



O.S.A.No.326 of 2011

IN THE HIGH COURT OF JUDICATURE AT MADRAS

JUDGMENT RESERVED ON	JUDGMENT PRONOUNCED ON
29.09.2022	19.10.2022

CORAM:

THE HONOURABLE **MS.JUSTICE V.M.VELUMANI**
and
THE HONOURABLE **MR.JUSTICE SUNDER MOHAN**

O.S.A.No.326 of 2011
and M.P.No.1 of 2014

1.J.F.Irani

2.Sathish Gupta

3.Yasmin Gupta

... Appellants

Vs.

1.Hajee Sir Ismail Wakf Estate
Represented by its Trustees
A.Masoodsait
Hajee Noor Mohamed, Abdul Khader Sait
No.37, Stepheasn Road
Fraser Town
Bangalore – 5.

2.H.M. Constructions
No.84, K.H.Road
Bangalore – 560 027.

3.P.J.Irani

4.S.M.Irani



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5.T.N.Langrana

6.Dr.Mrs.R.S.Boyce

7.Dr.Mrs.S.Y.Edljee

... Respondents

Prayer: This Original Side Appeal is filed under Order XXXVI Rule 1 of the Original Side Rules read with Clause 15 of Letters Patent, against the judgment and decree dated 30.04.2010 made in C.S.No.1215 of 1995 on the file of this Court.

For Appellants 1 to 3 : Mr.T.V.Ramanujam, Senior Counsel
for Mr.M.Narayanasamy

For 2nd Appellant : Mr.V.Raghavachari
for Mr.V.Vignesh

For R1 : Mr.C.D.Trivedi

For R2 : Mr.Sathish Parasaran, Senior Counsel
for Mr.R.Parthasarathy

For R3 to R7 : Given up vide order of this Court
dated 27.01.2014

J U D G M E N T

[Judgment of the Court was delivered by V.M.VELUMANI,J.]

One F.J.Irani is the 1st plaintiff, the respondents 6 & 7 are the plaintiffs 2 & 3, the appellants are plaintiffs 4 to 6 and respondents 1 to 5 are the defendants in C.S.No.1215 of 1995 on the file of this Court. The plaintiffs



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filed the said suit (a) for mandatory injunction for a direction to the defendants 1 & 2 to submit Form 37-1 for sale of the property more particularly described in the schedule hereunder to the plaintiffs for a sum of Rs.5,42,43,750/- in view of pre-emptive right of the plaintiffs (b) directing the defendants to execute the sale deed in favour of them.

1(a). After contest, the said suit was dismissed by the judgment and decree dated 30.04.2010. Challenging the said judgment and decree dated 30.04.2010 made in C.S.No.1215 of 1995 on the file of this Court, the plaintiffs 4 to 6 have come out with the present appeal.

2.The parties are referred to as per their respective ranks in the Civil Suit for the sake of convenience.

Case of the appellants/plaintiffs:

3. One J.H.Irani, father of the 1st plaintiff took on lease the suit property bearing Door Nos.2, 3 & 4, Blackers Road, Mount Road, Madras, by a registered lease deed dated 17.02.1943 with effect from 16.04.1940 for 21



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years with an option for renewal of lease for further period of 10 years ending with 15.04.1961. The Door Nos.2 and 3 were taken on lease for putting up Cinema Theatre measuring 14 grounds and 1116 sq.ft. and consequently the land contiguous to the theatre land namely, Door No.4 known as English Ware House measuring 1 ground and 1926 sq.ft. is absolutely necessary for convenient enjoyment of the Cinema Theatre. The said J.H.Irani at his own cost constructed the theatre in Door Nos.2 and 3 and named it as 'Casino Theatre'. The said J.H.Irani died in the year 1949 leaving behind his wife T.J.Irani, three sons namely, P.J.Irani, 3rd defendant, deceased son M.J.Irani, F.J. Irani, 1st plaintiff and two daughters namely, Dr.Mrs.R.S.Boyce & Dr.Mrs.S.Y.Edljee, plaintiffs 2 & 3. Mrs.T.J.Irani, wife of J.H.Irani died in the year 1962. One of the sons of J.H.Irani viz., M.J.Irani died leaving defendants 4 and 5, Mrs.H.M.Sahani and Mrs.R.A.Mehta, as his legal heirs. In view of the family arrangement, the legal heirs of J.H.Irani, the plaintiffs have succeeded to the suit property.

3(a). The plaintiffs and defendants 3 to 5 filed C.S.No.886 of 1992 against the 1st defendant for declaration that estate of late J.H.Irani, is the



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owner of theatre building, declaration that the clause in the lease deed to the effect that building put up by the lessees is that of lessors is invalid, illegal and void and for injunction restraining the 1st defendant from claiming any rent on the basis of ownership of superstructure and for other reliefs.

3(b). After the death of J.H.Irani, his legal heirs had been in possession and enjoyment of the said property and after the family arrangement, the plaintiffs are in possession and enjoyment of the said property.

3(c). On the expiry of original period of lease, the legal heirs of J.H.Irani and Mrs.T.J.Irani exercised their option for renewal of lease for further period of 10 years ending with 15.04.1971. The 1st defendant pressurised the plaintiffs to accept the demand of 1st defendant that the legal heirs of J.H.Irani should not claim ownership of superstructure. There was some delay in considering the said demand.

3(d). Meanwhile, the City Tenants' Protection Act was amended by the Act IV of 1972 and in view of express provisions, the demand of 1st



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defendant has become invalid, illegal and void. The 1st defendant instead of initiating proceedings for eviction of legal heirs of J.H.Irani, filed suit in C.S.No.69 of 1972 (Originating Summons) for a direction of the Court and for sanction of any settlement that may be arrived at in relation to the said property. The 1st defendant forced and coerced the legal representatives of J.H.Irani to enter into compromise that they will not claim any right over the superstructure. In view of compromise decree, a registered lease deed dated 09.08.1974 Ex.P3 was executed between the 1st defendant and the legal heirs of J.H.Irani. As per this lease deed, the lease was extended up to 31.12.1986 with an option to renew the lease for further period of 10 years. As per the terms of lease, monthly rent was fixed at Rs.3,000/- up to 31.12.1986. The said rent so fixed was only for the land and not for the theatre building.

3(e). In the lease deed, option is given to the lessees for renewal of further period of 10 years from 31.12.1986. The superstructure put up by J.H.Irani was not conveyed to 1st defendant and Corporation of Madras did not consider the 1st defendant as owner of the building. The property tax was assessed separately as J.H.Irani's estate. The plaintiffs are in possession and



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enjoyment of the property as lessees. The legal heirs of J.H.Irani did not surrender the possession of Door Nos.2 and 3 to the 1st defendant and took back the possession from the 1st defendant as alleged in the lease deed. The legal heirs of J.H.Irani was and is in possession and enjoyment of the property throughout from the date of original lease.

3(f). The 1st defendant filed R.C.O.P.No.2415 of 1985 on the file of IX Small Causes Court, Madras, for fixation of fair rent claiming that they are the owner of the building. In the said R.C.O.P., originally, the 1st plaintiff was not made as a party. The 1st plaintiff filed M.P.No.1817 of 1987 for impleading himself as respondent in the said R.C.O.P. and got himself impleaded. Pending trial of R.C.O.P., M.J.Irani, one of the sons of J.H.Irani, died and 1st defendant did not take any steps to implead legal heirs of M.J.Irani. In view of the same, XIII Small Causes Court, held that the matter is abated and dismissed the said R.C.O.P.

3(g). The plaintiffs may also state that the lease deed dated 09.08.1974 purported only to record that as per the terms of the earlier lease deed dated



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17.02.1943, the theatre and all other buildings erected by the lessees on the property belonged to the lessors absolutely. The plaintiffs submit that what was purported to be stated in the lease deed dated 09.08.1974 was a factual record of what they believed was the position which had arisen by virtue of Clause 8(m) of the lease deed dated 17.02.1943, which had been rendered illegal and void by the Amendments Act.

3(h). The plaintiffs filed C.S.No.886 of 1992 for declaration that the building of the property described in the suit schedule property was that of the plaintiffs and defendants 3 to 6, 1st defendant has no right, title or interest in the building and for injunction restraining the 1st defendant from claiming any right, title or interest notwithstanding the clause in the lease deed dated 09.08.1974 and for declaration that the clauses in the compromise memo and lease deed dated 09.08.1974 were illegal in view of Section 12 of the Tamil Nadu City Tenants Protection Act.

3(i). The 1st defendant assured that the legal heirs of J.H.Irani can be in possession as long as they wanted, they themselves can purchase the property



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and that when the 1st defendant desires to sell the property, the legal heirs of J.H.Irani would be given pre-emptive right to purchase the suit property.

3(j). Only on the said assurance, the legal heirs of J.H.Irani, entered into an agreement dated 09.08.1974 Ex.P3. In the said agreement dated 09.08.1974, it was specifically provided that if the 1st defendant decides to sell the suit property, they will give first option to the estate of J.H.Irani. The 1st defendant by letter dated 30.04.1984 offered to sell the property and called the plaintiffs to quote their offer. The appellants herein and legal heirs of J.H.Irani in their reply requested the 1st defendant to quote their offer so that the plaintiffs can consider the same either to accept or reject the same. After some correspondence, the 1st defendant dropped the said offer on the ground that beneficiaries of the estate did not want to sell the property.

3(k). The 1st defendant by its letter dated 29.04.1995 stated that they intend to call for tenders for the sale of suit property. The plaintiffs submitted their tender. It was informed that at the meeting to be held on 15.05.1995, the tenders would be opened. The 1st plaintiff was present and informed all the



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persons, who were present on the day that plaintiffs had pre-emptive right to purchase the property in view of clauses in the agreement. In the said tender, it was also known that Rs.35,00,000/- per ground was an offer given by the 2nd defendant.

3(l). The 1st plaintiff even at that stage had specifically pointed out that for the highest price, the plaintiffs should be given the opportunity to purchase the property. It was stated that the Trustees would consider the offers and revert.

3(m). The 1st defendant did not inform about the offer of the plaintiffs. Therefore, the plaintiffs by the letter dated 13.06.1995 specifically pointed out to the 1st defendant that the plaintiffs should be given the first option to purchase the suit property and that only when the plaintiffs expressed their inability to purchase the property the same could be offered to others and the 1st plaintiff had also then offered to purchase the property at Rs.37,50,000/- per ground. The plaintiffs also informed the 1st defendant that they are willing to negotiate the price and terms at the convenience of the 1st defendant. The



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1st defendant sent a letter dated 27.06.1995 stating that offer of Rs.35,00,000/- per ground submitted by the 2nd defendant was accepted and the same was confirmed in the presence of the 1st plaintiff and that revised offer cannot be entertained.

3(n). The plaintiffs by their reply dated 06.07.1995 informed to the effect that in the meeting, it was stated that matter would be placed before the Trustees and Trustees would revert to the plaintiffs.

3(o). The 1st defendant falsely sent a letter dated 12.07.1995 stating that the contents of paragraph 2 of the plaintiff's letter were false. The plaintiff's again wrote a letter dated 18.07.1995 pointing out that there is no confirmation of sale at the meeting and the pre-emptive right the plaintiffs had.

3(p). Under the lease agreement dated 09.08.1974 Ex.P4, the plaintiffs had the first right to purchase the property. The 1st defendant ought to have offered the property to the plaintiffs at the rate of Rs.35,00,000/- per ground



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and in any event, they should have accepted the offer of plaintiffs to purchase the property at the rate of Rs.37,50,000/- per ground. The plaintiffs understand that apparently there is some sort of dealing between the defendants 1 and 2 and some shady transaction being entered into between them.

3(q). Under the lease deed dated 09.08.1974, the plaintiffs have the first right to purchase the property and hence, the question of handing over the same to others would arise only if the plaintiffs refuse to purchase.

3(r). In view of the pre-emptive right that the plaintiffs had, the 1st defendant ought to have called upon the plaintiffs to find out whether they were interested in purchasing the property at Rs.35.00 lakhs per ground. When the plaintiffs offered Rs.37.50 lakhs per ground, the same should have been accepted.

3(s). The property in question comprises of 14 grounds and 1116 sq.ft. The purchase price would therefore be Rs.5,42,43,750/-. Therefore, in view



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of the provisions of the Act, the 1st defendant ought to have intimated the proposed sale to the appropriate authority and should have also obtained necessary certificate under Section 230A of the Income Tax Act.

3(t). The 2nd defendant cannot claim to be a bona fide purchaser for value, since they had knowledge about the pre-emptive right of the plaintiffs. Therefore, even if a sale deed had been executed in favour of the 2nd defendant, they will not be entitled to claim any right, but they will have to convey the property to the plaintiffs, upon the plaintiffs paying the money already paid by the 2nd defendant. The plaintiffs are ready and willing to pay the amount of Rs.5,42,43,750/- to the 2nd defendant for the conveyance of the property and prayed for a decree.

Case of the 1st defendant:

4.The 1st defendant filed written statement denying all the averments made by the plaintiffs and stated that they are owners of the property at Door Nos.2 and 3, Blackers Road, Mount Road, Madras. The land was leased out to J.H.Irani. The lease was renewed from 01.01.1972 to 31.12.1986 with an



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option to the lessees to renew the lease for further period of 10 years up to 31.12.1996. The plaintiffs did not exercise the option for renewal of lease, but lease was continued without any registered instrument.

4(a). The claim of the plaintiffs that they were compelled to enter into a registered lease deed dated 09.08.1974 is not acceptable. The plaintiffs are businessmen and they cannot plead ignorance. As per the provisions of the Evidence Act, the plaintiffs cannot lead oral evidence to destroy the contents of document.

4(b). When a person was compelled to execute any document, it is natural to the said person to approach the Court immediately. The plaintiffs filed C.S.No.886 of 1992 for declaration and injunction and the said suit was dismissed on 07.04.1995 and the said dismissal has become final.

4(c). The right of pre-emption prescribed in the lease deed dated 09.08.1974 expired by efflux of time and the right was not given for eternity. The option is not a permanent option.



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4(d). The property is an extent of more than 14 grounds and the monthly rent is only Rs.3,000/-, which is not commensurate with the value of locality. In order to augment its resources for the beneficiaries, the Trustees issued advertisement in the Newspaper dated 29.04.1995 inviting tenders in sealed covers. The plaintiffs also made their offer. On opening the sealed cover on 15.05.1995, offer of the plaintiffs worked out only Rs.28,00,138/- per ground, while the offer made by the 2nd defendant was Rs.35,00,000/- per ground and it was accepted and transaction was concluded in favour of 2nd defendant.

4(e). The offer letter made by the plaintiffs to pay Rs.37,50,000/- per ground could not be accepted since such an offer should have been made when the tenders were opened on 15.05.1995. After having participated in the tender process and after finding that the price offered by them was lower than the highest, the plaintiffs ought to have enhanced the offer at that time itself. Alternatively, the plaintiffs ought to have at least requested an auction between them and the 2nd defendant.



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4(f). The 1st defendant denied the allegation that there was some shady transaction with 2nd defendant and submitted that offer of the plaintiffs at Rs.5,42,43,750/- cannot be accepted and prayed for dismissal of the suit.

Case of the 2nd defendant:

5.The 2nd defendant filed written statement and denied all the averments made in the plaint and stated that in response to the advertisement dated 29.04.1995, he went to the address mentioned in the advertisement and submitted his offer in a sealed cover along with cheque for Rs.25,00,000/- as earnest deposit. Apart from 2nd defendant, six others participated in tender process including the plaintiffs. The offer of Rs.35,00,000/- per ground of 2nd defendant was the highest and the same was accepted by 1st defendant and confirmed on the same day. The offer of the plaintiffs was only Rs.28,13,800/-, which is Rs.7,00,000/- less than the offer of 2nd defendant. In the meeting held on 15.05.1995, after opening the tender, the 1st plaintiff did not inform that he has pre-emptive right. He was a silent spectator and took back the cheque for Rs.25,00,000/-. Subsequently, an agreement of sale on 13.06.1995 was also executed between the 1st defendant and 2nd defendant.



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The 2nd defendant apart from earnest deposit of Rs.25,00,000/-, paid another sum of Rs.51,00,000/- to the 1st defendant and totally, Rs.76,00,000/-.

5(a). The present suit filed by the plaintiffs is pre-mature, as on the date of filing of suit, there was no sale effected by the 1st defendant in favour of 2nd defendant. The lease deed dated 09.08.1974 Ex.P3 expired on 31.12.1986. There was no renewal of lease by written and registered lease deed after 31.12.1986. The plaintiffs are only trespassers in the suit property. The pre-emptive right mentioned in the lease deed and agreement does not survive after expiry of lease period on 31.12.1986. The plaintiffs unconditionally participated in the tender process. The plaintiffs did not raise any objection for the sale being confirmed in favour of 2nd defendant on 15.05.1995 and did not put on the prospective purchaser about the pre-emptive right. The 2nd defendant is a bonafide purchaser and he has paid Rs.76,00,000/- to the 1st defendant.

5(b). The plaintiffs acquiesced to the proposed sale of the suit property by the 1st defendant to the 2nd defendant. The plaintiffs having consciously



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participated in all the proceedings are not entitled to claim at later stage that first option must be given to them to buy the suit property.

5(c). The right of pre-emption is a weak right and can be defeated by all legitimate means. The contract between the plaintiffs and the 1st defendant does not debar the plaintiffs from giving up their so called right of pre-emption. The conduct of the plaintiffs extinguished their right of pre-emption by taking back their cheque for Rs.25,00,000/- and the plaintiffs have waived their alleged right of pre-emption. The so called right of pre-emption which plaintiffs' claim cannot defeat the legitimate right in favour of 2nd defendant, which have accrued in its favour from a concluded contract. In view of dismissal of the suit in C.S.No.886 of 1992 filed by the plaintiffs, they cannot file the present suit for the very same relief.

5(d). The sale agreement was duly submitted to the Income Tax Department under Section 230A of the Income Tax Act for issue of 'No Objection Certificate' for the intended sale. The 2nd defendant in the written statement denied various averments made by the plaintiffs in paragraphs – 44



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to 56 in the plaint and stated that it is not open to the plaintiffs to try to reopen the concluded contract and strike a deal in their favour at later stage.

The 2nd defendant further stated that injunction was granted in O.A.No.872 of 1995 and O.A.No.6143 of 1995 filed for vacating injunction was dismissed. In O.S.A.Nos.167 of 1996 & 135 of 1998, the Division Bench directed the plaintiffs to deposit Rs.5,42,43,760/-. The plaintiffs did not deposit the said amount. In view of the same, the plaintiffs are not entitled to the relief sought for in the suit. The 2nd defendant also stated that the plaintiffs are not entitled to any relief even on the ground of equity and prayed for dismissal of the suit.

6. Based on the above pleadings, the trial Court framed following issues and additional issues:

Issues:

“(i) Are the plaintiffs entitled to exercise the right of pre-emption even after the expiration of the registered lease deed, particularly when they have participated in the tender without any reservation?

(ii) Are the plaintiffs entitled to specific performance as prayed for by them?

(iii) Have the plaintiffs lost the right of the suit prayer particularly when they have not obeyed the orders of



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the Division Bench made in O.S.A.Nos.167 of 1996 and 135 of 1998, requiring them to deposit the entire amount in six months?

(iv) Is the second defendant entitled to purchase the property as the highest bidder? and

(v) To what relief, the parties are entitled?”

Additional Issues:

“(i) Whether the second defendant is not a bonafide purchaser of the suit property for valuable consideration without any notice of the plaintiffs' alleged right of pre-emption? and

(ii) Whether the plaintiffs' alleged right of pre-emption has expired by efflux of time even before the execution of sale deed by the first defendant in favour of the second defendant?”

7.Before the trial Court, the 6th plaintiff, daughter of 1st plaintiff, examined herself as P.W.1 and 34 documents were marked as Exs.P1 to P34. On behalf of 1st defendant, one Shabbir Malik, one of the Trustees of the 1st defendant was examined as D.W.1, 1st defendant marked five documents as Exs.D1 to D5 during cross-examination of P.W.1 and marked four documents



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through D.W.1 as Exs.D6 to D9. The 2nd defendant did not let in any oral and documentary evidence.

8.The learned Judge considering the pleadings, oral and documentary evidence, by the judgment and decree dated 30.04.2010, dismissed the suit.

9.Against the said judgment and decree dated 30.04.2010 made in C.S.No.1215 of 1995, the plaintiffs have come out with the present appeal.

10.The learned Senior Counsel appearing for the appellants 1 & 3 /Plaintiffs 4 & 6 and the learned counsel appearing for the 2nd appellant/5th plaintiff separately made submissions to set aside the impugned judgment and decree. After reiterating the averments in the plaint, they submitted that the plaintiffs have pre-emptive right to purchase the suit property. By the lease deed dated 09.08.1974, the lease was extended from 01.01.1972 to 31.12.1986 with an option to the plaintiffs to renew the lease for further period of 10 years from 01.01.1987 to 31.12.1996. On the same day, the 1st defendant and the plaintiffs have entered into an agreement Ex.P4, wherein



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the 1st defendant agreed to give first option to the plaintiffs to purchase the property in the event of 1st defendant deciding to sell the property. In the said agreement Ex.P4, it is agreed that the lease is commencing from 01.01.1972 to 31.12.1986. The 1st defendant decided to sell the suit property in favour of the 2nd defendant without giving first option to the plaintiffs as per the terms of lease deed and agreement both dated 09.08.1974, Exs.P3 and P4.

10(i). From 30.04.1984, the 1st defendant and plaintiffs were corresponding with regard to sale of the property to the plaintiffs. The 1st defendant was requesting the plaintiffs to give their highest price for purchasing the suit property. In response to the said correspondence, the plaintiffs were requesting the 1st defendant to quote their price to sell the property, so that the plaintiffs can accept or reject the said offer. After considerable correspondence, the 1st defendant by its letter dated 11.07.1985 Ex.P15 informed the plaintiffs that the beneficiaries have decided not to sell the suit property. The 1st plaintiff by the letter dated 15.03.1985 exercised their option to renew the lease up to 31.12.1996. The 1st defendant by its letter dated 18.03.1995 acknowledged the renewal letter. The plaintiffs have



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mentioned these facts in their letter dated 11.06.1985 Ex.P13. The 1st defendant did not dispute this fact by letting in oral and documentary evidence.

10(ii). The 1st defendant by circular dated 29.04.1995 called for highest offer. The said circular was issued only to ascertain highest price for the suit property. Seven persons including plaintiffs and 2nd defendant participated in the tender process. Even before tenders were opened, the 1st plaintiff informed all, who were present, that the plaintiffs have pre-emptive right. When tenders were opened on 15.05.1995, the 2nd defendant's offer of Rs.35,00,000/- was highest. The 1st plaintiff informed the Trustees of the 1st defendant that the plaintiffs are willing to match the said offer. The Trustees of the 1st defendant informed the 1st plaintiff that matter will be placed before all the Trustees and revert back to the plaintiffs. Therefore, it is not correct to state that on 15.05.1995 itself, the offer of the 2nd defendant was accepted and confirmed. The plaintiffs did not hear anything from the 1st defendant with regard to the offer of the plaintiffs to match the price of Rs.35,00,000/- quoted by the 2nd defendant and the plaintiffs sent a letter dated 13.06.1995



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offering Rs.37,50,000/- per ground. Even though the plaintiffs offered Rs.2,50,000/- more than the offer of 2nd defendant, the 1st defendant refused to accept the same. Mere participation in the invitation to tender will not amount to waiver of their pre-emptive right. The 1st defendant after ascertaining the highest offer in the invitation to tender is bound to give first option to the plaintiffs. The right of pre-emption is right of substitution, even after execution of sale deed, the plaintiffs can offer the same price and the plaintiffs can be substituted.

10(iii). The learned Senior Counsel appearing for the appellants 1 & 3/plaintiffs 4 & 6 and the learned counsel appearing for the 2nd appellant/5th plaintiff supported the averments made in the plaint and documents marked and also denied the averments made in the written statements filed by the defendants 1 & 2 and the documents filed by the 1st defendant and submitted that the Trustees were unable to arrive at the price of the suit property, hence they issued circular dated 29.04.1995 Ex.P16 inviting tenders. In the circular dated 29.04.1995 inviting tenders to ascertain the price for suit property, the 1st defendant has mentioned that lease is in force till 31.12.1996. The learned



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Judge without properly considering the lease deed dated 09.08.1974 Ex.P3, letter dated 11.06.1985 Ex.P13 and circular dated 29.04.1995 Ex.P16, erroneously held that lease expired with effect from 31.12.1986. The lease and right of pre-emption of the plaintiffs were in force, when the 1st defendant issued circular inviting tenders.

10(iv). Once the highest offer is received, the same ought to have been offered to the plaintiffs as they have pre-emptive right. Only when the plaintiffs refused the same, the 1st defendant can approach the next person to sell the property. The 1st defendant failed to examine any of the Trustees, who signed Ex.D7 dated 15.05.1995. The same is only a xerox copy marked with objection. If really the offer of 2nd defendant was accepted on 15.05.1995 itself, there is no necessity to issue letter dated 18.05.1995 Ex.D8 informing the 2nd defendant that their offer was accepted and confirmed. Similarly, there is no necessity to execute an agreement of sale dated 30.06.1995 Ex.D9. In the stamp paper on which the said agreement of sale Ex.D9 was typed, there is no name of stamp vendor, serial number, date on which it was sold and name of the purchaser. Only xerox copy of the agreement of sale Ex.D9 was



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marked with objection. These documents are created after the plaintiffs issued letter dated 13.06.1995 Ex.P17 offering Rs.37,50,000/- per ground.

10(v). The right of pre-emption is recognised in Mohammedan law. Subsequently, pre-emptive right is recognised to be created by a contract. The pre-emptive right of the plaintiffs is as per the lease deed and agreement Exs.P3 and P4. The learned Judge failed to consider the pre-emptive right conferred on the plaintiffs by contract instead of pre-emptive right under Mohammedan law. The plaintiffs can exercise their pre-emptive right by offering to pay the price of the property or match the highest offer of a third party. When a third party like the 2nd defendant gives highest offer, the 1st defendant must offer the same to the plaintiffs first and only when the plaintiffs are not accepting the said price, the 1st defendant can accept offer of 2nd defendant. In the present case, the 1st defendant did not offer the price of the 2nd defendant to the plaintiffs, even though on 15.05.1995, the 1st plaintiff informed the 1st defendant and others that he is willing to match the offer of 2nd defendant. The second option available to the plaintiffs is that they are entitled to substitution, when the property was sold to 2nd defendant. The



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limitation to enforce the right of pre-emption by substitution is one year when the property was sold.

10(vi) The learned Senior Counsel appearing for the appellants 1 & 3/plaintiffs 4 & 6 and the learned counsel appearing for the 2nd appellant/5th plaintiff further contended that finding of the learned Judge that non payment of Rs.5,42,43,750/- by the plaintiffs is fatal to their claim in the suit is not correct. The Division Bench while directing the plaintiffs to deposit the amount to the 1st defendant made it clear that they are not deciding the issue on merits and claim of the plaintiffs has to be decided only in the suit. The learned Judge failed to see that under Order XX Rule 14 C.P.C., the payment of money by the plaintiffs/pre-emptors will arise only after drafting the decree. The Court at the time of decreeing the suit will fix the amount to be paid and time for making such payment. The 1st defendant filed R.C.O.P. for fixation of fair rent. The said R.C.O.P. went up to S.L.P. and in the S.L.P., the application filed by the 2nd defendant to implead themselves as party was dismissed by the Hon'ble Apex Court on 21.07.2014. Mere participation of the plaintiffs in the invitation to tender to ascertain the price will not amount to acquiescence and waiver of their right of pre-emption.



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10(vii) In a suit for for pre-emption, the plaintiffs need not plead and prove their readiness and willingness to pay the amount as required in the suit for specific performance. To enforce the contract of pre-emption, it is not required that the plaintiffs must be owner of the property. Mohammedan law recognised the right of pre-emption. Right of pre-emption can also be created by statute, customs and contract. In the present case, the right of pre-emption is created in the lease deed and agreement both dated 09.08.1974, Exs.P3 and P4.

10(viii) Ex.P16 circular is not a regular tender Notification. In the tender Notification, no date of finalisation of tender and mode of payment of sale consideration were mentioned. It was also mentioned that highest offer will be at the discretion of the Trustees. In the tender Notification Ex.P16, it was clearly stated that only to ascertain highest offer, the same was issued.

10(ix) Ex.D7 is only a xerox copy marked with objection. The contention of the defendants 1 & 2 that the offer of 2nd defendant was accepted and confirmed by Ex.D7 is not correct. In the said Exhibit, the word



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'Pending' has been corrected as 'Tendring'. The finding of the learned Judge

that the plaintiffs did not object to the contents of Ex.D7 is contrary to the materials on record. Exs.D8 and D9 marked by 1st defendant were created after receiving Ex.P17 letter of the plaintiffs dated 13.06.1995. Ex.D9, the sale agreement dated 30.06.1995 is also xerox copy. Stamp paper of the agreement did not bear the stamp vendor name, date of stamp paper and serial number of the stamp paper. Though the said Ex.D9/sale agreement is dated 30.06.1995, in the sale deed, they referred the date as 13.06.1995. In view of letter Ex.P17 of plaintiffs dated 13.06.1995, Exs.D7 to D9 will not defeat the right of pre-emption created in favour of the plaintiffs. Secondary option available to the plaintiffs is right of substitution. As per Article 97 of the Limitation Act, time limit granted to the plaintiffs is one year from the date of sale in favour of the 2nd defendant. Section 64 of the Sale of Goods Act and also Tender Transparency Act are not applicable to the facts of the present case as 1st defendant issued only invitation to tender and not a tender for sale of immovable property.

10(x) The alleged waiver of pre-emption right cannot be true, because the 1st defendant has failed to give the first option to plaintiffs after



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ascertaining the highest price. It is settled law that the acquiescence will not confer any title. If in law, a person does not acquire title, the same cannot be vested only by reason of acquiescence or estoppel on the part of other. The right of pre-emption cannot be waived by any conduct or acquiescence. The waiver of the right should be explicit. A decree of specific performance has to be drafted under Order XX Rule 12A, whereas decree of pre-emption is drafted under Rule XX Rule 14 of C.P.C. The 1st defendant failed to prove that they gave option to the plaintiffs after offer from the 2nd defendant.

10(xi) Under the compromise decree, the right over the superstructure namely, Casino Theatre was granted in favour of the 1st defendant. For the first time, the said right was created under the compromise and hence, the same is required registration under the provisions of Section 17(2)(vi) of Registration Act. Due to want of registration of compromise decree, no title to the superstructure is passed on to the 1st defendant. In lease deed dated 09.08.1974 Ex.P3, there is a recital that the superstructure now belongs to lessor absolutely. Such a mode of transfer of interest in respect of immovable property is not permissible and there could be no conveyance by mere



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reference in the lease agreement. The plaintiffs' right over the superstructure never extinguished in view of the said statutory provisions under Section 17(2)(vi) of Registration Act and prayed for allowing the appeal.

10(xii) The learned Senior Counsel appearing for the appellants 1 & 3/plaintiffs 4 & 6 and the learned counsel appearing for the 2nd appellant/5th plaintiff filed M.P.No.1 of 2014 in present O.S.A.No.326 of 2011 prayed for granting leave to produce the documents annexed herewith such as (1) compromise decree made in C.S.No.69 of 1972 on the file of this Court dated 09.08.1974, (2) letter from plaintiff to 1st defendant dated 15.03.1985, (3) letter from the 1st defendant to plaintiff dated 18.03.1985, (4) letter from the plaintiff to the 1st defendant confirming the renewal of lease and (5) Statement of account of the plaintiff dated 04.01.2002 & 30.06.2002 and mark the same as additional evidence on the plaintiffs' side.

11.In support of his contentions, the learned Senior Counsel appearing for the appellants 1 & 3/plaintiffs 4 & 6 relied on the following judgments:

(i) (1996) 9 SCC 376 (Vijayalakshmi (Smt) vs B. Himantharaja Chetty);



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"16..... 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.

17. 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 pre-condition that the proposed or actual disposal would be only by way of sale and no other, and that too if made to a stranger."

(ii) (2019) 19 SCC 767 (Barasat Eye Hospital vs Kaustabh

Mondal);

"11. In view of the aforesaid elucidation, it was opined that the pre-emptor has two



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rights: first, the inherent or primary right, i.e., right for the offer of a thing about to be sold; and second, the secondary or remedial right to follow the thing sold. The secondary right of preemption is simply a right of substitution, in place of an original vendee and the pre-emptor is bound to show not only that his right is as good as that of that vendee, but that it is superior to that of the vendee."

(iii) AIR 1954 SC 417 (Audh Behari Singh vs Gajadhar Jaipuria);

"23. The correct legal position must be that when a right of pre-emption rests upon custom it becomes the lex loci or the law of the place and affects all lands situated in that place irrespective of the religion or nationality or domicile of the owners of the lands except where such incidents are proved to be a part of the custom itself."

(iv) 2020 (15) SCC 605 (Tilak Raj Bakshi vs Avinash Chand

Sharma);

"53. Now, if the Clause is broken down, it involves the following steps. A brother announces his desire to sell his share. He seeks written concurrence of the other brothers. A written concurrence is given. Then,



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the next step is reached. The selling brother offers to sell it to the other brothers. If they take the offer and the price is agreeable to the parties, sale follows. If the brothers do not wish to buy, the sale to the strangers is permitted. In the above process, in the facts of this case, it is clear that the Appellant and the first Defendant, without insisting on the written concurrence, went to the stage of offer to brothers. The Appellant has led the first Defendant to assume, even without a written concurrence, that the sale is permitted. The first Defendant has acted clearly on the basis that the requirement of the first stage was not being insisted upon. Otherwise, he could have certainly obtained the concurrence. Having thus acted in the matter, and the second stage having been reached, when for reasons where the fault cannot be attributed to the first Defendant, the offer, which the Appellant himself describes as reasonable, was not seized upon by the Appellant, the third stage emerged. This meant that it became open to the first Defendant to sell to a stranger and which is what he did by it selling it to the second Defendant. Even proceeding to enforce the clause, we find that the Appellant is clearly estopped from setting up the plea of absence of written consent of the brothers. It would be inequitable, particularly when we are considering the matter



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in an appeal sourced Under Article 136 of the Constitution of India.”

(v) AIR 1958 SC 838 (Bishan Singh vs Khazan Singh);

“21.....The right of pre-emption can be effectively exercised or enforced only when the preemptor has been substituted by the vendee in the original bargain of sale. A conditional decree, such as that with which we are concerned, whereunder a preemptor gets possession only if he pays a specified amount within a prescribed time and which also provides for the dismissal of the suit in case the condition is not complied with, cannot obviously bring about the substitution of the decree-holder in place of the vendee before the condition is complied with. Such a substitution takes effect only when the decree-holder complies with the condition and takes possession of the land.”

(vi) AIR 1925 Lah 178 (Vir Singh and another vs. Nihal Chand and others);

“The preemptor's action in taking on lease a portion of land sold, cannot be treated as acquiescence in the sale itself. Similarly the preemptor's presence throughout certain partition proceedings initiated by vendees does not estop from bringing a suit for preemption.”



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(vii) AIR 1939 Lah 517 (Alam Sher Khan vs Allah Din);

"Lastly, this Court in Ahmad Jan v. Kishen Chand A.I.R.(1919) Lah. 368 held that failure of a person-entitled to pre-empt to outbid the purchaser at an auction sale did not amount to waiver.

It is clear that the decisions of this Court are practically all against the view that a pre-emptor is bound to bid at an auction sale and that if he does not do so, he loses his right of pre-emption, the principle being that he is entitled to pre-empt the property at the price fixed and paid, and is not bound to make that price higher by competitive bidding."

(viii) AIR 1966 Ker 260 (ChinnaKunji vs KesavanKochukrishnan);

"8.The question then is whether the right has been lost to the plaintiffs on account of any waiver or acquiescence on their part.

"It is true that the right (of pre-emption) becomes enforceable only when there is a sale. We agree with Mr. Justice Mahmood that the sale is a condition precedent to its enforceability."

9.Again in Radhakrishnan Laxminarayan v. Shridhar Ram Chandra AIR 1960 SC 1368 it is held:



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"Under Section 54 of the Transfer of Property Act a contract for sale does not of itself create any interest in or charge on immovable property and consequently the contract in the instant case created no interest in favour of the vendee and the proprietary title did not validly pass from the vendors to the vendee and until that was completed no right to enforce pre-emption arose."

10. In Ram Sarup v. Munshi, AIR 1963 SC 553 the Supreme Court held "pre-emption is the substitution of the pre-emptor in place of the vendee". That cannot be claimed before a vendee has arrived, that is to say, before a sale has taken place.

11. Nor can a knowledge of the impending court-sale and indifference to bid at the court-sale be bar against the enforcement of preemption after the sale ILR 5 Mad. 198 was a case from Malabar where an otti-mortgagee was entitled to pre-emption in purchase of the equity of redemption. The plaintiff was an auction purchaser of the mortgagor's (jenmi's) rights who sued to redeem an otti-mortgage. The mortgagee claimed pre-emption. The plaintiff contended that "as public notice of the intended sale of the jenmi's interest was given, and as the defendant might have come in and bid, no further option of pre-emption is necessary, and that as defendant neglected to buy, he must submit to be redeemed. It was held that the pre-emptor "should not be driven to give any fancy auction price at an auction. He



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is entitled to the advantage which his position gives him, to be fully informed what price he is to pay before he makes up his mind to buy."

(ix) AIR 1919 Lah 368 (Ahmad Jan and another vs. Kishen Chand

and others);

"5. There is no reason why they should bid at the auction, and in this way enhance the price. We see no reason why they should not have stood by and waited to see what the actual price obtained was, and then have made their claim to preempt. As a matter of fact this is what they actually did, for a few days after the sale they sent a notice to the purchaser offering to pay him the actual price. We hold that there has been no waiver in the present case. The existence of the custom of pre-emption has not been admitted in this case, and there has been no decision on this point by either of the lower Courts. We therefore accept the appeal, and setting aside the orders of the lower Courts remand the case to the Court of first instance for re-decision on the merits. Stamp in this and the lower appellate Court will be refunded and other costs will be costs in the cause."



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(x) AIR 1915 All 51 (1) (Indraj vs Brother Clement, Missionary);

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"Reliance is placed upon the case of Kanhai Lal v. Kalka Prasad (1905) I.L.R. 27 All. 670. In that case no doubt, the Court held that the vendor was bound, when he had concluded a definite arrangement with a stranger to offer the property to the person entitled to pre-empt although he had previously refused to purchase. It does not appear very clearly from the report what was the custom found to exist. We think it can hardly be contended that where the custom is that the first offer must be made to the co-sharers the vendor must, after offering the property to the co-sharers, find a stranger willing; to buy, conclude a bargain with him, and then return to his co-sharers and offer the property to them. Surely in a case like the present the vendor has complied with the custom if he has informed the pre-emptor of his desire to sell and ascertained from him either that he does not wish to buy or the price beyond which he is not willing to go. It would almost seem that a custom which required the vendor to do more than this would be an unreasonable custom. Of course the vendor must give clear information of his intention to sell, and we are very far, from saying that if the pre-emptor expressed his willingness to purchase at a specific price



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the vendor would be justified in selling the property for practically the same price to a stranger without first informing the pre-emptor. In other words the vendor must act bona fide and the pre-emptor must have a fair opportunity of purchasing the property. Under the circumstances of the present case we think the view taken by the court below was correct and dismiss the appeal."

(xi) 2002 (2) CTC 72 (Kulasekaran Chettiar & Ors vs Meenakshi

Ammal & Anr);

"29.... As mentioned already, the burden is on the defendants to establish that the plaintiff had waived her right of pre-emption. Unfortunately, defendants did not raise any such plea in the written statement. In the written statement it is only stated that the plaintiff is estopped from claiming right conferred under Sec.22 of the Act, as the plaintiff had filed the earlier suit only for partition and so she is barred under Order II, Rule 2 of C.P.C., and her claim was barred by res judicata. Even in the Memorandum of Grounds filed in this Second appeal, no such plea regarding waiver has been raised. The defendants have to not only plead and establish such implied relinquishment, but also the said relinquishment was made knowing the plaintiff's



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right conferred under Sec.22 of the Act at the time of making such relinquishment, though the plaintiff knew about the sale by the 1st defendant. Merely because the plaintiff filed O.S. No. 112/86 only for partition, it cannot be said that she had relinquished her right conferred under Sec.22 of the Act. As held by the Apex Court, it cannot be presumed that plaintiff knew her right conferred under Sec.22 of the Act. The defendants have not discharged their burden to establish that the plaintiff had waived her right, that too, knowing the same, and so, the courts below are correct in accepting the case of the plaintiff and decree the same."

(xii) 1974 (2) SCC 70 (State of Punjab vs Amar Singh);

"33..... But where a compromise goes against a public policy prescription of a statute or a mandatory direction to the Court to decide on its own certain foundation facts, a razi cannot operate to defeat the requirement as specified or absolve the court from the duty. The resultant order will be ineffective. After all by consent or agreement, parties cannot achieve what is contrary to law and a decree merely based on such agreement cannot furnish a judicial amulet against statutory violation.



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34.... The core principle or ratio that is revealed in these cases is that in cases where a statute, embodies a public policy and consequentially prescribes the presence of some conditions for grant of reliefs, parties cannot by-pass the law by the exercise of a consent decree or order, and mere judicial imprimatur may not validate such decree or order where the court or tribunal is not seen to have applied its mind to the existence of those conditions and reached its affirmative conclusion thereon."

(xiii) AIR 1959 SC 689 (Waman Shriniwas Kini vs Ratilal

Bhagwandas & Co.);

"13... Assuming that to be so and proceeding on the facts found in this case the plea of waiver cannot be raised because as a result of giving effect to that plea the Court would be enforcing an illegal agreement and thus contravene the statutory provisions of s. 15 based on public policy and produce the very result which the statute prohibits and makes illegal."

(xiv) 2007(12) SCC 27 (Kamakshi Builders vs Ambedkar

Educational Society);

"23. Acquiescence on the part of



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Respondent No. 3, as has been noticed by the High Court, did not confer any title on Respondent No. 1. Conduct may be a relevant fact, so as to apply the procedural law like estoppel, waiver or acquiescence, but thereby no title can be conferred.

24. It is now well-settled that time creates title.

25. Acquisition of a title is an inference of law arising out of certain set of facts. If in law, a person does not acquire title, the same cannot be vested only by reason of acquiescence or estoppel on the part of other."

(xv) 1982 (1) SCC 223 (Chhanganlal Keshavlal Mehta vs Patel

Narandas Haribhai);

"21. The difference between admission and estoppel is a marked one. Admissions being declarations against an interest are good evidence but they are not conclusive and a party is always at liberty to withdraw admissions by proving that they are either mistaken or untrue. But estoppel creates an absolute bar.

22. It may be pointed out that estoppel deals with questions of facts and not of rights. A man is not estopped from asserting a right which he had said that he will not



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assert. It is also a well known principle that there can be no estoppel against a statute."

(xvi) AIR 1984 Mad 47 (Munavar Hussain Sahib vs E. R.

Narayanan);

"13. The question whether the parties can contract out of the Act or waive rights available under the Act may next be considered. We may observe that in regard to waiver there is no clear or specific plea by the appellants and therefore, rightly, the matter was not dealt with by the lower Court. Section 12 of the Act is relevant in this connection and that provides that nothing in any contract made by a tenant shall take away or limit his rights under the Act....

The Act had been passed with a view to give protection to tenants, who in certain areas, had put up buildings in the lands of others in the hope that they would not be vacated so long as they paid the fair rent for the lands. If this is borne in mind, the reason for making a provision like section 12 of the Act is clear. That provision was specifically enacted to prevent tenants contracting out of the rights and benefits conferred by the Act or even limiting such rights in any manner. Taking the aforesaid aspects into consideration, we



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are of the view that the tenant cannot contract out of the provisions of the Act and agree for a periodical extension of time under section 12 of the Act as by such a course, serious inroads will be made into the rights of the tenant available under the Act. We have earlier noticed how the appellants had not whispered anything about waiver at all. We have therefore no hesitation in rejecting the contention of the learned Counsel for the appellants."

(xvii) 1989 (1) SCC 64 (N. M. Ponnaiah Nadar vs Kamalakshi

Ammal);

"10. We may now refer to Halsbury's Laws of England and Hill and Redman's Laws of Landlord and Tenant and a decision of this Court for the exposition of law on the question whether a mere increase of rent would affect the terms of an existing tenancy so as to conclude a surrender of existing rights and regrant of fresh rights. The following passage occurs in Halsbury's Laws of England in para 448 page 354 (Fourth edition) Volume 27:

448. Variation of Terms of Leases.

Where the terms of the relationship between the landlord and the tenant are altered by agreement, it is necessary to decide whether the alteration amounts to the creation of a new tenancy upon the altered terms, and thus of necessity the surrender by operation of law of the previous tenancy, or whether the alteration merely continues the previous tenancy in a



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varied form.

13. One important factor which the High Court has failed to notice is that the City Tenants' Protection Act is a beneficial legislation and was enacted for the purpose of affording protection to tenants who put up buildings on lands of others taken on lease by them. In order to ensure the protection afforded to tenants by the Act is not lost, it has been provided under Section 12 that "nothing in any contract made by the tenant shall take away or limit the rights under this Act". By reason of this provision an obligation is canon the courts to scrutinize the materials very carefully whenever a lessee entitled to the benefits of the Act is sought to be deprived of them by a plea that there was a surrender of rights under the old lease and re-grant of tenancy rights under a new lease and to give acceptance to such a plea only when the evidence is clear and of a compulsive nature. Otherwise, the benefit conferred on tenants by the Act would be rendered nugatory by the manipulations of scheming lessors."

(xviii) 1995 (5) SCC 709 (Bhoop Singh vs Ram Singh Major);

"18. The legal position qua Clause (vi) can, on the basis of the aforesaid discussion, be summarised as below :



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(1) Compromise decree if bona fide, in the sense that the compromise is not a device to obviate payment of stamp duty and frustrate the law relating to registration, would not require registration. In a converse situation, it would require registration.

(2) If the compromise decree were to create for the first time right, title or interest in immovable property of the value of Rs. 100 or upwards in favour of any party to the suit, the decree or order would require registration.

(3).....

(4).....

(5) If the property dealt with by the decree be not the "subject matter of the suit or proceeding", Clause (vi) of Sub-section (2) would not operate, because of the amendment of this clause by Act, 21 of 1929, which has its origin in the aforesaid decision of the Privy Council, according to which the original clause would have been attracted, even if it were to encompass property not litigated."

(xix) 2008 (13) SCC 102 (K. Raghunandan vs Ali Hussain Sabir);

"24. A plain reading of the said provision clearly shows that a property which is not the subject matter of the suit or a proceeding would come within the purview of exception contained in Clause (vi) of Sub-section (2) of



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Section 17 of the Act. If a compromise is entered into in respect of an immovable property, comprising other than that which was the subject matter of the suit or the proceeding, the same would require registration. The said provision was inserted by Act 21 of 1929."

(xx) 2015 (3) SCC 164 (Phool Patti vs Ram Singh);

"29.... However, the self acquired property of Bhagwana that is 20 kanals, therefore, in view of the law laid down in Bhoop Singh the gift of 20 kanals of land by Bhagwana in favour of Ram Singh, notwithstanding the decree in the first suit, requires compulsory registration since it created, for the first time, right, title or interest in immovable property of a value greater than Rs. 100/- in favour of Ram Singh."

(xxi) 2009(11) SCC 18 (Commr of Customs (Preventive) vs Aafloat

Textiles(I) (P) Ltd);

"13. It was for the buyer to establish that he had no knowledge about the genuineness or otherwise of the SIL in question. The maxim caveat emptor is clearly applicable to a case of this nature.

15. "Caveat emptor is the ordinary rule in



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contract. A vendor is under no duty to communicate the existence even of latent defects in his wares unless by act or implication he represents such defects not to exist." "

(xxii) 2000 (6) SCC 402 (R.K.Mohd. Ubaidullah vs Hajee C. Abdul

Wahab);

"13.... In the ordinary course a reasonable prudent person placed in the position of the plaintiff would not have failed to mention about the existence of the prior agreement in his favour particularly when he is using the very same godown as a tenant under the first defendant for the last 20 years prior to the filing of the suit. Similarly the defendants 2 to 4 intending to purchase the property in possession of a tenant would not have failed to make inquiry as to any further interest in relation to possession or title of the plaintiff over the suit property. It is not uncommon that where a tenant is in possession of the property, that too for a long time, using it for business purpose would always like to purchase the property getting all advantages if offered for sale. Normally the landlord or owner of the property would also be interested in selling the property to a person in possession if a reasonable price is given to



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avoid litigation and to have smooth transaction. In certain statutes even provisions are made to give first option to a tenant to purchase the property. In such situation the defendants 2 to 4 would have made inquiry with the plaintiff about the nature of his possession and title under which he is in possession on the date of sale deed (Exhibit B-1) executed in their favour. If they had made inquiry plaintiff would have certainly revealed about Exhibit A-3 the prior agreement in his favour. If such inquiry was not made it only means that the defendants 2 to 5 willfully abstained from making such inquiry or they grossly neglected to do so."

(xxiii) 1971 (1) SCC 757 (Ahmedabad Municipal Corpn. vs Haji

Abdulgafur Haji Hussenbhai);

"3. To begin with it was contended that there is no warranty of title in an auction sale. This general contention seems to us to be well-founded because it is axiomatic that the purchaser at auction sale takes the property subject to all the defects of title and the doctrine caveat emptor (let the purchaser beware) applies to such purchaser."



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(xxiv) 2007 (5) SCC 730 (Yashoda vs K.Shobha Rani);

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"7. Secondary evidence, as a general rule is admissible only in the absence of primary evidence. If the original itself is found to be inadmissible through failure of the party, who files it to prove it to be valid, the same party is not entitled to introduce secondary evidence of its contents.

8.Essentially, secondary evidence is an evidence which may be given in the absence of that better evidence which law requires to be given first, when a proper explanation of its absence is given. The definition in Section 63 is exhaustive as the Section declares that secondary evidence "means and includes" and then follow the five kinds of secondary evidence."

(xxv) 2013 (10) SCC 758 (Kaliya vs State of M. P);

"13. Section 65(c) of the Act 1872 provides that secondary evidence can be adduced relating to a document when the original has been destroyed or lost, or when the party offering evidence of its contents cannot, for any other reason, not arising from his own default, or neglect, produce it in reasonable time. However, the secondary evidence of an ordinary document is admissible only and only when the party desirous of admitting it has



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proved before the court that it was not in his possession or control of it and further, that he has done what could be done to procure the production of it. Thus, the party has to account for the non-production in one of the ways indicated in the section."

(xxvi) 1975 (4) SCC 664 (Ashok Dulichand vs Madahavlal Dube);

"7. After hearing the learned counsel for the parties, we are of the opinion that the order of the High Court in this respect calls for no interference. According to clause (a) of section 65 of the Indian Evidence Act, secondary evidence may be given of the existence, condition or contents of a document when the original is shown or appears to be in the possession or power of the person against whom the document is sought to be proved, or of any person out of reach of, or not subject to, the process of the Court, or of any person legally bound to produce it, and when, after the notice mentioned in section 66, such person does not produce it."

12.Learned Senior Counsel appearing for the 2nd defendant submitted that the 1st plaintiff did not come forward to give evidence. The 6th plaintiff, Yasmin Gupta, who is Power of Attorney, was examined as P.W.1. P.W.1 was



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not present on 15.05.1995 and her evidence is only hear say evidence. The plaintiffs would have filed application for appointment of Advocate Commissioner to examine the 1st plaintiff on commission. An adverse inference has to be taken for non-examination of the 1st plaintiff. The suit filed by the plaintiffs is pre-mature. On the date of filing of suit, the 1st defendant did not execute any sale deed in favour of 2nd defendant and sale deed was executed only on 09.11.2006. The right of pre-emption is a weak right, it can be defeated by legitimate means by both the vendor and vendee. On the date of filing of suit, no remedy was available to the plaintiffs and on the date of execution of sale, pre-emptive right was not in force.

12(i) The plaintiffs were given three opportunities to purchase the suit property, but they did not avail the same. First opportunity was given in the year 1984, when the 1st defendant requested the plaintiffs to give their offer to purchase the property. The plaintiffs did not offer any price, but was insisting the 1st defendant to quote the price. Second opportunity was given to the plaintiffs, when 1st defendant has given an advertisement to sell the suit property. The 1st plaintiff participated in the tender process on 15.05.1995. On



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that day, he did not exercise his option, but only after a month, wrote a letter about exercising option. This aspect was elaborately considered by the learned Judge in the impugned judgment. Third opportunity was given to the plaintiffs, when the Division Bench in O.S.A.Nos.167 of 1996 & 135 of 1998, directed the plaintiffs to deposit a sum of Rs.5,42,43,750/-. But the plaintiffs failed to avail the said opportunity.

12(ii) The suit filed by the plaintiffs is only a suit for specific performance for enforcing the right of pre-emption. From the averments in the plaint and relief sought for in the suit, the suit is only for specific performance to enforce the contract of pre-emption. The only remedy available to the plaintiffs is to file suit under Sections 4, 10 and 15 of Specific Relief Act, 1963. The plaintiffs in C.M.Ps. filed for clarification mentioned two cheques for US dollars one lakh each, totalling about Rs.1 Crore, but no explanation was given why the two cheques were not deposited as ordered by the Division Bench. Nothing has been stated about the deposit of balance amount. In view of above facts, the plaintiffs failed to prove their readiness and willingness to get the sale deed executed in their favour. There is no



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remedy available to enforce their pre-emptive right conferred under contract.

The judgment relied on by the counsel appearing for the appellants/plaintiffs reported in **AIR 1965 PH 346 (Balbir Singh and others v. Kulwant Singh and others)** does not militate against the fact that the suit is one for specific performance.

12(iii) If the case of the plaintiffs is to enforce the contract of pre-emption, the said right is personal right of the 1st plaintiff and on his death, the said right extinguishes. The legal heirs are not entitled to relief of pre-emption. The plaintiffs have stated in paragraph 4 of the plaint that as per the family arrangement, all the properties have become property of the 1st plaintiff.

12(iv) The learned Judge in paragraphs 10.45 to 10.65 of the impugned judgment has considered various judgments on this aspect and rejected the claim of the plaintiffs. The lease deed Ex.P3 and agreement Ex.P4 were executed for the same transaction. Both has to be read together. When the lease expired on 31.12.1996, the right of pre-emption extinguished on that



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date and from 01.01.1997, the plaintiffs are only tenants on month to month basis and are not entitled to right of pre-emption as held by the learned Judge in paragraph 10.74 of the impugned judgment.

12(v) The plaintiffs are not entitled to right of pre-emption as they are not owners of superstructure, the land and adjoining property. As per the compromise decree, the 1st defendant became owner of superstructure and C.S.No.886 of 1992 filed by the plaintiffs was dismissed for default. The application filed to restore the suit and O.S.A.Nos.120 and 121 of 1999 filed were dismissed. In view of Order IX Rule 9 C.P.C., the plaintiffs are not entitled to re-agitate the same issue in the present suit. The compromise decree passed on 05.11.1973 in C.S.No.69 of 1972 (Originating Summons) is binding on the parties, until the same is set aside by a competent Court. The provisions of City Tenants Protection Act has no relevance to the present suit. It will apply only in a suit for ejectment. In the Rent Control proceedings filed by 1st defendant for fixation of fair rent, it was held that 1st defendant is owner of superstructure. This issue was taken upto Hon'ble Apex Court and the same was confirmed.



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12(vi) The plaintiffs have lost their right of pre-emption on account of acquiescence and waiver and are estopped from agitating the same. In Ex.P16, the circular dated 29.04.1995, it is clearly mentioned that it is for “Sale of Madras Properties” and to “Conclude the Sale in the best interest of the trust to augment the income of the beneficiaries”. In view of the same, it is not correct to state that Ex.P16 circular is only an invitation to tender to find out the appropriate market price to the suit property. The plaintiffs are not entitled to let in any evidence on the contents of written document, unless it falls within the exceptions as mentioned in Section 91 and 92 of the Indian Evidence Act, 1972. The 1st plaintiff took back the cheque for Rs.25,00,000/-, which shows that he has acquiesced in the auction sale, without any demur. The 1st plaintiff did not make any endorsement in Ex.D7 that he has taken back the cheque without prejudice to his right of pre-emption. The stand of the plaintiffs in Ex.P17 dated 13.06.1995 is unbelievable.

12(vii) The auction held on 15.05.1995 was concluded on the same day. Unless the Auctioning Authority and the Confirming Authority are different and auction should not be completed on the same day. Once auction



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sale is confirmed, the same can be set aside only on the ground of fraud or collusion. Ex.D8 letter dated 18.05.1995 and Ex.D9 agreement dated 30.06.1995 are only re-iteration of confirmation of auction on 15.05.1995. The contention of the plaintiffs that Exs.D7 to D9 are shady, concocted, fabricated are base less. The Trust is a private Trust where the beneficiaries are from the same family, who wanted to sell their private property. Hence, there is no question of dishonesty or need for fabricating or concocting documents. There is no doubt that the sale is for the benefit of the beneficiaries.

12(viii) The plaintiffs did not confront D.W.1 with any specific question that Ex.D7 was fabricated. The evidence of D.W.1 has to be read as a whole. The statement of D.W.1 that he has signed Ex.D7 is only a typographical error as the word 'not' has been left out. The 2nd defendant is a bonafide purchaser for valuable consideration. Only after dismissal of clarification application, the 1st defendant has executed the sale deed dated 09.11.2006 Ex.P31. The plaintiffs did not have any pre-emptive right and prayed for dismissal of the appeal.



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13. In support of his contentions, the learned Senior Counsel appearing for the 2nd defendant relied on the following judgments:

(i) **2001 (5) SCC 101 [Her Highness Maharani Shantidevi**

P.Gaikwad vs Savjibhai Haribhai Patel & Ors] ;

"25. In S. Chattanatha Karayalar v. The Central Bank of India & Ors. [(1965) 3 SCR 318], the observations of Moulton, L.J. in Manks v. Whitley were quoted and are relevant while dealing with the question of interpretation of several deeds which form part of same transaction. The observations read as follows :

"Where several deeds form part of one transaction and are contemporaneously executed they have the same effect for all purposes such as are relevant to this case as if they were one deed. Each is executed on the faith of all the others being executed also and is intended to speak only as part of the one transaction, and if one is seeking to make equities apply to the parties they must be equities arising out of the transaction as a whole."

26. The agreement and power contemplate two stages for the parties to take steps



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required of them. Certain steps are required to be taken by the plaintiff prior to the grant of declaration under Section 21 and before he is put into possession and certain steps after such grant and on being put into possession. The plaintiff is required to prepare a scheme in conformity with Section 21 at his cost and to file on behalf of the owner a declaration in regard to the said property before the competent authority within the prescribed period. The original defendant No.1 is required to sign relevant papers, applications, plans, drawings etc. as and when required by the plaintiff for the purpose of declaration and inquiries contemplated by Section 21(1) of the ULC Act. On making of declaration, as per clause (4), original defendant No.1 is required to deliver possession of the land to the plaintiff for execution of the scheme and construction in terms thereof. The plaintiff is authorised to recover the price of the land as may be determined by the competent authority and/or the State Government from their prospective members in the scheme; and is also entitled to receive deposits from the members and obtain loans from banks and other financial institutions and/or individuals for financing the scheme. Likewise, in the power of attorney also, the plaintiff has been authorised to take certain steps on behalf of the owner before the grant of declaration under Section 21 and being



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put into possession and certain steps after being put into possession. It is correct, as contended by Mr. Dhanuka, that these documents form part of same transaction. These documents have to be read together with a view to find out the manifest intention of the parties. It may, however, be noticed that affidavit-cum-declaration dated 10th February, 1988 was executed only by original defendant No.1 for the purpose of filing it before the competent authority and it reiterates the agreement and the power. By execution of this document it was neither intended to confer any additional rights in favour of the plaintiff nor to place any restriction on original defendant no.1 which was not envisaged by the agreement."

(ii) 1969 (3) SCC 445 [Jagad Bandhu Chatterjee vs Nilima Rani &

Others];

"5. In India the general principle with regard to waiver of contractual obligations is to be found in s. 63 of the Indian Contract Act. Under that section it is open to a promise to dispense with or remit, wholly or in part, the performance of the promise made to him or he can accept instead of it any satisfaction which he thinks fit. Under the Indian law neither consideration nor an agreement would be



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necessary to constitute waiver. This Court has already laid down in Waman Shrinivas Kini v. Ratilal Bhagwandas & Co.(1) that waiver is the abandonment of a right which normally everybody is at liberty to waive. "A waiver is nothing unless it amounts to a release. It signifies nothing more than an intention not to insist upon the right." It is well known that in the law of preemption the general principle which can be said to have been uniformly adopted by the Indian courts is that acquiescence in the sale by any positive act amounting to relinquishment of a pre-emptive right has the effect of the forfeiture of such a right. So far as the law of preemption is concerned the principle of waiver is based mainly on Mohammedan Jurisprudence. The contention that the waiver of the appellant's right under s. 26F of the Bengal Tenancy Act must be founded on contract or agreement cannot be acceded to and must be rejected."

(iii) 2008 (9) SCC 299 [Valji Khimji & Co vs O.L. Official

Liquidator of Hindustan Nitro Product (Gujarat) Ltd. & Others];

"28. If it is held that every confirmed sale can be set aside the result would be that no auction sale will ever be complete because always somebody can come after the auction or



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its confirmation offering a higher amount. It could have been a different matter if the auction had been held without adequate publicity in well-known newspapers having wide circulation, but where the auction sale was done after wide publicity, then setting aside the sale after its confirmation will create huge problems. When an auction sale is advertised in well-known newspapers having wide circulation, all eligible persons can come and bid for the same, and they will be themselves be to blame if they do not come forward to bid at the time of the auction. They cannot ordinarily later on be allowed after the bidding (or confirmation) is over to offer a higher price. Of course, the situation may be different if an auction sale is finalized say for Rs.1 crore, and subsequently somebody turns up offering Rs. 10 crores. In this situation it is possible to infer that there was some fraud because if somebody subsequently offers 10 crores, then an inference can be drawn that an attempt had been made to acquire that property/asset at a grossly inadequate price. This situation itself may indicate fraud or some collusion. However, if the price offered after the auction is over which is only a little over the auction price, that cannot by itself suggest that any fraud has been done.

29. In the present case we are satisfied



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that there is no fraud in the auction sale. It may be mentioned that auctions are of two types - (1) where the auction is not subject to subsequent confirmation and (2) where the auction is subject to subsequent confirmation by some authority after the auction is held.

30. In the first case mentioned above, i.e. where the auction is not subject to confirmation by any authority, the auction is complete on the fall of the hammer, and certain rights accrue in favour of the auction purchaser. However, where the auction is subject to subsequent confirmation by some authority (under a statute or terms of the auction) the auction is not complete and no rights accrue until the sale is confirmed by the said authority. Once, however, the sale is confirmed by that authority, certain rights accrue in favour of the auction purchaser, and these rights cannot be extinguished except in exceptional cases such as fraud."

(iv) 2004 (1) SCC 287 [Rafique Bibi (Dead) by LRs vs Syed

Waliuddin (Dead) by LRs. and Ors];

"7. Two things must be clearly borne in mind. Firstly, the Court will invalidate an order only if the right remedy is sought by the right person in the right proceedings and



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circumstances. The order may be 'a nullity' and 'void' but these terms have no absolute sense; their meaning is relative, depending upon the Court's willingness to grant relief in any particular situation. If this principle of illegal relativity is borne in mind, the law can be made to operate justly and reasonably in cases where the doctrine of ultra vires, rigidly applied, would produce unacceptable results. (Administrative Law, 8th Edition, 2000, Wade and Forsyth, p. 308). Secondly, there is a distinction between mere administrative order and the decrees of Courts, especially a superior Court. The order of a superior Court such as the High Court, must always be obeyed no matter what flaws it may be thought to contain. Thus a party who disobeys a High Court injunction is punishable for contempt of Court even though it was granted in proceedings deemed to have been irrevocably abandoned owing to the expiry of a time limit. (Ibid, p. 312.)

8. A distinction exists between a decree passed by a Court having no jurisdiction and consequently being a nullity and not executable and a decree of the Court which is merely illegal or not passed in accordance with the procedure laid down by law. A decree suffering from illegality or irregularity of procedure, cannot be termed inexecutable by the executing



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Court; the remedy of a person aggrieved by such a decree is to have it set aside in a duly constituted legal proceedings or by a superior Court failing which he must obey the command of the decree. A decree passed by a Court of competent jurisdiction cannot be denuded of its efficacy by any collateral attack or in incidental proceedings.

9. In Vasudev Dhanjibhai Modi v. Rajabhai Abdul Rehman & Ors., [1970] 1 SCC 670, it has been held :-

"When the decree is made by a Court which has no inherent jurisdiction to make it, objection as to its validity may be raised in an execution proceeding if the objection appears on the face of the record. But where the objection as to jurisdiction of the Court to pass the decree does not appear on the face of the record and requires examination of the questions raised and decided at the trial or which could have been but have not been raised, the executing Court will have no jurisdiction to entertain an objection as to the validity of the decree even on the ground of absence of jurisdiction."

(v) 2016 (12) SCC 288 [Muddasani Venkata Narasaiah vs

Muddasani Sarojana];

"15. Moreover, there was no effective cross-examination made on the plaintiffs witnesses with respect to factum of execution of sale deed, PW.1 and PW-2 have not been cross



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examined as to factum of execution of sale deed. The cross-examination is a matter of substance not of procedure one is required to put ones own version in cross-examination of opponent. The effect of non cross-examination is that the statement of witness has not been disputed. The effect of not cross-examining the witnesses has been considered by this Court in Bhoju Mandal & Ors. v. Debnath Bhagat & Ors. AIR 1963 SC 1906. This Court repelled a submission on the ground that same was not put either to the witnesses or suggested before the courts below. Party is required to put his version to the witness. If no such questions are put the court would presume that the witness account has been accepted as held in M/s. Chuni Lal Dwarka Nath v. Hartford Fire Insurance Co. Ltd. & Anr."

(vi) 1999 (3) SCC 573 [Vidhyadhar vs Manikrao & Anr.];

"17. Where a party to the suit does not appear into the witness box and states his own case on oath and does not offer himself to be cross examined by the other side, a presumption would arise that the case set up by him is not correct as has been held in a series of decisions passed by various High Courts and the Privy Council beginning from the decision in Sardar Gurbakhsh Singh v. Gurdial Singh and



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Anr. . This was followed by the Lahore High Court in Kirpa Singh v. Ajaipal Singh and Ors. AIR (1930) Lahore 1 and the Bombay High Court in Martand Pandharinath Chaudhari v. Radhabai Krishnarao Deshmukh AIR (1931) Bombay 97. The Madhya Pradesh High Court in Gulla Kharagjit Carpenter v. Narsingh Nandkishore Rawat also followed the Privy Council decision in Sardar Gurbakhsh Singh's case (supra). The Allahabad High Court in Arjun Singh v. Virender Nath and Anr. held that if a party abstains from entering the witness box, it would give rise to an inference adverse against him. Similarly, a Division Bench of the Punjab & Haryana High Court in Bhagwan Dass v. Bhishan Chand and Ors. drew a presumption under Section 114 of the Evidence Act against a party who did not enter into the witness box."

(vii) 2019 (9) SCC 358 [Mohinder Kaur vs Sant Paul Singh];

"6. We have considered the submissions on behalf of the parties. It is an undisputed fact that the suit property stood redeemed from mortgage on 04.07.1989. The appellant sent due intimation by registered post to the respondent on 27.07.1989 and also provided him with a photocopy of the release deed, requiring the respondent to take steps for execution of the sale deed. The respondent by reply dated 02.08.1989 insisted on the no dues certificate,



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denying receipt of the release deed. The respondent then gave a power of attorney on 02.11.1989 to PW?1. The witness was naturally unaware of the preceding events and denied receipt of the notice dated 27.07.1989 itself. The witness was therefore also incompetent to deny receipt of photocopy of the release documents by the respondent. It was for the respondent to establish his readiness and willingness for execution of the agreement by entering the witness box and proving his capacity to pay the balance consideration amount. Except for the solitary statement in the plaint no evidence whatsoever was led on behalf of the respondent with regard to the same, if PW?1 was competent to depose with regard to the same because these were facts which had to be personal to the knowledge of the respondent alone. Had the witness even led any documentary evidence on behalf of the respondent, in support of the plea for readiness and willingness on part of the respondent, different considerations may have arisen. The witness also sought to deny any knowledge regarding the cancellation of the agreement on 01.09.1989."

(viii) 2005 (2) SCC 217 [Janki Vashdeo Bhojwani & Anr vs



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Indusind Bank Ltd. & Ors];

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"13. Order III, Rules 1 and 2 CPC, empowers the holder of power of attorney to "act" on behalf of the principal. In our view the word "acts" employed in Order III, Rules 1 and 2 CPC, confines only in respect of "acts" done by the power of attorney holder in exercise of power granted by the instrument. The term "acts" would not include deposing in place and instead of the principal. In other words, if the power of attorney holder has rendered some "acts" in pursuance to power of attorney, he may depose for the principal in respect of such acts, but he cannot depose for the principal for the acts done by the principal and not by him. Similarly, he cannot depose for the principal in respect of the matter which only the principal can have a personal knowledge and in respect of which the principal is entitled to be cross-examined."

14.The learned counsel appearing for the 1st defendant made submissions in support of the impugned judgment of the learned Judge. He made further submissions that 1st defendant is Muslim Private Trust for doing charity and for the benefit of beneficiaries. After granting leave in respect of



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the property, there were litigations and the same were compromised. As per the compromise decree, the superstructure became the property of Trust.

Learned counsel appearing for the 1st defendant further submitted that he is adopting the arguments of the learned Senior Counsel appearing for the 2nd defendant and prayed for dismissal of the appeal.

15.Learned Senior Counsel appearing for the appellants 1 & 3/plaintiffs 4 & 6 and the learned counsel appearing for the 2nd appellant/5th plaintiff reiterated the contentions made earlier and the learned Senior Counsel referred to the judgments and submitted that suit for specific relief and suit for pre-emptive right are different.

16.Heard the learned Senior Counsel appearing for the appellants 1 & 3/plaintiffs 4 & 6, the learned counsel appearing for the 2nd appellant/5th plaintiff, learned counsel appearing for the 1st defendant, the learned Senior Counsel appearing for the 2nd defendant and perused the entire materials on record.

17.To decide the issues in the present appeal, the following points



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are arising for consideration:

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(1) Whether the lease was in existence on the date of filing of suit and till 31.12.1996?

(2) Whether the pre-emptive right granted to the plaintiffs by agreement dated 09.08.1974 is enforceable right?

(3) Whether the plaintiffs have acquiescence and waived their right of pre-emption?

(4) Whether highest offer of 2nd defendant was accepted and confirmed on 15.05.1995 in the presence of plaintiffs and 2nd defendant is a bonafide purchaser?

(5) Whether the 1st defendant is liable to offer first, the highest price to the plaintiffs?

(6) Whether the 1st defendant became owner of superstructure as per compromise decree in C.S.No.69 of 1972 (Originating Summons) dated 05.11.1973?

(7) Whether the suit is pre-mature and plaintiffs are entitled to relief of substitution?

18.Before considering and deciding the points for consideration arising



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in this appeal, we proceed to consider and decide M.P.No.1 of 2014 filed by the plaintiffs/appellants. The said Miscellaneous Petition is filed under Order XLI Rule 27 of C.P.C. read with Section 151 of C.P.C. The said Rule reads as follows.

"Order XLI Rule 27 of C.P.C.:

27. Production of additional evidence in Appellate Court—

(1) The parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary, in the Appellate Court, But if—

(a) the Court from whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted, or

[(aa) the party seeking to produce additional evidence, establishes that notwithstanding the exercise of due diligence, such evidence was not within his knowledge or could not, after the exercise of due diligence, be produced by him at the time when the decree appealed against was passed, or]

(b) the Appellate Court requires any document to be produced or any witness to be examined to enable it to pronounce judgment, or for any other substantial cause,

the Appellate Court may allow such evidence or document to be produced, or witness to be



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examined.

(2) Wherever additional evidence is allowed to be produced by an Appellate Court, the Court shall record the reason for its admission."

18(i) As per the Rule, the parties are entitled to produce additional evidence, oral or documentary in the appeal, if the party satisfies conditions mentioned therein. In the affidavit, the petitioners/plaintiffs have given sufficient reason which prevented them from producing these documents. Further, the letter of 3rd defendant on behalf of estate of J.H.Irani dated 15.03.1985 and reply of the 1st defendant dated 18.03.1985 are mentioned in Ex.P.13 the letter of the 3rd defendant on behalf of estate of J.H.Irani dated 11.06.1985. The letter of 3rd defendant on behalf of estate of J.H.Irani dated 02.07.1986 is confirming the renewal of lease upto 31.12.1996. The compromise decree in C.S.No.69 of 1972 is passed by this Court. Considering nature of documents sought to be produced and reasons given by the petitioners/plaintiffs in the affidavit filed in support of the petition, this Miscellaneous Petition No.1 of 2014 is allowed in respect of 3 letters and compromise decree and they are marked as Exs.P35 to P38.



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Point (1)

WEB COPY Whether the lease was in existence on the date of filing of suit and till 31.12.1996?

19.It is an admitted fact that land in the suit property along with property situate at D.No.4 known as English Ware House belongs to 1st defendant. Originally, the lease of all the three properties was granted to J.H.Irani, the father of the 1st plaintiff in the year 1940 for a period of 21 years. Subsequently, the said lease in respect of suit property was renewed by Ex.P3 deed of lease dated 09.08.1974 for the period from 01.01.1972 to 31.12.1986. In the said lease deed, an option was given to the three sons of J.H.Irani namely, P.J.Irani, 3rd defendant, deceased son M.J.Irani, F.J. Irani, 1st plaintiff and two daughters of J.H.Irani viz., Dr.Mrs.R.S.Boyce & Dr.Mrs.S.Y.Edljee, plaintiffs 2 & 3 with option to renew the lease for further period of 10 years. The plaintiffs by their letter dated 15.03.1985 exercised their option for renewal of lease for further period of 10 years namely, up to 31.12.1996. The 1st defendant by its letter dated 18.03.1985 acknowledged the letter of plaintiffs dated 15.03.1985. The plaintiffs followed up these letters by Ex.P13 letter dated 11.06.1985, in which they have informed



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exercising the option for renewal on 15.03.1985 Ex.P36 and acknowledged by 1st defendant by its letter dated 18.03.1985 Ex.P37. The 1st defendant did not deny these letters disputing option exercised by the 1st plaintiff.

19(i) The 1st defendant issued Ex.P16 circular dated 29.04.1995 calling for tenders to submit offers in respect of suit property and further mentioned that highest offer will be at the discretion of the Trustees. In the said Ex.P16 circular, the 1st defendant has specifically mentioned that lease expires on 31.12.1996, petition filed for fixation of fair rent is pending and taxes are paid by occupant. The above facts clearly show that lease in favour of the plaintiffs was in force till 31.12.1996 and the 1st defendant recognised the plaintiffs as tenants and has filed R.C.O.P. for fixation of fair rent. The contention of the learned counsel appearing for the plaintiffs that the plaintiffs are paying fair rent fixed as per the orders of the Hon'ble Apex Court in S.L.P.No.18956 of 2007 is not denied by the 1st defendant.

19(ii) In view of the 1st defendant admitting the lease was in force till 31.12.1996, the contention of the 1st defendant that lease expired on



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31.12.1986 and plaintiffs are tenants holding over and plaintiffs are only trespassers, cannot be accepted. If really the plaintiffs are trespassers, no rent control proceedings for fixation of fair rent is maintainable. On the other hand, only remedy available for the landlord against the trespassers is to sue him for damages for use and occupation. The learned Judge has not considered Ex.P13 letter of plaintiffs dated 11.06.1985 as well as Ex.P16 letter of 1st defendant dated 29.04.1995 in proper perspective. When the 1st defendant himself admitted that the lease was in force till 31.12.1996 and the plaintiffs are tenants, the findings of the learned Judge that lease expired on 31.12.1986 and that plaintiffs are holding the property as tenants at sufferance and they are akin to a trespasser are not correct. In view of the above finding, this Court holds that lease was in existence till 31.12.1996 and point (1) is answered in favour of the plaintiffs and against the defendants 1 & 2.

Point (2)

Whether pre-emptive right granted to the plaintiffs by agreement dated 09.08.1974 is enforceable right?



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20. It is not in dispute that the plaintiffs and 1st defendant entered into a lease agreement on 09.08.1974 and as per the said deed, lease was granted upto 31.12.1986 with an option to renew the lease for further period of 10 years upto 31.12.1996. On the same day, they entered into an agreement Ex.P4 with regard to certain payments. In the last clause of said agreement, the 1st defendant agreed to give first option to the plaintiffs, if the 1st defendant decides to sell the property. The said clause is extracted hereunder:

“In the event of the Party of the Second Part
deciding to sell their interest in the Property,
they will give the first option to the Party of
the First Part. ”

20(i) It is the case of the plaintiffs and defendants 1 & 2 that both Ex.P3 lease deed dated 09.08.1974 and Ex.P4 agreement entered on the same date must be read together. When both are read together, it is seen that the plaintiffs are given option to renew the lease for further period of 10 years. The plaintiffs exercised the said option by their letter dated 15.03.1985 Ex.P36 and the same was acknowledged by the 1st defendant by its letter dated 18.03.1985 Ex.P37. Further, the plaintiffs, by Ex.P13 letter dated



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11.06.1985 addressed to the 1st defendant referred to these two letters. In view of the option granted to the plaintiffs for renewal of lease upto 31.12.1996, which was exercised by the plaintiffs by letter dated 15.03.1985 Ex.P36, the lease came to be in force till 31.12.1996. Considering Ex.P4 agreement dated 09.08.1974 together with lease deed of the same date, letters dated 15.03.1985 Ex.P36, 18.03.1985 Ex.P37 and 11.06.1985 Ex.P13, this Court has no hesitation to hold that the plaintiffs had right of pre-emption as per Ex.P4 agreement and it is an enforceable right. Thus, the point (2) is answered in favour of the plaintiffs and against the defendants 1 & 2.

Point (3)

Whether the plaintiffs have acquiescence and waived their right of pre-emption?

21. It is the case of the 1st plaintiff that on 15.05.1995, in the meeting, he informed all the persons present therein including 2nd defendant that he had pre-emptive right. According to the 1st plaintiff, after opening of all the 7 tenders, he informed the 1st defendant that he is willing to match the highest offer of Rs.35,00,000/- per ground as offered by the 2nd defendant. It is further



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case of the 1st plaintiff that the Trustees, who were present in the meeting informed the 1st plaintiff that they would place the same before the Trustees and revert back to the 1st plaintiff.

21(i) On the other hand, it is the case of the defendants 1 & 2 that the 1st plaintiff participated in the tender without informing about his right of pre-emption and without any objection. After opening of all the tenders, the 1st plaintiff did not offer to match the highest bid of Rs.35,00,000/- per ground, but took back the cheque for Rs.25,00,000/-. During trial, the 1st plaintiff and three Trustees of 1st defendant who were present on 15.05.1995 and 2nd defendant did not enter the witness box to speak about their respective stand with regard to right of pre-emption. The evidence of both P.W.1 and D.W.1 are only hear-say evidence. In cross-examination, D.W.1 deposed that he signed Ex.D7, wherein the offers given by 7 persons were recorded. On going through Ex.D7, it is seen that D.W.1 did not sign the said document. During arguments, the learned Senior Counsel appearing for the 2nd defendant contended that statement recorded that D.W.1 signed Ex.D7 is only the typographical error and the word 'not' was by mistake not typed.



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21(ii) D.W.1 had admitted in his cross-examination that he was not a Trustee of 1st defendant on 15.05.1995. In such circumstances, the stand taken by the respective parties can be decided only by considering the documents filed by the parties. The 1st plaintiff by Ex.P17 letter dated 13.06.1995, informed the 1st defendant that he should be given the first option to purchase the property and only when he expresses his inability to purchase the property, the 1st defendant could offer the same to others. In the said Ex.P17, the 1st plaintiff offered Rs.37,50,000/- per ground to purchase the property. The 1st defendant by Ex.P18 dated 27.06.1995 replied that the 1st plaintiff's offer was Rs.28,00,000/-, whereas offer of 2nd defendant was Rs.35,00,000/- per ground, which is the highest offer and the same was accepted and confirmed in the presence of 1st plaintiff. This contention of the 1st defendant is not acceptable in view of the fact that the 1st defendant by Ex.D8, its letter dated 18.05.1995 only informed the 2nd defendant that his offer of Rs.35,00,000/- per ground was accepted. In the said letter, the 1st defendant has not mentioned that they have accepted the offer of 2nd defendant and confirmed the same on 15.05.1995 itself. Further, the defendants 1 & 2 have entered into an agreement of sale dated 30.06.1995.



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The 1st defendant filed only a xerox copy of the said agreement, which was marked with objection as Ex.D9. From the said document, it is seen that, the name of the stamp vendor, serial number, date of sale and name of purchaser were not mentioned. Further, it is pertinent to note that in the circular calling for tenders, it has been mentioned that highest offer will be at the discretion of Trustees. In Ex.D7, Heading is

“OFFERS RECEIVED FOR THE SALE OF
CASINO THEATRE NO.2, BLACKERS ROAD, MOUNT
ROAD, MADRAS 600 002. 15-05-1995 11.00 A.M. - 11.45
A.M.”

In the said document, names of persons, who gave offer and amounts offered were recorded and signatures were obtained. The three Trustees of the 1st defendant have also signed the said document. In the bottom of the said document, it has been mentioned as follows:

“THE SALE IS CONFIRMED IN FAVOUR OF
R
H. M. CONSTRUCTIONS ~~P~~PENDING THE
HIGHEST OFFER.”

21(iii) It is seen that the word 'Pending' has been corrected as



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'Tendring'. At the place of correction, no signature has been obtained from 7

persons including the 1st plaintiff. The three Trustees of 1st defendant also have not signed in the said correction. In the sale agreement Ex.D9, there is no date, name of the stamp vendor, serial number and name of purchaser, which is subsequent to Ex.P17 letter of plaintiffs dated 13.06.1995. The defendants 1 & 2 claim that Ex.D8 dated 18.05.1995 was served on the 2nd defendant by hand delivery. This creates doubt as to whether the said letter was written on 18.05.1995 and served on the 2nd defendant on the same day. This Court is of the view that Exs.D8 and D9 are created subsequent to plaintiffs' letter dated 13.06.1995 Ex.P17. It is pertinent to note that the learned Judge did not take note of the correction of word "Pending" into "Tendring" in Ex.D7 and has considered it as only "Tendering". In view of Ex.P17 letter dated 13.06.1995, the contention of the learned Senior Counsel and learned counsel appearing for the appellants/plaintiffs that offer of 2nd defendant was not accepted and confirmed on 15.05.1995 and documents viz., Exs.D8 and D9 are created to defeat the interest of plaintiffs, is acceptable. The 1st defendant has produced only xerox copies of Exs.D7 and D9. Further, after receiving offer from 7 persons including the 1st plaintiff, 1st



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defendant did not call upon the 1st plaintiff either to match the offer of 2nd defendant or increase the offer over and above Rs.35,00,000/- per ground offered by the 2nd defendant. In any event, mere participation and giving offer by 1st plaintiff will not amount to waiving of pre-emptive right of plaintiffs. Considering the above materials in its entirety, this Court holds that the plaintiffs have not acquiesced and waived their right of pre-emption. In view of the above materials, point (3) is answered in favour of the plaintiffs and against the defendants 1 & 2.

Point (4)

Whether highest offer of 2nd defendant was accepted and confirmed on 15.05.1995 in the presence of plaintiffs and 2nd defendant is a bonafide purchaser?

22.The 1st defendant issued Ex.P16 circular on 29.04.1995 inviting tenders for sale of suit property. In the said circular, the 1st defendant mentioned that

“highest offer will be at the discretion of the Trustees”

It is also mentioned in the said circular that it is for



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*“best interests of the Trust to augment
the income of the beneficiaries”.*

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The 1st defendant mentioned in the circular that lease expires on 31.12.1996 and rent control proceedings for fixation of fair rent is pending. On 15.05.1995, 7 persons including 1st plaintiff and 2nd defendant submitted their offer. The said offers were opened on the same day and the offer of Rs.35,00,000/- per ground of 2nd defendant was found to be highest offer. According to the 1st plaintiff, he informed the 1st defendant that he is willing to match the said offer and 1st defendant informed the 1st plaintiff to place the offer of the 1st plaintiff before the Trustees and revert back to the 1st plaintiff. It is seen from the materials that Ex.D7 is the record of offers received from seven persons and their names and addresses. Except the corrected endorsement in the bottom of the said document, no other material is produced by the 1st defendant that offer of the 2nd defendant was accepted and confirmed on 15.05.1995. The 1st defendant has not produced any Minutes Book or Register to show that offer of the 2nd defendant was accepted and confirmed on 15.05.1995.

22(i) The document which 1st defendant produced to show that offer of



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the 2nd defendant was accepted and confirmed is Ex.D8 dated 18.05.1995. In the said letter, the 1st defendant informed the 2nd defendant that its offer was accepted and confirmed. In the said letter, the 1st defendant did not state that offer of the 2nd defendant was accepted and confirmed on 15.05.1995 itself. As already held that Ex.D8 dated 18.05.1995 could not have been written by 1st defendant and served on the 2nd defendant on the same day. In any event, the contents of Ex.D8, clearly shows that offer of the 2nd defendant was not accepted and confirmed on 15.05.1995. The contention of the learned counsel appearing for the plaintiffs that if really offer of the 2nd defendant was accepted and confirmed on 15.05.1995 itself, there is no necessity to issue Ex.D8 letter dated 18.05.1995 and enter into Ex.D9 agreement of sale on 30.06.1995 after 1 ½ months, has considerable force and is acceptable.

22(ii) In Ex.P16 circular dated 29.04.1995 itself, it was mentioned that lease expires on 31.12.1996 and the rent control proceedings for fixation of fair rent is pending. In such circumstances, the 2nd defendant as a prudent business man ought to have verified whether plaintiffs have right of pre-emption. Further, Ex.P17 by which 1st plaintiff offered Rs.37,50,000/- per



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ground and a copy of the said letter was marked to 2nd defendant. In spite of said letter offering Rs.37,50,000/- per ground, which was made known to the 2nd defendant, 2nd defendant entered into an agreement of sale on 30.06.1995. In view of the above materials, this Court holds that offer of 2nd defendant was not accepted and confirmed on 15.05.1995 and 2nd defendant is not a bonafide purchaser. For the above reasons, point (4) is answered in favour of the plaintiffs and against the defendants 1 & 2.

Point (5)

Whether the 1st defendant is liable to offer first highest price to the plaintiffs?

23. As per Ex.P4 agreement dated 09.08.1974, pre-emption right was given to the plaintiffs. During the year 1984, the 1st defendant offered option to the plaintiffs to purchase the suit property and called upon the plaintiffs to submit their offer. This offer was made by the 1st defendant based on Ex.P4 agreement dated 09.08.1974. This agreement was executed on the same date of Ex.P3 lease deed. Reading of both the documents together, it is clear that the plaintiffs have pre-emptive right. In view of existence of such pre-



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emptive right and lease was in force till 31.12.1996, the 1st defendant ought to have offered first option to the plaintiffs to purchase the property at Rs.35,00,000/- per ground as offered by the 2nd defendant. In any event, the 1st defendant ought to have accepted the offer of Rs.37,50,000/- per ground of 1st plaintiff as per Ex.P17 dated 13.06.1995. In view of the above fact, we hold that the 1st defendant is liable to give first option to the plaintiffs to purchase the property at Rs.35,00,000/- per ground and only if the plaintiffs reject the said offer, the 1st defendant can accept and confirm the offer of the 2nd defendant. Having failed to give first option to the 1st plaintiff, contention of the 1st defendant that offer of the 2nd defendant was accepted and confirmed on 15.05.1995 is invalid and cannot be accepted. For the above reasons, point (5) is answered in favour of the plaintiffs and against the defendants 1 & 2.

Point (6)

Whether the 1st defendant became owner of superstructure as per compromise decree in C.S.No.69 of 1972 (Originating Summons) dated 05.11.1973?

24. It is an admitted fact that by the lease deed dated 17.02.1943, the



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land in which superstructure stands was leased out with permission to put up superstructure to run a theatre. As per Clause 3(a) of said lease deed, a theatre was constructed by the plaintiffs and it was named as 'Casino Theatre'. While so, in the year 1972, the 1st defendant filed C.S.No.69 of 1972 (O.S.) invoking Originating Summons for direction of the Court and for sanction of any settlement that may be arrived at in relation to the said property. In the said suit, a compromise was arrived and a compromise decree was passed. In the compromise decree, ownership of Casino Theatre was given to 1st defendant and plaintiffs relinquished their right over the said superstructure. According to the plaintiffs, the 1st defendant by force and coercion made the plaintiffs to agree to relinquish their right over Casino Theatre. But the plaintiffs have not taken any steps to set aside the said compromise decree. At the same time, it has to be seen whether 1st defendant became owner of the said Casino Theatre. According to the defendants 1 and 2, a compromise was arrived and compromise decree was passed based on the agreed terms. The defendants 1 & 2 denied that compromise was arrived at by force and coercion. As per the compromise decree, the 1st defendant became owner of superstructure 'Casino Theatre'. The learned Senior Counsel and learned



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counsel appearing for the plaintiffs contended that 1st defendant did not become owner of superstructure based on the compromise decree as the alleged right created as per the compromise decree was not registered as per Section 17(2)(vi) of Registration Act.

24(i) Any right created over immovable property worth more than Rs.100/- is compulsorily registrable. Section 17 is found in Part III of Registration Act under the heading of “Registrable Documents”. The heading in Section 17 of Registration Act is “Documents of which registration is compulsory”. In the said Section 17(1) and (1-A), the documents, which are compulsorily registrable have been mentioned. Sub-Section (2) of Section 17 mentions the documents, which are not compulsorily registrable as per Clauses (b) and (c) of Sub-Section (1). In clause (vi) of Sub-Section (2), it has been mentioned that compulsory registration is not applicable to the decree or orders of a Court, except compromise decree, wherein a right over the immovable property is created, which is not subject matter of the suit is compulsorily registrable. The above clauses are extracted hereunder for easy reference.

Section 17 of Registration Act:

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**“PART III
OF REGISTRABLE DOCUMENTS**

17.Documents of which registration is compulsory.

(1).. ..

.. ..

(2) Nothing in clauses (b) and (c) of Sub-Section (1) applies to-

(i)

.. ..

(vi) any decree or order of a Court except a decree or order expressed to be made on a compromise and comprising immovable property other than that which is the subject-matter of the suit or proceeding.”

24(ii) A reading of Section 17 shows that a decree or order of Court is not compulsorily registrable except a decree or order made on compromise and comprising immovable property other than which is the subject matter of the suit or proceeding. As per this Section, the 1st defendant will acquire title to the superstructure 'Casino Theatre', only if the compromise decree is registered as per Section 17 of Registration Act. The contention of the learned Senior Counsel and learned counsel appearing for the plaintiffs that no



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registration is effected based on the compromise decree is not denied by the defendants 1 & 2. In view of non registration of compromise decree, creating an interest in superstructure 'Casino Theatre', worth more than Rs.100/-, no title has been transferred to 1st defendant and 1st defendant did not become owner of Casino Theatre. For the above reasons, point (6) is answered in favour of plaintiffs and against the defendants 1 & 2.

Point (7)

Whether suit is pre-mature and plaintiffs are entitled to relief of substitution?

25. In the foregoing paragraphs, it has been held that plaintiffs are having pre-emptive right. Dictionary meaning of pre-emptive right is **“Purchase or appropriation by one person or party before opportunity offer to others”**. Originally pre-emptive right was created by Mohammedan law. Subsequently, some of the States have enacted Act recognising pre-emptive right. Now pre-emptive right can be created apart from Mohammedan law by statute, customs or contract.

25(i). The learned Judge in the impugned judgment considering various



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judgments enumerated five principles with regard to pre-emptive right. The learned Judge rejected the pre-emptive right claimed by the plaintiffs on the ground that lease expired on 31.12.1986 and plaintiffs were not owner of superstructure. These findings are contrary to the materials on record. As per Ex.P3 lease deed dated 09.08.1974, lease was granted upto 31.12.1986 with option to renew the lease for further period of 10 years. The plaintiffs exercised their option for renewal of lease for further period of 10 years upto 31.12.1996. The 1st defendant acknowledged the said letter and extended the lease upto 31.12.1996. This is evidenced in Ex.P16 circular dated 29.04.1995 wherein the 1st defendant mentioned that lease is in force till 31.12.1996. The learned Judge failed to consider the statement of 1st defendant in Ex.P16 that lease expires on 31.12.1996 and the plaintiffs are paying taxes. In view of own admission by the 1st defendant that lease expires on 31.12.1996, the finding of the learned Judge is not correct.

25(ii) As far as ownership of superstructure Casino Theatre is concerned, it is the contention of the 1st defendant that it became owner of Casino Theatre as per compromise decree in C.S.No.69 of 1972. As held in



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the previous paragraph, the 1st defendant did not become owner of Casino Theatre as they did not register the compromise decree as per Section 17 of Registration Act. The finding of the learned Judge that pre-emptive right can be enforced by owner of the property, the plaintiffs are not owner of the property and therefore, they are not entitled to pre-emption is not correct. As already held that 1st defendant did not become owner of superstructure as per compromise decree for want of non-registration as per Section 17 of Registration Act and the plaintiffs continued to be the owner of superstructure, Casino Theatre. It is also pertinent to take note that any right created over the immovable property more than Rs.100/- is compulsorily registrable. The learned Judge has not considered Section 17 of Registration Act and the finding of the learned Judge that 1st defendant became owner of Casino Theatre as per compromise decree is not correct.

25(iii). The learned Judge in the impugned judgment has held that even a tenant is entitled to right of pre-emption. The 1st defendant treating the plaintiffs as tenants, initiated rent control proceedings for fixation of fair rent.



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This fact also was not taken into consideration by the learned Judge. The learned Judge has held that the plaintiffs are tenants by sufferance and akin to trespassers. The learned Judge has come to this conclusion on the ground that the lease expired on 31.12.1986. Once the plaintiffs are treated as tenants by 1st defendant, the plaintiffs are entitled to pre-emptive right as per the principles enumerated by the learned Judge in the impugned judgment.

25(iv) In paragraph 11 of the judgment reported in **(2019) 19 SCC 767** extracted supra, the Hon'ble Apex Court has held that a person having pre-emptive right has two options, namely primary right and secondary right. The first right is to buy the property by offering market rate or offering to purchase at the rate quoted by third party. In the present case, pre-emptive right of plaintiffs was recognised by 1st defendant by offering to sell the property to the plaintiffs in the year 1984. After certain correspondence, offer was dropped by 1st defendant as beneficiaries of the Trust decided not to sell the suit property. In Ex.P4 agreement dated 09.08.1974, the plaintiffs and 1st defendant have specifically agreed that the plaintiffs have pre-emptive right and 1st defendant will offer the sale of the property first to the plaintiffs. The



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1st defendant in the year 1995 without offering to sell the property to the plaintiffs, issued Ex.P16 circular dated 29.04.1995 inviting tender. In the said circular, it has been mentioned that “highest offer will be at the discretion of the Trustees”. This means that said circular is not for auctioning the property and it is only to receive tender to ascertain the highest price for the suit property. After receiving tender and finding that 2nd defendant has given highest offer of Rs.35,00,000/- per ground, Rs.7,00,000/- over and above Rs.28,00,000/- given by the 1st plaintiff, the 1st defendant ought to have offered the same to the 1st plaintiff, who was present at that time. Only when the 1st plaintiff did not accept the said offer, the 1st defendant is entitled to sell the property to the 2nd defendant. From the Exhibits produced by the plaintiffs, it is seen that 1st plaintiff has offered to purchase the property at Rs.37,50,000/- per ground, Rs.2,50,000/- more than the offer of 2nd defendant. The plaintiffs have exercised their first option under pre-emption to purchase the suit property by matching the offer of 2nd defendant and also offering Rs.2,50,000/- more than the offer of 2nd defendant. The 1st defendant did not accept the said offer of the plaintiffs. Therefore, the plaintiffs have come out with the present suit. The contention of the defendants 1 & 2 that appeal is



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liable to be dismissed on the ground of pre-mature is not acceptable in view
of the finding of the learned Judge that

“Therefore, I hold that the suit need not be
dismissed on the sole ground that it was
laid premature”.

The defendants 1 & 2 have not challenged the said finding. The learned Judge
proceeded to consider the materials placed before him and delivered the
impugned judgment and decree. In view of the said finding, the appeal is not
liable to be dismissed as pre-mature.

25(v) As far as second option of substitution is concerned, pre-emptor
has one year time limit to initiate the suit from the date of sale. Article 97 of
the Limitation Act is relevant to decide this issue and the same is extracted
hereunder:



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<i>Description of suit</i>	<i>Period of Limitation</i>	<i>Time from which period begins to run</i>
To enforce a right of pre-emption whether the right is founded on law or general usage or on special contract	One year	When the purchaser takes under the sale sought to be impeached, physical possession of the whole or part of the property sold, or, where the subject-matter of the sale does not admit of physical possession of the whole or part of the property, when the instrument of sale is registered.

25(vi) The contention of the learned Senior Counsel appearing for the 2nd defendant is that the plaintiffs have lost their right of pre-emption, when they failed to pay a sum of Rs.5,42,43,750/- as ordered by the Division Bench of this Court in O.S.A.Nos.167 of 1996 and 135 of 1998. By common order dated 28.03.2002, the Division Bench of this Court did not decide the right of pre-emption of plaintiffs. The Division Bench of this Court considered only the order of injunction granted by the learned Judge in the application filed by the plaintiffs in the suit. The Division Bench of this Court has made it very clear that without deciding the right of plaintiffs on merits, directed the



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plaintiffs to pay the amount. Non payment of said amount will not extinguish the right of pre-emption of the plaintiffs. The relevant Rule in C.P.C. with regard to suit for pre-emption under Order XX Rule 14 of C.P.C. reads as follows:

“Order XX, Rule 14 C.P.C.:

14.Decree in pre-emption suit - (1) Where the Court decrees a claim to pre-emption in respect of a particular sale of property and the purchase-money has not been paid into Court, the decree shall—

(a) **specify a day on or before which the purchase-money shall be so paid**, and

(b) direct that on payment into Court of such purchase-money, together with the costs (if any) decrees against the plaintiff, on or before the day referred to in clause (a), the defendant shall deliver possession of the property to the plaintiff, whose title thereto shall be deemed to have accrued from the date of such payment, but that, if the purchase-money and the costs (if any) are not so paid, the suit shall be dismissed with costs.

(2) Where the Court has adjudicated upon rival claims to pre-emption, the decree shall direct,—

(a) if and in so far as the claims decreed are equal in



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degree, that the claim of each pre-emptor complying with the provisions of sub-rule (1) shall take effect in respect of a proportionate share of the property including any proportionate share in respect of which the claim of any pre-emptor failing to comply with the said provisions would but for such default, have taken effect; and

(b) If and in so far as the claims decreed are different in degree, that the claim of the inferior pre-emption shall not take effect unless and until the superior pre-emptor has failed to comply with the said provisions.”

25(vii) As per this Rule, when the Court decrees the suit for pre-emption in respect of a sale of property, the Court has to specify a date on or before which purchase money shall be paid. Therefore, only when the claim of pre-emption right as claimed by the plaintiffs is accepted, the Court must fix the date on or before which the plaintiffs have to deposit the purchase amount. The said time limit has to be incorporated in the decree. Therefore, this contention of the defendants 1 and 2 that non compliance of the order of the Division Bench of this Court, the plaintiffs have lost their right of pre-emption is not acceptable. In view of Order XX Rule 14 of C.P.C., the contention of the learned Senior Counsel appearing for the 2nd defendant that



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present suit is in the nature of suit for specific performance and therefore, the plaintiffs must plead and prove their readiness and willingness is not correct and acceptable. Further the provisions in C.P.C. in respect of specific performance and pre-emption are different. As far as suit for specific performance is concerned, the relevant Rule is Order XX Rule 12A of C.P.C. In the suit for pre-emption, the relevant Rule is Order XX Rule 14 of C.P.C. In view of separate Rules are incorporated in C.P.C. with regard to specific relief suit as well as pre-emption suit and also Order XX Rule 14 of C.P.C., the contention of the learned Senior Counsel appearing for the 2nd defendant that present suit filed by the plaintiffs is in the nature of suit under Specific Relief Act is not acceptable. Therefore, we hold that suit is not pre-mature and plaintiffs are entitled to relief of substitution. For the above reasons, point (7) is answered in favour of the plaintiffs and against the defendants 1 & 2.

26. For the foregoing reasons, the impugned judgment and decree dated 30.04.2010 made in C.S.No.1215 of 1995 is liable to be set aside and it is accordingly set aside. The suit is decreed as prayed for. The



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plaintiffs/appellants are directed to deposit the amounts within three months from today.

27.In the result, Original Side Application is allowed. No costs.

(V.M.V., J) (S.M., J)

19.10.2022

[1/2]

Exhibits marked in Appellants' side:

Exhibit P35: Compromise decree made in C.S.No.69 of 1972 on the file of this Court dated 09.08.1974;

Exhibit P36: Letter from plaintiff to 1st defendant dated 15.03.1985;

Exhibit P37: Letter from the 1st defendant to plaintiff dated 18.03.1985;

Exhibit P38: Letter from the plaintiff to the 1st defendant confirming the renewal of lease;

Index : Yes / No

Internet : Yes / No

Note:Issue order copy on 20.10.2022

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**V.M.VELUMANI,J.
and
SUNDER MOHAN,J.**

(kj)

**Pre-delivery Judgment made in
O.S.A.No.326 of 2011
and M.P.No.1 of 2014**

**19.10.2022
[1/2]**