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IN THE HIGH COURT OF PUNJAB & HARYANA AT
CHANDIGARH

RSA-2102-1986(O&M)
Date of decision : 27.08.2024

Labh Singh (now deceased) through his LR's and others

... Appellants

Versus

Tek Chand (now deceased) through his LR's

... Respondent

CORAM: HON'BLE MR.JUSTICE VIKAS BAHL

Present: Mr.Ravinder Banger, Advocate
for the appellants.

Mr.Puneet Jindal, Senior Advocate with
Mr.Rahul Bansal, Advocate
for the respondent.

VIKAS BAHL, J.(ORAL)

1. LR's of defendant no.1 and defendants no.2 and 3 have filed the present Regular Second Appeal against the judgment and decree dated 07.05.1986 of the Ist Appellate Court vide which the judgment of the trial Court dated 20.09.1983 has been set aside and the suit filed by the respondent-plaintiff (presently represented by his LR's) (hereinafter referred to as the "plaintiff") has been decreed subject to the plaintiff depositing Rs.6000/- being the sale price plus Rs.1040/- on account of stamp and registration charges (less 1/5th pre-emption money already deposited) in favour of the defendants in the trial Court on or before 10.06.1986.

2. Brief facts of the present case are that the respondent-plaintiff

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had filed a suit for possession by pre-emption of land measuring 1 bigha 1/2-3 biswas being 1/3rd share of land measuring 3 bighas 5 biswas bearing khasra no.505 Khewat no.175, Khatoni no.295 as per the jamabandi for the year 1977-78. It was the case of the plaintiff that Smt.Vidyawati had sold her share in the disputed land for a sale consideration of Rs.6000/- and the registered sale deed was executed on 17.02.1981 and the symbolic possession was delivered to the vendee and that it was the plaintiff who was in possession of the suit land for the last many years and had a superior right of pre-emption in respect of the said land as a tenant. It was further pleaded that the plaintiff had requested the defendants to admit his claim but they had refused and thus, the suit was filed.

3. The defendants had contested the suit and in the written statement, it had been stated that there was no superior right of the plaintiff to pre-empt the sale and that the plaintiff was not in physical possession of the suit land as tenant but the defendants were in cultivating possession of the suit land and the revenue entries were not correct. It was further averred that since the sale had been made by a female, as such the same was not pre-emptible by the plaintiff.

4. Replication was filed by the plaintiff and on the basis of the pleadings, the following issues were framed by the trial Court:-

“1. Whether the plaintiff has got superior right of pre-emption as alleged?OPP

2. Whether the defendant is entitled to stamp and registration charges, if so to what amount?OPD

3. Whether the suit land is not pre-emptible?OPD

4. Whether the suit is bad for non-joinder of necessary



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*parties?OPD*5. *Relief.”*

5. The trial Court vide judgment and decree dated 20.09.1983 had dismissed the suit of the plaintiff. With respect to issue no.1, it was observed by the trial Court that since the plaintiff was a tenant, he had a superior right to pre-empt the sale and while recording the said finding, the trial Court had taken into consideration the copy of jamabandi Ex.P1 showing the plaintiff to be in cultivating possession of the suit land and also copy of girdawari Ex.P3, which was also in favour of the plaintiff. The argument raised on behalf of the defendants to the effect that the said entries were not correct was rejected on the ground that the defendants had not filed any application for correction of the said entries and since there was a presumption of truth attached to the jamabandi Ex.P1, thus, by taking into consideration the same and the other evidence on record, issue no.1 was decided in favour of the plaintiff. It would be relevant to note that the said issue was not challenged before the Ist Appellate Court as no cross appeal / objection was filed on behalf of the defendants before the Ist Appellate Court. Issue no.2 was decided in favour of the defendants and against the plaintiff. Even issue no.3 was decided in favour of the defendants and against the plaintiff and under the said issue, it was observed that since the sale had been made by a female and the same was covered under the provision of Section 15(2) of the Punjab Pre-emption Act 1913, the same could not be subject to pre-emption by a tenant. Issue no.4 was stated to be not pressed and was accordingly decided against the defendants and in favour of the plaintiff. On the basis of the finding on the above said issues,

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moreso issue no.3, the suit of the plaintiff was dismissed.

6. Aggrieved against the judgment of the trial Court, the plaintiff had filed an appeal and vide judgment and decree dated 07.05.1986, the Ist Appellate Court had allowed the said appeal, set aside the judgment of the trial Court and decreed the suit of the plaintiff in the above said terms. A perusal of the above judgment would show that while allowing the said appeal, reliance was placed upon the judgment of the Hon'ble Supreme Court in the case of *Atam Parkash vs. State of Haryana* reported as **1986 AIR (Supreme Court) 859** and it was observed that since the entire section 15(2) of the Punjab Pre-emption Act 1913 had been declared as ultra vires of the Constitution of India by the Hon'ble Supreme Court, thus, the ground cited by the trial Court to the effect that the matter was covered under Section 15(2) was held to be no longer available for the defendants to be taken as a plea of defence. It was further observed that since issue no.1 had been correctly decided by the trial Court and it had been rightly held that the plaintiff had got a superior right of pre-emption and the said issue was not challenged by the defendants in the first appeal as no cross objection / cross appeal was filed, thus, the suit of the plaintiff being meritorious was required to be decreed. Since under issue no.2, the exact amount was not calculated by the trial Court, the Ist Appellate Court calculated the amount to be Rs.1040/- which was to be paid in addition to the sale consideration of Rs.6000/- after adjusting 1/5th pre-emption money which was already deposited. Thus, in view of the the judgment of the Hon'ble Supreme Court in the above said case, the appeal was allowed. It is the said judgment which

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has been challenged in the present Regular Second Appeal.

7. Initially on 28.07.1986, stay of execution was ordered in favour of the present appellants but thereafter vide order dated 28.10.1986, the ex-parte order of stay of execution of decree was vacated. Learned senior counsel for the respondent has also brought to the notice of this Court that an amount of Rs.5840/- [Rs.7040 – Rs.1200 (being 1/5th of Rs.6000/-)] had been deposited by the respondent-plaintiff on 03.06.1986 which was prior to 10.06.1986 which was the time granted by the Ist Appellate Court. In support of the same, he had produced on record the certificate issued by the Treasury Officer, Jagadhri dated 26.06.2015, which has been taken on record.

8. Learned counsel for the appellants has submitted that the sale in the present case was squarely covered within the ambit of Section 15(2) as it was proved that the property covered by the sale had come to Smt.Vidyavati, Vendor through her father and in such a situation the right of pre-emption could be exercised only under Section 15(2) and since the plaintiff was claiming to be a tenant, the said right of pre-emption under Section 15(2) was not available to him. It is further argued that even in case the entire section 15(2) had been set aside by the Hon'ble Supreme Court, the same would not give any right to a tenant to pre-empt the sale. It is also submitted that in the present case, it is not proved that the plaintiff was in possession of the suit property as a tenant.

9. Learned senior counsel for the respondent has, on the other hand, opposed the present appeal and has submitted that the matter in

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question is squarely covered by the judgment of the Hon'ble Supreme Court in the case of *Atam Parkash (supra)* and also the judgment of the Coordinate Bench of this Court in the case of *Ram Krishan vs. Ratti Ram* reported as **1986 PLJ 701**. It is further submitted that once Section 15(2) and certain sub clauses of section 15(1) have been held to be ultra vires, then the rights are to be adjudicated on the basis of the provisions which have not been set aside. It is argued that a perusal of Section 15(1)(a) as well as 15(1)(b) of the Act of 1913 would show that a specific right has been provided in favour of the tenants to pre-empt the sale either by the sole owner or by a co-sharer and the said right has not been held to be illegal. It is further submitted that in Section 15(1)(a) and 15(1)(b), reference has been made to a sole owner / co-sharer and no reference has been made to a male or female and that in the present case, it is not disputed that Vidyawati had sold a share of her holding and it had further been proved that the respondent-plaintiff was a tenant and thus, as per the provision of Section 15(1)(a) as well as 15 (1)(b), the plaintiff would have the right to pre-empt the same. It is further submitted that a specific issue i.e., issue no.1 was framed regarding the same and the trial Court had adjudicated the said issue in favour of the plaintiff and no cross appeal / cross objection has been filed against the finding on said issue no.1 and thus, it is not open to the present appellants to lay challenge to the said issue no.1. It is submitted that since the amount has also been duly deposited by the plaintiff in pursuance of the judgment passed by the Ist Appellate Court and there is no stay operating in favour of the present appellants and thus, the present appeal deserves to be



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dismissed.

10. This Court has heard the learned counsel for the parties and has perused the paper book.

11. The Hon'ble Supreme Court in the case of *Atam Parkash (supra)* after taking into consideration the provisions of the Punjab Pre-emption Act 1913 had observed that the right of pre-emption based on consanguinity is a relic of the feudal past and was totally inconsistent with the constitutional scheme and the Hon'ble Supreme Court accordingly declared clauses 'First', 'Secondly' and 'Thirdly' of Section 15(1)(a), 'First', 'Secondly' and 'Thirdly' of Section 15(1)(b), clauses 'First', 'Secondly' and 'Thirdly' of Section 15(1)(c) and importantly the whole of Section 15(2) as ultra vires the Constitution. The relevant portion of the said judgment is reproduced hereinbelow:-

“In 1960, there were substantial amendments to the [Punjab Pre-emption Act](#) and, after amendment, [section 15](#) was as follows:-

*"15. Persons in whom right of pre-emption vests 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) where the sale is by a sole owner -

First, in the son or daughter or son's son or daughter's son of the vendor;

Secondly, in the brother or brother's son of the vendor:

Thirdly, in the father's brother or father's brother's son of the vendor;



Fourthly, in the tenant who holds under tenancy of the vendor the land or property sold or a part thereof;

(b) where the sale is of a share out of joint land or property and is not made by all the co-shares jointly-

First, in the sons or daughters or sons' son or daughters' sons of the vendor or vendors;

Secondly, in the brothers or brother's sons of the vendor or vendors;

Thirdly, in the father's brother or father's sons of the vendor or vendors;

Fourthly, in the other co-sharers;

Fifthly, in the tenants who hold under tenancy of the vendor or vendors the land or property sold or a part thereof;

(c) where the sale is of land or property owned jointly and is made by all the co-sharers jointly-

First, in the sons or daughters or sons' or daughter's sons of the vendors;

Secondly, in the brothers or brother's sons of the vendors;

Thirdly, in the Father's brother's or father's brother's sons of the vendors:

Fourthly, in the tenants, who hold under tenancy of the vendors or any one of them the land or property sold or a part thereof.

(2) Notwithstanding anything contained in subsection(1) :-

(a) where the sale is by a female of land or property to which she has succeeded through her father or brother or the sale in respect of such land or property is by the son or daughter of such female after inheritance, the right of pre-emption shall vest:-

(i) if the sale is by such female, in her brother or brother's son;



(ii) if the sale is by the son or daughter of such female, in the mother's brothers or the mother's brother's sons of the vendor or vendors;

(b) where the sale is by a female of land or property to which she has succeeded through her husband, or through her son in case the son has inherited the land or property sold from his father, the right of pre-emption shall vest,-

First in the son or daughter of such (husband of the) female;

SECONDLY, in the husband's brother or husband's brother's son of such female.

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13. We are thus unable to find any justification for the classification contained in section 15 of the Punjab Preemption Act of the kinsfolk entitled to pre-emption. The right of pre-emption based on consanguinity is a relic of the feudal past. It is totally inconsistent with the Constitutional scheme. It is inconsistent with modern Ideas. The reasons which justified its recognition quarter of a century ago, namely, the preservation of the integrity of rural society, unity of family life and the agnatic theory of succession are today irrelevant. The list of kinsfolk mentioned as entitled to pre-emption is intrinsically defective and self-contradictory. There is, therefore, no reasonable classification and clauses 'First', 'Secondly', and 'Thirdly' of [section 15\(1\)\(a\)](#), 'First', 'Secondly' and 'Thirdly', of [section 15\(1\)\(b\)](#), Clauses 'First', 'Secondly' and 'thirdly' of [section 15\(1\)\(c\)](#) and **the whole of [section 15\(2\)](#) are, therefore, declared ultravires the Constitution.**

14. We are told that in some cases suits are pending in various courts and, where decrees have been passed, **appeals are pending in appellate courts. Such suits and**



appeals will now be disposed of in accordance with the declaration granted by us. We are told that there are a few cases where suits have been decreed and the decrees have become final, no appeals having been filed against those decrees. The decrees will be binding inter-partes and the declaration granted by us will be of no avail to the parties thereto.”

A perusal of the above judgment would show that the entire Section 15(2) was held to be ultra vires. It is the said provision which as per the trial Court had come to the rescue of the appellants-defendants. Once the said provision had been held to be ultra vires by the Hon'ble Supreme Court, then the judgment of the Ist Appellate Court placing reliance upon the above said judgment of the Hon'ble Supreme Court, holding that the judgment of the trial Court was not sustainable, in view of the law laid down by the Hon'ble Supreme Court, cannot be stated to be either illegal or perverse. A further perusal of Section 15(1) and (2) which have been reproduced in the said judgment would show that under Section 15(1)(a), the right of a tenant to pre-empt has not been held to be illegal and similarly even under section 15(1)(b) the right of a tenant and that of the co-sharer has not been held to be ultra vires. Thus, the right of a tenant in the case of sale by a co-sharer or sale by a sole owner, to pre-empt the sale has not been set aside or held to be ultra vires. The said right of the tenant is, thus, alive. On the other hand, the exception carved out in the case of sale by a female under Section 15(2) has been completely held to be ultra vires and thus, the present case would be squarely covered by the provisions of section 15(1).



12. The Coordinate Bench of this Court in the case of **Ram Krishan (supra)** had in a similar case, observed that where in case a party had on the basis of co-sharership sought pre-emption and the plea of Section 15(2) had been set up to defeat the right of pre-emption, it was observed by the Coordinate Bench of this Court that the said section was no more in the statute book and thus, the right of a co-sharer or the right of a tenant for seeking pre-emption would still survive in view of the retention of the provisions of Section 15(1) pertaining to rights of tenant and co-sharer. The said case was one of a co-sharer seeking pre-emption but observations in favour of the tenant were also made in the said case as the right of a tenant undisputedly survives even after the judgment of the Hon'ble Supreme Court in the case of **Atam Parkash (supra)**. The sale in the above said case was by a female and was stated to be covered by Section 15(2) of the Punjab Pre-emption Act. The relevant portion of the said judgment is reproduced hereinbelow:-

“4. During the pendency of this appeal, the Supreme Court vide judgment in Atam Parkash v. State of Haryana and others, 1986 AIR 859: 1987 RRR 116 (SC), has declared whole of Section 15(2) and clauses First, Secondly and Thirdly of Section 15(1) (a), First, Secondly, and Thirdly of Section 15(1)(b) and clauses First, Secondly, and Thirdly of Section 15(1) (c) as ultra vires of the Constitution. In view of the said judgment of the Supreme Court, learned counsel for the plaintiff-pre-emptor submitted that he being a co-sharer in the Khewat is entitled to a decree because of his superior right of pre-emption because Section 15(2) is no more on the statute book. The Courts below dismissed the plaintiff's suit on the



ground that the sale was by a female and, therefore, was covered by Section 15(2) and not by Section 15(1).

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7. Faced with this situation, the learned counsel for the vendee-defendants submitted that in the judgment referred to above, the Supreme Court never enlarged the right of pre-emption, rather it struck down Section 15(2) of the Act as a whole and part of Section 15(1) and, therefore, the plaintiff-pre-emptor's suit which had been dismissed by two Courts below could not be decreed on account of his being a co-sharer in the Khewat because of the said judgment which has been rendered during the pendency of this appeal. I do not find any force in this contention. In the plaint itself, the plaintiff claimed the right of pre-emption on the basis of his relationship as well being a co-sharer whereas his right of pre-emption being a co-sharer was negated on the ground that the sale was covered under Section 15(2) of the Act. In this situation, the plaintiff is not claiming the right of pre-emption of his being a co-sharer for the first time in this appeal. This was the case set up by the plaintiff in the very beginning and it has been so found by both the Courts below and could not be disputed either. As observed earlier, the right of pre-emption on behalf of co-sharership was denied because of Section 15 (2). Now the said section is no more on the statute book and the right of pre-emption is only available either to a tenant or a co-sharer. It is under these circumstances that the plaintiff is now seeking his right of pre-emption being a co-sharer. Since it is not being denied that the plaintiff Ram Krishan is a co-sharer in the Khata, he is entitled to a decree for possession by way of pre-emption.”

13. The law laid down in the above said two judgments applies on

all fours to the case in hand. It is not in dispute that issue no.1 “as to

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whether the plaintiff has got superior right of pre-emption as alleged” was decided in favour of the plaintiff by the trial Court after taking into consideration the entries in the jamabandi Ex.P1 as well as in khasra girdawari Ex.P3 and it was held by the trial Court that being a tenant the plaintiff had got a superior right to pre-empt the same. No cross appeal / cross objection against the finding on said issue no.1 was filed by the defendants. The Ist Appellate Court thus, rightly upheld the said issue. The argument raised on behalf of the learned counsel for the appellants that the respondent-plaintiff is not in possession and is not a tenant on the land in question is not sustainable on two counts. Firstly, having not challenged the finding on the said issue before the Ist Appellate court, the present appellants are estopped from challenging the same for the first time in the present regular second appeal. Moreover, the finding even on merits, has not been shown to be either illegal or perverse. Even the second argument raised on behalf of the learned counsel for the appellants to the effect that even in case Section 15 (2) was held to be bad, then also, the plaintiff would have no right to seek preemption, is rejected in view of the law laid down in the above said judgments and also in view of the fact that the surviving/existing provisions of Section 15(1)(a) and 15(1)(b) clearly provide the right of pre-emption to a tenant in the case of a sale by sole owner or by a co-sharer. No contrary law to the same has been cited before this Court.

14. In addition to the above, it would be relevant to mention that the respondent-plaintiff had already deposited Rs.5840/- which was the



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balance amount to be deposited in pursuance of the judgment of the Ist Appellate Court and that the interim order granted in favour of the appellants had been vacated on 28.10.1986.

15. Keeping in view the above said facts and circumstances, finding no merit in the appeal, the same is dismissed.

16. It would however be open to the defendants to withdraw the amount deposited by the plaintiff in pursuance of the judgment of the Ist Appellate Court and also the earlier amount i.e., 1/5th of the pre-emption money, by moving an appropriate application, if not already withdrawn by the defendants.

17. Pending application, if any, stands disposed of in view of the abovesaid order.

**(VIKAS BAHL)
JUDGE**

August 27, 2024
Davinder Kumar

Whether speaking / reasoned	Yes/No
Whether reportable	Yes/No