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**IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH**

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Date of decision : 12.10.2018

Joti Ram (deceased) through LR's and others

... Appellants

Versus

Leela Devi and others

... Respondents

CORAM: HON'BLE MR. JUSTICE AMIT RAWAL

Present: Mr. Ashish Aggarwal, Senior Advocate with
Mr. Kulwant Singh, Advocate
for the appellants.

Mr. C.B. Goel, Advocate
for the respondents.

AMIT RAWAL, J.

The appellant-defendant No.6 to 8 are, in present regular second appeal, against the concurrent findings of fact, whereby the suit of the respondents-plaintiffs for possession of land measuring 120 kanals being 2/3rd share of land measuring 180 kanals 5 marlas comprising in Khewat/Khatauni No.9/23 to 28 and 10/29 to 30 bearing Khasra No.10/17, 28 and 10/9, 10/8/2, 17/2/3 10 marals and Khewat/Khatauni No.21/62, 63 comprising of Khasra No.8/5 min 9/1, 9, 11, 12/1, 26/8, 13, 18/1, 8/5Min, 6/2, 9/2/1, 2/1, 2/2, 9/10, 26/1, 2/1, 9, 10/1 measuring 85 kanals 15 marlas, situated in the area of Village Jhanjora, Teshil Jagadhri, District Ambala, has been decreed by the trial Court and affirmed by the lower Appellate

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Court.

The plaintiffs instituted the suit, aforementioned on the premise that the land measuring 91 bighas 13 biswas i.e. 180 kanals, was owned by one Rama Nand. Rama Nand died without any male issue, but left behind his widow, Champa Kali and two daughters namely, Jaswanti and Lila Devi from his second wife, whereas one daughter Raja Devi, from his first wife. On demise of Rama Nand in the year 1933, a mutation in respect of the aforementioned entire land was sanctioned as per custom in favour of Champa Kali. According to the prevalent custom, the daughter did not get any share of inheritance in the property in the presence of the widow and in this aspect of the matter, Champa Kali alone became exclusive owner of the entire land, but it was averred that her estate was limited, therefore, had no power to alienate any part of the land except for consideration or legal necessity. Champa Kali gifted her land in favour of Jaswanti. Jaswanti vide sale deed dated 24.11.1952 sold the land measuring 20 bighas 5 biswas to Nanak. The plaintiffs filed declaratory suit dated 04.04.1953 against Champa Kali and Jaswanti, on the premise that the gift deed could not effect the reversionary rights. The trial Court vide judgment and decree dated 21.04.1954, decreed the suit by holding the sale deed was not valid in law by referring as "at that stage". In other words, it was held that Champa Kali had no authority to gift the land to one of the daughters. Jaswanti died in the year 1964.

The civil suit, aforementioned, for possession was filed in 1974 by arraying defendant Nos.1 to 5, children of Jaswanti. The written statement filed by admitting the claims of the plaintiffs, but the suit was

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contested by defendant Nos.6 to 8 on the premise that they were *bona fide* purchasers for a valuable consideration as the sale deed of 20 bighas 5 biswas in favour of Nanak was pre-empted by them by virtue of civil court's decree. It was averred that the plaintiffs were entitled to the extent of 2/3rd share left by Jaswanti, but cannot be granted relief from the land 94 kanals 10 marals, which stood under the ownership of defendant Nos.1 to 5. It was admitted that the land measuring 94 kanal 10 marals, out of 180 kanals, entered in Khata No.9/23 to 28 and 10/29 to 30, stood in the name of the defendants No.1 to 5, whereas the land measuring 85 kanals 15 marlas in Khewat No.21/62, 63, in their ownership.

Replication was filed, whereby para Nos.7 of the written statement revealed preemption of decree of land measuring 20 bighas 5 biswas by the defendants was not emphatically denied.

The trial Court on the basis of the aforementioned pleadings framed the following issues:-

1. *Whether the gift made by Champa Kali in favour of Jaswanti being without consideration and legal necessity was invalid against the reversionary rights of the plaintiff? OPP*
2. *Whether defendants No.6 to 8 are bona fide transferees for consideration, if so, to what effect? OPD*
3. *Whether the suit in the present form is not maintainable? OPD*
- 3-A *Whether Smt. Champa Kali had only limited widow's estate in the suit property and as such was not entitled to alienate the suit property? OPP*
4. *Relief.*

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The plaintiffs in support of the case examined Raja Devi as PW1 and Tika Singh as PW2, whereas the defendants examined Charani as DW1 and Kanshi Ram as DW2.

On the basis of the aforementioned evidence, the trial Court decreed the suit and the appeal taken before the lower Appellate Court also met with the same fate.

Mr. Ashish Aggarwal, learned Senior Counsel assisted by Mr. Kulwant Singh, learned counsel appearing on behalf of the appellant-defendant Nos.6 to 8 submitted that both the Courts below have abdicated in not referring to the provisions of Section 43 of the Transfer of Property Act, 1882 (in short 'the 1882 Act'), for, Jaswanti by way of natural succession after demise of Champa Kali along with other two sisters, Raja Devi and Lilla Wati would have inherited 1/3rd share, which was approximately to the extent of 30 bighas, therefore, sale deed dated 24.11.1952 with regard to land measuring 20 bighas 5 biswas, in favour of Nanak, which was pre-empted by defendant Nos.6 to 8, cannot be said to be invalid as the plaintiffs were in possession of the rest of the land. In a civil suit where challenge was laid to the sale deed of 1952, the appellants-defendants/pre-emptors were not impleaded. There was an apparent collusion between children of Jaswanti/defendant Nos.1 to 5 and plaintiff which was reflected as admitted written statement was filed. The lower Appellate Court had not read the contents of judgment and decree dated 21.04.1954 (Ex.P4) in a correct perspective as while rendering the finding under issue No.3, the Court held that defendant No.1, in that suit, i.e. Jaswanti, would be owner of 1/3rd land gifted to her after death of defendant

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No.2, Champa Kali, immaterial "at this stage", in essence, she would have the right to the extent 1/3rd share after demise of Champa Kali, therefore, the plaintiffs cannot be permitted to seek possession of the same land as in any case Jaswanti would have inherited the right and therefore, it was a sale by authorised person after demise of Champa Kali. The suit was wholly malicious and outcome of a greed, which cannot be permitted to perpetuate or validated by the Courts. The findings that the defendants to be not vendees or purchased the land from vendor having defective title and therefore, they cannot take benefit of Section 43 of the 1882 Act is wholly erroneous. In support of the aforementioned submissions by referring para No.4, laid reliance to the judgment rendered by Allahabad High Court in **"Sheo Ram and others V/s Gauri Shankar and others" 1954 AIR (Allahabad) 452** that the right of pre-emption is a right of substitution and the effect of decree of pre-emption is to substitute the pre-emptor for the vendee, therefore, the contract of sale which exists previously between vendor and vendee would deem to be subsisting between vendee and successful pre-emptors. Reliance was also laid to the judgment of this Court in **"Gurmej Singh V/s Makhan Singh and others" 1986 PLJ 615**, to contend that it cannot be said that Section 43 of the 1882 Act would apply to the original transferrer and original transferee. It is not case that the plaintiffs, on the demise of Champa Kali, had been deprived of their right as they had already been in possession of major chunk of land except share of Jaswanti, thus, urges this Court for setting aside the concurrent findings, under challenge.

Per contra, Mr. C.B. Goel, learned counsel appearing on behalf

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of the respondents-plaintiffs submitted that a female can always contest the alienation by claiming a declaratory decree being reversionary, so that right in the property would enure for the benefit of all the persons, who ultimately claimed the estate of alienator, in other words, he submitted that the object of the declaratory suit filed by the reversionary heir impeaching an alienation of ancestor estate is to remove a common apprehending injury in the interest of all the reversioners. The defendants cannot take the benefits of provisions of Section 43 of the 1882 Act, which only applies between original transferrer and transferee. They cannot be branded as substitute in place of a vendee. Ratio decidendi culled out in **Sheo Ram's case** (supra), referred to above, would not be applicable. Right to possession ripened only after death of Champa Kali. The possession was on account of invalid title. Nanak had no right and similarly the appellants-defendant Nos.6 to 8. The expression "at that stage" in the previous judgment and decree (Ex.P4) was on analogy that at the time of alienation by Jaswanti, succession had not opened, thus, urges this Court for dismissal of the present regular second appeal by upholding the judgment and decree, under challenge.

I have heard learned counsel for the parties, appraised the paper book as well as records of the Courts below and of the view that it is a fit case, where the matter is required to be revisited by the lower Appellate Court as the entire focus of the lower Appellate Court was only on one point that the status of the appellants-defendant Nos.6 to 8 was not of a vendee, as Nanak was having a defective title at the time of passing of judgment (Ex.P4), therefore, any preemption decree was invalid in the eyes of law. The aforementioned finding is not sustainable in the eyes of law in view of

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the *ratio decidendi* culled out by the Allahabad High Court in **Sheo Ram's case** (supra). For the sake of brevity, para No.4 of the judgment reads thus:-

"4. The only point which arises for consideration in this appeal is whether in view of the provisions of Section 43, T. P. Act the plaintiffs are now entitled to recover the property from Gauri Shanker. It is not disputed that Gauri Shanker has become the owner of the entire property which was the subject of sale in the sale deed dated 31-5-1935, and which was also the subject of preemption by the plaintiffs. It is also obvious that when Gauri Shanker executed the sale deed in favour of Ram Bir on 31-5-1935, he represented that he was the owner of the property while in fact, he was not. If, therefore, he subsequently acquires an interest in this property, the vendee shall be entitled to recover the property from Gauri Shanker. There are, however, two conditions which should be fulfilled before this relief can be granted, and they are firstly that the contract was entered into by a person who was competent to contract and secondly that the contract of transfer subsists. It cannot be disputed that Gauri Shanker was otherwise competent to make a transfer.

As regards the second condition, that the contract of transfer should subsist when a claim for recovery of the property on the principle of feeding the estoppel can be made, it has been contended on behalf of the respondents that the sale deed executed by Gauri Shanker in favour of Ram Bir no longer subsisted inasmuch as a decree for pre-emption on the basis of the sale deed had been passed in favour of the appellants. It appears that this contention has no force. The right of pre-emption is a right of substitution, and the effect of a decree for preemption, is to substitute the pre-emptor for the vendee. All rights available to, and all duties cast upon, the vendee, are taken over by the pre-emptor. Beyond this substitution there is no other change in the contract of transfer evidenced in the

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sale deed. Rights which were available against the transferee or vendee will also be available to the vendor against the pre-emptor. In effect, therefore, the contract of sale which existed previously between the vendor and the vendee would now be deemed to be subsisting between the vendor and the successful pre-emptor. A contract of transfer would therefore subsist even after a decree for pre-emption is passed and the pre-emption money is paid."

On plain and simple reading of the aforesaid finding, I am in agreement with the aforementioned *ratio decidendi*, for, the status of the pre-emptor on acquiring the pre-emption decree is to substitute and assume the role of a vendee, therefore, in such circumstances, provisions of Section 43 of the 1882 Act may come into play, as existence pre-emption decree was not denied by the plaintiffs. The lower Appellate Court remained oblivious of the fact that after the demise of Champa Kali, all three daughters including Jaswanti, vendor of Nanak, had 1/3rd share each and 1/3rd share out of 91 bighas would be approximately 30 bighas, whereas the sale deed was of 20 bighas 5 biswas.

Non-contest on behalf of LRs of Jaswanti being defendant Nos.1 to 5 is also a pointer to that effect, which has not been noticed by the lower Appellate Court.

I cannot also remain unmindful of fact that the factum of passing of preemption decree was not emphatically denied in the replication.

As an upshot of my observations, the judgment and decree of the lower Appellate Court is not sustainable in the eyes of law and the same

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is hereby set aside and the matter is remitted to the lower Appellate Court to adjudicate the dispute in entirety being last court of fact and law.

Original records of the Courts below be sent back.

The contesting parties or through their counsel are directed to appear before the lower Appellate Court on 20.11.2018.

This Court is sanguine of the fact that the lower Appellate Court shall decide the matter within a period of six months from the date of the receipt of certified copy of this order.

The present regular second appeal stands disposed of.

12.10.2018
Yogesh Sharma

(AMIT RAWAL)
JUDGE

	✓
Whether speaking/reasoned	Yes/ No
	✓
Whether Reportable	Yes/ No