no case has been made out for interference in revision. After all the question whether amendment should be allowed or not is a matter primarily within the discretion of the trial Court and I am unable to hold that the discretion has been exercised contrary to any rules of law or justice.

In the result, the petition fails and is dismissed but having regard to the circumstances of the case there will be no order as to costs.

*B. R. T.*

## LETTERS PATENT APPEAL

*Before Mehar Singh and R. P. Khosla, JJ.*

HAZARI AND OTHERS,—*Appellants.*

*versus*

NEKI AND OTHERS,—*Respondents.*

Letters Patent Appeal No. 13 of 1965

1965

July, 27th

*Pre-emption—Right of—Whether personal to the pre-emptor—Pre-emptor complying with the decree in his favour by depositing the amount in court in time—Vendee filing appeal against the decree—Pre-emptor dying during the pendency of the appeal—Decree—Whether should be set aside—Vendor and his sons brought on record as legal representatives of the pre-emptor—Decree—Whether can be affirmed in their favour.*

*Held,* that a right of pre-emption is not a personal right; it attaches to the land and runs with the land though it is not a right to or in the land. It does not die with death of the pre-emptor.

*Held,* that in a case where the pre-emptor obtained a decree in his favour and complied with its terms by depositing the amount in court within the time fixed in the decree, the title to the lands in the pre-emption suit accrued to him from the date of such payment as is expressly provided in Order 20, Rule 14(1)(b) of the Code of Civil Procedure, 1908. The death of the pre-emptor during the pendency of the appeal by the vendee from the decree of pre-emption did not have the effect of divesting the pre-emptor of his ownership of the land which he obtained before his death. At the stage of the appeal the pre-emptor was not enforcing or exercising a right of pre-emption but had already successfully done so and the vendee-appellant could only defeat him on the merits of his defence.

Merely because the pre-emptor died during the pendency of the appeal, his estate is not divested of the title acquired by him before his death. His heirs represent his estate and are not pre-emptors when they are brought on the record as his legal representatives in the appeal. The decree of pre-emption obtained by the deceased plaintiff pre-emptor cannot, therefore, be set aside merely on the ground of his death during the pendency of the appeal and the vendee can succeed in the appeal only on the merits of his defence.

*Held*, that the vendor and his sons, when brought on the record as the legal representatives of the deceased pre-emptor-plaintiff, represent the estate of the deceased and do not become parties to the appeal in the capacity and status of a pre-emptor. In the event of the affirmance of the decree obtained by the deceased plaintiff, the decree will not be in favour of the vendor and his sons as pre-emptors or any one of them as pre-emptor but the decree will be in favour of them as representing the estate of the deceased pre-emptor. The decree cannot, therefore, be set aside on the ground that, when affirmed, it will be in favour of the vendor and his sons.

*Letters Patent Appeal under clause* 10 *of the Letters Patent from the decree passed by the Hon'ble Mr. Justice H. R. Khanna dated* 17*th day of September,* 1964 *passed in R.S.A.* 281 *of* 1964, *affirming that of Shri M. L. Jain, Senior Sub-Judge with Enhanced Appellate Powers, Rohtak, dated the* 30*th January,* 1963, *who modified that of the Sub-Judge,* 1*st Class, Jhajjar, dated* 7*th November,* 1962, *granting the plaintiff a decree for possession of the suit land by way of pre-emption on payment of Rs.* 5,000 *only less the amount already deposited in court on or before* 15*th January,* 1963, *failing which the suit shall stand dismissed to the extent that the plaintiff is granted a decree for possession of the land in dispute to conditional on his depositing a sum of Rs* 2,000 *more payable to the defendants in the trial court on or before* 1*st March,* 1963 *failing which suit shall stand dismissed with costs throughout. The parties are left to bear their own costs before the Single Judge, in second appeal.*

P. C. JAIN, AND S. P. JAIN, ADVOCATES, for the Appellants.

U. D. GOUR, SHAMAIR CHAND AND PARKASH CHAND, ADVOCATES, for the Respondents.

JUDGMENT

Mehar Singh, J. MEHAR SINGH, J.—Three sales of land were effected by Dhara Singh in favour of Hazari, Amar Singh and Bhan Singh, appellants-vendees. The first sale was on September 20, 1960, of 27 Kanals and 4 Marlas, the second was on November 23, 1960 of 36 Kanals and 19 Marlas, and

he third was on March 6, 1961, of 33 Kanals and 18 Marlas. Neki, deceased-plaintiff, was Dhara Singh's father's brother. On the basis of such relationship he pre-empted the three sales under section 15(b), thirdly, of the Punjab Pre-emption Act, 1913 (Punjab Act 1 of 1913), and in all the three suits he succeeded in the trial Court. The appellants-vendees failed in the first appellate Court.

There were three second appeals in the three suits by the appellants-vendees in this Court. While those appeals were pending Neki, deceased-plaintiff, died on April 7, 1963. After his death the appellants-vendees in each one of their three second appeals moved an application under Order 22, rules 3 and 4 of the Code of Civil Procedure, to bring on the records of the appeals the legal representatives of Neki, deceased-plaintiff. Three legal representatives have been named. The first is Dhara Singh vendor, and the other two are the sons of this vendor. One of his sons named Ram Kishan had himself instituted pre-emption suits to pre-empt the sales and after having obtained decrees on compromise in those suits, he not having complied with the terms of the decrees, it was Neki, deceased-plaintiff, who succeeded in his claims. The reason for bringing Dhara Singh vendor on the records as legal representative of Neki, deceased-plaintiff, is that he is the nearest collateral relation entitled to succeed to the estate of the deceased-plaintiff. In the case of one son of this vendor named Balbir Singh, in the application it is stated that there is a will made by the deceased-plaintiff in his favour. The second son of the vendor has also been impleaded along with his brother and father. So at least Dhara Singh vendor has been impleaded because he is an heir to the estate of Neki, deceased-plaintiff, being at No. VII in Class II in the schedule under section 8 of the Hindu Succession Act, 1956 (Act 30 of 1956), and his son Balbir Singh has been impleaded because of his possible and likely claim under a will in his favour by the deceased-plaintiff. The decrees of the trial Court are of November 7, 1962, and those of the Court of first appeal of January 30, 1963. In between, and while the appeals were pending in the first appellate Court, on December 5, 1963, Neki, deceased-plaintiff, transferred the lands, the subject-matter of the suits, to respondents in those appeals other than Neki, deceased-plaintiff, as represented by Dhara Singh vendor and the two sons of the last-named,

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Ram Kishan and Balbir Singh. Those respondents, who may for the sake of convenience be described as second vendees, have become parties only at the stage of the second appeals. A pre-emption decree is in the nature of things a conditional decree and it has been stated at the bar that excepting the decree concerning the sale of 33 Kanals and 18 Marlas on March 6, 1961, the terms of the other two decrees were complied with by the pre-emptor, Neki, deceased-plaintiff. In other words, the deceased-plaintiff made payment of the amounts under those two decrees in the terms of the decrees. Although the exact date is not known, but it has been said that the payments were made within the time given in the decrees. In regard to the third sale of 33 Kanals and 18 Marlas which was effected on March 6, 1961, it has been stated that there is a dispute pending between the parties in the executing Court whether or not the deceased-plaintiff deposited the amount under the decree in the terms of the decree and within the time prescribed in it. This, however, is not going to make any difference to the decision of the question, the matter of contention, in these appeals. The reason is this, if the deceased plaintiff did not comply with the terms of the decree and make the deposit within the time stated in the decree, his particular suit must stand dismissed in the very terms of the decree. In that case no further question can possibly arise in any appeal in this Court in so far as the appellants-vendees are concerned. If on the other hand, the deceased-plaintiff complied with the terms of the decree and made the deposit within the time stated therein, the position is exactly the same as in the case of the other two sales in the other two appeals.

In the second appeals two arguments were urged before the learned Single Judge, which were negatived, but only one such argument survives at this stage in these appeals under clause 10 of the Letters Patent. The argument is that the right of pre-emption claimed by Neki, deceased-plaintiff, was a personal right which died with him on his death, and that the position is no different that Neki, deceased-plaintiff, died during the pendency of the second appeals, after the decrees of the trial Court had been affirmed by the Court of first appeal, than would have been the case if he had died during the pendency of the suits in the trial Court, in which case the trial Court would

have had no option but to proceed to dismiss each one of his three suits. The reason given in support of this is that it is now well settled that an appeal is a continuation of the suit and the proceedings in the original Court, and in consequence of the pendency of an appeal the subject-matter of the litigation is *sub judice*. The learned counsel for the appellants-vendees does not accept that the obtaining of decrees by the deceased-plaintiff makes any difference. He has pressed that in spite of his having obtained decrees from the trial Court when second appeals were pending against those decrees, the original suits or proceedings were in continuation and even if this Court proceeded to dismiss the second appeals, it would be passing decrees at that stage. The learned counsel has urged that a decree for pre-emption cannot possibly be made by this Court in second appeal when by the time such a decree is made the pre-emptor has lost his personal right of pre-emption, as in this case by the death of Neki, deceased-plaintiff, he ceased to be the vendor's father's brother. This argument has not found favour with the learned Single Judge who has by his judgment and decrees of September 17, 1964, dismissed the three second appeals of the appellants-vendees, however leaving the parties to bear their own costs. There is no other argument that has been urged on the side of the appellants-vendees in these appeals excepting this one argument. It has no relation to the merits of the defence of the appellants-vendees to the claims of Neki, deceased-plaintiff, to pre-empt the three sales. What is being urged is that the appeals being continuation of the suits of the deceased-plaintiff, on his death the right of pre-emption having come to an end, the suits must be dismissed and this Court cannot affirm in second appeal the decrees of the Court of the first appeal, for to do so would be passing decrees in favour of persons who have no right of pre-emption as Dhara Singh vendor and his sons. The only other matter which the learned counsel for the appellants-vendees has argued is that it is somewhat anomalous that a decree for pre-emption of the sales of Dhara Singh vendor be made in his favour, and he says that that cannot possibly be done

In regard to this last contention of the learned counsel for the appellants-vendees, it is apparent that this is not the correct status and capacity of Dhara Singh vendor in

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these appeals. Neither he nor any of his sons is a party to these appeals in the capacity and status of a pre-emptor. They are parties to these appeals as legal representatives of Neki, deceased-plaintiff, representing the latter's estate. So they are parties to these appeals in an entirely different capacity and in the event of the affirmance of the decrees obtained by Neki, deceased-plaintiff, it is not correct that those decrees will be in favour of Dhara Singh vendor and his sons as pre-emptors, or any one of them as a pre-emptor. The decrees will be in favour of them as representing the estate of Neki, deceased-plaintiff. So nothing turns upon this aspect of the argument on the side of the appellants-vendees.

The learned counsel on behalf of the appellants-vendees urges that the right of pre-emption is a personal right and dies with the pre-emptor. It is not a heritable right. It cannot be transferred. In this connection the learned counsel refers to *Sheo Narain* v. *Hira* (1), *Wajid Ali* v. *Shaban* (2), *Tafazzul Husain* v. *Than Singh* (3), and *Ramsarup Das* v. *Rameshwar Das* (4). This last mentioned case concerned a personal claim to an office and obviously with the death of the claimant the claim also died. So on facts this case does not bear on the question in the present appeals. In *Tafazzul Husain's case* the claim of pre-emption on the basis of co-sharership in the property failed because during the pendency of the suit, by reason of partition between the co-sharers, the plaintiff ceased to have that qualification. This was during the pendency of the suit and before the decree in the trial Court. Obviously the plaintiff could not succeed. In *Wajid Ali's case* Banerji, J., in his dissenting opinion observed that a right of pre-emption is not exercisable on the death of a person who could have made a claim for pre-emption, but this view was not shared by the other two learned Judges, who were of the opinion that where a right of pre-emption exists by custom, the right having once accrued does not of necessity lapse by the death of the pre-emptor before making a claim, but it descends along with the property by virtue of which

(1) I.L.R. (1885) 7 All. 535 (F.B.).
(2) I.L.R. (1909) 31 All. 623 (F.B.).
(3) I.L.R. (1910) 32 All. 567.
(4) A.I.R. 1950 Patna 184.

it subsists to the heir of the pre-emptor. So this case does not help the argument on the side of the appellants-vendees. In *Sheo Narain's case*, of the five learned Judges only Mahmood, J., expressed this view—"Under that (Mohammedan) law, when the ownership of the pre-emptive tenement is transferred or devolves by act of parties, or by operation of law, the transfer or devolution passes pre-emption to the person in whose favour the transfer or devolution takes place; but the rule is essentially subject to the proviso that such person cannot enforce pre-emption in respect of any sale which took place before such transfer or devolution." In so far as the observation of the learned Judge on the question of devolution by inheritance is concerned, it is obviously obiter because that was a case of an ordinary transfer in favour of a third person. So that even this case does not support the learned counsel. In *Fateh Khan* v. *Mohammad* (5), *Muhammad Yusuf Alikhan* v. *Dalkaur* (6), *Kaunsilla Kunwar* v. *Gopal Prasad* (7) and *Faqir Ali Shah* v. *Ram Kishan* (8) next heir was permitted to pursue a right of pre-emption and pre-empt a sale of immovable property. In *Sitaram Bhaurao Deshmukh* v. *Sayad Sirajul Khan Nawab Amir Yar Jung Bahadur of Secunderabad* (9), an administrator was permitted to proceed with such a suit. In all these cases, however, the question arose either before the institution of the suit or during the pendency of the suit, but before the decree of the trial Court. So none of these cases is really of assistance in the present appeals. In the same line is *Mirza Sadiq Husain* v. *Mohammad Karim* (10), in which a gift to continue a suit for pre-emption pending at the time of the making of the gift to the heir of the donor was upheld. The learned counsel for the opposite side has first referred to *Dhani Nath* v. *Budhu* (11), so as to show the nature of the right of pre-emption. In that case Plowden , S.J., held that a right of pre-emption is not a right to or in immovable property and proceeded to observe—"A preferential right to acquire land, belonging the another person upon the occasion of a transfer by the

(5) 98 P.R. 1898.
(6) I.L.R. (1898) 20 All. 148.
(7) I.L.R. (1906) 28 All. 424.
(8) 133 P.R. 1907 (F.B.).
(9) I.L.R. (1907) 41 Bom. 636.
(10) A.I.R. 1922 Oudh. 289.
(11) 136 P.R. 1894.

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latter, does not appear to me to be either a right to or a right in that land. It is *jus ad rem alienam acquirendam* and not *jus in re aliena*. The right, title and interest of the owner of land, which is subject to rights of pre-emption is not qualified or affected by the circumstance that it is so subject. The right, title and interest which passes upon a transfer is precisely the same whether the transfer be to a pre-emptor, or non-pre-emptor, the only difference being that in the latter case the transfer is voidable at the instance of any pre-emptor. What is really affected by the existence of the right of pre-emption is not the right, title or interest of the owner, which is precisely the same whether the land owned by him is or is not land subject to a claim of pre-emption or transfer, but the exercise of the owner's power of transfer. The owner of land so subject is restricted by the claim of the pre-emptor, he is not at full liberty to transfer to whomsoever he pleases, as he would be if the land was not subject to a right of pre-emption, until he has given the pre-emptor the opportunity prescribed by law to exercise his preferential right of acquisition. If we regard the pre-emptor's right between him and the owner, I think it becomes still more apparent that it is not a right to the land sold. A right to the offer of a thing about to be sold is not identical with a right to the thing itself, and that is the primary right of the pre-emptor. The secondary right is to follow the thing sold, when sold without a proper offer to the pre-emptor, and to acquire it if he thinks fit in spite of the same made in disregard of his preferential right. But even a decree in a suit brought for the purpose of enforcing this secondary right does not give the pre-emptor a right to the thing sold. He does not acquire that right until he has paid the price fixed in the decree within the prescribed period, and this he need not do unless he chooses. If he does so, the right, title and interest of the vendor which had meantime vested in the vendee is divested and vests in the pre-emptor and then, and not till then, he has a right to the land itself. In default of such payment his right of pre-emption over the land sold is not extinguished, but he loses his preferential right in respect to the particular transaction." The second case referred to in this respect by the learned counsel is *Audh Behari Singh* v. *Gajadhar Jaipuria* (12). In this case, after review of the case-law on the nature of the right of pre-emption, their

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

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Lordships observe—"In our opinion it would not be correct to say that the right of pre-emption under Mohammadan law is a personal right on the part of the pre-emptor to get a re-transfer of the property from the vendee who has already become owner of the same. * * *

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It is true that the right becomes enforceable only when there is a sale but the right exists antecedently to the sale, the foundation of the right being the avoidance of the inconveniences and disturbances which would arise from the introduction of a stranger into the land. We agree with Mr. Justice Mahmood that the sale is a condition precedent not to the existence of the right but to its enforcibility. * * *

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The correct legal position seems to be that the law of pre-emption imposes a limitation or disability upon the ownership of a property to the extent that it restricts the owner's unfettered right of sale and compels him to sell the property to his co-sharer or neighbour as the case may be. The person who is a co-sharer in the land or owns lands in the vicinity consequently gets an advantage or benefit corresponding to the burden with which the owner of the property is saddled, even though it does not amount to an actual interest in the property sold. The crux of the whole thing is that the benefit as well as the burden of the right of pre-emption run with the land and can be enforced by or against the owner of the land for the time being although the right of the pre-emptor does not amount to an interest in the land itself. It may be stated here that if the right of pre-emption had been only a personal right enforceable against the vendee and there was no infirmity in the title of the owner restricting his right of sale in a certain manner, a bona fide purchaser without notice would certainly obtain an absolute title to the property, unhampered by any right of the pre-emptor and in such circumstances there could be no justification for enforcing the right of pre-emption against the purchaser on grounds of justice, equity and good conscience on which grounds alone the right could be enforced at the present day. In our opinion the law of pre-emption creates a right which

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attaches to the property and on that footing only it can be enforced against the purchaser. The question now arises as to what is the legal position when the right is claimed not under Mohammadan law but on the footing of a custom. It cannot be and is not disputed that if the right of pre-emption is set up by non-Muslims on the basis of a custom, the existence of the custom is a matter to be established by proper evidence. * *

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The right of pre-emption, as we have already stated, is an incident of property and attaches to the land itself.

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The correct legal position must be that when a right of pre-emption rests upon custom, it becomes the 'lex loci' or the law of the place and affects all lands situated in that place irrespective of the religion or nationality or domicile of the owners of the lands except where such incidents are proved to be a part of the custom itself." So that a right of pre-emption is not a personal right, and it attaches to land and runs with the land though it is not a right to or in land. The contention of the learned counsel for the appellants-vendees that a right of pre-emption is thus a purely personal right and dies with the death of the pre-emptor is not supported by authority. The cases so far considered concern a right of pre-emption on the basis of title to property which supports such right on the ground of either co-sharership or vicinage. In all those cases the right of pre-emption was claimed on the basis of the co-sharer's title in the joint land or the contiguity of the pre-emptor's property to the land sold. In some of the cases cited, the learned Judges have held that in the case of such a right an heir cannot only continue a pending suit on the death of the pre-emptor but can also institute a suit, of course within limitation, even if the pre-emptor dies before the institution of the suit. In my opinion all those cases are really not relevant so far as the consideration of the one main argument in these appeals is concerned. There is only one case which is somewhat near to the facts of the

present appeals. The case is *Partap Singh* v. *Daulat* (13). In that case the pre-emptor instituted a suit to pre-empt a sale by reason of his nearness of relationship to the vendor, but during the pendency of the suit he died. His sons were brought on the record as plaintiffs. They themselves were not nearer relations to the vendor than was the vendee; but they claimed the advantage of the relationship possessed by their father. The learned Judges held that they could not have maintained the suit as against the vendees had they instituted the suit themselves, and they could not take advantage of the fact that their father at the time of the suit had a preferential right as against the vendees on the ground that he was a nearer relation. This case again does not advance the argument on the side of the appellants-vendees for the simple reason that the original pre-emptor died during the pendency of the suit, which is not the case in these appeals. Consequently none of the cases so far considered really bears upon the facts of the present appeals.

The deceased-plaintiff, Neki, complied with the decrees of the trial Court and made payment within the time given in those decrees; and rule 14(1)(b) of Order 20 of the Code of Civil Procedure in express terms provides that on such payment, title to the lands in the pre-emption suits is deemed to have accrued to him from the date of such payment. This question was considered by a Full Bench of this Court in *Ganga Ram* v. *Shiv Lal* (14) and it has been held in that case that the title to pre-empted property passes to the pre-emptor under a pre-emption decree on the deposit of the purchase-money in the terms of the decree and is deemed to pass to him from the date of the deposit. Similar view has prevailed with a Full Bench of the Lahore High Court in *Mohammad Saddiq* v. *Ghasi Ram* (15) and in *Dhani Nath* v. *Budhu* (16). So before his death, during the pendency of the second appeals by the appellants-vendees, Neki, deceased-plaintiff, became owner of the lands in the pre-emption suits. When he died, at that stage, he was not enforcing

(13) I.L.R.(1914) 36 All. 63.
(14) I.L.R (1964) 1 Punj. 555=1964 P.L.R. 251.
(15) A.I.R. 1946 Lah. 322.
(16) 136 P.R. 1894.

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or exercising a right of pre-emption, but had already successfully done so. Having complied with the terms of the decrees he gained title to the lands. At that stage the appellants-vendees could only defeat him on merits of their defence, and merely because he died during the pendency of those appeals, his estate is not divested of the title thus acquired by him. His heirs represent his estate and are not pre-emptors at this stage as has already been explained. The learned counsel for the appellants-vendees reiterates that an appeal is a continuation of the suit or the proceedings in the original Court and, in appeal, even though affirming the decrees of the Courts below, this Court is still passing decrees which it cannot do if the pre-emptor has, at this stage, lost his right of pre-emption. He relies upon *Ram Lal* v. *Raja Ram* (17) *and Ram Sarup* v. *Munshi* (18). Those are, however, cases under section 31 of the Punjab Pre-emption Act, 1913 (Punjab Act 1 of 1913), as amended by the Punjab Pre-eption (Amendment) Act, 1960 (Punjab Act 10 of 1960), which section expressly prohibits any Court from passing a decree in a suit for pre-emption, whether instituted before or after the commencement of Punjab Act 10 of 1960, which is inconsistent with the provisions of that Act. Some of the grounds of pre-emption have been taken away by that Act. It was to give benefit of the taking away of such rights that this section was enacted. It was held in those two cases that even at the stage of an appeal pending in the High Court, although the pre-emptor had succeeded in the trial Court in obtaining the decree, and, as during the pendency of the appeal, the statute took away his right of pre-emption, even though the High Court was affirming the decree, it was still passing a decree within the scope of section 31 in favour of a person who had by the subsequent amendment of Punjab Act 1 of 1913 lost his right of pre-emption, and thus was passing a decree inconsistent with the provisions of Punjab Act 10 of 1960. The deceased-plaintiff never lost his right of pre-emption under that Act. So section 31 has no application to the facts of the present case. By his death the deceased-plaintiff has not lost his right of pre-emption which, before his death, he had successfully exercised and in consequence of the decrees gained

(17) 1960 P.L.R. 291.
(18) A.I.R. 1963 S.C. 553.

title to the lands in dispute. On facts those two cases do not apply so far as these appeals are concerned. There is an observation by the learned Chief Justice in *Ram Lal's case* that in *Mohinder Singh* v. *Arur Singh* (19), the learned Judges held that where a right of pre-emption is taken away by a Government notification during the pendency of the appeal, the case must be decided on the basis of the law which existed at the time of the sale. The learned Chief Justice differed from this decision of the Division Bench of the Lahore High Court, but on checking the report of *Mohindar Singh's case* I find that the notification taking away the right of pre-emption had been issued by the Government not during the pendency of the appeal, after the pre-emptor had successfully obtained a decree in the trial Court, but during the pendency of the suit in the trial Court. At page 269 of the report the learned Judges have expressly stated that 'the suits were pending in the trial Court at the date of this notification * * * *'. The learned counsel for the appellant-vendees has relied upon this observation of the learned Chief Justice, but on the report of the case being seen by him he has given up this approach. So those two cases do not bear on the facts of the present appeals and do not help the argument on the side of the appellants-vendees. The deceased-plaintiff by his death did not lose title to the lands which before his death become part of his estate and that estate is now being represented by Dhara Singh vendor, his heir, and the two sons of that vendor. No doubt these appeals are continuation of the suits originally instituted by the deceased-plaintiff, but, if the appellants-vendees do not otherwise succeed on the merits of their defence, they cannot succeed merely because of the decease of Neki, deceased-plaintiff. The title thus acquired by the deceased-plaintiff to the lands was subject to the result of the appeals of the appellants-vendees, but that was on the merits of their defence and not that the death of the deceased-plaintiff divested him of the title already vested in him. At that stage he was no longer a pre-emptor endeavouring to exercise his right of pre-emption. He had become the owner of the lands, and at that stage what he was doing was defending that title in the appeals. There is one case which directly supports this approach. It is *Megha Ram*

(19) I.L.R. (1922) 3 Lah. 267.

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v. *Makhan Lal* (20), in which, on a similar argument having been urged, a Division Bench of the Punjab Chief Court observed thus—"It is to the effect that plaintiff based his suit on his possession of one-fourth share of a house adjoining the house in dispute, that the plaintiff on the 12th October, 1911 transferred that share to his mother by deed of gift, and that, therefore, the plaintiff has lost his *locus standi* to sue for pre-emption or to resist this appeal, and that his suit should be dismissed on this ground. In our opinion this contention cannot succeed, because plaintiff's decree awarded to him by the Divisional Judge bears date 2nd March, 1910 while his parting with the aforesaid one-fourth share of the adjoining house took place long afterwards. No doubt, according to the authorities, a pre-emptor can only succeed if he has a right of pre-emption at the date of the sale and at the date of the institution of suit and up to the passing of a decree in his favour (*Dhanna Singh* v. *Gurbakhsh Singh* (21), but in the present case plaintiff had his rights intact through the whole of these periods. No doubt in a sense the case is still *sub judice*, until the final appeal in this Court has been decided; but it is not *sub judice* in the sense in which the defendents use the phrase, nor do we think it is open to the aliene, against whom a decree for pre-emption has been passed, to ask this Court to set aside the decree of the Lower Appellate Court on the ground that, after the plaintiff had secured the decree, he had parted with the property on the strength of which he was able to sue for pre-emption. The plaintiff is not asking this Court for anything : defendant No. 1 cannot ask this Court to take away from plaintiff what the latter has obtained, on the ground that the letter could get it now if he was still asking for it". It is evident that this only argument on the side of the appellants—vendee is without substance.

The only other matter to which a brief reference may be made is that before his death the deceased plaintiff transferred his right to the respondents other than Dhara Singh vendor and his two sons, and in this connection the learned counsel for the appellants-vendees refers to *Mehr Khan* v. *Ghulam Rasul* (22), to contend that a decree for

(20) 67 P.R. 1912.
(21) 91 P.R. 1909 (F.B.).
(22) I.L.R. (1921) 2 Lah. 282.

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pre-emption is not transferable and the transferee cannot execute it. Somewhat different opinion was expressed by the learned Judges in *Jowala Sahai* v. *Ram Rakha*, (23). But it is not necessary to go into this matter in these appeals for the estate of the deceased—plaintiff is being represented by Dhara Singh and his sons as his legal representatives and that is in law sufficient representation of him. The second vendees can have recourse to any proceedings, in regard to which they are advised, to enforce the transfer in their favour. The question of a decision, in so far as the transfer in their favour is concerned, does not arise in these appeals.

In consequence the three appeals of the appellants-vendees are dismissed with costs.

Khosla, J.

R. P. KHOSLA, J.—I agree.

*B.R.T.*

CIVIL MISCELLANEOUS

*Before Inder Dev Dua and R. S. Narula, JJ.*

CHARAN DASS DOGRA AND OTHERS,—*Petitioners.*

*versus*

THE PUNJAB STATE AND OTHERS,—*Respondents.*

**Civil Writ No. 1552 of 1965**

1965

July, 30th

*Constitution of India* (1950)—*Art.* 226—*Scope and ambit of the power of the High Court—Alternative remedy—How far a bar to relief—Punjab Panchayat Samitis and Zila Parishads Act (III of* 1961—*S.* 5(2) (cc)—*Co-option of Women members—Whether must take place at meeting of the Samiti—Order of the High Court that the named woman should be co-opted—Whether has the effect of co-opting her without a meeting—Right of vote—Whether statutory—Punjab Panchayat Samitis (Co-option of Members) Rules* (1961)—*Rule* 4-*A*—*Whether has the effect of dispensing with the meeting—Panchayat institutions—Development of —Duty of the Officers in the matter pointed out—Desirability of removing ambiguity and lacuna from Law.*

*Held*, that Article 226 of the Constitution of India, widely worded as it is, confers on the High Court power of very comprehensive

(23) 78 P.R. 1896.