IN THE HIGH COURT OF JAMMU & KASHMIR AND LADAKH AT JAMMU

Reserved on: 06.11.2025
Pronounced on: 21.11.2025
Uploaded on: 21.11.2025
Whether the operative part or full judgment is pronounced: ***Full***

CFA No.19/2001

IQBAL SINGH

...PETITIONER(S)/APPELLANT(S)

Through: - Mr. K. L Pandita, Advocate.

Vs.

DURGA DEVI AND OTHERS.

...RESPONDENT(S)

Through: - Ms. Mehrukh Syedan, Advocate.

CORAM: HON'BLE MR. JUSTICE SANJAY DHAR, JUDGE

JUDGMENT

1) The appellant has challenged judgement and decree dated 14.02.2001 passed by the learned District Judge, Poonch (hereinafter to be referred as the trial court), whereby suit filed by respondent No. 1/plaintiff for right of prior purchase has been decreed in her favour and a decree of possession of the suit property has been passed against the appellant/defendant No. 1.

2) It seems that respondent No. 1/plaintiff had filed a suit against the petitioner and proforma respondent claiming right of prior purchase in respect of the property comprising

a kacha house and vacant piece of land situated in Poonch Town. The said property was purchased by the plaintiff from Isher Dass the predecessor-in-interest of the proforma respondents in terms of sale deed dated 26.05.1987. As per the case of respondent No.1/plaintiff, she along with father of Isher Dass had jointly purchased the suit property vide sale deed dated 28.04.1976 for an amount of Rs. 11,000/-. It was claimed that the plaintiff and predecessor-in-interest of proforma respondents did not partition the aforesaid property and after the death of Roop Chand the original co-owner of the property in question, his share in the property devolved upon Sh. Isher Dass, the predecessor-in-interest of the proforma respondents. It was further averred in the plaint that one room each out of the joint property that was purchased, remained in possession of the parties but no partition was effected.

3) The plaintiff claimed that she came to know that Isher Dass, the predecessor-in-interest of the proforma respondents was negotiating sale of his share in the aforesaid joint property in favour of the appellant herein and accordingly, a notice was served by the plaintiff through her counsel upon the predecessor-in-interest of the proforma respondents but despite this, he sold his share of the property in question to defendant No.1/appellant herein in

terms of sale deed dated 26.05.1987 for an amount of Rs. 40,000/-. It was pleaded by the plaintiff that actual sale consideration was Rs. 32,000/- but in the Sale Deed it was shown as Rs.40,000/-.

4) On the basis of aforesaid pleadings, the respondent No. 1/plaintiff claimed right of prior purchase against the defendants, on the grounds that property in question was un-partitioned and she being a co-sharer of the property, has right of prior purchase in respect of said property. Another ground urged by the plaintiff was that the suit property is site of the building and the structure, as such, she has a right of pre-emption. It was also contended by the plaintiff that the property in question has a common staircase and a common access and that suit property is a dominant heritage, as such, the plaintiff has a right of pre-emption. It was further contended that the portion of the property belonging to the plaintiff is contiguous to the suit property as such, being an owner of the contiguous property, she has a preferential right of prior purchase to the exclusion of others.

5) The suit was contested by the appellant, the purchaser of the property as well as by the other defendant who was the original co-owner of the property. In their written statements, the defendants pleaded that the plaintiff had

previously filed a suit in respect of the same property seeking a permanent injunction against the appellant herein in which she had clearly admitted that the suit property had been partitioned. It was submitted that the said suit was dismissed for non-prosecution. The defendants also pleaded that even though the property in question was jointly purchased by the plaintiff and predecessor-in-interest of the proforma respondents, yet the same stands partitioned. It was contended that the portions coming to the share of the two co-owners are separately demarcated specifically and the same are under exclusive possession and enjoyment of the parties. The existence of a common staircase and a common entrance to the suit property was also denied by the defendants.

6) Vide order dated 13.10.1990, the learned District Judge on the basis of the pleadings of the parties, framed the following issues:

> "Issue No. 1:
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> Whether the plaintiff has a prior right of purchase with respect to the suit property described in annexure-P-I? OPP
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> Issue No. 2:
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> Whether the plaintiff served the defendant No. 2 with a legal notice under Right of Prior Purchase Act, if so, wheat is its effect on the suit? OPP
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> Issue No. 3:
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> Whether the suit property has been sold against a full consideration of rupees forty thousand? OPD"

7) After framing of the issues, the parties led evidence in support of their respective cases. The plaintiff besides examining herself as witness, also examined PWs Banu Ram, Puran Chand, Amar Nath, Ali Hassan Mir, Ramesh Chander, Rameshwar Sharam and Chuni Lal as witnesses whereas appellant/defendant No.1, besides examining himself as witness, has examined DWs Ashok Kumar, Bansi Lal, Om Parkash, Vikrant Kumar, Dwarka Nath, Durga Devi and Raj Nath Bakshi as witnesses in support of his case.

8) Learned trial court after appreciating the evidence on record, passed the impugned judgment and decree, whereby the right of prior purchase of the plaintiff in respect of the suit property was upheld and she was held entitled to decree of possession on the basis of right of prior purchase subject to payment of Rs. 40,000/- within a period of one month from the date of decree. While passing the impugned judgment and decree, the learned trial court has held that the suit property was partitioned and the plaintiff cannot claim right of pre-emption on the ground of being co-owner of the property. However, the trial court on the basis of the evidence on record came to the conclusion that the property purchased by the plaintiff and predecessor-in-interest of proforma respondents is one single house/building and therefore, plaintiff's right of pre-emption is covered under

clause secondly of Section 15 of the J&K Right of Prior Purchase Act (for short the Act).

9) I have heard learned counsel for the parties and perused the impugned judgment, grounds of challenge and record of the trial court.

10) Before proceeding to narrate the grounds projected by the appellant for assailing the judgment/decree passed by the learned trial court, it would be apt to mention here that one of the grounds projected by the appellant for assailing the impugned judgment was that respondent No.1 has not complied with the mandatory condition of depositing the amount of security in terms of Section 21 of the Act and, as such, the suit of the plaintiff/respondent No.1 deserved to be dismissed.

11) This Court on the basis of the available record came to the conclusion that the aforesaid ground of the appellant is well-founded and that the plaintiff/respondent No.1 had failed to deposit the amount in terms of Section 21 of the Act, which is mandatory in nature and, as such, the suit was liable to be dismissed without even going to the merits of the case. On this ground, the judgment and decree passed by the learned trial court was set aside in terms of the judgment passed by this Court on 07.11.2023

12) However, the plaintiff/respondent No.1 filed a review petition against the judgment (supra) whereby it was brought to the notice of this Court that the plaintiff had, in fact, deposited an amount of Rs.40,000/ with the trial court, thereby adhering to the mandate of Section 21 of the Act. This Court, after perusing the original record of the trial court, came to the conclusion that the plaintiff had, in fact, deposited the said amount with the trial court. Accordingly, vide order dated 11.08.2025, judgment dated 07.11.2023 was reviewed and the appeal was restored for its fresh hearing. It is in these circumstances that the present appeal has now come up for fresh decision on merits.

13) Learned counsel for the appellant has contended that the conduct of plaintiff/respondent No.1 has been of such a nature as would give rise to an inference that she has waived her right of pre-emption. It has been contended that the plaintiff/respondent No.1, after sale of the suit property in favour of the appellant, filed a suit before learned Sub Judge, Poonch, seeking injunction against the appellant and other co-defendants without making a prayer for enforcement of her right of pre-emption. It has been submitted that the plaintiff abandoned the said suit and then filed the suit for enforcing her right of pre-emption without seeking leave from the court of Sub Judge, Poonch, to file the said suit. It

has been contended that all these factors go on to show that the plaintiff had waived her right of pre-emption.

14) Learned counsel appearing for the plaintiff/respondent No.1 has submitted that the right of pre-emption had accrued in favour of the plaintiff/respondent No.1 by virtue of the statute, namely, J&K Right of Prior Purchase Act, which was in force at the relevant time, as such, it cannot be stated that the plaintiff had waived her statutory right by her conduct. It has been submitted that a statutory right cannot be waived or defeated by admission or conduct.

15) From the aforesaid submissions made by the learned counsel appearing for the parties, the following point emerges for determination of this Court:-

> "Whether by her conduct, the plaintiff/respondent No. 1 had waived her right of prior purchase in respect of the suit property?".

16) With a view to find an answer to the question framed above, the facts and circumstances established from the evidence on record need to be noticed. In this context, if we have a look at the trial court record, it is revealed that the plaintiff through her counsel had issued a notice in terms of Section 19 of the Act to Shri Isher Dass, the original defendant No.2, on 31.12.1986, in which she had expressed

her intention to purchase his portion of the suit property. It is also revealed that thereafter on 03.06.1987, the plaintiff filed a suit against the appellant and late Isher Dass seeking an injunction against them so as to restrain them from encroaching upon the portion of the property which has fallen to her share. In the said suit, the plaintiff did not seek the relief relating to enforcement of her right of pre-emption against the appellant and co-defendant.

17) The plaintiff, while making her statement before the learned trial court, has admitted having filed the aforesaid suit and has also admitted its contents including the contents relating to the factum of partition of the property between her and co-defendant Isher Dass. She has also admitted that later on she abandoned the suit which was dismissed for non-prosecution.

18) The trial court record shows that after abandoning the suit for injunction filed by the plaintiff against the defendants, she filed another suit for enforcement of her right to prior purchase challenging the sale deed dated 26.05.1987 executed by Isher Dass in respect of his portion of the property in favour of appellant Iqbal Singh. The said suit was filed on 17.05.1988, just a few days prior to expiry of limitation period of one year from the date of execution of sale deed dated 16.05.1987. It is pertinent to mention here

that when the plaintiff had filed the suit for injunction against the defendants on 03.06.1987, she was aware about the sale deed dated 26.05.1987 executed by defendant Isher Dass in favour of appellant Iqbal Singh. This finds mention in the plaint filed by the plaintiff in the said suit.

19) The record of the trial court further shows that the legal heirs of defendant Isher Dass, in their written statement filed before the trial court, had raised a specific plea that the plaintiff had omitted to seek the relief of pre-emption in her earlier suit and on that ground the suit of the plaintiff is not maintainable. It would also be appropriate to mention here that in the suit filed by the plaintiff, out of which the present appeal has arisen, she did not make even a whisper about the earlier suit filed by her against the defendants. In fact, the facts relating to filing of the earlier suit were brought to the notice of the Court by appellant/defendant No.1 while filing his written statement.

20) The question that arises for determination, in the face of aforesaid facts which are proved on record, is as to whether it can be stated that the plaintiff had waived her right to pre-emption by her aforesaid conduct. Before deciding the said issue, it would be apt to notice the legal position as to nature of right of pre-emption and whether said right can be waived by conduct or otherwise.

21) The High Court of Lahore has, in the case of **Mool Chand v. Ganga Jal,** (1930) ILJ 11 Lahore (F.B) 258, while elucidating the nature of right of pre-emption, made the following observations:

> *11. In view of the aforesaid elucidation, it was opined that the preemptor has two 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.*
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> *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. Such superior right has to subsist at the time when the pre-emptor exercises his right. The position is thereafter summarized in the following terms:*
>
> > *"11. .....(1) The right of pre-emption is not a right to the thing sold but a right to the offer of a thing about to be sold. This right is called the primary or inherent right. (2) The pre-emptor has a secondary right or a remedial right to follow the thing sold. (3) It is a right of substitution but not of re-purchase i. e., the pre-emptor takes the entire bargain and steps into the shoes of the original vendee. (4) It is a right to acquire the whole of the property sold and not a share of the property sold. (5) Preference being the essence of the right, the plaintiff must have a superior right to that of the vendee or the person substituted in his place. (6) The right being a very weak right, it can be defeated by all legitimate methods, such as the vendee allowing the claimant of a superior or equal right being substituted in his place."*

22) In **Bishan Singh and Ors. v. Khazan Singh and anr.** AIR 1958 SC 838, the Supreme Court held that right of pre-emption being a weak right, it can be defeated by all legitimate methods, such as the vendee allowing the

claimant of a superior or equal right being substituted in his place. It was further held that apart from being a weak right, it is a claim which is generally looked upon by courts with certain amount of distaste. That is because it interferes with the freedom of the owner to sell his property to the person of his choice.

23) The Supreme Court has, in the case of **Barasat Eye Hospital and Ors. v. Kaustabh Mondal,** (2019) 19 SCC 767, described the nature of right of pre-emption in the following manner:

> ***23.*** *The historical perspective of this right was set forth by the Constitution Bench of this Court, as far back as in 1962, in Bhau Ram case . The judgment in Bishan Singh case preceded the same, where different views, expressed in respect of this law of pre-emption, have been set out, and thereafter the position has been summarised. There is no purpose in repeating the same, but, suffice to say that the remedial action in respect of the right of pre-emption is a secondary right, and that too in the context of the "right being a very weak right". It is in this context that it was observed that such a right can be defeated by all legitimate methods, such as a vendee allowing the claimant of a superior or equal right to be substituted in its place. This is not a right where equitable considerations would gain ground. In fact, the effect of the right to pre-emption is that a private contract inter se the parties and that too, in respect of land, is sought to be interfered with, and substituted by a purchaser who fortuitously has land in the vicinity to the land being sold. It is not a case of a co-sharer, which would rest on a different ground.*

24) In **Raghunath v. Radha Mohan and Ors.,** AIR 2020 SC 5026, it was reiterated that pre-emption is a weak right

and once a plaintiff-pre-emptor chooses to waive his right of pre-emption, he looses that right for ever and could not raise the right in perpetuity every time there is a subsequent transaction or sale.

25) From the foregoing analysis of the legal position, it is clear that the right of pre-emption is a very weak right and it can be defeated by a purchaser of property by all lawful means and it can also be waived by the pre-emptor by his conduct which can be inferred from the facts and circumstances of a case. In fact, the Supreme Court has, in the case of **Indira Bai v. Nand Kishore,** (1990) 4 SCC 668, elaborately discussed the circumstances in which estoppel can be put up as defence against the right of pre-emption. It was a case under Rajasthan Pre-emption Act and the Supreme Court while explaining the rule of estoppel observed as under:

> *"3. Estoppel is a rule of equity flowing out of fairness striking on behaviour deficient in good faith. It operates as a check on spurious conduct by preventing the inducer from taking advantage and assailing forfeiture already accomplished. It is invoked and applied to aid the law in administration of justice. But for it great many injustices may have been perpetrated. Present case is a glaring example of it. True no notice was given by the seller-but the trial court and appellate court concurred that the pre-emptor not only came to know of the sale immediately but he assisted the purchaser-appellant in raising construction which went on for five months. Having thus persuaded, rather misled, the purchaser by his own conduct that he acquiesced in his ownership he somersaulted to grab the property with constructions*

by staking his own claim and attempting to unsettle the legal effect of his own conduct by taking recourse to law. To curb and control such unwarranted conduct the courts have extended the broad and paramount considerations of equity, to transactions and assurances, express or im- plied to avoid injustice.

4. Legal approach of the High Court, thus, that no estoppel could arise unless notice under Section 8 of the Rajasthan Pre-emption Act (In brevity 'the Act') was given by the seller and pre-emptor should have had occasion to pay or tender price ignores the fallacy that Estoppel need not be specifically provided as it can always be used as a weapon of defence. In the Privy Council decision, referred earlier, the court was concerned with Oudh Laws Act (18 of 1876) which too had an identical provision for giving notice by seller. No notice was given but since pre-emptor knew that the property was for sale and he had even obtained details of lots he was precluded from basing his claim on pre-emption.

5. Exception, to this universal rule or its non-availability, is not due to absence of any provision in the Act excluding its operation but welfare of society or social and general well-being. Protection was, consequently, sought not on the rationale adopted by the High Court that in absence of notice under Section 8 of the Act estoppel could not arise but under cover of public policy. Reliance was placed on Shalimar Tar Products v. H.C. Sharma, AIR 1988 SC 145, a decision on waiver, and Equitable Life Assurance Society of the United States v. Reed, 14 Appeal Cases 587, which laid down that there could be no estoppel against statute. Equi- ty, usually, follows law. Therefore, that which is statutorily illegal and void cannot be enforced by resorting to the rule of estoppel. Such extension of rule may be against public policy. What then is the nature of right conferred by Section 9 of the Act? In Bishen Singh v. Khazan Singh, AIR 1958 SC 838 this Court while approving the classic judgment of Mahmood, J. in Gobind Dayal v. Inayatullah, ILR 7 All 775 (FB). 'that the right of pre-emption was simply a right of substitution' observed that, 'courts have not looked upon this right with great favour, presumably, for the reason that it operated as a clog on the right of the owner to alienate his property. In Radha Kishan v. Shridhar, AIR 1960 SC 1369 this Court again while repelling the claim that the vendor and vendee by accepting price and transferring possession without registration of sale deed adopted subterfuge to defeat the right of pre-emption observed that, 'there were 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'. Such being the nature of right it is harsh to claim that its extinction by conduct would amount to statutory illegality or would be opposed to public policy. The distinction be- tween validity and illegality or the transaction being void is clear and well known. The former can be waived by express or implied agreement or conduct. But not the latter. The provision in the Act requiring a vendor to serve the notice on persons having right of pre-emption is condition of validity of transfer, and therefore a pre-emptor could waive it. Failure to serve notice as required under the Act does not render the sale made by vendor in favour of vendee ultra vires. The test to deter- mine the nature of interest, namely, private or public is whether the right which is renunciated is the right of party alone or of the public also in the sense that the general welfare of the society is involved. If the answer is latter then it may be difficult to put estoppel as a defence. But if it is right of party alone then it is capable of being abnegated either in writing or by conduct. The Act does not provide that in case no notice is given the transaction shall be void. The objective is to intimate the pre-emptor who may be interested in getting himself substituted. The Act does not debar the pre-emptor from giving up this right. Rather in case of its non-exercise within two months, may be for the financial reasons. the right stands extinguished. It does not pass on to anyone. No social disturbance is caused. It settles in purchaser. Giving up such right. expressly or impliedly cannot therefore be said to involve any interest of community or public welfare so as to be in mischief of public policy."

26) The aforesaid judgment was relied upon by a Single Bench of this Court in the case of **Kanta Devi vs. Parkash Chopra & anr.** 1992 K.L.J 405, and it was held that rule of estoppel by acquiescence applies in cases of pre-emption. The Court further held that if a pre-emptor refuses to purchase the property, he is disqualified from subsequently maintaining a suit for pre-emption as he is estopped from

seeking to enforce his right by virtue of the provisions of Section 115 of Evidence Act.

27) With the aforesaid legal position in mind, let us now analyze the facts that have been established on record in this case, so as to determine as to whether the plaintiff is estopped from enforcing her right of pre-emption. It is an established fact that the plaintiff filed a suit for injunction against the appellant and co-defendant (erstwhile owner of the property in question) after giving a notice under Section 19 of the Act to the erstwhile owner, wherein she had expressed her desire to purchase the property in question. At the time when the plaintiff filed the suit for injunction, she was in knowledge of the fact that the appellant had purchased the said property. Her only assertion in the suit for injunction was that the appellant is trying to encroach upon her portion of the property. In the said suit she did not even make a whisper about her intention to enforce her right of pre-emption. Her only concern was that the appellant/defendant should not encroach upon her portion of property. This conduct of the plaintiff/respondent No. 1 allowed the appellant to believe that she had waived her right of pre-emption. In fact, there is evidence of record to show that the portion of the house which had been purchased by the appellant was demolished by him during the pendency

of the suit for injunction, which has been admitted by the plaintiff in her statement. According to the plaintiff this prompted her to abandon her suit for injunction. This circumstance shows that by the conduct of the plaintiff, the appellant was made to believe that she has waived her right of pre-emption thereby prompting him to change the nature of the suit property.

28) From the aforesaid circumstances established from the evidence on record, it can safely be concluded that the plaintiff by her conduct had waived her right to pre-emption in respect of the suit property. The issue framed for determination in this appeal is decided accordingly.

29) The contention of learned counsel appearing for the plaintiff/respondent No. 1 that the right of pre-emption cannot be waived being a statutory right, is without any basis in the face of the consistent legal position that estoppel can be put up as a defence against the right of pre-emption. Even though the appellant as well as the legal heirs of Isher Dass had, in their respective written statements before the learned trial court, specifically pleaded that the plaintiff while filing the earlier suit for injunction had omitted to sue for enforcement of right of pre-emption, but the same was not taken note of by the learned trial court while passing the impugned judgment. The trial court only proceeded on the

assumption that the suit property is a single plot, therefore, as per clause secondly of Section 15 of the Act, the plaintiff is entitled to the right of pre-emption. The learned trial court did not go into the effect of conduct of the plaintiff in omitting to sue for pre-emption in the first instance even after giving notice to the erstwhile owner of the suit property in terms of Section 19 of the Act. This aspect of the matter had an important bearing on the fate of the suit. The learned trial court, by ignoring this aspect of the case, has landed itself into grave error, thereby rendering the impugned judgement and decree unsustainable in law.

30) Apart from the above, it will be highly inequitable to grant decree of possession of the suit property in favour of the plaintiff at this stage when more than 38 years have elapsed since the purchase of the suit property by the appellant who has been in continuous occupation of the said property since then. Asking him to vacate the said property by paying him a meagre sum of Rs.40,000/- that has been deposited by the plaintiff before the trial court, would result in grave injustice to the appellant. As already discussed, the right of pre-emption is an extremely weak right. In fact, it impinges upon the constitutional right to property guaranteed to citizens of India and, as such, it can be defeated by a vendor by all legitimate means. In recognition

of this position, the J&K Right to Prior Purchase Act stands repealed after the coming into force of the J&K Reorganization Act, 2019. In these circumstances granting a decree of possession of the suit property in favour of the plaintiff on the basis of her right of pre-emption at this stage would be grossly inequitable.

31) For the foregoing reasons, the present appeal is allowed and the impugned judgment and decree dated 14.01.2001 passed by the learned trial court is set aside. The amount that has been deposited by the plaintiff/respondent No.1 with the trial court shall be refunded to her.

32) Trial court record along with a copy of this judgment be sent back.

(SANJAY DHAR)
JUDGE

Srinagar
21.11.2025
""Bhat Altaf"

*Whether the **Judgment** is speaking:* ***Yes***
*Whether the **judgment** is reportable:* ***Yes***