having been made in time, it does not follow that the time for making the award must be deemed to have been extended under section 28(2) of the Act. The matter of extension of time has to be decided by the exercise of sound judicial discretion after giving a proper opportunity to the parties to give explanation and satisfy the Court, by evidence or otherwise, as to the circumstances which led to the delay and enable it to decide as to whether it was a fit case where the delay be condoned and the time for making the award enlarged.

(17) There is no other point to be decided in this appeal which, in view of our answers to the questions of law referred to above, must be allowed, and the order of the Senior Subordinate Judge set aside. The trial Court is directed to dispose of the case in the light of the observation made above. There is no order as to costs in this Court.

Pandit, J.—I agree to the order proposed by my learned brother.

R.N.M.

LETTERS PATENT APPEAL

Before Mehar Singh, C.J. and Bal Raj Tuli, J.

KASHMIRI LAL,—*Appellant.*

versus

CHUHAR RAM,—*Respondent.*

Letters Patent Appeal No. 71 of 1965

November 19, 1969

The Punjab Pre-emption Act (I of 1913)—Sections 15(1)(a) Fourthly and 15(1)(c) Fourthly—Suit for pre-emption on the ground of tenancy—Plaintiff—pre-emptor—Whether has to prove tenancy only on the date of sale.

Held, that under sections 15(1)(a) Fourthly and 15(1)(c) Fourthly of the Punjab Pre-emption Act, 1913, when the suit for pre-emption is filed on the ground of tenancy, the plaintiff is required to prove only that he was a tenant under the vendor on the date of the sale and not at any time thereafter, as he could not remain the tenant under the vendor after the vendor had sold the suit property. In the case of a tenant, it is not necessary to prove that he continued to be tenant of the property till the filing of the suit and on the date of decree. (Para 7)

Letters Patent Appeal under Clause 10 of the Letters Patent from the decree of the Court of Hon'ble Mr. Justice D. K. Mahajan, dated the 21st day of December, 1964, in R.S.A. 425 of 1964 reversing that of Shri Mohan Lal Jain, Additional District Judge (II), Ambala dated the 12th February, 1964, which affirmed the decree of Shri H. S. Ahluwalia, Sub-Judge 1st Class, Ambala, dated the 30th April, 1963.

R. N. MITTAL, AND RAMESHWAR SHARMA, ADVOCATES, for the appellants.

J. V. GUPTA, ADVOCATE, for the respondent.

JUDGMENT

TULI, J.—Smt. Jiwani, widow of Gopala, gifted the house in suit by a registered deed, dated December 13, 1943, in favour of Kashmiri Lal, son of Gopi Ram, appellant. She died in September, 1948 and after her death, Chhajju, son of Kirpa Ram, Kashmiri, son of Munshi and Niranjan, son of Matu (hereinafter called the Vendors), succeeded to the 5/6th portion of the house while Purkhi, son of Munshi, succeeded to the remaining 1/6th share. The gift in favour of the appellant Kashmiri Lal, son of Gopi Ram, had been set aside with regard to 5/6th portion of the house to which the vendors succeeded. Purkhi did not challenge the gift by Smt. Jiwani in favour of Kashmiri Lal, appellant, and, therefore, the appellant continued to be the owner of 1/6th share of the house. The vendors filed a suit against the appellant and Purkhi for possession by partition of 5/6th share of the house on 2/14th July, 1949. The final decree in that suit was passed by Shri Jowala Das, Sub-Judge 1st Class, Ambala, on August 11, 1950. The relevant portion of the decree reads as under :—

> "It is ordered that a final decree be and the same is hereby passed in favour of the plaintiffs as follows:—
>
> According to the Commissioner's report the value of the entire suit house is Rs. 1,800 and thus the value of the Defdt Kashmiri's 1/6th share is Rs. 300. The entire house is allowed to the plaintiffs and the defendant Kashmiri Lal is awarded a decree for Rs. 300 against the plaintiffs. The amount decreed against the plaintiffs will be a first charge on the house allotted to the plaintiffs."

A copy of this decree is Exhibit PB on the record. In compliance with that decree, the sum of Rs. 300 was deposited in the Court of the Sub-Judge, 1st Class, Ambala, on August 30, 1950,—*vide* Exhibit PA. Form this decree it is clear that the ownership rights of the appellant in the house in dispute were extinguished by this decree and he was only held entitled to receive Rs. 300 which was to be the first charge on the property till payment. By Exhibit PA it is proved that the amount of Rs. 300 was deposited in the Court and, therefore, the extinction of the rights of the appellant in the house was complete.

(2) The vendors sold the house to Kashmiri Lal, appellant, by a registered deed, dated November 9, 1966. To pre-empt this sale, Chuhar Ram plaintiff-respondent, filed a suit on the ground that he was entitled to pre-empt the sale of the house under sections 15(1) Fourthly and 15(1)(c) Fourthly, of the Punjab Pre-emption Act. According to the sale-deed, only 5/6th of the house had been sold by the vendors in favour of the appellant for a sum of Rs. 5,000. In the sale-deed it is also mentioned that the appellant was the owner of the remaining 1/6th share of the house. To this suit that vendors and the appellant were made defendants. The suit was defended only by the appellant, who denied the preferential claim of Chuhar Ram, plaintiff, to pre-empt the sale on the ground that the appellant himself being a co-sharer, had a preferential right to that of the plaintiff. The plaintiff also challenged the amount of the price paid and stated that the market value of the house was not more than Rs. 3,000. On the pleadings of the parties, the learned trial Court framed the following issues:—

(1) Whether the plaintiff has a preferential right of pre-emption

(2) Whether the sale price was fixed in good faith ? If not, what is the market value at which the same is pre-emptible ?

(3) Whether the defendant vendee is already owner of 1/6th share in the house and its effect ?

(3) The learned trial Court held on the first issue that the vendee, being a co-sharer, had a superior right of pre-emption as against the

plaintiff, who was, no doubt, a tenant of the house at the time of the sale. On the second issue it was held that the market price of the house was Rs. 3,000 and that was the amount which was actually paid. On the third issue, it was held that the defendant-vendee was the owner of 1/6th share of the house in dispute. On these findings, the suit of the plaintiff was dismissed on April 30, 1963. Against that decree, the plaintiff filed an appeal which was dismissed by the Second Additional District Judge, Ambala, on February 12, 1964. The plaintiff then filed an appeal in this Court (RSA 425 of 1964), which was allowed by the learned Single Judge on December 21, 1964. The learned Judge decreed the plaintiff's suit on payment of Rs. 3,000 and gave one month's time to the plaintiff to deposit that amount failing which the appeal was to stand dismissed. On the oral request made by the learned counsel for the vendee, the learned Judge certified that the case was fit for further appeal under Clause 10 of the Letters Patent. The present appeal was thus filed and was admitted on March 19, 1965.

(4) The first point that has been vehemently pressed by the learned counsel for the appellant is that the learned Single Judge erred in law in upsetting the finding of fact concurrently arrived at by the learned trial Court and the first appellate Court on the point of the appellant being a co-sharer in the house in dispute to the extent of 1/6th share at the time of sale. It was, no doubt, a finding of fact, but the learned Single Judge did not accept it on the ground that there was evidence on the record to prove that the vendors were in possession of the entire house as owners, whereas the Courts below had come to a contrary conclusion because they misread the notice Txhibit P. 1 and the statement of Chhajju Ram, who appeared as P. W. 1. Thus an error crept in the decision of the Courts below. The learned first appellate Court had just referred to the notice Exhibit P. 1, which had been given by the vendors to the plaintiff somewhere in July or August, 1960, asking him to pay the arrears of rent for the past 10 months or to vacate the house by the 11th of August, 1960. This notice does not bear any date. But it is evident that it was given before the 11th of August, 1960. In this notice the vendors pointed out that if the plaintiff did not pay the rent due from him, they would have to file a suit against him and that his threat that in the case of the sale of the house by the vendors, he would pre-empt the sale, was without substance, as the pre-emptor has to pay the price which

is stated to have been paid before the Registrar and which is stated in the sale deed. The plaintiff was warned not to hold out the threat of pre-empting the sale unless he had sufficient amount to pay the price. In this notice, the vendors stated that they were the owners of the entire house. Chhajju Ram, one of the vendors appeared as a witness and stated that the notice was correct. The evidence was not given the proper weight it deserved and the learned lower appellate Court went to find out whether there was any evidence on the record in support of the assertion of the vendors being the owners of the entire house. He brushed aside the copy of the final decree in the partition suit, dated August 11, 1950, Exhibit PB, on the ground that it had become a dead letter because it had not been proved to have been executed. In my opinion, the decree did not need to be excuted to perfect the title of the vendors to the house because it recited the ownership of the vendors with regard to the entire house and the appellant was held entitled only to Rs. 300 on account of the price of 1/6th share of the house which amount was made a first charge on the house. That charge vanished when the amount of Rs. 300 was deposited by the vendors in Court on August 30, 1950,—*vide* Exhibit PA. The appellant thus ceased to be one of the co-sharers in the house. In the written statement, the appellant had asserted that he had become the owner of 1/6th share of the house by purchase from Purkhi 7 or 8 years prior to the filing of the written statement. From this averment in the written statement it is clear that the appellant did not place reliance on the final decree, dated August, 11, 1950, not having been executed and his right as co-sharer of the house to the extent of 1/6th having become absolute and indefeasible thereby. His positive assertion was that he had purchased 1/6th share of the house from Purkhi after the said decree, which fact was not proved on the record. He was in possession of the house at the time the suit for partition was filed, but after the decree he gave up its possession in what manner it is not known on this record, and it was only after he vacated the house that the plaintiff was put in possession thereof as a tenant. The learned Additional District Judge went beyond the pleadings to find out whether the whole house had been leased out to the plaintiff by the vendors alone or by the vendors on behalf of themselves and the appellant. This plea was never raised and could not be gone into by the learned lower appellate Court. After the purchase, the appellant issued two notices to the plaintiff-respondent asking him to vacate the house.

The first notice, dated July 10, 1961 was sent through Shri M. K. Bansal, pleader, in which it was stated that the appellant had purchased 1/6th portion of the house from Smt. Purkhi and had purchased the remaining 5/6th portion from its owner, the vendors, by a sale deed, dated November 9, 1960, which was registered on November 10, 1960. Thus the appellant had become the full owner of the house since November 9, 1960 and symbolical possession was also handed over to him by the vendors. It was further stated that the plaintiff was the tenant in the house under the previous owner, meaning the vendors, and had become tenant of the appellant since November 10, 1960 on a monthly rent of Rs. 10. He was requested to vacate the house and hand over its possession to the appellant by August 1, 1961, and to pay the arrears of rent, failing which the appellant would go to the Civil Court holding the plaintiff liable for all costs and damages, legal as well as others. The second notice was given through the same pleader on August 7, 1961 in which it was stated that the appellant had got 1/6th portion of the house from Shrimati Purkhi and purchased the remaining 5/6th portion from its owners, the vendors, for a cash price of Rs. 5,000, by means of a sale deed, dated October 9, 1960, which was registered on October 10, 1960, and symbolical possession was also handed over to the appellant. It was further stated that the plaintiff was a tenant under the previous owner in the house which meant the vendors alone and not the vendors and the appellant. It was then stated that the plaintiff had become a tenant of the appellant on the same conditions. The plaintiff was requested to vacate the house by August 31, 1961 and to pay the arrears of rent failing which legal action against him would be taken holding him liable for all the legal costs and the expenses of the appellant. Copies of these notices are Exhibits P. 6 and P. 7 respectively. These notices clearly show that the appellant had admitted that the vendors were the owners of the house to the extent of 5/6th and had given the entire house on lease to the plaintiff. The appellant nowhere stated that the lease had been given to the plaintiff with his consent. These notices were not taken into consideration by the learned lower appellate Court while finding that there was no evidence on the record to show that the vendors gave the entire house on rent to the plaintiff. The finding on this point by the learned Courts below was, therefore, contrary to the evidence on the record and against the pleadings contained in the written statement of the appellant.

(5) The only documents on the record which show that the vendors were the owners of 5/6th share in the house only and not

of the whole house are the agreement to sell, dated 4th October, 1960, Exhibit D. 2, executed by the vendors in favour of Paras Ram and the sale-deed Exhibit D. 1, executed by the vendors in favour of the appellant. The statement in these two documents that the vendors were the owners of 5/6th of the house is contrary to the assertion made in the notice Exhibit P. 1 which had been given by them only two months prior thereto. It may be, that in these two documents the ownership of 5/6th of the house was stated to be that of the vendors, in order to defeat the right of pre-emption of the plaintiff by holding out the appellant to be the owner of 1/6th share in the house, thus making him a co-sharer.

(6) In the light of the evidence on the record discussed above, I am clearly of the view that the learned Single Judge was right in upsetting the finding of fact arrived at by the learned lower appellate Court on this point. This argument of the learned counsel for the appellant is, therefore, repelled.

(7) The next argument advanced by the learned counsel for the appellant is that the plaintiff had ceased to be the tenant under the vendors at the time of the sale of the house because the vendors had terminated his tenancy by notice Exhibit P. 1 and after the purchase of the house by the appellant he terminated the tenancy of the plaintiff by issuing notices Exhibit P. 6 and P. 7 and thus on the date of the institution of the suit for pre-emption, and the date of the decree in the suit, the plaintiff was not a tenant of the house either under the vendors or the vendee. This plea was negatived by the learned Single Judge on the ground that under section 15(1) (a) Fourthly and 15(1) (c) Fourthly, the plaintiff was required to prove only that he was a tenant of the house under the vendors on the date of the sale and not at any time thereafter as he could not remain the tenant under the vendors after the vendors had sold that house. In the case of a tenant, it is not necessary to prove that he was the tenant under the vendor on the date of the filing of the suit and on the date of the decree. It is enough if he proves that he was the tenant of the house under the vendors on the date of sale. This view taken by the learned Single Judge, has been concurred in by some other learned Judges of this Court. In *Sohan Singh* v. *Udho Ram and others* (1), Pandit, J., held:—

> "The Punjab Pre-emption Act nowhere says that the pre-emptor should retain his qualifications for pre-empting

(1) 1967 P.L.R. 414.

the land till the date of the decree. It is true that the decisions have laid down that the plaintiff's preferential right must exist on the three important dates, viz., of sale, suit and decree. These rulings, were however, given before the legislature gave the right of pre-emption to a tenant of the vendor. It is undisputed that after the sale the tenant cannot hold the land sold under the tenancy of the vendor because the vendor no longer remains the owner of the property and the title in the same passes to the vendee. It is a different matter that after the sale the vendee may still retain him as his own tenant, but even if he becomes the tenant of the vendee, that does not afford him a ground for per-empting the land, because, as already mentioned above, it is only the tenant of the vendor who holds the land sold, who has a right of pre-emption. If the well-settled principle of law relied upon by the courts below were to be applied to the case of a tenant pre-emptor as well, then it would be depriving him of his right of pre-emption given by the statute. The "legislature could not have intended this result, because it is supposed to know the well-settled principle of law when it amended the Punjab Pre-emption Act and gave the right of pre-emption to the tenant of the vendor."

(8) A different view was taken by P. D. Sharma, J. in *Baru Ram* v. *Manji Ram*, (2). The judgemnt of Mahajan, J., under appeal and the judement of Pandit, J. in the case of *Sohan Singh's case* (1) (supra) were not brought to the notice of the learned Judge. On the basis of some other judgments relating to the pre-emption suits by persons other than tenants, it was held—

"What the law contemplates is that the plaintiff-pre-emptor who has based his right to pre-empt the sale on the provisions made in section 15 (1) (c) must be holding the land under tenancy of the vendor at the time of the sale and continued to hold it on the basis of the same right up to the date of decree."

In *Gurbachan Singh and others* v. *Bhagat Singh and others*, (3) Gurdev Singh, J. held—

"This clause applies to the sale of the joint land or property made by all the co-sharers jointly. Obviously, as a result

(2) 1967 P.L.R. 608.
(3) 1968 P.L.R. 553.

of such a sale, all co-sharers cease to have any interest in the joint property. Accordingly, the tenant or tenants holding the tenancy under the vendors would cease to be tenants of the vendors from the date of the sale. It, therefore, follows that a tenant of the vendors, who was holding the tenancy under the vendors on the date of sale, would cease to occupy that status as soon as the sale is completed and the title passes to the vendee. Consequently, subsequent to the sale a tenant of the vendors in whom right of pre-emption vests under clause. Fourthly of section 15 (1) (c) with which we are concerned, cannot by very nature of things satisfy the condition of being a tenant 'who holds under tenancy of the vendors or any one of them the land or property sold or part thereof'. In other words, it will be impossible for a tenant exercising the right of pre-emption under this clause to satisfy the conditions of retaining that qualification of his being a tenant under the vendors or any one of them on the date of the suit and the date of the decree. Insistance on his retaining that qualification subsequent to the sale would thus deprive the tenant of the right of pre-emption which the legislature has expressly conferred on him under clause Fourthly of section 15(1)(c). Such an interpretation would render the provision nugatory and result in depriving the tenant in a joint tenancy of their right to pre-empt which the legislature has given him."

Mahajan, J., in *Bhag Singh* v. *Bhajan Singh and another* (4), considered all the judgments referred to above and dissented from the view taken by P. D. Sharma, J., observing—

"With utmost respect to the learned Single Judge, if he wanted to take a contrary view, the matter should have gone to a Division Bench. In any event, the pre-ponderance of authority is in favour of the view that the only requirement, so far as the tenant is concerned, is that he should be in possession of the land at the date of the sale and if he is in possession on that date, he is entitled to a decree for pre-emption."

(4) 1968 P.L.R. 1046.

(9) After careful consideration we hold with respect that the view expressed by Mahajan, J., Pandit, J. and Gurdev Singh, J. in the judgments cited above, is the correct view and over-rule the judgment of P.D. Sharma, J. in *Babu Ram's case* (2), (supra) in so far as it takes the contrary view. The argument of the learned counsel for the appellant based on the judgment of P. D. Sharma, J., is thus repelled.

(10) Lastly the learned counsel for the appellant has sought to argue that the finding of the learned trial Court that the sale consideration of Rs. 3000 only had, in fact, been paid and, the balance of Rs. 2,000 had not been paid, is not correct. He tried to argue this point before the learned Single Judge on the ground that he was the respondent before the first appellate Court and he did not feel the necessity of controverting the finding of the learned trial Court on issue No. 2 because the suit of the plaintiff had been dismissed by the learned trial Court and his appeal was also being dismissed by the learned Additional District Judge. Before the judgment in the appeal was announced by the learned Additional District Judge, the appellant could not know whether the appeal of the plaintiff-respondent was going to be accepted or dismissed. If he was aggrieved from the finding of the learned trial Court on issue No. 2, he should have agitated the same before the first appellate Court. On the contrary it is stated by the learned first appellate Court in paragraph 5 of its judgment that:—

> "The findings of the learned trial Subordinate Judge on issue No. 2 were not contested before me by the counsel for the respondent, nor any arguments were addressed to me as against that finding. I thus affirm the findings of the Court below on issue No. 2."

In view of this observation of the learned lower appellate Court, the learned Single Judge stated that he could not examine this question because the matter was not agitated in the lower appellate Court. The finding with regard to the consideration for the sale was a finding of fact and was binding on the learned Single Judge in second appeal. The learned Single Judge, therefore, correctly did not allow the appellant to re-agitate the matter before him. For the same reason we did not allow learned counsel for the appellant to challenge that finding of fact before us.

(11) No other point has been argued before us.

(12) For the reasons given above, this appeal is dismissed with costs and the decree passed by the learned Single Judge is affirmed.

Mehar Singh, C.J.—I agree.

N.K.S.

APPELLATE CIVIL

Before H. R. Sodhi, J.

HIMACHAL GOVERNMENT TRANSPORT SIMLA AND ANOTHER,—*Appellants.*

versus

JOGINDER SINGH AND ANOTHER,—*Respondents.*

First Appeal From Order No. 194 of 1966

November 27, 1969.

Motor Vehicles Act (IV of 1939)—Sections 100-B and 110-D—Law of Master and servant—"Acting in the course of employment"—Meaning and scope of—Stated—Driver of a vehicle taking it on a route not prescribed in the permit—Such driver—Whether acting within the course of employment —Owner of the vehicle—Whether liable for the wrongful act of the driver.

Held, that it is a settled proposition of law that a master is liable to third persons for the torts committed by his servant in the course of employment and within the scope of his authority. No abstract rule can be laid down as to what amounts to acting within the course of employment and each case has to be decided on its own peculiar facts and circumstances. Broadly speaking, the master will not be liable to a third party if a servant instead of doing what he is employed to do does something which he is not employed to do at all. At the same time every deviation of the servant from the fixed execution of duty or disregard to instructions cannot be said to constitute such an interruption in the course of employment as to absolve the master from his responsibility. In order that a master can escape his liability, departure from the course of business must be total and not a mere deviation. (Para 8)

Held, that a driver of a vehicle owned by a master cannot be held to be not on his master's business and the latter not being in control of acts of his servant simply because the servant has chosen a route different from