IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

102

RSA-1275-1993 (O&M)
Date of decision: 16.12.2024

NARAIN DASS (DECEASED) THROUGH HIS LRS AND OTHERS

......Appellants

VERSUS

RAMESHWAR DASS THROUGH HIS LRs

.......Respondents

CORAM : HON'BLE MR. JUSTICE VINOD S. BHARDWAJ

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Present: - Mr. Ashok Giri, Advocate with
Mr. Mohit Giri, Advocate
for the appellants.

Mr. M.L. Sarin, Senior Advocate with
Ms. Hemani Sarin, Advocate
for the respondent.

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VINOD S. BHARDWAJ, J. (Oral)

The defendant is in second appeal against the judgment and decree dated 31.10.1992 passed by the Sub Judge, First Class, Ambala City in Civil Suit No. 585 dated 03.12.1990 and against the subsequent dismissal of the Civil Appeal No.121 of 09.12.1992 by the District Judge Ambala vide judgment and decree dated 17.05.1993.

2. Learned Counsel appearing on behalf of the appellant-defendant contends that respondent-plaintiff had filed a suit for possession by way of pre-emption of the land measuring 1 kanal 4 marlas being 24/113 shares out of the total land measuring 5 kanals – 13 marlas, bearing Khewat/Khatauni No. 22/22, Khasra No. 15//1/2(5-13), (Chahi) situated in Village Barwala,

H.H. No. 246, Tehsil Panchkula, District Ambala, as per the jamabandi pertaining to the year 1986-87, alongwith all other appurtenant rights. It was averred that Surmukh Singh son of Bhagwan Singh, Karam Singh son of Bhagwan Singh and Smt. Jagjeet Kaur daughter of Gurmukh Singh were co-sharers in the total land measuring 5 kanal 13 marlas and that land measuring 1 kanal-4 marlas out of the aforesaid land was sold to the appellants-defendants vide registered sale deed dated 14.09.1990, registered in the office of Sub-Registrar, Panchkula for a total sale consideration of Rs. 60,000/-. It was claimed by the respondents-plaintiffs that they had a superior right of pre-emption being co-sharers of the land in dispute at the time of sale in favour of the defendants for having purchased land measuring 1 kanal i.e. 20/113 share vide registered sale deed dated 02.01.1990. The land was stated to be an agricultural land and was pre-emptible and that no notice under Section 19 of the Pre-emption Act was ever served upon them, either by the vendor or the vendees nor was it made available before execution of the sale deed. Hence, the above suit was filed for seeking pre-emption.

3. The appellant-defendant filed their written statement averring that the sale in question was not with respect to a share and rather separate plots, having clean and clear boundaries, had been sold to different persons. It was also stated that a similar sale deed for a plot had also been executed by the vendor in favour of the respondent-plaintiffs and as such, Vendees were fully aware of the land having already been partitioned and separate plots being sold to different persons for residential purposes. It had been further averred that since there was a separate specific sale deed, for a specific number, duly bounded as per the description in the sale deed

executed by the vendors, hence, the same establish of a private partition having already taken place as on the date of execution of the sale deed and hence, the respondent-plaintiff would not be entitled to seek pre-emption of the same and claim possession. Prayer was made to dismiss the suit.

4. It was further averred that post execution of sale deed in their favour, they have already spent a sum of Rs. 15,000/- in making improvement and changes over the said property and that the land in question was not an agricultural land and instead was adjacent to the abadi deh and was not in cultivation since long.

5. On completion of pleadings, the following issues were framed:-

> *1. Whether the plaintiff is a co-sharer in the suit land?OPP.*
>
> *2. If issue No.1 is proved, then whether the plaintiff is entitled to pre-empt the sale deed dated 14.09.90?*
>
> *3. Whether the plaintiff has no locus-standi to file the present suit? OPD.*
>
> *4. Whether the defendants are entitled to special costs u/s 35-A of CPC? OPD.*
>
> *5. Relief.*
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> *6. After perusing the pleadings in para No.2 of the written statement and other pleadings, the following issues were framed vide order dated 02.06.1992.*
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> *1. Whether the defendant is entitled to improvement charges, if so to what effect? OPP.*
>
> *2. Whether the defendant is entitled to stamp and registration charges, if so to what amount? OPP.*

3. Relief.

6. Both the parties led their evidence in respect of their case and exhibited documents in support of their respective claim. They addressed their arguments on the issues framed. While dealing of the issue as to whether the respondent-plaintiff had become a co-sharer in the property and was entitled to seek pre-emption of the sale deed or not, the trial Court recorded that the argument of the appellants-defendants to the effect that it was not agricultural land was without any merit, since Ex.D1-Khasra/Girdawari from Kharif 1986 to Rabi 1991 showed that the land had been under cultivation during the said period. Ex.D4 i.e. copy of the sale deed vide which the defendant had purchased the land, merely showed the boundaries of the plot and lands adjoining it and that the same did not establish that the respondent-plaintiff was not a co-sharer in the suit land. It was thus held that the respondent-plaintiff having become a co-sharer, had every right to seek pre-emption of the sale deed. The suit filed by the respondent-plaintiff was accordingly allowed vide judgment and decree dated 31.10.1992 subject to the respondent-plaintiff paying a sum of Rs. 74,300/-.

7. Aggrieved thereof, the appellant-defendant preferred an appeal No. 121 of 09.12.1992 before the District Judge, Ambala. The said appeal was also dismissed by District Judge vide judgment dated 17.05.1993. The operative part of the judgment reads thus:-

> *"6. The main argument of the learned counsel for the appellant is that only plot had been purchased with specific boundaries and thus it cannot be pleaded that any share was sold. He also contended that plaintiff had also purchased a plot with specific boundaries and on the*

basis of the said purchase made by him on 22.1.1990 (Ex.D.5) he cannot claim to be co-sharer.

7. To begin with the argument appeared to be conviction but after looking at the sale deeds where it was clearly mentioned that share was being sold, the argument lacked conviction even though boundaries of the plot were given. Further the revenue documents Ex.P.1 and Ex.P.2 placed on record also showed that share had been sold and not the plot,, because these were under cultivation. On top of it the defendant brought on record Ex.DW/1/A an application filed by the defendants for getting the land partitioned and plaintiff has been shown as co-sharer. In face of this application it does not lie in the month of the defendants to contend that the plaintiff was not a co-sharer in the land in dispute. The trial court was thus justified in deciding Issues No.1 and 2 in favour of the plaintiff and against the defendants. The finding on issues No.3 and 4 being consequential to finding on Issues No.1 and 2 is also affirmed.

8. In respect of amount claimed on account of improvement having been made on the site in dispute cross objections have also been filed. The only evidence is that of Balbir Singh DW.5. He has produced receipt which was marked in the beginning but lateron exhibited on payment of cost. The receipt shows that a sum of Rs.14,500/-was spent on improvement of the land. The trial court has accepted that levelling was done but it was awarded only Rs.6000/-on the ground that this could have been the amount for the levelling involved. By way of cross objections it has been argued that cogent evidence had not been given in respect of improvement charges and in fact Rs.6000/-should have not been granted. It has also been contended that receipt was produced late.

> *9. I have considered this argument. Late production of the receipt cannot be considered a gat ground for rejecting the same and especially when it was exhibited on payment of cost. In fact of receipt and testimony of the witnesses it is not understood as to how the trial court came to the conclusion that Rs.6000/-was just and proper without disclosing any data. I am, therefore, of the view that the improvement charges should have been allowed to the tune of Rs.14,500/-as per receipt Mark-Y(Exhibited as D5 in para 13 of the judgment but not exhibited on the document), and I decide additional Issue No.1 accordingly.*
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> *10. In view of the foregoing discussion on the issues, cross objections fail and are hereby dismissed. As far as the appeal is concerned suit of the plaintiff stands decreed subject to payment of improvement charges to the extent of Rs.14,500/- and not Rs.6,000/-as directed by the trial court. But for this modification the appeal also fails and is dismissed. There will be, however, no order as to cost. The enhanced amount shall be paid by the plaintiff within a month from today failing which his entire suit for pre-emption shall stand dismissed.*

8. Aggrieved thereof, the instant Regular Second Appeal has been filed.

9. Learned Counsel appearing on behalf the appellants has referred to the sale deed Ex. D-4 to contend that the vendors had executed the sale deed by mentioning the specific boundaries and hence, claims that a private partition had already taken place prior to the sale of land in favour of different buyers including the respondent-plaintiffs. He contends that the appellants-defendants had migrated from Punjab to settle in Haryana during

the days of terrorism and as such, the above said plot was purchased for raising construction of a residential house. The said land was banjar and was not being used for cultivation. He draws attention of this Court to the document mark 'X' as per which separate plots had been carved out from the said land and the taksim report showed that specific plots with detailed description had been carved out and the sale deed registered in favour of the appellants-defendants. Reference is also drawn to the sale deed dated 22.01.1990 Ex.D-5 registered in favour of the respondent-plaintiff wherein similar narration about a specific number has been given. Reference is also made to the testimony of DW-3-Ram Kaur wife of Karam Singh i.e. the Vendor wherein she had averred that the land was sold by carving out residential plots to different vendors by giving specific description. It was further deposed that the land was banjar at the time of the sale and that possession thereof had been given to different persons. He also refers to the testimony of DW-2 Subhash Chander i.e the Registry Clerk to argue that separate shares were duly reflected in the sale deed as well as the document mark 'X'. Reliance is also placed on the judgment of this Court in the matter of ***"Smt. Shanti Devi and another versus Jage Ram and Others"*** to contend that if on the date of sale, a private partition is already effected, pre-emptive would stand removed from the status of a co-sharer and would not have any pre-emptive right. He also contends that even the parties in the partition support her testimony by their conduct and that they cannot question the factum of partition having been affected or not.

10. Referring to the above said judgment, he contends that the vendors of the appellant-defendant stepped in the witness box to establish that there was a private partition amongst the parties and different shares had

been carved out from the land holding and thereafter the sale deed was executed. Each vendee was conscious and aware of the specific share being sold out for residential purposes itself and as such, by their conduct, the respondent-plaintiff acknowledged the private partition of the land having already taken place. Hence, he cannot claim the status of co-sharer in the said land. The operative part of the judgment reads thus:-

> *20. Therefore, the following questions of law arise for consideration of this Court:-*
>
> *(i) Whether in the wake of the partition effected between the co-owners before the sale, would the sale by one of the co-owner of a specific khasra number still give rise to the right of a pre-emptor on the ground that he is a co-sharer or not?"*
>
> *(ii) Whether the private partition is recognised by law or not?*
>
> *(iii) Whether in the absence of any affirmation by revenue authorities, the partition effected between the parties can be said to be a nullity?*
>
> *21. On the basis of the above discussion, it is held that a private partition, which is based on the conduct of the parties, is certainly recognised by law and merely because it has not been affirmed by the revenue authorities does not imply that partition had not been effected, although the affirmation thereof by the revenue officials is to record mutation and other revenue entries so as to enable the State to collect revenue from the person or persons who is/are in possession and enjoyment of the property so partitioned. To fortify my view, the judgment of this Court in Ajmer Singh v. Dharam Singh, 2006(2) RCR (Civil) 541 (P&H)*

> *can also be relied upon. It is further held that when on the date of sale, a private partition had already been effected, the pre-emptor stood removed from the status of a co-sharer and had no peremptory right. The questions of law stand answered accordingly.*
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> *That apart, it is also necessary to mention that a major portion of the suit property, Le. 10 kanals and 17 marlas, has already been acquired and only about five marlas is left. The pre- emption amount has also been got retrieved by the plaintiffs and no purpose would be served by upsetting the cart at this stage and hence, for this reason as well, I am of the opinion that substantial justice would be ensured by accepting the prayer of the appellants.*
>
> *Consequently, the instant appeal is accepted and the impugned judgments and decrees are set aside.*

11. Counsel for the respondent-plaintiff on the other hand contends that the sale deeds in question were in respect of a share holding and that as per the Full Bench Judgment of this Court in the matter of ***"Bhartu versus Ram Sarup"*** reported as ***1981 PLJ 204 (FB)***, once a partition is not shown to be established, mere mentioning of specific numbers or boundaries in the land would not turn the sale deed into that of a specific number and that it shall still be a sale deed with respect to a share only. Hence, the status of the respondent-plaintiff as a co-sharer would not get defeated merely by mentioning of a separate description by way of boundaries as a means to oust the operation of law. Relevant extract of the above judgment reads thus:-

"8. The learned counsel for the appellant, on the other hand, relying on Radhakrishan Laxminarayan Toshniwal v. Shridhar Ramchandra Alshi and others, A. I. R. 1960 S. C. 1368, and Bishan Singh and others v. Khazan Singh and another, A. I. R. 1958 S. C. 838, contended that the right of pre- emption being piratical in nature is a very weak right and can be defeated by all legitimate means. He, therefore, argued that the interpretation of the said clause as enunciated in Mst. Gurnam Kaur's case (supra) cannot be rejected on the ground that the right of the co-sharer can be defeated by describing the land purchased in terms of specific khasra numbers because the vendee would have certainly a right to do so and he cannot be denied this right on the consideration that it would defeat the purpose of the Legislature. The argument, on the face of it, is quite attractive but has, in fact, no substance. What has been accepted by the Courts is the right of the vendee to defeat the claim of pre-emption of an individual but not the purpose of the Legislature. The purpose of the Legislature in accepting the right of a co-sharer obviously is to prevent the fragmentation of the holding, preserve the harmony amongst the co-sharers and avoid introduction of an undesirable person as a co-sharer. The legitimate means of a vendee to defeat the right of pre-emption of a co-sharer so far recognized by the Courts is that he may transfer the land purchased by him prior to the suit to another co-sharer having an equal right of pre-emption with the pre-emptor. By doing so, no doubt, the right of the pre-emptor is defeated but not the purpose of the Legislature because the land reverts back to another co-sharer in the joint khewat and it serves all the purposes referred to above. Consequently, howsoever weak the right of pre-emption may be, it cannot be accepted that it is so illusory that it can be defeated

> *simply by describing the land purchased in terms of specific khasra numbers instead of fractional share. We, therefore, answer the question in the affirmative and hold that the sale of a specific portion of land described by particular khasra numbers by a co-owner out of the joint khewat would be a sale of share out of the joint land and pre-emptible under section 15(1)(b) of the Punjab Pre-emption Act. As the learned counsel for the appellant intends the appeal on other points, this case would now go back to the learned Single Judge for final disposal"*

12. Reliance is also placed on the judgment of the Hon'ble Supreme Court reported as ***JT 2001 (10) SC 100*** titled "***Pokhar (dead) by LRs & others versus Ram Singh"*** to establish that when the sale has been made by a Co-sharer but khewat has not been partitioned, the sale deed was pre-emptible, approving the Full Bench view of the High Court in the matter of ***Bhartu (supra)***. The relevant extract of the said judgments is as under:-

> *"2. It is not disputed that the plaintiff is a co-sharer. It is also not disputed that the khewat has not been partitioned. It is also not disputed that the Punjab Pre-emption Act is applicable to the State of Haryana and under the Punjab Pre-emption Act, a co-sharer has a right to pre-empt a sale. However, what was argued is that since the land in dispute is a gair mumkin con-sisting of pasture and pond meant for the benefit of the village community, the law of pre-emption cannot be extended to such a land. This question was not urged before the High Court. We are, therefore, not inclined to entertain the argument. The only question raised before the High Court is whether a sale of a specific por- tion of khasra is hit by right of pre-emption under section 15(1)(b) of the Punjab Pre- emption Act as applicable to the State of Haryana. The High Court, relying upon the*

> *judgment of the full bench of the Pun- jab & Haryana High Court in Bhartu v. Ram Sarup [1981 PLJ 204], held that a sale of a specific portion of land de- scribed by the particular khasra numbers by a co-owner out of joint khewat would be sale of share out of the joint khewat and pre-emptiable under section 15(1)(b) of the Act. We are in agreement with the view taken by the High Court.*

13. It is also argued by the learned Senior Counsel that even though the respondent-appellant contends that a private partition had taken place, however, the Vendor never stepped into the witness box to establish the factum of partition. The contention of the petitioner that it was banjar land stands repelled by the fact that the Khasra Girdawaris brought on record showed the land to be under cultivation. He further contends that the testimony of Ram Kaur also shows that land was about 20-25 acres away from the *Abadi Deh* and was thus not adjacent to the village. It is also submitted that the said aspects in any case are questions of fact, which cannot be re-examined in second appeal as no substantial question of law arises for consideration before this Court.

14. He further contends that special provision regarding sale by a female, there is a specific provision in Section 15(2) had already been declared ultravires by the Hon’ble Supreme Court in the judgment reported as AIR 1986 Supreme Court 859. The appellant-defendant has nowhere claimed said protection by placing reliance on the said clause. He thus contends that all the submissions advanced by the appellant-defendant have already been considered by the both the Courts and findings have been recorded concurrently against the appellant-plaintiff.

15. Learned Senior Counsel also contends that the submission of the defendant that there was a partition, also stands defeated by his own conduct, as the appellant-defendant had himself instituted proceedings for seeking partition of the land and thus admitted the jointness of the status between the parties. Even though the said partition proceedings were eventually withdrawn, however, they would raise an estoppel against the petitioner from claiming that the land was already partitioned before the sale deed was executed in his favour.

16. No other argument has been raised by any of the parties or any judgment cited.

17. I have heard learned Counsel appearing on behalf of the respective parties and have gone through the documents available on record.

18. The foundation of the entire case as laid down by the appellant-defendant is to the effect that the sale deed executed in their favour specifically recorded different boundaries and the same would establish that there was a private partition effected between the parties and that the respondent-plaintiff were conscious of the separation of the status on the date when the sale deed was executed in their respective favours.

19. He is, however, not in a position to dispute the judgment relied upon by the Counsel for the respondents as regards the effect of mere mentioning of specific numbers in a joint land and that the same would not make any difference so far as the jointness of the status is concerned as has been laid down by a Full Bench of this Court in the matter of ***Bhartu versus Ram Sarup (supra)*** and affirmed by the Hon'ble Supreme Court in the matter of ***Pokhar (dead) by LRs & others (supra).*** The reiteration of the said

principles in the judgment of ***"Ram Chander versus Bhim Singh"*** is also not disputed by the Counsel for the appellant-defendant. Further, he is also not in a position to deny that a subsequent partition proceeding had been instituted at the behest of the appellant-defendant before the Revenue Authorities and that in the specific pleadings of the said partition application, it was acknowleged by the appellant-defendant that the land was joint. The said conduct amounts to an acknowledgment of the specific status by the appellant-defendant about the land being joint in the holding.

20. The law even though is to the effect that law of pre-emption being a piratical right can be defeated by every valid means, however, the right has to be defended by means recognized in law. The defence is thus required to be established and would not be defeated on any un-established plea.

21. A concurrent finding of fact about the appellant defendant having failed to establish a private partition has been recorded by both the Courts and no proved document is on record to establish the claim. A mere mock document can not be accepted to supersede the proved Khasra Girdawari's showing jointness of land and its cultivation alongwith the shares reflected in the sale deed. It is settled law that a concurrent finding of fact would not ordinarily be interfered with only because the High Court may have a different opinion. The appellant has merely reiterated the arguments noticed and rejected by both the Courts. He intends to emphasize a drawing of presumption and conclusion of private partition but has failed to establish the same by leading cogent evidence.

22. In so far as the judgment relied upon by the Counsel for the petitioner in the matter of ***"Smt. Shanti Devi and another versus Jage Ram and others"*** reported as 2010 (65) RCR (Civil) 365 is concerned, the same was an issue pertaining to the specific conduct of the co-sharers themselves when they were in possession of their respective shares and a substantial portion had already been acquired. The parties to partition had supported the fact of private partition in their testimony. No such evidence has come forth in the present case and rather the element of private partition is specifically disputed by the co-sharers. The mere mentioning of the dimensions/boundaries would not have material impact on the nature of the land as per the judgment of ***Bhartu (supra)***.

23. Even though the position in law is well settled that a pre-emption is a piratical right and can be defeated, however, the same does not mean that the rights recognized by the statute can be defeated merely by any superficial statement. The private partition has not been established and the document showing different plots has not been proved by the petitioner by leading any evidence. Reliance is placed only on the testimony of Registry Clerk rather than examining any person from the Revenue Department to show a private partition and separate possession between the parties. This Court would hence find it difficult to upset a finding of fact recorded concurrently by the Courts below, on the strength of the documents on record.

24. For the foregoing reasons, I find that no illegality has been pointed out by the Counsel for the appellant-defendant in the judgments passed by both the Courts. The present appeal is accordingly dismissed and the judgments passed by both the Courts are affirmed.

25. All the pending miscellaneous application(s), if any, are also disposed of.

(VINOD S. BHARDWAJ)
JUDGE

DECEMBER 16, 2024
Vishal Sharma

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