

## CIVIL MISCELLANEOUS

*Before Rajendra Nath Mittal, J.*

MALKIAT SINGH,—Appellant.

*versus*

SANTA SINGH,—Respondent

Regular Second Appeal No. 12 of 1962.

August 23, 1972

*Punjab Pre-emption Act (I of 1913)—Section 15—Punjab Security of Land Tenures Act (X of 1953)—Section 17-A(I)—Sale of land to a tenant holding land jointly with others—Whether pre-emptible.*

*Held*, that sub-section (1) of section 17-A of the Punjab Security of Land Tenures Act, 1953 clearly shows that sale of land comprising the tenancy of a tenant made to him by the landlord is not pre-emptible under the Punjab Pre-emption Act, 1913. The proviso under the sub-section provides that for the purpose of the sub-section, the expression "tenant" includes a "joint tenant" to whom whole or part of the land comprising the joint tenancy is sold by landowner. The reading of the proviso along with aforesaid sub-section makes it clear that the sale of the land to a tenant who is holding the land as a tenant jointly with others is not subject to pre-emption. The section gives complete protection to a tenant in possession of certain land jointly with other tenants against right of pre-emption if he purchases the whole or part of that property. The reason for enacting the proviso is that a joint tenant is in possession of every inch of land along with other joint tenants. It cannot be said that he is in possession of only that share of land which will fall to him on partition of tenancy land. Thus a sale of land to a tenant holding land jointly with others is not pre-emptible.

(Para 19)

*Regular Second Appeal from the decree of the Court of Shri R. S. Bindra, 2nd Additional District Judge, Ferozepore, dated 5th October, 1961, modifying that of Shri Rajinder Lal Garg, Sub-Judge, 1st Class, Moga, dated 22nd March, 1961, (granting the plaintiff a decree for possession by pre-emption of the suit land on payment of Rs. 3 154/10/- with costs against the defendants and further ordering that after deducting the amount already deposited by the plaintiff and the costs of the suit, the plaintiff shall pay the balance to the defendant personally or through Court on or before 15th May, 1961, failing which the suit of the plaintiff shall stand dismissed with costs) to the extent of granting the plaintiff Malkiat Singh a decree for 594/923rd share of the suit land on payment of proportionate amount and it has been conceded at the bar that the entire land is of equal value and the vendee has so far paid only Rs. 3154/10/- and he has to pay Rs. 1845/6/- to the mortgagees of the land in dispute and therefore, the preemptor shall for the time being deposit in Court only 594/923rd share of Rs. 3154/10/-, within one month*

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*from the date of the decree which will follow this judgment, if he fails to deposit the money, then his suit shall stand dismissed and further ordering that the mortgage amount of Rs. 1845/6/- shall be paid by the plaintiff Malkiat Singh and the vendee Santa Singh in ratio of 594 and 329 to mortgagees and leaving the parties to bear their own costs in both the Courts in all eventualities.*

H. L. Sarin, Advocate, with M. L. Sarin, Advocate, for the appellant.

A. L. Bahri, Advocate, for the respondent.

**JUDGMENT.**

MITTAL, J.—This judgment will dispose of Regular Second Appeals Nos. 12 of 1962 and 148 of 1962.

(2) These appeals have been filed against the judgment and decree dated October 5, 1961, of the learned Additional District Judge, Ferozepore, by which he modified the decree of the trial Court, dated March 22, 1961, and decreed the suit for possession by pre-emption partially.

(3) The facts which have given rise to these appeals are that Natha Singh was the owner of the land in dispute who sold the same for an amount of Rs. 5,000 to Santa Singh by a sale deed dated February 10, 1960. Malkiat Singh filed a suit for possession by pre-emption on the ground that he was brother's son of Natha Singh, vendor and as such had a superior right of pre-emption. He also stated that in fact Rs. 2,000 was the price fixed and paid but in order to avoid pre-emptors the amount of Rs. 5,000 was entered in the sale deed. The defendant denied the allegations of the plaintiff and contested the suit. He contended that the plaintiff had no superior right of pre-emption as he was a tenant under the vendor. He also stated that Rs. 5,000 were fixed in good faith and were paid, which was also the market price. Subsequently, it was admitted by the plaintiff that he did not contest the amount of consideration. The defendant admitted that the plaintiff was the brother's son of the vendor and had a right of pre-emption. Therefore, three issues were framed which were as follows :—

(1) Was the defendant a tenant under the vendor of the suit land at the date of the sale and its effect?

(2) Was the plaintiff a consenting party to the sale and its effect?

## (3) Relief.

(4) The trial Court held that the defendant was not a tenant under the vendor regarding the suit land at the time of sale and, therefore, the sale in question was pre-emptible. The trial Court on issue No. 2 held that the plaintiff was not a consenting party. The trial Court, therefore, decreased the suit of the plaintiff on payment of Rs. 5,000.

(5) The defendant went up in appeal before the first appellate Court, who modified the decree of the trial Court and held that the defendant was a tenant on 329 *marlas* of land out of a total area of 923 *marlas* and accepted the appeal *qua* 329 *marlas*, and affirmed decree of the trial Court regarding the remaining land, namely, 594 *marlas* on payment of proportionate sale price. Both the parties having felt aggrieved have come up in appeal against the judgment and decree of the learned Additional District Judge to this Court. The appeal by the plaintiff has been numbered as Appeal No. 12 of 1962 and that of the vendee-defendant has been numbered as 148 of 1962.

(6) Before dealing with the contentions of the learned counsel for the parties, it will be appropriate to give the details of the land which has been sold by the sale deed, dated February 10, 1960. In the sale deed, the land sold is mentioned as  $\frac{1}{4}$ th share in 184 *kanals* 12 *marlas* comprised in Khewat Nos. 1292 to 1302/1-1315 Khatauni Nos. 1734 to 1745/1 and 1759 and Khasra Nos.

15			15			16		
4,	5,	6	15,	16,	18,	23,	25,	1, 11, 10, 20, 21
1				2	1			1
23	24		15					15
1	5		3		3	3	3	8, 7
			2		2	3	1	3
15								24, 16
14,	17	13,	18	4	7	17	24	1 2
	1		1	2	1	2		1
470,	472,	473.						

(Note.—In sale deed, the total area has been given as 184 *kanals* 12 *marlas* but according to the Jamabandi, the total area

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comes to 184 *kanals* 4 *marlas*. This discrepancy, is, however, not very material).

(7) The aforesaid land can be divided into three parts, according to the Jamabandi of the year 1955-56 Exhibit P. 2, firstly, the land which is shown under the tenancy of Budh Singh son of Gurmukh Singh, secondly land under the tenancy of Santa Singh and Sucha Singh sons of Gurmukh Singh, and thirdly, land under mortgage and in possession of mortgagees. The respective Khewat and Khatauni Nos. etc. which fall under the above said categories have been given below :—

*First Category.—Land in possession of Budh Singh.*

Khewat No.	Khatauni No.	Rectangle No.	Kila No.	Area
1292	1734	15	4	2—4
			1	
			5	7—7
			6	8—0
			15	8—0
			16	8—0
			18	1—16
			2	
			23	3—16
			1	
			Total	39—3

*Second Category.—Land in possession of Santa Singh and Sucha Singh.*

Khewat No.	Khatauni No.	Rectangle No.	Kila No.	Area
1292	1735	15	25	8—0
			16	6—8
			1	
			1	
			11	8—0
			10	8—0
			20	8—0
			21	8—0
		23	1	8—0
		24	5	8—0
			Total	62—8

*Third Category.*—The remaining *Khasra* numbers measuring 83 *kanals* 1 *marla*. There is a difference in total area as given in the Jamabandi Exhibit P. 2 and the sale deed. However, I have taken total land as stated in the sale deed.

(8) Out of the aforesaid areas the sale has been effected of 1/4th share. The area sold in first category shall be (1/4th of 39 *kanals* 3 *marlas*) 9 *kanals* 15 $\frac{3}{4}$  *marlas* (195 $\frac{3}{4}$  *marlas*); in second category, (1/4th of 62 *kanals* 8 *marlas*), 15 *kanals* 12 *marlas* (312 *marlas*) and in third category (1/4th of 83 *kanals* 1 *marla*) 20 *kanals* 15 $\frac{1}{4}$  *marlas* (415 $\frac{1}{4}$  *marlas*).

(9) The first appellate Court has held that the plaintiff-appellant has superior right of pre-emption regarding the third category of land which is under mortgage and in possession of mortgagees. The learned counsel for either of the parties did not address any arguments regarding this land. As there is no contest between the parties regarding this land, therefore, the order of the first appellate Court is affirmed.

(10) Regarding second category, the submission made by Mr. Sarin, the learned counsel for the appellant, was that the respondent had pleaded in the written statement that he had been in possession of the land in dispute as a non-occupancy tenant for the last about 40 years, and, therefore, the plaintiff-appellant had no superior right of pre-emption. He urged that the first appellate Court came to the conclusion that he was in joint possession of area measuring 329 *marlas* (in fact this should be 312 *marlas*), though it was patently wrong as the said land had been shown to be in possession of Santa Singh and Sucha Singh in the Jamabandi relating to the year 1955-56 and in possession of Dalip Singh according to *Khasra Girdwari* relating to Rabi-1960. It was further submitted by him that if he was not in exclusive possession of the said land as a tenant, he could not subsequently because of the aforesaid finding turn round and say that he was entitled to the benefit of section 17-A of the Punjab Security of Land Tenures Act, 1953 (hereinafter referred to as 'the 1953 Act') even if he was a joint tenant.

(11) Mr. Bahri, the learned counsel for the respondent, submitted that he had taken the plea that he was in possession of the property in dispute, but in case it was proved that he was in possession thereof along with other persons, that will not change the nature

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of the plea. It was only the legal effect which had to be seen on account of the fact that he was in possession with other persons. In my view, the contention of Mr. Bahri must prevail. Merely because the respondent has not stated in the written statement that he was in possession of the land in dispute jointly with other tenants, is not sufficient to hold that he has not taken the plea that the suit of the plaintiff was not maintainable against him under section 17-A) of the 1953 Act. The plea that he was tenant under the vendor has been taken and if he is proved to be a joint tenant, it will not make any difference.

(12) Mr. Sarin has relied upon *Siddik Mahomed Shah v. Mt. Saran and others*, (1) wherein it has been observed that where a claim has never been made in the defence presented no amount of evidence can be looked into upon a plea which was never put forward. In that case, the appellant urged before the Judicial Commissioners that he was entitled to retain the land as it had been gifted by the respondent to him but that claim was never made in the defence presented and the Judicial Commissioners found that no amount of evidence could be looked into upon such a plea which was never put forward. Their Lordships of the Privy Council affirmed the aforesaid observations of the Judicial Commissioners, Sind.

(13) In the present case, however, the facts are absolutely different. As I have stated above, the plea has been taken though in a different form. In my view, Mr. Sarin cannot take any benefit from the observations of the Privy Council.

(14) The next submission which was made by Mr. Sarin was that the respondent did not prove that he was in possession of any piece of land in Rabi-1960 and the conclusion of the first appellate Court was erroneous. I am afraid, he also could not urge this point as this question is a question of fact which has been decided by the first appellate Court after taking into consideration the documentary as well as oral evidence. It relied upon the statement of Dalip Singh D.W. 4, who stated that the suit land was jointly cultivated by him, defendant and his uncle, Budh Singh. He further stated that they had been cultivating the same since long.

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(1) A.I.R. 1930, P.C. 57 (1).

(15) The first appellate Court came to the conclusion that the said land was being cultivated jointly by the defendant-respondent with his brothers, Sucha Singh and Budh Singh. It also took into consideration the statements of Santa Singh D.W. 1 and Puran Singh D.W. 3. Mr. Sarin has not been able to point out as to how this finding was vitiated. I have also myself seen the record and by perusal of the said documents, no other inference can be drawn except that the land aforesaid was being cultivated by the three brothers jointly. I, therefore, do not find any force in the argument of Mr. Sarin and hold that the finding arrived at by the first appellate Court is correct.

(16) Regarding first category of land, Mr. Bahri, the learned counsel for the respondent, (counsel for the appellant in Cross-Appeal No. 148 of 1962) submitted that the learned first appellate Court did not give any finding. This land has been shown to be in possession of Budh Singh in Jamabandi for the year 1955-56, and was under cultivation of Dalip Singh in Rabi-1960. He also submitted that on the basis of the same reasoning, which has been applied in the case of land mentioned in second category, this land should also be considered to be jointly in possession of the defendant-respondent along with his brothers.

(17) Mr. Sarin on the other hand submitted that it would not be a fair inference from the record. I agree with the contention of Mr. Bahri. The evidence which has been already discussed by me above under second category clearly shows that the land under this category was in joint possession of the defendant-respondent and his two brothers, as tenants.

(18) The next question that arises is that if the respondent Santa Singh is in possession of the aforesaid land jointly with his brothers, can he seek protection of sub-section (1) of section 17-A of the 1953 Act? Sub-section (1) of section 17-A is as follows :—

“Notwithstanding anything to the contrary contained in this Act or the Punjab Pre-emption Act, 1913, a sale of land comprising the tenancy of a tenant made to him by the land-owner shall not be pre-emptible under the Punjab Pre-emption Act, 1913, and no decree of Pre-emption passed after the commencement of this Act in respect of any such sale of land shall be executed by any Court :

Provided that for purposes of this sub-section the expression tenant includes a joint tenant to whom whole or part of

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the land comprising the joint tenancy is sold by land-owner."

(19) The aforesaid sub-section clearly shows that sale of land comprising the tenancy of a tenant made to him by the landlord is not pre-emptible under the Punjab Pre-emption Act, 1913, (hereinafter referred to as 'the 1913 Act'). The proviso under the said section provides that for the purpose of the sub-section, the expression "tenant" includes a "joint tenant" to whom whole or part of the land comprising the joint tenancy is sold by land-owner. The reading of the proviso along with aforesaid sub-section makes it clear that the sale of the land to a tenant who is holding the aforesaid land as a tenant jointly with others is not subject to pre-emption. The section gives complete protection to a tenant in possession of certain land jointly with other tenants against right of pre-emption if he purchases the whole or part of that property. The contention of Mr. Sarin that the tenant is protected by sub-section (1) of section 17-A of the 1953 Act only to the extent of his share in joint tenancy is not sustainable. The reason for enacting the proviso is very clear and it is this that a joint tenant is in possession of every inch of land along with other joint tenants. It cannot be said that he is in possession of only that share of land which will fall to him on partition of tenancy land.

(20) The aforesaid matter is *res intergra* and none of the counsel has been able to show any authority. There is, however, a case reported as *Partap Singh and another v. Kalu Ram* (2) in which a joint tenant instituted a suit under section 15 of the 1913 Act for possession by pre-emption on the ground that he was a tenant along with others on the land sold by the owner thereof. The relevant clause of the said section on the basis of which he claimed superior right of pre-emption is as follows:—

"15(1) (a) Fourthly, in the tenant who holds under tenancy of the vendor, the land or property sold or a part thereof."

(21) Koshal J., while deciding the case, observed that the respondent's interest as tenant extended to the entire holding and not merely to a part of it even if he could be said to be in occupation of the land as tenant-in-common with his brothers. It was further

(2) 1969 Curr. L. J. 829.



observed that each one of the three tenants, namely, the respondent and his two brothers had an interest in the whole of the disputed land whether they were occupying it as joint tenants or as tenants-in-common.

(22) Mr. Bahri also gets some support from the aforesaid observations of Koshal J. Section 17-A of the 1953 Act clearly gives protection to a tenant purchaser of the land which is in his possession along with other tenants. The phraseology of section 17-A is more favourable to the tenant than that of sub-clause fourthly of clause (a) of sub-section (1) of section 15 of the 1913 Act.

(23) In view of the aforesaid reasons, the plaintiff-appellant's suit stands dismissed regarding the land contained in first and second category and decreed regarding the land in third category on payment of proportionate price.

(24) For the reasons recorded above, I modify the aforesaid decree of the first appellate Court accordingly. The plaintiff appellant should deposit the price of the land within two months from today, if he has not done so earlier. In the circumstances of this case, I leave the parties to bear their own costs.

N.K.S.

LETTERS PATENT APPEAL

*Before Harbans Singh, C.J. and Bal Raj Tuli, J.*

THE AKAL TRANSPORT CO. (P.) LTD., LUDHIANA,—Appellant.

*versus*

THE DISTRICT JUDGE, ETC.,—Respondents.

Letters Patent Appeal No. 43 of 1972.

August 28, 1972.

*Motor Vehicles Act (IV of 1939)—Sections 2(28A), 48(3)(XXI) and 57(8)—Extension of route beyond one of the two termini—Section 57(8)—Whether applicable.*

*Held, that from the definition of the word "route" as given in section 2(28A) of Motor Vehicles Act, 1939, it is clear that if one of*