

PETITIONER:
INDIRA BAI

Vs.

RESPONDENT:
NAND KISHORE

DATE OF JUDGMENT 05/09/1990

BENCH:
SAHAI, R.M. (J)
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SAHAI, R.M. (J)
SHETTY, K.J. (J)

CITATION:
1991 AIR 1055 1990 SCR Supl. (1) 349
1990 SCC (4) 668 JT 1990 (4) 163
1990 SCALE (2) 445

ACT:

Indian Evidence Act, 1872: Section 115--Estoppel--Basis of the principle--Applicability in regard to right of pre-emption---Exception in case it involves public right or interest.

Rajasthan Pre-emption Act, 1966: Section 8-Rights of pre-emptor--Operation of rule of estoppel or waiver against such rights--Non-service of notice by vendor--Effect of.

HEADNOTE:

The appellant purchased certain properties by way of registered sale deeds. She constructed therein a godown and a two-storeyed building with the knowledge and assistance of the respondent, who did not say anything about the common passage and had never expressed his intention to pre-empt the sales.

Soon after the construction was over, the respondent sent a notice to the appellant claiming his right to pre-empt the sale. The appellant gave a reply to the notice. However, respondent filed a suit for preemption in relation to the said properties. The appellant pleaded that the respondent was estopped from claiming the pre-emption. Principle of waiver was also pleaded. The Trial Court dismissed the suit of the respondent, and he preferred an appeal before the District Judge which was also dismissed.

Respondent preferred a regular second appeal before the High Court. The High Court allowed the appeal holding that the principles of estoppel and waiver had no application against the pre-emptor to preempt the suit, and set aside the orders of the Courts below.

Aggrieved against the High Court's order the appellant has preferred this appeal, by special leave. Allowing the appeal, this Court,

HELD: 1.1 Estoppel is a rule of equity flowing out of fairness striking on behaviour deficient in good faith. It operates as a check on

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spurious conduct by preventing the inducer from taking advantage and assailing forfeiture already accomplished. It is invoked and applied to aid the law in administration of justice. But for it great many injustice may have been

perpetrated. [162D-E]

1.2 Legal approach of the High Court, that no estoppel could arise unless notice under Section 8 of the Rajasthan Pre-emption Act was given by the seller and pre-emptor should have had occasion to pay or tender price ignores the fallacy that Estoppel need not be specifically provided as it can always be used as a weapon of defence. [162G-H]

2. There can be no estoppel against statute. Equity usually follows law. Therefore, that which is illegal cannot be enforced by resorting to rule of estoppel. Such an extension may be against public policy. The distinction between validity and illegality or the transaction being void is clear and well known. The former can be waived by express or implied agreement or conduct. But not the latter. [163D & F-G]

Shalimar Tar Products Ltd. v. H.C. Sharma, AIR 1988 SC 145; Equitable Life Assurance Society of the United States v. Reed, 14 AC 587; Bishan Singh v. Khazan Singh, AIR 1958 SC 838 and Radha Kishan v. Shridhar, AIR 1960 SC 1369, referred to.

3. The provision in the Pre-emption Act requiring a vendor to serve notice on persons having right of pre-emption is condition of validity of transfer, and therefore a pre-emptor could waive it. Failure to serve notice as required under the Act does not render the sale made by vendor in favour of vendee ultra vires. The test to determine the nature of interest, namely, private or public is whether the right which is renounced is the right of party alone or of the public also in the sense that the general welfare of the society is involved. If the answer is latter then it may be difficult to put estoppel as a defence. The Act does not provide that in case no notice is given the transaction shall be void. The objective is to intimate the pre-emptor who may be interested in getting himself substituted. It does not debar the pre-emptor from giving up this right. Rather in case of its non-exercise within two months, may be for financial reasons, the right stands extinguished. It does not pass on to anyone. No social disturbance is caused. It settles in purchaser. Giving up such right, expressly or impliedly cannot therefore be said to involve any interest of community or public welfare so as to be in mischief of public policy. [163H; 164A-C]

Jethmal v. Sajanumal, [1947] Mewar Law Reports 36, overruled.

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Atam Prakash v. State of Haryana, AIR 1986 SC 859; Bishan Singh v. Khazan Singh, AIR 1958 SC 838; Radha Kishan v. Sridhar, AIR 1960 SC 1368; Naunihal Singh v. Ram Ratan, ILR 39 All. 127; Ram Rathi v. Mt. Dhiraji, [1947] Oudh 81; Gopinath v. R.S. Nand Kishore, AIR 1952 Ajmer 26; Abdul Karim v. Babulal, AIR 1953 Bhopal 26 and Kanshi Ram Sharma v. Lahori Ram, AIR 1938 Lah. 273, approved. Pateshwari Partab Narain Singh v. Sitaram, AIR 1929 PC 259, referred to.

4. In the instant case, the fact that the respondent knew of the sale deed, assisted the appellant in raising the construction and after the construction was completed in the month of June he gave notice in the month of July for exercise of the right and filed the suit in January, would itself demonstrate that the conduct of the respondent was inequitable and the courts in this country which are primarily the courts of equity, justice and good conscience cannot permit the respondent to defeat the right of appellant and invoke a right which has been called a weak and inequitable right. [164D-E]

JUDGMENT:

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 105 of 1990.

From the Judgment and Order dated 10.3. 1988 of the Rajasthan High Court in S.B. Civil Second Appeal No. 327 of 1976.

C.M. Lodha, H.M. Singh and R.S. Yadav for the Appellant.

S.K. Ghose, M. Qamaruddin and Mrs. M. Qamaruddin for the Respondent.

The Judgment of the Court was delivered by

R.M. SAHAI, J. Is Estoppel a good defence to 'archaic', *Atam Prakash v. State of Haryana*, A.I.R. 1986 SC 859, right of Pre-emption which is a 'weak right', *Bishen Singh v. Khazan Singh*, A.I.R. 1958 SC 838, and can be defeated by any 'legitimate' method *Radha Kishan v. Sridhar*, A.I.R. 1960 SC 1368.

Barring High Court of Rajasthan and erstwhile, Mewar State *Jethmal v. Sajanumal*, [1947] Mewar Law Reports, 36, most of the other high courts, namely, Allahabad, *Naunihal Singh v. Ram Ratan*, 39 ILR 127, Oudh, *Ram Rathi v. Mr. Dhiraji*, [1947] Oudh 81, Ajmer 352

Gopinath v. R.S. Nand Kishore, AIR 1952 Ajmer 26, Bhopal, *Abdul Karim v. Babu Lal*, AIR 1953 Bhopal, and Lahore *Kanshi Ram Sharma & Anr. v. Lahori Ram & Anr.*, AIR 1938 Lab. 273 have answered the issue in the affirmative. The Privy Council, [1929] PC AIR 259, too, applied this principle to non-suit a pre-emptor who knew that the property was in the market for long but offered to purchase, only one out of many blocs. It had:

"Assuming that the prior completed purchase by the appellant would under other circumstances, have given him the right of pre-emption in respect of the blocks in suit, he must be taken by his conduct to have waived this right, and that it would be inequitable to allow him now to re-assert it." Even in Muslim Law which is the genesis of this right, as it was unknown to Hindu Law and was brought in wake of Mohammedan Rule, it is settled that the right of pre-emption is lost by estoppel and acquiescence.

Estoppel is a rule of equity flowing out of fairness striking on behaviour deficient in good faith. It operates as a check on spurious conduct by preventing the inducer from taking advantage and assailing forfeiture already accomplished. It is invoked and applied to aid the law in administration of justice. But for it great many injustice may have been perpetrated. Present case is a glaring example of it. True no notice was given by the seller-but the trial court and appellate court concurred that the pre-emptor not only came to know of the sale immediately but he assisted the purchaser-appellant in raising construction which went on for five months. Having thus persuaded, rather misled, the purchaser by his own conduct that he acquiesced in his ownership he somersaulted to grab the property with constructions by staking his own claim and attempting to unsettle the legal effect of his own conduct by taking recourse to law. To curb and control such unwarranted conduct the courts have extended the broad and paramount considerations of equity, to transactions and assurances, express or implied to avoid injustice.

Legal approach of the High Court, thus, that no estoppel could arise unless notice under Section 8 of the Rajasthan Pre-emption Act (In brevity 'the Act') was given by the

seller and pre-emptor should have had occasion to pay or tender price ignores the fallacy that Estoppel need not be specifically provided as it can always be used as a
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weapon of defence. In the Privy Council decision, referred earlier, the court was concerned with Oudh Laws Act (18 of 1876) which too had an identical provision for giving notice by seller. No notice was given but since pre-emptor knew that the property was for sale and he had even obtained details of lots he was precluded from basing his claim on pre-emption.

Exception, to this universal rule or its non-availability, is not due to absence of any provision in the Act excluding its operation but welfare of society or social and general well-being. Protection was, consequently, sought not on the rationale adopted by the High Court that in absence of notice under Section 8 of the Act estoppel could not arise but under cover of public policy. Reliance was placed on *Shalimar Tar Products v. H.C. Sharma*, AIR 1988 SC 145, a decision on waiver, and *Equitable Life Assurance Society of the United States v. Reed*, 14 Appeal Cases 587, which laid down that there could be no estoppel against statute. Equity, usually, follows law. Therefore that which is statutorily illegal and void cannot be enforced by resorting to the rule of estoppel. Such extension of rule may be against public policy. What then is the nature of right conferred by Section 9 of the Act? In *Bishen Singh v. Khazan Singh*, AIR 1958 SC 838 this Court while approving the classic judgment of Mahmood, J. in *Gobind Dayal v. Inayatullah*, ILR 7 All 775 (FB). 'that the right of pre-emption was simply a right of substitution' observed that, 'courts have not looked upon this right with great favour, presumably, for the reason that it operated as a clog on the right of the owner to alienate his property. In *Radha Kishan v. Shridhar*, AIR 1960 SC 1369 this Court again while repelling the claim that the vendor and vendee by accepting price and transferring possession without registration of sale deed adopted subterfuge to defeat the right of pre-emption observed that, 'there were no equities in favour of a pre-emptor, whose sole object is to disturb a valid transaction by virtue of the rights created in him by statute. To defeat the law of pre-emption by any legitimate means is not fraud on the part of either the vendor or the vendee and a person is entitled to steer clear of the law of pre-emption by all lawful means'. Such being the nature of right it is harsh to claim that its extinction by conduct would amount to statutory illegality or would be opposed to public policy. The distinction between validity and illegality or the transaction being void is clear and well known. The former can be waived by express or implied agreement or conduct. But not the latter. The provision in the Act requiring a vendor to serve the notice on persons having right of pre-emption is condition of validity of transfer, and therefore a pre-emptor could waive it. Failure to serve notice as

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required under the Act does not render the sale made by vendor in favour of vendee ultra vires. The test to determine the nature of interest, namely, private or public is whether the right which is renounced is the right of party alone or of the public also in the sense that the general welfare of the society is involved. If the answer is latter then it may be difficult to put estoppel as a defence. But if it is right of party alone then it is capable of being abnegated either in writing or by conduct. The Act does not provide that in case no notice is given the transaction

shall be void. The objective is to intimate the pre-emptor who may be interested in getting himself substituted. The Act does not debar the pre-emptor from giving up this right. Rather in case of its non-exercise within two months, may be for the financial reasons, the right stands extinguished. It does not pass on to anyone. No social disturbance is caused. It settles in purchaser. Giving up such right, expressly or impliedly cannot therefore be said to involve any interest of community or public welfare so as to be in mischief of public policy.

Even otherwise on facts found that the respondent knew of the sale deed, assisted the appellant in raising the construction and after the construction was completed in the month of June he gave the notice in month of July for exercise of the right and filed the suit in January would itself demonstrate that the conduct of the respondent was inequitable and the courts in this country which are primarily the courts of equity, justice and good conscience cannot permit the respondent to defeat the right of appellant and invoke a right which has been called a weak and inequitable right.

In the result this appeal succeeds and is allowed. The order of the High Court is set aside and that of the First Appellate Court is restored. The appellant shall be entitled to his costs.

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Appeal allowed.