(2004) 10 P&H CK 0032

High Court Of Punjab And Haryana At Chandigarh

Case No: Regular Second Appeal No. 1352 of 1983

Bachan Singh (Dead) through LRs		APPELLANT
	Vs	
Labh Singh and Others		RESPONDENT

Date of Decision: Oct. 29, 2004

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 6 Rule 14(1), Order 6 Rule 2

Citation: (2005) 141 PLR 39 : (2005) 2 RCR(Civil) 26

Hon'ble Judges: Hemant Gupta, J

Bench: Single Bench

Advocate: Amarjit Markan, for the Appellant; B.S. Bedi, for the Respondent

Final Decision: Allowed

Judgement

This Judgment has been overruled by : Labh Singh and Others Vs. Bachan Singh, AIR 2008 SC 1432 : (2008) 2 CLT 331 : (2008) 1 JT 584 : (2008) 149 PLR 238 : (2008) 1 SCALE 369 : (2008) 4 SCC 140 : (2008) AIRSCW 1450 : (2008) 1 Supreme 335

Hemant Gupta, J.

The plaintiff is in second appeal aggrieved against the judgment and decree passed by the first Appellate Court whereby his suit for pre-emption was dismissed in appeal.

2. The plaintiff filed a suit for possession alleging therein that the vendor Singh Ram is jointly recorded as owner of half share of land measuring 24 kanals situated in village Fatehgarh Tehsil Naraingarh. It is also alleged that the plaintiff and the vendor Singh Ram are related to each other as the plaintiff is fourth decree collateral of the vendor. It is further pleaded that Singh Ram has sold half of 24 kanals of land by way of registered sale deed dated 2.6.1979 registered on 29.6.1979

for an ostensible consideration of Rs. 30,000/-. The plaintiff inter alia claimed superior right for pre-emption as a co-sharer with the vendor in the land in dispute u/s 15(1) of the Punjab Pre-emption Act, 1913 (hereinafter referred to as the Act).

3. If was the case of the defendant that Singh Ram was owner of only 3/4th share and his sister was owner of 1/4th share and both of them were jointly owners of half of the land. It was denied that Singh Ram alone has half share of land measuring 24 kanals but it was asserted that the sale was by Singh Ram and Angrejo who are owners of the land. In the replication, it was pointed out that the sale is by Singh Ram for himself and as Mukhtiar of Smt. Angrejo. Therefore, tire sale is pre-emptible.

4. The learned trial court decreed the suit on the ground that the plaintiff is a co-sharer and has thus, superior right of pre-emption. The learned trial Court negatived the argument raised by the defendant that the sale is by a female and thus governed by the provisions of Sub-section (2) of Section 15 of the Act. However, in appeal filed by defendant, the judgment and the decree passed by the learned trial Court was set aside and if was held that the vendee has improved his status as that of a co-sharer in view of the fact that the sale to the extent of share of Angrejo is act pre-emptible being sale governed by the provisions of Section 15(2) of the Act and thus the plaintiff does not have superior right of pre-emption.

5. In second appeal, the following substantial questions of law arise for consideration:

1. Whether the plaintiff has a superior right of pre-emption as a co-sharer?

2. Whether the suit for pre-emption can be dismissed for not disclosing the complete fact regarding the sale by Angrejo, a female vendor?

6. In Atam Prakash v. State of Haryana and Ors. (1986) 89 P.L.R. 329 (S.C.), the Hon''ble Supreme Court has found that there is no justification for the classification contained in Section 15 of the Act conferring right on the kinsfolk to seek pre-emption.

It found that the right of pre-emption based upon consanguinity is a relic of the feudal past. It is totally inconsistent with the constitutional scheme. It is inconsistent with modern ideas. It also held that the pending suits and appeals would be disposed of in accordance with the declaration granted by the Court. Relevant paras of the judgment are reproduced as under:-

"13. We are thus unable to find any justification for the classification contained in Section 15 of the Punjab Pre-emption Act of the kinsfolk entitled to pre-emption. The right of pre-emption based on consanguinity is a relic of the feudal past. It is totally inconsistent with the constitutional scheme. It is inconsistent with modern ideas. The reasons which justified its recognition quarter of a century ago, namely, the preservation of integrity of rural society, the unity of family life and the agnatic

theory of succession are today irrelevant. The list of kinsfolk mentioned as entitled to preemption is intrinsically defective and self-contradictory. There is, therefore, no reasonable classification and Clause ''First'', ''Secondly'' and ''Thirdly'' of Section 15(1)(c) and the whole of Section 15(2) are, therefore, declared ultra vires of the Constitution.

14. We are told that in some cases suits are pending in various courts and, where decrees have been passed, appeals are pending in appellate courts. Such suits and appeals will now be disposed of in accordance with the declaration granted by us. We art told that there are a few cases where suits have been decreed and the decrees have become final, no appeals having been filed against those decree. The decrees will be binding inter parties and the declaration granted by us will be of no avail to the parties thereto."

7. The plaintiff has sought possession on the basis of relationship being collateral of the vendor as well as being a co-sharer. However, the right of pre-emption based upon consanguinity has been found to be unconstitutional. The provisions of Section 15(2) of the Act itself have been declared ultra vires. It has also been held that such declaration of law would be applicable not only to pending suits but also to appeals. Therefore, the judgment and the decree passed by the first Appellate Court relying upon Section 15(2) of the Act holding that the sale to the extent of share of Angrejo is not pre-emptible is not sustainable in law. The distinction between the sale by male or by family no longer survives. The proposition was not disputed by the learned counsel for the respondent as well.

8. However, it was argued that the judgment of Hon''ble Supreme Court in Atam Prakash''s case (supra) was to restrict the right of pre-emption and not to enlarge the same. Therefore, the said judgment cannot be relied upon by the plaintiff to enlarge the scope in his suit for possession. However, I am unable to agree with such an argument raised by the learned counsel for the respondent. The Hon''ble Supreme Court has found the provisions of the Act conferring a right of pre-emption on the basis of relationship as relic of the feudal past and inconsistent with the constitutional scheme and the modem ideas. Therefore, having declared such provisions of law as unconstitutional, the rights of the parties have to be adjudicated upon as if the provisions declared ultra vires ware never the part, of the statute. In fact, the Supreme Court had the occasion to consider the effect of striking down of provisions of Section 15(2) in Atam Prahash''s case (supra) in a judgment reported in Nand Kishore and Anr. v. Avtar Singh and Ors. 1988 P.L.J. 47 wherein the suit was dismissed on the ground that one of the vendors was female and, therefore, Section 15(2) of the Act were struck down, the right of preemption was held to be u/s 15(1)(b) of the Act.

9. In the present case, the plaintiff has sought to pre-empt the sale as a co-sharer as well as on the basis of relationship. The plaintiff has separate and distinct enforceable right of pre-emption as a co-sharer and on the basis of relationship. As

a co-sharer the plaintiff has a right to seek per-emption as the distinction between the sale by male or female has been rendered redundant after the declaration of law in Atam Prakash''s case.

That was the view taken by this Court in Isa alias Hesa v. Ahmad Khan 2004 (2) R.C.R. 636, a single Bench judgment of this Court, wherein it was held to the following effect:

"6. I do not find any merit in the aforesaid contention of the learned counsel for the appellants, firstly, because of provisions of Section 15(2) of the Act were declared unconstitutional and were struck down by the Hon''ble Supreme Court in Atam Prakash v. State of Haryana (1986) 89 P.L.R. 329 (S.C.), and secondly in Nand Kishore v. Avtar Singh 1988 P.L.J. 47, the Hon''ble Supreme Apex Court has held that when a sale is made by a female and a male, a co-sharer is entitled to pre-empt the sale made by both u/s 15(1) of the Act as Section 15(2) of the Act has been declared to be ultra vires. It was also held that Section 15(1) of the Act applies to all sales, whether made by a female or a male and Section 15(2) of the Act was an exception to it when sale was made by a female, who had succeeded the land through her husband or through her son, in case the son had inherited the land from his father or was of land which she succeeded through her father or brother. The right of pre-emption under both the circumstances was given to certain named relations. The right of pre-emption u/s 15(2) of the Act had been struck down with the result that the section stands wiped out and u/s 55(1) of the Act, as stated by the Hon''ble Supreme Court in the aforesaid decision, the pre-emptor as a co-sharer is entitled to pre-empt the entire sale."

10. Therefore, after the judgment of Hon''ble Supreme Court in Atam Prakash''s case (supra) it is wholly immaterial whether the sale is by a male or by a female but the fact remains that the sale was by co-sharer in favour of the defendant and the plaintiff as a co-sharer has a right to pre-empt the sale in terms of Section 15(1) of the Act as applicable to the State of Haryana. Therefore, in respect of first substantial question of law it is held that the plaintiff has a right to seek pre-emption of the suit land in terms of Section 15(1) of the Act.

11. The argument that the plaintiff has not disclosed complete cause of action in the plaint and, therefore, the suit is liable to be dismissed is again devoid of merit. It is argued that the plaintiff has not made any reference of the fact that the plaintiff is a co-sharer with Angrejo and, therefore, the sale by her is also pre-emptible.

12. The learned counsel for the respondent relied upon Arjan Singh and Anr. v. Amar Singh, 1971 P.L.J. 46, and a Division Bench judgment of this Court in Smt. Ishar Kaur v. Banta Singh and Anr., 1981 P.L.J. 509 to contend that it was imperative for the plaintiff in a suit for pre-emption to state expressly the grounds in the plaint on which he claims a preferential right of pre-emption. Since such a ground has not been pleaded, therefore, the suit is liable to be dismissed. Reference was made to

the following observations in Arjan Singh''s case (supra):

"6. Order 6, Rule 2, Civil Procedure Code, requires that all material facts, on which the party pleading relies for his claim or defence, must be stated in a concise form in the pleadings. Now in the present case the grounds or the qualifications for pre-emption of a plaintiff are material facts which constitute the cause of his action. Under Order 6, Rule 2, Civil Procedure Code, therefore, it is imperative for the plaintiff in a suit for pre-emption to state the specific ground in the plaint on which he claims a preferential right of pre-emption against the vendee-defendant and such a ground must be pleaded, as held by Mehar Singh C.J. in Shankar Singh''s case, ibid, within the period of limitation prescribed for the suit...."

13. The question which arises is whether the name of the vendor was required to be disclosed in the plaint so as to confer a right of pre-emption in favour of tine plaintiff. The said judgment is clearly distinguishable and not applicable to the facts of the present case. In the said case, the plaintiff had sought to amend the plaint so as to replace the original ground of relationship. In those circumstances, it was held that the ground to seek pre-emption cannot be allowed to be substituted after the period of limitation. In the present case, the plaintiff has sought to pre-empt the sale as a co-sharer but name of none of the vendors was disclosed. The fact that the plaintiff and vendors are co-sharers is not disputed. Therefore, the mere fact that the name of Angerjo is not mentioned in the plaint is wholly inconsequential.

14. Similarly, in Ishar Kaur''s case (supra) the plaintiff has not disclosed the relationship on the basis of which suit for pre-emption was filed. Again the case is clearly distinguishable for the above reasons. Therefore, I do not find any substance in the argument raised by the learned counsel for the respondent as well.

15. It may be noticed that the Hon''ble Supreme Court in Shyam Sunder and Another Vs. Ram Kumar and Another, has upheld the validity of an Act amending Section 15 of the Act whereby the right of a co-sharer to pre-empt a sale was taken away. It has been held that where the suit has been decreed by the learned trial Court the right of co-sharer to pre-empt the sale will not affect such right by the amended provisions. It was held to the following effect:

"Order 20, Sub-rule (1) of Rule 14, C.P.C. provides that where a court decrees a claim to pre-empt in respect of a particular sale of properly and a decree holder has deposited the purchase money along with the cost of the suit in the court, the vendee is required to deliver possession of the property to the decree holder and title to the property stands transferred in favour of claimant. In view of the said provision, on deposit of purchase money in the court by the claimant the right and title to the property vest in pre-emptor and it becomes vested right of the pre-emptor. The tight of pre-emption prior to decree may be weak but after it becomes vested right, it can only be taken away by known method of law. The loss of qualification of pre-emptor or vendee acquiring status above to pre-emptor

during pendency of appeal cannot be allowed to influence the court as a Court of Appeal is mainly concerned with the correctness of the judgment rendered by the court of first instance. As earlier noticed that an appellate court is entitled to take into consideration subsequent event taking place during pendency of appeal and a court in an appropriate case permits amendment of plaint or written statement as the case may be but such amendment is permitted in order to avoid multiplicity of proceeding and not where such amendment causes prejudice to the plaintiff''s vested right rendering him without remedy. It is thus only those events which have taken place or rights of the parties prior to adjudication of pre-emption suit and which the trial Court was entitled to dispose of, can only be taken into consideration by the appellate Court. We find support of our view from decision in Sakina Bibi v. Amiran, I.L.R 1988 All. 472 (supra) wherein the High Court of Allahabad held that a Court of Appeal was only required to see whether the trial court had wrongly dismissed the claim of pre-emptor and it is irrelevant that during the pendency of appeal land was sold in an execution proceeding in another suit. In a pre-emption case, where an appeal is filed against the decree of Court of first instance, the scope of an appeal is confined to the question whether the decision of the trial Court is correct or not. This being the legal position which held the field for over a century any subsequent event taking place during pendency of appeal cannot be allowed to be taken into consideration by the appellate Court otherwise it may displace the case of a pre-emptor." 18. In view of the above, the suit of the plaintiff having been decreed by the learned trial Court and the plaintiff having deposited the purchase money in pursuance of the decree passed by the learned trial Court, such right of pre-emption cannot be defeated by virtue of amendment in Section 15 of the Act taking away right on the basis of co-sharer.

Resultantly, the appeal is allowed, the judgment and decree passed by the first appellate court is set aside and the suit of plaintiff is decreed with no order as to costs.