

Sona Ram  
and others  
v.  
Central Govern-  
ment and  
others

Pandit, J.

The Department will now decide the case in accordance with the observations made above. In the circumstances of this case, there will be no order as to costs.

S. B. CAPOOR, J.—I agree.

B.R.T.

FULL BENCH

Before S. B. Capoor, D. K. Mahajan and Prem Chand Pandit,  
JJ.

TEJA SINGH,—Appellant.  
versus

BIR SINGH AND ANOTHER,—Respondents.

Regular Second Appeal No. 1118 of 1962

1963  
May, 6th.

*Punjab Pre-emption Act (I of 1913)—Waiver—mortgagee, entitled to pre-empt, accepting mortgage amount from vendee—Whether loses his right to pre-empt.*

*Held*, that the mortgagee in accepting the mortgage money from the vendee does nothing more than to recognise that the latter as transferee from the mortgagor has the right to redeem. The mere recognition of this right cannot by itself amount to waiver of the mortgagee's right to pre-empt unless it is shown that the mortgagee had either made up his mind not to sue to enforce his right of pre-emption or had given expression to his intention not to do so.

*Case referred by the Hon'ble Mr. Justice Shamsher Bahadur on 8th January, 1963, to a larger Bench for decision owing to the importance of the question of law involved in the case. The Full Bench consisting of Hon'ble Mr. Justice Capoor, Hon'ble Mr. Justice Mahajan and Hon'ble Mr. Justice P. C. Pandit, finally decided the case on 6th May, 1963.*

*Second Appeal from the decree of the Court of Shri Sant Ram Garg, District Judge, Ambala, dated the 4th day*

of August, 1962, modifying that of Shri Harbans Singh, Sub-Judge, 1st Class, Rupar, dated the 30th October, 1961 (granting the plaintiffs a decree for possession of the suit land by pre-emption against the defendants on payment of Rs. 17,527 through Court by 31st December, 1961, and further ordering that the deposit if any already made would be accounted for, failing which the suit of the plaintiff would stand dismissed and leaving the parties to bear their own costs) to the extent that Bir Singh plaintiff-respondent would deposit a further sum of Rs. 386 in addition to the sale consideration already allowed by the Court below on or before 31st August, 1962, and further ordering that in that case the suit would stand decreed with costs in the lower Court and failing to comply with as above the suit would stand dismissed with costs throughout, but leaving the parties to bear their own costs.

SHAMSHER CHAND. A. S. AMBALVI, PARKASH CHAND JAIN,  
AND G. C. MITTAL; ADVOCATES, for the Appellant.

PARTAP SINGH & BIRINDER SINGH, ADVOCATES, for the Respondent.

### JUDGMENT

CAPOOR, J.—This regular second appeal is by the defendant-vendee Teja Singh in a suit for possession by pre-emption which was instituted by Bir Singh, now respondent. The sale, which was sought to be pre-empted, was of 26 kanals 4 marlas of agricultural land situated in village Sidhupur Khurd, tehsil Rupar, and it was effected by Uttam Singh,—*vide* sale-deed dated the 25th May, 1959 (Exhibit D. 1), the price being Rs. 17,527. Bir Singh's suit for pre-emption, which was instituted on the 20th February, 1961, was decreed by the Subordinate Judge, First Class, Rupar. The vendee appealed and the learned District Judge accepted the appeal only to the extent that Bir Singh was required to make the deposit of a further sum of Rs. 386 being the expenses for the

Capoor, J.

Teja Singh  
 v.  
 Bir Singh  
 and another

---

Capoor, J.

execution and registration of the sale-deed. Both the Courts below were agreed that the plaintiff being the brother of the vendor had a superior right of pre-emption to the vendee and on this question there is no contest in this second appeal. The defendant-vendee has also raised the pleas that the plaintiff was a mere figurehead acting for the vendor himself and further that the plaintiff had waived his right to sue. On these pleas issues Nos. 4 and 5 respectively were settled and the trial Court as well as the lower appellate Court have found these issues in favour of the plaintiff.

When this appeal came up for hearing before Shamsher Bahadur, J., the only contention advanced by Mr. Shamair Chand, the appellant's learned counsel, concerned the question of waiver. The circumstances on the basis of which the plea of waiver was pressed were as follows : 2 kanals and 13 marlas, out of the land sold by Uttam Singh to Teja Singh, had been mortgaged with possession by the vendor with Bir Singh plaintiff. After the sale Teja Singh on the 9th June, 1960, paid Rs. 474 to the plaintiff with the consequence that the mortgaged land, that is, 2 kanals and 13 marlas, was redeemed and possession of it delivered by Bir Singh to the vendee. In these circumstances Mr. Shamair Chand contended that by his conduct the plaintiff recognised the vendee's right to redeem the property, which right accrued to him merely on account of the sale transaction in his favour and thereby the plaintiff must be taken to have assented to the sale transaction. Mr. Shamair Chand supported his contention by referring to *Bawa Lehna Singh v. Jagan Nath and others* (1), and *Mehta Chandras v. Malik Itbar Khan and others* (2), while the learned counsel for the

---

(1) 138 P.R. 1888.  
 (2) 154 P.L.R. 1906.

plaintiff cited *Fazaldad Khan v. Sawan Singh and another* (3), *Kanshi Ram, v. Bhojaram and others* (4), and *Inder Ram v. Iqbal Mohammad and others* (5). It was in view of these conflicting authorities that the case has been referred to the Full Bench for decision.

Teja Singh  
v.  
Bir Singh  
and another  
—————  
Capoor, J.

So far as the facts of the present case are concerned there is no dispute. The only circumstance supporting the plea of waiver is that the plaintiff accepted from the vendee the amount of the mortgage deed due to him giving up as necessary consequence possession of a small area out of the total area of the land which had been sold by the mortgagor. None of the cases cited by Mr. Shamair Chand, on behalf of the appellant, went to the length of holding that on these facts the plaintiff had waived his right of pre-emption. The cases which were not brought to the notice of the learned Single Judge may first be mentioned. These are—(1) *Fatteh Chand v. Nihal Singh and others* (6), (2) *Kishan Lal v. Ishri* (7), and (3) *Abdulla v. Bishendas* (8). In the first case it was held that the right of pre-emption is a right to take over a sale bargain in its entirety, and if a pre-emptor suffers another person to purchase, and is content to accept a derivative title from him with respect to a portion only of the premises sold, being unwilling to buy the rest, he must be held to abide the consequence of losing even that portion, if another person, having a superior right to that of his vendor, claims to assert his right to take over the original bargain as a whole. *Kishan Lal v. Ishri* (7), was a case

(3) 37 P.R. 1908.

(4) A.I.R. 1924 Lahore 159.

(5) A.I.R. 1948 E. Pb. 5.

(6) 106 P.R. 1880.

(7) I.L.R. 28 All. 237.

(8) 22 P.R. 1881.

Teja Singh  
v.  
Bir Singh  
and another

---

Capoor, J.

in which the pre-emptor had accepted a lease of the land claimed from the vendee and it was held that this amounted to such an acquiescence in the sale as would bar the plaintiff's right of suit. These are thus cases in which the plaintiff was non-suited because he had accepted a derivative title with respect to the property sought to be pre-empted and they are, therefore, not helpful for the decision of the point under consideration in the present case. In the third case, the defendant-purchaser had mortgaged the property in suit to the plaintiff, claiming pre-emption, for the very purpose of paying the purchase-money to his vendor; this purpose was stated in the mortgage deed, and it was held that under these circumstances the plaintiff was *prima facie* estopped from demanding the pre-emption. This case is of no relevance for deciding the question of waiver which is before this Court in the present appeal.

The authorities, which have a direct bearing are *Bawa Lehna Singh v. Jagan Nath and others* (1), and *Mehta Chandras v Malik Itbar Khan and others* (2). In the former case the facts were that one-third share, out of the house sought to be pre-empted, was under mortgage by one of the vendors to the plaintiff, and it was provided in the deed of sale that out of the nominal purchase money the amount due on the mortgage should be retained by the vendee for payment to the mortgagee. Some two months after the sale the plaintiff gave a written notice to the vendee to pay the mortgage-debt, threatening him with an action if he did not do so, but saying nothing in the notice about his right of pre-emption, whereupon the vendee paid the amount to the mortgagee. The learned Judges (Plowden and Burney, JJ.), held that it would be against good conscience that a mortgagee who is also pre-emptor should be allowed to deal with a purchaser

of property one day, on the footing that the sale is valid as between them, and when he has thus procured payment of his mortgage, to treat the purchase the next day on the footing that the sale is invalid, as between them. The distinguishing feature of the case that the plaintiff had demanded the mortgage debt from the vendee was stressed and it was held that in consequence by implication the plaintiff treated the sale as valid as between himself and the vendee. In *Mehta Chandras v. Malik Itbar Khan and others* (2), it was stated that the facts were almost identical with those in *Bawa Lehna Singh v. Jagan Nath and others* (1), the only difference being that in the later case a notice to receive payment of the mortgage debt came from the vendee. It appears, however, that the plaintiff was a mortgagee in possession of the entire property which was the subject-matter of the sale, and after receiving the payment he gave up possession of the land without any reservation of his right to resume it immediately as pre-emptor.

Teja Singh  
v.  
Bir Singh  
and another  

---

Capoor, J.

Both these cases were noticed and distinguished in *Fazaldad Khan v. Sawan Singh and another* (3), and the learned Judges (Kensington and Johnstone, JJ), in fact observed that they were inclined to hold that the actual decision in *Mehta Chandras v. Malik Itbar Khan and others* (2), went too far. After considering these authorities the learned Judges held that the mere acceptance of the money by a mortgagee from the vendee was not a waiver of his right to claim pre-emption and did not equitably estop him from asserting his pre-emptive right. The ratio was that the plaintiff as mortgagee was entitled to take his money when offered to him. The offer of the mortgage amount to him was made within 3 weeks of the sale, and the learned Judges stressed the legal

Teja Singh  
v.  
Bir Singh  
and another  
—————  
Capoor, J.

position that the plaintiff was allowed 12 months to make up his mind whether he would sue or not. Even if at that time he had made up his mind to sue when he could arrange for the necessary funds, or when it should otherwise be convenient, it was not incumbent upon him to inform the vendee of his intention, and so give the vendee time to pass the land on to another person before plaintiff's suit could be filed.

With due respect to the learned Judges who decided *Bawa Lehna Singh v. Jagan Nath and others* (1), and *Mehta Chandras v. Malik Itbar Khan and others* (2), I am of the view that the reasons given for the contrary view in *Fazalddad Khan v. Sawan Singh and another* (3), are weighty. The mortgagee in accepting the mortgage money from the vendee does nothing more than to recognise that the latter as transferee from the mortgagor has the right to redeem. It would not be correct to say, as Mr. Shamair Chand maintained, that the sale was voidable at the instance of the plaintiff-pre-emptor. In fact as observed in *Janki v. Girjadat and another* (9), by Mahmood, J., a valid and perfected sale is a condition precedent to the exercise of the pre-emptive right. It is not that there is any defect in the title, which passes to the vendee by means of the sale but the transaction is subject to the superior right of the pre-emptor if he chooses to exercise it within the statutory limitations. Their Lordships of the Supreme Court in *Bishan Singh and others v. Khazan Singh and another* (10), have quoted with approval the observations of Mahmood, J., in *Gobind Dayal v. Inayatullah* (11), to the effect that the right of pre-emption is not a right to the thing sold but a right to the offer of a thing about

(9) I.L.R. 7 All. 482 at p. 487.

(10) A.I.R. 1958 S.C. 838 at p. 840.

(11) I.L.R. 7 All. 775.

to be sold. This right is called the primary or inherent right. The pre-emptor has a secondary right or a remedial right to follow the thing sold, that is, the right of substitution which entitles him to take the entire bargain and step into the shoes of the original vendee in respect of the rights and obligations arising from the sale.

Teja Singh  
v.  
Bir Singh  
and another  
—  
Capoor, J.

It is thus obvious that the mere recognition by the plaintiff of the vendor's right to redeem by taking the mortgage amount from the vendee cannot by itself amount to waiver of the plaintiff's right of pre-emption and this was so held by their Lordships of the Privy Council in *Baijnath Ram Goenka v. Ramdhari Chowdhry* (12). The facts briefly were that the two plaintiffs Mangni and Jowhari had obtained a transfer of a *zerpeshgi* mortgage binding the four anna share sold by Anupbati to Nirbhoy and which was the subject-matter of the pre-emption suits. After that sale Nirbhoy paid the mortgage money into Court in accordance with the provisions of the Transfer of Property Act, for the purpose of redeeming the mortgage; and the two plaintiffs took out that money. It was contended that by so doing they had recognised the title of Nirbhoy under his purchase and could not claim pre-emption. This argument was repelled with the observation that until a decree for pre-emption was made, Nirbhoy owned the land as purchaser and had a right to redeem. The taking out of the money by the plaintiffs, as mortgagees was no recognition of anything more than this, and was quite consistent with the claim to pre-empt. Mr. Shamair Chand sought to distinguish this case, on the ground that before the plaintiffs took out the money they had filed their suit for pre-emption, but I do not see how that circumstance makes any difference to the principle laid down by the Privy

---

(12) I.L.R. 35 Cal. 402 at p. 412.



Teja Singh  
v.  
Bir Singh  
and another  
Capoor, J.

Council and it is significant that Mr. Shamair Chand could not cite in support of this view any case subsequent to *Baij Nath Ram Goenka v. Ramdhari Chowdhry* (12). Following this authority, Broadway and Brasher, JJ., in *Kanshi Ram v. Bhojaram and others* (4), held that the conduct of the plaintiff in accepting the money from the vendee without any protest was quite consistent with his claim to pre-empt and could not be regarded either as an act of acquiescence or waiver of such claim on his part. This case was followed by Achhru Ram, J., in *Ganga Singh and another v. Jhanda Singh and another* (13), in preference to *Mehta Chandras v. Malik Itbar Khan and others*, (2), and the following passage from this judgment may usefully be quoted:—

“A pre-emptor can wait up to the last day of limitation prescribed for a pre-emption suit and is not required to consider whether he would bring such a suit at any time before that. He is under no obligation to make up his mind to bring a pre-emption suit at any particular time before the expiration of the period of limitation for the suit. His failure to express any intention of enforcing his right of pre-emption at the time of receiving the mortgage money due to him under a mortgage of the land sold can at best show that up to that time he had not yet decided whether he would bring a pre-emption suit or not. In order to constitute waiver of his pre-emptive right, it must appear that he had made up his mind not to sue to enforce that right and, in some way or another had given expression to an intention not to do so.”

These observations are apt to the present case in which also there is, beyond the acceptance of the mortgage money, nothing whatever to show that the plaintiff had either made up his mind not to sue to enforce the right of pre-emption or had given expression to his intention not to do so. Accordingly, the finding of the Courts below against the defendant on the question of waiver (which was the subject-matter of issue No. 5) must be affirmed.

Mr. Shamair Chand sought to buttress his argument on the question of waiver by pointing out that the right of pre-emption as held in *Bishan Singh and others v. Khazan Singh and another* (10), was a very weak right. But the context in which this observation was made was that such a right can be defeated by all legitimate methods, such as the vendee allowing the claimant of a superior or equal right being substituted in his place. In the present case, there is no dispute at all as to the existence of the right and unless the defendant succeeded in proving that it had been waived by the plaintiff or that plaintiff was estopped by his conduct from exercising it, the Courts are bound to give effect to that right. Similarly, this is not a case in which there is a doubt as to whether that sale was not a sale, hence, the principle laid down in *Rati Ram and others v. Ram Chand and others* (14), that if the transaction is capable of two interpretations the Courts should be disinclined to hold it to be a sale, is not applicable.

For the reasons given above. I would, upholding the judgment and decree of the lower appellate Court, dismiss the appeal but in the circumstances leave the parties to bear their own costs.

D. K. MAHAJAN, J.—I agree.

PREM CHAND PANDIT, J.—I also agree.

Teja Singh  
v.  
Bir Singh  
and another  
Capoor, J.

Mahajan, J.  
Pandit, J.

(14) A.I.R. 1959 Punj. 117.