

(8) The principal reasons that have led to the rule last mentioned are, first, ..... and, secondly, that a party is strictly not entitled to rely on the statute of limitation when what is sought to be brought in by the amendment can be said in substance to be already in the pleading sought to be amended. ....”

(18) The question, therefore, boils down to this, whether the plea, that is now sought to be added, can be said “in substance to be already in the pleading” and the answer to this is in the negative. The ground of cosharership is conspicuous by its absence in the original pleading.

(19) In view of the clear authority of this Court and that of the Supreme Court, I have no doubt in my mind that the Court below had not exercised its discretion in a judicial manner and transgressed its jurisdiction in allowing a new ground, or claiming a superior right of pre-emption, being taken at a time when a suit based on that ground would have been barred by time.

(20) I, therefore, accept this revision, set aside the order of the Court below and dismiss the application seeking amendment of the plaint. The trial Court will proceed with the case on the basis of the unamended plaint with all possible expedition. The record of this case will be sent back to the Court concerned immediately. The counsel will direct the parties to appear in the Court below on 1st of March, 1971, for further proceedings. The costs of this petition will be borne by the respondents.

N. K. S.

APPELLATE CIVIL

Before Prem Chand Pandit, J.

KUNDAN SINGH,—Appellant.

versus.

ARJAN SINGH,—Respondent.

**Regular Second Appeal No. 1057 of 1968.**

January 29, 1971.

*Punjab Pre-emption Act (I of 1913)—Section 15—Right of pre-emption—When waived—Sale by mother being pre-empted by son—Pre-emptor utilizing the sale money received by the vendor in purchasing some other land—Whether amounts to the waiver of the right of pre-emption.*

## Kundan Singh v. Arjan Singh (Pandit, J.)

*Held*, that the right of pre-emption is provided by statute, and it cannot be held to be waived unless by word or action, the pre-emptor has debarred himself from exercising it. Where a sale by a mother is pre-empted by her son who has utilized the sale money received by the vendor in purchasing some other land, he does not in law waive his statutory right of pre-empting the first sale by the mother. (Paras 15 and 16).

*Regular Second Appeal from the decree of the Court of Shri J. S. Chatha, Additional District Judge, Amritsar dated the 26th day of June, 1968, reversing that of Shri G. L. Chopra, Sub-Judge IIIrd Class, Amritsar, dated the 27th March, 1965, and granting the plaintiff a decree for possession by pre-emption of the land in suit on payment of Rs. 6,876.00 on or before 15th July, 1968 and in case of default the suit would stand dismissed and further ordering that the plaintiff would be liable to pay Rs. 6,424.00 to the mortgagees for redemption of the property and passed no order as to costs.*

M. L. SETHI, ADVOCATE, for the appellant.

J. N. KAUSHAL, ADVOCATE, for the respondent.

## JUDGMENT

P. C. PANDIT, J.—(1) This is a vendee's second appeal against the decision of the learned Additional District Judge, Amritsar, reversing on appeal the order of the trial Court dismissing the pre-emptor's suit.

(2) The only point that has been argued before me by the learned counsel for the appellant is one of waiver and the facts of the case relevant for that purpose are these. On 21st March, 1963, Shrimati Dhanno, wife of Tarlok Singh sold agricultural land measuring 72 Kanals, 4 Marlas, situate in village Jhita Khurd, District Amritsar, to Kundan Singh for Rs. 12,000. This land was under mortgage with possession for Rs. 6,424 and the same was gifted to the vendor by her brother Ajaib Singh in November, 1953. Arjan Singh, son of the vendor, brought a suit for pre-emption.

(3) On the pleadings of the parties, a number of issues were framed, but we are concerned with only two of them, namely, issues Nos. 8 and 9, which are as follows :—

“8. Whether the plaintiff has waived his right of pre-emption?

9. Whether the suit is collusive and is otherwise for the benefit of the vendor and its effect?”

(4) The trial Judge dismissed the suit holding issue No. 9 in favour of the vendee. As regards issue No. 8, he observed that the oral evidence produced by the vendee to prove waiver on the part of the vendor was not reliable, but he went on to hold—"But my observations and findings on issue No. 9, decided earlier, equally apply to the present issue also. And I hold that by his conduct the plaintiff had waived his right to bring the present suit. He had made use of the same money along with his brother in purchasing other land, which their mother received four days before by selling the suit land. By conduct, he is estopped from bringing the present suit."

(5) When the matter went in appeal before the learned Additional District Judge, he set aside the finding of the trial Court on issue No. 9, with the result that it was held that the pre-emptor's suit was neither collusive nor for the benefit of the vendor. On the point of waiver also, he found against the vendee. While discussing this question, he observed—

"The counsel for the respondent (vendee) then urged that the plaintiff and his brother had purchased property and paid Rs. 3,700.00. This was after about three days of the disputed sale. Mst. Dhanno is alleged to have received Rs. 3,676.00 out of the sale-price for purchase of land at another place. The defendant appearing as a witness alleged that this money was utilized by the plaintiff and his other brother to acquire the property. This is only an allegation and cannot be accepted as evidence of the fact because Kundan Singh had no personal knowledge about it. Even if it be accepted that the plaintiff and his brother had bought property after a few days elsewhere and had got some money from their mother, it would not amount to waiver. They can get money from anybody for purchasing property elsewhere. If money had been received by the plaintiff from their mother for the purpose of this suit then there may have been some force in the argument of the vendee-respondent. It would, therefore, follow that there was no oral or documentary evidence to prove waiver."

(6) The learned Judge then accepted the appeal, set aside the judgment and decree of the trial Court and granted the plaintiff a decree for possession of the land in question on payment of Rs. 6,876.

The pre-emptor was also made liable to pay Rs. 6,424 to the mortgagees for redemption of the property. The vendee has come here in second appeal.

(7) As I have already mentioned above, the only point urged before me by the learned counsel for the appellant was that the finding of the lower Appellate Court on the question of waiver was incorrect in law. The argument of the learned counsel was that the sale in question took place on 21st March, 1963, and out of the sale consideration of Rs. 12,000, Rs. 1,700 were taken as earnest money by Shrimati Dhanno on 7th July, 1962, and Rs. 3,676 were paid to her before the Sub-Registrar at the time of registration of the sale-deed, while Rs. 6,424 were left in deposit with the vendee for payment to the mortgagees. After four days of this sale, that is, on 25th March, 1963, Arjan Singh, pre-emptor, and his brother Surat Singh purchased land measuring 62 Kanals, 10 Marlas in village Sugga for Rs. 7,000 and the amount of Rs. 3,676, received by their mother Dhanno under the first sale, was utilised by them for the payment of the sale-price of the second transaction. Rs. 3,700 were paid by them on 25th March, 1963. It was specifically mentioned in the first sale-deed that the property was being sold by Dhanno for purchasing land in her husband's village. It was also submitted by the learned counsel that out of the earnest money of Rs. 1,700 received on 7th July, 1962 under the first sale, Rs. 1,500 were paid on 4th September, 1962, by the pre-emptor and his brother Surat Singh to the vendors of the second sale. To prove these facts, reliance was placed on the contents of the first sale-deed, Exhibit D. 1, and the copy of the second sale-deed. Exhibit D.W. 5/1. Reference was also made to the evidence of Kundan Singh, vendee himself as D.W. 6. He had stated that when he paid the earnest money to Dhanno, the next day advance for the purchase of the land in village Sugga was given. It was also stated by him that with the money received from the sale of the land in village Jhita Khurd, property was purchased by Arjan Singh and Surat Singh soon after. The evidence of the vendee was not accepted by the learned Additional District Judge, because, according to him, Kundan Singh had no personal knowledge about the matters about which he had deposed. Learned counsel contended that the fact that the pre-emptor along with his brother purchased land some four days after the first sale and utilised the sale-consideration of Rs. 3,676 for payment towards the second sale, showed that the pre-emptor had acquiesced in the first sale and, therefore, waived his right to pre-empt that sale.

(8) It is undisputed that Arjan Singh had a right of pre-emption so far as the sale made by his mother was concerned. The question for consideration is—had he lost that statutory right simply because he got the money from his mother, which she had received from the vendee, and utilised it for purchasing the property along with his brother? In the first place, it may be stated that this was not the vendee's case in the written statement. There the plea taken by him on the question of waiver was contained in paragraphs 1 and 4 of the additional pleas and they are as under :—

- (1) "That the sale in dispute actually took place through the intervention of Surat Singh, brother of the plaintiff, and the plaintiff. The bargain was struck by the plaintiff and his real brother for their mother in village Jhhita Khurd in presence of respectable persons of the village and thus plaintiff has played an active part in bargaining the transaction, and in token of the consent, real brother of the plaintiff attested the sale-deed. And plaintiff being not present on the date of the execution of the sale-deed, could not attest it, but in fact, gave his express and implied consent to it. Therefore, the plaintiff is barred to file the present suit.
- (4) That few days prior to the date of writing of the contract of the sale (Ikrarnama) the present plaintiff along with his real brother, who subsequently attested the sale deed, unequivocally declared that they would not pre-empt the sale if the defendant pays Rs. 14,000 for the sale, as the answering defendant was offering Rs. 11,000, while the plaintiff along with his brother and mother were demanding Rs. 14,000, actually it was settled at Rs. 12,000. Hence the plaintiff has waived his right of pre-emption, if any."

(9) From the above, it would be apparent that the case set up in the written statement was that the sale, which was the subject of pre-emption, had taken place through the intervention of the plaintiff and his brother Surat Singh. The bargain was struck by both of them on behalf of their mother and in the presence of the respectables of village Jhita Khurd. The plaintiff had taken active part in completing the sale transaction. His real brother had attested the sale-deed. Since he himself was not present on the date of its execution, he could not attest the same, but gave his express and implied consent to it. If the vendee could prove all these allegations made

by him in the written statement, then it could be said that the plaintiff had waived his right, because it was then he, who had struck the entire bargain with the vendee on behalf of his mother in the presence of the respectables of the village. That being so, he could not pre-empt the sale. But the Courts below have not accepted the evidence of the witnesses produced by the vendee to prove these allegations.

(10) It may also be mentioned that neither any evidence was led by the vendee in support of the allegation made by him in para 4 of the additional pleas nor was this point argued in the Court below.

(11) We are then left with the sole circumstance that the pre-emptor had utilised the consideration of the first sale in purchasing property some four days after that transaction. By this conduct of his, can it be held that he had waived his right of pre-emption?

(12) On 21st March, 1963, when Dhanno sold the property to Kundan Singh, the pre-emptor had not done anything, either expressly or impliedly, by which the vendee could get even an impression that he will not be filing a suit for pre-emption. His brother had attested the sale-deed and the very fact that the pre-emptor did not do so should have put the vendee on the guard. Nothing was done by the pre-emptor to lead the vendee to believe that he was giving up his right of pre-emption. On the basis of his subsequent conduct in purchasing the property by getting money from his mother, it could not in my opinion, be said that he was in any way a party to the first bargain and had thus waived his right of pre-emption. If the sale consideration had been utilised by the mother for purchasing property in the name of her son, that could not debar him from pre-empting the sale. The onus was on the vendee to prove beyond doubt that the pre-emptor had waived his right of pre-emption. He had to establish some positive act on the part of the pre-emptor, which would show that he had abandoned his statutory right of pre-emption. The Court is not allowed to hold that waiver has been proved on general inferences.

(13) It may be mentioned that the learned counsel for the appellant also submitted that the father of the pre-emptor was also instrumental in effecting the sale, which was the subject-matter of the pre-emption suit. Even if that be so, I do not see how this fact will improve the case of the appellant. It is his conduct and not that of his father, which has to be seen for finding out whether he had waived his right of pre-emption or not.

(14) In a recent decision of the Supreme Court in *Jagad Bandhu Chatterjee v. Smt. Nilima Rani Ghosh and others* (1), it was held:

“In India the general principle with regard to waiver of contractual obligation is to be found in section 63 of the Indian Contract Act. Under that section it is open to a promisee to dispense with or remit, wholly or in part, the performance of the promise made to him or he can accept instead of it any satisfaction which he thinks fit. Under the Indian Law neither consideration nor an agreement would be necessary to constitute waiver. This Court has already laid down in *Waman Shrinivas Kini v. Ratilal Bhagwandas & Co.* (2), that waiver is the abandonment of a right which normally everybody is at liberty to waive. “A waiver is nothing unless it amounts to a release. It signifies nothing more than an intention not to insist upon the right.” It is well known that in the law of pre-emption the general principle which can be said to have been uniformly adopted by the Indian Courts is that acquiescence in the sale by any positive act amounting to relinquishment of a pre-emptive right has the effect of the forfeiture of such a right.”

(15) In *Bhagat Singh v. Hukam Singh and others* (3); Cornelius, J., observed—

“The right of pre-emption is provided by statute, and it cannot be held to be waived unless by word or action, the plaintiff has debarred himself from exercising it, that is, has undertaken not to exercise it, or has performed some act which is entirely inconsistent with an intention to exercise it, or if in consequence of any act done by him, the vendee has been directly induced to enter upon the sale, in the bona fide belief that the pre-emptive right would not be exercised.

Where before purchasing the land and before any notice under section 19, had been issued by the vendor, the vendee had asked the pre-emptor whether he would object to his buying the land in dispute, to which the pre-emptor replied that he had no objection and that he (vendee) was at liberty to make the purchase.

(1) 1971 S.C.J. 38.

(2) (1959) S.C.J. 639.

(3) A.I.R. 1947 Lah. 299.

Held that the reply did not amount to waiver by the pre-emptor of his right of pre-emption, as the pre-emptor's answer did not affect any present right vested in him.

Held also that as the pre-emptor's reply was non-committal in relation to pre-emptor's rights, the vendee could not be supposed to have acted on the faith of any assurance derived from it. The pre-emptor was, therefore, not estopped from suing to enforce his right."

(16) These two authorities support the view that I have taken above. I, therefore, agree with the learned Additional District Judge that even if it be accepted that the plaintiff and his brother had purchased property elsewhere a few days after the sale and got the money of that sale from their mother for that purpose, it could not be held in law that the plaintiff had waived his right of pre-empting the first sale.

(17) The result is that this appeal fails and is dismissed. In the circumstances of this case, however, I will leave the parties to bear their own costs in this Court.

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N.K.S.

FULL BENCH

MISCELLANEOUS CIVIL.

*Before Harbans Singh, C.J., B. R. Tuli and P. C. Jain, JJ.*

HARBANS KAUR ETC.,—*Petitioners*

*versus*

LUDHIANA IMPROVEMENT TRUST ETC.,—*Respondents.*

**C. W. No. 3229 of 1969.**

February 5, 1973.

*Punjab Town Improvement Act (IV of 1922)—Sections 36, 42 and 59—Land Acquisition Act (I of 1894 as amended by Land Acquisition (Amendment and Validation) Ordinance 1967 later on enacted into Act XXIII of 1967)—Sections 4 and 6—Notice under section 36 and notification under section 42 Town Improvement Act—Whether equated with notification under section 4 and declaration under section 6, Land Acquisition Act—Section 6 as amended by the Ordinance and the Act—Whether applicable to notification under section 42,*