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Shamsher Bahadur, J.

On a plain reading of these provisions of the statute, therefore, the view taken by the learned Financial Commissioner appears to be correct and the estate of the testator being available, the payment of the gift tax is to be the first charge on it under section 30. Though there is no illegality in levying the gift tax only on the estate which has come into the hands of the first petitioner and his wife, the Assessing Authority should have made all the legatees under the will of Dr. Kartar Singh liable for payment of the gift-tax. It seems, no effort has been made to realise the arrears of the gift-tax from the other legatees. It is to be hoped that the legatees who are equally liable would be made to share the burden of the gift-tax. It is not, therefore, surprising that Daljit Singh Grewal, who is also a legatee under the will, has chosen to support the position of the donees some of whom are his own sons. It is only when it is found that the gift-tax cannot be realised from all the legatees that the property of 'Inder Niwas' should alone be put to auction. With these observations, I would dismiss this petition making no order as to costs.

B. R. T.

LETTERS PATENT APPEAL

Before D. Falshaw, C.J. and H. R. Khanna, J.

BASAWA SINGH,—*Appellant.*

versus

SANTA SINGH AND ANOTHER,—*Respondents.*

Letters Patent Appeal No. 311 of 1962.

1965

November, 4th

Punjab Pre-emption Act (I of 1913)—S. 27—Pre-emptor found entitled to pre-empt a part of the land—Whether liable to pay the full price.

Held, that the right of pre-emption is a right of substitution, and if plaintiff is found to have a superior right of pre-emption only in respect of a part of the property sold and gets a decree for possession in respect of that part, it would be only to the extent of that part of the property sold that there would be substitution of the plaintiff in place of the vendee. As substitution would be confined only to a part of the property sold, it seems but fair that the plaintiff should be made to pay the price which represents that part of the property in respect of which he is substituted. It is no doubt true that a pre-emptor must take the sale as a whole, and in case he is entitled to pre-empt the whole of the property sold, he cannot be allowed to pick and choose

and pre-empt only a part of the property sold which he finds to be profitable or convenient and to leave the other property, because this would militate against the rule which forbids the partial exercise of the right of pre-emption. On the other hand, it also seems equally true that where a vendee has included in the sale-deed some property in respect of which the plaintiff has no right of pre-emption and some other in respect of which he has such a right and the Court passes a decree regarding property about which the plaintiff has a right of pre-emption, it would not be in consonance with principles of justice and equity to burden the plaintiff with payment of the full sale price including the price for the portion of the property in respect of which his suit is being dismissed.

Letters Patent Appeal under Clause X of the Letters Patent of the High Court from the judgment of the Hon'ble Mr. Justice Mehar Singh, dated 21st December, 1961, passed in R.S.A. No. 312 of 1959 (Santa Singh Vs. Basawa Singh, etc.):

K. C. NAYAR, ADVOCATE, for the Appellant.

A. L. BAHRI, ADVOCATE, for the Respondents.

JUDGMENT

KHANNA, J.—This is an appeal under clause X of the Letters Patent by Basawa Singh plaintiff against the judgment and decree of learned Single Judge, whereby he partly allowed the regular second appeal filed by Santa Singh defendant. Khanna, J.

The brief facts of the case are that Jawala Singh defendant No. 2 sold land comprised in Khewat Nos. 18, 17/64 and 311 in favour of Santa Singh defendant No. 1 by means of a registered sale-deed, dated 28th February, 1957 for Rs. 3,500. Basawa Singh plaintiff filed the present suit for possession of that land by pre-emption on payment of Rs. 1,500 or such other sum as might be found by the Court to be due on the ground, *inter alia*, that he was a co-sharer in the land in suit and as such he had a superior right of pre-emption. The trial Court dismissed the suit on the finding that the plaintiff did not have any superior right of pre-emption. On appeal, the learned District Judge found that the plaintiff was a co-sharer in Khewat No. 18, measuring 8 Kanals 17 marlas, and as such had a superior right of pre-emption. As regards the sale price, it was found that out of Rs. 3,500, Rs. 3,300 had been paid in cash before the Sub-Registrar. The learned District Judge was not

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satisfied about the payment of Rs. 200 which was stated to have been paid as earnest money. Rs. 3,300 was also held to be the market value of the land. Decree for possession by pre-emption in respect of the whole of the land on payment of Rs. 3,300 was awarded in favour of the plaintiff. On second appeal by Santa Singh, defendant-vendee, the learned Single Judge upheld the finding of the First Appellate Court that the plaintiff was a co-sharer of the land comprising Khewat No. 18, and as such had a superior right of pre-emption in respect of that land. As the plaintiff was not the co-sharer of the land comprised in Khewat Nos. 17/64 and 311, his suit in respect of that land was dismissed. Question then arose as to what should be the amount on payment of which the plaintiff should be granted decree in respect of land comprised in Khewat No. 18, and it was held that he could get the decree on payment of the full amount of Rs. 3,300.

In Letters Patent Appeal by the plaintiff, the only contention, which has been advanced on his behalf by his learned counsel Mr. Nayar, is that as the plaintiff-appellant has been granted a decree for possession of land comprised in Khewat No. 18, measuring 8 Kanals 17 Marlas out of the total area of 17 Kanals 6 Marlas which was the subject of the sale, the plaintiff should not have been ordered to pay the full amount of Rs. 3,300. In our opinion, there is force in this contention. In *Talib Hussain and others* v. *Uttam Chand and others* (1), Jai Lal, J., dealt with this question and observed :—

> "Counsel for the appellant does not contest the findings that 7 marlas and 5 sarsahis is the only pre-emptible portion of the land. He, however, contends that the pre-emption money should be calculated proportionately on the total area sold. I am unable to agree to this suggestion. It is clear that if a portion of the entire area sold, is pre-emptible, then it is the real market value of that portion that is to be determined and it is not a fair way of dealing with the matter to work out the value according to the total price paid as the area pre-empted may be more valuable than the rest of the land or as in this case there may be special consideration for accepting a comparatively low price."

(1) A.I.R. 1929 Lahore 140.

We agree with the view expressed above and are of the opinion that it would be highly inequitable that a plaintiff, who is entitled to a decree of pre-emption in respect of only a part of the property sold, should be made to pay the full price of the entire property sold. The right of pre-emption is a right of substitution, and if a plaintiff is found to have a superior right of pre-emption only in respect of a part of the property sold and gets a decree for possession in respect of that part, it would be only to the extent of that part of the property sold that there would be substitution of the plaintiff in place of the vendee. As substitution would be confined only to a part of the property sold, it seems but fair that the plaintiff should be made to pay the price which represents that part of the property in respect of which he is substituted. It is no doubt true that a pre-emptor must take the sale as a whole, and in case he is entitled to pre-empt the whole of the property sold he cannot be allowed to pick and choose and pre-empt only a part of the property sold which he finds to be profitable or convenient and to leave the other property, because this would militate against the rule which forbids the partial exercise of the right of pre-emption. On the other hand, it also seems equally true that where a vendee has included in the sale-deed some property in respect of which the plaintiff has no right of pre-emption and some other in respect of which he has such a right and the Court passes a decree regarding property about which the plaintiff has a right of pre-emption, it would not be in consonance with principles of justice and equity to burden the plaintiff with payment of the full sale price including the price for the portion of the property in respect of which his suit is being dismissed.

In *Makund Sarup* v. *Sarvi Begam and others* (2), decided by a Division Bench of Allahabad High Court, three villages were sold together by one sale-deed. On a suit for pre-emption having been brought by the plaintiff, it was found that the plaintiffs had pre-emptive right in respect of only one of the villages and not in respect of the other two. The case was remanded to determine as to what part of the purchase price was attributable to the village in respect of which the plaintiffs had a superior right of pre-emption. In *Mt. Zainab Bibi* v. *Umar Hayat Khan*

(2) 2 I.C. 65.

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and others (3) decided by a Division Bench it was observed :—

> "No doubt it is a well-settled principle that a pre-emptor cannot be allowed to pick and choose and pre-empt only as much property as he considers convenient to get. In that sense partial pre-emption cannot be allowed. On the other hand, it has been equally well-settled in this Court that the mere fact that the vendee has included in the sale-deed some property as to which the pre-emptor has no right of pre-emption at all, would not deprive the pre-emptor of his right to pre-empt that property as to which he has a right. There has so far been no conflict of opinion on this point in this Court, and thousands of cases have been decided in which the pre-emptor has been allowed to claim pre-emption in respect of that portion to which he is entitled, leaving out the portion to which he was not entitled although the same was included in the sale-deed. In such cases an apportionment of the price has been allowed, and in many cases issues have been sent down to the Court below for making such an apportionment. So far as the Mahomedan Law is concerned, there is no doubt that where several properties are sold in portions of which a pre-emptor has the right of pre-emption, he is entitled to pre-empt that portion only on payment of a proportionate price."

Although the above-mentioned two Allahabad cases were in the context of pre-emption based upon Mahomedan Law, as prevalent in Uttar Pradesh, the principle enunciated therein that a pre-emptor, who can pre-empt only a part of the property sold is not liable to pay the full sale-price being in consonance with the principles of justice, equity and good conscience, should, in our opinion, equally apply, in the absence of any provision to the contrary, to similar cases arising under the statutory law of pre-emption in the Punjab.

Before we conclude, we may refer to two cases *Bishen Singh* v. *Mt. Bishni and two others* (4) *and Dr. Labh Singh*

(3) A.I.R. 1936 All. 732.
(4) 103 P.R. 1919.

v. *Kehr Singh and another* (5), which have been cited at the Bar. In *Bishan Singh's case*, Bishni sold one-third share in a joint *khata*, for Rs. 300. The plaintiff-appellant sued for pre-emption and during the pendency of the suit the other co-sharers in the *khata* brought a suit that the vendor was entitled to one-ninth share and not one-third share and obtained a decree. The plaintiff then contended that he should be made liable to pay one-third of the purchase price as he was receiving only one-third of the area actually sold. Shadi Lal, J., in that case quoted with approval the following dictum in an earlier case (N.W.P. Sudder Dewanny Adawlut, 1863 at page 394):—

> "In case of landed property, where the vendor is found later to have owned only part, the purchaser, if he has acted *bona fide*, is not compelled to surrender the remnant portion of his purchase to a pre-emptor at a less sum than that which he paid for the entirety of his purchase, if the purchaser elects to abide by his bargain and retain the residue at the amount he paid for the whole."

Bare narration of the facts goes to show that the above-cited case is distinguishable, because unlike the present case the vendee in that case was not retaining any part of the property sold with him. The dictum in the above-cited case has also further to be taken in the background of the law that right of pre-emption being that of substitution a pre-emptor gets the property sold with all the defects in title which were there in the original sale and he cannot claim reduction in the amount to be paid by him because of some loss of property on account of defects in the title passed to the vendee. The dictum enunciated in *Dr. Labh Singh's case* was that when a sale purports to include a property which the pre-emptor claims as his own, the pre-emptor should be allowed to sue for possession only of that part of property which does not already belong to him, and that he should be required to pay the same amount that the vendee has had to pay, even though this may be higher than the actual market value. This case is again distinguishable as is clear from the narration of its facts.

(5) A.I.R. 1945 Lah. 11.

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We are, therefore, of the view that the plaintiff-appellant is entitled to decree for possession by pre-emption of land comprised in Khewat No. 18 on payment of that amount which represents the market value of the land comprised in that Khewat. As there is no material on the present record to indicate as to what is the market value of that land, we remand the case under Order 41, Rule 25 of the Code of Civil Procedure to the trial Court with a direction to find out the market value of the land measuring 8 Kanals 17 Marlas comprised in Khewat No. 18. As the matter is old, every effort should be made to make a report in this behalf to this Court within three months. The parties are directed to appear in the trial Court on 29th November, 1965.

Falshaw, C.J.

D. FALSHAW, C.J.—I agree.

B.R.T.

REVISIONAL CIVIL

Before Mehar Singh, J.

ABHAY CHAND,—*Petitioner.*

versus

RAM CHAND AND OTHERS,—*Respondents.*

Civil Revision No. 543 of 1964.

1965

November, 5th

Specific Relief Act (XLVII of 1963)—S. 34—Suit for declaration by son against father that the land in respect of which compensation has been deposited by the occupancy tenants under S. 4 of the Punjab Occupancy Tenants (Vesting of Proprietary Rights) Act, 1952 (VIII of 1953) is Joint Hindu Family Property and he has one-half share therein—Whether maintainable.

Held, that section 10 of the Punjab Occupancy Tenants (Vesting of Proprietary Rights) Act, 1952, does not bar a civil Court from settling a civil dispute in the shape of a question with regard to the right to property. Where the occupancy tenants have deposited the amount of compensation payable by them under section 4 of the said Act, a suit by the son against his father for a declaration alone that the land belonged to joint Hindu family and he is entitled to one-half of the amount of compensation is maintainable under section 34 of the Specific Relief Act, 1963 as the consequential relief will be sought by him under sub-section (3) of section 4 of the said Act from the Collector.