

PETITIONER:
SMT. VIJAYALAKSHMI

Vs.

RESPONDENT:
B. HIMANTHARAJA CHETTY & ANR.

DATE OF JUDGMENT: 07/05/1996

BENCH:
PUNCHHI, M.M.
BENCH:
PUNCHHI, M.M.
SEN, S.C. (J)

CITATION:
JT 1996 (4) 747 1996 SCALE (4)300

ACT:

HEADNOTE:

JUDGMENT:

J U D G M E N T S

Punchhi, J.

This appeal by special leave is directed against the judgment and decree dated 1-9-1978, rendered by a Division Bench of the High Court of Karnataka in Regular First Appeal No.91 of 1973, affirming that of the Trial Court.

Shri Batchu Muniyappa Chetty, statedly the foster father of Smt. Vijaya Lakshmi, the appellant herein, and Shri B. Himantharaja Chetty, the contesting respondent herein, were brothers, being the sons of Shri Batchu Ramaiah Chetty. The father and sons effected a partition of their joint family properties, under registered Partition Deed dated June 23, 1928 (Ex.P.3), as detailed in Schedule A attached thereto. Thereunder the father was given properties described fully in Schedule B to the indenture valued at Rs. 20,000/-. The foster father of the appellant got properties described fully in Schedule B to the indenture and valued at Rs.12,500/-. The contesting respondent got the properties described fully in Schedule C to the indenture also valued at Rs.12,500/-. Clause 12 thereof provided a stipulation of preemption, which being the bone of contention, reads as follows:

"The second (the foster father of the appellant) and third (the contesting respondent herein) are allotted the immovable properties Nos.137, 138 and 139, Jeweller's Street and No.25, Veera Pillay Street as described in the Schedules hereunder. Though the party to whom it is allotted is entitled to dispose it of, he shall not do it to any stranger without giving the parties to this indenture an opportunity to buy it by pre-emption at the valuation

given in the schedule to this indenture."

The foster father of the appellant died somewhere in the year 1948 leaving his property by means of a Will dated 1-12-1948 to his widow Smt. Lakshmiddevamma, who also died in the year 1956. However, before her death, in 1951, she, as foster mother of the appellant executed a Will in favour of the latter bequeathing to her properties mentioned in Schedule C. The appellant claims to have received these properties as a foster child of late Batchu Muniyappa Chetty and his late widow Smt. Lakshmiddevamma, but not as a stranger.

The respondent on 11-12-1956 instituted a suit against the appellant for possession of the aforementioned Schedule C properties the Civil Court at Bangalore inter alia on the premise that under the terms of the Partition Deed, above-referred to, the dispositions of properties made in the manner stated above by late Batchu Muniyappa Chetty and after him by his widow Smt. Lakshmiddevamma, were in breach of the terms of the Partition Deed and therefore his right to enforce his claim for pre-emption, on payment of Rs.3100/-, the price fixed therein, had ripened. The appellant put forth the two wills to assert her title as legatee. She also claimed on a variety of grounds that neither the plaintiff-respondent had any right of pre-against her nor was such claim tenable in law.

Having regard to the multiplicity of pleas raised by both sides, the trial court framed as many as 11 issues but the relevant ones for the present purpose are the following two issues:

No.3. Whether the plaintiff proves his right of pre-emption in respect of disposition of properties by bequest as well?

No.4. Whether defendants prove that the alleged pre-emption is unenforceable against her for reasons stated in para 4 of the written statement?

After recording evidence of the parties and entertaining documentary evidence the trial court recorded its findings on those two issues to the effect that the plaintiff-respondent had all right of preemption in respect of the suit properties even though they came to the appellant by bequest and that such right of pre-emption was an enforceable right. On holding so and as a result of findings on other issues, the plaintiff-respondent's suit was decreed, directing the appellant to execute a Deed of Sale, at the cost of the plaintiff-respondent, on payment of Rs.3100/-, and consequently deliver possession of the properties to the plaintiff-respondent.

The appellant preferred Regular First Appeal before the High Court of Karnataka which was placed before a Division Bench comprising of K. Bhimiah and K.S. Puttaswamy, JJ. for disposal. The Hon'ble Judges of the High Court differed and rendered separate judgments. K. Bimiah, J. opined for the dismissal of the appeal affirming the judgment and decree of the trial court on all issues except to vary the price payable to be Rs.36000/- as determined by the trial court for purposes of jurisdiction and court fee. He thus ordered maintenance of the trial court's judgment and decree on payment of Rs.36000/- as price. K.S. Puttaswamy, J. however in his opinion took the view that findings on Issues Nos.3 and 4 be reversed and hence the appeal allowed. This divergence of opinion attracted Sub-section (2) of Section

98 of the C.P.C. and therefore the judgment and decree of the Trial Court got confirmed. The price rise too got affirmed on agreement. In sum the plaintiff-respondent got maintained the decree on payment of Rs.36000/- as price of the property. Being aggrieved the appellant is before us.

We do not propose to enlarge the canvass to enter into elaborate discussion and analysis as undertaken by members of the High Court Bench in their respective opinions on Issues Nos.3 and 4 relating to the concept of pre-emption, its historical perspective, related precedents and its validity as of today and other ramifications. All the same a classic judgment of Mohmood, J. in Govinda Dayal vs. Inayatulla [ILR 7 A1] 775 at page 909 (F8)] is worth reference, which explained the right of pre-emption in the following words:

"It (right of pre-emption) is simply a right of substitution entitling the preemptor by means of a legal incident to which the sale itself was subject, to stand in the shoes of the vendee, in respect of the rights and obligations arising from the sale under which he has derived his title. It is in effect, as if in a sale deed, the vendee's name was rubbed out and the pre-emptors's name was substituted in his place.

The concept of substitution from that long and even before has been the foundation of the law of pre-emption and has been noticed, followed and employed, time and again, in a catena of decisions. The fact that this Court in *Atam Prakesh vs. State of Haryana* [1986(2) SCC 249] has struck down the right of pre-emption based on consanguinity as a relic of the feudal past, inconsistent with the constitutional scheme and modern ideas, has not altered the situation that the right of pre-emption, wherever founded, whether in custom, statute or contract, is still a right of being substituted in place of the vendee, in a bargain of sale of immovable property. We therefore need not burden this judgment with other attributes of the concept as attempted by both Hon'ble Judges of the High Court. We would rather go to decide this appeal on the basis of the contractual term aforementioned.

It is noteworthy that Clause 12 of the Partition Deed not only mentions the list of the properties allotted to the two brothers but their separateness is complete and evidenced, the way these properties are apportioned and earmarked in Schedules C and D. by allocating specific properties to the two brothers, each of them had become exclusive owner of those allotted. Clause 10 of the Deed and the Schedules A, C & D are reproduced hereafter:

10. The parties two and three have been allotted portions in premises 137 and 138 Jeweller Street as per their respective schedules and the plan annexed to this indenture. The portions allotted to party No.2 are marked yellow and the party No.3 red. The cost of construction of wall or walls for partitioning the said portions, shall be borne by the parties two and three in equal shares."

Schedule A, containing the list of involved partible

joint family properties:

DISCRPTION	VALUE
(1) Property No.139	- Rs.1400
(2) Property No.138	- Rs.2800
(3) Property No.137	- Rs.1500
(4) No.25, Veera Pillay Street	- Rs. 400
Total	- Rs.6100

Schedule C showing properties which came to the foster father of the appellant:

DESCRIPTION	VALUE
(1) Total premises No.25, Veera Pillay Street, Bangalore;	- Rs.400
(2) Portion earmarked and shown as yellow in Property No.137;	- Rs.1400
(3) Portion earmarked and shown in yellow in Property No.138;	- Rs.1300
Total	- Rs.3100

Schedule D showing the properties which came to the contesting respondent:

DESCRIPTION	VALUE
(1) Total property No.139;	- Rs.1400
(2) Portion in Property No.137, as shown in red;	- Rs. 100
(3) Portion in Property No.138 as shown in red;	- Rs.1500
Total	- Rs.3000

Walls were intended to be raised to demarcate and separate the portions relating to two properties as the other two were individually allotted to the respective parties. This fall out of the partition has unfortunately not been taken into account either by the Trial Court or the Bench of the High Court. The following finding recorded by the Trial Court therefore does not match happily with the pattern of partition:

"The entire building consisting of the portion allotted to the share of the plaintiff and to the share of his brother Batchu Muniyappa Chetty forms one house. If a stranger is inducted in any portion of the house, the members residing in the other portion will feel it inconvenient to lead a peaceful life. Every house requires privacy from strangers. Apart from this there are common passage and entrances. In fact, storm water from the roof of one of the parties falls into the portion of the other party. A window belonging to the plaintiff opens into the space belonging to the other party. There are connected doors; the hall in the first floor is allotted to the share of the plaintiff and the hall just below it is in the possession

of defendants. There is a stair case also leading to the first floor and the space directly below it has gone to the share of the plaintiff's brother. All these matters are such that it is not possible to lead a convenient and peaceful life if a stranger is inducted to the property. It appears in view of these circumstances clause of pre-emption was inserted in the partition deed to safeguard the peace, convenience and amity of the family and the insertion of such a clause in the partition deed is not in violation of the provisions of the transfer of Property Act.

In view of what has been discussed above it must be held that the plaintiff has got a right of pre-emption in respect of the suit Property even though it is bequeathed by the late Batchu Muniyappa Chetty on his widow and his widow in turn bequeathed on the first defendant. It also be held that the right of preemption is an enforceable right. I, therefore, answer issues 3 and 4 in favour of the plaintiff and against the defendants."

And seemingly it has met the approval of the High Court.

Now who is the stranger' meant to be excluded in the Partition Deed? The Trial Court has viewed the plaintiff-appellant to be a stranger, being not a relative and at least to the family of the plaintiff-respondent. Bhimiah, J. affirms this view. Puttaswamy, J. held that the appellant is a stranger in the eye of law to the family of her foster father, but not in fact. The word 'stranger', in our view, had to be understood not in terms of blood or marriage relationship with the family but as a person unconnected with it, unknown in character and antecedents to the executants of the Deed. The word 'stranger' in the text has, in our view, to be interpreted as that person who has no connection whatsoever with the families of the original executants i.e. the father and two sons. It has to be seen that the plaintiff-respondent was not an utter stranger to the family members though she may not have been related to them through blood or marriage or otherwise by legal adoption. In any case, she had become connected with the family which relationship required to be respected with some sanctity, legitimately due to human bonds, because of her long association with her foster parents. Her status as such could by no means be termed as a 'stranger' for the purpose of Clause 12 of the Partition Deed. Thus if the bequest in her favour was not made to a total stranger, one need not enter the thicket to find whether the appellant was legally a stranger to the family, when factually she was not, and in that manner not unconnected with the family.

Next we come to the question whether the disposition conceived of in the Partition Deed should be a sale attracting pre-emption or could it also be a disposition other than sale. The word 'pre-emption' as is well

understood is a term of law. It is a right of substitution conferred on someone either by statute, custom or contract. The right is to step into the shoes of the vendee preferentially, on the terms of sale already settled between the vendor and the vendee. The courts below were put across the irrefutable argument that the tenor of the Deed suggested that it was written by a professional, knowing fully well the attributes of pre-emption. The Deed itself says that the parties have to be given an opportunity to buy the property meant for disposal. The Deed provides so on the supposition that the disposition contemplated would be a sale and none other. Had it been otherwise, the words "by pre-emption" could easily have been omitted conveying the meaning suggested and the deed made to read ".... he shall not do it to any stranger without giving the parties to this indenture an opportunity to buy it by pre-emption at the value given in the Schedule to this indenture". It is thus evident that the words "by pre-emption" were consciously employed to denote that the opportunity to buy it by pre-emption would only arise when there is a sale and on no other disposition. It could then be said that but for these words "by pre-emption", any other disposition could have come within the grip of the Clause towards buying property, but without bringing in the word "preemption".

Thus for the afore-expressed views we have come to the firm conclusion that on the terms of the Partition Deed, the contractual right of pre-emption conferred on the parties to buy property before it is disposed of to a stranger was based on the precondition that the proposed or actual disposal would be only-by way of sale and no other, and that too if made to a stranger. None of these conditions are satisfied in the facts and circumstances of the case as neither is the disposition a sale nor is the transferee a stranger. Therefore, the suit of the plaintiff-respondent should have been and is hereby dismissed by allowing this appeal, upsetting the judgments and decrees of the trial court as well as that of the High Court, but without any order as to costs.