IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

(101)

1. RSA-1223-1990 (O&M)

Ram Lubhaya and Others

… Appellants

Versus

Raj Kumar and Another

... Respondents

2. RSA-3096-1994 (O&M)

Ram Lubhaya and Others

… Appellants

Versus

Raj Kumar and Another

... Respondents

Date of Decision:-**17.12.2024**

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CORAM: HON'BLE MR. JUSTICE ALOK JAIN

Present:- Mr. Atul Lakhanpal, Senior Advocate with
Ms. Caral, Advocate for
the appellants.

Mr. M.L. Sarin, Senior Advocate with
Mr. Ritesh Aggarwal, Advocate
for the respondents.

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ALOK JAIN, J.

1. These two appeals are inter-connected. Both arise out of suits seeking decree of possession by way of pre-emption by co-sharer. The RSA No.1223 of 1990 and RSA No.3096 of 1994 were filed at the behest of the

defendants, who are aggrieved by the judgments and decree passed by the Learned First Appellate court, whereby the Judgments and decree passed by the Learned Trial Court were reversed and the decree of pre-emption were passed against them.

2. On the asking of the learned senior counsel for the appellants the facts are taken from **RSA No.1223 of 1990.**

3. The present RSA was filed against the judgment and decree dated 15.05.1990 whereby the learned First Appellate Court reversed the finding of the Learned Sub-Judge Ist Class, Hansi vide judgment and decree dated 26.10.1989.

4. The brief facts are that the suit for possession by way of Pre-emption of the agricultural land as prayed in the headnote of the plaint was filed by the respondent-plaintiff who claims to be the co-sharer of the suit property, and sought to pre-empt the sale of the suit land on the ground that the vendor (original owner/co-sharer Sundar Dass, who although was not impleaded as party) sold his 1/3rd share in the suit property i.e. 19 Kanals 1 Marla to the defendants without giving prior notice of sale to the plaintiffs and the second suit came to be filed by the plaintiffs challenging the subsequent sale deed dated 03.03.1986 executed by the other co-sharer (Khem Chand) in favour of the appellants/defendants. However, to the contrary, the stand of the appellants/defendants was that they were the *bona-fide/*purchaser of the 1/2 share of Sundar Dass vide registered sale deed dated 05.11.1985 and duly paid the entire sale consideration. Subsequently, the appellants/defendants had purchased the remaining ½ share in the suit property of 38 Kanal 1 Marla vide registered sale deed dated 03.03.1986

from Khem Chand and therefore before the second sale deed they had also become co-sharer of the suit land and plaintiffs had no superior-right for seeking pre-emption against them.

5. The Learned Trial Court had framed the following issues:

> *"1. Whether plaintiffs have got preferential right of pre-emption with regard to land in suit ?OPP*
> *2. Whether the sale price of the land in suit was fixed and paid in good faith ?OP Parties.*
> *3. If issue No. 2 is not proved what was the sale price of the land in suit at the time of sale ?OP Parties.*
> *4. Whether defendants-vendees are entitled to claim registration expenses, if so to what amount ?CPD*
> *5. Whether plaintiffs have no cause of action to file the present suit? OPD*
> *6. Whether the suit is time barred?OPD*
> *7. Whether the suit is bad for non-joinder and mis-joinder of necessary parties?OPD*
> *8. Whether the defendants are entitled to special costs?OPD*
> *9. Whether the defendants have affected any improvement over the land in suit, if so to what amount ?OPD*
> *10. Relief."*

6. It is important to discuss the finding of the Learned Trial Court on issue No. 1 in favour of appellants-defendants, by observing that the suit was instituted on 05.11.1986, while the second purchase of land was prior in time therefore the plaintiffs have no superior right to pre-empt the suit land as appellants-defendants had improved their status after the subsequent purchase of ½ share on 03.03.1986 from other co-sharer (Khem Chand) and the learned Trial court dismissed the plaintiffs' suit challenging the subsequent sale which was filed on 11.12.1992.

7. Aggrieved by the findings on issue No.1 alone the respondent-plaintiffs preferred the Appeal whereby the Learned First Appellate Court reversed the findings given by the Ld. Trial court on issue No. 1 that the defendants improved their status by means of subsequent purchase dated 03.03.1986 vide which the defendants became the co-sharer in the suit property due to which the plaintiffs have no superior rights of pre-emption on the suit property. Rather, it was observed by the Learned Appellate Court that the subsequent sale dated 03.03.1986 was also challenged by the plaintiffs, therefore the same does not amount to the improvement of status of the defendants and thereby set-aside the judgment and decree dated 26.10.1989 and decreed the suit in the favour of the respondents-plaintiffs.

8. Aggrieved by the finding of the Learned First Appellate Court the appellants-defendants have preferred the present second regular appeals.

9. In the back drop the above factual matrix and the record perused, the matter has been examined as herein below:

The arguments advanced by counsel for the appellants-defendants are as follows:-

Learned Senior Counsel appearing for the appellants has submitted that the appellants (original defendants in the suit) purchased the suit property by virtue of a sale deed on 05.11.1985. On that date, the plaintiffs-respondents were not co-sharers in the suit property, which is clearly reflected from the *Jamabandi* (Ex. P3) that the names of the plaintiffs or their predecessors do not find any mention, while the following names of shareholders from whom the appellants purchased their share was duly recorded as under:

"Khemchand and Sunderdas S/o Kanwar Bhan 2/3rd shareholder and Ved Prakash and Vesheda Bai widow of Nand Lal S/o Kanwar Bhan 1/3rd shareholder."

10. He further submits that on the date of the sale, the appellants were the *bona-fide* purchasers, and in the absence of the plaintiffs being recorded as owners/co-sharer in the revenue record, the vendors (not impleaded as party to the suit) were incapacitated to issue any notice to the other co-sharers as required under Section 19 of Punjab Pre-Emption Act, 1913. Therefore, the suit for pre-emption itself, considering the date of sale, clearly demonstrates that the plaintiffs were never the co-sharers in the suit property at the time of sale, hence the suit was *per se* not maintainable.

11. Learned Senior Counsel further submits that the plaintiffs claimed to become co-sharers on the strength of a Civil Court decree dated 22.08.1985 however, they failed to demonstrate the same by leading any cogent evidence by virtue of which the said mutation entry was recorded on 29.12.1985 [Ex. P-2], by the Assistant Collector, Grade-II on the first date and subsequently approved on 08.10.1986. The attention drawn to these dates is relevant because the mutation was sanctioned in favour of the plaintiffs much after the execution of sale deed dated 05.11.1985. Therefore, the suit which was filed on 05.11.1986 based on the decree and mutation in the favour of the plaintiff-respondents was wholly misconceived and untenable in law as it is the settled principles of law that the plaintiffs have to stand on their own legs, which they have failed to do. Therefore, the *bona-fide* purchase of the suit property by the appellants-defendants against

lawful consideration cannot be challenged by seeking pre-emptory rights at much later stage by manipulating the facts.

12. The learned Senior counsel further pressed the issue that the vendors from whom the suit land/property was purchased by the appellant-respondents were never impleaded as a party to the suit despite the fact that the vendors are the necessary parties, who sold the suit property without notice as required under the Act. Further, when no claim of pre-emption was instituted by the respondents-plaintiffs, within the limitation period and subsequently the appellant-defendants by virtue of the first sale deed become the co-sharer in the suit property, therefore, the subsequent sale deed in favour of the appellant-defendants not only improved their status but also be regarded as the sale by one co-sharer to the other and the respondents-plaintiffs cannot be allowed to claim the right of pre-emption. Hence the order passed by the Learned First Appellate Court is untenable and unwarranted.

13. Further, the learned Senior Counsel has submitted that although the objection was not raised as to the status of plaintiffs-respondents being co-sharer earlier, but the same can be raised at this stage before i.e., Second Appellate Court, and to substantiate the same learned Senior counsel has placed reliance upon **Order XLI Rule 33 of the Code of Civil Procedure, 1908,** the same is reproduced as under:

> *33. Power of Court of Appeal.—The Appellate Court shall have power to pass any decree and make any order which ought to have been passed or made and to pass or make such further or other decree or order as the case may require, and this power may be exercised by the Court notwithstanding that the appeal is as to part only of the decree and may be*

exercised in favour of all or any of the respondents or parties, although such respondents or parties may not have filed any appeal or objection 1 [and may, where there have been decrees in cross-suits or where two or more decrees are passed in one suit, be exercised in respect of all or any of the decrees, although an appeal may not have been filed against such decrees]: [Provided that the Appellate Court shall not make any order under section 35A in pursuance of any objection on which the Court from whose decree the appeal is preferred has omitted or refused to make such order.]

To substantiate the above argument the following judgments have been relied upon:

a) Giasi Ram v. Ramji Lal (1969)1 SCC 813 (SC)

9. Order No. XLI r 33 of the Civil Procedure Code was enacted to meet a situation of the nature arising in this case. In so far as it is material the rule provided.

> *"The Appellate Court shall have power to pass any decree and make any order which ought to have been passed or made and to pass or make such further or other decree or order as the case may require, and this power may be exercised by the Court notwithstanding that the appeal is as to part only of the decree and may be exercised in favour of all or any of the respondents or parties, although such respondents or parties may not have filed any appeal or objection."*

The expression "which ought to have been passed" mean "which ought in law to have been passed". If the Appellate Court is of the view that any decree which ought in law of have been passed but was in fact not passed by the subordinate court, it may pass or make such further or other decree or order as the justice of the case may require.

b) Mahant Dhagir v. Madam Mohan, 1987 (Supp.) SCC 528

"15. But that does not mean, that the Math should be left without remedy against the judgment of learned single Judge. If the cross-objection filed under Rule 22 Order 41, C.P.C. was not maintainable against the correspondent, the Court could consider it under Rule 33 Order 41, C.P.C. Rule 22 and Rule 33 are not mutually exclusive. They are closely related with each other If objection cannot be urged under Rule 22 against co-respondent, R 33 could take over and come to the

rescue of the objector. The appellate court could exercise the power under Rule 33 even if the appeal is only against a part of the decree of the lower court. The appellate court could exercise that power in favour of all or any of the respondents although such respondent may not have filed any appeal or objection. The sweep of the power under Rule 33 is wide enough to determine any question not only between the appellant and respondent, but also between respondent and co-respondents. The appellate court could pass any decree or order which ought to have been passed in the circumstances of the case The appellate court could also pass such other decree or order as the case may require. The words "as the case may require used in Rule 33 Order 41 have been put in wide terms to enable the appellate court to pass any order or decree to meet the ends of justice. What then should be the constraint? We do not find many. We are not giving any liberal interpretation. The rule itself is liberal enough. The only constraints that we could see may be these : That the parties before the lower court should be there before the appellate court. The question raised must properly arise out of judgment of the lower court. If these two requirements are there, the appellate court could consider any objection against any part of the judgment or decree of the lower court. It may be urged by any party to the appeal. It is true that the power of the appellate court under Rule 33 is discretionary. But it is a proper exercise of judicial discretion to determine all questions urged in order to render complete justice between the parties. The court should not refuse to exercise that discretion on mere technicalities."

c) **Sharanamma v. M.D. Divisional Contr. NEKRTC, (2013) 11 SCC 517**

"14. When an Appeal is filed under Section 173 of the Motor Vehicles Act, 1939 (hereinafter shall be referred to as the 'Act'), before the High Court, the normal Rules which apply to Appeals before the High Court are applicable to such an Appeal also. Even otherwise, it is well settled position of law that when an Appeal is provided for, the whole case is open before the Appellate Court and by necessary implication, it can exercise all powers incidental thereto in order to exercise that power effectively.

16. It is well settled that the right of Appeal is a substantive right and the questions of fact and law are at large and are open to Review by *the Appellate Court. Thus, such powers and duties are necessarily to be exercised so as to make the provision of law effective."*

14. On the strength of the above submissions and arguments the Learned Senior Counsel prays that principle of equity and justice be upheld by allowing the present appeal(s) and dismissing the suit of the plaintiffs-respondents.

Arguments advanced by the counsel for the respondents-plaintiffs.

15. Learned Senior Counsel appearing for the respondents (original plaintiffs) has opened his arguments stating that the learned trial Court while discussing issue No. 1 in detail, specifically returned the finding that the plaintiffs are the co-sharers in the suit property and the same find mention in para Nos. 10 and 11 of the trial court's judgment dated 26.10.1989 passed in Civil Suit No.7977 of 1986 which are reproduced as under:

10. In support of this issue father of the plaintiffs Sant Lal appeared as PW1 and he also produced copy of the sale-deed Ex. P1, mutation Ex. P2 and jamabandi Ex.P3 and deposed that the plaintiffs are co-sharers in the suit land. He also examined Ashok Kumar Patwari PW2 who deposed that the suit property has not been partitioned so far. The mutation Ex.P2 shows that Raj Kumar and Finak Raj plaintiffs have become the owners in possession of 1/3 share of the suit property through a civil court decree. The mutation was sanctioned in favour of the plaintiffs on 29.12.85. From the civil decres they are owners in possession as co-sharers of the suit property. The documents clearly shows that the plaintiffs are co-sharere with the vendors of the property in dispute at the time of sale and even at present. The defendants have also not specifically denied that the plaintiffs to be co-sharers in the suit land and jamabandi Ex. P3 also shows that no partition has so far taken place between the parties. Even it is admitted in their cross-examination that the suit property is joint and it has never been partitioned so far. Counsel for the plaintiffs argued that the plaintiffs have *superior right to pre-empt the suit land and the defendants/ vendors have no concern with it.*

11. Now the question arises as to whether plaintiffs being co-sharers in the suit land have a right to pre-empt the sale of the suit land. It has been alleged that the plaintiffs are the co-sharers in the khewat in question. Counsel for the defendants argued that the plaintiffs can not pre-empt the suit land under section 21(a) of the Pre-emption Act. Section its 21(a) reads as 'any improvement, otherwise than through inheritance or succession, made, in the status of a vendee defendant after the institution of suit for pre-emption shall not affect the right of the pre- emptor-plaintiff in such suit. So the defendants have improved their status by purchasing the suit land on 3.3.86 from Khem Chand co-sharer. He relied on PLJ 1972 Ram Kishan Va. Sm.Sharbati and others Punjab and Haryana High Court page 54. It has been held in this authority that it is open to the vendee to defeat the right of the pre-emptor by clothing himself with a qualification equal or superior to that on the basis of which the pre-emptor comes into the court provided he does so before the pre-emptor files his suit az and it is immaterial whether he does so through the transaction, a part of which is sought to be pre-empted, or by a separate transaction. so in the instant case the defendants had also purchased share of the 38 K. 1M. on 3.3.86 from Khem Chand and they have improved their status as they could do so. It was also argued by counsel for the defendants that the pre-emptor must have superior right of pre-emption at the date of the sale, at the date of institution of the suit and at the date of the decree. The right of pre-emption is a practical right and it can be defeated by legitimate.

16. Though the Suit was dismissed by the learned Trial Court on the ground that the appellants-defendants had improved their status by virtue of their subsequent sale deed dated 03.03.1986, however, neither there was any challenge to the said finding returned by the trial Court regarding the plaintiffs' status as co-sharers, nor the civil Court decree in favour of respondents-plaintiffs was ever challenged by anyone on behalf of the appellants-defendants at any stage.

17. Further, the Learned First Appellate Court also returned similar findings as to the plaintiffs-respondents being the co-sharers in the suit property and the relevant paras 8 and 15 of the Appellate Court's judgment dated 15.05.1990 are reproduced as under:

> *"8. The learned counsel for the plaintiffs has challenged the findings of the learned trial court recorded under issue No.1 only.*
> *15. The findings of the learned trial court recorded under other issues were not challenged before me during the course of arguments. However the findings of the learned trial court recorded under issues No.2 and 4 needs some correction. While discussing the evidence of the defendants under issue No.2 the learned trial court held that the defendants purchased the suit land for a consideration of Rs.43995-31 P. but in the last line under issue No.2 it was recorded that the defendants purchased the suit land for Rs.43997-31 P. It seems that in place of Rs.43995-31, it was written by clerical or type mistake that the defendants purchased the suit land for Rs.43997-31P. The price of the suit land mentioned in the sale deed is also 43995-31P and none of the parties objected to it and therefore, I correct the findings of the learned trial court under issue No.2 holding that the sale consideration was Rs.43995-31 P. as revealed from the sale deed Ex.P.1."*

18. Also, the First Appellate Court rightly held that the subsequent sale deed would not constitute an improvisation and the issue as to the status of the appellants-respondents as co-sharers cannot be raised.

19. To substantiate the above argument, the learned Senior counsel referred to para 17 to 19 of the judgment passed by the Hon'ble Supreme Court in the case of **Biswajit Sukul v. Deo Chand Sarda & Others [2019 (1) Rent LR 40 SC],** and the relevant extract is reproduced as under:

> *"17) The plaintiff in his first appeal did not challenge the finding of the Trial Court recorded on the first part of issue No.4 and rightly so because it was already answered by the Trial Court in his*

favour. The First Appellate Court, therefore, could not examine the legality and correctness of this finding in plaintiff's appeal unless it was challenged by the defendants by filing cross objection under Order 41 Rule 22 of the Code in the appeal.

18) As mentioned above, the defendants though suffered the adverse finding on first part of issue No. 4 but did not file any cross objection questioning its legality. In the light of these admitted facts arising in the case, the First Appellate Court had no jurisdiction to examine the legality and correctness of the finding on first part of issue No. 4 in plaintiff's appeal and reverse it against the plaintiff.

19) Second, the High Court also committed the same mistake by not noticing the aforesaid jurisdictional error committed by the First Appellate Court. The High Court, in plaintiff's revision again, went into the legality of the findings of first part of issue No.4 on merits and affirmed the finding of the First Appellate Court. This finding ought to have been set aside by the High Court only on the short ground that the First Appellate Court had no jurisdiction to examine it in plaintiff's appeal."

20. Further, it is submitted by the learned senior counsel that as regards to the arguments raised by the appellants with regard to the relevancy of the dates of sale in their favour which are stated to be essential to establish the fact that the respondents-plaintiffs were not co-sharers in the suit property at that particular point of time, then the said argument/issue cannot be allowed to open for review in the Regular Second Appeal at such belated stage on two grounds.

Firstly, the finding returned by the trial Court that the plaintiffs are co-sharers was never challenged by the appellants/defendants.

Secondly, this issue being a pure question of fact cannot be examined by this Court in a Regular Second Appeal.

21. Further, to substantiate his averments, the Learned Senior Counsel for the respondents-plaintiffs relied upon the judgment passed by the

Hon'ble Supreme Court of India in the case titled **Diety Pattabhiramasway v. S. Hanymayya & Others [1959 SC 57],** and the relevant extract is reproduced hereunder as:

> *"The finding on the title was arrived at by the learned District Judge not on the basis of any document of title but on a consideration of relevant documentary and oral evidence adduced by the parties. The learned Judge therefore, in our opinion, clearly exceeded his jurisdiction in setting aside the said finding. The provisions of Section 100 are clear and unambiguous. As early as 1891. the Judicial Committee in Durga Chowdhrani V. Jawahir Singh, 17 Ind App 122 (PC), stated thus:*
>
> *There is no jurisdiction to entertain a second appeal on the ground of erroneous finding of fact, however gross the error may seem to be. The principle laid down in this decision has beep followed in innumerable cases by the Privy Council as well as by different High Courts in this country. Again the Judicial Committee in Midnapur Zamindari Co. Ltd. V. Uma Charan, 29 Cal WN 131: (AIR PC 187), further elucidated the principle by pointing out:*
>
> *"If the question to be decided is one of fact it does not involve an issue of law merely because documents which are not instruments of rights but are merely historical documents, rights be construed." Nor does the fact that the finding of the first appellate Court is based upon some documentary evidence make it any the less a finding of fact (See ILR 11 Lah 199: (AIR 1930 PC 91). But, notwithstanding such clear & authoritative pronouncements on the scope of the provisions of Section 100, Civil Procedure Code, some learned Judges of the High Courts are disposing of Second Appeals as if they were first appeals. This introduces, apart from the fact that the High Court assumes & exercises a jurisdiction which it does not possess, a gambling element in the litigation & confusion in the*

mind of the litigant public. This case affords a typical illustration of such interference by a judge of the High Court in excess of his jurisdiction under S. 100, Civil Procedure Code. We have, therefore, no alternative but to set aside the decree of the High Court on the simple ground that the learned Judge of the High Court had no juris- diction to interfere in second appeal with the findings of fact given by the first appellate Court based upon an appreciation of the re- levant evidence. In the result, the decree of the High Court is set aside and the appeal is allowed with costs throughout."

22. The learned counsel for the respondents-plaintiffs submitted that the Vendor is not a necessary party but a proper party in the said suit. And the issue as to the non-joining of the necessary party was neither pressed by the appellant-defendants before the Learned Trial Court nor did they challenge it before the First Appellate Court. Therefore, prejudice will be caused to the respondents-plaintiffs by entertaining such objection at this belated stage and to substantiate the same the Learned Senior Counsel relied upon para 7, 8 and 10 of the judgment titled **Hardeva v. Ismail, RLW 1970 (316),** to strength his side of the scale and the same are reproduced as under:

7. It may be urged that the sale of a property by a vendor ordinarily involves a warranty of title and if the vendee loses in a case filed by a third party, he has a right to recover back the sale-price paid by him to the vendor and in this way the vendor is interested in the result of the suit. This is true. But this does not mean that a person who claims title in the property cannot file a suit for recovery of the property or for declaration of his right therein against the vendee. In spite of the fact that the vendor is interested in the result of the suit to the extent that he may be liable to refund the amount of consideration received by him, it cannot be said that the person claiming the property as his own cannot recover it from the vendee on proving that the vendor has no right, title or interest in the *property. The vendor may not be bound by the decree passed in such a suit, but the person who has filed the suit can recover back the property from the vendee In America the proper procedure which may be adopted by the vendee in order that the vendor may be bound is that be may give notice of the suit to the vendor. In this connection we may refer to the following passage in "Presman on Judgments Vol I page 970":*

> *"But, in accordance with the general rule governing the proceedings and judgment against an indemnitee or covenantee, the purchaser, or any subsequent vendee, upon being sued for the property, in trover or replevin, or in any action involving the title, may give notice of the pendency and nature of the suit, to the original vendor, or require him to defend or to assist in defending the same, and after such notice the vendor, whether he defends or not, cannot, in subsequent litigation with the vendee, question the finding of title involved in the judgment. This rule is based upon the existence of an express or implied warranty of title."*

8. <u>In India, the proper procedure is for the vendee to make an application that vendor is also a proper party to a suit and he may be made a party to it and the court may unless it comes to the conclusion that such application was made to delay the proceedings or for causing harassment to the plaintiff may make vendor a party to the suit. But he is not a necessary party; he is a proper party</u>.

10. The second part of the relief claimed by the plaintiff was for a decree for pre-emption and the question to be determined is whether the vendor was a necessary party to the suit In our humble opinion, the vendor is not a necessary party in a suit for decree for pre-emption precisely for the same reasons as mentioned above for a suit for declaration This is the view taken in a number of cases, Reference may be made in this connection to Ram Sarup (plaintiff) vs. Sital Prasad (Defendants) (13), Harbans Tiwari vs. Tota Sahu (14), S. Brij Narain Applicant vs. B. H. K. Dhaon Opposite Party (15).

23. Lastly, to substantiate his case Learned Senior counsel for respondents-plaintiffs relied upon the judgment titled **Prema (Dead)**

Through LRs. Vs. Surat Singh and others [2003 (1) PLJ 133] and relevant paras No.12 and 14 are reproduced as under:-

> *"12. The conclusion arrived at and the answer recorded to the aforementioned question have to be understood in the facts of that case and cannot be generalised to limit the scope of Section 21-A of the Act. Be that as it may, from what we have stated above, it is clear that for the purpose of the first suit, the defence of the improvement of status based on the second sale cannot be accepted because that acquisition of right itself is amenable to challenge and was indeed challenged. Acquisition of status for the purpose of Section 21-A of the Act would mean, a status which is undisputable and/or not amenable to challenge and not the one in controversy or subject matter of challenge before a competent court.*
>
> *13. Section 28-A of the Act, which was inserted in the Act, anterior to Section 21-A reads thus:*
>
>> *"Section 28-A: If, in any suit for pre-emption, any person bases a claim or plea on a right of pre-emption derived from the ownership of agricultural land or other immovable property, and the title to such land or property is liable to be defeated by the enforcement of a right of pre-emption with respect to it, the court shall not decide the claim or plea until the period of limitation for the enforcement of such right of pre-emption has expired and the suits for pre-emption (if any) instituted with respect to the land or property during the period have been finally decided.*
>>
>> *(2) If the ownership of agricultural land or other immovable property is lost by the enforcement of a right of pre-emption, the court shall disallow the claim or plea based upon the right of pre-emption derived therefrom."*

14. A careful reading of this provision shows that if in a suit for pre-emption, claim is based or a plea taken is dependent on a right of pre-emption derived from the co- ownership of the agricultural land or other immovable property and title to such land or property is liable to be defeated by enforcement of a right of pre-emption with respect to it, the court is directed not to decide the claim or plea until the period of limitation for the enforcement of such right of pre-emption has expired or the suit for pre-emption, if any, instituted with respect to the land or property during the period has been finally decided. Section 28-A of the Act is attracted to a case where a plaintiff seeks relief of pre-emption as also to a case where the improvement of status is pleaded in defence. If that be so, the fact that by virtue of the second sale, the appellant has acquired one-eighth share in the joint property would be of no consequence as the plea of improvement of status would not be available to him as the second sale itself is the subject-matter of the second suit."

24. On the basis of the above objections and arguments, Learned Senior Counsel humbly prayed for the dismissal of the present appeal(s).

ANALYSIS

25. Heard counsel for the parties and have carefully gone through the records of the case.

26. The pertinent dates to decide upon the present *lis* are tabulated herein under:-

Sr. No.	Date	Event
1		Total Suit Property is 57K 1M comprised in Khewat No. 273 Khatauni No. 3536 comprised in Rect. No. 39, Killa No. 6(8- 0), 7(8-0), 8/1/1 (2-5), /3/2(3-16), 14(8-0), 15(8-0). Out of the above 57K 1M and the same was owned

		as under: **1.** 1/3rd Share owned by Jasodha Vesheda Bai and Ved Parkash **2.** 1/3rd share was owned by Sunder Dass. **3.** 1/3rd Share was owned by Khem Chand.
2	05.11.1985 Ex.DA/Ex/DB	Vide regd. Sale deed no. 2038 dated 05.11.1985 Sunder Dass sold his 1/3rd share in the above-mentioned property i.e. 19K 1M to the Defendants/Appellants, for a consideration of ₹43,995.30/ps
3	29.12.1985	Based on the Civil Court decree dated 22.08.1985-mutation was sanctioned in the favour of plaintiffs/respondents.
4	03.03.1986 Ex.P3	Defendants/Appellants bought the remaining 1½ share in the Suit abovementioned property from Khem Chand (Actually this is 1/3rd of 57K 1M) vide sale deed NO. 3300 for a sale consideration of ₹43,995.31ps.
5	05.11.1986 (CS-797-1986)	Suit for possession by way of pre-emption was filed by respondents/plaintiffs *qua* the sale deed dated 05.11.1985.
6	03.03.1987 (CS-160-C-1987)	Suit for possession by way of pre-emption was filed by respondents/plaintiffs *qua* the sale deed dated 03.03.1986.
7	26.10.1989	Civil Suit No.797 of 1986 was dismissed by Sub-Judge 1st Class.
8	15.05.1990	Appeal against order dated 26.10.1989 in Civil Suit No.797 of 1986 was allowed by the learned Additional District Judge, Hisar.

9	27.11.1992	Civil Suit No.160-C-1987 was dismissed by stating that plaintiffs have no superior title to pre-empt.
10	29.11.1994	Appeal filed against the order dated 27.11.1992 was allowed by the learned Additional District Judge, Hisar.

27. The issue that arises for consideration before this Court is:

(i) Whether the First Appellate Court has fell in error in reversing the judgment and decree passed by the Trial Court?

28. At this stage it is relevant to mention here Sections 10, 14, 15 19, 20, and 21-A of the Pre-emption Act, 1913 and the same read as under:

*"**10**. **Party to alienation cannot claim pre-emption**. In the case of a sale by joint-owners, no party to such sale shall be permitted to claim a right of preemption.*

***14. Limit of exercise of right in respect of land sold by member of an agricultural tribe.**- No person other than a person who was at the date of sale a member of an agricultural tribe in the same group of agricultural tribes as the vendor shall have a right of pre-emption in respect of agricultural land sold by a member of an agricultural tribe.*

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 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 vendor the land or property sold or apart thereof. (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, in the sons or daughters or sons' sons 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 brother's sons of the vendor or vendor's;

Fourthly, in the other co-shares;

Fifthly, in the tenants who hold under tenancy of the vendor or vendor 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-shares jointly – First, in the sons or daughters or son's 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 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 sub-section (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 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 brother or the mother's brother's son 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 or preemption shall vest –

First, in the son or daughter of such 1[husband of the] female;

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

***19. Notice to pre-emptors** .-When any person proposes to sell any agricultural land or village immoveable property or urban immoveable property or to foreclose the right to redeem any village immoveable property or urban immoveable property, in respect of which any persons have 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 of 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 situated, 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.

***20. Notice by pre-emptor to vendor**.-The right of preemption of any person shall be extinguished unless such person shall, within the period of 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.

21A. *Any improvement, otherwise than through inheritance or succession, made, in the status of a vendee defendant after the institution of a suit for pre-emption shall not affect the right of the preemptor plaintiff in such suit.*

However, it is pertinent to mention here that the rights of co-sharer to pre-empt sale deed in favour of stranger stands repealed by the dint of Haryana Pre-emption Amendment Act No. 10 of 1995, whereby the State of Haryana amended Punjab Pre-emption Act, 1913. The Hon'ble Supreme Court in ***Atam Parkash v. State of Haryana (1986) 2 SCC 249*** deprecated the right of pre-emption based on consanguinity as 'feudal', 'piratical', 'tribal', 'weak', 'easily defeated' and declared the same to be ultra vires of the Constitution of India. The question with respect to applicability of Haryana Pre-emption Amendment Act No.10 of 1995 came up for consideration before the Hon'ble Supreme Court in the case of ***Shyam Sunder and others v. Ram Kumar and another, (2001) 8 SCC 24***, wherein the Five Judges Bench held as under:-

"xxxx xxxx xxxx

44. From the aforesaid decisions, the legal principle that emerges is that the function of a declaratory or explanatory Act is to supply an obvious omission or to clear up doubts as to meaning of the previous Act and such an Act comes into effect from the date of passing of the previous Act. Learned counsel for the appellants strongly relied upon a decision of a two-Judge Bench of this Court in ***Mithilesh Kumari v. Prem Behari Khare [(1989) 2 SCC 95]*** in support of his argument. In the said decision, it was

held by this Court that the Benami Transactions (Prohibition) Act, 1988 being a declaratory Act, the provisions of Section 4 of the Act have retroactive operation. The reliance on this decision by the appellants' counsel is totally misplaced as this decision was overruled in ***R. Rajagopal Reddy v. Padmini Chandrasekharan [(1995) 2 SCC 630]*** wherein it was held that the Act was not passed to clear any doubt that existed as to the common law or the meaning of effect of any statute and it was, therefore, not a declaratory Act.

45. We have already quoted substituted Section 15 of the amending Act but do not find that the amending Act either expressly or by necessary implication intended to supply an omission or to clear up a doubt as to the meaning of the previous Section 15 of the parent Act. The previous Section 15 of the parent Act was precise, plain and simple. There was no ambiguity in it. The meaning of the words used in Section 15 of the parent Act was never in doubt and there was no omission in its phraseology which was required to be supplied by the amending Act. Moreover, the amending Act either expressly or by implication was not intended to be retroactive and for that reason ***we hold*** that amending Act 10 of 1995 is not a declaratory Act and, therefore, it has no retrospective operation.

46. For the aforestated reasons, we approve the view of law taken in ***Didar Singh v. Ishar Singh [(1995) 1 Scale 1 : (2001) 8 SCC at p. 52, below]*** and further hold that the decision in the case of ***Ramjilal v. Ghisa Ram [(1996) 7 SCC 507 : JT (1996) 2 SC 649 (2)]*** does not lay down the correct view of law.

47. The result of the aforesaid discussion is that the amending Act being prospective in operation does not affect the rights of the parties to the litigation on the date of adjudication of the pre-emption suit and the appellate court is not required to take into account or give effect to the substituted Section 15 introduced by the amending Act.

FINDINGS

29. Now upon careful consideration of the facts of the case, arguments advanced and procedural aspect provided under the provisions of the Pre-emption Act 1913, the following findings emerge:

29.1 The revenue record unequivocally shows that the appellants-defendants, obtained 1/3rd share in the suit property through a registered sale deed dated **05.11.1985**, and at that point of time, the respondents-plaintiffs were not shown to be co-sharers in the revenue record; in fact, admittedly their names did not appear in *Jamabandi* (Ex. P3). The claim of respondents-plaintiffs being the co-sharers arises much later, which was based on a mutation entry No.3413 sanctioned on 29.12.1985, therefore, the appellants-defendants as well as their vendor, at the time of sale in their favour had no knowledge that the plaintiffs were in litigation and could not seek a right of being the co-sharer in the sale property. Therefore, it is well established that the appellants were the bona-fide purchasers of the suit property as on 05.11.1985. The date of sale i.e. 05.11.1985 is most crucial and sacrosanct for the reasons that the notice required under Section 19 of the Act was to be issued before the sale is to be executed.

29.2 Subsequently, the appellants-defendants claiming themselves to have purchased the remaining 1/3rd share in the suit property on 03.03.1986 from Khem Chand the other co-sharer by claiming their improvement as co-sharer, which occurred prior to the institution of the pre-emption suit on 05.11.1986. Considering Section 21A of the Punjab Pre-emption Act, 1913, which only prohibits improvements in status after the institution of a pre-emption suit; however, it does not restrict any such improvements which was made before filing of the suit. Thus, any right acquired by appellant-defendants by way of sale deed before filing of the suit, will have a direct effect of improving their status and shall have the direct bearing on the suit filed by the pre-emptor. As it was rightly held by the Learned Trial Court that the defendants had become the co-sharer after the execution of first sale deed on 05.11.1985 qua the subsequent execution of second sale deed on 03.03.1986 and the appellants-defendants no longer remained strangers but had already acquired the status of the co-sharers after the execution of the first sale deed. Considering the dates it comes out that the respondents-plaintiffs remained silent upon their right of pre-emption until the execution of the second sale deed and even much thereafter for 8 months. While on the other hand the First Appellate Court, erroneously disregarded the appellants-defendants status of co-sharers which was acquired on 05.11.1985, before the sanctioning of the mutation in the favour of the respondents-plaintiffs on 29.12.1985.

29.3 It is pertinent to mention here that the failure to implead the vendors as a party to the suit raises a critical flaw as by non-impleadment of necessary party, the court was deprived from critical testimony and evidence which could better clarify as to whether the procedural requirement of notice as provided under Section 19 of the Act, were ever met or not. Therefore, such omission not only rendered the suit procedurally defective but also undermines the integrity of the respondents-plaintiffs' case.

29.4 Furthermore, the right of pre-emption is a preferential right that can be exercised only if the pre-emptor demonstrate that he had a superior title or status on the date of sale as that of a co-sharer. However, in the present case the mutation in the favour of the respondents-plaintiffs was sanctioned on 29.12.1985, by way of which they are claiming status of co-sharer. Although the plaintiffs claimed that the mutation was sanctioned on the strength of the decree dated 22.08.1985 but the appellants were neither a party to the said lis, nor, the decree has seen the light of the day. These development as to the status occurred after the sale deed dated 05.11.1985 executed in favour of the appellants-defendants. Therefore, being the fact that the plaintiffs were not co-sharers at the time of the sale of suit land, they cannot be allowed to retrospectively claim the right of pre-emption based on subsequent developments.

29.5 Coming on to the issue of non-impleadment/non-examination of vendors, this Court has already dealt with the issue in **RSA-2458-1991**, titled as **Mange Ram and another vs. Shiv Charan and Others**. Interpreting Sections 19 and 20 of the 1913 Act, this Court concluded that:-

> *"19. Mere status of co-sharer is not enough to mature into a right of pre-emption. As per settled law in order to succeed in a suit enforcing right of pre-emption, it is imperative to show that:- 1. The pre-emptor had 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. 2. The pre-emptor who claims the right to pre-empt the sale on the date of the sale must prove that such right continued to subsist till the passing of the decree of the first court. If the claimant loses that right or a vendee improves his*

right equal or above the right of the claimant before the adjudication of suit, the suit for pre-emption must fail. 3. That no notice of the proposed sale of the land as provided under Section 19 was served upon pre-emptor showing the price at which vendor was willing to sell the property.

4. In case notice under Section 19 of 1913 Act was served upon him, the pre-emptor within a period as prescribed under Section 20 of 1913 Act served notice on the vendor accepting the price expressing his willingness to pay the same."

29.6 In view of the above, the vendors may not be the necessary party but were proper party in the *lis.* This Court however finds that non-examination of vendors has a bearing on the suit, rather their absence is fatal to the plaintiffs-respondents.

29.7 Nonetheless, the plaintiffs were also required to prove that they had no notice of the sale as provided under Section 19 of the Act, 1913. However, apart from mere bald pleadings raised in the plaint, that no notice with respect to sale deed was served upon them neither the plaintiffs have led any evidence to come out of the rigours of Sections 19 and 20 of the Act of 1913, nor they impleaded the vendors as a party to the suit so as to clarify on the issue. A perusal of Section 19 and Section 20 of the Act, 1913 clearly demonstrate that it is the duty of the seller of the land who has to give notice to all such persons through Court and therefore, the appellants cannot be held guilty for the non-compliance of the requirements and said provisions cannot be detrimental to the bona-fide purchaser. It is also admitted position that the plaintiffs did not bother even to call the vendor Sunder Dass or Khem Chand in evidence and therefore the adverse inference has to be drawn against the plaintiffs-respondents.

29.8 Another issue to be looked into is that as to whether the suit would be maintainable at the first instance or not? At the sake of repetition, the provisions of Sections 14 & 15 of the Act are reproduced herein-below:-

> ***14. Limit of exercise of right in respect of land sold by member of an agricultural tribe.****- No person other than a person who was at the date of sale a member of an agricultural tribe in the same group of agricultural tribes as the vendor shall have a right of pre-emption in respect of agricultural land sold by a member of an agricultural tribe.*
>
> ***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 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 vendor the land or property sold or apart there of. (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, in the sons or daughters or sons' sons 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 brother's sons of the vendor or vendor's;*
>
> *Fourthly, in the other co-shares;*

Fifthly, in the tenants who hold under tenancy of the vendor or vendor 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-shares jointly – First, in the sons or daughters or son's 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 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 sub-section (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 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 brother or the mother's brother's son 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 or preemption shall vest –

First, in the son or daughter of such 1[husband of the] female;

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

A perusal of Section 14 clearly shows that it is a barring provision and starts with the word "*No person other than a person who was at the date of sale a member of an agricultural tribe*" read with provision of Section 15(1)(b)(fourthly), which states that the right of pre-emption of agricultural land and village immovable property shall vest in the other co-sharer against the sale of a share, out of joint land property and is not made by all the co-sharers jointly.

Admittedly in the present case, the plaintiff was not recorded as the co-sharer as on 05.11.1985 in the Revenue Record i.e. the date of sale by Sunder Dass to the appellants and therefore he was not entitled to institute a suit for pre-emption against the said sale deed. The rights of the plaintiffs-respondents were born on 29.12.1985 when the mutation in their favour as a co-sharer was recorded. Therefore, the suit challenging the sale deed dated 05.11.1985 and seeking pre-emptive rights which did not arise on or before the date of sale of the land, was rightly dismissed by the Trial Court.

29.9 Lastly, even for the sake of arguments if it is assumed that the vendors were not required to be impleaded as a necessary party in view of the settled law, still plaintiffs ought to have examined them to prove that statutory notice was not served upon them. The Appellate Court below has totally ignored the aforesaid fact and has held plaintiffs entitled to preempt the sale deed without returning any finding on the statutory notice. In view thereof, this Court finds that without proving the fact of plaintiffs being co-sharers in the suit property on the date of execution of sale deed coupled with the fact the plaintiff failed to discharge its onus to prove that there was no notice upon the plaintiffs under Section 19 of the Act of 1913, the suit of the plaintiffs was not maintainable as it was a pre-requisite conditions for filing the suit.

30. As a sequel of discussion held here-in-above, the present appeals are allowed and the judgment and decree of the First Appellate Court is set aside and restoring the Trial Court's decision to dismiss the suit as the respondents-plaintiffs fails to meet the requirements under Pre-emption Act, 1913.

31. A photocopy of this order be placed on the file of other connected case.

(ALOK JAIN)
JUDGE

17.12.2024
Gaurav Sorot

Whether reasoned / speaking? Yes / No

Whether reportable? Yes / No