

Munshi and another v. Hari Singh, (Mehar Singh. C.J.)

(6) No other point having been argued in this case, I allow this writ petition partially to the extent that the provision for reservation of 240 *kanals* of land in the consolidation scheme of the village is set aside and annulled and the State Government is directed to bring the said scheme in accord with the requirement of law laid down in this respect by their Lordships of the Supreme Court in *Bhagat Ram and others v. State of Punjab and others* (1). So far as relief claimed against respondents Nos. 2 to 4 is concerned, the petition is dismissed. In the circumstances of the case, there is no order as to costs.

K.S.K.

APPELLATE CIVIL

Before Mehar Singh, C.J., and R. S. Sarkaria, J.
MUNSHI AND ANOTHER,—Appellants.

versus

HARI SINGH,—Respondent.

Letters Patent Appeal No. 156 of 1964

February 13, 1969.

Transfer of Property Act (IV of 1882)—Section 119—Property subject to right of pre-emption—Whether covered by the expression “any defect in the title”—Section 119—Whether attracted.

Held, that the right of pre-emption being a burden running with the land, the enforcement of the same leads to the deprivation of possession of the land so far as the person purchasing it is concerned or the person taking it in exchange from him is concerned. Because possession of land is thus lost in the exercise of the right, which runs as a burden with the land, it is within the expression ‘any defect in the title’ as that is used in section 119 of the Transfer of Property Act. The section is, therefore attracted.

(Para 7)

Letters Patent Appeal under Clause 10 of the Letters Patent from the decree of the Court of the Hon’ble Mr. Justice S. B. Kapoor, dated the 23rd day of January, 1964, in R.S.A. 545 of 1961, reversing with costs that of Shri Brijindra Singh Sodhi, Additional District Judge, Karnal, dated the 17th December, 1960, and restoring the decree of Shri Shamsher Singh Kanwar, Extra Sub-Judge, IV Class, Karnal, dated the 26th February, 1960, granting the plaintiff a decree for possession of the land in dispute.

D. C. GUPTA, ADVOCATE, for the Appellants.

H. L. SARIN, SENIOR ADVOCATE, with H. S. AWASTHY AND A. L. BEHL, ADVOCATES, with him, for the Respondents.

(1) 1967 P.L.R. 287.

JUDGMENT

MEHAR SINGH, C.J.—An area of land measuring 8 Bighas and 14 Biswas was purchased by Munshi and Kola, defendants, by a registered sale deed of May 3, 1956, for Rs. 700 from Chandan, father of Hari Singh plaintiff (now respondent). The defendants had also purchased another area of land from one Kundan.

(2) In a suit by the plaintiff to pre-empt the sale of land by his father and for declaration that the sale was not binding on him for want of consideration and legal necessity, there was a compromise between the plaintiff and the defendants whereunder on payment of Rs. 700 by the plaintiff to the defendants, the former was to have the land subject of the suit. The decree was for possession of the land and of the date of August 14, 1956. By the time the plaintiff came to execute that decree and obtain possession of the land under the decree consolidation of holdings had taken place in the village. In lieu of the lands which the defendants had—land purchased by them from the plaintiff's father, land purchased by them from Kundan, and land already with them, they were allotted, on repartition, new area of land. In the execution of the decree of August 14, 1956, there was again a settlement between the plaintiff and the defendants whereunder the plaintiff was given land, described in paragraph 3 of the plaint of his suit, by the defendants, and he took possession of that land. The fact of the matter was that that land had been allotted to the defendants in lieu of the land purchased by them from Kundan.

(3) The second sale in favour of the defendants from Kundan was pre-empted by one Lajjya Ram, who obtained a decree for possession of the land referred to in that sale. The consolidation of holdings having taken place in the village, the land that was allotted to the defendants and in lieu of the land purchased from Kundan was the land described in paragraph 3 of the plaint by the plaintiff. Lajjya Ram having complied with the terms of the pre-emption decree sought possession of the land under that decree and obviously he followed the land allotted to the defendants, as described in paragraph 3 of the plaintiff's plaint, in lieu of the land of the defendants purchased by them from Kundan. By the time Lajjya Ram came to enforce his decree, that piece of land was in the possession of the plaintiff pursuant to compromise and settlement between the plaintiff and the defendants in execution of the decree of August

14, 1956. The plaintiff was subsequent transferee of that land which was subject to the right of pre-emption of Lajjya Ram and so Lajjya Ram succeeded in obtaining possession of that land from the plaintiff. In this way while the plaintiff succeeded in his pre-emption suit, although on the basis of the compromise between the parties and having paid Rs. 700 to the defendants he gained title to the land subject to his pre-emption suit, but, in the circumstances as have been detailed above, he ultimately came to lose possession of the land that he obtained under the pre-emption decree in his favour. He lost that land because the land given by the defendants to him was subject to the right of pre-emption of Lajjya Ram. It has been nobody's case at any stage that the plaintiff was made aware by the defendants that that land was subject to the right of pre-emption of Lajjya Ram which, if enforced by the last-mentioned person, would result in the plaintiff being deprived of the possession of the land, and thus rendering the decree in his favour for possession of land, because of his pre-emptive right, meaningless and infructuous.

(4) It was after the plaintiff had thus lost the land of which the possession had been obtained by him under the pre-emption decree in his favour of August 14, 1956, that the plaintiff brought the suit, giving rise to this appeal, for recovery of the land from the defendants which obviously the defendants secured on repartition in consolidation of holdings in their village in lieu of the land which had been sold to them by the plaintiff's father and of which the sale had been pre-empted by the plaintiff. The plaintiff succeeded in the trial Court, but on appeal by the defendants, the Court of first appeal dismissed the suit of the plaintiff on the ground that the original piece of land in exchange of which the defendants had made over the land mentioned in paragraph 3 of the plaintiff's plaint no longer existed. In second appeal by the plaintiff the learned Single Judge has by his judgment and decree of January 23, 1964, reversed the decree of the Court of first appeal and restored that of the trial Court, decreeing the suit of the plaintiff. The learned Judge has based his judgment on section 119 of the Transfer of Property Act and in the view that the land purchased by the defendants from Kundan was subject to the right of pre-emption of Lajjya Ram and the land that the defendants obtained in repartition as a result of consolidation of holdings in the village in lieu of that land was thus also subject to that right of pre-emption of Lajjya Ram, which right of pre-emption of Lajjya Ram was an

infirmity attaching to the title of the defendants in the land. The infirmity which attached to the land originally purchased by the defendants from Kundan continued to attach to the land obtained by them in repartition on consolidation of holdings. So the case, according to the opinion of the learned Judge, came within the scope of section 119 of the Transfer of Property Act, which section is to this effect—"If any party to an exchange or any person claiming through or under such party is by reason of any defect in the title of the other party deprived of the thing or any part of the thing received by him in exchange, then, unless a contrary intention appears from the terms of the exchange, such other party is liable to him or any person claiming through or under him for loss caused thereby, or at the option of the person so deprived, for the return of the thing transferred, if still in the possession of such other party or his legal representative or a transferee from him without consideration.

(5) In this appeal by the defendants under clause 10 of the Letters Patent from the judgment and decree of the learned Single Judge, what is urged on their behalf by the learned counsel is that section 119 of the Transfer of Property Act is only attracted when there is defect in the title to the property, but a property subject to a right of pre-emption is not a defect in the title to that property. The learned counsel has referred to *Dhani Nath v. Budhu* (1), in which Sir Meredyth Plowden, Senior Judge, held that "the subjection of village land to rights of pre-emption is a burden on the land in the hands of every holder of the land, and restricts his freedom of transfer, but from this burden no right to or interest in the land so subject arises in any other person." This dictum of the learned Senior Judge was approved by their Lordships of the Supreme Court in *Audh Behari Singh v. Gajadhar Jaipuria* (2), and in *Sundar Singh v. Narain Singh* (3). So a right of pre-emption is not a right to or interest in land, but it is a burden on the land and their Lordships in *Audh Behari Singh's case* (2), observed that such burden on the land runs with the land and can be enforced by or against the owner of the land for the time being. The learned counsel has urged that the right of pre-emption not being a right to or interest in land, and even though it is burden on the land running with it, is not defect in title to the land. He seeks further support for his arguments from *Ghulam Jilani v. Imzad Husain* (4).

(1) 136 P.R. 1894.

(2) A.I.R. 1954 S.C. 417.

(3) A.I.R. 1966 S.C. 1977.

(4) (1882) 4 Allah. 357.

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In that case the defendant had sold land to the plaintiff and one of the conditions of sale was—"Should any person claim as a co-sharer or proprietor of the property, and assert his claim against the purchaser, or raise any dispute of any kind, or if from any unforeseen cause the purchaser be deprived of the possession of the property or any portion thereof, or his possession thereof is disturbed in any way, then I, my heirs and assigns, shall be liable for the purchase-money, the profits of the property, and the costs of litigation." The sale was successfully pre-empted by a co-sharer of the defendant. On that the plaintiff, who had defendant the pre-emption suit, sued the defendant to recover costs incurred by him in defending that pre-emption suit in the wake of the condition of sale as reproduced above. The question was whether the claim was covered by that condition. The learned Judges held that it was not so covered. On the decision itself there is nothing that supports the arguments of the learned counsel in the present case. He, however, refers to the observation of Tyrell, J., to this effect—"It (guarantee clause) refers in our opinion to flaws or defects in the title conveyed by the vendor, and is not applicable to a loss accruing to the vendee by reason of his disqualification to buy." So the plaintiff's claim was dismissed. No doubt the learned Judge had used the expression 'flaws or defects in the title' in his observation, but the ratio of the decision is no more that the guarantee clause in the sale deed did not cover the claim of the plaintiff in that case. In the circumstances, the observation of the learned Judge is not really of assistance to the argument of the learned counsel.

(6) The learned Single Judge has in his judgment observed that a right of pre-emption is an infirmity in the title of the vendor of property subject to such a right, following in this respect *Audh Behari Singh's case* (2) This he had also held in *Sunder Singh and others v. Narain Singh and others* (5) There was an appeal in *Sundar Singh's case* to the Supreme Court and that is the case of *Sunder Singh v. Narain Singh* (3) already referred to. In their judgment their Lordships do not use the word 'infirmity' in the title of the vendor of the land, which land on sale is subject to a right of pre-emption, The reply on the side of the plaintiff is that in view of the decisions of their Lordships of the Supreme Court in the two cases already cited, as a right of pre-emption is a burden running with the land, it is a defect in title of the land. The learned counsel has pointed out that in

(5) I.L.R. (1961) 2 Pb. 882.

section 119 of the Transfer of Property Act the expression used is 'any defect in the title', as compared to the expression 'any material defect in the property or in the seller's title' as used in section 55, paragraph 1(a), of the same Act. He has pressed that this is not a case in which the question of material defect in the title of the defendants in the land is in question, but what is in question is any defect in their title. So he says that the burden of the right of pre-emption running with the land is within the ambit and scope of the expression 'any defect in the title' as used in section 119 of that Act. He has referred to *Salabat v. Abdūl Rahman* (6), but in that case the learned Judges proceeded on the basis that there was defect in title and the report does not clarify whether such defect was taken to have arisen in consequence of exercise of a right of pre-emption, even though that was also a case of exchange. So this case is not helpful to the plaintiff.

(7) The right of pre-emption being a burden running with the land, the enforcement of the same leads to the deprivation of possession of the land so far as the person purchasing it is concerned or the person taking it in exchange from him is concerned. Because possession of land is thus lost in the exercise of the right, which runs as a burden with the land, it appears to me that it is within the expression 'any defect in the title' as that is used in section 119 of the Transfer of Property Act. I find support for this approach from *Ballard v. Way* (7). In that case leasehold houses were sold by auction, which were described in the particulars and conditions of sale as a well-secured rental with reversionary interest, and as an eligible investment. By the provisions of a local Act, for the establishment of the South London Market Company, the Company were authorised to treat for, purchase, and take the premises in question for the purposes of the Act. No notice was given of this liability in the particulars and conditions of sale; and the jury found as a fact that the vendee had no notice of the liability. The conditions contained no express warranty of title. Parke, B., observed that "It is impossible that there can be a good title when the property is subject to such a liability as this", that is to say, the liability to purchase by the Company in that case. It appears to me that the right of purchase there was something analogous to the right of purchase of pre-emptor who has a right to pre-empt a sale. Such a liability was held not to give a good title to

(6) (1917) 41 I.C. 248.

(7) (1836) 15 English Reports 540

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the property. In the present case, the plaintiff had not been informed or given notice of the liability of the property given to him being subject to a loss to him because of another person's right of pre-emption, under which right the latter could obtain possession of the property thus depriving the plaintiff of the same. This was, therefore, a defect in title to the land of the defendants given by them to the plaintiff, who, in exercise of his own right of pre-emption, was entitled to have the land pre-empted by him free from any such defect and, on consolidation of holdings, to have the land allotted in repartition in lieu of the land pre-empted by him. Instead of giving him land which had been obtained by the defendants in lieu of the land pre-empted by the plaintiff and free from any further liability of purchase by somebody else in exercise of his right of pre-emption, the plaintiff was given by the defendants land which was in fact liable to such a defect, and, in consequence, the plaintiff came to lose the possession of the land thus given to him by the defendants. In the circumstances the decision of the learned Single Judge is not open to exception.

(8) In the result, this appeal fails and is dismissed with costs.

RANJIT SINGH SARKARIA, J.—I agree.

K.S.K.

APPELLATE CIVIL.

Before Prem Chand Pandit, J.

KARTAR SINGH AND ANOTHER,—*Appellants.*

versus

AJMER SINGH AND ANOTHER,—*Respondents.*

Second Appeal From Order No. 79 of 1968

February 18, 1969.

Punjab Pre-emption Act (I of 1913)—Section 22—Misapprehension on the part of a pre-emptor regarding the date of deposit of 1/5th of the value of the property to be pre-empted—Pre-emptor applying for extension of time—Trial Court rejecting the plaint for non-deposit without passing separate order on the application—Appellate Court extending time for deposit—Such Court—Whether acts illegally.

Held, that an appellate Court can at any time exercise the powers conferred on the trial Court under sub-section (1) of section 22 of Punjab Pre-emption Act 1913. It can also extend the time for the deposit of 1/5th of the probable value of the property sought to be pre-empted. It is only when the plaintiff-pre-emptor fails to make the required deposit either within the original time fixed or within the extended time allowed by the