Before : J. V. Gupta, J.

SANTOKH SINGH,—*Appellant.*

versus

LIJJA RAM and another,—*Respondents.*

Regular Second Appeal No. 364 of 1977

May 15, 1986

Punjab Pre-emption Act (I of 1913)—Section 15(1)(a) Fourthly—Suit for pre-emption decreed as plaintiff was co-sharer in the joint khata till the date of decree—Vendees/Judgment-Debtors' first appeal dismissed and second appeal subsequently filed and pending in the High Court—Plaintiff/decree-holder applying for partition of suit property as also other land during the pendency of the second appeal—Partition allowed and decree-holder allotted land other than the suit land as his share—Pre-emptor thereafter ceasing to be a co-sharer of the joint khata—Factum of partition placed on record by the vendee-decree-holder—Effect of partition of joint khata on pending appeal—Stated—Pre-emptor—Whether still entitled to the pre-emption decree as being co-sharer in the suit land.

Held, that the plaintiff—Pre-emptor who claimed the superior right of pre-emption being a co-sharer under Section 15(1)(a) of the Punjab Pre-emption Act, 1913, lost his superior right of pre-emption because he ceased to be a co-sharer in the khata it having been partitioned during the pendency of the appeal. The Court at the appellate stage is entitled to take into consideration the subsequent events and if during the pendency of the appeal, the plaintiff—pre-emptor has lost his right to pre-empt the sale being a co-sharer by his own act and conduct such decree-holder is not entitled to the pre-emption decree being a co-sharer in the suit land.

(Paras 6 and 9).

Regular Second Appeal from the decree of the Court of the Senior Sub-Judge with enhanced appellate powers, Karnal, dated the 22nd day of February, 1977, affirming with costs that of the Sub-Judge, IInd Class, Kaithal, dated the 14th day of December, 1972, decreeing the suit of the plaintiff for possession by way of pre-emption of the suit land on payment of Rs. 18,882.50 less the amount of zare-panjam *already deposited if any, on or before 15th*

January, 1973 and ordering that failing which the suit of the plaintiff shall stand dismissed and in either case, leaving the parties to bear their own costs.

C.M. No. 1253-C of 1986:

Application under Order 41, rule 27, read with Section 151, Civil Procedure Code praying that this application may be allowed and Annexure 'P-1' alongwith its true translation may be permitted to be placed on the record of the case.

It is further prayed that the documents, i.e., order of the Collector, Guha, dated 17th January, 1983, sanctioning the partition, and 'Naqsha Jeem' prepared thereafter, dated 16th May, 1983 if not admitted by the plaintiff-respondent, be got summoned from him and these documents may be permitted to be considered at the time of final hearing of the appeal.

N. C. Jain with S. K. Aggarwal, Advocate, *for the Appellant.*

H. L. Sarin with Sukhdev Singh, Advocate, *for the Respondent.*

JUDGMENT

J. V. Gupta, J.

(1) This is vendee's second appeal in a pre-emption suit against whom the suit has been decreed by both the Courts below.

2. The plaintiff-respondent Lajja Ram, claimed superior right of pre-emption being the brother's son of the vendor as well as being a co-sharer in the *khata*. It has been concurrently found by both the Courts below that the plaintiff was a co-sharer in the *khata* though at the same time it was also found that he was the brother's son of the vendor. The plea of the vendee — defendant that he was a tenant on the suit land was negatived. Consequently, the plaintiff's suit was decreed. The appeal filed by the vendee—defendant was dismissed by the lower appellate Court. Dissatisfied with the same, he has come up in second appeal to this Court.

3. As regards the ground to claim the superior right of pre-emption being the brother's son of the vendor, the same is no more available to the plaintiff in view of the Supreme Court decision in *Atam Parkash* v. *State of Haryana,* (1). However, as the plaintiff

(1) 1986—1 P.L.R. 329.

was also found to be a co-sharer in the *khata, he* still could maintain the suit for pre-emption. During the pendency of this appeal, the vendee-defendant moved an application under Order XLI rule 27 of the Code of Civil Procedure, for permission to place additional evidence on record. It is stated in paragraphs 4 and 5 thereof that during the pendency of the appeal in this Court, the plaintiff started partition proceedings before the revenue Courts including the land, in dispute, and sought the separation of his share of the land from other co-sharers by way of partition. The Collector,—*vide* order, dated January 17, 1983, sanctioned the partition and as a consequence thereof *"naqsha jeem"* was prepared on May 16, 1983. The partition proceedings have been completed and concluded. Land measuring 48 *Kanals* comprised in rectangle No. 11, *Killas* Nos. 1, 2, 9, 10 and 12 and rectangle No. 7, *Killa* No. 22 has been allotted to the appellant in lieu of the land in dispute, regarding which the decree had been passed in favour of the pre-emptor. As against this, the land measuring 121 *kanals* 3 *marlas* in some of the various rectangles and *killa* Nos. was allotted to the pre-emptor. According to the appellant, all these facts stand admitted by the plaintiff-pre-emptor in his application Civil Miscellaneous No. 2405-C of 1983, moved in this Court. Reply to the said application has been filed on behalf of the defendant-vendee. The allegations made in paragraphs 4 and 5 of the application made by the appellant u/o 41 rule 27 C.P.C. are not denied. In paragraph 6 of the reply it has been stated by the plaintiff-pre-emptor that even if the factum of partition during the pendency of the appeal is admitted and proved, the same has no legal effect on the merits of the appeal in any way. It is in these circumstances that the main question to be decided in this appeal is : as to what is the effect on the rights of the plaintiff-pre-emptor who was no more a co-sharer in the *khata* at this appellate stage and whether in these circumstances, his suit for pre-emption is liable to be dismissed though it was decreed by the Courts below he being a co-sharer in the *khata* or still he is entitled to the said decree because he maintained that right up-till the date the decree was passed in his favour by the trial Court ?

4. According to the learned counsel for the vendee-appellant, the pre-emptor was to retain his right of pre-emption till the matter was finally decided because an appeal is a continuation of the suit and in case during the pendency of the appeal the right of pre-emption on the basis of which the suit was filed was lost, then, the suit must fail as the appellate Court is entitled to take into consideration the subsequent events. According to the learned counsel, it is at

this stage when the appeal is to be decided by this Court that we have to see the right of the pre-emptor as to whether he retains the same or not. On the other hand, the learned counsel for the plaintiff-pre-emptor submitted that the plaintiff was required to maintain his right to pre-empt the sale up to the decree of the trial Court and it was of no consequence if the said right of pre-emption was lost subsequently during the pendency of the appeal. In support of the contention, the learned counsel relied upon the Full Bench judgment of this Court in *Ramji Lal* v. *The State of Punjab* (2). An appeal against the said Full Bench judgment of this Court was dismissed by the Supreme Court and is reported as the *State of Punjab* v. *Ramji Lal* (3). The learned counsel also relied upon *Bhagwan Das* v. *Chet Ram*, (4), and *Rikhi Ram* v. *Ram Kumar*, (5).

5. As observed earlier, the main question to be decided is as to what is the effect on the rights of the pre-emptor when he has lost his right of pre-emption being a co-sharer during the pendency of this appeal ?

6. In the Full Bench judgment of this Court in *Ramji Lal's case* (supra), the pre-emptors' suit was decreed by the trial Court. During the pendency of the first appeal by the vendees therein, the State Government issued a notification under section 8(2) of the Punjab Pre-emption Act, 1913, declaring that no right of pre-emption shall exist with respect to the sale of land described in the Schedule appended thereto. The pre-emptors challenged the said notification by way of a civil writ petition in this Court. On a reference by a learned Single Judge, the matter was referred to the Full Bench where three questions were considered. Question No. 1 therein is material for determining the controversy and the other two questions need not be noticed. It reads,—

> "Whether a pre-emptor in whose favour a pre-emption decree has been given in the first Court should retain superior right of pre-emption till the hearing of the appeal by the vendee against the decree and whether the impugned notification issued during the pendency of the appeal against the decree in the present case, successfully takes away the already exercised right of pre-emption of the

(2) 1966 P.L.R. 345.
(3) A.I.R. 1971 S.C. 1228.
(4) A.I.R. 1971 S.C. 369.
(5) A.I.R. 1975 S.C. 1869.

petitioners (pre-emptors) so as to defeat their suit in appeal ?"

The answer to the first part of the said question by the Full Bench was that it is a settled rule in pre-emption law that a pre-emptor must maintain his qualification to pre-empt to the date of the decree of the first Court only, whether that decree is one dismissing the suit or decreeing it and his loss of qualification, whether by his own act or by an act beyond his control, after the date of that decree does not affect the fate of his claim in the suit. A pre-emptor in whose favour a pre-emption decree has been given by the first Court need not retain his superior right of pre-emption till the hearing of the appeal by the vendee. A notification under section 8 of the Punjab Pre-emption Act, taking away his right of pre-emption in the property, issued during the pendency of appeal against the decree does not take away the already exercised right of pre-emption so as to defeat his suit. In the said Full Bench case, reliance in this behalf was mainly placed on an earlier Full Bench decision of the Lahore High Court in *Zahur Din* v. *Jalal Din*, (6). That again was a case where the suit of the plaintiff-pre-emptor was dismissed by the trial Court. During the pendency of the appeal by the pre-emptor against the decree, the vendee improved his status so as to be equal to that of the pre-emptor and, thus, wanted to defeat the pre-emptor's superior right of pre-emption. Thus, that was not the case where the plaintiff-pre-emptor had lost his right on the basis on which he claimed the same to pre-empt the sale. Thus, the main controversy in the said case was as to whether the vendee could defeat the superior right of pre-emption of the plaintiff-pre-emptor by improving his status during the pendency of the appeal. It was in that context that it was held in the said case that no doubt it was possible for a vendee to improve his status effectively up to the time of the adjudication of the suit against him and get it dismissed if on account of the improvement he becomes either equal to or superior in status to that of the pre-emptor, but it is not possible to extend the date by which the vendee can improve his status beyond the date of the adjudication of the suit by the Court of the first instance and he cannot, therefore, by improving the status during the pendency of the appeal defeat the right of the pre-emptor when the decision of the first Court in the pre-emption suit against which the appeal was preferred was given on merits whether rightly in pre-emptor's favour or erroneously against him. Thus, it was held therein that the

(6) I.L.R. (1944)25 Lahore 443.

right to pre-empt could not be defeated by the vendee by improving his status during the pendency of the appeal. For that purpose, the *terminus quo* was the date when the trial Court passed the decree. In the said case, the Full Bench was also fully aware of the fact that the subsequent events which had taken place after the passing of the decree by the trial Court could be taken into consideration while deciding the appeal by the appellate Court. It was held,—

> "No doubt, Courts do very often take notice of events that happen subsequent to the filing of suits and at times even those that have occurred during the appellate stage and permit pleadings to be amended for including a prayer for relief on the basis of such events but this is ordinarily done to avoid multiplicity of proceedings or when the original relief claimed has, by reason of change in the circumstances, become inappropriate and not when the plaintiff's suit would be wholly displaced by the proposed amendment and a fresh suit by him would be barred by limitation although in cases where it would not be so barred, different considerations might come into play and a different view might be possible. Ordinarily an appellate Court can give effect to such rights only as had come into being before the suit had been disposed of and which the trial Court was competent to dispose of. The scope of the appeal is to be ordinarily limited to ascertain the correctness of the decision of the trial Court. It would follow that events which happened subsequent to the decree passed by the trial Court cannot be taken into consideration by an appellate Court for the purpose of depriving the successful party, or the party who should have succeeded, of the decision which was or ought to have been in his favour. No doubt the powers conferred on an appellate Court by Order 41 rule 33 (Code of Civil Procedure) are very wide; but they cannot be exercised so as to effect a vested right for instance, by virtue of the law of limitation and similarly a right which had been declared to be vested in a pre-emptor by a decree passed in his favour by the trial Court."

The main question involved in the above-said Full Bench case was whether a vendee can improve his status during the pendency of an appeal when the decision of the trial Court in a pre-emption suit against which it was preferred was that of a dismissal on its merits? Not a single case has been cited at the bar by the learned

counsel for the pre-emptor where a pre-emptor had lost his right to pre-empt the sale on the basis on which he claimed his superior right of pre-emption during the pendency of the appeal and, even then, he was entitled to maintain the decree passed by the trial Court in his favour. Thus, the distinction is quite obvious. The present is a case where the plaintiff-pre-emptor who claimed the superior right of pre-emption being a co-sharer, has himself, by his own act and conduct lost his superior right of pre-emption because he was no more a co-sharer in the *khata* it having been partitioned during the pendency of the appeal. The other rulings relied upon by the learned counsel for the plaintiff-respondent have also no applicability to the facts of the present case.

7. In *Bhagwan Das's case* (supra), the right of pre-emption was claimed by the plaintiff being a tenant on the suit land. Since the ejectment decree was passed against him at the instance of the vendees, he was dispossessed from the suit land. Consequently, he brought the said suit for possession by pre-emption under section 15(1)(a). Fourthly of the Punjab Pre-emption Act, 1913. The said suit was dismissed by the trial Court, but decreed in appeal. The judgment and decree of the lower appellate Court therein were affirmed in second appeal by this Court. On an appeal by the vendees before the Supreme Court, it was held by their Lordships that 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. To the same effect was the law laid down by their Lordships of the Supreme Court in *Rikhi Ram's case* (supra) where the plaintiffs had lost their right to pre-empt the sale during the pendency of their suit. It was held therein that where during the pendency of a suit for pre-emption the vendee obtains an order of eviction of the tenant, the tenant loses his right to pre-empt and he cannot obtain a decree for pre-emption.

8. The learned counsel for the appellant relied upon *Amarjit Kaur* v. *Pritam Singh*, (7), to contend that an appeal is a re-hearing; hence subsequent events can be taken into consideration by

(7) 1974 P.L.J. 486.

the appellate Court at the time of disposing of the appeal. In the said case, the appellant had challenged the correctness of the decree passed by the High Court dismissing the suit for pre-emption in view of the provisions of the Punjab Pre-emption (Repeal) Act, 1973 before the Supreme Court. It was held therein that an appeal is a re-hearing. If the High Court were to dismiss the appeal, it would be passing a decree in a suit. If the High Court were to confirm the decree in a suit, it passes a decree of its own. A Court of appeal has the same powers and performs as nearly as may be the same duties as are conferred and imposed on Courts of original jurisdiction. The hearing of appeal is under the procedual law in the nature of a re-hearing and the Court of appeal is entitled to take into account even facts and events which have come into existence after the decree appealed against. Thus, the decree passed by the High Court in the said case was affirmed.

9. In *Jagdish Singh* v. *Dalip Singh*, (8), it was held by a learned Single Judge of this Court that a pre-emptor has to show that he had a right of pre-emption on the date of the sale as also on the date of the suit, which right should continue up to the date of decree of the trial Court and not beyond that date. In the said case the vendor was a co-sharer in the joint land out of which he had sold a specific *khasra* number. During the pendency of the appeal against the judgment and decree of the trial Court whereby the plaintiff-pre-emptor's suit was dismissed, it was pleaded by the vendee that the joint land had been partitioned during the pendency of the suit with the result, the vendor and the pre-emptor ceased to be the co-sharers and as such the pre-emptor ceased to have the right of pre-emption as a co-sharer and, therefore, the appeal be dismissed on that score. However, it was found as a fact therein that there was no partition and if at all there was a partition, it was not binding on the minor plaintiff and as such did not affect his rights. However, the following observations were also made therein,—

> "Assuming for the sake of arguments, that there was partition made by the aforesaid order which was binding on the minor plaintiff, yet I am of the view that the right of the plaintiff to seek pre-emption is not taken away by such order of partition. It is well established by now that a pre-emptor has to show that he had a right of pre-emption on the date of the sale, as also on the date

(8) 1982 P.L.R. 677.

of the suit, which right should continue up to the date of decree of the trial Court and not beyond".

However, in view of the earlier findings in the above-said case, the said observations were in the nature of *obiter dicta*. It may be added that if the Court at the appellate stage is entitled to take into consideration the subsequent events, then in that situation, if during the pendency of the appeal, the plaintiff-pre-emptor has lost his right to pre-empt the sale being a co-sharer by his own act and conduct, then, he is not to blame anybody else and in that situation, he is not entitled to the pre-emption decree being a co-sharer in the suit land.

10. As a result, this appeal succeeds and is allowed. The judgments and decree of the Courts below are set aside and the plaintiff's suit is dismissed with no order as to costs.

R. N. R.

Before : *D. V. Sehgal, J.*

KARTAR SINGH and others,—*Petitioners.*

versus

STATE OF HARYANA and others,—*Respondents.*

Civil Writ Petition No. 3779 of 1985

July 10, 1986

Punjab Municipal Act (III of 1911)—Section 3(18)(b)—Haryana Munipcipal Act (XXIV of 1973)—Sections 203 to 210—Punjab Scheduled Roads and Controlled Areas Restriction of Unregulated Development Act (XLI of 1963)—Section 4(1)(b)—Government order declaring the area within the muncipal limits as 'unbuilt area' under Section 3(18)(b) of the Punjab Municipal Act—Municipal authorities forwarding request for preparation of a town planning scheme as envisaged by Section 203 of the Haryana Act—Government notification thereafter issued under Section 4(1)(b) of the Unregulated Development Act declaring the same area as 'controlled area'—Notification aforesaid—Whether debars the framing of a scheme in respect of the unbuilt area within the municipal limits—Provisions of Section 203 aforesaid—Whether inconsistent with the provisions of the Scheduled Roads Act—Provisions of Scheduled Roads Act—Whether operate in 'unbuilt areas' declared