

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

RSA No.394 of 1989 (O&M)
DATE OF DECISION : 18.04.2022

Bachan Singh (deceased) through his Legal Representatives

.....Appellants

versus

Chuhar Singh alias Ajmer Singh (since deceased) through his Legal
Representatives

.....Respondents

CORAM : HON'BLE MRS. JUSTICE ALKA SARIN

Present : Mr. J.S. Maanipur, Advocate for the appellants.

Mr. R.S. Longia, Advocate for the respondents

..

ALKA SARIN, J. :

The present regular second appeal has been filed by the defendant-appellant challenging the judgment and decree dated 24.01.1989 passed by the lower Appellate Court decreeing the suit of the plaintiff-respondent while reversing the judgment and decree dated 29.08.1988 passed by the Trial Court.

The brief facts relevant to the present *lis* are that one Smt. Nirmala Devi was co-owner to the extent of 1/3 share in land measuring 53

kanals - 7 marlas i.e. 17 kanals - 16 marlas situated in village Jogna Khera, Tehsil Thanesar. Vide registered sale deed dated 15.07.1985 she sold the said land to the defendant-appellant for a sale consideration of Rs.45,000/-. On 13.06.1986, a suit was filed by the plaintiff-respondent for possession by way of pre-emption on the ground that he was a co-sharer in the land and hence had a superior right to pre-empt the sale in question.

The suit was contested by the defendant-appellant. Defendant No.2 in the suit i.e. Smt. Nirmala Devi, the vendor, was given up as being an unnecessary party to the suit. It was averred in the written statement that the defendant-appellant was a tenant under defendant No.2 i.e Smt. Nirmala Devi, the vendor, on the suit land at the time of sale on payment of 1/3 batai and that the sale in his favour was not pre-emptible. It was further averred that an amount of Rs.45,000/- had been paid as consideration and registered sale deed was executed in favour of the defendant-appellant. A replication was filed reiterating the stand taken in the plaint.

On the pleadings of the parties, the following issues were framed :

- “1. Whether the plaintiff has superior right to preempt the sale in question ? OPP
2. Whether the sale price of the land of Rs.45,000/- was actually fixed and paid ? OPD
3. If issue no.2 is not proved what was the market value of the suit land ? OPD
4. Whether the defendant no.1 is entitled for expenses of registration and stamp charges ? OPD

5. Whether defendant no.1 was tenant over the suit land at the time of its sale ? OPD
6. Whether the suit is not maintainable in the present form ? OPD
7. Whether plaintiff is estopped by his own act and conduct to bring the present suit ? OPD
8. Whether 1/5th preemption money was not deposited by the plaintiff in time ? OPD
9. Relief.”

Vide judgement and decree dated 29.08.1988 the Trial Court, relying on Ex.DW9/1 i.e. Khasra Girdawari for Kharif 1983 to Rabi 1984 wherein the defendant-appellant was shown in cultivating possession of the suit land as tenant under defendant No.2 i.e. Smt. Nirmala Devi, the vendor, and Sant Kumar and also relying on Ex.D2 i.e. the agreement to sell which contained a recital that the defendant-appellant was a tenant over the suit land and further relying on Ex.D1 i.e. the sale deed in question which also had a recital that the defendant-appellant was a tenant on the suit land prior to and on the date of the sale, dismissed the suit holding the sale to be not pre-emptible as per the provisions of Section 17-A of the Punjab Security of Land Tenures Act, 1953 (hereinafter referred to as the ‘Land Tenures Act’).

Aggrieved by the judgment and decree passed by the Trial Court, the plaintiff-respondent preferred an appeal which was allowed by the lower Appellate Court vide judgment and decree dated 24.01.1989 holding therein that since the change of entry in the Khasra Girdawari was

made without notice hence the said document could not be relied upon. The lower Appellate Court decreed the suit of the plaintiff-respondent.

Aggrieved by the judgment and decree dated 24.01.1989 passed by the lower Appellate Court the present regular second appeal has been preferred by the defendant-appellant.

Before advertng to the arguments raised by the learned counsel, a few relevant facts, which have not been pointed out by the counsel, also need to be adverted to. At the time of filing of the suit i.e. 13.06.1986 when the suit was checked and registered and notice was issued to the defendants, the plaintiff-respondent was directed to deposit 1/5th of the pre-emption amount on or before 26.08.1986. From a perusal of the Trial Court record it transpires that the said amount towards 1/5th of the pre-emption amount was not deposited by the plaintiff-respondent and the time was extended on 26.08.1986. A specific issue No.8 was framed - Whether 1/5th preemption money was not deposited by the plaintiff in time? OPD. which was not pressed at the time of arguments by the defendant and came to be decided against the defendant and in favour of the plaintiff.

It is further to be noted that before this Court, during the pendency of the present regular second appeal, CM-841-C-1990 was filed for permission to withdraw the amount deposited in the Trial Court over and above 1/5th of the pre-emption money. Vide order dated 05.04.1990 the plaintiff-respondent was allowed to withdraw 4/5th of the pre-emption amount without prejudice to his rights to re-deposit the same.

Learned counsel for the defendant-appellant would contend that the Trial Court had rightly dismissed the suit filed by the plaintiff-respondent holding the sale not to be pre-emptible under Section 17-A of the Land Tenures Act. Learned counsel for the defendant-appellant has contended that the defendant-appellant was a tenant on the suit land prior to the date of the sale which is evident from Ex.D2 which is the agreement to sell whereby defendant No.2 i.e. Smt. Nirmala Devi, the vendor, agreed to sell the suit land to the defendant-appellant. The sale deed in question Ex.D1 also has a recital to the effect that the defendant-appellant was a tenant over the suit land prior to and on the date of sale. Further, reliance has been placed upon Ex.DW9/1 which is the Khasra Girdawari from Kharif 1983 to Rabi 1984 wherein the defendant-appellant has been shown to be in cultivating possession of the suit land as a tenant under defendant No.2 i.e. Smt. Nirmala Devi, the vendor, and Sant Kumar. In further support of his contention the learned counsel for the defendant-appellant has referred to the testimony of DW9 Nanak Chand, Patwari who had stated that the Khasra Girdawari Ex.DW9/1 was correct according to the record and the spot and inadvertently the same could not be entered into in the jamabandi for the year 1983-84. The learned counsel has further drawn the attention of this Court to Ex.DW9/2 which is the Rapat Roznamcha No.92 relating to the change of Khasra Girdawari of Kharif 1983 in favour of the defendant-appellant as tenant, and Ex.DW9/3 which is the Rapat Roznamcha No.93 relating to change of Khasra Girdawari of Rabi 1984 in favour of the defendant-appellant. Further reliance has been placed on Ex.DW8/1 which is a written statement filed by Nanak Chand, Patwari in

another suit filed by the defendant-appellant against the plaintiff-respondent wherein challenge was to the entries in the jamabandi for the year 1983-84. In the said suit, a written statement (Ex.DW8/1) was filed wherein in para-3 it was stated that jamabandi for the year 1983-84 was prepared by him and further that the entry of Rapat Roznamcha No.92 with regard to Khasra Girdawari of the crop Kharif 1983 of Mauja Jogna Khera was correctly entered by him. Similarly, the entry made in Rapat Roznamcha No.93 was also made by him.

The learned counsel for the defendant-appellant, on the basis of the aforesaid evidence, would contend that there was ample evidence on the record to show that the defendant-appellant was a tenant on the suit land prior to the date of sale and on the date of the sale and the sale is not pre-emptible. In support of his argument, the counsel has relied upon a judgment passed by this Court in **Hardial Singh & Anr. vs. Mool Chand & Ors. [1985 PLJ 387]** to contend that the case is to be decided on preponderance of evidence for and against and it was not necessary that the vendee conclusively proves that he was a tenant on the land under the vendor at the time of sale. The learned counsel has further contended that the right of pre-emption is a weak right and a piratical right which can be defeated by all legal means.

Per contra, the learned counsel for the plaintiff-respondent has contended that the defendant-appellant had failed to prove that he was a tenant on the suit land prior to the sale and further that the change in the revenue entries was made without notice and hence the same could not be relied upon. In support of his contention, reliance has been placed upon

Bachan Singh vs. Sher Singh [1994(2) PLR 623]; Som Nath vs. Lachhman Singh [2001(1) RCR (Civil) 100]; Fateh Singh vs. Het Ram [1995(3) PLR 223]. It is further the contention of the counsel that though as per the Haryana Amending Act, 1995 the right of a co-sharer to pre-empt stands extinguished, however, as per the judgment passed by the Supreme Court in **Shyam Sunder & Anr. vs. Ram Kumar & Anr. [2001(3) RCR (Civil) 754]** the said amendment has been held to be prospective in operation and does not affect the rights of the parties to the litigation on the date of adjudication of the pre-emption suit and the Trial Court is not required to take into account or give effect to the substituted Section 15 introduced by the Haryana Amending Act.

Heard.

As per the law laid down by a Constitution Bench of the Supreme Court in **Pankajakshi (dead) through LR's & Ors. vs. Chandrika & Ors. [2016(6) SCC 157]**, there is no requirement for framing of substantial questions of law.

In the present case the legal position as it emerges is that as per the law laid down in the **Shyam Sunder's** case (*supra*) the right of the plaintiff-respondent herein to pre-empt the sale survives in as much as the Haryana Amending Act, 1995 to the Punjab Pre-emption Act, 1913 has been held to be prospective in nature. The second legal position which emerges is that as per Section 17-A of the Land Tenures Act, in case of a tenant on the suit land, the sale of said land has been held to be not pre-emptible.

Before adverting to the facts of the present case, a closer look at the law of pre-emption would be necessary. The Constitution Bench of the Supreme Court in the case of **Shyam Sunder** (*supra*) inter-alia held as under :

“18. In modern time, 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, 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 stranger into the family holding or property. A co-sharer under law of pre-emption has right to substitute himself in place of stranger in respect of portion of the property purchased by him

meaning thereby 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 law of pre-emption prevails. Such a right at present may be characterised as archaic, feudal and outmoded 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 view that where there is a sale of holding or property by a co-sharer, the right of pre-emption is required to be settled at the earliest either on 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 the first instance or vendee improving his status till the adjudication of suit for pre-emption and after adjudication of 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 Zabur Din v. Jalal Din (supra) a full Bench of 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 having 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 adjudication of the suit by the trial Court.” (Emphasis supplied).”

The right of pre-emption has been held to be a very weak right and a piratical right which can be defeated by all legal means.

This Court in the case of **Hardial Singh** (*supra*) has held as under :

“6. In any case, the matter does not rest here. The plaintiffs produced Patwari Kuldip Singh P.W. 9. In his examination-in-chief, he has stated that the notice of the change of Girdawari was given to the landowners but he again stated that he has not brought the notice file nor they maintain any such file. From this it has been inferred by the Courts below that no notice as such was given to the landowners before effecting the change in the Khasra Girdawari. From the perusal of the report Exhibit P.W. 7/B, it is found

that it was made on the basis of an application made by the vendees. It has been recited therein that the necessary correction has been made as per averments in the application and the Patwari Halqa was directed that he should inform the landowners to that effect. Apart from that, that is not the only evidence on which the lower appellate Court has come to the conclusion that the vendees were the tenants at the time of sale. Admittedly the three vendors are in service and, therefore, could not be in self-cultivation of the suit land as such. It was for them to show that through whom the land was being cultivated by them. No such evidence was led by the plaintiff. Moreover, no effort was made by the landowners to get the said entry corrected at any time. Their silence and inaction also shows that the entries were correct. Moreover, apart from the revenue entries being in favour of the defendants, the plaintiff has also not been able to establish that the suit land was really in possession of the vendees in Rabi 1977. In such a circumstance the matter had to be decided on preponderance of evidence for and against and not necessarily on the basis that the vendee had to conclusively prove that he was a tenant on the land in dispute under the vendors at the time of the sale, as held by a Division Bench of

this Court in Gurdev Singh v. Barjinder Singh and others, 1973 PLJ 314. In these circumstances, there being a concurrent finding of fact by both the Courts below, that the vendees are the tenants on the suit land, the same could not be said to have been vitiated in any manner. Moreover, I do not find any illegality or infirmity in the said finding as to be interfered with in second appeal.”

The Supreme Court in the case of **Sulleh Singh vs. Sohan Singh [AIR 1975 SC 1957]** has held as under :

“12. This Court in Naguba Appa v. Namdev, AIR 1954 Supreme Court 50, held that the directions given by the Trial Court are mandatory under the provisions contained in Order 20 Rule 14 of the Civil Procedure Code. This Court in Naguba Appa’s case (supra) said that “mere filing of an appeal does not suspend the decree of the Trial Court and unless that decree is altered in any manner by the Court of Appeal, the pre-emptor is bound to comply with that direction”.

13. In Dattaraya s/o Keshav Tawalay v. Shaikh Mahboob Shaikh Ali & Anr. [1969]2 SCR 514, this Court said that a decree in terms of Order 20 Rule 14, imposes obligations on both sides and they are so conditioned that performance by one is conditional on performance by the other. To illustrate, if the

defendants by obtaining the stay order from the High Court relieve themselves of the obligation to deliver possession of the properties the plaintiff-decree-holder must also be deemed thereby to be relieved of the necessity of depositing the money so long as the stay order continues.

14. In the present case, the lower appellate court did not grant any stay to the plaintiffs-respondents. In view of the fact that the plaintiffs respondents did not deposit the amount as directed by the Trial Court on or before 1 April, 1969, it became mandatory on the lower appellate court by reason of the ruling of this Court in Naguba Appa's case (supra) to dismiss the suit. The observations of this Court in Naguba Appa's case (supra) that the pre-emptor is bound to comply with the directions of the Trial Judge unless that decree is altered in any manner by a Court of Appeal do not mean that where the deposit is not made in accordance with the directions of the Trial Court, the appellate court can extend the time for payment. Thereafter, the lower appellate court was in error in extending the time for payment till 2nd August, 1969.

15. In Naguba Appa's case the pre-emption money was not deposited within the time fixed in the decree. The pre-emptor made an application to the Court for

making the deposit without disclosing that the time fixed by the decree had elapsed. The application was allowed. The defendant, when apprised of the situation, made an application to the Court to the effect that the plaintiff's suit stood dismissed on account of his failure in making the deposit in time. The Trial Judge held that the pre-emption money not having been paid within the time fixed in the decree the suit stood dismissed. On appeal the decision was set aside. On second appeal it was restored and it was held that the suit stood dismissed under Order 20, Rule 14 Civil Procedure Code. An appeal was preferred against the judgment of the High Court this Court held that the High Court was right in holding that the pre-emptor's suit stood dismissed by reason of his default in not depositing the pre-emption price within the time fixed in the Trial Court's decree."

In the backdrop of the law laid down, the facts of the present case need to be dealt with. In the present case, besides the Khasra Girdawari, there are numerous other documents which show that the defendant-appellant was a tenant on the suit land prior to the sale in his favour. Ex.D2, which is the agreement to sell executed by defendant No.2 i.e. Smt. Nirmala Devi, the vendor, in favour of the defendant-appellant on 29.05.1984, had a clear recital that the defendant-appellant was a tenant on the suit land. Further, a similar recital has been made in Ex.D1,

which is the sale deed in question. Further, entry in the Rapat Roznamcha No.92 relating to change of Khasra Girdawari for Kharif 1983 also shows that the defendant-appellant was a tenant on the suit land at the time of the sale. DW9, Nanak Chand, Patwari, while stepping into the witness box has stated that the entry in revenue record was correct as per the record and the spot. Further, it has come in the cross-examination that change in the entry was made after asking defendant No.2 i.e. Smt. Nirmala Devi, the vendor. Further, corroboration to the effect that the defendant-appellant was a tenant on the suit land can be found from the written statement Ex.DW8/1 wherein the entry in the Khasra Girdawari and the Rapat Roznamcha No.92 has been stated to have been correctly made by none other than by Nanak Chand, Patwari who appeared in the present case as DW9. In the **Hardial Singh's** case (*supra*), while dealing with a case of pre-emption it has been held that the matter has to be decided on preponderance of evidence for and against and it is not necessary that the vendee conclusively proves that he was a tenant on the land in dispute under the vendor at the time of sale.

The judgment relied upon by the learned counsel for the plaintiff-respondent in the case of **Bachan Singh** (*supra*) to the effect that there can be no change in the revenue entry without following the instructions under Section 11 of the Punjab Land Revenue Act, 1887 would be of no avail in as much as there is ample evidence even otherwise in the present case which goes to show that the defendant-appellant was a tenant on the suit land. It is trite that the right of pre-emption is a very weak right and can be defeated by resorting to all legal means necessary for defeating

the said right. The judgment relied upon by learned counsel in the case of **Som Nath** (*supra*) is a case where it has been held that no change in revenue entries can be made detrimental to the right of a tenant. The facts of the present case are totally distinguishable in as much as the change in the entry if at best could be held detrimental would be to the interests of defendant No.2 i.e. Smt. Nirmala Devi, the vendor, who, as per Nanak Chand, Patwari had been categorically asked prior to effecting the change in the Khasra Girdawari. Further, there has been no contest to the change in the entry by defendant No.2 i.e. Smt. Nirmala Devi, the vendor, who could raise a plea of being the aggrieved party. The judgment relied upon by learned counsel in the case of **Fateh Singh** (*supra*) would also be of no avail in as much as, as has been held above, there is other corroborating evidence which has come on record to show that the defendant-appellant was a tenant on the suit land. In fact, in the said judgment it has been held that the right to pre-emption is a piratical right and all necessary means necessary for defeating it can be resorted to.

One further point, though not argued or raised by the learned counsel for the parties, cannot be ignored is that the provisions of Order 20 Rule 14 of the Code of Civil Procedure, 1908 have been held to be mandatory in **Sulleh Singh's** case (*supra*). In the present case, as is apparent from a perusal of the zimni orders of the Trial Court, the 1/5th pre-emption money as directed by the Court on 13.06.1986 was not deposited and thereafter the time for depositing the same was extended. Though a specific issue No.8 was framed however, the same was not pressed. The provisions of Order 20 Rule 14 CPC have been held to be mandatory in

nature and any default in depositing the pre-emption money would result in dismissal of the suit. In the present case the pre-emption amount was not deposited on time as directed and the time was extended, which the Trial Court was not empowered to do. Hence, even on the said ground the suit of the plaintiff-respondent ought to have been dismissed. Be that as it may, since the said point is neither raised nor argued at any point of time, it is not necessary to delve into the same any further.

In view of the law laid down and the discussion above, the present regular second appeal is allowed. The judgement and decree of the lower Appellate Court is set aside and those passed by the Trial Court are restored and the suit of the plaintiff-respondent is dismissed. Since vide order dated 05.04.1990 the plaintiff-respondent was allowed to withdraw 4/5th of the pre-emption amount, he is allowed to also withdraw the remaining 1/5th of the pre-emption amount upon the present regular second appeal being allowed.

The regular second appeal stands allowed accordingly.
Pending applications, if any, also stand disposed off.

(ALKA SARIN)
JUDGE

18.04.2022
parkash

NOTE : Whether speaking/non-speaking : Speaking Whether reportable : YES/NO
--