

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 02.03.2021

PRONOUNCED ON : 18.03.2021

CORAM

THE HONOURABLE MR.JUSTICE T.RAVINDRAN

S.A.No.1312 of 2008

- 1.Yogavalli (deceased)
- 2.D.Narayana Murthy
- 3.N.Dhanalakshmi
- 4.N.Karthikeyan
- 5.N.Krishnan
- 6.N.Rajagopal
- 7.N.Durai

Appellants

(Appellants 2 to 7 brought on record
as LR's of the deceased sole appellant
vide order of Court dated 21.02.2018
made in M.P.No.1 of 2015 in S.A.
No.1312/2008)

Vs.

- 1.Elumalai
- 2.Kuppan
- 3.Kalaiselvi
- 4.N.Gopalan

Respondents

(R4 impleaded vide order
of Court dated 03.02.2015
made in M.P.No.1/14 in
S.A.No.1312 of 2008)

Prayer :- Second Appeal has been filed under Section 100 of CPC against the Judgement and Decree dated 31.07.2007 passed in A.S.No.54 of 2006 on the file of the Additional District Judge, Fast Track Court No.2, Ranipet, reversing the Judgment and Decree dated 28.02.2005 passed in O.S.No.391 of 1987 on the file of the District Munsif Court, Arakkonam.

For Appellants : Mr.N.Subbarayulu
for M/s.G.Jeremiah

For Respondent : Mr.S.Ambigabathi
Nos.1 to 3

For Respondent : Mr.J.Shanmugasundaram
No.4

JUDGMENT

Challenge in this second appeal is made to the Judgement and Decree dated 31.07.2007 passed in A.S.No.54 of 2006 on the file of the Additional District Judge, Fast Track Court No.2, Ranipet, reversing the Judgment and Decree dated 28.02.2005 passed in O.S.No.391 of 1987 on the file of the District Munsif Court, Arakkonam.

2.For the sake of convenience, the parties are referred to as per their rankings in the trial Court.

3.The plaintiff in O.S.No.391 of 1987 is the appellant in the second appeal.

4.Suit for declaration and permanent injunction.

5.The case of the plaintiff, in brief, is that the property described in the plaint "A" schedule is the absolute property of the plaintiff's mother Jayalakshmi ammal, who after bequeathing the plaint "B" schedule property in favour of her daughter-in-law by name Rajeswari ammal in 1963, released her right in respect of the remaining part of the plaint "A" schedule property in favour of the plaintiff and the defendants wife by name Navamani by way of a registered deed of release dated 19.11.1976 and prior to the abovesaid release deed, Jayalakshmi settled the entire plaint "A" schedule property in favour of the plaintiff and the defendants wife Navamani by way of a settlement deed dated 19.01.1972 rescinding the settlement in favour of her daughter-in-law and in O.S.No.16 of 1965, on the file of the Subordinate Court, Vellore, it was held that Rajeswari cannot be questioned by the latter and the plaintiff and her sister Navamani, the settlees under the settlement deed dated 19.01.1972, were

inducted into the possession of the their respective shares excluding the portion in the occupation of Rajeswari and they came to own and possess the "C" and "D" schedule properties, as a result of the release deed dated 19.11.1976 executed by Jayalakshmi in favour of the plaintiff and her sister Navamani and in the settlement deed dated 19.01.1972, it was specifically stated by Jayalakshmi that the settlees in case of alienating their shares should offer their shares to other settlee and the settlees should not dispose of their shares in any other manner. The plaintiff's sister Navamani died leaving behind the defendants as her legal heirs and the first defendant is endeavouring to alienate the properties got by Navamani ammal as above stated without even following the procedures laid down under the settlement deed and therefore, according to the plaintiff, since she has got a right to purchase the property mentioned in the "D" schedule by way of the preemption and as the first defendant is endeavouring to alienate the same to the third parties, according to the plaintiff, she has been necessitated to lay the suit for appropriate reliefs.

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6.The defendants resisted the plaintiff's suit contending that the plaintiff's suit is not maintainable either in law or on facts and admitted that as per the registered release deed dated 19.11.1976 in favour of the plaintiff and

Navamani, they had acquired right in the property mentioned therein and according to them, the settlement deed dated 19.01.1972 is not acted upon and further, put forth the case that the abovesaid settlement deed was cancelled by Jayalakshmi ammal by way of a deed dated 15.10.1975 and the plaint "D" schedule property had been already disposed of and therefore, there is no cause of action for the suit and the plaintiff is not entitled to secure the reliefs prayed for and as per the release deed dated 19.11.1976, both the plaintiff and Navamani acquired absolute right to the properties released in their favour and accordingly, the defendants sold the property to one Gopal by way of the sale agreement dated 04.11.1978 and settled the possession of the same to him and therefore, the plaintiff is not entitled to question the abovesaid sale transaction and accordingly, sought for the dismissal of the plaintiff's suit.

7.In support of the plaintiff's case, PWs1 to 3 were examined and Exs.A1 to A8 were marked. On the side of the defendants, DW1 was examined and Exs.B1 & B2 were marked.

8.On an appreciation of the materials placed on record and the submissions put forth by the respective parties, the trial Court was pleased to

decree the suit in favour of the plaintiff as prayed for. On appeal preferred by the defendants, the first appellate Court, on a consideration of the materials available on record and the submissions put forth by the respective parties, was pleased to set aside the judgment and decree of the trial Court and by way of allowing the appeal preferred by the defendants, dismissed the plaintiff's suit. Challenging the same, the present second appeal has been laid.

9.At the time of admission of the second appeal, the following substantial questions of law were formulated for consideration:

"i. Whether the condition of first offer to the other party stipulated in the settlement deed is binding on both the parties or not?"

ii. Whether the right of preemption will be abrogated after sometime due to the death of one of the parties to the document?"

iii. Whether the right to give first offer of sale would amount to preventing the other party from selling the property for ever?"

iv. Whether the right of preemption is part and parcel of the right to hold the property or independent of the same?

v. Whether the right of preemption is a personal right or a right in rem?"

10. The plaintiff by way of the present suit is endeavouring to enforce the right of preemption available to her under the settlement deed dated 19.01.1972 executed by her mother in favour of the plaintiff and the plaintiff's sister Navamani.

11. From the materials placed on record, it is found that the plaintiff and the plaintiff's sister had derived the properties of their mother by way of the settlement deeds dated 19.01.1972, 21.12.1963 and the release deed dated 19.11.1976 executed by Jayalakshmi ammal, which have been marked as Exs.A1 to A3. On a perusal of the abovesaid documents, particularly, Ex.A1 settlement deed, it has been specifically mentioned therein by Jayalakshmi ammal that in the event of alienating their respective shares, the settlees should offer their share to the other sharer and should not dispose of their shares in any other manner. Therefore, it is found that the right of preemption has been provided under Ex.A1 settlement deed.

12.Though the defendants would plead that Ex.A1 settlement deed had been subsequently cancelled, however, as regards the validity of the cancellation deed, there is no acceptable and reliable material forthcoming on the part of the defendants. Be that as it may, as rightly contended by the plaintiff's counsel that once the settlement deed had been executed by the settlor Jayalakshmi giving absolute right to the settlees to their respective shares, there is no question of cancellation of the same by the settlor.

13.As far as this case is concerned, from the pleas and the materials placed on record, it is found that there is no dispute that the right of preemption is available to the settlees viz., the plaintiff and the plaintiff's sister Navamani by way of Ex.A1 settlement deed. Therefore, in the event of the settlees alienating their shares, they should offer the sale of their shares to her sister and only by way of adopting the said procedure, they should endeavour to go for the sale of their shares and that such a clause is available Ex.A1 settlement deed is not in dispute and the same has also been controverted by the defendants in the written statement.

14.By way of the present suit, the plaintiff is claiming the right of preemption qua the plaint "D" schedule property, which had been allotted to Navamani. Now, according to the plaintiff, after the demise of Navamani, her legal heirs viz., the defendants are endeavouring to alienate the plaint "D" schedule property to the third parties without following the procedure of preemption stipulated and embodied in the settlement deed Ex.A1 and hence, seeking for declaration of her right of preemption available in Ex.A1 settlement deed qua the plaint "D" schedule property and to injunct the defendants from alienating the same to the third parties without adopting the procedure of sale embodied under Ex.A1 settlement deed i.e. the right of preemption available to the plaintiff, the plaintiff has come forward with the suit for appropriate reliefs.

15.Though the defendants would plead that the property had been alienated to one Gopal, son of Natarajan, however, pointing to the same, there is no material placed on record worth acceptance. The same had also been considered in detail by the trial Court in issue No.4 and held that the defendants have failed to establish that the plaint "D" schedule property had been already alienated.

16.Considering the pleas and the materials placed on record, the trial Court was pleased to grant the reliefs in favour of the plaintiff as prayed for. However, the first appellate Court, though it would also concur with the findings of the trial Court that the right of preemption is available to the plaintiff qua the plaint "D" schedule property by virtue of Ex.A1 settlement deed, however, according to the first appellate Court, the said condition is void as it restrains Navamani from disposing of her share in the plaint "D" schedule property, after she having been declared as absolute owner of the plaint "D" schedule property by way of the settlement deed and in this connection, the first appellate Court placed reliance upon Section 10 of the Transfer of Property Act and on that premise, the first appellate Court proceeded to hold that the abovesaid restriction pleas put on Navamani under Ex.A1 settlement deed qua the sale of the plaint "D" schedule property is a permanent clog and thereby rule against perpetuity had been violated and accordingly, proceeded to dismiss the plaintiff's suit.

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17.Whether such a clause of granting a preferential right to the plaintiff to purchase the share of Navamani qua the plaint "D" schedule property can be held to be a permanent clog made on the property and thereby, the rule against

the perpetuity had been violated is the question to be answered in this second appeal.

18.By granting the plaintiff, the right of preemption under Ex.A1 settlement deed, it is seen that the plaintiff was only given the right of first offer of sale in the case of alienation of the plaint "D" schedule property by her sister Navamani or her legal heirs. By way of the abovesaid preemption clause, Navamani or her LRs are not injuncted or prohibited from transferring the property to any person, all that it restricts is that the offer of sale must be first made to the plaintiff and in the event of the plaintiff failing to exercise the offer, the defendants would be entitled to go for the sale of the property to other willing purchasers. At the foremost, whether such a preemption clause could be incorporated in Ex.A1 is the question to be decided. In the decision reported in **(2010) 7 Supreme Court Cases 603 (K.Naina Mohamed (Dead) Through LRs. Vs. A.M.Vasudevan Chettiar (Dead) Through LRs. and others)**, while dealing with the right of preemption provided in the Will, the apex Court has held that restriction against the alienation of property to strangers by exercise of right of preemption cannot be held to be violation of rule against perpetuity and further held that such a restriction was meant to ensure that the property bequeathed or settled under the deed of settlement viz.,

Ex.A1 as in the present case do not go into the hands of the third party and held that such restriction is perfectly valid and did not violate the rule against the perpetuity. The position of law has been outlined in the abovesaid decision as follows:

**"A.Family and Personal Laws -
Succession and inheritance - Will -
Construction of - Restriction against alienation
of property to strangers - Nature and legality of
- Pre-emption right if conferred thereby - Rule
against perpetuity, held, not violated by such
restriction**

**- Testator executing will creating life
interest in suit properties in favour of her two
sisters SA and RA with a stipulation that after
their death their male heirs would acquire
absolute right in properties subject to the
condition that they shall not sell the property to
strangers - Pre-emptive right of ultimate
legatees over property, if any - RA and her son,
executing sale deed in favour of appellant (a
stranger) in respect of their share in suit
property partitioned under a compromise -
Validity of**

- Held, from a reading of will, the two sisters were to enjoy the properties jointly during their lifetime without creating any encumbrance - After their death, their male heirs were to get absolute rights in the properties - Male heirs of two sisters could alienate their respective shares to other co-sharers - Testator indirectly conferred a preferential right i.e. a right of pre-emption upon male heirs of her sisters to purchase share of male heir of either sisters - Restriction was not absolute inasmuch as alienation was permitted among male heirs of the two sisters - Only restriction was on alienation of property to strangers - Meant to ensure property bequeathed did not go into the hands of third party - Restriction perfectly valid and did not violate rule against perpetuity - Hence, trial court and High Court's judgment setting aside sale to appellant, upheld- Succession Act, 1925 - S.114 - Property Law - Pre-emption - right of - Conferred under a will - Validity of - Transfer of Property Act, 1882, S.10.

B. Property Law - Pre-emption - Restriction on alienation of property outside

the family - Nature of, and validity - Family and Personal Laws - Family arrangement.

The rule against perpetuity has its origin in Duke of Norfolk case, 22 ER 931 of 1682. The House of Lords held that such a shifting condition could not exist indefinitely and that tying up property too long beyond the lives of people living at the time was wrong. In India, the rule against perpetuity has been incorporated in Section 114 of the Succession Act, 1925. However, the principle enshrined in the aforesaid section does not have any bearing on this case.

Ram Baran Prasad v. Ram Mohit Hazra AIR 1967 SCC 744 ; Shivji v.Raghunath, (1997) 10 SCC 309, relied on

Duke of Norfolk case, 3 Chan Cas 1 : 22 ER 931, referred to <http://www.lawcom.gov.uk>, referred to

On reading Clause 11 in conjunction with Clauses 4 and 10 of the will, it becomes clear that the two sisters of the testator were to enjoy

house properties jointly during their lifetime without creating any encumbrance and after their death, their male heirs were to get the absolute rights in A and B properties. The male heirs of the two sisters could alienate their respective shares to other sharers on prevailing market value but not to strangers. The restriction contained in Clause 11 was not absolute inasmuch as alienation was permitted among male heirs of the two sisters. The object of incorporating this restriction was to ensure that the property does not go out of the families of the two sisters. It can thus be said that R had indirectly conferred a preferential right upon the male heirs of her sisters to purchase the share of the male heir of either sisters. This was in the nature of a right of pre-emption which could be enforced by the male heir of either sister in the event of sale of property by the male heir of the other sister.

If the term "other sharers" used in Clause 11 is interpreted keeping in view the context in which it was used in the will, there can be no manner of doubt that it referred to the male heirs of the other sister. The only restriction contained

in Clause 11 was on alienation of property to strangers. The restriction which was meant to ensure that the property bequeathed by R does not go into the hands of third party was perfectly valid and did not violate the rule against perpetuity evolved by the English courts or the one contained in Section 114 of the Succession Act, 1925.

The male heirs of SA and RA did not question the conditional conferment of the title of the properties upon them. Since the intention of the testator was to impose a restriction on alienation of property, Clauses 10 and 11 cannot be interpreted in a manner which would permit violation of that condition. therefore, the appellant stranger who purchased B property in violation of the aforesaid condition cannot say that the restriction contained in Clause 11 of the will should be treated as void because it violates the rule against perpetuity."

19.The abovesaid position of law was also referred to by the apex Court in the recent decision reported in **2020-2-L.W.527 (Tilak Raj Bakshi Vs. Avinash Chand Sharma (Dead) Through Lrs.& others)** and held that a family

settlement/contract can give rise to a right of preemption and in the abovesaid case, the Supreme Court had considered the position of law qua the right of preemption articulated by the apex Court in the decision reported in ***AIR 1958 SC 838 (Bishan Singh V.Khazan Singh)*** and the abovesaid settlement of law is extracted below:

"“7. Before attempting to give a satisfactory answer to the question raised, it would be convenient at the outset to notice and define the material incidents of the right of pre-emption. A concise but lucid statement of the law is given by Plowden, J. in 136 P.R. 1894, at page 511, thus:

“A preferential right to acquire land, belonging to another person upon the occasion of a transfer by the latter, does not appear to me to be either a right to or a right in that land. It is jus ad rem alienum acquirendum and not a jus in re aliena.... A right to the offer of a thing about to be sold is not identical with a right to the thing itself, and that is the primary right of the pre-emptor. The secondary right is to follow the thing sold, when sold without the proper offer to the pre-emptor, and to acquire it, if he thinks fit, in spite of the sale, made in disregard of his

preferential right.” The aforesaid passage indicates that a pre-emptor has two rights: (1) inherent or primary right i.e. a right for the offer of a thing about to be sold and (2) secondary or remedial right to follow the thing sold.”

“11. The plaintiff is bound to show not only that his right is as good as that of the vendee but that it is superior to that of the vendee. Decided cases have recognized that this superior right must subsist at the time the pre-emptor exercises his right and that that right is lost if by that time another person with equal or superior right has been substituted in place of the original vendee courts have not looked upon this right with great favour, presumably, for the reason that it operates as a clog on the right of the owner to alienate his property. The vendor and the vendee are, therefore, permitted to avoid accrual of the right of pre-emption by all lawful means. The vendee may defeat the right by selling the property to a rival pre-emptor with preferential or equal right. To summarize: (1) The right of pre-emption is not a right to the thing sold but a right to the offer of a thing about to be sold. This right is called the primary or inherent right. (2)

The pre-emptor has a secondary right or a remedial right to follow the thing sold. (3) It is a right of substitution but not of re-purchase i.e., the pre-emptor takes the entire bargain and steps into the shoes of the original vendee. (4) It is a right to acquire the whole of the property sold and not a share of the property sold. (5) Preference being the essence of the right, the plaintiff must have a superior right to that of the vendee or the person substituted in his place. (6) The right being a very weak right, it can be defeated by all legitimate methods, such as the vendee allowing the claimant of a superior or equal right being substituted in his place.”

20.Following the abovesaid position of law qua the right of preemption, the Supreme Court in the decision reported in **2020-2-L.W.527 (Tilak Raj Bakshi Vs. Avinash Chand Sharma (Dead) Through Lrs. & Others)** has held that the right to preemption is ordinarily born out of custom or in terms of a statutory provision and held that a family settlement/contract can give rise to a right of preemption.

21.Considering the abovesaid principles of law qua the right of preemption, it is seen that by virtue of the abovesaid clause, the right of Navamani or the defendants to sell the plaint "D" schedule property to strangers is not completely or permanently sealed and on the other hand, the abovesaid clause could only be termed as a reasonable restriction imposed by Jayalakshmi ammal to ensure that the family property do not go out of the family and remain only with the family members. Therefore, when by way of the preemption clause, the deceased Navamani or the defendants are not restrained from alienating the plaint "D" schedule property to the third parties and they are only required to offer the sale of the plaint "D" schedule property to the plaintiff at the first instance and in that event of the plaintiff not willing to purchase the plaint "D" schedule property for a valid consideration as per law, it is open to the defendants to go for the alienation of the plaint "D" schedule property to strangers in accordance with the law.

22.In the light of the abovesaid position of law, the decision relied upon by the defendants' counsel reported in **2020 (2) CTC 109 SC (Sridhar & anr. Vs. N.Revanna & Ors.)**, in my considered opinion, would not be applicable to the case at hand. In the abovesaid decision, the Supreme Court was

necessitated to consider the question whether the first defendant therein who was gifted the schedule property had no right to alienate the schedule property in any manner whatsoever and accordingly, by invoking Section 10 of the Transfer of Property Act, held that the condition restraining from alienating his share cannot be imposed and such a condition is void. However, as above pointed out, the preemption clause available to the plaintiff by virtue of Ex.A1 settlement deed does not prevent the defendants from alienating the plaintiff's schedule property, it only directs the defendants to offer the sale first to the plaintiff and thereafter, to the third parties in the event of the plaintiff not willing to come forward for the sale for a valid consideration as per law.

23. Similar is the decision relied upon by the defendants' counsel reported in *AIR 1986 Ker 56 (Fathima Sarohini Suresh and Ors. Vs.K.Saraswathi Amma and Ors.)*. The said decision is also to be not applicable to the facts and circumstances of the case at hand.

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24. In support of his contentions, the plaintiff's counsel would rely upon the decisions reported in *2002 (2) CTC 72 (Kulasekaran Chettiar (decd.) and seven others Vs. Meenakshi Ammal and another)*, *2015 (2) CTC 465*

(B.K.Rangachari and others Vs.L.V.Mohan), the order of our High Court dated 29.03.2012 passed in C.R.P.(NPD) Nos.4081 & 4082 of 2009 (N.Manickam Vs.Kanagaraj and two others) and AIR 1971 ORISSA 65 (V.58 C.22)(1) (Ganesh Chandra Pradhan Vs.Rukmani Mohanty and others). The principles of law outlined in the above said decisions are taken into consideration and followed as applicable to the case at hand.

25.In the light of the abovesaid discussions, when the right of preemption available to the plaintiff qua the plaint "D" schedule property by virtue of Ex.A1 settlement deed, not being a permanent clog or violative of the rule against perpetuity, in the light of the decisions of the apex Court referred to supra, the reasonings of the first appellate Court for non suiting the plaintiff are liable to be set aside and it has to be held that the condition of the first offer of sale to the other settlee as stipulated in Ex.A1 settlement is binding upon the settlees as well as their legal heirs and the right of preemption will not get abrogated after the death of one parties to the settlement deed and by virtue of right of preemption, the other party is not prevented from alienating her share forever and the right of preemption is not a permanent clog against the alienation and also not in violation of the rule against perpetuity and the right of preemption is a right in rem and accordingly, the substantial questions of

law formulated in the second appeal are answered in favour of the plaintiff and against the defendants.

In conclusion, the Judgement and Decree dated 31.07.2007 passed in A.S.No.54 of 2006 on the file of the Additional District Judge, Fast Track Court No.2, Ranipet, are reversed and resultantly, the Judgment and Decree dated 28.02.2005 passed in O.S.No.391 of 1987 on the file of the District Munsif Court, Arakkonam are confirmed. Accordingly, the second appeal is allowed with costs. Consequently, miscellaneous petition, if any, is closed.

Index : Yes/No

Internet : Yes/No

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To:

18.03.2021

- 1.The Additional District Judge, Fast Track Court No.2, Ranipet.
- 2.The District Munsif Court, Arakkonam.
- 3.The Section Officer, V.R.Section, High Court, Madras.

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Pre-delivery Judgement made in
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