

(2022) 12 GAU CK 0029

Gauhati High Court

Case No: First Appeal From Order No. 58 Of 2022

Mansur Ali Ahmed

APPELLANT

Vs

Santoshi Agarwalla
And Anr.

RESPONDENT

Date of Decision: Dec. 16, 2022

Acts Referred:

- Code Of Civil Procedure, 1908 - Section 151, Order 39 Rule 1, Order 43 Rule 1(r), Order 39 Rule 2

Hon'ble Judges: Mitali Thakuria, J

Bench: Single Bench

Advocate: S Dutta, G N Sahewalla

Final Decision: Disposed Of

Judgement

1. Heard Mr. S. Dutta, learned Senior Counsel for the appellant. Also heard Mr. G. N. Sahewalla, learned Senior Counsel for the respondents.

2. This is an application under Order 43 Rule 1(r) of the Code of Civil Procedure read with Section 151 of the Code of Civil Procedure for

modification and/or setting aside the impugned order dated 17.11.2022, passed by the Court of learned Civil Judge, Dibrugarh, in Misc. (J) Case No.

126 of 2022 (in Title Suit No. 166 of 2022).

3. The facts leading to the present appeal is that the present appellant, as the petitioner, filed a petition under Order XXXIX Rule 1 & 2 of the Code of

Civil Procedure, which was registered as Misc. (J) Case No. 126 of 2022, in connection with Title Suit No. 166/2022, seeking temporary injunction,

which was rejected vide Order dated 17.11.2022.

4. On being highly aggrieved and dissatisfied with the order dated 17.11.2022, passed by the learned Court of Civil Judge, Dibrugarh, in Misc(J) Case

No. 126/2022 in connection with Title Suit No. 166/2022, the appellant has preferred this appeal on the following grounds, amongst others:

(i) That the learned Trial Court has erred in law as well as facts in rejecting the application filed by the appellant, as the petitioner, under Order

XXXIX Rule 1 & 2 of the Code of Civil Procedure in Misc. (J) Case No. 126/2022, and as such, the impugned order, dated 17.11.2022, passed by the

learned Civil Judge, Dibrugarh, is liable to be set aside and quashed.

(ii) That the learned Court below, while disposing the petition under Order XXXIX Rule 1 & 2 of the Code of Civil Procedure, has completely

overlooked and/or misunderstood the importance and/or impact of the provision of "preemption" under which the appellant, as a plaintiff/petitioner,

has exercised his right over the suit property, which caused serious miscarriage of justice and hence, the order passed by the learned Civil Judge,

Dibrugarh, is liable to be set aside and quashed.

(iii) That the learned Civil Judge, Dibrugarh, arrived at a specific finding of there being a "prima facie case in favour of the

appellant/petitioner/plaintiff" ought not to have rejected the prayer of injunction as had been sought for by the appellant. Taking the advantage, the

opposite party/defendant No. 1, in result, changing the nature and character of the suit land and which shall in turn render the "prima facie" case

of the appellant completely redundant and/or infructuous and for which, the impugned order dated 17.11.2022 is liable to be set aside and quashed.

(iv) The learned Court below came to a finding that the opposite party No. 1 is already in possession of the suit premises, though there was no such

averment pleaded in the written objection of the opposite party No. 1, and moreover, the appellant, in his pleadings in respect of Misc. (J) Case No.

126/2022, had categorically stated that opposite parties are not possessing the suit premises and that being so, the impugned order, dated 17.11.2022,

passed by the learned Civil Judge, Dibrugarh, in Misc. (J) Case No. 126/2022, is liable to be set aside and quashed.

(v) That the findings of the learned Civil Judge, Dibrugarh, to the effect that the balance of convenience is not in favour of the appellant/ petitioner as

the opposite party No. 1 has already taken possession of the suit property which is erroneous inasmuch as the learned Court below failed to take note

of the fact that the appellant, as the plaintiff/petitioner, had filed the Title Suit as well as the injunction petition on 30.09.2022. But, the learned Court

below directed for issuance of notice upon opposite party vide its order dated 30.09.2022 in spite of specific pleadings that the opposite party No. 1

was yet to take possession of the suit property. Thus, the learned Civil Judge, Dibrugarh, had not only overlooked the urgency of the petitioner/

plaintiff, but also by way of completely disregarding the fact that the appellant as petitioner/plaintiff being aware of his right under the law of

preemption had clearly, without any undue delay, immediately approached the learned Court below seeking enforcement of his right under the said

principle of law and hence, the impugned order, dated 17.11.2022, is bad in law and liable to be set aside.

(vi) That the learned Trial Court has erred in fact in coming to specific finding that no irreparable loss and injury would cause to the appellant in spite

of being made aware about the fact that the opposite party No. 1 was contemplating to adversely change the nature and character of the suit property

and which would clearly cause irreparable loss and injury to the appellant/petitioner.

(vii) That the learned Court below had erred in law in permitting the opposite party No. 1 to carry out the construction activity over the suit property

and thereby defeating the very purpose of filing the application under Order XXXIX Rule 1 & 2 of the Code of Civil Procedure as it is a settled

proposition of law that a person cannot be made to suffer for the wrong committed by the Court and hence, the impugned order dated 17.11.2022 is

liable to be set aside and quashed.

5. Accordingly, the present appellant/petitioner prayed to modify/set aside the impugned order dated 17.11.2022, passed by the learned Civil Judge,

Dibrugarh, in Misc. (J) Case No. 126/2022, arising out of Title Suit No. 166/2022.

6. Mr. S. Dutta, learned Senior Counsel for the appellant, has submitted that the appellant, as a plaintiff, instituted a title suit, being Title Suit No.

166/2022, exercising his right of preemption on the suit property. A family settlement and compromise decree was passed in Title Suit Case No.

11/2016 by the Court of learned Munsiff No. 1, Dibrugarh, under which the opposite party No. 2 and the father of the petitioner, namely, Nizamuddin

Ahmed, had inherited their respective share of ancestral property and got their land separated with separate patta and dag, but the land of both the

parties are in same campus, which is in L-Shaped and separated by a common road and there is no wall in between the land of opposite party No. 2

and Nizamuddin Ahmed and the common road was lying in between the lands for the use of the family members of the petitioner as well as the family

members of the opposite party No. 2. Subsequently, Nizamuddin Ahmed had sold his residential land to his son, i.e. the petitioner, vide Sale Deed No.

2909/2014, and accordingly, the petitioner mutated his name over the said property and is regularly paying the land revenue. When it has come to the

knowledge of the present appellant/petitioner that the opposite party No. 2 was looking for purchaser to sale his aforesaid property, which is adjacent

to the land of the petitioner, the petitioner requested the opposite party No. 2 to sale the property to him and he was ready to give the market value.

But, the opposite party No. 2 did not respond to the request of the petitioner and for which, the petitioner has to serve a notice to the opposite party

No. 2 exercising his right of preemption and the father of the petitioner also submitted a petition before the Deputy Commissioner, Dibrugarh,

requesting the concerned authority not to grant NOC in favour of the opposite party No. 2 for sale of the land to any third party without the knowledge

and information of the petitioner. In this regard, one public notice was also advertise in a daily newspaper (Axomiya Pratidin) on 16.07.2022, wherein,

it is mentioned that they are intending to purchase the suit property which is their family property and also adjacent to their land having right of

preemption to purchase the same. But the opposite party No. 2 had sold a land measuring 0B-2K-0L to opposite party No. 1, vide registered Sale

Deed No. 549 at Sl. No. 5951/2020, registered at the Office of Sub_Registrar, Dibrugarh, dated 21.09.2022, on a consideration of Rs. 60 Lakhs

including the Assam Type house with the boundary wall, keeping the petitioner in dark in spite of the fact that there is common road and gate and no

wall between the residential land of the petitioner and the opposite party and for which, the petitioner immediately filed the Title Suit supported with a

petition for injunction for immediate relief as the petitioner has prima facie case and balance of convenience also lies in favour of the petitioner and if

injunction is not granted, the petitioner will suffer from irreparable loss which cannot be compensated in terms of money. But, the learned Court below

overlooked and misunderstood the importance and impact of the provision of preemption under which the appellant/petitioner had exercised his right

over the suit property and without considering the entire fact of the case, the learned Court below rejected the petition for injunction vide order dated

17.11.2022, which caused serious miscarriage of justice as the opposite party No. 1 has already taken possession over the suit land and also trying to

change the nature and character of the same. The learned Senior Counsel for the appellant, therefore, submitted that if the present application is not

allowed restraining the opposite party No. 1 from making further construction over the suit property, the very purpose of filing the title suit, claiming his

right of preemption, will become infructuous. And, in the same time, the present appellant will suffer irreparable loss and injury which cannot be

compensated in terms of money.

7. In this context, the learned Senior Counsel for the appellant also relied on a decision of a Constitutional Bench of Honâ€™ble Supreme Court in

Audh Bahari Singh (Shri) Vs. Gajadhar Jaipuria & Ors., reported in AIR 1954 SC 417, and submitted that the right of preemption is not a personal

right, but it is an incident of the property attaching to the land itself. He further emphasized on the paragraph No. 22 of the said judgment, which reads

as under:

â€œIn our opinion the decision proceeds upon a wrong assumption. The right of pre-emption, as we have already stated, is an incident of

property and attaches to the land itself. As between Muhammadans the right undoubtedly arises out of their personal law; but that is

because the law of pre-emption is no part of the general law in India. Muhammadans live scattered all over our country and unless the right

of pre-emption is regarded as part of their personal law they would lose the benefit of it altogether. Hence if a Muhammadan owns land in

any local area and has co-sharers or neighbouring proprietors who are also Muhammadans, a right of pre-emption would accrue to the

latter under the personal law of the Muhammadans, which is enforced in this country since the British days on grounds of equity, justice

and good conscience. But though arising out of personal law the right of pre-emption is not a personal right; it is a real right attaching to

the land itself. When the right is created by custom it would, be, as the Privy Council, has said, co-extensive with the right under

Muhammadan Law unless the contrary is proved. This means that the nature and incidents of the right are the same in both cases. In both it

creates a right in the property and not a mere personal claim against the vendor or the vendee and the essential pre-requisites to the

exercise of the right and the terms of enforcement are identical in both But this does not mean that the customary right must be personal to

the inhabitants of a particular locality. It may be so, if that is the incident of the custom itself as established by evidence, but not otherwise.

Under Muhammadan Law the right is confined to persons of a particular religious persuasion because it has its origin in the Muhammadan

Law which is no longer a law of the land. But when it is the creature of a custom the religious persuasion of the parties or the community' to

which they belong are. altogether immaterial. All that is necessary to prove in such cases is that the right of pre-emption is recognised in a

particular locality and once this is established, the land belonging to every person in the locality would be subject to the custom,

irrespective of his being a member of a particular community or group. The whole doctrine, as enunciated above, is based upon the

fallacious assumption that the right of pre-emption is a personal right arising out of certain personal conditions of the parties like religion,

nationality or domicile and this fallacy crept into our law simply because the right of pre-emption as between Muhammadans is administered

as a part of their personal law in our country.â€

8. In this context, Mr. G. N. Sahewalla, the learned Senior Counsel appearing on behalf of the opposite parties/ respondents, has submitted that as per

the settlement deed, both the parties are possessing the land and the disputed land is not adjacent to the land of the petitioner and the land is separated

by one 18 feet wide road and the said 18 feet is still exist along with 15.5 wide approach road. Further, it is submitted by the learned Senior Counsel

for the respondents/ opposite parties that right of preemption is itself void and law of equity is against the right of preemption.

9. In this context, the learned Senior Counsel for the opposite parties/respondents relied on a decision of Honâ€™ble Supreme Court in Radhakishan

Laxminarayan Toshniwal Vs. Shridhar Ranchandra Alsi, reported in AIR 1960 SC 1368, and emphasized on paragraph Nos. 13 & 14 of the said

judgment, which reads as under:

â€œ13. In the present case the transaction of sale had not been completed until February 1, 1944, when the sale deed was executed.

Anything done previous to it could not ordinarily be said to be a fraud to deprive a pre-emptor, from the exercise of his right of pre-

emption. There are no equities in favour of a pre-emptor, whose sole object is to disturb a valid transaction by virtue of the rights created in

him by statute. To defeat the law of pre-emption by any legitimate means is not fraud on the part of either the vendor or the vendee and a

person is entitled to steer clear of the law of pre-emption by all lawful means.

14. It was then submitted that the sale deed had as a matter of fact, been executed on February 1, 1944; but respondent Sridhar brought the

suit not on the cause of action arising on the sale dated February 1, 1944, but on the transaction of April 10, 1943, coupled with that of

April 24, 1943, which being mere contracts of sale created no interest in the vendee and there was no right of pre-emption in respondent

No. I which could be enforced under the Code. Mr. Chatterji urged that it did not matter if the sale took place later and the suit was

brought earlier but the suit as laid down was one to pre-empt a sale of April 1943 when, as a matter of fact, no sale had taken place. If

respondent Sridhar had based his right of pre-emption on the basis of the sale of February 1, 1944, the appellant would have taken such

defence as the law allowed him. The defence in regard to the conversion of the land from agricultural into non- agricultural site which

negatives the right of pre-emption would then have become a very important issue in the case and the appellant would have adduced proper

proof in regard to it. The right of pre-emption is a weak right and is not looked upon with favour by courts and therefore the courts could

not go out of their way to help the pre-emptor.â€

10. Further, the learned Senior Counsel for the respondents relied on a decision of Honâ€™ble Apex Court in Kumar Gonsusab & Ors. Vs.

Mohammed Miyan URF Baban & Ors., reported in (2008) 10 SCC 153, wherein also, the Honâ€™ble Supreme Court expressed the view that

â€œthe right of preemption is a weak right and is not looked upon with favour by Courts and therefore the Courts cannot go out of their way to help

the preemptor.â€

11. Further it is submitted that in the instant case, the opposite party No. 1 has already purchased the land and by executing one registered Sale Deed,

he is the lawful owner of the suit land and already in possession of the land in question and exercising the right of preemption, one cannot prevent a

person from executing any sale deed or to stop the possession of a lawful owner. The learned Court below had rightly passed the order in Misc. (J)

Case No. 126/2022 and hence, there is no requirement of any interference by this Court to the order passed by the learned Court below rejecting the

prayer for temporary injunction, as prayed by the present appellant/ petitioner. The learned Court below discussed at a length about all the materials

placed before it and accordingly decided the case, which need no interference of this Court. It is rightly held by the learned Court below that the

petitioner has not been able to satisfy the Court for granting temporary injunction in his favour and failed to prove three golden principles in his favour,

for which the injunction petition has been rightly rejected by the learned Court below. More so, from the observations made by the Honâ€™ble Apex

Court, it is seen that the right of preemption is a very weak right and the Court cannot help a preemptor only on the basis of right of preemption or

cannot restrain any lawful owner to transfer his land to any other person.

12. In reply, the learned Senior Counsel for the appellant/petitioner submits that the decision of the Honâ€™ble Supreme Court, upon which the

learned counsel for the opposite parties/respondents has relied upon, i.e. Kumar Gonsusab (supra), is a two judges Bench judgment and the judgment,

as cited by him, hereinabove, i.e. Audh Bahari Singh (supra), which was decided on April, 1954, is a Constitutional Bench judgment, which is not yet

overruled and hence, it cannot be held that the right of preemption is a weak piece of right. Further, it is submitted by the learned Senior Counsel for

the appellant/petitioner that on the strength of the rejection order passed by the learned Court below, the opposite party No. 1 has already changed the

nature and character of the suit land and hence, if he is allowed to do further construction over the suit property, in that event, there will be multiplicity

of proceedings and hence, prayed for an order to maintain status quo.

13. Considering the submissions of learned counsels for both sides, I have perused the record and order passed by the learned Court below in Misc.

(J) Case No. 126/2022.

14. It is seen that while passing the order dated 17.11.2022 in Misc. (J) Case No. 126/2022, the learned Court below has held that there is a strong

prima facie case in favour of the petitioner considering the fact that there are some issues to go for trial to determine the right of preemption of the

plaintiff/petitioner. It is observed by the learned Court below that in the instant case, the petitioner has claimed that the suit land is adjacent to his

property and hence, he has the right to exercise the law of preemption, to which the opposite parties vehemently objected and it is the case of the

opposite party No. 2 that the suit land and the land of the petitioner are not having any common boundary, but are separated by a common way of 18

feet wide and 318 feet length. So, considering the rival submissions of the parties, the learned Court below opined that there is strong prima facie case

to go for trial or to determine the right of preemption of the petitioner/plaintiff. But, the learned Court below rejected the prayer for temporary

injunction with the view that the petitioner failed to prove the existence of remaining two golden principles, i.e. balance of convenience and irreparable

loss and injury in his favour.

15. The learned Court below, while rejecting the petition for temporary injunction, has also relied on a decision of Hon^{ble} Apex Court in the case

of Best Sellers Retail India (P) Ltd. Vs. Aditya Nirla Nuvo Ltd., reported in (2012) 6 SCC 792, has held that "yet, the settled principle of law is that

even where prima facie case is in favour of the plaintiff, the Court will refuse temporary injunction if the injury suffered by the plaintiff on account of refusal of temporary injunction was not irreparable.â€

16. It is the admitted fact that the opposite party No. 2 was having the valid title over the suit property and presently the opposite party No. 1 has valid

title in respect of the suit premises as he purchased the same from opposite party No. 2 by observing all necessary formalities and his name is also

mutated in the copy of Jamabandi. It is also admitted that there are various judgments of Honâ€™ble Apex Court and the opposite party also relied on

2 (two) judgments of the Honâ€™ble Apex Court, wherein, the Honâ€™ble Apex Court has expressed the view that the right of preemption is a very

weak piece of right and right of preemption is itself void and against the law of equity. But, in the same time, it also cannot be denied that the judgment

of the Constitutional Bench of Honâ€™ble Supreme Court, decided on April 1954, is not yet overruled, wherein, the Honâ€™ble Apex Court

expressed the view that the right of preemption would accrue to the latter under the personal law of the Muhammadans, which is enforced in this

country since the British days on the grounds of equity, justice and good conscience.

17. In the present case, it is seen that the opposite party No. 1 has already purchased the land observing all necessary formalities from the opposite

party No. 2 and mutating his name over the suit land, he has the possession over the disputed land. But, in the same time, it also cannot be denied that

very purpose of filing the title suit on the right of preemption by the petitioner/plaintiff will become infructuous if the nature and character of the entire

suit land is change before the disposal of the title suit pending before the learned Court below.

18. So, considering the entire facts and circumstances of this case, I find that modification of the order passed by the learned Court below is deemed

necessary and hence, I find it justified to direct both the parties to maintain status quo over the suit property till disposal of the title suit. Accordingly,

both the parties are hereby directed to maintain status quo over the suit property as on today and the learned Court below is directed to proceed with

the case and shall dispose of the case expeditiously within 6 (six) months.

19. With the above observation and direction, this appeal stands disposed of.

20. LCR be returned.