded. Such right of pre-emption has been taken away and all proceedings pending before any authority have been ordered to be abated including proceedings in any other Court. Any other Court is wide enough to include the Constitutional Courts i.e. the High Court and the Supreme Court. Even the 10% of the pre-emption amount which is required to be deposited was ordered to be deposited. Thus, keeping in view the object of the Statute, purpose to be achieved and the express language of the Amending Act, all proceedings of pre-emption under the Act pending before any authority under the Act or before any Court shall stand abated.

09. From the aforesaid judgement it is inferable that a pre-emptor must have the right to pre-empt on the date of sale, on the date of filing of the suit and also on the date of passing of the decree by the court of the first instance only. The pre-emptor, claiming the right to pre-empt the sale on the date of the sale, must prove that such right continued to subsist till passing of decree of the first court and if the claimant loses that right or a vendee improves his right equal or above the right of the claimant before the adjudication of suit, the suit for pre-emption must fail. In **Shyam Sunder and others v. Ram Kumar and another, (2016) 4 SCC 763**, right of pre-emption was said to be maligned law inasmuch as it was said that such rights have been characterized as feudal, archaic and outmoded. Such right of pre-emption has been taken away and all proceedings pending before any authority have been ordered to be abated including

proceedings in any other Court. Any other Court is wide enough to include the Constitutional Courts i.e. the High Court and the Supreme Court. Even the 10% of the pre-emption amount which is required to be deposited was ordered to be deposited. Thus, keeping in view the object of the Statute, purpose to be achieved and the express language of the Amending Act, all proceedings of pre-emption under the Act pending before any authority under the Act or before any Court shall stand abated.

10. Therefore, in view of the law laid down in the aforementioned judgement and as the Act stands repealed and is not enforced at present, as such, right of prior purchase being not available at this stage, the appeal is held to be without any merit and is, accordingly, **dismissed**.



(Vinod Chatterji Koul)
Judge

JAMMU
RAM MURTI
01.05.2024

Whether the order is speaking : *Yes/No*
Whether the order is reportable : *Yes/No*