Bhartu Vs Ram Sarup

Court: High Court Of Punjab And Haryana At Chandigarh

Date of Decision: March 26, 1981

Acts Referred: Transfer of Property Act, 1882 â€" Section 44

Citation: (1981) 3 ILR (P&H) 356

Hon'ble Judges: S.S. Sandhawalia, C.J; S.P. Goyal, J; G.C. Mital, J

Bench: Full Bench

Advocate: P.S. Jain and V.M. Jain, for the Appellant; Bhal Singh Malik and Vishal Singh, for the Respondent

Judgement

S.P. Goyal, J.
The question referred to the Full Bench in Regular Second Appeal No. 886 of 1969 is as follows:

Whether 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 u/s 15(1)(b) of the Punjab Pre-emption

2. The facts leading to the present controversy are that Ram Chander son of Ram Singh sold to the Appellant, Bhartu, land measuring 21 square

yards out of 4 Kanals 2 marlas, bearing Khasra No. 99/4/2, Khatoni No. 204 and Khewat No. 100 through a registered sale deed dated May

19, 1966, for an amount of Rs. 300/-. Respondent Ram Sarup claiming himself to be a co-sharer in the said Khewat filed this suit for possession

of the said land by way of pre-emption. Both the Courts below upheld the claim of the Plaintiff and decreed the suit. The correctness of the

impugned judgment and decree was assailed by Mr. P.S. Jain, learned Counsel for the Appellant, on the ground that the sale being of a portion of

a specific Khasra number and not of share out of the joint land, no right of preemption was available to the Respondent as a co-sharer in the

Khewat. Reliance for this proposition was placed on two decisions, Bakhshish Singh v. Gurcharan Singh 1972 PLJ. 672 and Smt Gurnam Kaur v.

Ralla Ram and Ors. 1970 PLJ. 687, the former being a Division Bench case. Doubling the correctness of these decisions, the above noted

question of law was referred for decision by a Full Bench.

3. The relevant provisions of Section 15 which is under consideration reds as under:

The right of pre-emption in respect of agricultural land and village immovable property shall vest--(a) ... ...

(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.... SECONDLY.... THIRDLY....

FOURTHLY, in the other co-sharers, FIFTHLY,....

According to the view taken by the learned Single Judge in Mst. Gurnam Kaur case, (supra) and approved by the Division Bench in Bakhshish

Singh case (supra), a co-sharer would have no right of pre-emption of sale made by another co-sharer if what is sold is the specific land described

by particular killa Khasra numbers as it would not be a sale of share out of the joint land. The facts in the said case were that Jai Dev, one of the

co-sharers, had sold land measuring 32 kanals comprised of Rectangle No. 8, Khasra No. 14 min. 16, 17, 24 and 25 out of the joint holding of

Ralla Ram etc. The other co-sharers filed a suit to pre-empt this sale claiming themselves to be co-sharers in the joint Khewat. Their plea was

negatived relying on the judgment of the Full Bench in Lachhman Singh v. Pritam Singh 1972 PLR. 341 (Full Bench), in the following words:

Applying the ratio of the Full Bench decision it is to be seen whether Smt. Gurnam Kaur, vendee became a share-holder in the joint khata of which

Jai Dev was co-sharer. If she became a share-holder in the joint khata, then the answer would be that Jai Dev had sold a share of the land from

the joint Khata and the pre-emptors can claim preferential right of pre-emption in view of the provisions of Section 15(1)(b) of the Punjab Pre-

emption Act. If Smt. Gurnam Kaur had not become a co-sharer in the joint khata because of the fact that she having not purchased a specific

share in the whole of the Khata but having purchased only specific Khasra numbers measuring 32 kanals, in that case a share out of the joint

holdings has not been sold by Jai Dev, vendor and the Plaintiffs cannot claim a superior right of pre-emption. To my mind, after applying all the

four tests laid down by the Full Bench to the present case, it cannot be said that Smt. Gurnam Kaur became a co-sharer in the joint khata of which

Jai Dev, vendor was a co-sharer. I am, therefore, inclined to hold that Jai Dev, vendor did not sell a specific share from the joint Khata of which

the Plaintiffs claim themselves to be the co-sharers.

The question involved in Lachhman Singh"s case (supra) (Full Bench) was as to whether the purchaser of a specific portion of some killa numbers

in two rectangles would become a co-sharer in the khewat consisting of several other rectangles and would be entitled to pre-empt the sale of land

out of the rectangles other than in which he became owner by the said purchase. On these facts it was held that such a purchaser does not become

a co-sharer in the khewat and therfore, had no right to pre-empt the sale. The proposition laid down by the Full Bench has no direct bearing on the

question whether the sale of specified khasra numbers out of a khewat would be a sale of share out of the joint land or not and the answer to this

question, in our view, depends on the inter se rights of the co-sharers in the joint khewat and the nature in law of the sale of a specified portion of

the joint holding.

4. The inter se rights and liabilities of the co-sharers were settled by a Division Bench of this Court in a very detailed judgment in Sant Ram Nagina

Ram Vs. Daya Ram Nagina Ram and Others, and the following propositions, inter alia, were settled:

(1) A co-owner has an interest in the whole property and also in every parcel of it.

(2) Possession of joint property by one co-owner, is in the eye of law possession of all even if all but one are actually out of possession.

(3) A mere occupation of a larger portion or even of an entire joint property does not necessarily amount to ouster as the possession of one is

deemed to be on behalf of all.

(4) The above rule admits of an exception when there is ouster of a co-owner by another. But in order to negative the presumption of joint

possession on behalf of all, on the ground of ouster, the possession of a co-owner must not only be exclusive but also hostile to the knowledge of

the other as, when a co-owner openly asserts his own title and denies that of the other.

(5) Passage of time does not extinguish the right of the co-owner who has been out of possession of the joint property except in the event of ouster

or abandonment.

(6) Every co-owner has a right to use the joint property in a husband like manner not inconsistent with similar rights of other co-owners.

(7) under an arrangement consented by the other co-owners, it is rot open to any body to disturb the arrangement without the consent of other

except by filing a suit for partition.

It is evident from the said propositions that when a co-sharer is in possession exclusively of some portion of the joint holding, he is in possession

thereof as a co-charer and is entitled to continue in its possession if it is not more than his share till the joint holding is partitioned. It is also

undisputed that a vendor cannot sell any property with better rights than he himself has. Consequently when a co-sharer sells his share in the joint

holding or any portion thereof and puts the vendee into possession of the land in his possession, what he transfers is his right as co-sharer in the

said land and the right to remain in its exclusive possession till the joint holding is partitioned amongst all the co-sharers. It waS on this basis that a

Division Bench of the Lahore High Court in Sukhdev v. Parsi Plaintiff and Ors. AIR 1940 Lah. 673; held that a co-sharer who is in exclusive

possession of any portion of a joint khata can transfer that portion subject to adjustment of the rights of the other co-sharers therein at the time of

partition and that other co-sharer''s right will be sufficiently safeguarded if they are granted a decree by giving them a declaration that the possess

on of the transferees in the lands in dispute will be that of co-sharers, subject to adjustment at the time of partition. As is well-known, a declaratory

decree is nothing but a judicial recognition of the existing rights and such a decree does not tend to create any rights. The passing of the declaratory

decree, therefore, shows beyond doubt that what the vendee gets in the transfer from a co-sharer is the right of that co-sharer and not exclusive

ownership of any portion of joint land. It is also undisputed that the right of pre-emption is available not only when a co-sharer sells the whole of

his share but also when he sells a portion thereof. When a co-owner describes the land sold out of his share not in terms of a fractional share of the

holding but in terms of measurement and khasra numbers even then he sells nothing but his rights as co-sharer in the joint holding i.e., portion of his

share therein. The share in the joint holding according to the dictionary meaning also does not mean a fractional share and instead means a definite

portion of property owned by a number of persons in common.

5. The rights of a transferee from a co-owner are not entirely dependent on judicial decisions but are regulated by Section 44 of the Transfer of

Property Act which provides that where one or two or more co-owners of the immovable property legally competent in that behalf transfers his

share of such property or any interest therein, the transferee acquires as to such share or interest and so far as is necessary to give effect to the

transfer, the transferor''s right to joint possession or other common or part enjoyment of the property and to enforce a partition of the same but

subject to conditions and liabilities affecting at the date of the transfer, the share or interest so transferred. According to this statutory provision also

what transferee gets is the right of the transferor to joint possession and to enforce a partition of the same irrespective of the fact whether the

property sold is fractional share or specified portion, exclusively in possession of the transferor. Again, it cannot be disputed that when a co-sharer

is in exclusive possession of the specified portion of the joint holding, he is in possession there of as a co-sharer and all the other co-sharers

continue to be in its constructive possession. By the transfer of that land by one co-owner, can it be said that other co-sharers cease to be co-

sharers in that land or to be in its constructive possession. The answer obviously would be in the negative because try of the other co-share is can

either seek a declaration from the Court as held in Sukh Dev''s case (supra) that the vendee is in possession only as a co-sharer or can initiate

proceed--for partition of the joint holding including the tend transferred. If the other co-sharers continue to be co-sharers in the land transferred

even though comprised of specific khasra numbers how can it be said that what is sold is something other than the share out of the joint holding.

That the sale of specific portion of land out of joint holding by one of the co-owners is nothing but a sale of a share cut of the joint holding, would

be further elucidated if we take the example of a sale where a co-owner sells the land comprised of a particular khasra number which is not in his

possession but is within his share in the joint holding. For example, "A" who is joint owner of one-fourth share in the joint holding measuring 100

bighas sells the land measuring 10 bighas bearing khasra numbers "X" and "Y" which are not in possession. On the basis of this sale, the vendee

can neither claim himself to be a transferee of the said land nor can he claim its possession from other co-owners in possession thereof. The effect

in law of such a transfer would be only that the vendee shall be entitled to 10 bighas of land out of the share of his vendor at the time of partition or

prior thereto to a decree for joint possession to the extent of the land purchased by him. Consequently, the effect in law of sale of even of specified

portion of joint land is that it is only a sale of portion of share by one of the co-owners.

6. Take another example where "A" and "B" jointly own a khewat in equal share measuring 200 bighas. "B" is in separate possession of 100

bighas of land comprised of specific khasia numbers and transfers it to "C". This is not disputed that in spite of this sale, "A" continues to be a co-

sharer in the land transferred by "B". If that is so how can it be disputed that "C would necessarily be a co-sharer in the remaining 100 bighas of

land in possession of "A" as otherwise it would mean that "A" is exclusively owner of 100 bighas of land in his possession and also a co-sharer

with "C in the remaining 100 bighas which obviously is not possible. The matter can further be illustrated by another example. "A" and "B" are co-

sharers in the joint khewat, say of 100 bighas of land in equal shares. "B" who is in exclusive possession of land measuring 40 bighas of land

comprised of khasra Nos. 1, 2,3 and 4 transfers two khasra numbers, that is, 1 and 2, measuring 20 bighas to "C specifically stating in the deed

that he is in possession of these khasra numbers as a co-sharer and is transferring his interest as such. Can it be said on these facts that "C has

purchased anything except a co-sharer"s interest in khasra Nos. 1 and 2 in spite of the fact that the sale is of specific numbers and of the specified

area. The answer obviously would be in the negative and if so then the sale is obviously of a share by the co-sharer out of the joint land and nothing

else.

7. The matter can be looked from another angle, also. If the interpretation, in Mst. Gurnam Kaur''s case (supra) is accepted, the said clause u/s 15

of the Act would be liable to be rendered otiose and the purpose of the Legislature defeated by a simple device of describing the land sold by

specific khasra numbers instead of fractional share. For example, if a co-owner to the extent of one-fourth share in the joint holding of 400 bighas

sells land measuring 100 bighas described by specific khasra numbers, there would be no light of pre-emption of the sale according to the rule laid

down in Smt. Gurnam Kaur''s case (supra). However, if ''A'' sells one-fourth of his share measuring 100 bighas but without specifying any khasra

numbers, there would a right of pre-emption. In both cases, ''A'' has sold whole of his share in the joint holding but in one case the sale would be

preemptible and in the other not depending on the manner how the land has been described in the sale deed. The intention to enact a provision of

such illusory nature respecting the right of pre-emption by a co-sharer cannot be easily ascribed to the Legislature. If the purpose of the statute is

to be carried out and the right of pre-emption to a co-sharer preserved then the words, ""sale of share of joint land"" have to be interpreted so as to

include in its ambit any sale out of the joint holding by a co-sharer irrespective of the fact whether the land sold is fractional share or specified

portion comprised of particular khasra numbers. Consequently the decisions in Mst. Gurnam Kaur''s case and Bakhshish Singh''s case (supra) are,

hereby, overruled.

8. The learned Counsel for the Appellant, on the other hand, relying on Radhakisan Laxminarayan Toshniwal Vs. Shridhar Ramchandra Alshi and

Others, and Bishan Singh and Others Vs. Khazan Singh and Another, , contended that the right of preemption 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

among 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 recognised by by 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,

how ever 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 u/s 15(1)(b) of the Punjab Pre-emption Act. As the learned Counsel for the Appellant intends to argue the appeal on

other points, this case would now go back to the learned Single Judge for final disposal.

S.S. Sandhawalia, C.J.

9. I agree.

G.C. Mital, J.

10. I agree.