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KHANNA, J.—I agree with the answers proposed by my Lord the Chief Justice along with the rider added by my learned brother Dua J.

FALSHAW, C.J.—I have read the judgment of my learned brother Dua J. with which I find myself generally in agreement. Indeed I do not think there is any essential difference between the views he has expressed and what I myself was trying to say.

B.R.T.

FULL BENCH

Before Mehar Singh, S. B. Capoor and Prem Chand Pandit, JJ.

RAMJI LAL, AND ANOTHER,—*Petitioners.*

versus

THE STATE OF PUNJAB AND OTHERS,—*Respondents.*

Civil Writ No. 1523 of 1962.

1965

December, 6th.

Punjab Pre-emption Act (I of 1913)—S. 4—Pre-emptor—Whether to retain superior right of pre-emption till the decision of the appeal by the vendee against the decree passed in favour of the pre-emptor—S. 8—Notification under—Whether mala fide—*How to be determined.*

Held, that a pre-emptor must have his qualification to pre-empt on the date of the sale, on the date of the institution of the suit and on the date of the decree of the trial Court. He must maintain his qualification to pre-empt to the date of the decree of the first Court only, whether that decree is one dismissing the suit or decreeing it, and his loss of qualification, whether by his own act or by an act beyond his control such as the improvement of his status by the vendee so as to equal or better the status of the pre-emptor, after the date of that decree, does not affect the fate of his claim in such a suit. When a pre-emptor establishes his preferential right to pre-empt a sale to the date of the adjudication by the trial Court, his right to get the property in preference to the vendee effectively comes into existence then, and so it becomes a vested right, which obviously can only be taken away from him by retrospective legislation.

Held, that while issuing a notification under section 8 of the Punjab Pre-emption Act, 1913, exempting a particular sale from the right of pre-emption, the Government has to act through human agencies and on the reports of various officers. In order to determine whether a particular action of the Government is *mala*

fide or not, it is the conduct of such agencies, whose duty it is to lead up to such action, that has to be considered. And it follows as a matter of course that if there are a number of such human agencies which come in with their reports, opinions and recommendations, then the whole process must be considered that leads up to an action by the Government in the shape of issuance of a notification like the impugned notification.

The impugned notification has been held to be *mala fide* on the consideration of the facts of this case.

Case referred by the Hon'ble Mr. Justice Prem Chand Pandit on 10th December, 1962 to a Division Bench for the decision of an important question of law involved in the case. The Division Bench consisting of the Hon'ble Mr. Justice Mehar Singh and the Hon'ble Mr. Justice Hans Raj Khanna on 24th October, 1963 further referred the case to a larger Bench owing to the importance of the legal point involved in the case. The case was finally decided by the Full Bench consisting of the Hon'ble Mr. Justice Mehar Singh, the Hon'ble Mr. Justice S. B. Capoor and the Hon'ble Mr. Justice Prem Chand Pandit on 6th December, 1965.

Petition Under Articles 226 *and* 227 *of the Constitution of India praying that an appropriate writ, order or direction be issued quashing the order, dated 3rd September, 1962, passed by respondent No.* 1. *and also quashing the impugned Notification as being without jurisdiction,* ultra vires *and unconstitutional.*

H. L. SARIN, WITH V. P. SOOD, MISS ASHA KOHLI AND BALRAJ BEHAL, ADVOCATES, for the Petitioners.

J. N. KAUSHAL, ADVOCATE-GENERAL, WITH M. R. SHARMA, M. R. MAHAJAN AND V. M. GAIND, ADVOCATES, for the Respondents.

ORDER OF THE FULL BENCH

Mehar Singh, J. MEHAR SINSH, J.—In this reference, arising out of a petition under Article 226 and 227 of the Constitution, these three questions are for consideration—

(i) Whether a pre-emptor in whose favour a pre-emption decree has been given in the first Court should retain *superior right of pre-emption till the hearing of the appeal by the vendee against the decree, and whether the impugned notification issued during the pendency of the appeal against the decree in the present case, successfully takes away the already exercised right of pre-emption of the petitioners (pre-emptors) so as to defeat their suit in appeal?

(ii) Whether section 8(2) of Punjab Act 1 of 1913 confers arbitrary, unguided and uncanalised power on the State Government to take away the right of pre-emption, and is on that ground constitutionally invalid, or whether when that provision is read with section 9 of the very Act, it provides sufficient statement of policy and guidance by the Legislature for the exercise of the power of the State Government under section 8(2) of that Act and thus that sub-section is not an invalid piece of legislation on the ground already stated above?

(iii) Whether the impugned notification of September 3, 1962, is *ultra vires* the power of the State Government under section 8(2) of Punjab Act 1 of 1913 and whether it is invalid because it has been issued *mala fide* to the injury of the petitioners and to the advantage of respondents 2 and 3?

The facts out of which this reference has arisen are these. On May 9, 1958, Khillu, Mohan Lal, and Radhey Lal, sold 12 Kanals and 19 Marlas (8,440 square yards) land to Surrinder Kumar and Virander Kumar, respondents 2 and 3. The petitioners, Ramji Lal and Khazan, on January, 9, 1959, instituted a suit to pre-empt that sale claiming a preferential right of pre-emption in them. The suit was resisted by respondents 2 and 3. During the pendency of the suit on November 16, 1961, was published notification No. 4965-RIV-61/7577 of November 9, 1961, under section 8(2) of the Punjab Pre-emption Act, 1913 (Punjab Act 1 of 1913), hereinafter to be referred to as the Act, in this form—

"In exercise of the powers conferred by sub-section (2) of section 8 of the Punjab Pre-emption Act, 1913, the Governor of Punjab is pleased to declare that no rights of pre-emption shall exist with respect to urban or village immovable property or agricultural land when purchased by any person for setting up or extension of any industry in the State with the permission of the Director of Industries, Punjab."

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An issue was settled in the suit after that in regard to the effect of that notification on the right of the petitioners claiming preferential right of pre-emption. Respondents 2 and 3 made efforts to obtain from the Director of Industries permission in the terms of the notification, but they did not succeed during the trial. On April 16, 1962, the learned trial Judge decreed the claim of the petitioners for possession by pre-emption of the land in question with a usual condition in the decree in regard to the payment of the amounts stated in it by a certain date, otherwise directing that the suit shall stand dismissed if the condition was not complied with. The learned trial Judge gave a finding of fact that it was not proved that respondents 2 and 3 intended to establish industry on the land in question.

On May 16, 1962, respondents 2 and 3 filed an appeal against the decree of the trial Court. On May 19, 1962, respondent 2 made an affidavit and delivered it on the same day in the Department of Industries, in which affidavit he affirmed that he would only set up a factory in the land in question and will not use it for any other purpose. There was consideration of the matter in the Industries Department and correspondence between that department and the Revenue Department, to all of which detailed reference will be made later, and in the end on September 4, 1962, the State Government, respondent 1, issued notification No. 4444-RIV-62/4011 of September 3, 1962, copy Annexure 'D', in the Gazette Extraordinary of that date, and it says—

> "In exercise of the powers conferred by sub-section (2) of section 8 of the Punjab Pre-emption Act, 1913, the Governor of Punjab is pleased to order that no right of pre-emption shall exist with respect to the sale of land, described in the Schedule to this notification, made on the 9th May, 1958, in favour of Messrs Surrinder Kumar and Virander Kumar, opposite Railway Station, Faridabad, for the establishment of a factory for manufacturing cork products.
>
> *Schedule*
>
> *District.*—Gurgaon.
>
> *Tehsil.*—Ballabgarh.

Revenue Estate with Hadbast No.—Majesar, Hadbast No. 79 Khasra Nos. 2/16 (1 Kanal 12 Marlas), 17 (2 Kanals 1 Marla), 24 (2 Kanals 12 Marlas), and 25 (7 Kanals 14 Marlas), all totalling to 13 Kanals 19 Marlas."

This notification was issued during the pendency of the appeal of respondents 2 and 3 against the decree of the trial Court decreeing the pre-emption suit of the petitioners. It was then that on October 1, 1962, the petitioners filed the the petition under Articles 226 and 227, and, as stated, this reference arises out of that petition.

In so far as the first question is concerned, the Privy Council held that a pre-emptor's claim may be defeated by his losing his preferential qualification to pre-empt after the sale and 'at any time before the adjudication of the suit' : *Hans Nath* v. *Ragho Prasad Singh* (1). It is settled that a pre-emptor must have his qualification to pre-empt on the date of the sale, on the date of the institution of the suit, and on the date of the decree of the trial Court. Although their Lordships have in terms limited their dictum in *Hans Nath's case* to the former Agra Province, but it has been held to apply equally in Punjab by three Full Benches of the Lahore High Court in *Madho Singh* v. *Lieut. James R. R. Skinner* (2), *Zahur Din* v. *Jalal Din* (3), and *Faiz Mohantmad* v. *Fajar Ali Khan Din* (4). In support of their dictum, their Lordships in *Hans Nath's case* rely upon the dictum of Sulaiman J. (Lindsay J. concurring) in *Baldeo Misir* v. *Ram Lagan Shukul* (5), in which the learned Judge observed— "It is well settled law that a plaintiff pre-emptor in order to be able to maintain a suit for pre-emption must establish his right to pre-empt on three important dates. He must have a right of pre-emption at the time when the sale took place; otherwise he would have no cause of action at all. He must also have the same right at the time when the suit is brought or else he would have no *locus standi* to

(1) (1931)59 I.A. 138.
(2) I.L.R. (1942)23 Lah. 155.
(3) I.L.R. (1944)25 Lah. 443.
(4) I.L.R. (1944)25 Lah. 473.
(5) I.L.R. (1923)45 All. 709.

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sue. A possible view to take might have been that nothing which happens after the institution of a suit can alter the position of the parties. But it has been held in a number of cases by this Court that it is incumbent on the plaintiff to prove that his right to pre-empt continues up to the date when the decree ought to have been passed in his favour, namely, the date on which the case was disposed of by the first Court. It matters little whether the Court of first instance did actually dismiss or decree his suit." This view has also been taken in *Sri Thakur Radhika Raman Bihariji Maharaj* v. *Bohra Shiam Sundar Lal* (6). These two cases follow in this respect *Skina Bibi* v. *Amiran* (7). The view of the Lahore High Court is the same, following the last mentioned case, in *Zahur Din* v. *Jalal Din* (3). There is a dissenting note to this in *Niaz Ali* v. *Muhammad Ramzan* (9), by Chevis J., in so far as the dismissal of a pre-emption suit by the trial Court is concerned, the learned Judge being of the opinion that if that happens and the pre-emptor loses his qualification during the appeal, that might prove fatal to his suit: but this opinion is first obiter, and then must be taken no longer to be sound in view of the exactly contrary opinion by the Full Bench in *Zahur Din* v. *Jalal Din* (3). It is, therefore, a settled rule in pre-emption law that a pre-emptor must maintain his qualification to pre-empt to the date of the decree of the first Court only, whether that decree is one dismissing the suit or decreeing it, and his loss of qualification, whether by his own act or by an act beyond his control such as the improvement of his status by the vendee so as to equal or better the status of the pre-emptor, after the date of that decree does not effect the fate of his claim in such a suit. The other cases that take the same view are *Megha Ram* v. *Makhan Lal* (8), *Niaz Ali* v. *Muhammad Ramzan* (9), *Kaju Mal* v. *Salig Ram* (10), *Ganda Singh* v. *Bhan* (11) *and Hazari* v. *Neki*, Letters, Patent Appeal 13 of 1965, decided on July 27, 1965. The learned Advocate-General has not been able to deny that such is the rule, but what he contends, is that this rule has held the field till the decision of the Federal Court in

(6) I.L.R. (1923)45 All. 561.
(7) I.L.R. (1888)10 All. 472.
(8) 67 P.R. 1912.
(9) 130 P.R. 1916.
(10) 91 P.R. 1919.
(11) A.I.R. 1923 Lah. 310.

Lachmeshwar Prasad Shukul v. *Keshwar Lal Chaudhuri* (12), in which their Lordships held that the hearing of an appeal under the procedural law of India is in the nature of re-hearing and, therefore, in moulding the relief to be granted in a case on appeal, the appellate Court is entitled to take into account even facts and events which have come into existence after the decree appealed against. Consequently, the appellate Court is competent to take into account the legislative changes since the decision in appeal was given and its powers are not confined only to see whether the lower Court's decision was correct according to the law as it stood at the time when its decision was made. In that case Varadachariar J., with whom Gwyer C.J. concurred, observed that "once the decree of the High Court had been appealed against, the matter became *sub judice* again and thereafter this Court had seisin of the whole case, though for certain purposes, e.g., execution, the decree was regarded as final and the Courts below retained jurisdiction." The learned Advocate-General has urged that after this decision of their Lordships all the cases already referred to on the question now under consideration must be held no longer good law. He points out that when the dicta in those cases is scanned, the basis of the same as (i) that at the stage of the appeal subsequent events cannot be looked into and considered and (ii) that all that is to be seen at the stage of the appeal is whether the decree passed by the trial Court has or has not been passed correctly. This basis the learned Advocate-General says has been completely swept away by the decision of their Lordships of the Federal Court in *Lachmeshwar Prasad Shukul's case.* So, according to him, now, after the decision of that case, where a pre-emptor loses his qualification to pre-empt a sale after the decree of the first Court and at the stage of the appeal, that event must be taken into consideration, with the obvious consequence that he must fail in his pre-emption suit. In this respect the learned counsel further refers to *Ram Lal* v. *Raja Ram* (13), *and Ram Sarup* v. *Munshi* (14), and these two cases follow *Lachmeshwar Prasad Shukul's case,* but, like that case, proceed to a decision upon a statutory provision which made the new legislation retrospective. The

(12) A.I.R. 1941 F.C. 5.
(13) 1960 P.L.R. 291.
(14) A.I.R. 1963 S.C. 553.

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Act was amended by the Punjab Pre-emption (Amendment) Act, 1960 (Punjab Act 10 of 1960), whereunder certain qualifications available for pre-emption have been taken away, and then by section 6 of the amending Punjab Act 10 of 1960 new section 31 in the Act has been added and that section 31 reads—"No Court shall pass a decree in a suit for-pre-emption whether instituted before or after the commencement of the Punjab Pre-emption (Amendment) Act, 1959 (1960), which is inconsistent with the provisions of the said Act." This new section is in terms retrospective in the sense that whether the suit for pre-emption is instituted before the date of the amending Act or after, a decree cannot be passed contrary to its provisions, that is to say, contrary to the provisions of the amending Punjab Act 10 of 1960. The Federal Court having held in *Lachmeshwar Prasad Shukul's case* that an appeal is a rehearing of the suit and at the stage of the appeal the suit is itself pending and is *sub judice,* it followed logically from that that when the appellate Court gave a decision in such an appeal, it must be taken to be passing a decree in the suit. Consequently when the new section 31 is read with the decision of the Federal Court in *Lachmeshwar Prasad Shukul's case,* (12), it becomes obvious that in a pre-emption suit when the appellate Court decides the appeal, as in the appeal the subject-matter of the suit is *sub judice,* it passes a decree at that stage, and the passing of such a decree is prohibited by the new section 31. This is exactly what has been decided in both *Ram Lal's* (13) and *Ram Sarup's cases* (14). As such those cases, in so far as the decisions proceed on the new section 31, do not advance the argument urged by the learned Advocate-General, though it is correct that, as the same follow *Lachmeshwar Prasad Shukul's case* there is support in them to the argument of the learned Advocate-General that an appeal is a re-hearing of the suit and consequently the appellate Court when deciding the appeal passes a decree in the suit. Otherwise those two cases, as already pointed out, like the *case of Lachmeshwar Prasad Shukul,* proceed on the application to a litigation pending at the stage of the appeal of retrospective statutory provision. The learned Advocate-General has further contended that the fact that a pre-emptor has, after obtaining decree in the trial Court, complied with that decree and by payment of the amount mentioned in it has gained title to the property according to Order 20, rule 14, of the Code

of Civil Procedure, makes no difference and his position is not improved in that manner. In this respect he refers to *Laxman Ramchandra Dalal* v. *Wasudeo, Withal Chimote* (15), *Sarjabai* v. *Bhagwanji Nagoji Dhangar* (16) *and Kisan Dewaloo Mali* v. *Ganga Bai* (17), the substance of the decisions in those cases, so far as the present matter is concerned, being that a pre-emptor may appeal against a pre-emption decree without complying with that decree according to Order 20, Rule 14 and should he succeed in his appeal the appellate Court may extend time for making deposit of the amount under the decree. In this respect the approach of the learned Advocate-General is correct because the rule being that a pre-emptor has to maintain his preferential qualification to the date of the adjudication of the first Court, irrespective whether the pre-emption suit is dismissed or decreed, if the suit is dismissed the question of the pre-emptor gaining title by compliance with the decree according to Order 20, Rule 14, does not arise, and this factor would appear, therefore, not to be decisive in the matter. In *Zahur Din* v. *Jalal Din* (3), the suit of the pre-emptor was dismissed by the trial Court. During the pendency of the appeal by the pre-emptor against the decree, the vendee improved his status so as to be equal to that of the pre-emptor. It was then urged on the side of the vendee that the pre-emptor must fail if at the stage of the appeal he no longer held the preferential qualification to pre-empt the sale in question. The argument advanced for the vendee was precisely the same as has been advanced by the learned Advocate-General in this case and as has been substantially reproduced above. It was said that an appeal is a rehearing of the suit and continuation of the same and in determining the rights of the pre-emptor or of the vendee the appellate Court may consider any circumstances which have arisen during the pendency of the suit in appeal even though those circumstances may have come into being subsequent to the decree of the first Court. This argument was repelled by the learned Judges constituting the Full Bench (Harries C.J. and Abdul Rashid and Abdur Rahman JJ.). It was also contended before the learned Judges that if after the decree of the trial Court and before compliance with that decree and gaining of title to the property according to Order 20, Rule 14, the vendee should either improve

(15) A.I.R. 1939 Nag. 120.
(16) A.I.R. 1939 Nag. 140.
(17) A.I.R. 1939 Nag. 279.

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his status so as to equal that of the pre-emptor or the pre-emptor should lose his preferential qualification, the latter must obviously fail, and the learned Judges pointed out that reference to the compliance of the decree and its consequence because of Order 20, Rule 14, made no difference to the rule that the pre-emptor is only required to maintain his preferential qualification to the date of the adjudication by the trial Court and no further. They observed:—

"There is no doubt, however, that the powers conferred on an appellate Court by Order 41, Rule 33, are very wide, but they should not be exercised so as to affect a vested right. say, for instance, by virtue of law of limitation (*Chokalingam Chetty* v. *Seethai Achi* (18), and similarly a right which had been declared to be vesting in a pre-emptor by a decree passed in his favour. It may be that title to the property decreed in a suit for pre-emption may not actually some to vest in the pre-emptor up to the date of deposit of the whole price by him in Court. This is, however, a different matter. The right to get the property in preference to the vendee, although an inchoate one up to the date of the decision of the first Court, comes into existence effectively with a decree in his favour and although that may not entitle him to the property (as stated by Sir Meredyth Plowden in *Dhani Nath* v. *Budhu* (19), in the sense that he does not become an owner of the same until payment, nevertheless entitles him to get the property on compliance with the conditions stated in the decree. The right to get the property is in short declared by the decree and can only be defeated by its terms. The question, therefore, as to when a decree-holder's title to the property would be complete seems to be besides the point. We are only concerned in a suit for pre-emption with a plaintiff's preferential right to acquire the property and to get himself substituted for the vendee in the sale which he wishes to pre-empt and not with the question as to when he becomes the owner of the property after his suit for pre-emption has been decreed. The contention, therefore, that the vendee is entitled to improve his status even after a decree and before the pre-emptor has deposited the price in pursuance of the decree has no force and does took place between the date when the right to pre-empt not advance the matter any further. And if events which

(18) (1928)54 Mad. L.J. 88(P.C.).

(19) 136 P.R. 1894.

comes to be effectively recognised by a Court and the date when the deposit of the price is made by the pre-emptor in pursuance of the decree cannot be taken into consideration, much less can events that happen during the pendency of an appeal be looked at or allowed to influence one's judgment in the matter particularly as a Court of Appeal is, as observed before, mainly concerned with the correctness of the decision arrived at by the trial Court." The learned Judges further pointed out—"There appears to be no principle or reason to extend the period of a vendee's acquisition beyond that date when the plaintiff's right has been declared to have either come into existence effectively or otherwise finally adjudicated by the trial Court and the function of a Court of Appeal is confined to an examination as to the correctness of the lower Court's decision." Earlier the learned Judges said— "It is true that in a sense an appeal is a continuation of a suit but this is only in a limited sense. It does not, however, mean that the rights which could be pleaded and enforced before a suit was finally adjudicated by the first Court, could be pleaded as of right for the first time during the pendency of the appeal. It is also true that Courts do very often take notice of events that happen subsequent to the filing of suits and at times even those that have occurred during the appellate stage and permit pleadings to be amended for including a prayer for relief on the basis of such events but this is ordinarily done to avoid multiplicity of proceedings or when the original relief claimed has, by reason of change in the circumstances, become inappropriate and not when the plaintiff's suit would be wholly displaced by the proposed amendment (*see Steward* v. *The North Metropolitan Tramways Company* (20) and a fresh suit by him would be so barred by limitation although in cases where it would not be so barred, different considerations might come into play and a different view might be possible. It cannot be, however, disputed that ordinarily an appellate Court can give effect to such rights only as had come into being before the suit had been disposed of and which the trial Court was competent to dispose of." Thereafter the learned Judges refer to *Sakina Bibi's case* and follow it. If I understand this case right the learned Judges have been of the opinion that

(20) (1885)16 Q. B.D. 178.

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when a pre-emptor establishes his preferential right to pre-empt a sale to the date of the adjudication by the trial Court, his right to get the property in preference to the vendee effectively comes into existence then, and so it becomes a vested right, which obviously can only be taken away from him by retrospective legislation as happened in the *cases of Ram Lal and Ram Sarup*. The impugned notification of September 4, 1962, cannot have that effect, for that notification does not operate retrospectively because the Act makes no provision for retrospective operation of such a notification and it has been held in *Niaz Ali's* and *Kaju Mal's cases* that such a notification does not operate retrospectively. No doubt in *Ram Lal's case* the Division Bench did not approve of those two cases, though those cases were also decided by Division Benches. However, the dicta in those two cases have the support of subsequent Full Bench Decision in *Zahur Din* v. *Jalal Din* (3), a case which obviously appears not to have been placed before the learned Judges in *Ram Lal's case* as it was not placed before us in the Division Bench, otherwise this first question would probably never have been referred to a larger Bench as has been done in the present case. In my opinion *Zahur Din* v. *Jalal Din* is a complete answer to the argument of the learned Advocate-General on this first question, and if that decision of a Full Bench of three Judges is to be over-ruled, in my opinion a larger Bench than the present Bench of three Judges will have to do that.

On question two, the learned counsel for the petitioners refers to *P. J. Irani* v. *State of Madras* (21), for the proposition that guidance for the exercise of the power under section 8(2) of the Act by the Government should have been available from the preamble and the operative provisions of the Act, in particular section 9, but it is not to be found there. His position is that the preamble of the Act says not a word about the policy of the legislature or any guidance to the Government for the exercise of its powers, under the said section and even section 9, which excludes claim for pre-emption in respect of certain alienations, does not do so either. The learned Advocate-General has first pointed out that question two should not be confined only to consideration of section 9, but should

(21) A.I.R. 1961 S.C. 1731.

also cover the other relevant operative provisions of the Act to see whether or not the legislature has afforded guidance for the exercise of such powers by the Government, and in this he is correct. He has then said that in section 4 of the Act there is a provision with regard to the right of pre-emption as to sales of agricultural land or village immovable property or urban immovable property, and sections 3(5), 5, 8(1) and 9 exclude expressly certain sales with regard to which no such right is to exist. He contends that the scheme of the Act is to give right of pre-emption in regards to sales and then to exclude such a right in regard to certain defined sales. This is so. His further contention is that from the provisions which exclude certain sales from the right of pre-emption is to be found enough guidance for the Government to exercise its powers under section 8(2) of the Act so as by a notification to exclude certain sales from the exercise of right of pre-emption. He points out (i) that sales by Courts or revenue officers are excluded by section 3(5) (a) and creation of occupancy tenancies by section 3(5) (b), (ii) that business premises are excluded by section 5(a)(i), (iii) that religious buildings, buildings of public utility such as Dharamsalas, and the like buildings are excluded by section 5(a)(i) and (ii), (iv) that to protect a person bringing under plough waste land, sales of such land are excluded by section 5(b), (v) that right of pre-emption is excluded from any cantonment except when it is permitted under a notification by the State Government in the case of the sale of any agricultural land which is provided in section 8(i), (vi) that sales made by and to the Government and local authorities are excluded by section 9, and (vii) that a sale made to any company under the provisions of Part VII of the Land Acquisition Act, 1894, is also excluded by section 9. The last exclusion is, in fact, formally a sale taken by the Government and then made by it, after acquisition of the land, in favour of a company. The learned Advocate-General urges that if respondents 2 and 3 had on behalf of a company wanted to purchase land to establish an industry, they could have made the purchase through the Government with the aid of the provisions of the Land Acquisition Act, 1894, and such a sale would then have been immune from right of pre-emption under section 9. As those respondents have not been able to form a company in connection with their intended industrial undertaking, they could not have benefit of section 9 in

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this respect. The Government has done the next best to further the same object by proceeding to issue a notification, in regard to the sale in their favour, under section 8(2) of the Act to exclude that sale from the right of pre-emption. The particular sale, the learned Advocate-General presses, has been for analogous reason as in section 9. Therefore, it cannot be said that the Government in issuing the impugned notification of September 4, 1962, has acted in an arbitrary manner and not in accordance with the guidance provided by the operative provisions of the Act to which reference has been made. There is force in the contention by the learned Advocate-General, but as will appear on the decision in regard to second part of question three it is not necessary to pronounce in this judgment on this aspect of the matter.

In regard to the first half of question three, the brief argument of the learned counsel for the petitioners is that the impugned notification of September 3(4), 1962, is *ultra vires* the powers of the State Government under section 8(2) of the Act because such a notification cannot be issued after the pre-emptor has succeeded in establishing his right of pre-emption to the stage of the adjudication by the trial Court, for then there is no sale that can be pre-empted. It is obvious that this contention is an aspect of question one only and no more need be said with regard to it than what has already been said on the first question. The second half of this qusetion is rather more important. The argument of the learned counsel for the petitioners is that the impugned notification is *mala fide* issued to the injury of the petitioners and to the advantage of respondents 2 and 3 ignoring the finding of the trial Court in the pre-emption suit of the petitioners that respondents 2 and 3 have failed to prove that they have purchased the land in question to set up an industry therein and that that finding has been stultified merely on an affidavit of respondent 2 filed a few days after filing of appeal against the decree of the trial Court in the petitioners' pre-emption suit. The learned counsel for the petitioners has said that in reply respondent 1, the State of Punjab, has done no more than to produce a copy of the affidavit of respondent 2 in support of its action in this respect and he points out, again referring to *P. J. Irani's case* that in that case the State Government produced a statement of reasons which led it to issue the notification that was impugned

in that case. In the wake of this the learned Advocate-General has produced all the relevant executive files on the matter so that this Court may know the circumstances in which the impugned notification has been issued by respondent 1. The sale was obtained by respondents 2 and 3 on May 9, 1958. The petitioners instituted the suit to pre-empt that sale on January, 8, 1959. During the pendency of the suit first notification of November 9, 1961, under section 8(2) of the Act was published in the Gazette on November 16, 1961. To that date respondents 2 and 3 were precariously defending the preferential claim of the petitioners to pre-empt the sale. It has to be remembered that it is a sale in the name of two private persons. After the issue of the notification under section 8(2) of the Act on November, 9(16), 1961. respondents 2 and 3 found some hope in putting forward an effective defence to the claim of the petitioners. Earlier, to that they had addressed a letter on February 22, 1961, to the Director of Industries pointing out that the Development Commissioner, Small Scale Industries, New Delhi, had not taken any action on their communication seeking permission to set up a factory for the manufacture of cork stoppers and other cork products and seeking his help. To that the Director of Industries replied on March 13, 1961, that "according to the instructions of Government of India, no approval is now required for the establishment of any industry in the small scale sector. You can, therefore, go ahead with your venture and every assistance will be given to you under the existing rules and regulations." After the notification of November 9 (16), 1961, there was a letter on behalf of respondents 2 and 3 to the Director of Industries on January 23, 1962. In that letter reference was made to the sale, to the pre-emption suit of the petitioners with regard to that sale, and the notification under section 8(2) of November 9 (16), 1961. The respondents sought permission of the Director of Industries in terms of that notification for setting up their factory. One copy of that letter was forwarded to the District Inspector of Industries at Gurgaon by an order of the same date. Later another copy with an endorsement of February 26, 1962, on behalf of the Director of Industries was addressed to the District Inspector of Industries, Gurgaon, in which it has been pointed out that "the notification by the Revenue Department only applies to such parties who have purchased the land on or after the date of the issue of the note-

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fication by the Revenue Department under Pre-emption Act. 1913, i.e., November 9 (16), 1961. In order to examine the request of the party an attested copy of the sale deed along with Fard Jamabandi bearing the measurement of land and Khasra Nos. etc. along with his report whether the factory building has been constructed or not; whether machinery has been purchased or not; what type of industry is proposed to be set up, be supplied immediately." By a letter of February 16, 1962, the District Inspector of Industries, Gurgaon, replied that 'the facts stated in the letter have been verified and the requisite certificate may be issued to the party if no objection. The site was inspected and it was found that they had only just started the construction and there is about 1½ ft. high boundary wall on the iste." This was the recommendation made by the District Inspector of Industries on the application dated January, 23, 1962, of respondents 2 and 3. There is an office note of March 14, 1962. In this note there is a reference to the pre-emption suit filed by the petitioners. It is then pointed out that the notification of November 9(16), 1961, is not likely to cover the sale in favour of respondents 2 and 3, it being of an earlier date and it is further stated that father of respondents 2 and 3 had said that on consultation their lawyer had given that opinion. The note then proceeds in this manner—"According to the policy decision, we give exemption certificate only to such parties who may sign an agreement deed indicating that the concession given to them would not be misutilized and land would not be sold for making money. The case under reference for drafting the agreement deed, is under the consideration of the Department, the party desires that, as the case is to be considered in the Court at Palwal on the 17th March, 1962, the exemption certificate may be issued in this case immediately. I have given an interim reply to the party to enable them to show this letter to the Court on the 17th when they have to appear in this case before the Judge." The note then points out that the past practice had been, where such an exemption is sought, to refer the matter to the Revenue Department first before the issue of the necessary notification. Accordingly the case was then referred to the Revenue Department with the approval of the Director of Industries given on March 19, 1962. The matter then came before the Deputy Secretary in the Revenue Department, who, on April 27, 1962, sent the case to the Deputy Commissioner

(Collector) at Gurgaon, for report on the question whether the land had been purchased with the express purpose of setting up a factory for the manufacture of cork products by the purchasers, respondents 2 and 3, and whether it was going to be used for that purpose. Copy of this letter was endorsed to the Commissioner, Ambala Division, through whom the report was sought from the Deputy Commissioner. In due course, as is the usual practice, the Deputy Commissioner of Gurgaon forwarded a copy of this letter to the Tehsildar concerned under endorsement of May 16, 1962. The Tehsildar made his report. This report is rather important for the matter of the argument urged on the side of the petitioners and is, therefore, being set down here in full—

"Reference : D.C's. office endorsement No. 5206/ DRA, dated the 16th May, 1962.

In the enclosure the petitioners have mentioned in para 1 that they purchased this land in the name of Shri Surinder Kumar and Virandar Kumar Rastogi, who are the partners of Messrs Cork Products of India. They were required to produce the partnership deed and give details of the constitution of Cork Products of India concern. Shri Surinder Kumar produced the partnership deed executed on a non-judicial stamp of Rs. 5 instead of Rs. 15. The deed is under stamped, hence impounded and sent separately to the Collector, Gurgaon, for necessary orders.

As alleged by Shri Surinder Kumar and Shri Virandar Kumar that they purchased land as partners of Messrs Cork Products of India.

From this it infers that they had in view to form a distinct partnership concern under the name of Cork Products of India. If this was the position and they really intended to establish a factory known as Cork Products of India. obviously, the land should have been purchased in the name of the concern and not in the name of individuals. They could not also furnish details of the constitution of the concern which shows that they have none of this name. They

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have alleged that they are already working as partnership under the name and style of India Metal Industries, which is also producing some types of corks. If the two brothers are the sole partners in both the undertakings, i.e., Indian Metal Industries and Cork Products of India. certainly, the constitution of Indian Metal Industries which is in operation must have same details. They could be produced to show their *bona fides*. But none of it has been presented, for the best reasons known to them.

I have inspected the site also. In the middle of the land an ordinary Kotha 12'x10'x8' approximately has been built up by the petitioners. Except this there are no signs of any foundations laid for building a factory. The land has been subjected to pre-emption and in one Court they have already lost the case and decreed in favour of pre-emptors. In order to defeat the object and efforts of the pre-emptors, it appears they thought of this plan to take shelter under notification No. 4965/RIV-61/7577, dated November 9 (16), 1961, issued by the Punjab Government in favour of industrialists, and thus to thwart the provisions of Pre-emption Act.

They have another land opposite Railway Station, Faridabad, in the Industrial Area measuring about 2,000 square yards. That land stands in the name of Shri Virandar Kumar, Surinder Kumar along with their father. That area could also be used for this purpose.

In view of this I am of the opinion that they are not correct in saying that they purchased this land with the express purpose of setting up a factory for the manufacture of cork products. Since it is purchased in "the names of individuals and not in the name of firm or concern. I am not inclined to believe any truth in their request. To me their scheme appears a mere subterfuge to nullify the pre-emption proceedings.

(Sd.). . . .,
Tehsildar, Ballabgarh.
6th June, 1962".

On receipt of this report of the Tehsildar, the Assistant Superintendent, Revenue on June 16, 1962, put it up before the Deputy Commissioner with a usual office note. The Deputy Commissioner passed this order on it on June 20, 1962,— "Reply to Government as proposed by the Tehsildar whose report (copy) may be sent and endorsed." This was marked to the District Development and Panchayat Officer. Immediately after this endorsement is the second endorsement of the Deputy Commissioner made on June 22, 1962, which runs in this manner — "Discussed with A.S.R. (Assistant Superintendent, Revenue) in the presence of Surinder Kumar etc., representatives of Messrs Cork Products. They say that the other land they have is being used for manufacture of metal caps and has no surplus space for installation of cork factory. Regarding misuse or abuse by them, they would be giving the usual undertaking to the D.I. (Director of Industries). The case for exemption may, therefore, be recommended." This was marked to the Assistant Superintendent Revenue. And thereafter by a letter of June 28, 1962, under the signatures of the Deputy Commissioner the case of respondents 2 and 3 was recommended. The first paragraph of the letter is formal making reference only to the endorsement of the Deputy Secretary in the Revenue Department and paragraphs 2 and 3 of that letter reads thus—

> "2. The representatives of Messrs Cork Products of India have stated before me that the land in question has been purchased by them with the express purpose of setting up a factory for the manufacture of corks and that it is going to be used for the said purpose. As regards misuse or abuse by them they would be giving the usual undertaking to the Director of Industries, Punjab, Chandigarh.
>
> 3. Under the circumstances, mentioned above. it is recommended that the State Government may be moved to grant exemption from the rights of pre-emption of the land in question under section 8(2) of the Punjab Pre-emption Act, 1913. The draft notification in triplicate is enclosed".

It is immediately apparent that the report of the Tehsildar was suppressed and two days later the Deputy Commissioner (Collector) changed his mind, but the order,

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which is reproduced above, does not explain why the report of the Tehsildar was not forwarded to the Government. There can be no two opinions that that report had material bearing on the question whether or not this was a case in which the Government would exercise its powers under section 8(2) of the Act. The Commissioner, of course, endorsed the communication of the Deputy Commissioner without more. When the case came back to the Revenue Department, there is a note of August 14, 1962, in which this is stated—

> "In this connection it may be stated that it will be appropriate if we may request the Director of Industries, Punjab, to ask the applicants to give the necessary undertaking before the notification is issued. The Director of Industries may also be requested to watch the further progress of the firm in respect of purchase, installation of the machinery and other aspects and intimate to this Department while taking the usual undertaking from the firm."

It was pointed out in the note that the Legal Remembrancer was doubtful whether such a notification would be considered legal and whether it would not be violative of Article 14 of the Constitution. This note was put up to the Deputy Secretary in the Revenue Department. The recommendation then was that as the land was going to be utilised for the esablishment of a factory, the exemption applied for may be given. The case was marked to the Financial Commissioner and the Revenue Minister, and the proposal was finally approved by the Revenue Minister on August 21, 1962. In consequence the impugned notification of September 3 (4), 1962, was issued under section 8(2) of the Act taking away right of pre-emption with regard to the sale of the land in favour of respondents 2 and 3. It is apparent (a) that, although at some stages reference to the pre-emption suit, appears in the history of the case, neither respondents 2 and 3 disclosed the fact that decree in that case had been passed in favour of the petitioners nor did any authority (except the Tehsildar) try to find out whether decree had or had not been passed in that suit (b) that it was never brought to the notice of any authority by respondents 2 and 3 that the finding of the trial Court was against them and it was that they had

failed to prove that they intended to set up a factory and obviously no authority ever tried to learn anything about that finding, except, perhaps, the Tehsildar gained some inkling of that, (c) that only a few days after the filing of the appeal by respondents 2 and 3 against the decree of the trial Court a mere affidavit was filed by respondent 2 saying that they intended to put up a factory in the land in question, (d) that the District Inspector of Industries at Gurgaon made a report in favour of respondents 2 and 3 but only on the basis that they had just started building the boundary wall, (c) that the Tehsildar, who saw the land, made a report in every respect adverse to respondents 2 and 3 pointing out that they had just set up a small room in the middle of the land, that there was not any show of even setting up a factory building there, that a decree for pre-emption of the sale had been passed against respondents 2 and 3, and that the move of these respondents was to stultify and defeat that decree, (f) that the Deputy Commissioner (Collector) first ordered that a copy of the report of the Tehsildar be forwarded to the Government, but two days later on the approach of the respondents and his Assistant Superintendent Revenue he changed his mind, suppressed that report, and on the mere statement of the respondents that they intended to set up a factory in the land in question, he proceeded to recommend that exemption notification under section 8(2) of the Act be issued in their favour and that this was then followed up by the higher authorities, (g) that obviously the report of the Tehsildar was suppressed which had material bearing on the decision to be taken in the matter of issue of the impugned notification and for this suppression there is no explanation available on the side of the respondents and particularly respondent 1, and (h) that although in the note of the Joint Director of Industries, made on March 14, 1962, it was pointed out that respondents 2 and 3 were to sign an agreement that the exemption to be granted to them would not be misutilised and the land would not be sold for money-making, and although the Revenue Department's note of August 14, 1962, said that the Director of Industries be asked to obtain such an undertaking before the issue of the notification, yet no such agreement or undertaking was obtained by anybody from respondents 2 and 3 and all that was done was that on November 8, 1962, a day before the date of the notification itself and some days before its publication on November 16, 1962,

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another affidavit was obtained from respondents 2 and 3 that the land 'had been purchased for the purpose of establishing a factory as noted above and that we give solemn undertaking not to misuse or abuse the above land, exempted from the right of pre-emption. We further declare and undertake that the above land shall be used only for industrial purposes.' On the respondents 2 and 3 not complying with such an affidavit, I doubt whether they could or could not have been prosecuted for having made a false affidavit, but certainly in a Court of law no action could be taken against them with regard to the land in the event of their not using the same for setting up a factory, in other words, there was no manner of contract by them whereby they would have to surrender back the land in the event of their not using it for the establishment of a factory, the reason because of which the notification has been issued attempting to take away the right of the petitioners to pre-empt the sale in favour of those respondents. Even if they can be prosecuted on the affidavit for having made a false statement in it, they still get away with the land and who loses but the petitioners. There is no allegation that anybody in the Revenue Department in Chandigarh, say the Secretary of that Department or the Deputy Secretary in that Department, has acted in a *mala fide* manner in the issue of the impugned notification. But what has been pressed on the side of the petitioners is that a notification like this is not the act really of one single person finally approving that the notification be issued. It is the result of a process of formal or informal inquiries and reports and consideration of various authorities at various stages leading up to the recommendations based on material collected which go to form the basis of the judgment whether or not such a notification should issue in any particular case. It is the whole process that has to be considered. This approach, to my mind, is the correct and, if I may say so, the only possible approach in such circumstances. Government obviously acts through human agencies, and in the matter whether a particular action of the Government is *mala fide* or not, it is the conduct of such agencies, whose duty it is to lead up to such action, that has to be considered. And it follows as a matter of course that if there are a number of such human agencies which come in with their reports, opinions and recommendations, then the whole process must be considered that leads up to an action by the Government in

the shape of issuance of a notification like the impugned notification. With this approach it is obvious that the impugned notification must be held to have been issued *mala fide*. The reason in the circumstances of this case is simple. In the first place, the report of the Tehsildar was a crucial and vital document in this case, which would substantially and materially affect the approach of the higher authorities in the conclusion to issue or not to issue the notification. In this respect what happened before the Deputy Commissioner (Collector) had also the same bearing. It should have been disclosed what orders the Deputy Commissioner (Collector) passed first and what was the order which he pased two days later. An endeavour should have been made by somebody to find out what was the fate of the suit of the petitioners and what was the finding given by the trial Court in the decision of that suit. This was not done even after the matter was pointed out by the Tehsildar. In other words, either deliberately or by sheer avoidance no effort was made to find out what finding the trial Court had given in the matter. but the affidavit of respondent 2 seems to have been taken as such. In spite of it having been pointed out that before the issue of the notification an agreement be obtained from respondents 2 and 3 against misuse and misutilisation of the land for the purpose other than that for which it was being exempted from the right of pre-emption of the petitioners and for not making it an otherwise profiteering transaction, no such agreement, binding in law, was obtained from these respondents, but instead the matter was slurred over by obtaining a second affidavit from the two respondents. It is thus apparent that at the final stages, when the question for consideration was whether or not the impugned notification should be issued. whether all the circumstances were present which justified the issue of such a notification and whether all the obligations that were required to be taken by respondents 2 and 3 had been taken before its issue, were matters which either could not be considered because substantial material collected was withheld or clear directions were completely ignored. The Deputy Commissioner (Collector) is an important link in the process which leads to the issue of a notification as the impugned notification, and in the links of the chain that leads to the issue of such a notification if there is something which does not smack of dealings in good faith at his level, that affects

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the nature of the ultimate action taken, as has in fact happened in this case, and it is a factor which must be considered as weighty in coming to the conclusion whether the action taken as a whole is or is not *mala fide*. In the circumstances of the case, to my mind, the impugned notification cannot be held to have been issued in good faith and has to be held to have been issued *mala fide*. On this conclusion the impugned notification must be struck down as invalid. Once this conclusion is reached, the petitioners succeed in their petition.

The consequence is that the impugned notification is struck down as invalid because it has been issued *mala fide* so that the petitioners succeed in their petition which is hereby accepted, but, in the circumstances of the case, the parties are left to their own costs.

Capoor, J.

S. B. CAPOOR, J.—I agree.

Pandit, J.

PANDIT, J.—I agree that the writ petition should be accepted, because the impugned notification was issued *mala fide*. The parties should, however, bear their own costs.

B.R.T.

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