

(19) For the reasons mentioned above, we find no force in this petition and order the same to be dismissed. No costs.

R. S. Narula, C.J.—I agree.

Prem Chand Jain, J.—I also agree.

Gurnam Singh, J.—So do I.

R. N. Mittal, J.—I concur.

N. K. S.

FULL BENCH

APPELLATE CIVIL

Before M. R. Sharma, S. S. Sidhu and A. S. Bains; JJ.

THAN SINGH AND OTHERS,—Appellants.

versus

NANDU ETC.,—Respondents.

Regular Second Appeal No. 1255 of 1967

September 9, 1977.

Punjab Pre-emption Act (1 of 1913)—Section 15—Suit for possession by pre-emption—True nature of a transaction which is apparently an exchange—Whether can be gone into by the Court in such suit—Pre-emptor—Whether can be allowed to lead evidence to prove such nature of the transaction.

Held, that (1) it is open to the plaintiff (pre-emptor) to establish that the transaction in a suit is in reality a sale and not an exchange or gift and that the Courts can enquire into the true nature of such a transaction. Under the Evidence Act also, there is no bar to lead evidence to prove certain transaction as a sale ;

(2) a vendor can defeat the right of the pre-emptor by all legitimate means ;

(3) if two views are possible, then the one which defeats the right of the pre-emptor has to be accepted ; and

Than Singh and others v. Nandu etc. (A. S. Bains, J.)

(4) if the Courts below have arrived at a finding that a certain transaction is a sale, exchange or gift, as the case may be, then this finding is not open to scrutiny in second appeal.

(Para 13).

Case referred by Hon'ble Mr. Justice Ajit Singh Bains, to a larger Bench on 27th April, 1977, for the opinion of an important question of law involved in the case. The Full Bench consisting of Hon'ble Mr. Justice M. R. Sharma, Hon'ble Mr. Justice S. S. Sidhu and Hon'ble Mr. Justice A. S. Bains has finally decided the case on merits on 9th September, 1977.

Regular Second Appeal from the decree of the Court of Shri B. L. Singal, Additional District Judge, Rohtak, dated the 23rd day of June, 1967, reversing that of Shri Shiv Doss Tyagi, Sub-Judge 1st Class, Jhajjar, dated the 29th January, 1966, and dismissing the suit of the plaintiff and leaving the parties to bear their own costs throughout.

P. S. Jain, Advocate with V. M. Jain, Advocate, for the Appellants.

G. C. Mittal, Advocate with Arun Jain, Advocate, for the Respondent.

JUDGMENT.

Ajit Singh Bains, J.—

(1) The facts from which this reference to Full Bench has arisen are as follows :—

(2) Than Singh, plaintiff (since deceased) brought a suit for possession by pre-emption of the land which was given in exchange by Smt. Saraswati to Nandu, claiming himself to be the brother of the deceased husband of Smt. Saraswati, alleging that the transaction was virtually a sale in the guise of an exchange and that it was done to defeat his pre-emptive right, because on the same day Smt. Saraswati executed a sale-deed, Exhibit D. 2, in favour of Gordhan, brother of Nandu, in respect of the land she got in exchange from Nandu and the sale money mentioned in the sale deed was Rs. 2,000. Nandu defendant contested the suit and, controverting the allegations in the plaint, pleaded that the transaction in question was in fact an exchange and not sale and that the plaintiff had no right of pre-emption. The parties contested on the following issues :—

1. Whether the plaintiff has superior right of pre-emption ?

2. Whether the transaction is a sale or an exchange and, if an exchange, to what effect ?
3. Relief.

Issue No. 1 was decided by the trial Court in favour of the plaintiff and it was held that he had a superior right of pre-emption. On issue No. 2 the trial Court held that the transaction, dated 22nd April, 1964, Exhibit D. 1, was in fact a sale and not an exchange and the plaintiff was, therefore, entitled to claim possession on the basis of pre-emption in respect of this transaction. Consequently, the suit of the plaintiff was decreed. Defendant No. 1 Nandu, went in appeal, and the learned Additional District Judge, Rohtak reversed the finding of the trial Court on issue No. 2 and held that the transaction, Exhibit D. 1, was an exchange and not a sale, and allowing the appeal dismissed the plaintiff's suit. Hence this second appeal by Than Singh plaintiff, who is now dead and is represented by his legal representatives in this appeal.

(3) When this second appeal came before me on 27th April, 1977, I thought it necessary to refer it to a Full Bench in view of the fact that there appeared to be conflict of authorities reported as *Gul Muhammad v. Sabz Ali Khan and others* (1), on one hand and *Narain Singh and another v. Waryam Singh and others* (2) and *Rati Ram and others v. Mam Chand and others* (3) on the other, and while referring the case to a Full Bench, it was observed as under:—

“Since there is conflict of view in the above three Division Bench authorities, and in the context of the modern changed socio-economic conditions, the pre-emption law is being considered as an outmoded law because it creates a clog on the right of the owner to alienate his property to a person of his own choice, it has, therefore, to be strictly construed. Moreover, according to the definition of the term ‘sale’ as well as that of the term ‘exchange’ as given in sections 54 and 118 respectively of the Transfer of Property Act, the document Exhibit D. 1, on plain reading, clearly answers the definition of exchange. I am,

- (1) 104 P.R. 1918.
- (2) A.I.R. 1921 Lahore 192.
- (3) A.I.R. 1959 Pb. 117.

Than Singh and others v. Nandu etc. (A. S. Bains, J.)

therefore, of the view that the law as laid down in (*Gul Muhammad's case* (1) (*supra*) needs reconsideration by a larger Bench."

(4) Mr. P. S. Jain, learned counsel for the appellant, contends that the transaction in question is in fact a sale and not exchange and it has been given the colour of exchange in order to defeat the right of the pre-emptor.

(5) The sole question for determination in this second appeal before us is whether in a pre-emption suit the Court can enquire into the true nature of a transaction which is apparently an exchange in order to determine that in fact it is a sale and not an exchange and allow the pre-emptor to lead evidence to prove the same. There is no dearth of authorities and the basic authority on this point is *Tara Chand v. Baldeo and others* (4). As early as in 1889 in a pre-emption case a question arose whether a certain transaction in the form of a gift was really a sale and whether the Court could go behind the document and it was held by their Lordships of the Full Bench that in the case of an alienation of land, in which a document has been executed purporting to be a deed of gift or of mortgage it is open to a third party claiming to exercise a right of pre-emption to prove that the transaction was in reality one of sale, and that, the document sought to be impugned was executed in order to conceal its real nature and to defraud him of his legal rights. Their Lordships in the same judgment also observed that a person is entitled to evade the law of pre-emption by all lawful means and that it is quite open to a proprietor of land to mortgage his estate for an indefinite period although he would have sold it but for the law of pre-emption.

(6) In *Gul Muhammad v. Sabz Ali Khan and others* (1) (*Supra*) Khair Muhammad and Haidran Khan exchanged 1926 *kanals*, situated at *mauza* Rakh Rekh, with Gul Muhammad who gave in exchange about 2791 *kanals* of other land. On the 13th January, 1913, the suit to pre-empt was instituted by the plaintiff Sabz Ali who alleged that the exchange set forth above was really a sale in disguise and he based his claim to pre-empt on that sale on the ground that he was an heir of the vendors. On the 21st January, 1912, i.e.

(4) 117 P.R. 1890 (F.B.)

just two days after the challenged exchange Khair Muhammad and Haidran Khan sold for Rs. 13,100 the land taken by them in exchange and this circumstance clearly established that they had no desire to acquire for themselves the land which they purported to have taken in exchange and that the cloak of an exchange was employed in order to effect the transfer of their land to Gul Muhammad without exposing him to the risk of an attack by a pre-emptor. It was held by their Lordships as under :—

“We have no doubt that it is the business of the Court in every such case to determine what the real intention of the parties was as opposed to their apparent intention, and in this case we have no hesitation whatever in finding that what the parties intended in effect was a sale and not an exchange.”

(7) In *Gul Muhammad Khan v. Khan Ahmad Shah* (5) also, the instrument conveying the land was not a deed of sale but an instrument of exchange. In this case, in addition to the price of land, a piece of land was given in exchange for the land and in this situation, it was held by their Lordships that it was in fact a sale and not an exchange as the piece of land was insignificant as compared to the price of land sold, i.e., Rs. 4,500. The price of one Ghumao of land was only Rs. 40 or Rs. 50, to the rest of the consideration, Rs. 4,500 in money which was made designedly merely in order to give a transaction which in reality was a sale the colour of an exchange. In that situation, it was held that merely the addition of an insignificant piece of land to the major transaction would not make it an exchange.

(8) In *Narain Singh and another v. Waryam Singh and others* (2), (supra), it was held that the law of pre-emption may be evaded by legal means, and there is, therefore, nothing illegal in effecting an exchange when the buyer apprehends that a sale effected in his favour would be pre-empted.

(9) In *S. Masih Hassan v. Allaha Diya and others* (6), the plaintiff brought a suit for possession by pre-emption of 18 bighas of land which had been given under an exchange deed by A to B in

(5) 29 P.R. 1893.

(6) A.I.R. 1947, Lahore 320.

Than Singh and others v. Nandu etc. (A. S. Bains, J.)

exchange for about 10 bighas of land, a house and Rs. 200 in cash. The plaintiff contended that though the transaction was given the appearance of an exchange it was in fact a sale. On these facts, their Lordships held as under:—

“It was open to the plaintiff to establish that the transaction in suit which had the appearance of an exchange was in fact a sale and it was not only open to the Court to enquire into the true nature of the transaction but it was also its duty to give effect to its finding on the point in relation to the right of pre-emption”.

(10) In *Chiragh Din v. Allah Din*, (7), the deed of transfer in respect of which pre-emption was sought was in terms of gift. 12 Kanals 2 Marlas of land was gifted by ‘N’ as some return for the services rendered to him. In the deed it was also stated that the value of the property was Rs. 1,000. It was found, as a matter of fact, that the donee was not in any way related to ‘N’ to whom he was in no way proved to be beholden, that N had six sons of his own and was on good terms with them and that he was by no means a man of superfluous wealth and in that situation, both the lower Courts found that the transfer was really one of sale and not a gift. It was held by their Lordships that on the facts found the lower Courts were fully justified in holding that the transfer was really one of sale, though disguised as a gift.

(11) In *Rati Ram and others v. Mam Chand and others* (3) (supra), it was held by a Division Bench of this Court that where out of regard for the donees and their father, the donor gets the land mutated in favour of the donees who in return maintain him and look after him, such a transaction cannot be described to be a sale. It was further observed by their Lordships as under:—

“It is well established that right of pre-emption is a piratical right and it imposes a restriction on the right of the owner to transfer this property to whomsoever he likes. This right operates as a clog on the right of the owner to alienate his property to a person of his own choice; it has, therefore, to be strictly construed. The plaintiff in a pre-emption suit, who is an aggressor, must prove affirmatively that the transaction which he wants to pre-empt is a sale and that he has a preferential right over

the vendees; in case there exists a doubt about the transaction in question being a sale the plaintiff must fail. The policy underlying the law of pre-emption is to keep out strangers and thus to maintain the privacy and compactness of joint owners. If the transaction indispute is capable of two interpretations the Courts should be disinclined to hold it to be a sale so as to force the owner of the property to transfer it to a person who is not of his choice. It is well established that it is open to a party to defeat a possible pre-emptor by all legitimate means."

(12) The authorities *Dhala Bahlak v. Dhala Lakhan and others* (8), and *Bahawal v. A mir and another* (9), relied on by Mr. Jain, are irrelevant and have no bearing on the question which we have to answer.

(13) From the close scrutiny of the aforesaid authorities and on the basis of the foregoing discussion, the following conclusions are arrived at:—

- (1) that it is open to the plaintiff (pre-emptor) to establish that the transaction in suit is in reality a sale and not an exchange or gift and that the Courts can enquire into the true nature of such a transaction. Under the Evidence Act also, there is no bar to lead evidence to prove certain transaction as a sale;
- (2) that the vendor can defeat the right of the pre-emptor by all legitimate means;
- (3) if two views are possible, then the one which defeats the right of the pre-emptor has to be accepted; and
- (4) if the Courts below have arrived at a finding that a certain transaction is a sale, exchange or gift, as the case may be, then this finding is not open to scrutiny in the second appeal.

(14) Now, in the light of the principles formulated above, it is to be adjudged if the deed in the instant case is a sale deed or exchange. Mr. Jain contends that the transaction in question is, in fact, a sale and not an exchange as the land received in exchange from Nandu was sold on the same day to the brother of Nandu.

(8) A.I.R. 1936, Lahore 612.

(9) A.I.R. 1939, Lahore 343.

Than Singh and others v. Nandu etc. (A. S. Bains, J.)

(15) There is little force in this contention. The terms 'sale' and 'exchange' are defined in Sections 54 and 118 of the Transfer of Property Act. Section 54 is in the following terms:—

“‘Sale’ is a transfer of ownership in exchange for a price paid or promised or part-paid and part promised”.

Section 118 is in the following terms:—

“When two persons mutually transfer the ownership of one thing for the ownership of another, neither thing or both things being money only, the transaction is called an ‘exchange’”.

The deed in question fully complies with the requisites of exchange in terms of Section 118 of the Transfer of Property Act and it admits of no other interpretation except that of exchange. The subsequent transaction may be on the same day but it is not between the same parties. Hence it cannot be said that the deed in fact is cloak on sale and is not an exchange. The vendor can by all legitimate means defeat the right of the pre-emptor. Pre-emption law is a relic of feudalism. It has been repealed in the State of Punjab. It creates a clog on the right of the owner to alienate his property to a person of his own choice. Even if two interpretations of a document are possible, the one which defeats the right of the pre-emptor is to be accepted. In the present case, the deed admits of no other interpretation except that of being an exchange and it is clearly a deed of exchange and not of sale. Moreover, the learned Additional District Judge having held as a finding of fact that the deed in question is an exchange deed and not a sale-deed, this finding is not open to scrutiny in this second appeal.

(16) For the reasons recorded above, this appeal fails and the same is dismissed, but there will be no order as to costs.

M. R. Sharma, J.—I agree.

S. S. Sidhu, J.—I also agree.

N. K. S.

