

A

MOHD. NOOR AND ORS. ETC. ETC.

v.

MOHD. IBRAHIM AND ORS. ETC. ETC.

JULY 19, 1994

B

[R.M. SAHAI AND B.L. HARSARIA, JJ.]

Rajasthan Pre-emption Act, 1966—Sections 2(vii), 3, 4, 11/Rajasthan Tenancy Act, 1955—Section 14(a)—Pre-emption—Right of Co-sharers in Khatedari rights of agricultural lands—Whether entitled to claim pre-emption—Held, No—Transfer made by a Khatedar tenant—Not a transfer of ownership.

Rajasthan Tenancy Act, 1955—Sections 14(a), 14(c), 40 to 43, 59—Nature of Khatedari rights—Transfer of such rights—Whether amounts to transfer of ownership—Held, No.

D

The appellants in the present appeal were co-shares in the Khatedari rights of the land transferred. The question that arose for consideration was whether a co-sharer of khatedari rights of agricultural land was entitled to claim pre-emption under the Rajasthan Pre-Emption Act, 1966.

E Consequently the dispute was whether the sale of the land amounted to transfer of ownership within meaning of Section 2(vii) of the Act.

Dismissing the appeal, this Court

HELD : 1.1. A Khatedar tenant is a person by whom rent is payable u/s 43 of the Rajasthan Tenancy Act. The effect of it in law is that such a person cannot be deemed to be an absolute or unlimited owner which is necessary before the right of pre-emption can be exercised. [802-E]

1.2. The Rajasthan Tenancy Act permits transfer of agricultural land. Therefore, a khatedar tenant is entitled to transfer his tenancy land. But a co-sharer can claim the right of the pre-emption only if it is a sale of ownership. The tenancy legislation visualizes transfer of subordinate right but the Rajasthan Pre-Emption Act, 1966 recognises transfer of absolute right only. Transfer of Khatedari rights being transfer of subordinate right only, no right of pre-emption exists in such transfer. Even though a khatedar tenant is an owner for all practical purposes, his

ownership is limited and, therefore, the transfer by a Khatedar tenant of an agricultural holding does not give right to a co-sharer to claim right of pre-emption. Right of pre-emption is a right of substitution in ownership either of land or house. It is not available in transfer of tenancy.

[793-H, 794-A-D]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2696 of B
1982 Etc. Etc.

From the Judgment and Order dated 1.12.81 of the Rajasthan High Court in B.B.C.R.S.A.No. 174 of 1981.

B.D. Sharma, Rajendramal Tetia, Indira Makwana and Narotam C Vyas for the Appellants.

Sushil Kumar Jain and Sudhanshu Atreya for the Respondent.

V.J. Francis for the Respondent in Nos. 5 & 8.

D
The Judgment of the Court was delivered by

R.M. SAHAI, J. The short and the only question that arises for consideration in these appeals is whether a co-sharer of khatedari rights of agricultural land is entitled to claim pre-emption under the Rajasthan Pre-Emption Act, 1966 (hereinafter referred to as 'the Act').

F
Right of pre-emption has not been looked upon favourably as it operates, 'as a clog on the right of the owner to alienate his property'. In *Radhakishan Laxminarayan Toshniwal v. Shridhar Ramchandra Aishi & Ors.*, AIR (1960) SC 1368 = [1961] 1 SCR 248, it was observed that, 'to (To) defeat that law of pre-emption by any legitimate means' was not fraud. Therefore, availability of this weak or archaic right has to be construed strictly. If the Act, there is no provision extending the benefit of pre-emption to agricultural holdings. A person claiming pre-emption, therefore, has to squarely fall with in the forecorners of the provisions contained therein.

G
The right of pre-emption is defined in Section 3 to means, 'a right accruing under Section 4 of the Act upon transfer of any immovable property to acquire such property and to be substituted as the transferee thereof in place of and in preference to the original transferee'. Section 11 of the Act entitles a person to bring a suit for pre-emption when a transfer

A

B

C

D

E

F

G

H

- A has been completed. Transfer under clause (viii) of Section 2 of the Act means 'a sale, or a mortgage where the final decree for foreclosure in respect thereof has been passed'. A transfer of immovable property for purposes of the Act, therefore, must be a transfer or mortgage. Sale has been defined by clause (vii) of Section 2 to mean, 'a transfer of ownership in immovable property in exchange for a price paid or promised or partly paid and partly promised'. A co-sharer under Section 2(i) of the Act is entitled to claim pre-emption by filing a suit under Section 11 of the Act. Since factually there was no dispute that each of the appellants are co-sharers in the khatedari rights of the land transferred the entire dispute that shall clinch the issue is if the sale of the land amounted to transfer of ownership within meaning of Section 2(vii) of the Act.

- To determine this it is necessary to examine the nature of Khatedari rights and if a transfer of such right amounts to transfer of ownership. A khatedar tenant is one of the tenants mentioned in clause (a) or Section 14 of the Rajasthan Tenancy Act, 1955 (hereinafter referred to as 'the Tenancy Act') and clause (c) defines the circumstances in which a person may become a khatedar tenant. Such a tenant has a right to bequeath his interest under Section 59 of the Tenancy Act and transfer his interest under Section 41 of the same Act on conditions specified in Sections 42 and 43. His interest is heritable under Section 40 as well. Is that sufficient in law to make him owner of the property? Is the transfer made by a khatedar tenant a transfer of ownership? A khatedar tenant, admittedly, is a person by whom rent is payable under Section 43 of the Tenancy Act. The effect of it in law is that such a person cannot be deemed to be an absolute or unlimited owner which is necessary before the right of pre-emption can be exercised. In *Butterworth's Words and Phrases Legal Defined*, Second Edition, Vol. 4, Page 61, 'ownership' has been defined as under :

- G "Ownership consists of innumerable rights over property, for example, the rights of exclusive enjoyment, of destruction, alteration, and alienation, and of maintaining and recovering possession of the property from all other persons. Such rights are conceived not as separately existing, but as merged in one general right of ownership".

Salmond summed up the concept of ownership as under :

- H "Summing up the conclusion to which we have attained, we may

define the rights of ownership in a material thing as the general, A permanent and inheritable right to the uses of that thing."

Austin in his book of *Jurisprudence*, 3rd Edition, Page 817 defines the 'right ownership' as

'a right indefinite in point of user, unrestricted in point of disposition, and unlimited in point of duration over a determinate thing.'

The theoretical concept of 'ownership', therefore, appears to be that a person can be considered to be owner if he has absolute dominion over it in all respects and is capable of transferring such ownership. Heritability and transferability are not doubt some of the many and may be most important ingredients of ownership. But they by themselves cannot be considered as sufficient for clothing a person with absolute ownership. Their absence may establish lack of ownership but their presence by itself is not sufficient to establish it. The ownership concept does not accord with the status of a person who is paying the rent. A tenant under various legislations either urban or rural property, agricultural or otherwise, enjoys right of heritability and transferability. At the same time, he does not become owner of the property. Transfer of ownership is distinct and different from transfer of interest in the property. A licensee or even a tenant may be entitled by law to transfer his interest in the property but that is not a transfer of ownership. For instance, a lessee from a corporation or a local body or even State Government to raise building may have heritable and transferable right but such a person is not an owner and the transfer in such a case of his interest in the property and not the ownership. In *Inder Sen & Anr. v. Naubat Singh & Ors.*, I.L.R. 7 All. 553(FB) it was held that absolute ownership is an aggregate of compendium of rights such as right of possession, the right of enjoying usufruct of the land and so on and so forth. The ownership, therefore, is a sum total of various subordinate rights. The right to transfer the subordinate right either under general law or statutory law does not make it transfer of ownership. Section 6 of the Transfer of Property Act, 1882 permits transfer of any property. It may be transfer of absolute or subordinate right. The Tenancy Act permits transfer of agricultural land, therefore, a khatedar tenant is entitled to transfer his tenancy land. But a co-sharer can claim the right of pre-emption only if it is a sale of ownership. In other words the tenancy legislation visualizes transfer of subordinate right but the Act recognises

B

C

D

E

F

G

H

- A transfer of absolute right only. Transfer of khatedari rights being transfer of subordinate right only no right of pre-emption exists in such transfer. It is true that after abolition of zamindari in various States the tiller of the soil has become owner of the land. But it cannot be disputed that the proprietorship of the land vests in the State to whom the rent is payable.
- B It is not uncommon that a person in possession of an agricultural holding even as an owner cannot put his land to any use as he desires. For instance, if the land has to be converted from agricultural use to non-agricultural use then the tenure-holder is required to obtain permission of the State Government or the appropriate authority appointed by it. All these indicate that even though a Khatedar tenant is an owner for all practical
- C purposes but his ownership is limited and, therefore, the transfer by a Khatedar tenant of an agricultural holding does not give right to a co-sharer to claim right of pre-emption. The submission that the ownership of the State was a mere fiction cannot be accepted. Right of pre-emption is a right of substitution in ownership either of land or house. It is not available in transfer of tenancy.
- D

In the result, all these appeals fail and are dismissed.

A.G.

Appeals dismissed.