Nabin Chandra Sarma Vs Rajani Chandra Chakrabarti and Others

Court: Calcutta High Court

Date of Decision: May 14, 1920

Final Decision: Dismissed

Judgement

Mookerjee, C.J.
This is an appeal by the. Plaintiff in a suit for enforcement of a right of pre-emption with regard to immoveable property.

The claim is based on both contract and custom. The properly in dispute originally belonged to the Plaintiff''s paternal uncle who transferred it to

his son-in-law. In that conveyance, a clause was inserted in the following terms : ""If it became necessary for the transferee or his successor to sell it

to any body he or his successor would be bound to sell it either to the vendor or to his nephew (the Plaintiff), or his heirs at the rate of 20 rupees

per Kedar."" The case for the Plaintiff is that in contravention of this covenant, the third Defendant, who is the son of the son-in-law of his uncle, has

transferred the property to the first two Defendants. He accordingly urges that the first two Defendants are bound to retransfer the property to him

on receipt of price at the contract rate. No question arises as to whether the first two Defendants were or were not aware of this covenant; for they

must be deemed to have notice of the contents of the conveyance which was the root of the title of their vendor.

2. The Defendants have resisted the claim on the ground that the covenant is void for remoteness and is not enforceable in law. This argument has

been accepted by the Courts below on the authority of the decision in Nobin Chandra Soor v. Nabab Ali Sarkar 5 C.W.N. 343, (1900). On the

present appeal, the correctness of that decision has been called in question, and we have been invited to hold that the covenant does not

contravene the rule against perpetuities. We are of opinion that this contention is not well founded.

3. It is now firmly settled that an option to arise on any intended sale or other particular kind of alienation by the owner, for example, a right of pre-

emption or first refusal, is subject to the rule against perpetuities, and to bind the land or property, must comply with it, unless the right is conferred

by statute. It may be entirely void, even where limited to a proper period, if intended merely as a total check on alienation by the owner. The

leading decision on the point is the judgment of Sir George Jessel, M.R., in London and South Western Railway v. Gomm 20 Ch. Div. 562

(1882). In that case, the Plaintiff company, in 1855, conveyed land to Powell in fee, and Powell covenanted with the company that he, his heirs or

assigns, would, at any time, on receipt of Ã¯Â¿Â½100, re-convey the land to the company. In 1879, Gomm purchased the land from Powell with notice

of the covenant; in 1880 the company demanded a conveyance, and, upon Gomm''s refusal, brought a bill for specific performance. Mr. Justice

Kay discussed the cases very fully, and declared that he was unable to agree with what had been said in Gilbertson v. Richards 4 H. & N. 277

(1859); 5 H. & N. 453 (1860) and Birmingham Canal Co. v. Cartwright 11 Ch. Div. 421 (1879). ""In my opinion,"" he said, ""a present right to an

interest in property which may arise at a period beyond the legal limit is void, notwithstanding that the person entitled to it may release it."" The

learned Judge, however, thought that the rule against perpetuities was ""a branch, not of the law of contract but of property,"" and added that ""a

contract not creating any estate or interest properly so called in property, at law or equity, is not obnoxious to the rule;"" and as the covenant in that

case did not run with the land at law, and a purchaser without notice would not be bound by it, he thought it was not within the rule against

perpetuities at all, and made a decree for specific performance. Gomm, thereupon, appealed. The Court of Appeal consisting of Sir George Jessel,

M.R., Sir James Hansen, and Sir Nathaniel Lindley, L. JJ., reversed the decree. The Court held that the option to purchase gave an equitable

interest which was within the Rule against perpetuities, and that judged by that Rule, it was void. The Master of the Rolls said he considered that

Mr. Justice Kay was ""quite right in the view he hikes of the doctrine of remoteness and of the authorities cited before him, not forgetting the case of

Birmingham Canal Co. v. Cartawright 11 Ch. Div. 421 (1879), which must he, treated as overruled, ""and that he had ""most correctly and

accurately defined the law,"" but that he was in error in Thinking that the covenant did not create any interest in land. This conclusion was

subsequently applied in Trevelyan v. Trevelyan 33 Law Times Rep 833. Woodall v. Clifton [1905] 2 Ch. 257 and Worthing Corporation v.

Heather [1906] 2 Ch. 532.

4. The same view has been adopted in this country. One of the earliest decisions is that of Nobin Chandra Soor v. Nabob Ali Sarkar 5 C.W.N.

343 (1900), where it was expressly ruled that a covenant for pre-emption which was unlimited in point of time was void on the ground that it was

obnoxious to the rule against perpetuities. This accords with the decision in Tripura Soonderi v. Juggernath 21 W.R. 321 (1875). The point was

not taken in Hari"s Paik v. Juhuruddin 2 C.W.N. 575 (1897), where, however, the question arose between the covenantee and a purchaser from

the covenantor, as explained in the similar case of Kalimuddin v. Beazuddin 14 C.W.N. 295 : S.C. 10 C.L.J. 626 (1909). The case of Nobin

Chandra v. Nabob Ali 5 C.W.N. 343 (1900) has been discussed and approved in Anath Nath v. Keshab Chandra 14 C.W.N. 601 (1910),

Ramasami Pattar v. Chinnan Asari ILR 24 Mad. 448 (1901) and Kalathu Ayyar v. Ranga Vadhyar ILR 38 Mad. 114 (1912), though, perhaps, a

different note was sounded in Arula v. Marriaboyina [1915] 28 Mad. L.T. 471 and Dahva v. Maharai 1 P.L.J. 238 (1916). But we may add that

the doctrine favoured in this Court is supported by the decision of the Judicial Committee in Chandi Churn Baru v. Sidheswari Debi L.R. 15 I.A.

159 : S.C. ILR 16 Cal. 71 (1888).

5. Dr. Jadu Nath Kanjilal has not produced a single authority in support of his contention that the covenant in this case is not bad for remoteness.

But he has argued that in particular contingencies the covenant might not contravene the rule against perpetuities, and might consequently be

upheld. This contention is wholly erroneous. To test whether a covenant violates the rule against perpetuities we must look, not to the particular

events which may have actually happened but to all possible contingencies; Dungannon v. Smith [1845] 2 Cl. & F. 546, Joe v. Andley 1 Cox. 224

: 1 R.R. 46 (1787), Soudaminey v. Jogesh Chand ILR 2 Cal. 282 (268) (1877) and Bramamayi v. Jogesh Chander 8 B.L.R. 400, 407 (1871). In

the light of this principle, it is abundantly clear that the covenant in this case is obnoxious to the rule against perpetuities. The claim, in so far as it is

based on contract, is consequently untenable.

6. The Plaintiff next bases his claim upon custom, as it has been found by the Courts below that the Muhomedan law of pre-emotion is followed by

Hindus in the District of Svlhet. But here the Plaintiff finds himself in a situation of inextricable difficulty. It has been held by the Subordinate Judge

that the Plaintiff has not, complied with the requirements of the Mahomedan law on the subject. One of these requirements is that the pre-emptor

must assert his claim immediately on getting information of the sale. Here the pre-emptor did not immediately, on getting the information, assert his

claim. Reference, however, has been made to the decision in Amjad Hossein v. Kharag Sen Sahu 4 B.L.R. (A.C.) 203; 13 W.R. 299 (1870),

which indicates that the preempted may take a short time in order to ascertain whether his information is correct. But the facts of that case were of

a very special character, and the decision cannot be taken to weaken the principle that any unreasonable or unnecessary delay is to be construed

as an election not to pre-empt [Baijnath v. Ramdhari L.R. 35 I.A. 60 : S.C. ILR 35 Cal. 402; 12 C.W.N. 419 (1908)]. On the other hand, a

lapse of twelve hours before the assertion is made has been held to avoid the claim [Ali Muhammad v. Taj Muhammad ILR 1 All. 283 (1876)]

and even where the delay was caused by the pre-emptor going to the land, which was the subject of pre-emption, and making the assertion there

[Ram Charan v. Nara Bir Mahton 4 B.L.R. (A.C.) 216 ; 13 W.R. 259 (1870)] or going to his own bouse to get the purchase money prior to

asserting it [Jarfan Khan v. Jubbur Miah ILR 10 Cal. 383 (1881)], the delay was considered fatal to the claim. The requirements of the

Mahomedan law on the subject are very stringent as appears from two well-known passages, one in Baillie''s Digest of Mahomedan Law, 481,

and the other in the Hedaya, Book XXXVIII, Chap. II, 550; the formalities must be strictly complied with and there must be clear proof that they

have been duly observed [Jadu Singh v. Rajkumar 4 B.L.R. (A.C.) 171 ; 13 W.R. 177 (1870)]. On the facts found, it is impossible for us to hold

in the present case that the Plaintiff has complied with the requirements of the Mahomedan law on the subject.

7. The conclusion follows that the Plaintiff has no enforceable right either on contract or on custom and that the suit has been rightly dismissed. The

result is that the appeal is dismissed with costs.

Fletcher, J.

I agree.