Before Sir Shah Muhammad Sulaiman, Chief Justice, Justice Sir Lal Gopal Mukerji, and Mr. Justice King

1933 November, 24

TARA CHAND (PLAINTIFF) *v.* RADHASWAMI SATSANG SABHA AND ANOTHER (DEFENDANTS)*

Agra Pre-emption Act (Local Act No. XI of 1922), sections 4(1) and 20—"Co-sharer"—"Indefeasible interest"—Acquisition of a defeasible interest by the vendee prior to the sale sought to be pre-empted—Vendee resisting pre-emption on the ground of his having acquired a share by exchange shortly before the sale—Deed of exchange voidable by sons and grandsons of the other party to the transaction.

A suit for pre-emption was resisted by the vendee on the ground that he had become a co-sharer by having acquired certain property under a deed of exchange about six weeks before the sale in question. It appeared that the property acquired by the exchange was ancestral property belonging to the transferor as well as his sons and grandsons and that the exchange was not for the benefit of the family, so that it was voidable at the instance of the sons and grandsons. By another suit the plaintiff also sought to pre-empt the exchange, which, he alleged, was in reality a sale. *Held*—

Where the vendee had before his purchase acquired a share, even with a defeasible title (which is not pre-empted by the plaintiff), he can defeat the claim for pre-emption brought by the plaintiff who held a share with an indefeasible title.

If the deed of exchange relied upon by the vendee, which can not be pre-empted, turns out to be a sale deed and the plaintiff is pre-empting that sale deed, the vendee cannot successfully defeat the claim of pre-emption on the strength of this ostensible deed of exchange which is found to be in reality a sale deed.

The word "indefeasible" in section 20 of the Agra Pre-emption Act can not be taken to have the restricted meaning of "not being liable to pre-emption" but has its ordinary though wider meaning of "incapable of being defeated, or not liable to be defeated". It follows that where an acquisition obtained by the vendee is liable to be defeated or capable of being defeated, for example by the sons and grandsons of the transferor, even though it has not yet been actually defeated, the vendee acquires merely a defeasible and not an indefeasible interest thereby.

*First Appeal No. 46 of 1930, from a decree of Muhammad Junaid Nomani, Subordinate Judge of Agra, dated the 22nd of October, 1929.

No section of the Agra Pre-emption Act lays down that a vendee can not be deemed to be a "co-sharer" as defined in section 4(1) at the time of the sale in question if he then possesses merely a defeasible interest in the mahal. It is only the acquisition of an interest by him, subsequent to the sale in question and accrual of a cause of action to the pre-emptor, which is required by section 20 of the Act to be indefeasible.

If a pre-emptor can maintain a suit, as being a co-sharer, on the strength of a defeasible title, the vendee who is resisting the claim on the ground that he himself was a co-sharer at the time of the sale must of necessity stand on the same footing and be entitled to say that he was a co-sharer, although on the strength of a defeasible title.

The facts of the case fully appear from the judgment of the Division Bench which first heard the case:

SULAIMAN and YOUNG, JJ.: This is a plaintiff's appeal arising out of a suit for pre-emption of properties in village Bahadurpur Khaspur which consists of five mahals. The sale deed was executed on the 9th of December, 1927, and was registered on the 9th of June, 1928. The plaintiff alleged that the defendant purchaser was a stranger and that the plaintiff was a co-sharer in three out of the five mahals. The claim was contested by the defendant on the ground that the defendant was a company and had purchased the lands for the purposes of a manufacturing industry, and the property therefore was not pre-emptible. It was further pleaded that under a deed of exchange dated the 24th of October, 1927, the defendant had acquired shares in two out of the five mahals, which put him on the same footing as the plaintiff. The plaintiff accordingly got his plaint amended and paragraph 5A added, under which the deed of exchange was challenged as being null and void and fictitious by reason of the fact that the property of Shambhu Dayal which had been taken in exchange by the vendee was the ancestral joint property of himself, his sons and grandsons. It was further urged that the secretary of Radha Swami Satsang Sabha, the defendant, had no authority to execute the deed of exchange. The plea that the transfer made by the secretary of the Sabha was without authority has not been pressed in appeal.

The learned Subordinate Judge has come to the conclusion that the deed of exchange was real and valid and the plaintiff was not entitled to challenge it on the ground that it transferred joint family property. He has further held that the

1933

TARA CHAND v. RADHA-SWAMI SATSANG SABHA

land in question was acquired for the purposes of a manufacturing industry and was therefore not pre-emptible under section 8(*c*) of the Pre-emption Act. It seems to us that the findings of the learned Subordinate Judge are unsatisfactory and it is not possible to dispose of this appeal finally without clear findings on certain questions of fact.

The learned Subordinate Judge has conceded that in the case of a deed of gift of an ancestral property by a member of a joint Hindu family it would be totally invalid, but he has considered that a deed of exchange stands on a totally different footing. No case on the point had been reported which would have been a guide to him on the interpretation of section 20 of the Pre-emption Act. The learned Subordinate Judge accordingly thought that "if the deed of exchange in question is not *ab initio* void it does not lie in the mouth of the plaintiff, a stranger to the said deed, to question it,....., but the invalidity of the deed of exchange can only be questioned by his sons, and not by strangers like the plaintiff." The learned Judge is under a misapprehension in thinking that because the deed of exchange would not be void *ab initio* but only voidable, a stranger to the family cannot challenge it. The question in this case is not one of avoiding the deed of exchange. That can be done at the election of the members of the exchanger's family only. But the plaintiff is undoubtedly entitled to impugn the exchange on the ground that it does not confer an indefeasible title on the vendee. If the exchange is capable of being avoided by the other members of the family it is defeasible, even though it has not yet actually been avoided. The burden of proving that an indefeasible title was acquired under this deed of exchange lies upon the vendee and he must discharge it: *Ram Ugrah Rai* v. *Ram Samajh Rai* (1). The learned Subordinate Judge has rightly pointed out that if a transaction of exchange is managed judiciously it may be even beneficial to the family, but he has omitted to record any finding whether in fact this exchange was beneficial to Shambhu Dayal's family so as to be binding on the other members. The deed of exchange cannot be assumed to confer an indefeasible title on the vendee without proof that the transaction was for the benefit of Shambhu Dayal's family. Admittedly Shambhu Dayal is a member of a joint Hindu family which consists of his minor son and grandsons and the property given in exchange was his ancestral property.

(1) [1931] A.L.J., 54.

On the second question as well the learned Subordinate Judge has erred in inferring that the whole of the land in question was acquired for a manufacturing industry. The present suit for pre-emption was connected with another suit for pre-emption of the property taken under a deed of exchange which the plaintiff alleged was in reality a sale deed. The sale deed in dispute in the present case expressly mentioned that the property was required by the Radha Swami Satsang, a registered body, "for its dairy farm, agricultural farm and expansion of the industries which it has started". On the face of it the sale deed therefore showed that the land was required partly for purposes of a dairy farm, and partly for an agricultural farm and for the expansion of certain other industries not mentioned in the deed. The secretary of the Sabha, on whose deposition reliance has been placed by the learned Subordinate Judge, merely stated that the land in suit was purchased for manufacturing purposes, that they had not till then applied it to that use as it was in dispute, but on portions of it they had built quarters for their employees in the dairy department. This is not in exact accordance with the recital contained in the sale deed quoted above. It is possible that the secretary is assuming that an agricultural farm is also a manufacturing farm. It is also possible that by the land in suit he meant the land in dispute in the connected case. The exact area purchased consisted of about 830 bighas plus more lands of which the area was not mentioned, which was part of a fluctuating mahal, that is a mahal which changed in its extent owing to alluvion or diluvion.

We have no doubt in our minds that a dairy farm is a manufacturing industry, and land acquired primarily and substantially for its purpose may be protected under section 8(*c*) of the Agra Pre-emption Act. On the other hand, land acquired for purposes of agriculture would not be one taken for manufacturing purposes: *Punjab Sugar Mills Co.* v. *Lachhman Prasad* (1) and *Sarju Tewari* v. *Mohammad Amin* (2). There is no clear finding by the learned Subordinate Judge as to what portion of the land had been required for purposes of a manufacturing industry and what portion for agricultural industry or for expansion of other manufacturing industries. The evidence on this point is vague and meagre, and we are not satisfied that any correct conclusion can be arrived at on the mere statement of Mr. Nehal Chand.

The other finding that the defendant No. 1 was a company and was protected under section 8(*b*) of the Act has no force

(1) (1929) I.L.R., 51 All., 1046. (2) [1930] A.L.J., 648.

1933

TARA CHAND v. RADHA-SWAMI SATSANG SABHA

because the protection is confined to purchase of lands under the Land Acquisition Act only. That is not the case here.

Before disposing of the appeal we must therefore have clear findings on the following two issues:

(1) Was the exchange made by Shambhu Dayal by the deed dated the 24th of October, 1927, for the benefit of the family of Shambhu Dayal?

(2) (i) What exact portion of the lands purchased had been acquired for the purposes of the manufacturing industry? and (ii) To what uses have the lands purchased been put (*a*) within one year and (*b*) so far up to date?

The parties will be at liberty to produce fresh evidence on the issues remitted. The findings should be returned within three months from this date if practicable. The usual ten days will be allowed for objections.

On receipt of the findings, objections were raised thereto, and after hearing them the Division Bench passed the following order:

SULAIMAN, C. J., and YOUNG, J.: The facts of this case are given in our order dated the 15th of January, 1932. The findings returned by the court below have been challenged on behalf of the plaintiff.

The first finding, that the deed of exchange relied upon by the defendants was not for the benefit of Mr. Shambhu Dayal, the transferor, must be accepted. Mr. Shambhu Dayal, when examined and questioned, evaded the answer and did not say that it was for the benefit of his family, but stated something which according to him made this question irrelevant. It was not for the witness to say whether the question arose in the case or not. He should have answered the question put to him. The court below, however, has pointed out that on the evidence of the patwari it was clear that Mr. Shambhu Dayal got four bighas of land yielding one anna per year as income and gave away four bighas of land in exchange which were yielding two rupees. This was the income five years before, which would be about the time when the sale deed was executed; though later on the income on the former four bighas might have risen to Re.1-4-0. Although the plots of land were very small, nevertheless the court below was right in holding that "it saw absolutely no justification for the father Mr. Shambhu Dayal to have entered into such a bad bargain." We accept the finding of the court below that the exchange made by Shambhu Dayal was never for the benefit of his family.

The learned advocate for the defendants has raised a fresh point before us that the property transferred by Mr. Shambhu Dayal had been the self-acquired property of his father, which had been given to Mr. Shambhu Dayal under a will and became his self-acquired property, and he had an absolute power of disposal over it and his sons or grandsons would not have any interest in it and would not have any right to challenge the exchange. . . . . It seems to us that it is now too late for the defendants to raise such a plea.

* * * * * *

We think that the learned Subordinate Judge was perfectly justified in refusing to take into consideration the statement of Mr. Shambhu Dayal that the property was his self-acquired property.

In the absence of the will itself it is not possible to hold what was the nature of the interest conferred upon the legatees. Further, in the absence of any opportunity having been given to the plaintiff, we cannot accept the uncalled for statement of Mr. Shambhu Dayal that the property of his father was his own self-acquired property. It seems to us that when it had been assumed all along and never seriously challenged that the property in the hands of Mr. Shambhu Dayal was joint family and ancestral property, we cannot go into this question unless we send down a further issue to the court below and ask that court to take fresh evidence and try it. We think that having regard to the attitude adopted by the defendants all along and the assumption made before us in appeal again, it would be unfair to the plaintiff to re-open this question at this stage. We therefore must assume that the property in the hands of Mr. Shambhu Dayal was the joint ancestral property of Mr. Shambhu Dayal, and his sons and grandsons have a right to challenge the alienation when it is found that it was not for the benefit of the family. There was obviously no pressing legal necessity for the transfer.

We must also accept the finding of the court below that "I do not find any area was meant for the manufacturing industry, as the manufacturing plant is complete all by itself in Jaganpur land of the defendants' own." [The evidence was then referred to.] We think that in the absence of any satisfactory evidence the learned Subordinate Judge was perfectly justified in holding that the area in question had been acquired for agricultural farm, servants' quarters (required for such an agricultural farm), pasturage, farming and garden, and that no part of the area was meant for the manufacturing industry at all. In view of the fact that there

1933

TARA CHAND v. RADHA-SWAMI SATSANG SABHA

is no reliable evidence on the point, and that the defendants have not utilised the land for the purpose for over a year, we must accept this finding. The defendants are therefore not entitled to take advantage of section 8, sub-section (*c*) of the Agra Pre-emption Act.

The last point urged in appeal is that inasmuch as the defendants had become co-sharers by virtue of the deed of exchange dated the 24th of October, 1927, long before they took the sale deed, they had put themselves on the same footing as the plaintiff and the latter could not pre-empt. The contention is that in order to have acquired the status of a co-sharer prior to the sale deed, it is not incumbent on the defendants to show that the interest acquired by them was an indefeasible interest. The learned counsel for the respondents has urged before us that the language of section 20 seems to be confined to acquisitions made between the date of the sale deed and the date of the institution of the suit. He further relies on the language of sections 10 and 12 of the Act and argues that no right of pre-emption can accrue when the defendant was already a co-sharer from before the date of the sale deed. Reliance is placed on the definition of the word "co-sharer" in section 4, sub-section (1) and it is urged that the defendants fulfilled the requirements of that section even if the interest acquired by them was a defeasible interest. Reference is made to the pronouncement of the Full Bench in the recent case of *Narsingh Narain* v. *Ram Chander Pande* (1), where it was held that for a co-sharer to be entitled to pre-empt it was not necessary that he should have acquired an indefeasible title. It is therefore contended that the defendants ought to be on the same footing as the plaintiff.

We think that there is a certain amount of anomaly involved in the contentions of the counsel for both the parties. If the plaintiff can maintain his suit for pre-emption on the strength of a defeasible title, it seems unfair that the defendants should not be allowed to defend their acquisition on the strength of a similar title. On the other hand if the defendants are allowed to defend the purchase on the ground of a defeasible title, then it may be difficult to see how the claim for pre-emption of a second sale deed taken immediately after the first sale deed could be allowed.

In the connected second appeal the position taken up by the plaintiff is that the deed of exchange in question was in reality a sale deed, which implies an assertion that the transfer of property by the defendants to the transferor was bogus and

(1) (1932) I.L.R., 54 All., 971.

that the real consideration which secretly passed was cash consideration.

We think that the point raised is of sufficient importance to be considered by a Full Bench. We accordingly direct that the following points should be referred to the Full Bench and that the record be laid before the Chief Justice for the constitution of such a Bench:

(1) Whether, if the vendee had before his purchase acquired a share with a defeasible title, he can defeat the claim for pre-emption brought by the plaintiff who had an indefeasible title?

(2) Would the answer be in any way different if the deed of exchange relied upon by the vendee turns out to be a sale deed?

Dr. *N. P. Asthana* and Messrs. *B. Malik* and *S. N. Gupta*, for the appellants.

Messrs. *K. Verma* and *Shabd Saran*, for the respondents.

SULAIMAN, C.J., MUKERJI and KING, JJ.:—The facts of this case are given in the order of reference. The plaintiff's claim for pre-emption was resisted by the defendant Sabha on the ground, among others, that the defendant Sabha was a co-sharer by virtue of a deed of exchange taken shortly before the sale deed sought to be pre-empted. The plaintiff challenged the deed not only on the ground that it was null and void and fictitious, but also that it conferred only a defeasible interest on the defendant.

Only two questions have been referred to the Full Bench. They are (1) Whether, if the vendee had before his purchase acquired a share with a defeasible title, he can defeat the claim for pre-emption brought by the plaintiff who had an indefeasible title? (2) Would the answer be in any way different if the deed of exchange relied upon by the vendee turns out to be a sale deed?

These questions cannot be answered without considering the effect of an acquisition of a defeasible title by the pre-emptor or the vendee as against the other.

The only section where the word "indefeasible" has been used in the Agra Pre-emption Act is section 20.

1933

TARA CHAND v. RADHA-SWAMI SATSANG SABHA

It has not been used by the legislature anywhere else. Unfortunately that word has not been defined in the Act. As it is a well known technical word which has received judicial interpretation in England, this Court had to hold that the word "indefeasible" cannot be taken to have the restricted meaning of "not being liable to pre-emption" but has its ordinary though wider meaning of "incapable of being defeated. or not liable to be defeated": See *Deo Narain Singh* v. *Ajudhia Prasad* (1). This case has since been followed in numerous cases. When the legislature chooses to borrow a technical word from the English Common law there seems to be no good ground for giving to it a meaning different from what it has in the English law.

It would follow that where an acquisition obtained by a vendee is liable to be defeated or capable of being defeated, even though it has not yet been actually defeated, the vendee acquires merely a defeasible and not an indefeasible interest thereby.

Now section 20 of the Act lays down that no suit for pre-emption shall lie where prior to its institution the vendee has acquired an indefeasible interest which if existing on the date of the sale would have barred the suit. The provision obviously means that the indefeasible interest must be such that if it had existed at the time of the sale, although in fact it did not so exist, it would have been a bar to the claim of pre-emption. The phraseology employed leaves no room for doubt that the legislature contemplates an acquisition of an indefeasible interest by the vendee during the period between the sale deed and the institution of the suit. The reason for this is obvious. On the execution of the sale deed a right to pre-empt accrues to the pre-emptor and a cause of action arises in his favour. The legislature has provided that once such a cause of action has accrued, the vendee should not be allowed to defeat the claim for pre-emption based on that cause of action

(1) (1927) I.L.R., 49 All., 696.

unless and until he acquires not merely a defeasible but an indefeasible interest in the mahal between the period of the sale deed and the period of the suit. It is accordingly clear that it is not sufficient for a vendee to acquire a mere defeasible interest. If he wants to resist the claim of the pre-emptor successfully he must show that he has, subsequently to the sale deed and before the suit was filed, acquired an indefeasible interest.

On this interpretation of section 20 it would follow that the requisite condition of the acquisition of an indefeasible interest is to be fulfilled only when the vendee is resisting the claim on the strength of an acquisition made between the sale deed and the institution of the suit. A voluntary transfer in favour of the vendee during the pendency of the suit is of no avail to him under the proviso to section 19. It would also seem that no section of the Act lays down that a vendee cannot be a co-sharer at the time of the sale if he possesses merely a defeasible interest in the mahal. It is the subsequent acquisition by him which is required to be indefeasible.

It was held by a Full Bench of this Court in *Narsingh Narain* v. *Ram Chander Pande* (1) that in order to enable a pre-emptor to maintain a suit for pre-emption it is not necessary for him to show that his title had become indefeasible and that he himself was not liable to be pre-empted. The word "co-sharer" is defined in section 4, sub-section (1) as a person other than a petty proprietor who is entitled as proprietor to any share or part in a mahal. There is no jurisdiction whatsoever for introducing new words into this definition and holding that that proprietor must have purchased his interest more than 12 months before the cause of action accrued in his favour. Similarly the words "petty proprietor" and "purchaser" in sub-sections (7) and (8) of section 4 cannot be given restricted meanings. One is, therefore, driven to hold, as was laid down by the Full Bench case

(1) (1932) I.L.R., 54 All., 971.

1933

TARA CHAND v. RADHA-SWAMI SATSANG SABHA

referred to above, that for a person to be a co-sharer it is not required that he should have acquired an indefeasible title at the time. Indeed numerous cases, decided before the Pre-emption Act came into force, can be cited under which a plaintiff who acquired a share under one sale deed was allowed to pre-empt another sale deed taken shortly after his own. Now section 12 gives the classes of persons who are entitled to pre-empt, and they include coparceners and co-sharers. It must therefore be held that in order to have the right of pre-emption it is enough that the pre-emptor is a co-sharer at the time of the sale deed and it is not further incumbent upon him to show that he had before that date acquired an indefeasible interest in the mahal.

The position of the vendee, who is resisting the claim of a pre-emptor on the ground that he himself is a co-sharer, must of a necessity be similar. If a pre-emptor can maintain a suit on the strength of a defeasible title, the vendee in the same way can resist the claim on the ground of a defeasible interest if it existed at the time of the sale. If when the sale takes place it so happens that the plaintiff and the vendee both possess defeasible interests in the same mahal, it would be illogical to allow the plaintiff with a defeasible title to have preference over the vendee with an equally defeasible title. When both stand on the same footing, there is absolutely no ground for giving one preference over the other. As the Act makes no distinction between defeasible and indefeasible titles so far as the pre-emptor is concerned, it would follow that the defendant vendee who has a defeasible title at the time of the sale deed would be an equal co-sharer whether the pre-emptor on that date has a mere defeasible or an indefeasible title. It is only when the defendant acquires title after the cause of action has accrued in favour of the pre-emptor in the execution of the sale deed that it is incumbent upon him to show an indefeasible title. Barring this exception, there is nothing to show that a defendant with a

defeasible title existing at the time of the sale cannot successfully resist a plaintiff with an indefeasible title. On the view expressed by the Full Bench in *Narsingh Narain's* case (1) both the plaintiff and the vendee would be co-sharers at the time of the sale, whether their titles are defeasible or indefeasible, and if they both come in the same class under section 12 the pre-emptor cannot claim any preference at all.

It is urged on behalf of the respondent that this view may involve a difficult situation where a defendant has taken several sale deeds in succession, for it might well be argued that even if he must submit to pre-emption of the first sale deed, he can resist the claim to pre-empt the subsequent sale deeds because on those dates he had a defeasible title by virtue of the first sale deed. We, however, do not think that such a result will necessarily follow. There was plenty of authority before the Agra Pre-emption Act which did not allow a vendee to take advantage of an earlier sale deed which was being pre-empted. In a case where there are such successive sale deeds, a pre-emptor ought to pre-empt all the sale deeds, and if separate suits are filed they can be connected with each other. If the plaintiff succeeds in pre-empting the earlier sale deeds and thereby destroys the very foundation of the defence of the vendee so far as the subsequent sale deeds are concerned, he must get a decree for pre-emption of the subsequent sale deeds as well. It is no answer to say that the vendee had a defeasible title at the time of the subsequent sale deeds. Such a defence cannot prevail when the very foundation of it is being destroyed by the plaintiff at the same time. The court will pass a decree for pre-emption of all the sale deeds and it would be inconsistent to allow the defendant to set up an earlier sale deed as a defence which also is allowed to be pre-empted by the court. Of course, where a plaintiff omits to pre-empt the first sale deed or where the first transaction confers a defeasible interest

(1) (1932) I.L.R., 54 All., 971.

1933

TARA CHAND v. RADHA-SWAMI SATSANG SABHA

like a gift or exchange from a Hindu widow or a member of a joint Hindu family, which cannot be pre-empted by the plaintiff, it would be open to the vendee to set it up as a defence to the claim for pre-emption of his subsequent sale deeds. But where the first transaction is a sale deed and is being pre-empted by the plaintiff himself and a decree is to be given to the plaintiff, no defence can be based on it so as to defeat the claim for pre-emption of the subsequent sale deeds. This view is consistent with the view which prevailed before the Agra Pre-emption Act came into force and we have no reason to imagine that the legislature intended to alter that law. Accordingly there can be no real difficulty in the case of successive sale deeds.

Our answer to the first question, therefore, is that if the vendee had before his purchase acquired a share with a defeasible title (which is not pre-empted by the plaintiff) he can defeat the claim for pre-emption brought by the plaintiff who had an indefeasible title.

Our answer to the second question is that if the deed of exchange relied upon by the vendee, which cannot be pre-empted, turns out to be a sale deed and the plaintiff is pre-empting that sale deed, the vendee cannot successfully defeat the claim of pre-emption on the strength of this ostensible deed of exchange which is found to be in reality a sale deed.

REVISIONAL CRIMINAL

Before Sir Shah Muhammad Sulaiman, Chief Justice, and Mr. Justice King

1933
November, 24

EMPEROR *v.* RAGHUBAR DAYAL*

Stamp Act (II of 1899), sections 2(10), 62(b); article 5, exemption (a)—Entries in account books of sales of ornaments, signed by the sellers—"Conveyance"—"Memorandum of agreement for sale"—Exemption from stamp duty—Purchaser getting unstamped receipt written and signed by the

*Criminal Revision No. 329 of 1933, from an order of L. V. Ardagh, Sessions Judge of Jhansi, dated the 3rd of March, 1933.