

IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

RSA No.857 of 1988 (O&M)
Date of Decision: January 12, 2021

Jiya Lal (Deceased) through his LRs and others
.....Appellant(s)
Versus
Raj Kumar (Deceased) through his LRs
...Respondent(s)

CORAM: HON'BLE MR. JUSTICE MAHABIR SINGH SINDHU

Present: Mr. Amit Jain, Advocate for the appellants.
Mr. S.K. Garg Narwana, Senior Advocate with
Mr. Japjit Singh Johal, Advocate for the respondents.

MAHABIR SINGH SINDHU, J.

Controversy in the present case relates to right of pre-emption of a co-sharer in terms of Section - 15 (I)(b), Clause ‘Fourth’ of The Punjab Pre-emption Act ,1913 (as applicable to State of Haryana) for short “the Act” and the part of the text existing at the relevant point of time, reads as under:-

“15 Persons in whom right of pre-emption vest in respect of sales of Agricultural land and village immovable property:-
(1) The right of pre-emption in respect of agricultural land and village immovable property shall vest:--
(a)
(b) Where the sale is of a share out of joint land or property and is not made by all the co-sharers jointly:-
FIRST.....
SECONDLY.....
THIRDLY.....
FOURTHLY, in the other co-charers;
FIFTHLY.....
(c)”

2. Subject matter of the *lis* is agricultural land measuring 35 Kanals, 2 Marlas, hereinafter referred as “suit land”; which was purchased by appellants-vendees (defendants No. 1 to 5) from defendants No. 6 to 12 (Vendors), vide registered sale deed dated 14.06.1986. Respondent-sole Plaintiff (now deceased), claiming himself to be a co-sharer in the ‘Khewat’ comprising suit land, filed suit for pre-emption, which was decreed by both the courts below.

Unsuccessful appellants are in second appeal under section 41 of The Punjab Courts Act, 1918; for short “the Punjab Courts Act”.

3. Suit was filed by respondent on the premise that:-

- (i) he is a co-sharer in the khewat comprising the suit land; whereas the appellants are having no concern with the same;
- (ii) no notice regarding the sale of suit land was ever issued to him by the vendors;
- (iii) suit land was sold for an amount of Rs.98,000/-, but just to defeat his right, in the sale deed total consideration has been reflected as Rs.1,20,000/- wherein fictitious amount of Rs.22,000/- is included to have been paid at the time of agreement to sell.

4. Appellants No.1 to 4 filed joint written statement; whereas, separate response was filed by appellant No.5 raising the following pleas:-

- (i) respondent is not a co-sharer in the Khewat comprising the suit land;
- (ii) he refused to purchase the suit land due to shortage of funds and thereafter, appellants purchased the same with his consent;
- (iii) sale-deed was executed by the vendors after receiving the total sale consideration of Rs.1,20,000/- being the market price;
- (iv) also submitted that in case the suit of respondent is decreed, the appellants are entitled to recover an amount of Rs.15,000/-

as stamp duty, Rs.503.75 paisa being registration fee and Rs.22/- for writing charges as well as Rs.10,000/- spent for improvement of the suit land.

Respondent filed replication and reiterated the contents of plaint while controverting the objections of the appellants raised in their respective written statements.

5. On the basis of pleadings of the parties, learned trial court framed following issues:-

- “1. *Whether plaintiff being co-sharer with vendors in the khewat comprising the suit land has got superior right of pre-emption against defendant set No. 1 over the suit land? OPP.*
2. *Whether Rs.1,20,000/- as sale consideration of the suit land was fixed in good faith and actually paid by defendant set No. 1 to vendors? OPP.*
3. *Issue No. 2 is not proved, then what was the prevailing market price of the suit land at the time of sale? OPP.*
4. *Whether plaintiff has got no locus standi to file the suit? OPD.*
5. *Whether plaintiff has got no cause of action to file the suit? OPD.*
6. *Whether the suit is under valued for the purposes of court fees? OPD.*
7. *Whether in the event of decree of the suit defendants set No. 1 are entitled to recover Rs.15525.75 P. as stamp expenses registration charges and writing charges from plaintiff? OPD.*
8. *Whether the plaintiff is estopped by his own act and conduct from filing the suit? OPD.*
9. *Whether in the event of decree of the suit defendants set No. 1 are entitled to recover Rs.10000/- allegedly spent for effect in improvements over the suit land? OPD.*
10. *Relief.”*

It is necessary to mention here that prior to framing of the issues, respondent in compliance of order of learned trial court, deposited

Rs.24000, being 1/5th amount of probable value of suit land in terms of Section 22 of the Act.

6. In order to prove his case, respondent-Raj Kumar himself appeared as PW-1 and produced following documentary evidence:-

- (i) Exhibit P1-Registered sale-deed dated 14.06.1986,
- (ii) Exhibit P2-Jamabandi for the year 1981-1982,
- (iii) Exhibit P3-Mutation No. 672 dated 13.03.1986
- (iv) Exhibit P4-Receipt dated 29.08.1986.

7. On the other hand, appellants produced five witnesses including appellant No.4-Ramdhari, which are as under:-

- (i) DW1-Prithi Pal, deed writer of sale-deed.
- (ii) DW2-Davinder Kumar, deed writer for agreement to sell.
- (iii) DW3-Des Raj, attesting witness of agreement to sell,
- (iv) DW4-Shri Ram, attesting witness of sale-deed.
- (v) DW5-Ramdhari.

Appellants also produced following documentary evidence:

- (i) Ex.D1-Sale deed dated 14.06.1986.
- (ii) Ex. D2- Agreement to sell dated 04.03.1986.

8. Ld. trial court after hearing both sides, decided issue Nos.1,4, 5, 6,8 & 9 in favour of the respondent; whereas issue Nos. 2 & 7 were decided in favour of the appellants and against the respondent. In view of the findings recorded on issue No.2, learned trial court disposed off issue No.3 without any further discussion.

While dealing with issue No.10, learned trial court decreed the suit of the respondent vide judgment and decree dated 23.11.1987, in the following manner:-

“It is ordered that the suit of plaintiff succeeds and the same is, hereby, decreed by holding that plaintiff being co-sharer in the khewat comprising the suit land is

entitled to pre-empt the impugned sale of suit land. Plaintiff is directed to deposit Rs.1,11,525-75P(calculated after deducting Rs.24,000/- the earlier deposit of 1/5th of the sale price from the total amount of Rs.1,35,525-75P being Rs.1,20,000/- as sale consideration, Rs.15,000/- as stamp expenses Rs.503-75P as registration fees and Rs.22/- as writing charges) in the Treasury on or before 23.12.1987, failing which the suit of plaintiff shall stand dismissed. However in the event of deposit of such amount by plaintiff within the stipulated period, defendants No.1 to 5 shall deliver the vacant possession of suit land to plaintiff. Parties are left to bear their own costs.”

9. Aggrieved against the judgment and decree of trial court, appellants preferred an appeal, but the same was dismissed by learned first appellate court vide impugned judgment and decree dated 12.02.1988.

10. Hence, the present second appeal.

It is relevant to mention here that on 06.02.2019, second appeal was dismissed by Single Bench of this Court; but the same has been set aside by the Hon'ble Supreme Court vide order dated 06.12.2019 in Civil Appeal No.9233 of 2019, on the short point that application for additional evidence under Order 41, Rule 27 of the Code of Civil Procedure, 1908; for short “CPC” remained pending before this Court and remanded the matter for fresh decision on merits in accordance with law, inter alia observing as under:-

“4. For the nature of order we propose to pass, it is not necessary to dilate on the factual matrix of the case except to observe that the second appeal filed by the appellant(s) came to be dismissed despite the application preferred by the appellant(s) under Order 41 Rule 27 of the Code of Civil Procedure for production of certified copy of order dated

07.06.1986 passed by the Guardian Judge, Jind by way of additional evidence to establish that the respondent(s)/ plaintiff(s) had knowledge of date of sale of property as the sale was after taking permission from the Guardian Judge.

5. Counsel for the appellant(s) has also invited our attention to the report accessed through the official website of the High Court which indicates that the stated application is still pending in the High Court.

6. The High Court in the impugned judgment has taken notice of the stated application and the contention urged by the appellant(s) in that regard. However, the High Court has not analyzed the efficacy of the said application or the argument pursued by the appellant(s).

7. As aforesaid, the impugned judgment has dealt with other issues without recording any observation in reference to the plea taken by the appellant(s) that the said document would go to the root of the matter.

8. We also place on record the argument of the counsel for the respondent(s) that the said document has no relevance to the matter in issue. However, that plea will have to be considered by the High Court in the first place”.

11. Parties were heard at length through video conference up to their complete satisfaction.

Contentions on behalf of the appellants:-

- i) Respondent is having no right of pre-emption claiming to be a co-sharer as the sale deed was executed regarding the specific khasra numbers and as per revenue record, vendors were recorded in exclusive possession of their respective share. In the sale deed also vendors claimed themselves to be exclusive owners as well as in possession of the suit land. Since all the co-sharers were in possession of their respective parcel of land having been allotted separate khata numbers on the basis of private partition and as such the respondent cannot

be treated as a co-sharer in the suit land . Reference is made to single bench judgment of this court reported as **Ajmer Singh versus Dharam Singh 2006(2) RCR (Civil) 541**.

- ii) Respondent as well as vendors are members of one extended family, having common ancestor, resident of the same village; thus, he was having full knowledge of the intention of vendors regarding agreement to sell and consequent sale deed. Reference in this regard was made to Section 114 of the Indian Evidence Act, 1872 (for short 'Evidence Act') for drawing such a presumption by this court about the existence of above facts. It has come on record from the testimony of DW-5 that respondent participated during the negotiations and he consented for the sale in favour of the appellants, but refused to purchase the same due to lack of funds; therefore, respondent waived off his right and in view of Section 115 of the Evidence Act, he is estopped from filing the suit for pre-emption.
- iii) Right of pre-emption is a piratical right as it imposes restriction on the right of the owner to transfer or alienate his/her property in favour of a person of his choice, therefore, the same should be construed strictly and reference in this regard is made to two Division Bench judgments of this Court, reported as **Rati Ram and others v. Mam Chand and others AIR 1959 Punjab 117 DB** and **Jai Singh Versus Mughla and others 1967 PLR 475 DB** .
- iv) At the relevant point of time, some of the vendors were minors, therefore, Shanti (defendant No.6) being natural guardian, sought permission to sell their share in terms of Section 8 (2) of the Hindu Minority and Guardianship Act, 1956 (for short "the Guardianship Act"); which was granted by Guardian Judge, Jind on 07.06.1986. Before passing the order by Guardian Judge, notice to general public was also issued through publication on 21.04.1986 in newspaper 'Dainik Chetna' circulated in the locality; thus, respondent was having constructive notice about the sale of suit land in terms of Section 19 of the Act; but despite that he filed present suit on

28.07.1986 i.e. beyond the period of three months and as such in view of the provisions of Section 20 of the Act (ibid) his right of pre-emption stood extinguished. While pressing into service the provisions of Order 41, Rule 27 (1)(b) of CPC, submitted that in view of the factual position explained above, even at second appellate stage, this Court has ample power to accept additional evidence for coming to the just conclusion or for other substantial cause even if the document was within the knowledge of the appellant. Also submitted that the order dated 28.07.1986 passed by Guardian Judge is a public document; authenticity of which is not in dispute; therefore, would certainly enable the Court for effective adjudication of the dispute between the parties. Reference in this regard was made to two Single Bench judgments of this court reported as **2011 (1) RCR (Civil) 690 Gurdial Singh & others Vs. Mam Chand**; and **2012 (4) RCR (Civil) 56 Ram Niwas Vs. Kalu Ram & others**.

12. On the other hand, learned Senior counsel for the respondent opposed the above contentions while submitting as under:-

- (i) Both the courts below have concurrently held that respondent is a co-sharer in the Khewat and entitled to pre-empt the sale in question. Although it was denied by the appellants in their respective written statements that respondent is not a co-sharer in the khewat comprising the suit land; but in view of the sale deed Ex.P1, Jamambandi (Ex.P-2) as well as mutation Ex.P3 it is clearly established that the Khewat No.70, comprising the suit land is joint and specific khasra numbers/ share from joint Khewat have been sold out in favour of the appellants by their vendors, therefore, the respondent has lawful right of pre-emption being a co-sharer. Specifically submitted that none of the DWs uttered even a single word that respondent is not a co-sharer in the suit land. Also argued that sale of specific khasra number or portion of the land from a joint Khewat by one of the co-owner/co-

sharer amounts to sale of share from joint holding and that is pre-emptible. Reference was made to Full Bench judgment of this Court reported as **1981 PLJ 204-Bhartu Vs. Ram Sarup**, as well as two judgments of Hon'ble Supreme Court reported as (2009) 15 SCC 747-**Jai Singh and others Vs. Gurmej Singh**; (2009) 16 SCC 625 **Pokhar (dead) by LRs Vs. Ram Singh**. Also pointed out that full bench judgment in **Bhartu's** case (supra) was duly approved by Hon'ble Supreme Court in **Pokhar's** case (supra). Further contended that plea of private partition is a pure question of fact which was never raised by the appellants before the courts below; nor there is any evidence available on record to the effect that khewat No.70 was ever partitioned between the co-sharers and on the basis thereof they were put in separate possession. Again submitted that plea of private partition has been raised first time during the arguments before this court without any factual foundation; thus the same is liable to be rejected out-rightly.

- (ii) Before both the courts below, appellants could not prove that respondent was having any knowledge about the sale of the suit land or consented during negotiations or at the time of executing the sale deed. The plea on behalf of the appellants that respondent had no sufficient money to purchase the suit land, is also liable to be rejected; as they failed to prove the same before learned trial court and the finding to that effect was never challenged before the first appellate court. It is matter of record that when respondent came to know about the sale deed, he immediately filed the suit for pre-emption on 28.07.1986; deposited 1/5th amount of Rs.24000/- under section 22 of the Act and thereafter made compliance of trial court decree for payment of balance amount of Rs.1,11,525.75 Paisa with the treasury; thus by no stretch of imagination it could be construed that respondent was having any

shortage of funds at the relevant time. None of the vendors have been produced to prove the fact that respondent was having any knowledge about the sale of suit land or that he refused to purchase the same on account of insufficient funds. Even DW-5 (Ramdhari) also did not depose to the effect that respondent refused to purchase the suit land due to lack of funds. Merely that respondent as well as vendors belong to one extended family from common ancestor would not *ipso facto* prove that he was having knowledge of the intention of vendors regarding sale of suit land; thus, there is no occasion for this court to draw any presumption under section 114 of Evidence Act against the respondent. Still further, neither attesting witness of the agreement to sell; nor of sale deed uttered even a single word that respondent was involved either at the time of agreement to sell or that sale deed was executed with his consent; thus the plea of estoppel raised on behalf of the appellants being afterthought is liable to be rejected. Issue No.8 was specifically framed regarding estoppel, but that was not pressed by the appellants before the trial court; consequently, the same has been decided against them and even before the first appellate court also, this point was never urged; nor in the grounds of present second appeal, such a plea has been raised; thus, the appellants cannot be heard on the point of estoppel.

- (iii) Right of pre-emption being co-sharer is a statutory right under Section 15 (1) (b) clause fourthly of the Act and the same is held to be valid, mandatory and not discretionary. Reference was made to two Constitutional Bench judgments of Hon'ble Supreme Court reported as **(1986) 2, SCC, 249-Atam Parkash Vs. State of Haryana and ors; (2001) 8 SCC 24-Sham Sunder and others Vs. Ram Kumar and others.**

- (iv) Appellants have taken the stand in their written statements that respondent was present at the time of negotiation of the suit land and they purchased the same with his consent, therefore, there was no requirement for issuance of any notice to him, but appellants are trying to raise altogether a new plea that in view of the public notice dated 21.04.1986, issued by Guardian Judge before passing of the order dated 07.06.1986, respondent was having constructive notice in terms of Section 19 of the Act; thus both the pleas are diametrically opposite to each other. There was no such pleadings of constructive notice on behalf of the appellants before learned trial court; thus the same cannot be allowed to be raised at this stage. Pointedly argued that in view of the provisions of Section 19 of the Act, it was obligatory upon the vendors to give a notice to the respondent through court having the jurisdiction of suit land, but there had been no compliance of this mandatory provision; thus on that count also the public notice as well as order of Guardian Judge are neither relevant; nor helpful to the appellants. Reference was also made to **2011 (1) RCR (Civil) 210-Roshan Lal and others Vs. Sadhu and another**. While opposing the application for additional evidence, learned Senior counsel submitted that appellants were well aware about the order dated 07.06.1986 from the very beginning of filing the suit which had been decreed way back on 23.11.1987, but the application for additional evidence was filed on 28.10.2013 i.e. after a period of 26 years, that too without showing any diligence or justification. Also submitted that sole point raised on behalf of the appellants for bringing on record the order dated 07.06.1986 by way of an additional evidence is that respondent was having the knowledge about the sale of suit land in view of the public notice and order by the Guardian Judge, but in both the written statements the

stand of the appellants is that no notice was required to be issued to the respondent. The notice under Section 19 of the Act is required to be issued by the court of competent jurisdiction where land is situated; but in the present case no such notice was ever issued by the court concerned at the instance of vendors; thus, on that count also the order of the Guardian Judge is not at all relevant for adjudication of the matter in controversy; nor for any other substantial cause, hence the same is liable to be rejected.

13. Heard learned counsel for the parties and perused the record.

CM 11538-C-2013 under Order 41 Rule 27 CPC

Order 41 Rule 27 of the CPC being relevant for adjudication of the application in question is extracted as under:-

“Order 41 Rule 27. Production of additional evidence in Appellate Court.- (1) The parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary, in the Appellate Court. But if—

(a) the Court from whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted, or

(aa) the party seeking to produce additional evidence, establishes that notwithstanding the exercise of due diligence, such evidence was not within his knowledge or could not, after the exercise of due diligence, be produced by him at the time when the decree appealed against was passed, or

(b) the Appellate Court requires any document to be produced or any witness to be examined to enable it to pronounce judgment, or for any other substantial cause, the Appellate Court may allow such evidence or document to be produced, or witness to be examined.

(2) Wherever additional evidence is allowed to be produced, by an Appellate Court, the Court shall record the reason for its admission.”

Perusal of Rule 27 extracted hereinabove makes it apparently clear that a party can be permitted to lead additional evidence at the appellate stage only under three circumstances, viz. (a) where the trial court has refused to admit the evidence though it ought to have been admitted; (b) the evidence was not available to the party despite exercising due diligence; and (c) the appellate court requires the additional evidence for enabling it to pronounce a judgment or for any other substantial cause of similar nature.

In the present case, points (a) and (b) referred above, would not be relevant for decision of the present application; as the appellants have projected their case to be falling within the purview of point (c).

It is averred by the appellants in para 4 of the application that order dated 07.06.1986 of the Guardian Court is having a direct bearing upon the case; thus, the same deserves to be brought on record by way of an additional evidence to enable this court for pronouncing the judgment and for substantial cause to do complete justice between the parties. Further in para 5 of the application, it is submitted that certified copy of above order has been obtained from the custody of proper source; thus, the same cannot be said to be tampered with in any manner and as such, it can be accepted as additional evidence.

On the other hand, respondent opposed the application while raising preliminary objections to the effect that it is not maintainable at such a belated stage; appellants cannot be permitted to fill-up the lacuna in their

case; and it is not their plea that they could not produce the order of Guardian Court during the pendency of the suit after exercising due diligence.

On merits, it is submitted that even if the order dated 07.06.1986 is coming from the custody of proper source, the same cannot be allowed to be produced as an additional evidence at the second appellate stage. Also submitted that the conditions laid down under Order 41 Rule 27 CPC are not fulfilled in the present case, thus, the application is liable to be rejected.

Concededly, from the very beginning, the appellants were well aware about order dated 07.06.1986, whereby the permission was granted to defendant No.6 (Smt. Shanti) being natural guardian of the minors under Section 8 (2) of the Guardianship Act and this factual position is clearly discernible from the sale deed itself, wherein the recital of above order was duly made.

14. Section 8 (2) of the Guardianship Act being relevant is also extracted as under:-

“8. Powers of natural guardian.- (1)

(2) The natural guardian shall not, without the previous permission of the court,-

(a) mortgage or charge, or transfer by sale, gift, exchange or otherwise, any part of the immovable property of the minor; or

(b) lease any part of such property for a term exceeding five years or for a term extending more than one year beyond the date on which the minor will attain majority.”

Perusal of sub-section 2 extracted hereinabove makes it abundantly clear that permission under this provision is to be granted by

the Guardian Court to safeguard the interest of the minor, in case natural guardian wishes to deal with his/her (minor's) property in any manner stipulated therein. It transpires that initially, petition was filed in the court of Ld. District Judge, Jind by defendant No.6, while impleading the General Public as opposite party (P-6) and undisputedly, the respondent was not arrayed as a party in that petition. Thereafter, learned Senior Sub-Judge, Jind passed an order dated 10.03.1986 for service in the matter through publication in 'Dainik Chetna' newspaper; and in pursuance thereof notice was issued in the above stated newspaper published from Bhiwani on 21.04.1986. Ultimately, the petition was allowed *ex parte* by Guardian Judge (Senior Sub-Judge, Jind) vide order dated 07.06.1986.

Now appellants have raised the plea that respondent was having constructive notice and knowledge about the sale of suit land in view of the permission granted by Guardian Judge, therefore, the additional evidence is very much necessary for adjudication of the matter in controversy.

It is noteworthy that at no point of time, the appellants raised the plea of constructive notice or knowledge of the respondent either on the basis of publication in newspaper; or on account of order of the Guardian Court. Neither in their written statement; nor before the courts below or even in the grounds of second appeal, such a plea had ever been raised at their instance. In the written statement also, there is no pleadings to that effect; nor any witness on behalf of the appellants deposed in this regard. No doubt, in their written statement, appellants raised the plea that respondent was having knowledge about the sale of suit land; he participated at the time of negotiations, but refused to purchase the same

due to shortage of funds; thereafter, the suit land is alleged to have been purchased by the appellants with consent of the respondent. However, they failed to prove their plea that respondent was having any knowledge regarding the sale of suit land or that he participated during negotiations; or he was having any shortage of funds at the relevant point of time. When appellants have miserably failed before both the courts below to prove their plea regarding the knowledge attributed to the respondent about sale of suit land, then certainly, they cannot be permitted to shift their stand while importing the ploy of constructive notice or knowledge on the basis of order passed by Guardian Judge at this stage. It seems that just to defeat the lawful claim of the respondent, after a period of 26 years and that too at the second appellate stage, appellants want to create altogether a new case to prolong the litigation. If such a course is permitted, then of course, the finality in this litigation would not only be a mirage; but mockery of justice as well.

Non-compliance of section 19 of the Act is another reason to opine that proposed additional evidence is not at all relevant to pronounce the judgment or for any other substantial cause and Section 19 (ibid) reads as under:-

***“19. Notice to Pre-emptors.-When any person proposes to sell any agricultural land or village immovable property or urban immovable property or to foreclose the right to redeem any village immovable property or urban immovable property, in respect of which any persons have a right of pre-emption, he may give notice to all such persons, of the price at which he is willing to sell such land or property or the amount due in respect of the mortgage, as the case may be.*”**

Such notice shall be given through any Court within the local limits of whose jurisdiction such land or property or any part thereof is situate and shall be deemed sufficiently given, if it be stuck up on the chaupal or other public place of the village, town or place in which the land or property is situate.”

Still further, Section 20 of the Act being relevant is also extracted as under:-

“20. Notice by pre-emptor to vendor.- *The right of pre-emption of any person shall be extinguished; unless such person shall, within the period of the three months from the date on which the notice under Section 19 is duly given or within such further period not exceeding one year from such date as the Court may allow, present to the court a notice for service on the vendor or mortgagee of his intention to enforce his right of pre-emption. Such notice shall state whether the pre-emptor accepts the price or amount due on the footing of the mortgage as correct or not, and if not, what sum he is willing to pay.*

When the court is satisfied that the said notice has been duly served on the vendor or mortgagee, the proceedings shall be filed”.

Perusal of Section 19 extracted hereinabove clearly reveals that, when any person proposes to sell any agricultural land or village immovable property in respect of which any persons have a right of pre-emption, he may give notice to all such persons of the price at which he is willing to sell such land or property, as the case may be; such notice shall be given through any Court within the local limits of whose jurisdiction such land or property is situated and shall be deemed sufficiently given, if it be stuck up on the chaupal or other public place of the village or place in which the land or property is situated.

No doubt, under first part of Section 19, it is not binding upon the vendors to give a notice regarding the sale, but once he/she has opted for such a course, then it becomes obligatory that the notice is to be given to the pre-emptor through the Court within the local limits of whose jurisdiction, the land or property is situated. Undisputedly, in the present case, the suit land is situated within the jurisdiction of civil court at Narwana, but no such notice stipulated under Section 19 of the Act was ever given at the instance of the vendors by the court concerned; therefore, neither there was any compliance of this legal provision; nor the right of respondent for claiming pre-emption stood extinguished in terms of Section 20 of the Act. Thus, mere issuance of public notice in a petition under Section 8(2) of the Guardianship Act or the order dated 07.06.1986 passed by the Guardian Judge would not be construed as a constructive notice or knowledge of the respondent regarding sale of suit land.

Law is well settled since long that “when a statutory power is conferred for the first time upon a Court, and the mode of exercising it is pointed out, it means that no other mode is to be adopted”. (***Taylor Vs. Taylor***), (1875) 1 Ch. D 426).

The above legal proposition was duly acknowledged and followed by the privy council in **Nazir Ahmad versus K Emperor** 63 Indian Appeals 372 in the following manner:-

“where a power is given to do a certain thing in a certain way, the thing must be done in that way or not at all. Other methods of performance are necessarily forbidden.”

Reference can also be made to the judgment of Hon'ble Supreme Court reported as ***Babu Verguese Vs. Bar Council of Kerala***, (1999) 3 SCC 422, wherein, it was held as under:-

"it is the basic principal of law long settled that if the manner of doing a particular act is prescribed under any statute, the act must be done in that manner or not at all".

Although much stress was given by learned counsel for the appellants that Angrej Singh while appearing as PW-2 before the Guardian Judge, categorically deposed to the effect that respondent did not raise any objection in selling the land, but this contention is also not acceptable for the following reasons:-

- (i) witness had deposed only to the effect that other co-sharers are also selling their land ('*zameen dusre hissedar bhi bech rahe hai*') and they have no objection in this regard; meaning thereby, the witness is talking about the other vendors who were selling their land along with the minors. Since the respondent was not selling his land, therefore, by no stretch of imagination, it could be construed that this witness is stating about the present respondent;
- (ii) as already discussed, respondent was not a party before Guardian Judge; deposition of this witness was recorded during the *ex-parte* proceedings without facing any cross-examination in a petition under Section 8 (2) of the Guardianship Act; thus, his testimony cannot be accepted as a proof to the effect that respondent was having no objection against sale of the suit land in favour of the appellants.

In view of above discussion, additional evidence sought to be produced at the instance of the appellants is neither relevant; nor helpful to adjudicate the matter in controversy or for pronouncement of the judgment

by this Court or for any other substantial cause. Truly speaking, neither in law; nor at equity, the appellants can be permitted to adopt such a course for filling up the inherent lacunae in their case. It is obvious that just to remain in possession of the suit land and prolong the matter as long as possible, the appellants are adopting the delaying tactics by hook or crook which should be put at rest for maintaining faith in judicial system.

Judgment relied upon by learned counsel for the appellants in **Gurdial Singh's** case (supra) is not helpful as in that case application was filed for additional evidence before learned first appellate court by the plaintiffs for bringing on record the jamabandis and the same was declined on the ground that documents were within his knowledge of the party at the earlier stage; however, Single Bench of this court set aside the rejection order while inter-alia observing that document is capable of assisting the court to take final decision in respect of the dispute between the parties. Since in the present case the order of Guardian Court is held to be not at all relevant, thus the factual position is entirely different. Similarly, **Ram Niwas's** case (supra) is also not helpful to the appellants as in that case, application for additional evidence filed by the plaintiff for bringing on record the certified copies of three civil suits, written statement and an agreement to sell pertaining to one civil suit was allowed by first appellate Court, and that order was under challenge in a civil revision. The single Bench of this court, after relying upon legal precedents including **Gurdial Singh's** case (supra) concluded that "if the court finds the documents sought to be produced in additional evidence are relevant to decide the real issue in controversy and further the court feels that interest of justice requires that the documents may be received

and the kinds of documents are such, the authenticity of which cannot be disputed, the same may be allowed to be produced in additional evidence.”

Since, In the present case, document is found to be not a tall relevant for adjudication of the matter in controversy, therefore, this court is of the firm opinion that application for additional evidence has been filed by the appellants with an ill conceived motive; just to frustrate the ends of justice; consequently, the same is liable to be rejected and so ordered.

15. Before proceeding further, it is necessary to mention here that in view of the constitution Bench judgment of Hon’ble Supreme Court in **Pankajakshi (Dead) th. LRs. Vs. Chandrika and ors. (2016) 6 SCC 157** framing of substantial question of law would not be necessary for deciding the present second appeal and the same is to be considered in accordance with the parameters of Section 41 of the Punjab Courts Act. Thus, in view of the facts and circumstances enumerated herein, the points for decision of the present appeal are culled out as under:-

- i) Whether respondent has proved himself to be a co-sharer in the khewat comprising the suit land?
- ii) Whether respondent was having any knowledge of the sale of suit land and he consented for the same at any point of time?
- iii) Whether impugned judgments and decrees passed by both the courts below while decreeing the suit of the respondent for pre-emption are legally sustainable?

Point No.(i)

It is the pleaded case of respondent that he is a co-sharer in the khewat comprising the suit land. Admittedly, the suit land is measuring 35

kanals 2 marlas, comprised in khewat No.70 and as per revenue record, the description of the same would be as under:-

*“Khewat No.70 (old No.67),
Khatoni No.82, 83 and 84
Mustatil (Rectangle)//Khasra No.19//10(8-0), 11 (6-16),
22/1/1 (3-2), 21/1 (4-0), 20 (7-0); and
20//15/2 (6-4)”*

Learned trial court after taking into consideration the material available on record, while deciding issue No.1 came to the conclusion that Khewat comprising the suit land was joint. It was specifically observed by trial court that no cogent evidence has been produced by the appellants to prove that respondent was not a co-sharer in the khewat comprising the suit land.

Above finding of fact was not assailed by the appellants before learned first appellate court. This court has also gone through the impugned judgment dated 12.02.1988 and there is not even a whisper discernible that point of co-sharer was ever urged during the course of arguments before the first appellate court. In the present second appeal also, the appellants failed to plead the ground to the effect that respondent is not a co-sharer. Jamabandi (Ex.P2) clearly reveals that suit land is part of khewat No.70 and respondent along with the predecessor-in-interest of the vendors, namely, Ram Chander were recorded as co-sharer in the khewat upto the extent of their respective share. After the death of Ram Chander, vendors inherited the suit land vide mutation No.672 dated 13.03.1986 (Ex.P3). Even in the sale-deed (Ex.P1) also, there is a clear recital made to the effect that suit land is part of khewat No.70, khatoni No.82, 83 & 84 and vendors sold their share upto the extent of land

measuring 35 Kanals 2 Marlas. It is noteworthy that as per the provisions of Section 44 of the Punjab Land Revenue Act, 1887, for short 'Land Revenue Act', presumption of truth is attached with the entries recorded in the jamabandi, until and unless the contrary is proved. For reference, Section 44 (ibid) is extracted as under:-

“44 Presumption in favour of entries in Record- of- rights and annual records:- An entry made in a record-of-rights in accordance with the law for the time being in force, or in an annual record in accordance with the provisions of this Chapter and the rules thereunder, shall be presumed to be true until the contrary is proved or a new entry is lawfully substituted therefor.”

In the present case, appellants miserably failed before both the courts below that respondent is not a co-sharer. None of the DWs deposed to the effect that respondent is not a co-sharer in the suit land; therefore, this court has no hesitation to concur with the findings recorded by both the courts below to the effect that respondent is/was a co-sharer in the suit land with the vendors. Although appellants tried to raise the plea that vendors were in exclusive possession of specific khasra numbers on the basis of private partition and those very specific numbers were sold to them, but this plea is of no help for the reasons that; (i) sale of specific khasra numbers is not a bar to claim the right of pre-emption by the co-sharer; rather it is well settled by full Bench of this Court in **Bhartu's case (supra)** that sale of a share on joint holding is pre-emptible and the operative part of which is extracted as under:-

“We, therefore, answer the question in the affirmative and hold that the sale of a specific portion of land described by

particular khasra numbers by a co-owner out of the joint khewat would be a sale of share out of the joint land and pre-emptible under section 15(1(b) of the Punjab Pre-emption Act.”

Also relevant to mention here that above judgment (**Bhartu’s** case) was duly approved by Hon’ble Supreme Court in **Pokhar’s case (supra)**. In the recent judgment also (**Jai Singh’s case (supra)**), Hon’ble Supreme Court in para 11 held that “sale of subsequent portion of the land out of the joint holding by one of the co-owners is nothing but a sale of a share out of the joint holding and is pre-emptible under Section 15 (1)(b) of the Act”.

Plea of private partition raised on behalf of the appellants is also liable to be rejected as there is no material to substantiate the same. Even learned counsel for the appellants has failed to point out that courts below have ignored any material in this regard or that such a plea was ever raised in their written statements. The judgment relied upon by the appellants (**Ajmer Singh’s case (supra)**) would not be helpful as in that case, partition was duly proved and reference, in this regard can be made to para-23 thereof, which reads as under:-

“23. Since on the basis of evidence discussed above, it has been found that partition was already effected between the parties, therefore, plaintiff was not a co-sharer on the date of sale of land and thus, not entitled to decree of pre-emption.”

Thus, there is no hesitation for this court to observe that the plea of private partition raised by the appellants is not only afterthought, but fallacious.

Even otherwise, there is a clear distinction between the partition of a joint holding *vis-a-vis* mere separation of possession between the co-

sharers in a joint holding. When a joint holding is partitioned, then there is a separation of proprietary right and the portion according to which the holding is divided are held in severalty by the individual share holder allotted to him. On the other hand, in case of mere separation of possession as compared to partition, the entire holding still remains the joint property of all the co-sharers despite the fact that each sharer holds separate possession in the joint holding; managing his portion; appropriating its proceeds, yet he is not competent to deal with the same in any manner, which would be prejudicial to the joint proprietary interest of all the co-sharers in each and every part of the holding.

Consequently, this Court is in fully agreement with the conclusion recorded by both the courts below to the effect that respondent is a co-sharer of khewat No.70 comprising the suit land.

Point No.(ii)

Appellants contended that respondent as well as vendors are members of the same extended family from common ancestor, therefore, they were having knowledge about the sale of suit land.

Learned trial Court, in para 9, of the judgment recorded specific finding to the effect that “Defendants also failed to prove that plaintiff was having the prior knowledge of impugned sale of the suit land”. This finding was not assailed before the first appellate court as there was neither any ground pleaded; nor any argument raised to impeach the finding of fact. In the present second appeal also, there is no such ground pleaded; yet the appellants while shifting their stand want to prove the plea of knowledge on the basis of constructive notice attributed to the respondent and taking a cue from the order of Guardian Judge, but the application for bringing on

record that document as additional evidence already stands rejected being not at all relevant. (para 15 supra).

No doubt, respondent and vendors belong to one extended family, but it would not *ipso facto* lead to the conclusion that respondent was having knowledge about sale of suit land in favour of the appellants. Resultantly, this Court is not inclined to draw any adverse inference or presumption against the respondent on the basis of Section 114 of the Evidence Act; thus, the contention of the appellants to that effect is also rejected.

Although appellants while making a reference to the testimony of DW5 contended that respondent participated during the negotiations of sale, but he refused to purchase the same on account of shortage of funds. However, after going through the entire testimony of DW5, this Court does not find any such narration that respondent refused to purchase the suit land on account of shortage of funds, thus, the contention is totally unfounded and liable to be rejected. No doubt, during cross-examination, this witness voluntarily stated that respondent participated during the negotiation of sale, but none of the witnesses to the agreement to sell or sale-deed uttered even a single word in this regard. Therefore, the self serving statement of DW5 to the extent that respondent participated during negotiations; he was having the knowledge about the sale of suit land, is also not acceptable and view of both the courts below is found to be possible as well as fully convincing.

As already discussed, appellants could not prove before both the courts below that respondent was having any knowledge about the sale of suit land or that he consented during negotiations at the time of

executing the sale deed. Still further, record reveals that sale-deed was executed in favour of the appellants on 14.06.1986; respondent filed suit for pre-emption on 28.07.1986; in pursuance of order dated 29.07.1986 passed by learned trial Court, an amount of Rs.24,000/- was deposited by the respondent as 1/5th amount of approximate value of suit land in terms of Section 22 of the Act. Thereafter, in compliance of the trial court decree dated 23.11.1987, balance amount of Rs.1,11,525.75 Paise was deposited with the treasury; therefore, all the above sequence of events, clearly establish that prior to filing the suit, respondent was having neither any knowledge about the sale of suit land; nor he faced any shortage of funds for purchase of the same.

Appellants also raised the plea of estoppel against the respondent; but perusal of judgment of learned trial court clearly reveals that issued No.8 was specifically framed to that effect and the same was not pressed by the appellants. Consequently, this issue was decided against the appellants and the plea of estoppel was never challenged before the first Appellate Court or in the grounds of present second appeal and as such contention of the appellants to that effect is also liable to be rejected.

In view of the above, this Court is fully agreeable with the findings recorded by the courts below to the effect that respondent was not having any knowledge about the sale of suit land in favour of the appellants; nor he had consented for the same at any point of time.

Point No.(iii)

It was contended on behalf of the appellants that right of pre-emption is a piratical right and it imposes restriction on the right of the

owner to transfer or alienate his/her property in favour of a person of his choice, therefore, the same should be construed strictly and reference was made to the two Division Bench judgments of this Court.

This contention of the appellants is wholly misplaced and liable to be rejected in view of the law laid down by Hon'ble Supreme Court in **Atam Prakash's** case (supra) as well as **Sham Sunder's** case (supra).

In **Atam Prakash's case**, Constitution Bench upheld the validity of Section 15(1)(b) clause 'fourthly' of the Act relating to the right of co-sharers for pre-emption and held that the same does not infringe with either Articles 14 or 15 of the Constitution.

Still further, in **Sham Sunder's case**, again the Constitutional Bench in paras-17 & 18 held that right of pre-emption under statutory law is mandatory and not merely discretionary. For reference, paras-17 & 18 of the judgment are extracted as under:-

“17. In modern times, the right of pre-emption based on statutes is very much a maligned law. During hearing of these appeals such rights have been characterised as feudal, archaic and outmoded and so on. But its origin which was based on custom and subsequently codified was out of necessity of the then village community and society for its preservation, integrity and maintenance of peace and security. In changed circumstances, the right of pre-emption may be called outmoded, but so long it is statutorily recognised, it has to be given the same treatment as any other law deserves. The right of pre-emption of a co-sharer is an incident of property attached to the land itself. It is some sort of encumbrance carrying with the land which can be enforced by or against the co-owner of the land.

*The main object behind the right of pre-emption either based on custom or statutory law, is to prevent intrusion of a stranger into the family holding or property. A co-sharer under the law of pre-emption has right to substitute himself in place of a stranger in respect of a portion of the property purchased by him meaning thereby that where a co-sharer transfers his share in holding, the other co-sharer has right to veto such transfer and thereby prevent the stranger from acquiring the holding in an area where the law of pre-emption prevails. Such a right at present may be characterised as archaic, feudal and out-moded but this was law for nearly two centuries either based on custom or statutory law. It is in this background the right of pre-emption under statutory law has been held to be mandatory and not mere discretionary. The Court has no option but to grant decree of pre-emption where there is a sale of a property by another co-sharer. And for that reason the Courts consistently have taken the view that where there is a sale of holding or property by a co-sharer, the right of a pre-emption is required to be settled at the earliest either on the pre-emptor's proving his qualification to pre-empt on the date of the sale, on the date of filing of suit, and on the date of the decree of the court of first instance or the vendee improving his status till the adjudication of the suit for pre-emption and after adjudication of the suit any loss of qualification by the pre-emptor or vendee improving his status equal or above to right of pre-emptor is of no consequence. In **Zahur Din v. Jalal Din, AIR 1944 Lah. 319** a full Bench of the Lahore High Court while expressing necessity for settlement of rights of the parties at the earliest, held thus:-*

"It seems to be essential that a line should be drawn at some stage when the race between a pre-emptor and a vendee ought to come to an end and after leaving the well-known landmark of the date of the sale behind - as one now must - the farthest limit that can be granted to a vendee is that of 'the time of the adjudication of the suit' by the trial court." (emphasis supplied)

18. As noticed earlier, in **Hans Nath v. Ragho Prasad Singh, AIR 1932 PC 57**, the Privy Council held that a pre-emptor to maintain a suit for pre-emption is required to prove his right of pre-emption on three important dates. The 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 of adjudication of the suit. However, it is a matter of no consequence whether the trial court decrees or dismisses the suit. It has also been the consistent view of the Privy Council and various High Courts that a pre-emptor must possess qualification to pre-empt a sale on the date of decree of the court of first instance only for maintainability of the suit although it is immaterial that the pre-emptor loses the right of pre-emption after the adjudication of the suit either by his own act or the vendee improving his status equal to the pre-emptor during pendency of appeal filed against the decree of the trial court. This view of law is in consonance with the object behind the right of pre-emption and held the field for over a century with which we are in respectful agreement, as nothing has been shown to us which may persuade us to take a contrary view and disturb the settled law."

On the other hand, judgments cited on behalf of appellants in **Rati Ram's case (supra)** as well as **Jai Singh's case (supra)**, are not helpful to them, in any manner. In **Rati Ram's case**, sale deed in favour of the vendee was not proved, therefore, plea of pre-emption was not accepted and reference in this regard, can be made to para-6 of the judgment, which reads as under:-

“As I have discussed above, there is no evidence on the record proving the transaction in dispute to be a sale; the essential requisites of sale have not been established. From the proved facts on the record, in my opinion, no proper inference in favour of the transaction being a sale can be drawn and the Courts below have clearly erred in doing so.”

In **Jai Singh's case**, the right of pre-emption was denied while taking into consideration the provisions of Article 19(1)(f) of the Constitution being the fundamental right at that point of time, but learned counsel for the appellants did not realize that right to property is no longer a fundamental right and the same has already been taken out from the purview of the part-III of the Constitution by way of the 44th constitutional amendment w.e.f. 20.06.1979. Moreover, in view of the **Sham Sunder's case (supra)**, right to pre-emption is held to be mandatory and not discretionary.

16. Both the courts have concurrently held that respondent is a co-sharer; he was having neither any knowledge about sale of suit land, nor consented for the same. Still further, there is no material available on record to point out that courts below have committed any error of law or procedure, but only finding of facts were assailed at the third stage without any substance to that effect. As a result thereof, this court has no hesitation to concur with the opinion of the courts below. Also relevant to

mention here that Hon'ble Supreme Court in a recent judgment while considering the provisions of Section 41 of the Punjab Courts Act, in **Randhir Kaur Vs. Prithvi Pal Singh and others, (2019) 17 SCC 71**, held that jurisdiction to interfere in second appeal is only where there is an error in law or procedure and not merely an error on a question of fact and paras 15 and 16 being relevant, are extracted hereunder:-

“15. A perusal of the aforesaid judgments would show that the jurisdiction in second appeal is not to interfere with the findings of fact on the ground that findings are erroneous, however, gross or inexcusable the error may seem to be. The findings of fact will also include the findings on the basis of documentary evidence. The jurisdiction to interfere in the second appeal is only where there is an error in law or procedure and not merely an error on a question of fact.

16. In view of the above, we find that the High Court could not interfere with the findings of fact recorded after appreciation of evidence merely because the High Court thought that another view would be a better view.”

17. Consequent upon the discussion made hereinabove, the irresistible conclusions would be as under:-

- i) respondent was a co-sharer in khewat comprising the suit land;*
- ii) he was having neither any knowledge about the sale of suit land by the vendors; nor ever consented for the same;*
- iii) impugned judgments and decrees passed by both the courts below are perfectly legal, valid and justified while decreeing the suit of the plaintiff/respondent for pre-emption.*

Above all, it would be material to observe here that respondent deposited the entire amount of Rs.1,35,535.75 P (Rs.24,000/- + Rs.1,11,525.75 P) uptill the year 1987; but till date, not able to get the possession of the suit land and now next generation is fighting for the same.

18. In view of the above, this Court does not find any error of law or procedural lapse for interference under Section 41 of the Punjab Courts Act. Resultantly, there is no option except to dismiss the present appeal.

19. Ordered accordingly.

(MAHABIR SINGH SINDHU)
JUDGE

January 12, 2021
sanjay

Whether speaking/ reasoned: Yes/No
Whether Reportable: Yes/No