APPELLATE CIVIL

Before Tek Chand and Inder Dev Dua, JJ.

BASTI,—*Appellant*

versus

JAI CHAND AND OTHERS,—*Respondents*

Regular Second Appeal No. 520 of 1956

1962

Jan., 22nd

Punjab Security of Land Tenures Act (X of 1953)—Section 17—Matters to be proved by the tenant pre-emptor stated—Burden to prove that the land sold is not comprised in the reserved area—Whether lies on the pre-emptor.

Held, that the following three conditions have to be satisfied by the tenant seeking pre-emption under section 17 of the Punjab Security of Land Tenures Act, 1953, before he can exercise his right to pre-empt sale, etc., of the land:—

(i) That he has been in continuous occupation of the land comprised in his tenancy for a period exceeding four years on the date of the sale;

(ii) That the descendants of the vendor's grandfather are not asserting their prior right to pre-empt; and

(iii) That it is in respect of the land other than the land comprised in the reserved area of the landowner.

It is not correct to say that once the pre-emptor proves the first two conditions, he is entitled to a decree by way of pre-emption except where the defendant successfully shows that the area in question is within the reserved area. The pre-emptor has to show that the sale of land was pre-emptible by proving that he possessed the requisite qualifications, and further, that the land was such with respect to which the suit for pre-emption could be instituted at his instance as the contest is between him and the vendee and not between him and the vendor.

Case referred by the Hon'ble Mr. Justice D. K. Mahajan, on 22nd September, 1961, to a Division Bench for the decision of the case and the case was finally decided by a Division Bench, consisting of Hon'ble Mr. Justice Tek Chand and Hon'ble Mr. Justice Dua, on 22nd January, 1962.

Second Appeal from the decree of the Court of Shri Madan Mohan Singh, Additional District Judge, Hissar, dated the 25th day of May, 1956, reversing that of Shri Harnam Singh, Senior Sub-Judge, Hissar, dated the 11th November, 1959, dismissing the plaintiff's suit and allowing costs to the appellants in appeals.

ABNASHA SINGH, ADVOCATE, for the Appellant.

T. S. MUNJRAL AND S. C. SIBAL, ADVOCATES, for the Respondents.

JUDGMENT.

Tek Chand, J.

TEK CHAND, J.—This is a regular second appeal which has been referred by Mahajan, J., for disposal by a Division Bench. The facts of this case are that Sadhu Singh and Daulat Singh, defendants 5 and 6, two brothers, sold land measuring 119 *bighas* 7 *biswas* to Jai Chand and three others, defendants 1 to 4, for consideration stated to be 10,000. This land was under the tenancy of the plaintiff Basti. The sale was effected on 15th of November, 1954, and Basti asserting his right of pre-emption under section 17 of the Punjab Security of Land Tenures Act, 10 of 1953, instituted a suit on 15th of March, 1955, for pre-emption. On 11th November, 1955, the suit was decreed and the genuine consideration was held to be Rs. 8,000. The vendees appealed and the Additional District Judge allowed their appeal holding that the right of pre-emption as claimed by the plaintiff had not been substantiated. From this decree the present regular second appeal was filed on 23rd of June, 1956. The regular second appeal came up before Mahajan, J., on 15th of February, 1961. Mahajan, J., expressed the view that it was not possible to decide this case without determining the question, which had not been properly determined by the Courts below, as to whether the vendors were "small landlords" within the meaning of section 17 of the Act. The learned Single Judge remanded the case to the trial Court directing that Court to submit a report after enquiring whether at the date of the sale the vendors were possessed of the

Basti v. Jai Chand and others

Tek Chand, J.

land more than the permissible limit under the provisions of the Act. According to the report the landlords, i.e., the vendors, were not found to be "small landlords". On that occasion the attention of the learned Single Judge was drawn to the Single Bench decision of Gosain, J., in *Subedar Shangara Singh* v. *Indraj and others* (Regular Second Appeal No. 390 of 1960), decided on the 27th of September, 1960. As Mahajan, J., had expressed doubts as to the correctness of that decision this matter has been referred to the Division Bench.

On the pleadings of the parties several issues were framed including the first issue which is as under:—

(1) Is the plaintiff's right of pre-emption superior to that of the defendants?

This is an appropriate stage to deal with the relevant provisions of Punjab Act 10 of 1953, which have to be considered. Sub-section (2) of section 2 defines "small landowner" as a "landowner whose entire land in the State of Punjab does not exceed the 'permissible area'." 'Permissible area' is defined in the succeeding sub-section as meaning thirty standard acres and with the other portions of this definition which covers other contingency we are not concerned. Sub-section 4 defines 'reserved area' as meaning the area lawfully reserved under the Punjab Tenancy (Security of Tenure) Act, 1950 (Act 22 of 1950), as amended by President's Act of 1951 or under this Act. The relevant portion of section 5 runs as under:—

"5. (1) Any reservation before the commencement of this Act shall cease to have effect and subject to the provisions of sections 3 and 4 any landowner who owns land in excess of the permissible area may reserve out of the entire land held by him in the State of Punjab as land-owner, any parcel or parcels not exceeding the permissible

Basti v. Jai Chand and others — Tek Chand, J.

area by intimating his selection in the prescribed form and manner to the patwari of the estate in which the land reserved is situate or to such other authority as may be prescribed;

Provided that * * * * * * * * * *.

(2) * * * * *

(3) A landowner shall be entitled to intimate a reservation within six months from the date of commencement of this Act, and no reservation so intimated shall be varied subsequently whether by act of parties or by operation of law, save with the consent in writing of the tenant affected by such variation or until such time as the right to eject such tenant otherwise accrues under the provisions of this Act."

Thus according to sub-section (3) the landlord had to intimate a reservation by 15th of October, 1953, the date of commencement of the Act being 15th of April, 1953. In passing it may be mentioned that sections 5-A, 5-B and 5-C were inserted by section 3 of the Punjab Security of Land Tenures (Amendment) Act, 46 of 1957, and the effect of these provisions was that in the case where land was situated in more than one Patwar Circle. an intimation by the landowner or tenant, of reservation, was to be made within a period of six months from the commencement of the Amending Act of 1957. Section 17 is reproduced below *in extenso*:—

[His Lordship read section 17 and continued:]

This section confers a right upon a tenant of landowner other than the "small landowner" to pre-empt sale. This right is exercisable under the following condition:

Basti
v.
Jai Chand and others

Tek Chand, J.

> "The pre-empting tenant has been in continuous occupation of the land comprised in his tenancy for a period exceeding four years on the date of the sale of the land or foreclosure of the right to redeem the land".

This right of pre-emption shall be in preference to the rights of other pre-emptors as provided in the Punjab Pre-emption Act, 1913 (Act I of 1913), except, the descendants of vendor's grandfather, who would be entitled to pre-empt the sale or foreclosure of the land, other than the land comprised in the reserved area of the landowner. This shows that the right of the tenant to pre-empt under section 17 follows and does not precede the right of the descendants of vendor's grandfather. It is further required that this right of pre-emption is in respect of the land other than that comprised in the reserved area of the landowner. These three conditions have to be satisfied by the tenant seeking pre-emption under section 17 before he can exercise his right to pre-empt sale, etc., of the land.

In this case the plaintiff appellant satisfies two out of the three requirements, namely, that he has been in continuous occupation of the land comprised in his tenancy for a period exceeding four years on the date of the sale, and also that the descendants of the vendor's grandfather are not asserting their prior right to pre-empt. In order to establish the plaintiff's right to pre-empt he has further got to show that it is in respect of the land other than the land comprised in the reserved area of the landowner. This he has not been able to substantiate. The contention of the learned counsel for the plaintiff-appellant is that, once he has satisfied the first two requirements, he is entitled to a decree by way of pre-emption except where the defendant has successfully shown that the area in question is within the reserved area. In other words the argument is that though there are three requirements, on the satisfaction of which, a decree for pre-emption

Basti
v.
Jai Chand and others
———
Tek Chand, J.

can be passed, nevertheless, compliance with the first two requirements should suffice so far as the plaintiff tenant is concerned. He is liable to be defeated if the defendant can show that the land in suit falls within the 'reserved area'. The reason for this contention advanced by the learned counsel is that the land-owner vendor would alone know what area he has reserved and when was reservation made by him, i.e., whether within the period prescribed by the statute or beyond that period. I am not convinced of the soundness of this contention. In this case the contesting respondents whom the plaintiff has to defeat are not the vendors but the vendees. The learned counsel has placed reliance upon section 106 of the Indian Evidence Act and on Order VI, rule 13 of the Code of Civil Procedure, and to my mind, neither of the provisions are applicable and their scope has been entirely misconceived. Section 106 lays down a rule of burden of proof on a person when any fact is especially within the knowledge of that person. It cannot be said that the fact that a particular area is comprised in the reserved area of the land-owner, or not, is especially within the knowledge of the respondent-vendees. Order VI rule 13 dispenses with proof, on allegation of fact which the law presumes in favour of the parties as to which the burden of proof lies upon the other side. Section 3 of the Act comprises reservation of land by small land-owner not exceeding in aggregate the permissible area. A land-owner has to reserve it by intimating his reservation in the prescribed form and manner to the Patwari of the estate in which the land reserved is situated, or to such other authority as may be prescribed, before expiry of six months from possession of the land so sold. It is open to the tenant to inspect the public record and to find out if the area in his occupation was reserved by the land-owner or not. After a careful consideration of the contentions of the learned counsel for the plaintiff-appellant, I cannot persuade myself to accept his view-point, that the plaintiff tenant is entitled to a decree by way of pre-emption without adducing evidence that the land in suit falls outside the reserved area. In

Basti v. Jai Chand and others

Tek Chand, J.

my view it is for the plaintiff to allege and then to prove that the pre-emptive decree is being sought in respect of an area other than the reserved area. I agree with Justice Gosain, and I am of the view that the plaintiff pre-emptor has to show that the sale of the land was pre-emptible by proving that he possessed the requisite qualifications, and further, that the land was such with respect to which the suit for pre-emption could be instituted at his instance. One important condition which had to be substantiated before a decree for pre-emption could be passed remains unsatisfied. That being the case in my view the plaintiff cannot succeed.

It has been urged on behalf of the plaintiff, that he should be given now an opportunity to lead evidence in order to show, that the area in his occupation and the subject-matter of the suit was other than the reserved area. Plaintiff's counsel says that Justice Gosain in that case had given an opportunity to the plaintiff by remanding the case for determination of this question after giving opportunity to the parties to lead their evidence. I do not think that the direction given in that case is a precedent of a sufficiently persuasive character for passing a similar order. The discretion exercised by a Court depends upon the particular facts in each case. In my view there does not appear to be any justification for giving to the plaintiff a further opportunity at this stage. The first issue is sufficiently comprehensive and section 17 of the Act contains no ambiguity. This case has once been remanded by the learned Single Judge and on that stage the plaintiff did not ask for an opportunity to lead evidence to show, that the land in suit was not included in the reserved area. I do not think that this Court will be justified in granting the indulgence prayed for in this case.

This appeal is devoid of merit and is, therefore, dismissed. In the circumstances of this case, however, the parties are left to bear their own costs of this appeal.

Basti
v.
Jai Chand and others

Dua, J.

DUA, J.—I agree with the reasoning and the conclusions of my learned brother Tek Chand J. that the appeal is devoid of merit and deserves to be dismissed. I, however, wish to add a few words of my own not because I hope in any manner to improve upon the reasons on which the judgment is based but because of the importance of the question raised, one learned Single Judge of this Court (D. K. Mahajan J.) having expressed definite doubts about the correctness of the views expressed by another Single Judge of this Court (Gosain J).

The right of pre-emption has quite frequently been described in decided cases to be a piratical right; it operates as a clog on the right of the owner of property to transfer it to whomsoever he likes. A pre-emptor is thus considered an aggressor in the sense that he wishes to dislocate and dislodge the vendee to whom the owner of the property has lawfully transferred it. It is thus considered essential—and in my opinion quite rightly—for a pre-emptor to prove that the sale which he wants to pre-empt is of such property which is subject to the right of pre-emption vesting in the claimant. The Supreme Court has described the right of pre-emption to be a weak right which is not looked upon with favour with the result that the Courts are disinclined to go out of their way to help a pre-emptor. (See *Radhakishan Laxminarayan* v. *Shridhar Ramchandra* Civil Appeal No. 167 of 1955, decided by a Bench of five Judges on 23rd August, 1960).

Section 17 of the Punjab Security of Land Tenures (Amendment) Act, 46 of 1957, which confers the right of pre-emption on the claimants in the case before us, has already been reproduced *in extenso*. A plain reading of this section clearly suggests that it is only a tenant of a land-owner other than a small land-owner on whom the right of pre-emption has been conferred provided he satisfies two conditions mentioned therein. But before the question of compliance with these conditions arises the basic pre-requisite for the exercise of this right is the existence of the sale or foreclosure of land other than the land comprised in the

Basti v. Jai Chand and others

Dua, J.

area of the land-owner reserved in the manner prescribed in the Act. It is only in respect of such a sale, etc., that the right of pre-emption has been created. It is thus such a sale or foreclosure alone on which the right created by this section can operate, of course subject to the two conditions mentioned above and also to other provisions of this section.

But then it is contended that the plaintiff-pre-emptor is under no obligation to establish that the sale in respect of which the right is being sought to be exercised falls within the purview of section 17, for, this is a mater of which a pre-emptor may not be aware. In support of this contention, assistance has been sought from the provisions of section 106 of the Indian Evidence Act.

Now, the dispute in the pre-emption suit normally lies more actively and effectively between the pre-emptor and the vendee because it is the vendee who is being sought to be dislocated or disturbed by the pre-emptor; and of the two, the vendee can hardly be considered to be a person who has more special knowledge of the fact whether the land comprised in the sale is other than the reserved area of the vendee. But this apart, section 106 of the Indian Evidence Act contains merely one of several rules of evidence dealing with the problem of the burden of proof which is the subject-matter of Chapter VII of the Indian Evidence Act. These rules, as I understand them, are no more than statements of rebuttable presumptions of law and do not appear to be necessarily exclusive or independent of each other as if operating in secluded or exclusive spheres. Courts have in the exercise of their judicial judgment to see as to which of these rules can consistently with the dictates of justice and on the facts and circumstances of a given case operate together or separately in order to impose the burden of proof on the contesting litigants, Chapter VII begins with section 101 which lays down that whoever desires the Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove the existence of those facts. In accord-

ance with this rule, it is the plaintiff in the case before us who desires the Court to give judgment as to his right to pre-empt the sale in question with the result that he must prove that the sale is such as attracts the right of pre-emption conferred on him by virtue of section 17 of Act 46 of 1957. Sections 102 and 103 which bring out some other aspects of the rule embodied in section 101 and further support to the view that the plaintiff must prove the existence of a sale which he is entitled to disturb by insisting that his name should be substituted for that of the vendee. As to the quantum of evidence which may in a given case be sufficient to discharge this onus that is a question which does not arise in the instant case and which has, therefore, not been convassed at the Bar.

Basti
v.
Jai Chand and others

Dua, J.

Section 106 on which reliance has principally, if not solely, been placed by the appellant embodies a general rule that a party wishing to establish his case by a fact within his special knowledge or of which he has specially cognisance, must prove it. This rule seems to me to constitute one of the exceptions to the general rule that the burden is on the party who substantially asserts the affirmative; this rule may in certain circumstances even prevail against presumptions of law. The rule embodied in this section, however, does not seem to shift the onus or override or prevail over and in preference to the rules laid down in sections 101 to 103. It certainly does not by any means relieve the plaintiff of the initial burden of bringing himself within the essential terms of the statute on which he relies for his title or preferential claim to the property sold. The obligation to make out his title or a preferential right to purchase the property would have to be discharged by him even if the negative is to be proved for establishing the right claimed. It would, therefore, in my opinion, be incumbent on the plaintiff-pre-emptor also to prove the basic fact which is the foundation of his right, that the sale is of such land as is dealt with in section 17 and in respect of which he has been given a right

Basti
v.
Jai Chand and
others

Dua, J.

to oust the vendee and to claim title to the property in his place. This basic fact is not self-evident and, therefore, has to be established by the person who would otherwise fail. It would thus appear that the view expressed by Gosain, J., in *Subedar Shangara Singh* v. *Indraj and others*, Regular Second Appeal No. 390 of 1960 is quite correct and it is difficult to find fault with it.

B.R.T.

APPELLATE CIVIL

Before Tek Chand and Inder Dev Dua, JJ.

JAGDEV SINGH AND OTHERS,—*Appellants*

versus

SURAT SINGH AND OTHERS,—*Respondents.*

Regular First Appeal No. 122 of 1955.

1962

Jan. 23rd

*Punjab Village Common Lands Regulation Act (XVIII of 1961)—Sections 2(g), 3 and 4—*Shamilat-deh *over which adverse possession claimed by a co-sharer for more than 12 years—Whether vests in the Panchayat—Adverse possession by a co-sharer—When effective—Interpretation of statutes—Interpretation of "including" and "excluding" clauses—How to be made.*

Held, that the land which originally constituted *shamilat-deh* and over which a co-sharer claims to have been in adverse possession falls within the purview of the statutory definition, and it is so notwithstanding any decree or contract, etc., to the contrary. Section 3(1) of the Punjab Village Common Lands Act, 1961, suggests the retrospective operation of the definition of *shamilat-deh* as contained in clause (g) of section 2, inasmuch as the *shamilat* law before the enforcement of Punjab Act No. 18 of 1961, and this Act after its commencement are deemed always to have applied to all lands which are *shamilat-deh* as so defined. Section 4 vests in the village Panchayat all rights, title and interests in the land included in *Shamilat-deh* which has not already vested in a Panchayat under the *shamilat* law. Certain rights described in sub-section (3) of section 4 have been saved from the statutory vesting effected by sub-sections (1) and (2) of this section. Sub-section (2) of section 3 also incorporates an exception to sections 3(1) and 4 and the rights, title and interests excluded from the statutory definition of "*shamilat-deh*" as contained in section 2(g) has been re-vested in the original owners.