

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

**RSA-677-2016 (O&M)
Reserved on: 28.10.2022
Pronounced on: 01.11.2022**

Raj Pal (deceased) through LR Ram Kumar

... Appellant

Vs.

Mahinder Singh and others

... Respondents

CORAM: HON'BLE MR. JUSTICE ARVIND SINGH SANGWAN

Present: Mr. Amit Jain, Sr. Advocate with
Ms. Aeshna Jain, Advocate
for the appellant.

Mr. Paritosh Vaid, Advocate
for respondent No.1 and LRs of respondent No.2.

ARVIND SINGH SANGWAN, J. (ORAL)

Challenge in this appeal is to the judgment and decree dated 31.10.2015 passed by the lower appellate Court, vide which the appeal filed by respondents No.1 & 2-plaintiffs was allowed and the judgment and decree dated 27.09.1993 passed by the Sub Judge 1st Class, Kaithal, dismissing the suit, was set aside.

It is pertinent to mention here that respondents No.1 & 2-plaintiffs

filed an appeal and the same was also dismissed by the lower appellate Court vide judgment and decree dated 05.06.1996. Thereafter, they filed RSA-2393-1996, which was dismissed in limine on 17.10.1996. The respondents-plaintiffs filed SLP (Civil) No.7775 of 1997 before the Hon'ble Supreme Court and on 14.01.2002, the following order was passed: -

“That the judgment and order dated the 17th October, 1996 of the High Court of Punjab and Haryana at Chandigarh in R.S.A. No.2393 of 1996 be and is hereby set aside and R.S.A. No.2393 of 1996 be and is hereby restored to the file of the aforesaid High Court with the request to the said High Court to decide the same afresh in accordance with law.”

Thereafter, RSA-2393-1996 was allowed on 03.07.2015 and the case was remanded back to the lower appellate Court. The observations made in the judgment dated 03.07.2015 read as under: -

*“The plaintiffs thereafter filed present Regular Second Appeal which was initially dismissed on 17.10.1996 in limine. The matter was taken to the Apex Court by the plaintiffs-appellants and in view of the judgment of the Apex Court in **Shyam Sunder and another Vs. Ram Kumar and another, 2001 (8) SCC 24** whereby the issue of retrospectivity was decided by the Apex Court and it was held that rights of the parties in the light of law of pre-emption as it existed on the date of passing of the decree had to be*

seen and the Appellate Court was not required to take into note the substituted Section 15 introduced by the amending Act. The SLP filed accordingly was allowed and the matter was remanded to this Court for fresh decision vide order dated 14.1.2002.

xxx

xxx

xxx

Even in view of the judgment of the Apex Court, the issue regarding right of a co-sharer to file a suit on the basis of a pre-existing right which existed at the time of filing of the suit already stands decided in favour of the appellants.

In such circumstances, the question of law referred to above is answered in favour of the plaintiffs-appellants and the present Regular Second Appeal is allowed and the matter is remanded to the Court of District Judge, Kaithal for fresh decision on merits. The said appeal shall be decided by issuing notice to the concerned parties at the earliest preferably latest by 31st March, 2016.”

(This Court is not in agreement with the aforesaid observations, in view of law referred to in the later part of this judgment, as right of a co-sharer is to be maintained till passing of the judgment by the Court of first instance).

What is held in **Shyam Sunder**’s case (supra) is that if the suit of pre-emption is decreed by Court of first instance and during pendency of appeal, the amendment came in existence, the right of pre-emptor survives,

However, if the suit is dismissed by Court of first instance, the right of pre-emptor do not survive before the Appellate Court.

Brief facts of the case are that respondents No.1 & 2-plaintiffs filed a suit for possession by way of pre-emption qua 04 kanals of land claiming superior right of pre-emption as co-sharers. The case set up by the plaintiffs is that they are co-sharers in the joint khewat of land in dispute, out of which defendants No.3 to 7 had sold land measuring 04 kanals 01 marla representing 80/120572 shares out of unpartitioned land to vendees-defendants No.1 & 2 with all rights appurtenant thereto including the right of passage, irrigation etc. vide registered sale deed dated 05.03.1990 for a consideration of Rs.20,000/-. It is also stated in the plaint that though there is a recital regarding handing over actual physical possession of land comprised in khasra No.1138, but no possession was delivered, as the land was never partitioned.

Upon notice, defendants No.1 & 2 Rajeev Deswal and Rajbir Singh contested the suit and stated that they have sold the suit land to defendant No.5 Shabeg Singh vide sale deed dated 13.06.1990 and defendant No.8 Rajpal had filed Civil Suit No.146 of 1991, instituted on 28.02.1991, praying for a decree of possession by way of pre-emption against defendants on the basis of his superior right as co-sharer and the same was decreed on 22.03.1991 and had taken possession of the land. Separate written statement was filed by defendant No.8, who also contested the suit claiming himself to be owner and in actual possession of 04 kanals of land comprising in khasra No.1138, which was sold

by defendants No.3 to 7, as he pre-empted the land and paid entire sale consideration with expenses.

Thereafter, the trial Court framing the following issues: -

1. Whether the plaintiffs have superior right of pre-emption? OPP
2. If issue No.1 is proved then for what amount the defendants are entitled? OPP
3. Whether plaint is not properly verified, if so, its effect? OPD
4. Relief.

The lower Courts record is requisitioned.

The plaintiffs, in support of their case, examined plaintiff No.1 Mohinder as PW1 and produced on record jamabandi for the year 1983-1984 as Ex.P1 to prove that the plaintiffs are co-sharers in the unpartitioned land. The copy of sale deed dated 05.03.1990, qua which the right to pre-emption, is set up was exhibited as Ex.P2 and the subsequent sale deed dated 13.06.1990 was exhibited as Ex.P3. Similarly, copy of the plaint in Civil Suit No.146 of 1991, instituted by appellant-defendant No.8 along with judgment and decree passed in the said suit were exhibited as Ex.P4 to Ex.P6 and the challan regarding deposit of *Zare Panjam* i.e. 1/5th of the amount of sale deed was exhibited as Ex.P7.

In the evidence, the defendants produced Ex.D1, copy of rapat roznamcha dated 06.09.1991.

The trial Court, thereafter, under issue No.1 recorded a finding that

there is no applicability of the principle of *lis pendens* and after the judgment was passed in Civil Suit No.146 of 1991 on 22.03.1991, the plaintiffs ceased to be co-sharers, therefore, loose their superior right of pre-emption on the basis of being co-sharers.

Thereafter, respondents No.1 & 2-plaintiffs preferred an appeal before the lower appellate Court, which was also dismissed vide judgment and decree dated 05.06.1996. Feeling aggrieved, they filed RSA-2393-1996 before this Court and vide judgment dated 03.07.2015, the matter was remanded back to the lower appellate Court for fresh decision on merits. Thereafter, the lower appellate Court, vide judgment and decree dated 31.10.2015, allowed the appeal by setting aside the judgment of dismissal passed by the trial Court and decreed the suit of respondents No.1 & 2-plaintiffs.

This appeal is pending since 2016 and record of the Courts below is requisitioned.

Learned senior counsel for the appellant has argued that in para No.4 of the plaint, respondents No.1 & 2-plaintiffs claimed superior right to pre-empt the sale deed on the grounds; firstly, they were and are still co-sharers in the khewat, out of which the land was sold by the vendors to the vendees, who are strangers and secondly, no notice of the sale was given to them and after filing of the suit, it has come to their notice that defendants No.1 & 2 have executed the sale deed in favour of defendant No.5 on 13.06.1990, therefore, principle of *lis pendens* would apply. It is further alleged in the plaint that

previously, Civil Suit No.146 was instituted on 28.02.1991 by defendant No.8 Raj Pal, claiming pre-emption as a co-sharer, which was decreed on 27.03.1991 and the said decree is not binding on their right being a collusive decree and defendant No.8 Raj Pal (appellant herein) has no right to pre-empt the same, as he was not co-sharer and the aforesaid decree was passed on the basis of a compromise, which is collusive in nature. It is further stated that no money was paid or *Zare Panjam* was deposited in Court, therefore, the decree is nullity.

Learned senior counsel has further argued that in the written statement filed by defendant No.8, all these facts were disputed and it was specifically stated that the land measuring 04 kanals was sold by vendors-defendants No.3 to 7 out of khasra No.1138 and possession of the same was delivered. It was denied that the decree passed in favour of defendant No.8 was collusive decree or that principle of *lis pendens* would apply. Learned senior counsel has referred to the jamabandi for the year 1983-84, to submit that in the disputed khewat No.1/1 (min), defendants No.3 to 5 Amar Singh, Darshan Singh and Shabeg Singh are shown to be co-sharers to the extent of 24660 and similarly, defendants No.6 & 7 Jai Mal Singh and Waryam Singh are co-sharers to the extent of 15063 and defendant No.8 Raj Pal is also a co-sharer. Learned senior counsel has also referred to the plaint of Civil Suit No.146 dated 28.02.1991 Ex.P4 to submit that in the suit filed by defendant No.8 Raj Pal against Rajbir Singh and others, in which Amar Singh, Darshan Singh, Shabeg Singh, Jaimal Singh and Waryam Singh were impleaded as defendants No.3 to

7 with a specific ground that they have sold 80/120572 shares out of the land 6028 kanals 12 marlas. It is argued that it was a big chunk of land and the plaintiff being co-sharer had a superior right to pre-empt the sale made by defendants No.3 to 7 in favour of defendants No.1 & 2 vide sale deed dated 05.03.1990 for a sum of Rs.20,000/- along with all rights appurtenant thereto and possession of 04 kanals of land comprising in khasra No.1138 was delivered to him. In the said suit, written statement was filed by the defendants admitting the claim of the plaintiff and the suit was decreed on the basis of compromise on 27.03.1991 vide judgment Ex.P4, which was exhibited as Ex.C1, in the said Civil Suit No.146 of 1991. Learned senior counsel has referred to the said judgment, to submit that it was directed that compromise Ex.C1 be made a part of the decree and it was followed by the decree Ex.P6. It is submitted that in the compromise Ex.C1, which was made part of the decree, Clause 1 clearly provides that the plaintiffs have a right of pre-emption, therefore, the suit be decreed, as per compromise. In Clause 4 of this compromise Ex.C1, it is stated that ***“defendant No.5 has received a sum of Rs.20,000/- towards sale consideration, Rs.2500/- towards purchase of stamp papers and Rs.50/- towards miscellaneous fees of registry i.e. Rs.23,000/- and has executed the receipt”***. It is further stated in the Clause 5 that actual possession has been delivered to the plaintiff at the spot.

Learned senior counsel has also referred to Ex.P7, receipt dated 15.05.1990 of Rs.4,000/- issued by the Treasury regarding deposit of 1/5th

amount towards *Zare Panjam*. It is submitted that even as per roznamcha Ex.D1, the revenue officials recorded that the possession of 04 kanals of land in khasra No.1138 was handed over to the defendants. It is further argued that since appellant-defendant No.8, in a previous suit, has already exercised his superior right of pre-emption being a co-sharer, therefore, right of respondents No.1 & 2-plaintiffs stood extinguished. It is also submitted that in order to pre-empt the land, the plaintiffs are to prove their right at the time of sale, institution of the suit as well as passing of the decree by Court of first instance.

In support of his arguments, learned senior counsel for the appellant has relied upon judgment of the Hon'ble Supreme Court in **Pirthi Vs. Mohan Singh and others, (2011) 9 Supreme Court Cases 107**, wherein it has been specifically held that right of pre-emption is to be maintained till passing of the decree. The operative part of this judgment reads as under: -

*“In Didar Singh , it was held that in a suit for pre-emption, pre-emptor must prove his right to pre-empt up to the date of the decree of the first court and any loss of right or subsequent change in law after the date of adjudication of the suit and pre-tendency of appeal would not affect the decree of the first court. The said view has been approved by the Constitution Bench. In other words, in a suit for pre-emption, the pre-emptor must prove his right to pre-empt up to the date of decree of the first court. **To put it clear, 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 (Emphasis supplied) ”

Similar view is taken by the Hon’ble Supreme Court in subsequent judgment in **Vijay Singh Vs. Shanti Devi and another, (2017) 8 Supreme Court Cases 837**, wherein, while interpreting the judgment in **Shyam Sunder’s** case (supra), it is held that after the amendment was introduced on 17.05.1995, there was no right existing in favour of the plaintiff, as ex-parte decree was set aside and the suit was to be decided afresh in that case, therefore, on the date, when the Court of first instance was to decide the suit, right was taken away by the amendment dated 17.05.1995. Learned senior counsel has argued that in the instant case, Court of first instance dismissed the suit on 27.09.1993 and during pendency of the appeal filed by respondents No.1 & 2-plaintiffs, amendment came in existence, therefore, the appeal was also dismissed, though while remanding the case back in RSA-2393-1996, it was observed that right is to be maintained till the time of filing of the suit, as notice above, however, the same is not correct interpretation in view of judgment of the Hon’ble Supreme Court in **Pirthi’s** case (supra) and **Vijay Singh’s** case (supra).

It is next submitted that the suit was dismissed on 27.09.1993, however, the same was decreed for the first time vide impugned dated 31.10.2015 and in the intervening period, by way of amendment of Punjab Pre-emption Act, right of a co-sharer to pre-empt the land stood extinguished.

Learned senior counsel has referred to a judgment of the Hon'ble Supreme Court in **Shyam Sunder and another Vs. Ram Kumar and another, 2001 (8) SCC 24**, whereby the issue of retrospectivity of the amendment in the Act was decided by the Hon'ble Supreme Court and it was held that had right of the parties in the light of law of pre-emption, as it existed on the date of passing of the decree by Court of first instance, is to be seen and the appellate Court was not required to consider the substituted Section 15 introduced by the amending Act. It has been held by the Hon'ble Supreme Court in this judgment that if before decretal of the suit by the Court of first instance, right stands extinguished, it will extinguish the right of the plaintiff. However, if suit stands decreed by Court of first instance, the amendment will not take away the right of plaintiff during pendency of appeal.

It is argued that for the first time, the suit has been decreed in favour of the plaintiffs by the lower appellate Court on 31.10.2015 and before that, right stood extinguished on 17.05.1995 and it is well settled principle of law that if the decree of dismissal of a suit for pre-emption is reversed by the lower appellate Court, it will not relate back to the date of decree passed by the trial Court and the date will be considered from the date of decree by the trial Court, therefore, the lower appellate Court has patently erred in not appreciating this legal aspect of the case.

Learned senior counsel has next argued that when the suit was filed by the appellant i.e. Civil Suit No.146 of 1991, to pre-empt the sale made vide

sale deed 05.03.1990, the same was instituted within a period of one year i.e. 28.02.1991, whereas the instant suit has been filed by respondents No.1 & 2-plaintiffs on 07.05.1990, therefore, the lower appellate Court has wrongly held that subsequent sale is hit by the principle of *lis pendens*. It is submitted that from the date of decree dated 22.03.1991 passed in Civil Suit No.146 of 1991 in favour of the appellant, superior right of respondents No.1 & 2-plaintiffs stood extinguished, as it is admitted case of both the parties that defendant No.8-appellant Raj Pal and plaintiffs Mohinder Singh and Surender Singh were co-sharers in the same khewat, as per jamabandi Ex.P1, therefore, once the appellant has exercised the superior right of pre-emption prior to exercise of right by respondents No.1 & 2-plaintiffs, their right stood extinguished. In this regard, learned senior counsel has referred to judgment of the Hon'ble Supreme Court in **Bishan Singh and others Vs. Khazan Singh and another, 1958 AIR (Supreme Court) 838**, wherein it is held as under: -

“11. The plaintiff is bound to show not only that his right is as good as that of the vendee but that it is superior to that of the vendee. Decided cases have recognized that this superior right must subsist at the time the pre-emptor exercises his right and that that right is lost if by that time another person with equal or superior right has been substituted in place of the original vendee. Courts have not looked upon this right with great favour, presumably, for the reason that it operates as a clog on the right of

the owner to alienate his property. The vendor and the vendee, therefore, permitted to avoid accrual of the right of pre-emption by all lawful means. The vendee may defeat the right by selling the property to a rival pre-emptor with preferential or equal right. To summarize: (1) The right of pre-emption is not a right to the thing sold but a right to the offer of a thing about to be sold. This right is called the primary or inherent right. (2) The pre-emptor has a secondary right or a remedial right to follow the thing sold. (3) It is a right of substitution but not of re-purchase, i. e., the pre-emptor takes the entire bargain and steps into the shoes of the original vendee. (4) It is a right to acquire the whole of the property sold and not a share of the property sold. (5) Preference being the essence of the right, the plaintiff must have a superior right to that of the vendee or the person substituted in his place. (6) The right being a very weak right, it can be defeated by all legitimate methods, such as the vendee allowing the claimant of a superior or equal right being substituted in his place.

xxx

xxx

xxx

13. The Act defines the right and provides a procedure for enforcing that right. It does not enlarge the content of that right or introduce any change in the incidents of that right. Section 4 embodies the preexisting law by defining the right as a right of a

person to acquire land in preference to other persons in respect of sales of agricultural lands. Section 13 cannot be read, as we are asked to do, as a statutory recognition of a right of preemptors of equal degree to exercise their rights piecemeal confined to their shares in the land. Section 13 confers on a group of persons, in whom the right of preemption vests, to exercise that right either jointly or severally, that is to say, either the group of persons or one of them may enforce the right in respect of the entire sale. Section 17 regulates the distribution of preempted land when the Court finds that several pre-emptors are equally entitled to the right of pre-emption. But this Section applies only where (1) the right is yet to be exercised and (2) the pre-emptors are found by the Court to be equally entitled to exercise the right. The section does not confer the right on or against a person, who has already exercised the right and ceased to be a preemptor by his being legitimately substituted in place of the original vendee. (See ILR 11 Lahore 258, at p. 274 and Lokha Singh v. Sermukh Singh, AIR 1952 Punjab 206, at p. 207. Sections 19 and 20 prescribe the procedure for the exercise of the primary right, while s. 28 confers a power on the Court to join together two or more suits arising out of the same sale, so that suitable directions may be given in the decree in regard to the order in which each claimant is entitled to

exercise the right. This section is enacted presumably to avoid conflict of decisions and finally determine the rights of the various claimants. The aforesaid provisions do not materially affect the characteristics of the right of pre-emption as existed before the Act. They provide a convenient and effective procedure for disposing of together different suits, arising out of the same transaction, to avoid conflict of decisions, to fix the order of priority for the exercise of their rights and also to regulate the distribution of the preempted land between rival pre-emptors.”

With reference to this judgment, it is argued that right to pre-empt is a pivotal right, which can be defeated by any legal means and it is held by the Hon’ble Supreme Court that vendee may defeat the right by selling the property to a rival pre-emptor with preferential or equal right to pre-empt the land being co-sharer and had exercised the right, which culminated into passing of a decree in his favour much prior to passing of the impugned decree by the lower appellate Court, therefore, right of respondents No.1 & 2-plaintiffs stood extinguished.

Learned senior counsel has relied upon judgment of the Hon’ble Supreme Court in **Suresh Chand and another Vs. Suresh Chander (dead) through legal representatives and others, (2020) 4 Supreme Court Cases 643**, wherein, with regard to rival pre-emptor, has observed as under: -

“The right of pre-emption is a preferential right to acquire the

property by substituting the original vendee. The transfer or sale of an immovable property is a condition precedent to the enforceability of the right. The right of pre-emption is attached to the property and only on that footing can it be enforced against the vendee. Though the right is recognised by law, yet it can be rendered imperfect by the vendor when he transfers the property to another person who also has a superior right to the plaintiff pre-emptor.”

It is next argued that Section 17 of the Punjab Pre-emption Act, 1913 provides that where several pre-emptors are found by the Court to be equally entitled to the right of pre-emption, the said right will be exercised by proportionately defeating the share, but where the pre-emptors are found to be equally entitled to exercise the right, Section 17 does not confer the right on or against a person, who had already exercised the right and ceased to be a pre-emptor by being legitimately substituted in place of original vendee. Learned senior counsel has referred to a judgment of this Court in **Ram Chand Vs. Khem Chand and others**, 1973 PLJ 528, wherein, with regard to doctrine of *lis pendens*, following observations are made: -

“4. I am afraid, there is no merit in the contention advanced by the learned counsel. On principle no distinction exists because either the doctrine of lis pendens is attracted to a transfer effected in favour of a person having equal right of pre-emption or it does not. If it not attracted, it makes no difference whether such a

*person becomes owner of the suit property during the pendency of the pre-emption suit either as a result of an outright sale in his favour or by succeeding in his suit and thus getting a decree in his favour, because if the provisions of Sections 17 and 28 of the Act were held to constitute an obstacle in his way, then nothing was more easier than to circumvent them by withdrawing his suit and thereafter, as permitted by the ratio of Full Bench decision of Lahore High Court in Mool Chand and others' case (supra), to purchase the land in a sale transaction from the vendees. I am, therefore, of the view that ratio of **Mool Chand and others v. Ganga Jal and others, AIR 1930 Lahore 356** clearly covers the present case."*

It is argued that while relying upon **Bishan Singh's** case (supra), it is held by this Court in **Ram Chand's** case (supra) that doctrine of *lis pendens* is not attracted, as it makes no difference, whether a person becomes owner of the suit property during pendency of a pre-emption suit either as a result of outright sale in his favour or by succeeding his suit and getting a decree in his favour. Learned senior counsel has referred to another judgment of this Court in **Bara Singh and others Vs. Chain Singh and others, 1982 PLJ 60**, wherein the following question for consideration was drawn by the Court: -

"The point of substance which arises in this appeal is the effect of a pre-emption decree obtained by a co-sharer in a civil suit filed by another co-sharer to pre-empt the same sale which had not been decided by the time the earlier pre-emption decree was passed."

The Court recorded a finding that if a pre-emptor is substituted in place of the vendee either by purchasing within one year of the sale or in a suit filed by him within the time through a decree, then superior right of pre-emptor by another plaintiff, having an equal right, cannot succeed in view of **Bishan Singh's** case (supra).

Learned senior counsel has argued that first sale deed is of 05.03.1999 and second is of 13.06.1990 and the suit was instituted by the appellant (plaintiff in the previous suit i.e. Civil Suit No.146 of 1991) within one year of limitation and was decreed in his favour, therefore, the appellant having an equal right of pre-emption having succeeded prior to exercise of right by respondents No.1 & 2-plaintiffs (in the instant suit), therefore, right of respondents No.1 & 2-plaintiffs stood extinguished. It is lastly argued that the finding recorded by the lower appellate Court that amount of *Zare Panjam* having not been deposited, no decree can be passed in Civil Suit No.146 of 1991, is erroneous, as it is provided under Section 22(1) of the Act that 1/5th amount of *Zare Panjam* is to be deposited with the Court before framing of the issues and in the instant case, before framing of the issues, the matter was compromised at a stage, when the written statement was filed along with compromise Ex.C1 in the suit and therefore, no order was passed by the Court in that suit directing appellant to deposit 1/5th *Zare Panjam*. For a reference, Section 22(1) of Punjab Pre-emption Act, 1913 is reproduced as under: -

“22. Plaintiff may be called on to make deposit or to file security.

- (1) In every suit for pre-emption the Court shall at, or at any time before, the settlement of issues, require the plaintiff to deposit in Court such sum as does not, in the option of the Court, exceed one-fifth of the probable value of the land or property, or require the plaintiff to give security to the satisfaction of the Court for the payment, if required, of a sum not exceeding such probable value within such time as the Court may fix in such order. ”

In reply, learned counsel for respondent No.1 and LR of respondent No.2 has argued that appellant-defendant No.8 Raj Pal procured a collusive decree just to defeat the right of plaintiffs Mohinder Singh and Surender Singh, therefore, considering all the facts, the lower appellate Court has rightly held that said decree is not binding on right of the plaintiffs. It is further submitted that the plaintiffs being co-sharers have a superior right to claim right of pre-emption and the second sale deed dated 13.06.1990 is hit by the principle of *res judicata*, as the present suit was filed on 07.05.1990 i.e. prior to execution of the sale deed, therefore, the lower appellate Court has rightly held that principle of *lis pendens* would apply. It is also argued that the lower appellate Court has rightly recorded a finding that at the time of execution of the sale deed dated 13.06.1990 Ex.P3 by defendants No.1 & 2 in favour of defendant No.5, he was not co-sharer, therefore, no decree could be passed in Civil Suit No.146 of 1991 in his favour.

Learned counsel has further argued that the judgment in RSA-

2393-1996, remanding the case back, has attained the finality and it is observed that the plaintiffs have to maintain the right at the time of filing of the suit and the same interpretation has been made by the lower appellate Court, while decreeing the suit. It is also argued that earlier suit, vide which a decree was passed in favour of defendant No.8-present appellant, was in fact a collusive decree and will have no binding on right of the plaintiffs. It is also submitted that since the plaintiffs have already filed a suit prior to institution of the suit by appellant-defendant No.8 regarding the same right of pre-emption as co-sharers, the sale, which has come in existence in terms of the decree, is hit by the principle of *lis pendens*, therefore, the lower appellate Court has rightly held that the plaintiffs are entitled to a decree in their favour.

It is next argued that the lower appellate Court has rightly held that defendant No.5 cannot be held co-sharer of the property, after execution of the sale deed, therefore, he had no right to sell the same. It is further held by the lower appellate Court that since plaintiff Raj Pal, in the previous suit, has not deposited 1/5th amount/*Zare Panjam*, as per Section 22 of Punjab Pre-emption Act, suit could not be decreed even on the basis of compromise.

In view of the above discussion, following **substantial questions of law** are involved in the present appeal: -

1. Whether the plaintiffs/pre-emptors have to maintain their superior right on the date of sale, filing of the suit as well as decree passed by the Court of first instance?

2. Whether in view of question of law No.1, when suit of the plaintiffs was dismissed by the Court of first instance on 27.09.1993 and right of co-sharer was taken away on 17.05.1995, passing of the impugned decree on 31.10.2015 by the lower appellate Court is against the ratio of law laid down by the Hon'ble Supreme Court that right is to be maintained till the date of decree of Court of first instance?
3. Whether the lower appellate Court was justified in going into the pleadings of the previous suit and to set aside the said decree, despite the limited scope under Order 23 Rule 3A CPC?
4. Whether a rival pre-emptor, who had already exercised his right of pre-emption, extinguishes the right of other pre-emptor in view of Section 17 of Punjab Pre-emption Act and direct plaintiff to deposit the amount?
5. Whether 1/5th amount/*Zare Panjam* is to be deposited on or before the date, when the trial Court framed the issues as per Section 22 of Punjab Pre-emption Act?

After hearing learned counsel for the parties, I find merit in the present appeal, for the following reasons: -

- (a) At the first instance, it is worth noticing that when the case was remanded back to the lower appellate Court vide judgment dated 03.07.2015, on the basis of interpretation in **Shyam Sunder**'s case

(supra), in RSA-2393-1996, by observing that the plaintiffs had to maintain the right **till filing of the suit**, which is contrary to judgment of the Hon'ble Supreme Court interpreting **Shyam Sunder's** case (supra). In both judgments of the Hon'ble Supreme Court in **Vijay Singh's** case (supra) and **Suresh Chand's** case (supra), while referring to **Shyam Sunder's** case (supra), it is held that for a decree of pre-emption, a pre-emptor should possess the right to pre-empt on three dates i.e. (i) date of sale, (ii) date of filing of the suit; and (iii) date of passing of decree by the Court of first instance **only**. In the instant case, Court of first instance dismissed the suit vide judgment and decree dated 27.09.1993 and during pendency of first appeal, by way of amendment dated 17.05.1995, right of pre-emption of a co-sharer was taken away. Thereafter, the first appeal was dismissed on 05.06.1996 and as noticed above, in RSA-2393-1996 filed by the respondents-plaintiffs, the case was remanded back, therefore, for the first time, the lower appellate Court passed the impugned decree in their favour on 31.10.2015 i.e. much after the amendment taking away the right of pre-emption as co-sharer. In view of well settled principle of law that the plaintiff is to maintain his right till the date of decree of the Court of first instance, the lower appellate Court patently erred in not interpreting the judgment of the

Hon'ble Supreme Court referred to above that no decree could be passed in favour of the plaintiff, therefore, there was no occasion to allow the appeal and grant a decree in 2015. Accordingly, **question of law No.1** is answered in favour of the appellant.

- (b) The trial Court recorded a finding that appellant-defendant No.8 being co-sharer had filed a suit as a rival pre-emptor vis-a-vis the plaintiffs-respondents No.1 & 2, therefore, once the suit for pre-emption was decreed in his favour, the respondents-plaintiffs have no superior right to pre-empt the same sale deed, as right stood extinguished. In view of judgment of the Hon'ble Supreme Court in **Bishan Singh's** case (supra) and judgment of this Court in **Bara Singh's** case (supra) holding that a vendee can defeat the right by selling the property to a rival pre-emptor with preferential or equal right and also in a similar view taken by the Hon'ble Supreme Court in **Suresh Chand's** case (supra), after passing of the decree dated 27.03.1991 in Civil Suit No.146 of 1991 filed by the appellant, pre-empting the land as co-sharer, right of the respondents-plaintiffs stood extinguished. Accordingly, **question of law No.2** is answered in favour of the appellant.
- (c) It is well settled principle of law that a Court cannot look into pleadings of a previous decree in terms of Order 23 Rule 3A CPC, as the previous decree can only be set aside on the ground of fraud

and misrepresentation and in the absence of any such pleadings in this case, the lower appellate Court has wrongly set aside the judgment and decree passed in favour of the appellant by referring to the pleadings of said suit, therefore, **question of law No.3** is answered in favour of the appellant.

- (d) The finding recorded by the trial Court that principle of *lis pendens* would apply in this case, is also erroneous in view of judgment of the Hon'ble Supreme Court in **Bishan Singh's** case (supra) that the right of pre-emption is a feeble and pivotal right, which can be defeated by any legal means like by selling the property to a rival pre-emptor with preferential or equal right, and right of pre-emption is not a right to be sold and is a secondary right, which is a right of substitution and is a weak right. Therefore, in view of the judgment in **Bishan Singh's** case (supra) and **Bara Singh's** case (supra), once the appellant has already pre-empted the sale by way of decree dated 27.03.1991, the lower appellate Court wrongly recorded a finding that the respondents-plaintiffs had a superior right. Thus, **question of law No.4** is answered in favour of the appellant.
- (e) A perusal of the impugned decree in favour of the appellant would show that there are four clauses, which are incorporated in terms of the compromise and it records that the plaintiff being pre-emptor

had paid the entire sale consideration of Rs.20,000/- to the owners along with the expenses of stamp duty as well as registration charges, therefore, the finding recorded by the lower appellate Court that nothing has come on record that 1/5th amount/*Zare Panjam* was not deposited in terms of Section 22 of Punjab Pre-emption Act, is incorrect. Even otherwise *Zare Panjam* i.e. 1/5th of the sale amount as per Section 22 of the Punjab Pre-emption Act, 1913 is to be deposited before framing of issues under an order of Court and no evidence has come on record that any such order was passed in that suit. Rather the impugned judgment and decree show that it was compromised at the stage of filing of written statement i.e. before framing of issues. Accordingly, **question of law No.5** is answered in favour of the appellant.

In view of the above, finding merits in the present appeal, same is allowed. The impugned judgment and decree dated 31.10.2015 passed by the lower appellate Court are set aside and judgment and decree dated 27.09.1993 of the trial Court, dismissing the suit, are restored.

[ARVIND SINGH SANGWAN]
JUDGE

01.11.2022
vishnu

Whether speaking/reasoned : Yes/No

Whether reportable : Yes/No