

CASE NO.:
Appeal (civil) 2713-14 of 2004

PETITIONER:
J.C. Sehgal

RESPONDENT:
Devi Dass & Ors.

DATE OF JUDGMENT: 27/04/2004

BENCH:
S. Rajendra Babu, Dr. AR. Lakshmanan & G.P. Mathur.

JUDGMENT:
J U D G M E N T

(Arising out of S.L.P.(C)Nos. 21469-21470 of 2002)

Dr. AR. Lakshmanan, J.

Leave granted.

These two appeals arise out of S.L.P.(C) Nos. 21469-21470 of 2002 and filed against the judgment and final order dated 10.10.2002 passed by the High Court of Jammu and Kashmir at Jammu in C.R. No.231 of 2001 and C.R.No.4 of 2002, whereby the High Court dismissed the revision petition bearing C.R.No. 231 of 2001 of the appellant herein \026 J.C. Sehgal and allowed the revision petition bearing C.R.No.4 of 2002 filed by respondent No.1 \026 Devi Dass.

The short background facts of the case are as under:

One Abdul Rouf Ahmed was the owner in possession of four rooms along with land appurtenant thereto. One of the said rooms and some portion of the land was given to one Raj Kumar on rent as tenant. The aforesaid Abdul Rouf Ahmed sold the entire property to one Issar Dass. Respondent Nos.2 to 5 herein are the legal heirs of the aforesaid Issar Dass. The tenant Raj Kumar accepted late Issar Dass as his landlord and a fresh rent note was executed during 1967. During the subsistence of the tenancy of the aforesaid Raj Kumar, late Issar Dass divided the entire property in four separate portions. The portion under the tenancy of aforesaid Raj Kumar was sold by late Issar Dass to one Ved Paul Gupta through a sale deed dated 20.3.1977 which was challenged by respondent No.1 herein by way of pre-emption suit by taking recourse to the provisions of J & K Rights of Prior Purchase Act. The sole ground taken in the suit was that the property purchased by aforesaid Ved Paul was contiguous to the land belonging to the plaintiff (respondent No.1) as the parnallas of his house were flowing towards the property sold. However, the defendants in the suit did not appear in the case and did not defend the suit filed by respondent No.1 herein. During the pendency of the pre-emption suit, Ved Paul, who constructed on the suit property, sold the same to one Shashi Kant vide sale deed dated 19.5.1978. This fact was within the knowledge of the plaintiff/respondent No.1 herein. The aforesaid Shashi Kant, in turn, sold the suit property to Raj Kumar who was already in possession of the suit property as tenant and continued to remain as tenant till the property was purchased by him. Raj Kumar purchased the suit property vide sale deed dated 1.7.1981. The trial Court, on the basis of the evidence, passed a judgment on 13.12.1984 decreeing the suit, the copy of which has been filed as Annexure-P/1. On 17.1.1998, the appellant herein purchased the suit property from the aforesaid Raj Kumar through a sale deed for valuable consideration. According to the appellant, he had no knowledge about the pendency of the pre-emption proceedings or the order passed thereon. On 20.8.2000, respondent No.1 herein filed a petition for execution before the trial Court. The trial Court vide its order dated 28.8.2000 issued a warrant of possession. On coming to know of the execution proceedings, the appellant herein filed an application raising various grounds under Order XXI Rule 58, 99 and 101 of C.P.C. and prayed for stay of the operation of warrant of possession. The appellant further brought to the notice of the executing Court that he has already challenged the decree in a separate suit and the same is pending for consideration. On 19.12.2000, the appellant filed a separate suit for declaration and perpetual injunction challenging the decree obtained by

respondent No.1 herein. The trial Court by its order dated 19.12.2000 granted the temporary injunction and stayed the execution proceedings. Later the trial Court by its order dated 13.11.2001 vacated the interim order granted on 19.12.2000. The trial Judge, by a separate order dated 13.11.2001, rejected the application of the appellant filed under Order XXI Rule 58, 99, 101 read with Sections 94 and 151 of the C.P.C. (Annexure-P/3). The appellant preferred an appeal before the Additional District Judge challenging the orders of the sub-Judge, who vacated the temporary injunction. The IInd Additional District Judge by his order dated 4.12.2001, granted interim order after hearing the appellant herein. The appellant preferred a revision petition before the High Court challenging the judgment of the sub-Judge dated 13.11.2001 against the interim orders of the IInd Additional District Judge in the application filed under Order XXI Rule 58, 99, 101 read with Section 94 and 151 of C.P.C. Respondent No.1 herein also filed a revision petition before the High Court against the interim orders of the IInd Additional District Judge. The District Judge allowed the appeal and stayed the execution of the ex parte decree till the final decision of the suit. The High Court took both the petitions

for hearing and by its judgment dated 10.10.2002 rejected the civil revision petition bearing No. C.R.231/2001 holding that there is no merit in the revision petition and allowed the revision petition filed by respondent No.1 herein bearing C.R.No.4/2002 in view of the dismissal of the revision petition filed by the appellant herein. According to

the appellant, the High Court failed to consider that the revision petition bearing No.C.R.4/2002 filed by respondent No.1 herein had become infructuous as the appellate Court disposed of the appeal on 4.10.2002 itself and, therefore, nothing survives in it. Further, respondent No.1 did not challenge the order dated 4.10.2002 passed by the Additional District Judge. It was further submitted that the High Court did not consider the various issues raised by the appellant in his revision petition. Being aggrieved by the order passed in C.R.No.231/2001 and C.R.No.4/2002, the above appeals have been filed.

We heard Mr. Ranjit Kumar, learned senior counsel appearing for the appellant and Mr. Gopal Jain, learned counsel appearing for the respondents. Our attention was drawn to the relevant pleadings filed in this case and the judgment and orders passed by the High Court and the lower Courts and also to the annexures.

Mr. Ranjit Kumar, learned senior counsel appearing for the appellant, submitted that the High Court was not justified in not considering the various pleas raised by the appellant as available to him under Order XXI Rule 58, 99 and 101 of C.P.C. According to him, the Courts below are not justified in rejecting the petitions on the ground that the

purchase of the suit property by the appellant was hit by principles of lis pendens and whether the lis pendens is applicable to the facts of the present case. It was further submitted that the High Court was not justified in entertaining C.R.No.4/2002 filed by respondent No.1 herein challenging the interim order which has become infructuous as the appellate Court disposed of the appeal itself by its judgment dated 4.10.2002. He further submitted that the Courts below have committed error in executing decree against the appellant who was not a party to decree and the present decree was passed on one-sided evidence only and that the Courts below are not justified in not considering the fact that the decree holder voluntarily admitted and accepted the appellant as tenant qua the property in question.

Per contra, Mr. Gopal Jain, learned counsel appearing for the respondent, submitted that the water parnallas were fitted to the property long before the sale of the property to the appellant. The water of parnallas passes through the property of the appellant and that the order of the sub-Judge in the pre-emption suit filed by respondent No.1, clearly takes into account the fact that the property of respondent No.1 is in the vicinity of the house of the appellant and that the parnallas fitted in the roof pass through the said property, therefore, it is proved that the property of respondent No.1 is the dominant property and hence respondent No.1 has a right of prior purchase under Section 15(5) of the Prior Purchase Act. It was held that no notice of the sale of the property was given to respondent No.1 even when he was ready and willing to offer the price for the property. According to learned counsel appearing for the respondents, the High Court has rightly held that the appellant cannot be said to have improved his right by purchasing the property from Raj Kumar and the High Court was further correct in holding that the improvement in status for the purpose of Section 15(5) of the Prior Purchase Act can only be applicable to Raj Kumar and the appellant having purchased the property from Raj Kumar cannot and would not fall under Section 15(5) of the Prior

Purchase Act. Argued further, learned counsel submitted that the High Court was right in holding that once the order in execution petition of the sub-Judge dated 13.11.2001 was upheld, it would not be apt to give any further life to the interim order dated 13.11.2001 passed by the IInd Additional District Judge, Jammu. He further submitted that the decree dated 13.12.1984 was not challenged and, therefore, attained finality with the efflux of time and any argument regarding raising of permanent structure etc. by the appellant cannot be sustained at the belated stage.

Mr. Ranjit Kumar, learned senior counsel, drew our attention to the following important events from the rejoinder affidavit:

- (a) The respondent filed suit against Ved Paul on 19.5.1978.
- (b) During the pendency of the suit, the suit property was sold to one Shashi Kant. The aforesaid suit property was again came to be sold to one Raj Kumar on 1.7.1981. However, none of these two subsequent purchasers were made parties to the suit. The defendant-Ved Paul having sold the suit property did not prosecute the suit.
- (c) The suit of the respondent came to be allowed on 13.12.1984 ex parte.
- (d) Though the suit was decided on 13.12.1984, the respondent decree holder did not seek execution of the same for a considerable time (till 28.8.2000).
- (e) In the meantime, the purchaser of the aforesaid suit property, Raj Kumar, sold the suit property to the appellant herein on 17.1.1998.
- (f) The respondent initiated execution proceedings only on 28.8.2000 seeking execution of the order dated 13.12.1984.
- (g) The appellant having come to know of the decree dated 13.12.1984 and also the execution proceedings initiated by respondent No.1, the appellant made application before the executing Court objecting to the execution. As the executing Court cannot go behind the decree, the application was rejected.
- (h) The appellant, in these circumstances, filed a suit for declaration and perpetual injunction challenging the decree dated 13.12.1984. The trial Judge granted interim stay. However on 13.12.1984, the trial Court vacated the stay.
- (i) The appellant preferred an appeal against the order of vacating stay. The IInd Additional Judge granted interim stay on 4.12.2001.
- (j) The aforesaid interim stay was challenged by the respondent before the High Court. During the pendency of the aforesaid proceedings, the Additional District Judge passed an order dated 4.10.2002 and made the interim stay absolute.
- (k) The High Court, vide its impugned judgment, set aside the interim order dated 4.12.2001 and also set aside the order dated 4.10.2002, though the order dated 4.10.2002 was not impugned before it.
- (l) It is also a fact that the decree dated 13.12.1984 was ex parte and the trial Court had no opportunity of considering the other side of story. The trial Court allowed the suit ex parte in the absence of objections.

In reply to the preliminary submissions made by the counsel for the respondents, learned senior counsel appearing for the appellant submitted that the decree dated 13.12.1984 is ex parte decree and, therefore, the sub-Judge relied upon the contentions of the plaintiff before him and that the appellant herein has already filed a suit giving the complete facts of the case. It was further submitted that respondent No.1 made false allegation about the existence of his house and parnallas on the date of institution of the suit for pre-emption. In fact, no house was in existence at the time of the suit during 1978 nor any house is existing even today on the portion of respondent No.1. Hence, it was submitted that the ground of pre-emption by respondent No.1 had no leg to stand in law and, therefore, respondent No.1 lost his right of prior purchase with respect to the suit property. It was further submitted that the appellant was not a party to the decree dated 13.12.1984 and defendant No.1, who had already sold the suit property during the pendency of the suit has not prosecuted the suit. Respondent No.1, who had the knowledge of the subsequent sales had never taken steps to implead the subsequent purchasers. Hence it was submitted that the appellant is entitled to file a suit and challenge the decree and can also take all the pleas available to him.

We have briefly set out the facts of this case and also the contentions raised by the counsel appearing on either side with reference to pleadings and documents and also with reference to the proceedings before the Courts below. We shall now consider the respective submissions.

As already noticed, two civil revision petitions were filed before the High Court, One was filed by the appellant herein, being C.R. No.231 of 2001, against the

order of the sub-Court dated 13.11.2001 whereby the trial Court rejected the application of the appellant filed under Order XXI Rules 58, 99 and 101 of the C.P.C. challenging the execution proceedings pursuant to the decree dated 13.12.1984, which decree was put into execution only in the year 2000 though the decree was of 1984. The second revision petition being C.R.No.4/2002, was filed by respondent No.1 herein challenging the interim order of the IInd Additional District Judge, Jammu dated 4.12.2001 passed in appeal preferred by the appellant under Order XXXVIII Rule 1(r) of the C.P.C. These appeals are against the order of the learned sub-Judge, Jammu, who had dismissed the prayer for injunction under Order XXXIX Rules 1 and 2 filed by the appellant herein in his suit, the suit having challenged the decree dated 13.12.1984. The Additional District Judge, in appeal, passed an interim order staying the execution proceedings. The High Court vide its impugned judgment dismissed the civil revision preferred by the appellant herein and allowed the civil revision preferred by respondent No.1 herein. The decree that was challenged by the appellant in a suit was passed on 13.12.1984 in a suit for pre-emption filed by respondent No.1 herein under the provisions of the J & K Right of Prior Purchase Act, 1936 (In short, "the Act") wherein the plaint averments were: "In the plaint, it has been averred by the plaintiff that he owns a house situated at Mohalla Mastgarh, Jammu, whereas defendant Nos. 1 and 2 owned a house and a vacant piece of land in the same locality which is contiguous to the house of the plaintiff; that all the parnallas of his house flow towards the land of defendant No.2 since the construction of his house and his house is also contiguous' to the house of the defendant and as such is vested with the right of pre-emption in the house of defendant No.2." (Emphasis supplied)

The suit was filed on 17.3.1978 wherein averment was to the aforesaid effect. The provision of law as existing under the Act vide Section 15 thereof, as amended in 1973, reads as under:

"15 \026 Persons in whom right of prior purchase vests in Urban Immovable Property \026 the right of prior purchase in respect of urban immovable property shall vest.

Firstly \026 in the co-sharers of such property, if any;
Secondly \026 where the sale is of the site of the building or structure, in the owners of such building or structure;
Thirdly \026 where the sale is of property having a stair case common to other properties, in the owners, of such properties;
Fourthly \026 where the sale is of property having a common outer entrance with other properties, in the owners of such properties;
Fifthly \026 where the sale is of a servient property in the owners of the dominant property and vice-versa;
Sixthly \026 in the tenant occupant thereof."

However, earlier, prior to 1973 amendment, stood as under:

"15 \026 Persons in whom right of prior purchase vests in Urban Immovable Property \026 The right of prior purchase in respect of Urban Immovable Property shall vest \026

Firstly \026 in the co-sharers of such property, if any;

Secondly \026 where the sale is of the site of the building or structure, in the owners of such building or structure;

Thirdly \026 where the sale is of property having a stair case common to other properties, in the owners, of such properties;

Fourthly \026 where the sale is of property having a common outer entrance with other properties, in the owners of such properties;

Fifthly \026 where the sale is of a servient property in the owners of the dominant property and vice versa;

Sixthly \026 in the owners of property contiguous to the property sold."

Thus what appears to have been amended in 1973 is clause 'sixthly' only. It would be seen that the suit had been filed in 1978 claiming pre-emption under a law that existed prior to the amendment in 1973. After 1973, there is no provision, as aforesaid, in the Act for an owner of a property contiguous to the property sold to seek pre-emption. Thus the plaintiff asked for grant of a decree under clause 'sixthly' of the un-amended Section 15 (as existed prior to 1973). However, the decree that was passed was on the basis of clause 'fifthly' of Section 15 as would be found from paragraph of the judgment of the sub-Judge, Jammu which reads as under:

"From the statement of the plaintiff, which is supported by as many as four witnesses produced by him namely, PW 1 Amar Nath, PW 2 Pradeep Kumar, PW 3 Mast Ram and PW 4 Preetam Singh during the trial, who in one voice have stated that the suit property is quite in the vicinity of the plaintiff's house and the water of the parnalla fitted in the roof of the plaintiff's house passes through the suit property, it stands proved that the plaintiff's house is the dominant property to the suit property and as such the plaintiff has right of prior purchase under Section 15(5) of Prior Purchase Act."

Thus though the decree was sought on a non-existent provision of law, the Court granted it on a provision which was not the case of the plaintiff-respondent No.1. This decree was the subject matter of the challenge in two suits, one was filed by Raj Kumar, the vendor of the appellant herein, seeking a declaration that the decree passed by the Court of sub-Judge, Jammu, on 13.12.1984 in Civil Suit No.177/78 be declared null and void and unexecutable. This suit is still pending. Subsequently, the appellant herein also filed a suit being - File No. 48 - Civil Suit titled J.C. Sehgal vs. D.D. Abrol and Ors., praying for a suit for declaration and permanent injunction on the ground that the decree is a nullity as it had been passed without jurisdiction on a void clause of contiguity-cum-vicinage and that it had been passed on the grounds of wilful fraud, deception and misrepresentation of facts. It is important to state here that the learned Sub-Judge, Jammu, in his order dated 13.11.2001 on the application filed under Order XXI Rule 58 has noted at pages 51-52 in para 7 as under:

"It is no doubt true that ground of prior purchase in respect of vicinage has been repealed but the question is whether the decree dated 13.12.1984 passed by this Court was on the ground of vicinage or on the ground mentioned in Section 15(5) of the Prior Purchase Act. A bare perusal of the judgment dated 13.8.1984 reveals that judgment and decree has been passed in terms of Section 15(5) of Right of Prior Purchase Act on the ground that plaintiff's house is the dominant property to the suit property and the water of the parnallas of the house of the decree holder passes through the suit property. The contention of the learned counsel for the applicant that the decree has been passed on the ground of vicinage is without merit. Though, it has been mentioned in the suit as well as in judgment that suit property is contiguous to the house of plaintiff, but by no stretch of imagination, it can be said that decree has been passed on the ground of vicinage."
[Emphasis supplied]

Thus, it is seen that though respondent No.1 had sought pre-emption on a non-existent provision of law, as seen earlier, the Court granted such pre-emption decree on another ground which had not been argued and thus the said decree was the subject matter of challenge in the two suits, as aforesaid.

This apart, that if the decree which was sought to be executed, 16 years after the decree of the year 1984 is executed in 2000, the appellant, who is in possession, would be dispossessed from the property pending disposal of the suit filed by the appellant, especially when such decree is sought to be executed is a nullity on account of the fact submitted in the legal submissions made.

Learned counsel for the respondent, in fact, has fairly conceded at the time of arguments by the respondent's counsel that the civil revision preferred by the

respondent herein was against the interim order passed by the IIIrd Additional District Judge, Jammu, dated 04.12.2001 granting stay of execution proceedings pending the suit of the appellant herein.

In that Civil revision, the High Court did not pass any stay order. The IIIrd Additional District Judge went on to pass a final order in that appeal under Order XXXVIII Rule 1 (r) on 04.10.2002 making the stay absolute pending the suit of the appellant herein. This order dated 04.10.2002 was never challenged before the High Court. These facts would be apparent from the judgment of the High Court itself. It was contended before the High Court that how could the order dated 04.10.2002 be set aside when the same was not the subject-matter of challenge before the High Court. The High Court, however, held as under:

"However, without commenting on this controversy so far as the above aspect of the matter is concerned, to say that once a subordinate Court whose interim order is subject matter of challenge decides a matter finally and that should deprive this Court from pronouncing upon the correctness of proceedings is an argument which cannot be sustained. By this process, a subordinate Court cannot be given a handle to put the superior Court in a position which disenables it from pronouncement upon the validity or correctness of an order."

It was submitted that the above finding is an erroneous finding of the High Court as fairly submitted by the counsel for the respondent herein, inasmuch as when the High Court did not stay the proceedings before the IIIrd Additional District Judge and the order passed by the Third Additional District Judge was not challenged or appealed against and only the interim order was appealed against. The High Court ought not to have set aside the order dated 04.10.2002, the final order passed by the Third Additional District Judge as has been done by the High Court in the operative portion of its judgment.

In the instant case, respondent No.1 is seeking to enforce the right of pre-emption which this court had held in several decisions to be a very weak right. In *Bhau Ram vs. B. Baijnath Singh*, (1962) Supp. 3 SCR 724, this Court held at pages 740-741 as under:

"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 is 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 s.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 interests of the general public."

We are of the opinion that the Courts below are not justified in executing the decree against the appellant who was not a party to the decree. Likewise, the High Court is not justified in entertaining C.R. No. 4 of 2002 which challenges the interim order which has become infructuous as the appellate Court disposed of the appeal itself by its judgment dated 04.10.2002. The High Court while interfering with the

interim orders dated 04.12.2001 has no right to set aside the final judgment of the appellate Court dated 04.10.2002 which has not been challenged before the High Court.

As already noticed, one suit was filed by Raj Kumar, the vendor of the appellant herein seeking a declaration that the decree passed by the Sub-Judge, Jammu, on 13.12.1984 in Civil Suit No. 177/78 be declared null and void and unexecutable. The appellant herein has also filed a suit being File No.48 - Civil Suit praying for a suit for declaration and permanent injunction on the ground that the decree is a nullity as it had been passed without jurisdiction on a void clause of contiguity-cum-vicinage and that it had been passed on the grounds of wilful, fraud, deception and misrepresentation of facts. During the pendency of the suits if the decree which was sought to be executed 16 years after the decree of the year 1984 the appellant who is in possession would be dispossessed from the property pending disposal of the suits filed by the appellant.

In the facts and circumstances of the case, we direct the execution to remain in abeyance pending disposal of the two suits one filed by Raj Kumar, the vendor of the appellant herein and the other filed by the appellant herein being File No. 48 \026 Civil Suit Titled J.C. Sehgal vs. D.D. Abrol & Ors. and in the meanwhile the appellant would not be dispossessed. This is especially in view of the fact that the respondent No.1 is seeking to enforce the rights of pre-emption which Courts have held in several decisions to be a weak right.

In the result, the appeals are allowed and the common judgment and final order dated 10.10.2002 passed by the High Court of Jammu & Kashmir in C.R. No. 231 of 2001 and C.R. No. 4 of 2002 is set aside. No costs.