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

RSA-764-1988 (O&M)

Date of decision : 06.02.2019

Duli Chand

... Appellant

Versus

Krishan Lal

... Respondent

CORAM: HON'BLE MR. JUSTICE AMIT RAWAL

Present: Mr. Ashok Verma, Advocate
for the appellant.

Mr. S.K. Jain, Advocate
for the respondent.

AMIT RAWAL, J. (ORAL)

The present regular second appeal is directed against the concurrent findings of fact, whereby the suit of the plaintiff by way of pre-emption of ½ share of the agricultural land measuring 136 kanals 12 marlas, has been dismissed by the trial Court vide judgment and decree dated 17.01.1987 and affirmed by the lower Appellate Court vide judgment and decree dated 22.02.1988.

The aforementioned suit, earlier decreed by the trial Court, on 11.12.1981, but the appeal preferred by the defendant was dismissed by the lower Appellate Court, on 11.08.1982.

The defendant approached this Court vide RSA No.1818 of 1982 and along with the same, an application for additional evidence was moved as during the interregnum i.e. during the pendency of the appeal

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before the lower Appellate Court, the appellant-plaintiff, vide sale deed dated 12.01.1982, had sold his own shares, claiming to be co-sharer. This Court, vide order dated 08.05.1986, remitted the matter to the trial Court to decide the controversy afresh. It is, in these circumstances, the trial Court, vide judgment and decree dated 17.01.1987, dismissed the suit by holding that the plaintiff was no longer co-sharer and therefore, could not be permitted to preempt the sale deed. The appeal before the lower Appellate Court was dismissed by relying upon the ratio decidendi culled out by Hon'ble the Supreme Court in **"Jagdish V/s Nathi Mal Kejriwal and others" 1986 (4) SCC 510.**

Mr. Ashok Verma, learned counsel appearing on behalf of the appellant-plaintiff submitted that the aforesaid judgment relied upon by the lower Appellate Court, is no longer a good law in view of the *ratio decidendi* culled out by Hon'ble the Supreme Court, in **Bhikha Ram V/s Ram Sarup, 1992 AIR (SC) 207,** even as per *ratio decidendi* culled out by the Larger Bench of Hon'ble the Supreme Court in **Shyam Sunder and another V/s Ram Kumar and another, 2001 (2) PLJ 332, 2001 (AIR) SC 2472,** wherein, while dealing with the many questions including retrospective effect of the amendment in the Haryana Amendment Act, 1995, causing amendment in the Punjab Preemption Act, 1913, the question came to be decided, whether kinsfolk of the vendor or the vendee having ceased to be a co-sharer, would be able to maintain the suit for pre-emption till the first decree and the first decree, according to him, would be of 11.12.1981, the attention of this Court has further been drawn to the judgment rendered by this Court in **"Ajmer singh V/s Dharam Singh" 2006 (2) RCR (Civil) 541,** wherein, para 10 has held as under:-

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"10. I have heard learned Counsel for the parties at length. Both the parties have relied upon the judgment delivered by the Constitution Bench of Hon'ble Supreme Court in Shyam Sunder's case (supra). Hon'ble Supreme Court has examined the issue of right of pre-emption and held the pre-emptor must possess his right to pre-empt right from the date of sale till the date of decree of the first Court, and loss of that right after the date of decree either by own act, or an act beyond his control or by any subsequent change in legislation which is prospective in operation during pendency of the appeal filed against the decree of the Court of first instance would not affect the right of pre-emptor. It has been held that claimant must possess right of pre-emption on the date of sale. The claimant must possess the same right on the date when the suit is instituted and that right should continue to exist on the date when the suit is instituted and that right should continue to exist on the date of adjudication of the suit. However, it is a matter of no consequence, whether the trial court decrees or dismissed the suit. In view of the said judgment, in respect of first question, it is concluded that dismissal of the suit by the learned trial court will not defeat the right of pre-emption on account the enactment of the Haryana Act No. 10 of 1995. "

On the other hand, Mr. Jain, learned counsel appearing on behalf of the respondent-defendant submitted that the question to be pondered and adjudicated by this Court would be, whether the first decree would of 11.12.1981 or 17.01.1987, as this Court, vide order dated 08.05.1986, set aside the first decree, in essence, the first decree was no longer in existence. At the time of passing of first decree, the appellant had already lost the right and status of co-sharer and therefore, the suit of pre-emption was liable to be dismissed by upholding the judgment and decree, under challenge.

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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 the following 'Substantial Questions of Law' arise for determination of this Court:-

1. *Whether in the peculiar facts and circumstances of the case, first decree would be 11.12.19812 or 17.01.1981.*
2. *Whether the vendor or its kinfolks loses the right to preempt, in case of the sale of their shares in joint khata, at the time of pendency of the appeal.*

On perusal of the para No.10 of the judgment rendered in **Ajmer Singh's case** (supra), extracted herein above, which is in tandem with the *ratio decidendi* culled out by Hon'ble the Supreme Court in **Shyam Sunder's case** (supra), I am of the view that the lower Appellate Court has committed illegality and perversity in dismissing the suit by relying upon the *ratio decidendi* culled out in **Jagdish's** case (supra), which was no longer a good law in **Bhikha Ram's case** (supra). It would be in the fitness of things in case the lower Appellate Court adjudicates the controversy afresh in accordance with law i.e. in terms of the law in vogue, at the time of pendency of the appeal.

Keeping in view the aforementioned facts and circumstances, by leaving the substantial questions of law, as framed above, open, I deem it appropriate to set aside the judgment and decree of the lower Appellate Court and the matter is remitted to the lower Appellate Court to decide the controversy afresh, in view of the observations made hereinabove as well as in accordance with law.

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Let this exercise be done within a period of six months from the date of the receipt of the certified copy of this order.

The parties or through their counsel are directed to appear before the lower Appellate Court on 02.04.2019.

With the aforesaid observations, the present regular second appeal is disposed of.

06.02.2019
Yogesh Sharma

(AMIT RAWAL)
JUDGE

Whether speaking/reasoned **Yes/ No**

Whether Reportable **Yes/ No**