

[102] IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

[1] RSA-2458-1991
Reserved on 29.07.2024
Pronounced on 23.08.2024

Mange Ram and another ...Appellants

versus

Shiv Charan and othersRespondents

[2] RSA-196-1992

Shiv Charan and others ...Appellants

Versus

Mange Ram and others ...Respondents

Coram : **HON’BLE MR. JUSTICE PANKAJ JAIN**

Present: Mr. Chanderhas Yadav, Advocate for the appellants
(RSA-2458-1991) and for respondents (RSA-196-1992).

None for the appellants (RSA-196-1992).

Mr. Lovepreet Singh, Advocate for
Mr. Sanjeev Kodan, Advocate
for respondent No.2 (RSA-2458-1991).

None for other respondents.

PANKAJ JAIN, J. (ORAL)

[1] These two appeals arise out of the same suit.

[2] For convenience, facts are being taken up from RSA-2458-1991. Parties are hereinafter referred by their original positions in the civil suit i.e. the appellants in RSA-2458-1991 as the plaintiffs and the respondents in the said appeal as defendants.

[3] Plaintiffs filed suit for possession by way of pre-emption, asserting their preferential right to pre-empt sale deed dated 02.06.1988 being co-sharers.

[4] Plaintiffs claimed that defendant No.4-Rambir sold land ad-measuring 16 kanals 03 marlas, as detailed in para No.1 of the plaint in favour of defendant Nos.1 to 3 vide registered sale deed dated 02.06.1988, defeating pre-emption right of the plaintiffs. The plaintiffs being co-sharers in the suit land are entitled to pre-empt the sale deed and seek possession.

[5] Defendant No.4 was given up by the plaintiffs. Suit was contested by defendant Nos.1 to 3, who denied that the plaintiffs are co-sharers in the suit land.

[6] On the basis of the pleadings of both the parties, the trial Court framed the following issues:-

- “1. *Whether plaintiffs have superior right of pre-emption, as alleged? OPP.*
2. *Whether plaintiffs have no locus-standi to file the suit? OPD.*
3. *Whether suit is not maintainable in the present form? OPD.*
4. *Whether defendants are entitled to stamp and registration charges? OPD.*
5. *Whether suit is bad for mis-joinder of cause of action? OPD.*
6. *Relief. ”*

[7] While returning finding on issue No.1, trial Court held that the plaintiffs have been proved to be co-sharers in land comprised in favour of Khewat Nos.533, 677/1, 679/4 and 674 and are thus entitled to right of pre-

emption. They having not proved to be co-sharers in khewat No.672, are not entitled to pre-empt sale *qua* land comprising khewat No.672. Resultantly, suit for pre-emption filed by the plaintiffs was decreed proportionately with respect to land comprising khewat No.533, 677/1, 679/4 and 674.

[8] In appeal preferred by the defendants, lower Appellate Court reversed the decree passed by the trial Court in part, holding that the plaintiffs are co-sharers only in the land comprised in khewat Nos.679/4 and 677/1. Thus, Appellate Court, while modifying the decree passed by the trial Court decreed the suit of the plaintiffs to pre-empt the sale only to the extent of 4 kanals 13 marlas of suit land confined to share in khewat Nos.679/4 and 677/1.

[9] Both the parties have filed separate appeals before this Court.

[10] Learned counsel for the appellants in RSA-196-1992 has pointed towards judgment passed by the trial Court dated 11.10.1990 to submit that defendant No.4-vendor was given up by the plaintiffs in their suit. He thus submits that the vendor-defendant No.4 having been given up by the plaintiffs, the suit was liable to be dismissed. Reliance has been placed upon ratio of law laid down by Hon'ble the Supreme Court in the case of **'Jhabbar Singh (Deceased) through Legal Heirs and others versus Jagtar Singh son of Darshan Singh'**, reported as **2023 AIR (Supreme Court) 2074**.

[11] *Per contra*, counsel for the plaintiffs-Mr. Chanderhas Yadav, apart from attacking findings recorded by the lower Appellate Court submits that plaintiffs are co-sharers in khewat Nos.533, 677/1, 679/4, 674 and 672. The same has been proved on record by way of revenue record (Exhibits P-2

& P-5) and thus suit filed by the plaintiffs ought to have been decreed *in toto*. It has been further asserted by him that ratio of law laid down by Hon'ble the Supreme Court in case of '**Jhabbar Singh**'(supra) is not applicable to the present case. He submits that defendant No.4 was served in the suit yet he opted not to appear and proceedings were being delayed, awaiting his appearance. It was only in these circumstances that defendant No.4 was given up.

[12] I have heard counsel for the parties and have carefully gone through the records of the case.

[13] Before advertng to the merits of the case, I deem it appropriate to test the suit on the touch stone of the ratio of law laid down by Hon'ble the Supreme Court in '**Jhabbar Singh**'s case (supra). The plaintiffs filed instant suit, claiming superior right being co-sharers and thus asserted that they are entitled to pre-empt the sale deed, drawing strength from the Punjab Pre-emption Act, 1913. Trite it is that the right of pre-emption is a weak right and has to be construed strictly. The Supreme Court in '**Atam Parkash vs. 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.

[14] The pre-emptor cannot succeed in a suit, asserting right of pre-emption merely by proving that he is co-sharer. Chapter 4 of the 1913 Act provides for procedure. Sections 19, 20 & 21 reads as under:-

“ 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 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 situate, 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 preemption. 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.

[15] Thus, a pre-emptor apart from proving himself as co-sharer is also required to prove that the vendor in the sale deed sought to be pre-empted did not give notice to all persons having right of pre-emption of the price at which he was willing to sell land. Section 20 provides that any person in receipt of notice under Section 19 extinguishes his right unless he

expresses his intention to exercise his right of pre-emption within a period of 03 months from the date of receipt of notice under Section 19. Thus, statute casts duty upon the plaintiffs, enforcing right of pre-emption to plead that there was no notice from vendor under Section 19. In case notice under Section 19 was served on pre-emptor, he responded to the same within the time period prescribed to save his right from being extinguished under Section 20 of the 1913 Act. Court prior to decreeing the suit of pre-emptor has to return finding that Section 19 was not complied with or if complied with, vendor executed sale deed despite the pre-emptor expressing his intention to pre-empt the sale deed. For returning such finding vendor is necessary. Such plea is directed against vendor and in his absence, the issue of compliance of Section 19 cannot be adjudicated.

[16] The plaintiffs impleaded vendor as a party initially but gave him up. The question thus arises is:-

Whether suit filed by the plaintiffs could have been decreed after plaintiffs gave up the vendor?

[17] Hon'ble the Supreme Court in case of '**Jhabbar Singh**'(supra) answering somewhat similar situation held as under:-

"12. At the outset, it may be noted that the plaintiff Jagtar Singh, the predecessor of the present respondent, had filed the suits claiming himself to be the co-sharer in the joint khewat along with the vendor Jit Singh, and had sought relief against the defendant Jhabbar Singh and others with regard to the possession of the suit lands, on the ground that he as a co-sharer had a superior right to pre-empt the sales, and that he was not put to any notice of sale of the suit lands on or before the date of such sales. In a very loosely drafted plaint, the plaintiff had neither pleaded as to how he was the co-sharer, nor had he impleaded the said Jit Singh, the owner of the suit lands, with whom he claimed to be the co-sharer, and who had sold the suit lands to the defendants Jhabbar Singh and Others. It is

needless to say that in a suit for pre-emption, the vendor i.e., the owner of the suit land who had allegedly not given any notice of sale to the plaintiff as required to be given under [Section 19](#) of the Pre-emption Act and against whom the right to pre-empt the sale is claimed would be a proper party if not a necessary party, for a complete and final adjudication on the issues involved in the suit.

13. *As held by this Court in [U.P. AwasEvamVikasParishad vs. Gyan Devi](#)², necessary party is one without whom no order can be made effectively; and a proper party is one in whose absence an effective order can be made but whose presence is necessary for a complete and final decision on the question involved in the proceedings. When a right to pre-empt the sale was claimed by the plaintiff Jagtar Singh as a co-sharer in the lands along with the owner Jit Singh, alleging that the mandatory provisions contained in [Section 19](#) i.e., for giving notice to the pre-emptor, was not complied with by the owner or seller Jit Singh, his presence as the party defendant was desirable along with the other defendants Jhabbar Singh and Others, to effectively and finally decide the disputes between the parties. Though, Order I, Rule 9 states that no suit shall be defeated by reasons of the misjoinder or non-joinder of parties, care must be taken by the court to ensure that all the parties, be it the plaintiff or the defendant, whose presence is necessary for complete and final adjudication on the issues involved in the suit, are before the court. That is the reason why the courts are empowered to strike out or add parties, at any stage of the proceedings as per Order I, Rule 10, C.P.C.*

14. *Further, having regard to the absolutely sketchy and loosely drafted plaint in the instant case, the Court is tempted to regurgitate the basic and cardinal rule of pleadings contained in Order VI, Rule 2(1) of the Code, according to which every pleading (i.e., plaint or written statement) has to contain a statement in concise form of the material facts on which the party pleading relies for his claim or defence, as the case may be. Of course, the pleading need not contain the evidence by which such material facts are to be proved, nonetheless the facts necessary to formulate a complete cause of*

action i.e., the material facts must be stated. Omission of a single material fact would lead to an incomplete cause of action and [in that case](#), the statement of claim would become bad in the eye of law.

15. Now, so far as the right of pre-emption is concerned, it may be noted that it is a very weak right and could be defeated by all legitimate methods. This Court as back as in 1958, in case of [Bishan Singh and Others vs. Khazan Singh & Another](#) (supra), had set-forth the contours of the right of pre-emption. It was opined therein by the four-Judge Bench that-

“11.....The right of pre-emption is not a right to the thing sold but a right to the offer of a thing about to be sold. This right is called the primary or inherent right. (2) The pre-emptor has a secondary right or a remedial right to follow the thing sold. (3) It is a right of substitution but not of re-purchasei. e., the pre-emptor takes the entire bargain and steps into the shoes of the original vendee. (4) It is a right to acquire the whole of the property sold and not a share of the property sold. (5) Preference being the essence of the right, the plaintiff must have a superior right to that of the vendee or the person substituted in his place. (6) The right being a very weak right, it can be defeated by all legitimate methods, such as the vendee allowing the claimant of a superior or equal right being substituted in his place.”

16. The afore-stated position was reiterated by this Court in [Barasat Eye Hospital vs. Kaustabh Mondal](#)³, and again in the recent decision in case of Raghunath (Dead) by LRs. vs. Radha Mohan (Dead) Through LRs. And Others⁴, wherein it has been observed as under: -

“14. We have given our thoughtful consideration to the aforesaid issue and in order to determine the same, we had, at the inception itself, set out the judgment in [Barasat Eye Hospital](#) case [[Barasat Eye Hospital v. KaustabhMondal](#), (2019) 19 SCC 767 : (2020) 4 SCC (Civ) 810] . We have, thus, referred to the earlier judicial view in para 10 of the judgment extracted aforesaid. The historical perspective of

the right of pre-emption shows that it owes its origination to the advent of the Mohammedan rule, based on customs, which came to be accepted in various courts largely located in the north of India. The pre-emptor has been held by the judicial pronouncements to have two rights. Firstly, the inherent or primary right, which is the right to the offer of a thing about to be sold and the secondary or remedial right to follow the thing sold. It is a secondary right, which is simply a right of substitution in place of the original vendee. The pre-emptor is bound to show that he not only has a right as good as that of the vendee, but it is superior to that of the vendee; and that too at the time when the pre-emptor exercises his right. In our view, it is relevant to note this observation and we once again emphasise that the right is a “very weak right” and is, thus, capable of being defeated by all legitimate methods including the claim of superior or equal right.”

17. *At this juncture, it would be also apt to mention that apart from the fact that the right of pre-emption is very weak right and capable of being defeated by all legitimate methods, the pre-emptor must establish that he had the right to pre-empt on the date of sale, on the date of the filing of the suit and on the date of the passing of the decree by the Court of the first instance. The pre-emptor or the claimant-plaintiff who claims the right to pre-empt the sale on the date of sale, has also to prove that such right continued to subsist till the passing of the decree of the first court. If the claimant-plaintiff loses that right or the vendee improves his right equal or above the right of the claimant before the adjudication of the suit, the suit for pre-emption would fail.*

18. *This proposition of law has been well settled by this Court since 1971, in case of [Bhagwan Das \(Dead\) by LRS and Others vs. Chet Ram](#) 1971 (1) SCC 12. In the said case, this Court had vapproved the full bench decision of Punjab High Court in Ramji Lal and Another vs. The State of Punjab and Others, AIR 1966 P&H 374, which had ruled that a pre-emptor must maintain his qualification to pre-empt upto the date of the decree. ”*

[18] Trite it is that vendor in the suit for pre-emption is a proper party and not a necessary party. Thus, suit cannot be dismissed solely on the ground that vendor was not made party or was subsequently given up. The issue is not non-joinder of necessary party. However, issue is absence of finding on statutory notice.

[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.

[20] In the present case, the plaintiff in the suit raised pleadings with respect to notice in Para No.3, which reads as under:-

“That no notice of the above said sale deed and purchase was ever issued to the plaintiffs.”

[21] However, when plaintiff No.2-Parkash entered into witness box in support of his case as PW-1, he did not utter even a single word as to whether notice was served upon them by the vendor or not. The service of the notice or non service thereof in terms of Section 19 and Section 20 is a statutory requirement. The same needs to be pleaded and proved. Reliance can be placed upon the following observations made by Justice Dua in **‘Basti versus Jai Chand’, ILR (1962) 2 Punjab 290’:-**

“ It certainly does not by any means relieve the plaintiff of the initial burden of bringing himself within the essential terms of the statute on which he relies for his title or preferential claim to the property sold. The obligation to make out his title or a preferential right to purchase the property would have to be discharged by him even if the negative is to be proved for establishing the right claimed. It would, therefore, in my opinion, be incumbent on the plaintiff-pre-emptor also to prove the basic fact which is the foundation of his right, that the sale is of such land as is dealt with in Section 17 and in respect of which he had been given a right to oust the vendee and to claim title to the property in his place. This basic fact is not self evident and, therefore, has to be established by the person who would otherwise fail ”

[22] The same were further relied upon by this Court in the case of **‘Behari Lal and others versus Motla and others’, 1963 PLJ 129,** observing as under:-

“7. As regards the second contention, it is, conceded by Mr. Gandhi that it was not pleaded by his clients in the plaint that the sale was out of the surplus area or, in other words, the sale was not from the reserved area. It is no doubt true that this is a negative contention, but all the same it is a statutory requirement and it has to be pleaded and proved. Mr. Justice Dua in Basti v. Jai Chand, ILR (1962) 2 Punjab 290: 1962 P.L.J. 70 at p. 75), examined this matter sitting with Mr. Justice Tek Chand and observed, -

" It certainly does not by any means relieve the plaintiff of the initial burden of bringing himself within the essential terms of the statute on which he relies for his title or preferential claim to the property sold. The obligation to make out his title or a preferential right to purchase the property would have to be discharged by him even if the negative is to be proved for establishing the right claimed. It would, therefore, in my opinion, be incumbent on the plaintiff-pre-emptor also to prove the basic fact which is the foundation of his right, that the sale is of such land as is dealt with in Section 17 and in respect of which he had been given a right to oust the vendee and to claim title to the property in his place. This basic fact is not self evident and, therefore, has to be established by the person who would otherwise fail."

These observations fully apply to the facts of the present case. There is no allegation, must less any proof of the basic fact. That being so, the second contention is also sound and must prevail. ”

[23] Apart from that, no effort was made by the plaintiffs to examine vendor to satisfy the statutory mandate. Thus, the pleadings regarding non receipt of notice of sale raised in plaint remained uncorroborated.

[24] In the light of the afore-stated circumstances, this Court finds that without giving finding with respect to compliance of Section 19 & Section 20 of the 1913 Act, Courts below erred in decreeing the suit filed by the plaintiffs.

[25] In view of the aforesaid findings, this Court does not find it proper to dwell further with respect to the finding recorded by the Courts below regarding co-ownership of the plaintiffs.

[26] In view of the above, appeal preferred by plaintiffs is **dismissed**, whereas appeal preferred by defendants is **allowed**. Suit filed by the plaintiffs is ordered to be **dismissed**.

[27] Pending miscellaneous application(s), if any, shall also stands *disposed off*.

(PANKAJ JAIN)
JUDGE

23.08.2024
'R. Sharma'

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