

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

**RSA No.968 of 1991
Date of decision:12.02.2018**

Lal Chand ... Appellant
Vs.

Lekh Ram (since deceased) and another ... Respondents

RSA No.967 of 1991

Lal Chand ... Appellant
Vs.

Kalawati Devi and another ... Respondents

CORAM: HON'BLE MR. JUSTICE AMIT RAWAL

Present:- Mr. Ranjit Saini, Advocate
for the appellant.

Mr. Umesh Aggarwal, Advocate
for the respondent.

AMIT RAWAL J.

This order of mine shall dispose of two Regular Second Appeals bearing Nos.968 and 967 of 1991.

The present appeal is directed against the judgments and decrees of both the Courts below, whereby, suit for possession by way of pre-emption on behalf of the appellant-plaintiff being co-sharer, has been dismissed.

It would be apt to give preface of the matter for adjudication of the lis.

The appellant-plaintiff/Lal Chand instituted a suit for possession by way of pre-emption of the land in dispute on the premise that defendant no.1, who used to be owner in possession of land measuring 26 kanals 17 marlas as described in para 1 of the plaint situated in village Biharipur, sold it to defendant no.2-Ram Chander, vide registered sale deed dated 3.9.1985 for a consideration of ₹49,000/-. Since the plaintiff being co-sharer had a preferential right, instituted the suit aforementioned on 25.08.1986. Defendant no.1/vendor was given up. Defendant no.2 contested the suit by filing a written statement took various objections qua non-maintainability, cause of action and time barred but did not deny the execution of the sale deed. The replication was filed.

Since the parties were at variance, the trial Court framed the following issues on 23.02.1989:-

- “1. Whether the plaintiff has preferential right to pre-empt the sale? OPP*
- 2. Whether the defendants are entitled to recover registration expenses? OPD*
- 3. Whether the plaintiff has cause of action? OPD*
- 4. Whether the suit is time barred? OPD*
- 5. Whether the plaintiff is estopped from filing the present suit by his own act and conduct? OPD*
- 6. Whether the suit is bad for partial pre-emption? OPD*
- 7. Relief.”*

In order to prove his case, the plaintiff examined following witnesses:-

PW1 - Shish Ram

PW2 - Kishan Singh Reader to Tehsildar

PW3 – R.C.Yadav, Advocate

PW4 – plaintiff himself.

Defendants examined the following witnesses:-

DW1 – Harphool son of Arjun

DW2 - Nand Lal, deed writer

DW3 – defendant no.2, himself.

The trial Court dismissed the suit and the appeal laid before the Lower Appellate Court also met with the same fate.

Mr. Ranjit Saini, learned counsel appearing on behalf of the appellant-plaintiff submitted that both the Courts below dismissed the suit on the ground that as per the revenue record brought on record, the land in dispute was described as “*gair mumkin bara*” which falls within the definition of sub-section (b) of Section 5 of The Punjab Pre-emption Act, 1913 (hereinafter called as “1913 Act”) which prohibited the right of pre-emption.

He submitted that the Courts below have committed illegality and perversity in not understanding the definition of agricultural land provided in sub-section (2) of Section 3 of Punjab Alienation of Land Act, 1900 as expression “land” which is not occupied at the site of any building in a town or village and is occupied or let for agricultural purposes or for purposes subservient to agriculture. Since the *gair mumkin* land was also subservient to agriculture, therefore, the plaintiff was entitled to seek pre-emption of property in dispute.

He further submitted that the Lower Appellate Court exceeded jurisdiction in observing that appellant cannot be held to be co-sharer in the land in dispute on the premise that appellant had purchased $\frac{1}{2}$ share of khewat no.92 measuring 1 kanal 0 marla and other $\frac{1}{2}$ share of khasra no.92 by respondent no.1. The said killa was the part and parcel of khewat no.36 and in the absence of any partition or family arrangement between the parties, the appellant had to be treated as a co-sharer in the entire khewat. In other words, he submitted that appellant-plaintiff and defendant no.1, in the absence of any partition, being co-owners, had preferential rights which were available as per the provisions of Sections 6 and 12 of 1913 Act.

He also submitted that the Legislature had caused an amendment in the aforementioned Act, w.e.f. 17.05.1995, whereby, the right of co-owner to pre-empt the land in respect of sale by a co-sharer was taken away by vesting the right only in the tenant and said amendment came to be debated upon before the Supreme Court of India in various judgments, i.e., **Didar Singh etc. Vs. Ishar Singh (dead) by LRs etc. 2001 (8) SCC 52** and **Ramjilal Vs. Ghisa Ram 1996 (7) SCC 507.**

In view of two different opinions of Supreme Court of India, the matter was referred to Constitution Bench in **Shyam Sunder and others Vs. Ram Kumar and another 2001 (8) Supreme Court Cases 24** and in view of the findings rendered by the Constitution Bench, suit of the plaintiff cannot be said to be not maintainable despite the fact that the right of co-sharer had been taken away owing to principle no.3 culled out by Constitution Bench which reads as under:-

“10. On an analysis of the aforesaid decisions referred

to in first category of decisions, the legal principles that emerge are these:

- 1. The pre-emptor must have the right to pre-empt on the date of sale, on the date of filing of the suit and on the date of passing of the decree by the Court of the first instance only.*
- 2. The pre-emptor who claims the right to pre-empt the sale on the date of the sale must prove that such right continued to subsist till the passing of the decree of the first court. If the claimant loses that right or a vendee improves his right equal or above the right of the claimant before the adjudication of suit, the suit for pre-emption must fail.*
- 3. A pre-emptor who has a right to preempt a sale on the date of institution of the suit and on the date of passing of decree, the loss of such right subsequent to the decree of the first court would not affect his right or maintainability of the suit for pre-emption.*
- 4. A pre-emptor who after proving his right on the date of sale, on the date of filing the suit and on the date of passing of the decree by the first court, has obtained a decree for preemption by the Court of first instance, such right cannot be taken away by subsequent legislation during pendency of the appeal filed against the decree unless such legislation has retrospective operation.”*

In other words, the Constitution Bench upheld the findings rendered in Didar Singh's case (supra) and held that amendment caused in 1913 Act, taking away the right of a co-sharer was not retrospective in nature.

Per contra, Mr. Umesh Aggarwal, learned counsel for the respondent-defendants submitted that '*gair mumkin bara*' does not fall within the definition of agricultural land as per the provisions of 1913 Act and the land pre-empted, has been prescribed under Section 5 (b) of 1913 Act, where no right of pre-emption in the sale of agricultural land being waste land reclaimed by the vendee.

He further submitted that present appeal is not maintainable owing to the amendment caused in 1913 Act, whereby, right of a co-sharer has been taken away, as the appeal is in continuation of the suit. If at all, this Court passes a decree, it would tantamount to put the clock back which is not permissible in the eyes of law. The concurrent findings of facts and law cannot be interfered until and unless there is gross illegality and perversity and thus, urged this Court for dismissal of the appeals.

In support of his arguments, relied upon the judgment rendered by the Supreme Court of India in **Pirithi Vs. Mohan Singh and others 2011 (9) SCC 107**.

I have heard the learned counsel for the parties, appraised the judgments and decrees of the Courts below, as well as record.

It would be essential and necessary for adjudication of the appeals to refer to the definitions prescribed under Sections 3, 5, 7 and 12 of 1913 Act which read thus:-

3. Definitions - *In this Act, unless a different intention appears from the subject or context :-*

(1) Agricultural Land - “agricultural land” shall mean land as defined in the Punjab Alienation of Land Act, 1990 (as amended by Act I of 1907), but shall not include the rights of a mortgagee, whether usufructuary or not, in such land;

(2) Village immovable property – “village immovable property” shall mean immovable property within the limits of a village other than agricultural land;

(3) Urban immovable property – “urban immovable property” shall mean immovable property within the limits of a town other than agricultural land. For the purposes of this Act a specified place shall be deemed to be a town (a) if so declared by the Provincial Government by notification in the official Gazette, or (b) if so found by the Courts;

(4) Member of agricultural tribe – “member of agricultural tribe” and “group of agricultural tribes” shall have the meanings assigned to them respectively under the Punjab Alienation of Land Act, 1900.

(5) Sale shall not include –

- (a) Sale in execution – a sale in execution of a decree for money or of an order of a Civil, Criminal or Revenue Court or of a Revenue Officer.*
- (b) Creation of occupancy right – the creation of an occupancy tenancy by a landlord, whether for consideration or otherwise;*
- (c) Any expression which is defined by section 3 of the Punjab Land Revenue Act, 1887, shall, subject to the provisions of this Act, have the meaning assigned to it in the said section.*

5. No right of pre-emption in respect of certain buildings.- *No right of pre-emption shall exist in respect of (a) the sale of or the foreclosure of a right to redeem-*

- (i) a shop, serai or katra;*
- (ii) a dharmasala, mosque or other similar building.*

or

(b) the sale of agricultural land being waste land reclaimed by the vendee.

Explanation: For the purposes of this section “waste land” means land recorded as banjar of any kind in revenue records' and such ghair mumkin lands as are reclaimable.

7. Exists under certain conditions in urban immovable property.-*Subject to the provisions of section*

5, a right of pre-emption shall exist in respect of urban immovable property in any town or sub-division of a town when a custom of pre-emption is proved to have been in existence in such town or sub-division at the time of the commencement of this Act, and not otherwise.

12. The law determining the right of pre-emption.-*In respect of all sales and foreclosures not completed before the commencement of this Act, the right of pre-emption shall be determined by the provisions of this Act; but in respect of all sales and foreclosures completed before the commencement of this Act, the right of pre-emption shall be determined by the law in force at the time of such completion.”*

The Constitution Bench in paragraphs 46 and 47 of Shyam Sunder's case (supra) held that the view taken in Didar Singh (supra) was the correct one. For the sake of brevity, paragraphs 46 and 47 are reproduced herein below:-

46. *For the aforestated reasons, we approve the view of law taken in Didar Singh etc. vs. Ishar Singh (dead) by Lrs. etc. (supra) and further hold that the decision in the case of [Ramjilal vs. Ghisa Ram](#) (supra) does not lay down the correct view of law.*

47. *The result of the aforesaid discussion is that the amending Act being prospective in operation does not affect the rights of the parties to the litigation on the date of*

adjudication of the pre-emption suit and the appellate court is not required to take into account or give effect to the substituted [Section 15](#) introduced by the amending Act”

The Supreme Court of India in paragraph 7 of Didar Singh (supra) held as under:-

“7. By the Notification of 28th July, 1983 the Governor of Haryana declared that no right of pre-emption shall exist in respect of the sales of land included in the boundary of Ambala City Municipal Committee as notified by the Government of Haryana. Local Department Notification dated 21st February, 1974. It was, therefore, contended that since the appeal in the High Court was pending when the aforesaid Notification came to be issued the right of pre-emption became non-est as admittedly the lands in question were situate within the area of the Ambala City Municipal Committee. But that Notification was later quashed. By the subsequent Notification of 8th October, 1985 the Governor declared that no right of pre-emption shall exist in respect of sales of land falling in the areas of any Municipality in Haryana. Counsel, therefore, submitted that the right of pre-emption stood extinguished by the issuance of these Notifications and the appeal being a continuation of the suit the High Court was not justified in affirming the decree of the Trial Court. This precise question was considered by the Full Bench of the High Court of Punjab in Ramji Lal v. State

of Punjab (1966) ILR 19(2) Punjab 125. Question No.1 was formulated on the basis of a similar contention urged before the Full Bench which held that in a suit for pre-emption the claimant must prove that his right to pre-empt subsisted till the date of the decree of the First Court and that loss of the right after the date of the decree by an act beyond his control did not affect his claim in the suit. Accordingly, the Notification under Section 8(2) extinguishing the right of pre-emption in the property issued during the pendency of the appeal against the decree of the Trial Court did not disentitle the plaintiffs to maintain their claim of pre-emption already exercised and decreed. This is the law which is holding the field since 1965. The view taken by the Full Bench of the Punjab High Court is not shown to be erroneous. Besides, having regard to the language of Order 20 Rule 14 of the Code of Civil Procedure title passes on payment of the money and we see no reason why we should disturb that view. We, therefore, do not find any substance in the second contention also.”

After discussing the Didar Singh (supra) and the view expressed by the Constitution Bench and taking into consideration the fact that in Pirthi's case, co-sharer had filed a suit on 31.10.1992 and it was during the pendency of the suit by amendment, the right was taken away. It is in that background of the matter, it was held that legal principles culled out by the Constitution Bench did not come to the rescue and aid of the

plaintiff in Pirthi's case (supra) by holding that the suit was not maintainable but in the instant case, suit as noticed above was filed on 25.08.1986 and decision thereon was rendered on 30.09.1989 and appeal filed before the Lower Appellate Court was decided on 24.01.1991. During all this period, right of co-sharer to pre-empt the land was subsisting.

In view of the aforementioned fact, I am of the view that argument of Mr. Umesh Aggarwal, with regard to maintainability of the appeal, is not tenable and is hereby rejected.

Section 5(b) of 1913 Act, as extracted above prohibits the pre-emption of land in respect of sale of agricultural land being waste land reclaimed by the vendee and the expression given therein envisages that waste land would mean a land recorded as '*banjar*' of any kind in revenue record and such *gair mumkin* land being re-claimable. Concededly, as per the revenue record, the land subject matter of the sale deed dated 3.09.1985 being pre-empted was "*gair mumkin bara*" for which no right enured in favour of the co-sharer to pre-empt the land. Both the Courts below were consistent and coherent in its finding with regard to nature of the land. No contrary evidence has been placed on record to enable this Court to form a different view than the one given by the Courts below.

As an upshot of my findings, there is no illegality and perversity in the findings recorded by both the Courts below which are based upon the appreciation of oral and documentary evidence much less no substantial question of law arises for adjudication of the present appeals.

Accordingly, the appeals stand dismissed.

(AMIT RAWAL)
JUDGE

February 12, 2018

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Whether Speaking/Reasoned

Yes/No

Whether Reportable

Yes/No