(13) Learned counsel for the petitioner also referred to a Bench decision of this Court in *Union of India* v. *Messrs, New India Constructors, Delhi and others* (4). A perusal of that authority, however, shows that this precise point as to whether section 8 applies in a case of this kind or not, was not actually raised there. It appears as if it was taken for granted that section 8 was applicable.

(14) I, therefore, hold that section 8 of the Act has no application to the facts of the present case.

(15) As already mentioned above; the petition was made by the contractor both under sections 8 and 20 of the Act. Learned counsel for the petitioner concedes that if my finding be that section 8 has no application, as I have already held, then he does not press his petition under section 20 of the Act.

(16) The result is that this revision petition fails and is dismissed. In the circumstances of this case, however, I will leave the parties to bear their own costs.

K. S. K.

FULL BENCH

Before D. K. Mahajan, Bal Raj Tuli and Pritam Singh Pattar, JJ.

KARNAIL SINGH, ETC.,—*Appellants.*

versus

JABIR SINGH, ETC.—*Respondents.*

Regular Second Appeal No. 560 of 1961.

March 1, 1974.

Punjab Pre-emption Act (I of 1913 as amended by Act X of 1960)—Sections 5, 21A, and 31—Suit to pre-empt the sale of waste land—Land reclaimed after the institution of the suit—Suit decided and appeal against the decision pending—Section 5(b)—Whether applies to the case—Suit—Whether liable to fail—Applicability of section 5—Whether to be seen at the date of ultimate decision of the case.

(4) A.I.R. 1955 Pb. 172.

Held, (per Full Bench), that in section 5(b) of Punjab Pre-emption Act, 1913 no time limit is fixed upto which the waste land can be reclaimed by the vendee. It nowhere prescribes that no right of pre-emption shall exist in respect of the sale of agricultural land being waste land if it is reclaimed by the vendee before the institution of the suit for pre-emption or till the date of the decree passed by the trial Court or by the appellate Court. There is also no provision in the Act which prohibits the vendee from reclaiming the land during the pendency of the suit to defeat the suit of the pre-emptor. Section 21-A of the Act can have no application to such reclamation of the waste land. This section only lays down that any improvement. otherwise than through inheritance or succession, made in the status of a vendee-defendant after the institution of a suit for pre-emption shall not affect the right of the pre-emptor-plaintiff in such suit. The section refers to the improvement in the status of the vendee during the pendency of the suit and does not refer to the improvement made in the property or land, which is the subject-matter of the suit. Hence where waste land is sold and a suit for pre-emption thereof is filed, but if the waste land is reclaimed by the vendee till the date of the decree by the trial Court or appellate Court, section 5 of the Act will apply. The pre-emptor will have no right of pre-emption regarding the reclaimed land and his suit *qua* that land must fail. In view of the provisions of section 31 of the Act, the applicability of section 5(b) of that Act has to be seen at the date of the ultimate decision of the case and not at the date of the institution of the suit.

(Paras 11, 12 and 19)

Held, (per Mahajan, J.), that section 5 of the Punjab Pre-emption Act clearly postulates that there is no right of pre-emption in respect of agricultural land which, when sold, was waste and has been reclaimed by the vendee. The reclamation necessarily will take place after the sale of the waste land and the bar to a suit for pre-emption arises in the very nature of things after the sale of the waste land. It follows, therefore, that in order to attract the provisions of section 5. reclamation has to be after the sale and cannot be, in any circumstances, before the sale. This again indicates that if the intention of the Legislature was to fix any time-limit for the reclamation of the waste land, it would have prescribed it. In view of section 31 of the Act, provisions of section 5 have to be given effect to at the time when the decree is passed and that in itself would include the passing of the decree at the stage of appeal.

(Para 28)

Case referred by Hon'ble Mr. Justice D. K. Mahajan, vide order dated 27th August, 1971, to a Full Bench Consisting of Hon'ble Mr. Justice D. K. Mahajan, Hon'ble Mr. Justice Bal Raj Tuli and Hon'ble Mr. Justice Pritam

Singh Pattar for decision of a complicated question of law, and the Full Bench finally decided the case on 1st March, 1974.

Regular Second Appeal from the decree of the Court of Shri Brijindra Singh Sodhi, Additional District Judge, Karnal, dated the 1st day of April, 1961, modifying that of Shri Ved Parkash Aggarwal, Sub-Judge, 1st Class, Karnal, dated the 25th March, 1960, (granting the plaintiff a decree for possession by pre-emption on payment of Rs. 21,685 to be deposited after adjusting the 1/5th amount already deposited by 15th May 1960, failing which the suit of the plaintiff will be deemed to be dismissed, and leaving the parties to bear their own costs) to the extent that a decree is given for possession of the suit land except Khasra Nos. 1071 to 1075 on payment of Rs. 19,960 and leaving the parties to bear their respective costs.

J. N. Kaushal, Senior Advocate with Ashok Bhan, Advocate, *for the appellants.*

H. L. Sibal, Senior Advocate with G. C. Mittal, and Arun Jain, Advocates, *for the respondents.*

JUDGMENT

PATTAR, J.—(1) By this judgment, we shall dispose of the following two Regular Second Appeals, which are directed against the judgment dated 1st April, 1961 of the Additional District Judge, Karnal:—

(1) R. S. A. No. 560/1961—Karnail Singh and others *vs.* Jabbar Singh.

(2) R. S. A. No. 1221/1961—Jabbar Singh *vs.* Karnail Singh and others.

Both these appeals came up for hearing before Hon'ble Mahajan, J., and by order dated 27th August 1971, he directed that both the appeals may be laid before the Hon'ble Chief Justice for constituting a Full Bench to decide the law point involved in these appeals. The following observations were made in the order dated 27th August, 1971 of Mahajan, J.:—

"The Principal contention that has been advanced by the learned counsel for the vendees is that in view of section 31, the applicability of section 5 has to be seen at the date of the ultimate decision and not at the date of the suit. A contrary view to the contention urged has been taken in

three decisions of this Court, *Balwant Singh* v. *Kehar Singh*, 1963 P. L. R. 972, *Madan Lal* v. *Dhan Raj* ; 1964. Current Law Journal (Punjab), 343, and *Tek Chand* v. *Sain Dass*, 1967 Current Law Journal (Punjab and Haryana) 824. It appears to me that these decisions run contrary to the decision of the Supreme Court in *Ram Sarup* v. *Munshi*, A. I. R. 1963 Supreme Court 553, wherein their Lordships approved the decision of this Court in *Ram Lal* v. *Raja Ram*, 1960 PLR 291.

Apart from this, there is no time-limit fixed in section 5 upto which the waste land can be reclaimed by the vendees. In my opinion, no artificial time-limit can be fixed and the proper approach would be that the applicability of section 5 should be judged at the time when the decree is to be passed.

As I hold a contrary view to the Division Bench decisions already referred to, it will be proper that these cases are settled by a Full Bench. The other points are not very complicated and it would be proper that the whole case is settled by the Full Bench."

That is, how, these two appeals are before the Full Bench.

(2) The facts of this case are that Ruhla Singh, defendent No. 1, owned land measuring 705 Kanals and 7 Marlas fully described in para No. 1 of the plaint and situated in the area of village Chanal Heri, Tahsil Thanesar, District Karnal (now District Kurukshetra) and he sold the same to Karnail Singh and others, defendants 2 to 10 for Rs. 21,160 on the basis of a registered sale dead dated 27th February, 1958. Jabbar Singh plaintiff, who is the minor son of the vendor Ruhla Singh filed suit for possession by pre-emption of this land on payment of the sale price through his next friend on the allegations that his right of pre-emption is superior to that of the vendees, who are strangers. The defendants-vendees contested this suit. They did not admit that the plaintiff was the son of the vendor and had a superior right of pre-emption. In the alternative it was pleaded that the plaintiff and the vendor Ruhla Singh were members of the Joint Hindu Family and the land in suit belonged to the Joint Hindu Family and, therefore, the plaintiff had no right to sue for pre-emption. It was also alleged that the plaintiff is a member of the Joint Hindu Family and is owner of more than 30 standard acres of land,

and therefore this suit is not competent. They averred that the plaintiff is estopped from filing this suit. They claimed Rs. 10,000/- on account of the improvements made by them on this land after the sale in case decree was passed against them. They pleaded that after the sale, the Punjab Pre-emption Act was amended and this sale is not pre-emptible under the provisions of Section 5 as amended. In his replication, the plaintiff denied the allegations made by the vendees. It was pleaded that he and his father were governed by custom in matters of succession and alienation of property. On these pleadings of the parties, the following issues were framed by the trial Court :—

(1) Whether the plaintiff has a preferential right to pre-empt ?

(2) Wherther the suit property belonged to the Joint Hindu Family of the plaintiff and his father and as such the plaintiff is in the position of the vendor ?

(3) Whether the plaintiff is estopped from filing the suit ?

(4) Whether the plaintiff is a big landlord and its effect ?

(5) Whether any improvements have been made and of what value?

(6) Relief.

(6-A) Whether the plaintiff and defendant No. 1 are governed by custom in matters of succession and alienation. Its effect? :

(7) Whether the sale is not preemptible on the ground mentioned in the new amending Act in Section 5 and about what area?."

The trial Court decided issue No. 1 in favour of the plaintiff and decided issues Nos. 2, 3, 4, 5 and 6-A against the defendants. It was held that the land in suit was not agricultural land and as such the provisions of Section 5, as amended, of the Punjab Pre-emption Act were not applicable to the present case and issue No. 7 was also decided against the defendants. As a result, decree for possession by Pre-emption of the land in suit on payment of Rs. 21,685/- was passed in favour of the plaintiff against the vendees after adjusting 1/5th of the amount already deposited by them. Feeling dissatisfied, Karnail Singh and others defendants-vendees filed an appeal against this decree in the Court of the District Judge, which was decided by

the Additional District Judge, Karnal, on 1st April 1961. The additional District Judge affirmed the decision of the trial Court on issues Nos. 1, 2, 3, 4, 5 and 6-A. However, on issue No. 7, he held that the vendees had reclaimed 5 Khasra Nos. 1071 to 1075 measuring 40 Kanals before the institution of the suit, and therefore, the suit for Pre-emption regarding these five khasra numbers was not maintainable in view of the provisions of Section 5, as amended, of the Punjab Pre-emption Act and the decree of the trial Court regarding these five khasra numbers was set aside and the suit of the plaintiff was dismissed. Regarding the remaining land in suit, the decree of the trial Court was maintained and a decree for possession of the land in suit excepting Khasra Nos. 1071 to 1075 on payment of Rs. 19,960/- was passed in favour of the plaintiff. To the above extent, the decree of the trial Court was modified and the parties were left to bear their costs. Feeling dissatisfied, Karnail Singh and others, vendees, filed Regular Second Appeal No. 560 of 1961 alleging that the decision of the lower appellate Court was wrong and incorrect and it may be set aside and the suit of the plaintiff may be dismissed *in toto*. Jabbar Singh plaintiff filed Regular Second Appeal No. 1221 of 1961 alleging that the decision of the lower appellate Court on issue No.7 that the suit regarding five khasra numbers 1071 to 1075 was not maintainable is wrong and incorrect and it may be set aside and the decree passed by the trial Court in his favour may be restored.

(3) Mr. Jagan Nath Kaushal, learned counsel for Karnail Singh and others, defendants-appellants of R.S.A. No. 560 of 1961, contested the decision of the lower appellate Court on issue No. 7 only. He contended that in view of the provisions of Section 31 of the Punjab Pre-emption Act No. I of 1913, (hereinafter called the Act), as added by Punjab Pre-emption Amendment Act No. 10 of 1960, the applicability of Section 5 of that Act has to be seen at the date of the ultimate decision in the case and not at the date of the institution of the suit and, therefore, the decision of the lower appellate Court passing decree regarding the entire land in suit excepting five khasra numbers measuring 40 Kanals cannot be sustained. He maintained that in Section 5(b) of the Act, no time-limit is fixed upto which the waste land can be reclaimed by the vendee and, therefore, no artificial time-limit can be fixed that the vendee can only reclaim the land upto the date of the institution of the pre-emption suit. He further argued that the law laid down in *Balwant Singh* v. *Kehar Singh* (4) and *Tek Chand* vs. *Sain Dass* (2) to the effect that the land,

(1) 1963 P.L.R. 972.

(2) 1967 Curr. L.J. (Pb. & Hr.) 824 (D.B.).

which is saved from the pre-emption suit is only the land, which has been reclaimed upto the date of the suit and not beyond that is not correct and is contrary to the law laid down by the Supreme Court in *Ram Sarup* v. *Munshi and others* (3) and an earlier Division Bench ruling of this Court reported as *Ram Lal* v. *Raja Ram* (4).

(4) Before proceeding to examine these contentions, I set out below the relevant provisions of the Punjab Pre-emption Act.

"*Section* 5

No right of pre-emption shall exist in respect of—

(a) ————

(b) the sale of agricultural land being waste land reclaimed by the vendee.

Explanation.—For the purposes of this section the expression 'waste land', means recorded as *banjar* of any kind in revenue records and such *ghair mumkin* lands as are reclaimable."

"*Section* 31

No Court shall pass a decree in a suit for pre-emption, whether instituted before or after the commencement of the Punjab Pre-emption (Amendment) Act, 1960, which is inconsistent with the provisions of the said Act."

This section 31 and clause (b) to Section 5 and its Explanation were added by the Punjab Pre-emption (Amendment) Act No. 10 of 1960 in the Punjab Pre-emption Act.

(5) In the instant case, the sale of the land in suit took place on the basis of registered sale deed dated 27th February, 1958. The suit for possession by pre-emption was filed by Jabbar Singh plaintiff on 26th February, 1959. During the pendency of this suit, the Punjab Pre-emption (Amendment) Act No. 10 of 1960 was passed and thereafter the parties amended their pleadings and in accordance with the amended pleadings, issue No. 7 was framed.

(3) (1963) 3 S.C.R. 858.

(4) 1960 P.L.R. 291.

(6) In support of his contentions, the first case relied upon by Mr. Jagan Nath Kaushal, the learned counsel for the vendees-appellants, is *Ram Sarup* v. *Munshi and others* (3) (supra). By this decision, four appeals were decided by the Supreme Court. In Civil Appeal No. 510 of 1961, which was decided by this judgment, the sale which gave rise to the suit for pre-emption was under a sale deed dated December 29, 1949, in favour of the appellant and the first respondent's claim to pre-empt was based on Section 15(c) thirdly of the Punjab Pre-emption Act, 1913. The suit was decreed by the trial Court on November 8, 1951 and when the matter was under appeal, in which the question of the constitutional validity of Section 15(c) thirdly was raised, the Act was amended by Punjab Act 10 of 1960, by which, *inter alia*, (1) Section 15 of the original Act was repealed and in its place was substituted a new provision which omitted to confer a right of pre-emption in the case of persons owning land in the estate as the original Section 15(c) thirdly had done and (2) retrospective effect was given to the provisions contained in the Amending Act by the insertion of a new Section 31, which provided that no Court shall pass a decree in a suit for pre-emption, whether instituted before or after the commencement of the Punjab Pre-emption (Amendment) Act, 1960, which is inconsistent with the provisions of the said Act. On these facts, it was held by the Supreme Court as follows :—

> "The language used in Section 31 was comprehensive enough so as to require an appellate Court to give effect to the substantive provisions of the amending Act whether the appeal before it was one against a decree granting pre-emption or one refusing that relief. Consequently, in view of Section 31, the decree for pre-emption passed by the trial Court could not be sustained."

It was further observed in the body of the judgment that when an appeal is filed, the finality which attaches to the decree of the lower Court disappears and that even when an appellate Court dismisses an appeal, it also is passing a decree.

(7) The next case relied upon by Mr. Kaushal is *Amir Singh and another* v. *Ram Singh and others*, (5). The facts of this case were that the properties in suit had been sold by 'A' to the appellants on May 31, 1956, but the respondents, as the owners of certain

(5) (1963) 3 S.C.R. 884.

agricultural land in the *patti* claimed that they had a right to pre-emption under Section 15(c)(ii) and (iii) of the Punjab Pre-emption Act, 1913. In the suit instituted by the respondents for this purpose, appellants resisted the claim on the ground that the vendees from 'A' had transferred by exchanges some of the items out of the lands purchased by them and that as a result of the said exchanges the appellants themselves had become entitled to pre-empt the said sales under the same statutory provision. The suit was, however, decreed by the trial Court and the decision was confirmed by the High Court of Punjab. The appellants obtained special leave to appeal to the Supreme Court and during the pendency of the appeal the Act was amended by Punjab Act 10 of 1960, by which, *inter alia*, (1) clauses (ii) and (iii) of Section 15(c) of the original Act were deleted, (2) Clause 4 of Section 15(1)(e) provided that the right of pre-emptien in respect of agricultural land and village immovable property shall vest in the tenants, who held under tenancy of the vendors or any one of them the land or property sold or a part thereof, and (3) Section 31 provided that no Court shall pass a decree in a suit for pre-emption, whether instituted before or after the commencement of the amending Act of 1960, which was inconsistent with the provisions of the said Act. In view of the new provisions introduced by the amending Act the respondents raised a new contention that they were tenants, who held under tenancy of the vendor, of the lands in question and, as such, they were entitled to the right of pre-emption under clause 4 of section 15(1)(c) of the Act, as amended, even if it be held that the right to claim pre-emption under clauses (ii) and (iii) of Section 15(c) of the unamended Act was taken away retrospectively by the amending Act. The appellants pleaded that even assuming that Clause 4 of Section 15(1)(c) was applicable, the respondents could not get a decree on the basis of the new right of pre-emption inasmuch as they had no such right on the date on which the suit was filed or when the sales were effected. On these facts, it was held:—

"(1) That the provisions of Section 31 of the Punjab Pre-emption Act, 1913, as amended by Punjab Act 10 of 1960, are retrospective in operation and, therefore, the decree passed in favour of the respondents by the trial Court and affirmed by the High Court under the unamended section could not be sustained.

(2) The retrospective operation of Section 31 necessarily involves effect being given to the substantive provisions

of amended Section 15 retrospectively, and hence the rights which the respondents now claim under the amended provisions must be deemed to have vested in them at the relevant time, with the result that they are entitled, on remand, to ask for a decree passed on the basis of the said rights."

As a result, the decree passed by the High Court was set aside and the case was sent back to the trial Court with a direction that it should allow the respondents-plaintiffs an opportunity to amend their claim by putting forth their right to ask for pre-emption as tenants under the amended provisions of Section 15 and after the amendments are thus made, the appellants should be give an opportunity to file their written statements and then appropriate issues should be framed and the suit tried and disposed of in the light of the findings on those issues in accordance with law. To the same effect was the law laid down in *Chanan Singh and another* v. *Jai Kaur,* (6).

(8) In *Ram Lal* vs. *Raja Ram,* (4), the facts were that the plaintiff filed a suit for pre-emption on the ground of vicinage. The trial Court dismissed the suit holding that the place where the pre-empted property was situate fell outside the limits of Panipat town and in that locality no custom of pre-emption prevailed. On appeal, the lower appellate Court reversed the decision of the trial Court and decreed the plaintiff's suit holding the custom of pre-emption prevailed in the locality in which the property in dispute was situate. Against this decision the vendee filed a second appeal in the High Court. During the pendency of the appeal, the Punjab Pre-emption Act (I of 1913) was amended by Punjab Act No. 10 of 1960, whereby Section 16 of the Punjab Pre-emption Act was deleted and in its place a new Section was substituted whereby the ground on which the urban property was pre-empted was taken away. On these facts, it was held by a Division Bench of this Court that an appeal is a continuation of the original proceedings and a re-hearing of the matter and that the Punjab Pre-emption (Amendment) Act, 1960, must be given effect to not only in fresh suits filed or suits pending but also in those cases in which appeals are pending and have not been decided. The law laid down in this authority was approved by the Supreme Court in *Ram Sarup* vs. *Munshi,* (3), (supra).

(6) (1970) 1 S.C.R. 803.

(9) Therefore, the legal position is that the provisions of Section 31 of the Punjab Pre-emption Act, added by the Punjab Pre-emption (Amendment) Act No. 10 of 1960, are retrospective in operation, that an appeal is a continuation of the original proceedings and a re-hearing of the suit and the appellate Court is bound to give effect to the substantive provisions of the amending Act, whether the appeal before it is one against a decree granting pre-emption or one refusing that relief.

(10) It is well-settled that a pre-emptor in order to succeed must have a right of pre-emption not only at the time of the sale of the property but also at the time of the institution of the suit for pre-emption and also at the time of the passing of the decree in the suit by the trial Court. According to Section 15(1)(a) Fourthly of the Punjab Pre-emption Act, a tenant who holds under the tenancy of the vendor the land or property sold or part thereof has a right of pre-emption. In *Bhagwan Das* v. *Chet Ram*, (7), it was held as under :—

> "A pre-emptor, in order to succeed, must have a right to pre-empt not only at the time of sale of the land by the landlord but also at the time of the institution of the suit for pre-emption and also at the time of passing of the decree in the suit by the trial Court. In other words, his tenancy must remain intact and he must hold the land in his capacity as a tenant till the date of the decree.
>
> The sale of the land alone cannot divest the tenant of his right to hold the land of which he is in possession by virtue of his tenancy under the vendor. But if his tenancy is determined by a decree for eviction, he loses his status of a tenant. He then does not satisfy the first requirement of section 15(1)(a) Fourthly, that he is a tenant who holds the land. In that situation he cannot succeed in a pre-emption suit if the decree for eviction has been passed after the sale but before the institution of the suit or during its pendency and before the date of decree."

(7) A.I.R. 1971 S.C. 369.

Similar is the case of a person, who files a suit to pre-empt the sale on the ground of being a co-sharer in the property and in this respect reference may be made to *Het Ram and another* v. *Dal Chand and others,* (8). The facts of this case were that at the time when the suit for pre-emption was instituted, the plaintiff was a co-sharer in the property sought to be pre-empted, but a parallel litigation had been going on in the shape of a partition suit and, before a decree could be passed in the pre-emption suit, the final stages of the partition suit had been reached and certain specific plots were marked off for each of the co-sharers and the result was that the plaintiff ceased to be a co-sharer in the land in respect of which he had brought the three pre-emption suits. On these facts, it was held as under :—

> "The law of pre-emption is a highly technical one and a plaintiff, before he can succeed, must show that his right existed not only in its preliminary stages before he went into the Court but also while the case was in the course of active prosecution before the Judge and in fact up to the time when the Court passed the decree. He should show that he has the right on three important dates, viz. (1) the date of the sale, (2) the date of the institution of the suit and (3) the date of the first Court's decree."

Since the plaintiff ceased to be a co-sharer, his suits were dismissed. To the same effect was the law laid down in *Shiv Singh* vs. *Phuman,* (9). The facts of this case were that a pre-emptor sued for pre-emption on the ground that he was a co-sharer with the vendor in the Khata, a share of which was sold, while the vendee was not. During the pendency of the suit in the trial Court, the vendee applied for partition of his share in the Khata and the partition was effected before the suit was decided. On these facts, it was held:—

> "That as the Khata had ceased to be joint at the time of the decree of the trial Court, the plaintiff had lost his right of pre-emption. This was not a case of improvement in the status of a vendee contemplated by Section 21-A of the Punjab Pre-emption Act but of deterioration in the Status of the plaintiff who had lost his status of a co-sharer."

(8) A.I.R. 1933 Lah. 381 (2).

(9) 1948 P.L.R. 78.

(11) In Section 5(b) of the Pre-emption Act, no time-limit is fixed up to which the waste land can be reclaimed by the vendee. It nowhere prescribes that no right of pre-emption shall exist in respect of the sale of agricultural land being waste land if it is reclaimed by the vendee before the institution of the suit for pre-emption or till the date of the decree passed by the trial Court or by the appellate Court. In *Radhakishan Laxminarayan Toshniwal* v. *Shridhar Ramchandra Alshi and others*, (10), it was held as under :—

> "There are no equities in favour of a pre-emptor, whose sole object is to disturb a valid transaction by virtue of the rights created in him by statute. To defeat the law of pre-emption by any legitimate means is not fraud on the part of either the vendor or the vendee and a person is entitled to steer clear of the law of pre-emption by all lawful means.
>
> Moreover, the right of pre-emption is a weak right and is not looked upon with favour by Courts and, therefore, the Courts cannot go out of their way to help the pre-emptor."

There is no provision in the Punjab Pre-emption Act, which prohibits the vendee from reclaiming the land during the pendency of the suit to defeat the suit of the pre-emptor. Section 21-A of the Punjab Pre-emption Act, as contended by the counsel for the plaintiff-respondent Jabbar Singh, can have no application to such reclamation of the waste land. Section 21-A of the Act lays down that any improvement, otherwise than through inheritance or succession, made in the status of a vendee-defendant after the institution of a suit for pre-emption shall not affect the right of the pre-emptor-plaintiff in such suit. This section refers to the improvement in the status of the vendee during the pendency of the suit and does not refer to the improvement made in the property or land, which is the subject-matter of the suit and, therefore, it has no application to this case.

(12) Mr. H. L. Sibal, the learned counsel for the plaintiff-respondent Jabbar Singh relied upon a Division Bench judgment of this Court in *Balwant Singh and others* v. *Kehar Singh*, (1), in support of his contention that the land which is saved from the pre-emption suit is only that land out of the sold land, which has

(10) A.I.R. 1960 S.C. 1368.

been reclaimed up to the date of the suit and not beyond that. In that case the question of law which was referred to the Division Bench for decision was whether the scope of the amended Section 5 of the Punjab Pre-emption Act excluding the right of pre-emption in respect of a sale of agricultural waste land reclaimed by the vendee extends up to the date of the suit or the decree. The Division Bench held :—

> "that it is the sale of waste land reclaimed by the vendee which is protected from the hands of the pre-emptor and obviously the relevant date is the one when the pre-emption suit is filed. The land which is saved from the pre-emption suit is only the land which has been reclaimed up to the date of the suit and not beyond."

To the same effect was the law laid down in *Tek Chand* v. *Sain Dass and others,* (2). In *Balwant Singh's case,* (1), (*supra*) the counsel for the appellant had contended that if the land reclaimed by the vendee only up to the date of the suit is taken into account, it would be inconsistent with the provisions of the amending Act and that according to the law laid down in *Ram Lal* v. *Raja Ram* (4), the provisions of the Punjab Pre-emption (Amendment) Act No. 10 of 1960 must be given effect to not only in fresh suits filed or the suits pending, but also in those cases in which the appeals are pending and have not been decided. This contention of the learned counsel was repelled by the Hon'ble Judges with the following observations :—

> "To say that the vendee is given a *carte blanche* to reclaim as much of the land as he can even after the pre-emption suit is filed would lead to a good deal of undesirable manoeuvring and delay in litigation. Only a resourceless vendee would be left with any unreclaimed land by the time that a decree is passed..... An attempt to counter this argument has been made by the suggestion that it would make it possible for a suit for pre-emption to be brought immediately after the sale, thereby preventing the vendee from reclaiming any waste land. If we accept the contention of the applicants, we encourage, on the other hand, a vendee to take his own time to complete the reclaimation of land. We do not think that the interpretation should be made to depend on the promptness of the pre-emptor or the convenience of the vendee. The plain and grammatical meaning of the

word 'reclaimed' should be our sole guide. As much of the agricultural waste land as has been reclaimed by the vendee is saved from the hands of the pre-emptor. There is no warrant to assume that the word 'reclaimed' includes land to be reclaimed. This construction enables us to reach a conclusion without the addition of anything more than is actually in the statute itself and has been rightly preferred by the lower appellate Court. If a vigilant suitor thereby stands to gain we should remain uninfluenced by this result. After all, it should not be regarded as an unmeritorious reward to a pre-emptor who in knowledge of the law is prompt enough to bring a suit for pre-emption in respect of agricultural waste land even when the vendee has not had a chance to reclaim it after the sale."

The reasoning adopted in these two Division Bench judgments cannot be accepted in view of the law laid down in the above Supreme Court judgments reported as *Ram Sarup* v. *Munshi and others* (3) *Amir Singh and others* v. *Ram Singh and others* (5) and *Canan Singh and another* v. *Jai Kaur* (6) and by a a Division Bench of this Court in *Ram Lal* v. *Raja Ram* (4) While deciding *Balwant Singh's case* (1) (supra) the learned Judges did not take notice of not discussed the provisions of the newly added Section 31 of the Punjab Pre-emption Act, which is retrospective in operation and according to which no Court shall pass a decree in a pre-emption suit, whether instituted before or after the commencement of the Punjab Pre-emption (Amendment) Act No. 19 of 1960, which is inconsistent with the provisions of the said Act. If the land reclaimed by the vendee before the passing of the decree by the trial Court and a decree for pre-emption is passed in favour of the plaintiff regarding that land, then the decree will be inconsistent with the provisions of Section 5 (b) and section 31 of the Act. Therefore, the conclusion is irresistible that if the waste land is reclaimed by the vendee till the date of the decree by the trial Court or the appellate Court, the pre-emptor shall have no right of pre-emption regarding the reclaimed land and his suit *qua* that land must fail.

(13) Mr. Sibal, the learned counsel for the plaintiff then contended that if the contention of the counsel for the appellant-vendees is accepted, it may lead to absurd results and only a resourceless vendee would be left with any unreclaimed land by the time the decree is passed by the trial Court or the appellate Court. Be that

as it may, the Courts are not concerned with such results and are only to interpret and enforce the law as has been enacted by the legislature and it is for the latter (legislature) to amend the law to avoid such results. If the suit of a pre-emptor, who claims right of pre-emption being a tenant of the land sold under the vendor or being a co-sharer in such land, can be defeated by the vendee by obtaining a decree for eviction against that tenant or an order/decree for partition of the land/property during the pendency of the suit for pre-emption and before the passing of the decree by the trial Court, then I fail to understand why the vendee cannot defeat the pre-emption suit of the plaintiff by reclaiming the land, which is the subject-matter of the suit during its pendency.

(14) For the reasons given above, the contention of the learned counsel for the plaintiff-respondent is rejected as being devoid of force.

(15) Mr. Sibal then referred to two other rulings in support of his contention that land, which is saved from pre-emption suit, is only the land, which has been reclaimed upto the date of the suit and not beyond, to attract the provisions of Section 5 (b) of the Act, The first ruling relied upon by him is *Ramji Lal Ram Lal and another* v. *State of Punjab* (11) wherein it was held as per head note 'A' as under:—

> "Where a pre-emptor has established his preferential right to pre-empt a sale and a pre-emption decree has been passed in his favour by the first Court, it is not necessary that he should retain the superior right of pre-emption till the hearing of the appeal preferred by the vendee against the decree. When a pre-emption decree is passed by the first Court, the right of pre-emption becomes a vested right which can only be taken away from the pre-emptor decree-holder by retrospective legislation. Therefore, where, during the pendency of the apeal against a pre-emption decree, a notification under Section 8(2) was issued by the Punjab Government exempting the sale, with respect to which the decree was passed, from the right of pre-emption.
>
> That the Notification could not have retrospective effect because the Act itself made no provisions for retrospective operation of such notifications. The Notification could not,

(11) I.L.R. (1966) 2 Pb. 125 (F.B.)=A.I.R. 1966 Pb. 374 F.B,),

therefore, take away the already exercised right of pre-emption so as to defeat the suit in appeal."

This ruling obviously has no application to the present case, because the Notification issued in that case was not retrospective in operation. On the other hand, in this case it has been held above that Section 31 of the Pre-emption Act is retrospective in effect, according to which no decree inconsistent with the Amendment Act No. 10 of 1960 can be passed by any Court.

(16) The next ruling relied upon by Mr. Sibal is *Faiz Mohammad* v. *Chaudhary Fajar Ali Khan and another* (12) wherein it was held:—

"The vendee is on the defensive and is entitled to arm himself with a shield in order to protect his right which had accrued to him on the basis of his contract. A pre-emptor is on the other hand an aggressor. It is he who wishes to dislocate the vendee and it is he, therefore, who must show that the superior right to pre-empt which he had at the date of the sale continues to remain superior at all relevant times. If he fails to show that he must fail in his suit. Hence, it is not permissible for a pre-emptor to so improve his position before the date of the institution of the suit although after the date of the sale as to render the improvement made by the vendee in his status after the institution of the suit for pre-emption against him ineffectual."

This ruling is quite irrelevant for our present purposes. In the instant case, there is no question of improvement being made by the vendees in their status. The vendees simply reclaimed most of the land after the institution of the suit and claimed benefit of Section 5.

(17) In *Thakur Madho Singh and another* v. *Lt. James R. R. Skinner and another* (13) it was held:—

"A vendee can defeat the right of the pre-emptor by improving his status at any time before the passing of the decree in the pre-emption suit by the trial Court, as the rights of parties are adjudicated upon by the trial Court alone and the function of the Court of appeal is only to see what was the decree which the Court of first instance should have passed.

(12) A.I.R 1944 Lah. 172 (F.B.).

(13) A.I.R. 1941 Lah. 433 (F.B.).

The improvement by the vendee in his status can be effected even after the expiry of one year from the date of the original transaction of sale.

The aforementioned improvement can in certain circumstances, be effected by the vendee even by dealing with the land which is the subject-matter of the suit."

(18) In order to counter-act the view taken in the aforesaid Full Bench authority that the vendee was entitled to defeat the pre-emptor suit by improving his status till the date of the decree by the trial Court, Section 21-A was added in the Punjab Pre-emption Act by the (Punjab Pre-emption Act) (Amendment) Act No. I of 1944 and this section came into force with effect from 29th May, 1944. This Section 21-A simply says that a vendee cannot make improvement in his status otherwise than through inheritance or succession after the institution of the suit to defeat the claim of the pre-emptor. In the instant case, the vendee-appellants did not make any improvement in their status and they simply reclaimed the land to get benefit of Section 5(b) read with Section 31 of the Pre-emption Act.

(19) For the reasons given above, it is held that in view of the provisions of Section 31 of the Punjab Pre-emption Act, the applicability of Section 5(b) of that Act has to be seen at the date of the ultimate decision of the case and not at the date of the institution of the suit. Under section 5(b), no time-limit is fixed upto which the waste land can be reclaimed by the vendee to defeat the suit of the pre-emptor. Further section 5(b) does not say that no right of pre-emption shall exist in respect of agricultural land being waste land if it is reclaimed by the vendees before the institution of the suit for pre-emption or till the date of decree passed by the trial Court or by the appellate Court. The vendee, therefore, can defeat the suit of the pre-emptor by reclaiming the land even after the institution of the suit till the date of the decree passed by the trial Court or by the appellate Court.

(20) The word 'reclaim' in Section 5(b) of the Act is not defined in the Punjab Pre-emption Act. The dictionary meaning of 're-claim' is 'to bring under cultivation'. In *Tek Chand* v. *Sain Dass and others supra* (2) it was held as under:—

" 'Reclamation' as defined in Shorter Oxford English Dictionary Volume Two (1961 edition) means 'the making

of land fit for cultivation'. 'Reclaim' likewise is defined thus:—

'To bring waste land, etc. under, or into a fit state for cultivation'. The building of house on land obviously cannot be regarded as reclamation in the context in which this word is used in clause (b) of Section 5."

(21) In *Madan Lal and others* v. *Dhan Raj and others*, (14), it was held :—

"That it is obvious that the reclamation of waste land mentioned by the Punjab Pre-emption Act refers to reclamation for purposes of cultivation and the meaning is that if waste land is brought under cultivation by the vendee, there is in respect of that land no right of pre-emption. The mere setting up of a building on such land is not reclamation referred to in the Punjab Pre-emption Act."

(22) Both the Courts below found that Khasra Nos. 1071 to 1075 measuring 40 Kanals had been reclaimed by the vendees before the institution of the suit and this being a finding of fact based on evidence cannot be assailed in second appeal. This finding was also not contested by the learned counsel for the plaintiff-pre-emptor Jabbar Singh. Consequently, the plaintiff's suit with respect to these khasra numbers must fail and the decision of the Additional District Judge, Karnal, on this point is correct. There is no substance in Regular Second Appeal No. 1221 of 1961 Re: *Jabbar Singh* v. *Karnail Singh and others* and the same must be dismissed.

(23) During the pendency of the suit, the trial Court appointed Shri Mani Subrat Jain, Pleader of Karnal, as a Local Commissioner to inspect the land in dispute in village Chanal Heri, tehsil Thanesar, to find out if the vendees had broken the land in suit and if so, when and to what effect. He visited the spot on November 9, 1959 but none of the parties was present even though the date of inspection had been intimated to them by the trial Court. The Local Commissioner called the vendor and some other persons, who took him to the land in suit. His report is Exhibit P. 6. He found that the land in suit is situated at a distance of two miles from the village. He observed that front portion of the land, which measured about 9 killas had been broken within about a month of his

(14) 1964 Curr. L.J. 343.

inspection with a tractor and that gram crop had been sown therein. These nine killas had not yet been levelled. The other land was lying unbroken.

(24) The trial Court appointed another Local Commissioner, Shri Rameshwar Lal Gupta, Pleader, by order dated February 22, 1960 on the application made by Karnail Singh and others, vendees-appellants, that a Local Commissioner may be appointed, who should visit the spot in the presence of the parties and should report how much of the land was broken and was under cultivation. He visited the spot in the presence of the defendants. He sent Kundan Lal Chaukidar to call the plaintiff but it was found that he had gone to Pundri and his mother, who was the next friend of the minor-plaintiff had gone to her parents' house in another village. He recorded the statements of the Chaukidar and other persons in whose presence he visited the land. He also called the Patwari, who brought the revenue records pertaining to the land in dispute. In his report, Exhibit D. 18, he found as follows :—

> "About 13/14 killas of this land give the appearance that they are under cultivation at present, and some plants of Gram and Sarson were standing upon this portion but the cultivation was found to be very thin, almost comparable to a tree after spring season when some new born leaves can be seen upon some of its branches. The defendants and their counsel told me that this paucity of crop was owing to complete lack of rains in this season.
>
> Then so far as the rest of the land is concerned barring a few Killas, the whole of it has been broken. The unbroken land may not be more than 2 or 3 Killas. Big logs of Dhak wood would also be abundantly seen on the whole land. At some places they had been heaped while at others they were still to be dug out. Dug-out thorny bushes could also be seen at some places in the land."

(25) In para No. 9 of the grounds of appeal in R.S.A. No. 560/1961, the appellants-vendees mentioned that at the date of sale the entire land comprised in sale was *banjar* and now, the entire land had been reclaimed and brought under plough by them. These allegations were repeated by Mr. Jagan Nath Kaushal, the learned counsel for the appellants in his arguments and these were not controverted by the counsel for the respondent. The Additional District

Judge also found that the entire land in suit had been broken by the vendees before the decree was passed by the trial Court. The decision of the Additional District Judge is dated April 1, 1961. It is undisputed that at present the whole of the land in suit is under cultivation. As held above, we have to look to the condition of the land when the decree is to be passed by the High Court in second appeal. As observed in *Ram Sarup* v. *Munshi* (2) *supra* a Court passes a decree even if it dismisses the appeal. Admittedly, the whole land is under cultivation for the last several years. Therefore, according to Section 5(b) read with Section 31 of the Act, Jabbar Singh plaintiff-pre-emptor has no right of pre-emption and his suit must fail.

(26) As a result, appeal No. 560 of 1961, filed by Karnail Singh and others, defendants-vendees, is accepted and the decree of the Additional District Judge dated April 1, 1961 passed for possession by pre-emption of the whole of the land in suit excepting 5 Khasra Nos. 1071 to 1975 is set aside and the suit for pre-emption filed by Jabbar Singh plaintiff is dismissed *in toto*. Appeal No. 1221 of 1961 filed by Jabbar Singh plaintiff is dismissed. Taking into consideration the facts and circumstances of this case, the parties are left to bear their own costs in both the appeals.

D. K. Mahajan, J.

(27) I have gone through the judgment prepared by my learned brother, Pattar J. I entirely agree with him. But in view of the importance of the question involved, I would like to add a few words of my own.

(28) Section 5 of the Punjab Pre-emption Act clearly postulates that there is no right of pre-emption in respect of agricultural land which, when sold, was waste and has been reclaimed by the vendee. Therefore, necessarily the reclamation will take place after the sale of the waste land and the bar to a suit for pre-emption arises in the very nature of things after the sale of the waste land. It follows, therefore, that in order to attract the provisions of section 5, reclamation has to be after the sale and cannot be, in any circumstances, before the sale. This again indicates that if the intention of the Legislature was to fix any time-limit for the reclamation of the waste land, it would have prescribed it. In view of section 31 of the Act, provisions of section 5 have to be given effect to at the time when the decree is passed. (See *Amir Singh and another* v. *Ram Singh and others* (5) and that in itself would include the passing of

the decree at the stage of appeal. (See *Ram Sarup* v. *Munshi and others* (3). It appears that the decisions (*Balwant Singh* v. *Kehar Singh,* (1) and *Tek Chand* v. *Sain Dass,* (2) taking the contrary view to the effect that reclamation must be before the date of the suit for pre-emption in order to attract the provisions of section 5, did not keep in view what I have stated above. The learned Judges were mainly impressed with this that the reclamation after suit would affect the right of pre-emption conferred by the Punjab Pre-emption Act. However, the basic rule that the pre-emptor has to preserve his right, right upto the date of the decree of the trial Court was lost sight of. It follows that a pre-emptor can lose that right before the suit reaches the stage of a decree. It is immaterial, how that loss occurs. I see no logic why the vendee cannot reclaim the land before the trial Court passes a decree merely because the pre-emptor will loss his right of pre-emption. If the right of pre-emption is such a right that it crystalizes on a given date then the rule that the pre-emptor must enjoy that right upto the date of the decree is meaningless. If what I have said is correct, it automatically follows that the suit can be defeated by reclaiming the land right upto the date of litigation is finally settled after the right of appeal has been exhausted. This conclusion is irresistible in view of the clear language of section 31 of the Act and the decisions of the Supreme Court, already referred to, wherein it has been observed that the language used in section 31 was comprehensive enough so as to require an appellate Court to give effect to the substantive provisions of the amending Act whether the appeal before it was one against a decree granting pre-emption or one refusing that relief. The relevant time when the Court has to see whether in view of the mandatory provisions of section 5 a decree can be passed will, therefore, be :—

(a) When the trial Court is about to pass a decree;

(b) if an appeal is taken, the time when the appellate Court is going to pass a decree in appeal.

(29) Thus, it cannot be said that the view adopted by this Court in the decisions already referred to, that the relevant date on which the reclamation has to be made is the date of the suit, is correct.

TULI, J.—I entirely agree with my learned brethren and have nothing to add.

K. S. K.