

IN THE HIGH COURT FOR THE STATES OF PUNJAB AND HARYANA
AT CHANDIGARH

1. RSA No.2487 of 1995

Ramesh Kumar

... Appellant

v.

Karnail Singh and another

... Respondents

2. RSA No.2508 of 1995

Gurmeet Singh and others

... Appellants

v.

Balwant Kaur and others

... Respondents

Date of decision: May 19th, 2015.

CORAM: **HON'BLE MR. JUSTICE DR. BHARAT BHUSHAN PARSOON**

Argued by: Shri Arvind Singh, Advocate, for the appellant.

None for the respondents.

(RSA No.2487 of 2005)

Shri Sanjiv Gupta, Advocate, for the appellants.

Shri Saurabh Bajaj, Advocate for respondent No.1.

(RSA No.2508 of 2005)

Dr. Bharat Bhushan Parsoon, J.

Regular Second Appeal Nos.2487 and 2508 of 1995 are being decided by this common judgment as the facts and the law involved therein are the same. Adjudication of these regular second appeals by common judgment is also necessary for clarity of the matter and for better comprehension. For convenience, facts have been taken from RSA No.2487 of 1995.

2. Dinesh Kumar, defendant No.2, respondent No.2 herein, (who was given up vide order dated 31.8.1992) was owner of land measuring 1 kanal 14 marla being 34/1144th shares of 1/5th share of the total land situated in village Bodla, Tehsil Thanesar, District Kurukshetra, detailed and described in the jamabandi for the year 1989-90 as also in the plaint, hereinafter mentioned as the suit land. He had sold the said suit land to Ramesh Kumar, defendant No.1, appellant herein, vide registered sale deed dated 11.1.1991 for consideration of Rs.25,000/- along with all rights appurtenant to the land. Plaintiff Karnail Singh, respondent No.1, claiming superior right of ownership had filed a suit seeking decree by way of pre-emption.

3. Defendant No.1 had contested the suit tooth and nail. It was claimed that since the land was *banzar kadim* at the time of sale and had been re-claimed by the vendee-defendant, appellant herein, it was not pre-emptible. It was claimed that the plaintiff, respondent No.1, was not entitled for a decree of pre-emption. It was claimed that Rs.5,000/- had been spent by the vendee on reclaiming the land. The suit was contested. Claiming the price of the land to have been fixed in good faith and actually paid, existence of cause of action was denied. Dismissal of the suit was sought.

4. In replication, earlier assertions in the plaint were reiterated by the plaintiff.

5. On the pleadings of the parties, following issues were settled for adjudication by the lower court on 4.11.1992:-

- 1) Whether plaintiff being a co-sharer in the khewat comprising the suit land has got superior right of pre-emption, as alleged? OPP
- 2) Whether Rs.25,000/- the sale price of suit land was fixed in good faith and actually paid by vendee Ramesh Kumar to Dinesh Kumar vendee? OPD
- 3) If issue No.2 is not proved, then what was the prevailing market price of the suit land? OP Parties

- 4) Whether the plaintiff has got no locus standi to file the suit? OPD
- 5) Whether the suit is not maintainable as alleged? OPD
- 6) Whether the 1/5th pre-emption amount has not been deposited by plaintiff? OPD
- 7) Whether the suit is time barred? OPD
- 8) Whether plaintiff is estopped by his own act and conduct from filing the suit? OPD
- 9) Whether the suit is Benami, if so its effect? OPD
- 10) Whether in the event of decree of suit, defendant No.1 is entitled to recovery of Rs.5,000/- allegedly spent on effecting improvement over the suit land as well as stamp and registration charges from the plaintiff?
- 11) Relief.

6. Vide order dated 21.4.1994, following additional issues had also been framed by the lower court:-

11-A) Whether defendant No.1 has become owner of the suit property by way of adverse possession? OPD

11-B) Whether suit is bad for partial pre-emption? OPD

11-C) Whether plaintiff has got no cause of action? OPD

7. After receiving oral as well as documentary evidence from the parties, hearing to counsel for the parties was also provided. Thereafter holding the respondent-plaintiff to be a co-sharer, issue No.1 was decided in favour of the plaintiff; issues No.2 and 3 were decided against the plaintiff; issue Nos.4, 5, 6, 7, 8 and 9 were decided in favour of the plaintiff. Issue No.1 was partly decided in favour of the defendant. Issues No.11-A, 11-B and 11-C were decided in favour of the plaintiff. Sequelly, the suit of the plaintiff for possession by way of pre-emption was decreed against the defendant. On payment of sale price of Rs.25,000/- along with stamp and other charges mentioned in the decree within one month therefrom, possession of the suit land was to be delivered to the plaintiff. Judgment

and decree was passed on 30.11.1994. Appeal preferred by the vendee-defendant against the said judgment and decree was dismissed on 12.10.1995 by Additional District Judge, Kurukshetra. The decree had followed.

8. This decree of the first appellate court is under challenge in the present regular second appeal. It claimed that the courts below neither appreciated the facts nor the law and despite the fact that the land is *banzar kadim* and thus was not pre-emptible, decree was passed against the vendee-defendant. Challenging findings on issue No.1 of the lower court, affirmed by the first appellate court, it is claimed that the appellant was in possession of the land adversely to the vendor to his knowledge for the last about 20 years and the suit was collusive at the instance of vendor- respondent No.2. Similarly, findings on issues No.6 to 9 as also 11-A, 11-B and 11-C were challenged.

9. It is also pleaded that right to pre-emption on the basis of co-sharership had been omitted by the legislature vide Act No.10 of 1995. Reference has been made to amending Act in Section 15 of the Punjab Pre-emption Act, 1914. It is claimed that amendment came when the appeal was pending and right of pre-emption being piratical one and appeal being continuation of the suit, it was liable to be dismissed. It is also claimed that the land stood partitioned much prior to the date of sale and thus right of pre-emption was even otherwise no more subsisting in favour of the respondent-plaintiff. Prayer for reversal of the impugned judgments and decree of the courts below by way of acceptance of the appeal was made.

10. So far as RSA No.2508 of 1995 is concerned, the land therein was of village Kaulapur, Tehsil Thanersar, District Kurukshetra. Vendor-defendant Bhambool Singh, defendant No.6 had sold away the suit land vide sale deed dated 19.5.1988 to defendants No.1 to 5 for a sale consideration of Rs.1,69,250/-. Plaintiff Smt. Balwant Kaur, respondent herein, had sought possession of the suit land by way of pre-emption claiming herself to be a co-sharer in the khewat.

11. The defendants had contested the suit tooth and nail. Despite their contest, claim of the plaintiff was found merited and was accepted. Suit was decreed on 26.9.1994. Appeal against the same was dismissed.

12. In RSA No.2508 of 1995, pleas as taken in RSA No.2784 of 1995 have also been taken.

13. During the course of arguments, appellants in both the appeals have urged that right of pre-emption on the basis of co-sharership is no more existent and right of pre-emption being piratical right, comes to an end.

14. It has further been urged that the vendees who were themselves co-sharers in the land and thus no right of pre-emption on the basis of co-sharership in favour of the plaintiffs subsists. It has further been contended that the land was *banzar kadim* and thus was not even otherwise pre-emptable.

15. Though none appeared for the respondents after 15.11.2011 in this appeal, however, counsel for contesting respondent No.1 in RSA No.2508 of 1995 has countered the arguments of the appellants. It is claimed that decree having been passed by the lower court in favour of the respondent-plaintiffs notwithstanding the amendment in the Act abolishing right of pre-emption of a co-sharer, still enures for the benefit of the plaintiffs and the amendment cannot operate retrospectively. It is further urged that the land was cultivable and was not *banzar kadim* and thus was pre-emptible. Status of the vendee-defendants as co-sharers, as has been claimed by them, has been denied to them urging that right of the respondent-plaintiffs is indefeasible and has to be protected.

16. Right of pre-emption is a piratical right and can be defeated by all legitimate means, is a proposition of law which is of no dispute. In Than Singh and others v. Nandu and others, 1978 PLR 98 (FB), it was held that the pre-emption law is a relic of feudalism and creates a clog on the right of the owner to alienate his property to a person of his choice and thus is a

very weak right. It was further held that if two views are possible in a pre-emption case, the one which defeats the right of pre-emption is to be accepted.

17. Assertion of the vendee-appellant is that the land was *banzar kadim* and thus was not pre-emptible. It has been explained that the land was reclaimed by the appellant and earlier to it, it was not subject to cultivation. When this plea of the vendee is examined on the factual matrix of the case, it transpires that possession of a specific part of khasra No.344 (1/14) was delivered to the defendant. There is clearly a typographical error in description of the land. In the written statement, khasra Number of the land is 334.

18. Co-joint reading of Jamabandi for the year 1984-85 (Ex.D1) and for the year 1989-90 (Ex.D2) reveals that khasra No.334 (1/14) is *banzar kadim*. However, copy of *khasra girdawri* prepared on 23.10.1990 (Ex.D3) reveals that specific part of khasra No.334 in possession of vendor Dinesh Kumar is recorded as *chahi*. So far as nature of the land is concerned, crops of *chari* and *barsim* are shown to have been harvested.

19. It would be relevant to mention here that the sale in dispute took place on 11.1.1991; before the sale took place, *girdawari* (Ex.D3), as noticed earlier, records the suit land to be *chahi* as on 23.10.1990.

20. It is transparently clear that the suit land at the time of sale of the same had no more remained to be *banzar kadim* and rather it had already been reclaimed by the vendor Dinesh Kumar prior to the sale.

21. Oral testimony of Ramesh Kumar appellant, who appeared before the court below as DW1, that after the sale of the land it was reclaimed and was made cultivable, is of no avail because documentary evidence in matters vouched by revenue record is to take precedence over oral evidence. No amount of oral evidence in contradiction with the documentary evidence is to be taken into consideration unless there is proper explanation coming forth for the same.

22. Counsel for the appellant-defendant seeking support from Union of India v. Moksh Builders and Financiers Ltd. And others etc., AIR 1977 SC 409, referring to Section 18 of the Indian Evidence Act, has urged that admission by a party is substantive evidence of a fact admitted by a party. Facts of the case in hand are entirely different. Clear admission has not been made by the vendee-appellant against his own interest but it is a self-styled admission in his own favour which cannot be acted upon against the overwhelming revenue record operating against the vendee-defendant.

23. To suffer repetition, revenue record clearly reveals that reclamation of the land was made by the vendor much earlier to the sale of the land and thus at the time of sale, it was no more *banzar kadim* land any further as the same had been put to cultivation and had become *chahi* land whereupon crop of chari had grown and was harvested.

24. It is a conceded fact that in terms of Section 5(b) of the Act, a vendee is given right of pre-emption only in respect of *banzar kadim* land which he may have reclaimed after it was sold to him. In short, nature of land to be determinative is to be seen at the time of sale. Since the suit land already stood reclaimed prior to the sale in favour of the vendee-appellant, this plea of the appellant against professed legitimate claim of pre-emption agitated by the respondent-plaintiff, is not tenable.

25. When the respondent-plaintiff is recorded as co-sharer in the suit land along with vendor Dinesh Kumar and jamabandi for the year 1984-85 and 1989-90, Exs.D2 and D3 respectively, manifests the plaintiff to be a co-sharer in the suit land, his right of pre-emption cannot be defeated.

26. Apart from the revenue record, there is not even a whisper made anywhere by Ramesh Kumar DW1 to the effect that the respondent-plaintiff was not a co-sharer in the suit land. Perusal of sale deed Ex.P1 further reveals that the sale is of a share.

27. Sale consideration of Rs.25,000/- is also shown to have been paid in good faith. It is clear that the suit land was sold for Rs.25,000/-,

which money was actually paid and it was the market value of the same.

28. During the pendency of the suit, amendment in the Act had left the co-sharers high and dry when their right of pre-emption granted under the Act was abrogated. This controversy has reached even to the Hon'ble Apex Court in Shyam Sunder and another v. Ram Kumar and another, 2001 (3) RCR (Civil) 754 wherein it was held that the amendments in the Punjab Pre-emption Act, 1913, as amended on 7.5.1995, by Haryana Amendment Act, 1995 is prospective in nature and has no retrospective application. In RSA No.2456 of 1995 (O&M) (Hardayal Singh and others v. Kiru Ram and others), rendering decision on 9.11.2010, this Court in tune with the judgment of the Hon'ble Supreme Court as also quoting extensively from Shyam Sunder and another's case (supra), clearly held as under:-

*“The Supreme Court in para No.47 of the judgment in the case of **Shyam Sunder and another (Supra)** held as under:*

“For the aforestated reasons, we approve the view of law taken in Didar Singh etc. Vs. Ishar Singh (dead) by LR's (Supra) and further hold that the decision in the case of Ramjilal and others (Supra) does not lay down the correct view of law.”

Thus, from the authoritative judgment of the Constitutional Bench of the Supreme Court, it is clear that the amendment Act which came into force after the decree of the trial Court would not effect right of the pre-emptor which had crystallized on the date when the decree of the trial Court was passed.”

29. It is a conceded fact that the decree from the lower court in favour of the respondent-plaintiff in the present case was made on 30.11.1994, i.e., prior to the date of amendment in the Act.

30. Further plea of the appellant is that he was in possession of the suit land for the last 18-20 years. This assertion of the appellant-defendant is not corroborated by any revenue record. Possession of the vendor is manifest from the revenue record in the shape of jamabandis and the crop inspection report. Regarding possession of the appellant-vendee/defendant, the lower court was right in coming to a firm finding qua this aspect.

31. The appellate court has also endorsed the finding of the lower court on this count.

32. One-fifth of the sale consideration was to be deposited as pre-emption amount on or before 13.9.1992. As per treasury challan, said money was deposited in the treasury on 5.2.1992. There is thus no delay in compliance with the orders of the court. There was ground of estoppel and issues no.8 and 9 governing estoppel and transaction being benami, even this adjudication is to be against the defendants who had raised this plea because they could not substantiate the same with their evidence.

33. Similarly, neither there is any material nor evidence to make out a case of partial pre-emption. The defendant has not been able to produce any evidence to show that the suit had been filed by a pseudonym. Sequel, not only the plaintiff being a co-sharer had locus standi to file the suit but he could also maintain and prosecute the same. Findings returned by the learned lower court on all the issues and affirmed by the first appellate court do not suffer from any factual or legal error.

34. Sequel, substantial question of law 'as to whether amendment brought in the Punjab Pre-emption Act, 1913 vide Act No.10 of 1995 with effect from 7.5.1995 abrogating the right of pre-emption on the basis of co-sharership' is answered to the effect that the same will have only prospective effect.

35. Another substantial question of law, 'as to whether the land in litigation is *banzar kadim* and thus is out of the purview of pre-emption', as has already been held earlier, is answered to the effect that the same is not *banzar kadim* as the same already stood reclaimed by the vendee before entering into possession thereof.

36. Yet, one another issue is as to whether vendee is also a co-sharer in the joint khewat where right of pre-emption subsists, vendee-defendants could not establish themselves to be co-sharers with the respondent-plaintiff.

37. So far as RSA No.2508 of 1995 is concerned, Raunak Singh son of Bhagwan Singh is recorded as a co-sharer along with vendor

Shambool Singh in khewat No.28 and 29 in terms of jamabandi for the year 1982-83. Said Raunak Singh had transferred land out of his share in khewat No.28 and 29 to Smt. Balwant Kaur through a civil court decree of 21.1.1988. It is also evident from mutation No.266 (Ex.P2). There is oral testimony of Smt. Balwant Kaur as PW1 that even earlier to this decree, she was a co-sharer. Co-sharer Raunak Singh along with Smt. Balwant Kaur had been making application before the Assistant Collector First Grade, Thanesar for partition of khewat No.28 and 29. Plaintiff thus is proved to be a co-sharer in possession in portion of the suit land.

38. So far as stand of defendants No.1 to 3 that they were co-sharers prior to the sale and thus their sale was not pre-emptable is concerned, there are five defendants in all. Defendants No.1 to 3 are shown to be co-sharers in the revenue record but defendants no.4 and 5 came to be so recorded only after judgment and decree dated 6.3.1990.

39. Even though decree dated 6.3.1990 in favour of defendants No.4 and 5 is based on family settlement, it does not give any fillip to the cause of defendants No.4 and 5 because after the family settlement, partition proceedings could have started. Decree is of 6.3.1990. Sequel, out of five vendees, three defendants are co-sharers where two are not. In this situation, contention of counsel for the defendants is that vendee can legitimately defeat the pre-emptive right by all means. Defendants no.4 and 5 became co-owners of the plaintiff in the suit land only during pendency of the suit.

40. The decree dated 6.3.1990 cannot be related back to the family settlement of a previous date because there is no evidence much less credible and acceptable on that count. If a set of vendee-defendants was earlier co-owner but rest of them were not so, then even the vendees who are co-sharers lose because of the joining of non co-sharers. Reference may be made to Garib Singh v. Harnam Singh, 1971 PLR 706 (FB).

41. Sequel, decrees Ex.D3 to D6 passed on 6.3.1990, i.e., during the pendency of the suit cannot have any effect. Thus, finding returned by

the first appellate court to the effect that defendants No.1 to 3 who were already co-sharers in the suit land forfeited their right to resist pre-emptive right of the plaintiff by joining defendants No.4 & 5 along with them in the joint sale, is upheld and affirmed.

42. As a result of the above discussions, both these appeals fail and are accordingly dismissed.

May 19th, 2015.
kadyan

[Dr. Bharat Bhushan Parsoon]
Judge

1. *Whether Reporters of local papers may be allowed to see the judgment ? yes*
2. *Whether to be referred to the Reporters or not ? yes*
3. *Whether the judgment should be reported in the Digest? yes*