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distinction. If, however, that is a valid consideration, then, under Hindu Law (as amended), now a sister stands fairly high up in order of succession and she is certainly a preferential heir than the 7th degree collaterals. Hamira and others v. Ram Singh and others (1), can hardly be of any substantial assistance to Mr. Bahri. In the reported case the only question referred for decision to the Full Bench was whether in the absence of a son, a sister of the last male holder, can for the purposes of inheritance, be regarded as a daughter of his (the last male holder's) father and the answer was in the negative. A sister, according to this decision, has to establish her right to succeed in the capacity of sister and not in the capacity of a daughter of the last male holder's father. As is apparent, from the above discussion, sister's right to succeed to her brother's non-ancestral property has in the present case been considered on the footing only of her being a sister of the last male holder.

In this view of the matter, the appeal must be allowed, the judgment and decree of the Court below set aside and the plaintiffs' suit dismissed; there will be no order as to costs in this Court.

Falshaw, J.—I agree.

R. S.

APPELLATE CIVIL

Before Falshaw and Dua, JJ.

RATI RAM AND OTHERS,—*Appellants.*

versus

MAM CHAND AND OTHERS,—*Respondents.*

Regular Second Appeal No. 13 of 1953.

1958

Nov., 14th

Punjab Pre-emption Act (I of 1913)—Right of pre-emption—Nature of—Transaction whether a sale—Burden

(1) 134 P.R. 1907.

of proof—On whom lies—Code of Civil Procedure (V of 1908)—Section 100—Inference from proved facts—Whether question of law.

Held, that the right of pre-emption is a piratical right and it imposes a restriction on the right of the owner to transfer his property to whomsoever he likes. This right operates as a clog on the right of the owner to alienate his property to a person of his own choice; it has, therefore, to be strictly construed. The plaintiff in a pre-emption suit, who is an aggressor, must prove affirmatively that the transaction which he wants to pre-empt is a sale and that he has a preferential right over the vendees; in case there exists a doubt about the transaction in question being a sale, the plaintiff must fail. The policy underlying the law of pre-emption is to keep out strangers and thus to maintain the privacy and compactness of joint owners. In the present changed condition of our society this trend is likely to obstruct and retard, instead of promoting, the economic and social progress of the community. In this view of the matter if the transaction in dispute is capable of two interpretations, the Courts should be disinclined to hold it to be a sale so as to force the owner of the property to transfer it to a person who is not of his choice. It is well-established that it is open to a party to defeat a possible pre-emptor by all legitimate means. If an owner of land can adopt a device whereby he can hand over the land to the donees without effecting a sale, he is well within his rights to do so. A pre-emptor cannot ask the Court to treat it as a sale merely because, according to him, there appeared to be no adequate reason for the donor to make a gift of the property to the donees.

Held, that the burden lies heavily on the plaintiff to establish affirmatively that the transaction which he wants to pre-empt is a sale and nothing else. Merely because the defendants have not succeeded in affirmatively establishing the transaction in question to be a *bona fide* and genuine gift, it does not necessarily lead to the conclusion that it is a sale.

Held, that from the proved facts on the record no proper inference in favour of the transaction being a sale can be drawn and the Courts below have clearly erred in doing so. This error is clearly an error of law. Besides, the

Courts below have also failed to approach the consideration of the case from a correct legal point of view. Instead of applying their mind to the question whether or not the transaction in dispute had been proved by the plaintiff to be a sale, they concentrated their attention on the question whether the defendants had esablished the transaction to be a genuine gift. This was a wholly erroneous approach and has resulted in a decision which is contrary to law.

Regular Second Appeal from the decree of Shri Prahlad Singh, Additional District Judge, Rohtak, dated the 29th November, 1952. affirming that of Shri Sansar Chand, Senior Sub-Judge. Rohtak, dated the 3rd January, 1951, granting the plaintiffs a decree for possession of the land in dispute by pre-emption against the defendants on payment of Rs. 25370 payable by defendants Nos. 2 to 6, the vendees, by 3rd March. 1951, with costs, failing which their suit shall stand dismissed.

D. K. MAHAJAN with MOOL RAJ MULICK and N. N. GOSWAMI, for Appellants.

D. N: AGGARWAL with RAJINDER NATH, for Respondents.

JUDGMENT

I. D. Dua, J.

DUA, J.—This is a defendants' appeal against the judgment and decree of the Additional District Judge, Rohtak, granting to the plaintiffs a decree for possession of the land in suit on the ground that the transaction in suit though described as a gift was a sale and that the plaintiffs had a preferential right to pre-empt the said sale. The plaintiffs alleged that the land mentioned in the plaint belonged to Suraj Bhan, defendant No. 1 who transferred 5/6th share of the same measuring 101 *bighas* and 9 *biswas* with *shamilat* rights to defendants Nos. 2 to 6 for a sum of Rs. 8,000 on the 19th of December, 1946, besides the mortgage charge on this land. The mutation was accordingly sanctioned on the 26th of December, 1948.

This mutation, the plaintiffs pleaded, though described as a gift, was in fact a sale. The plaintiffs who claim to be the collaterals of defendant No. 1 and also Biswedars filed a suit for pre-emption on the ground of having a preferential right of purchase than defendants Nos. 2 to 6. A part of the land in dispute was already under a mortgage with a charge of Rs. 12,000. Therefore, the plaintiffs sued for possession by pre-emption on payment of Rs. 8,000 only.

The defendants contested the suit and controverted the plea relating to the transaction being a sale. They, on the contrary, pleaded that the transaction was an out and out gift in favour of the defendants donees on account of natural affection for them as they were relatives. The preferential right of pre-emption claimed by the plaintiffs was also denied and the defendants also asserted that they were Biswedars in the village. It was in the end asserted that the market value of the land in dispute was Rs. 75,000. On the pleadings of the parties the following issues were framed:—

1. Whether the suit land was sold by defendant No. 1 in favour of defendants Nos. 2 to 6 ?

2. What was the sale price paid or fixed in good faith ?

3. What is the market value ?

4. If issue No. 1 be held in favour of the plaintiffs, have plaintiffs preferential pre-emption right as against defendants Nos. 2 to 6 ?

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While dealing with issue No. 1, the trial Court considered the statements of plaintiffs' witnesses Nos. 1 to 4 not worthy of any reliance. The evidence of these witnesses was sought by the plaintiffs to be brought on the record as direct evidence of the transaction in dispute being a sale. Having disbelieved this direct evidence the trial Court, however, proceeded to consider some circumstantial evidence and came to the conclusion that the transaction in dispute was a sale. The trial Court considered the following circumstances for the purposes of arriving at the above conclusion:—

(i) Suraj Bhan, defendant was 21 years old.

(ii) The area of land owned by him at the time of alienation measured 121 *bighas* and 15 *biswas*.

(iii) The land in dispute is subject to a charge of Rs. 12,000.

(iv) The explanation given by the defendant in support of his motive for the gift in dispute did not appeal to the trial Court.

The trial Court observed after considering the above circumstances that a person who could not clear off the encumbrance of Rs. 12,000 could not possibly be in such a financial position as to afford to alienate 101 *bighas* and 9 *biswas* to defendants Nos. 2 to 6 by way of gift simply on sentimental grounds. On this basis the trial Court came to the conclusion that this transaction must be held to be a sale.

On appeal the learned District Judge also on almost identical grounds dismissed the appeal. The Courts below have determined the market value of the property at Rs. 37,370; out of this the mortgage charge to the extent of Rs. 12,000 has been deducted and the plaintiffs have been ordered to

deposit a sum of Rs. 25,370 representing the sale price of the land in dispute.

On second appeal on behalf of the vendees Mr. D. K. Mahajan has submitted that there is absolutely no evidence on the record to suggest that the transaction in dispute was a sale and that the Courts below have proceeded on bare conjecture in holding the transaction in favour of the appellants to be a sale and, therefore, liable to be pre-empted. In my opinion, the learned counsel is right. Sale has been defined in section 54 of the Transfer of Property Act (Act IV of 1882), as follows:—

> " 'Sale' is a transfer of ownership in exchange for a price paid or promised or part-paid and part-promised."

On the present record there is absolutely no evidence showing that ownership of the land in dispute was transferred to the defendants-appellants in exchange for a price paid or promised or part-paid and part-promised. The oral evidence, led by the plaintiffs in support of the transaction being a sale, has been expressly disbelieved by the trial Court and does not seem to have been relied upon before the learned Additional District Judge on first appeal. The circumstances on which both the Courts below have relied in coming, to the conclusion that the transaction in dispute amounts to a sale do not at all justify the inference drawn by them. We have been taken through the evidence led in the case and in our view all that can be said is that had Suraj Bhan been more prudent, he would perhaps not have made a gift of the property in question to the defendants appellants. Such a finding cannot, in my opinion, necessarily lead to the inference that the transaction in dispute is a sale. It is in evidence that Suraj Bhan's

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father Laiku is the real brother of Ramji Lal who is married to Amar Singh's sister and Amar Singh is the father of the donees. Even the lower appellate Court observes that there was some connection between the parties which could be described in terms of relationship. It is also in evidence that this Amar Singh took Suraj Bhan (when he was a minor) under his protection and maintained him though out of the income of the land belonging to him (Suraj Bhan, minor). There is also some evidence on the record that the donees including Rati Ram arranged for Suraj Bhan's marriage and even financed it. In this background it is not possible for me to hold the transaction in dispute to be necessarily a sale which has been concealed under the cloak of a gift. As stated above the price of the land after deducting mortgage charge has been determined by the Courts below to be Rs. 25,370. There is no finding that this price was promised or paid or part-promised and part-paid. The Courts below have, curiously enough, completely ignored this really material aspect of the case. Even if the whole or part of the price was originally promissed it must, if the transaction were really a sale, be paid to the seller within a reasonable time. Considering the matter from this point of view if the transaction in dispute was in effect a sale and it was wrongly described as a gift it would certainly have been possible for the plaintiffs, who claim to be collaterals of Suraj Bhan, to lead some evidence regarding either receipt of the whole or part of sale price by Suraj Bhan or payment by the donees to Suraj Bhan of the whole price or a substantial part of it. Absence of any reliable evidence suggesting payment of price or promise of payment of price leads to the irresistible conclusion that the transaction in dispute was not intended to be a sale. It is possible that, out of

regard for the donees and their father, Suraj Bhan got the land in dispute mutated in favour of the donees who in return maintained him and looked after him but such a transaction cannot, in my opinion, be described to be a sale.

It is well established that right of pre-emption is a piratical right and it imposes a restriction on the right of the owner to transfer his property to whomsoever he likes. This right operates as a clog on the right of the owner to alienate his property to a person of his own choice; it has, therefore, to be strictly construed. The plaintiff in a pre-emption suit, who is an aggressor, must, in my opinion, prove affirmatively that the transaction which he wants to pre-empt is a sale and that he has a preferential right over the vendees; in case there exists a doubt about the transaction in question being a sale, the plaintiff must fail. The policy underlying the law of pre-emption is to keep out strangers and thus to maintain the privacy and compactness of joint owners. In the present changed condition of our society this trend is likely to obstruct and retard, instead of promoting, the economic and social progress of the community. In this view of the matter if the transaction in dispute is capable of two interpretations the Courts should, in my opinion, be disinclined to hold it to be a sale so as to force the owner of the property to transfer it to a person who is not of his choice. It is well established that it is open to a party to defeat a possible pre-emptor by all legitimate means. If, therefore, Suraj Bhan could adopt a device whereby he could hand over the land to the donees without effecting a sale then I think he is well within his rights to do so. The plaintiffs cannot ask the Court to treat it as a sale merely because, according to him, there appeared to be no adequate motive for Suraj Bhan to make

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a gift of the property to the donees. The learned counsel for the respondents has drawn our attention to *Chiragh Din* v. *Allah Din and another* (1), particularly to the following passage at page 209:—

> "Admittedly, the deed is in terms one of gift, and according to these terms the gift (which comprised 12 *kanals* 2 *marlas* of land in Mauza Baghanwala) was made by Nathu as some return for the services rendered to him at various times by his near kinsman and very good friend, Chiragh Din. The deed, somewhat naively and ingeneously, states incidentally that the value of the property is Rs. 1,000."

On those facts the learned Judges dealing with that case held the transaction to be a sale. On the facts and circumstances of the reported case the learned Judges may have been right in holding the transaction to be a sale but, without expressing any final opinion as to whether or not they were right, this ruling cannot in my opinion afford any useful guidance for us in deciding the instant case. With the utmost respect to the learned Judges who decided *Chiragh Din's case* (1), I find myself unable to agree with their approach to a pre-emption suit. In my view, the burden lies heavily on the plaintiff to establish affirmatively that the transaction which he wants to pre-empt is a sale and nothing else. Merely because the defendants have not succeeded in affirmatively establishing the transaction in question to be a *bona fide* and genuine gift, it does not necessarily lead to the conclusion that it is a sale. In the reported case the value of the property

(1) 70 P.R. 1916.

having been mentioned as Rs. 1,000 in the deed itself, appears to have weighed considerably with the learned Judges of the Chief Court in determining the nature of the transaction. Those facts do not, however, bear any close analogy to the facts of the present case. I do not think it will serve any useful purpose to discuss *S. Masih Hassan* v. *Allaha Diya and others* (1), *Bahawal* v. *Amir and another* (2) and *Thakur Das and others* v. *Tulsi Das* (3), cited by the learned counsel for the respondents because they do not seem to me to bear any close resemblance to the facts of the case before us. I might at this stage refer to the decision in *Gul Muhammad* v. *Tota Ram and another* (4), where it has been held that if the consideration for a transaction consists of a cash payment and also of conveyance of some land to the vendor then the transaction being indivisible (partly sale and partly exchange) it could not be pre-empted as a sale.

The learned counsel for the respondents had, however, strenuously urged that the Courts below have concurrently found that the transaction in question is a sale and this, being a finding of fact, is not open to attack on second appeal. As I have discussed above there is no evidence on the record proving the transaction in dispute to be a sale; the essential requisites of sale have not been established. From the proved facts on the record in my opinion no proper inference in favour of the transaction being a sale can be drawn and the Courts below have clearly erred in doing so. This error is in my opinion clearly an error of law. Besides, the Courts below have also failed to approach the consideration of the case from a correct legal point of view. Instead of applying their mind to the

(1) A.I.R. 1947 Lah. 320.
(2) A.I.R. 1939 Lah. 343.
(3) 70 P.R. 1890.
(4) 31 I.C. 221.

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question whether or not the transaction in dispute had been proved by the plaintiff to be a sale, they concentrated their attention on the question whether the defendants had established the transaction to be a genuine gift. This, in my view, was a wholly erroneous approach and has resulted in a decision which is contrary to law.

In the result, I allow the appeal and setting aside the judgment and decree of the Courts below dismiss the plaintiffs' suit with costs throughout.

FALSHAW, J.—I agree.

R. S.

REVISIONAL CIVIL

Before Mehar Singh, J.

SANSAR CHAND,—*Petitioner*

versus

RAM LALL AND ANOTHER.—*Respondents.*

Civil Revision No. 390 of 1956

1958

Nov., 18th

Courts Fees Act (VII of 1870)—Section 7 (vi)—Suit for possession by pre-emption—Vendee affecting improvements after the sale but before the institution of suit—Plaintiff whether liable to pay court-fee on the value of such improvements.—Suit for possession by pre-emption and an ordinary suit for possession—Distinction between.

Held, that in a suit for possession to enforce a right of pre-emption. the plaintiff seeking only a right to be substituted for the vendee at the date of the sale and not having a right in law to claim anything more nor claiming anything more, cannot be forced or compelled to pay court-fee on the value of improvements made by a vendee after the sale and before the date of the suit because of an equitable claim by such a vendee to be compensated for the value of such improvements. Such improvements are not part of the claim of the plaintiff in such a suit and he cannot be forced to pay court-fee on a subject-matter of dispute that arises not because of his claim but because of the defence of the defendant.