

status. He has been held to be a mortgagee of the suit property and his tenancy rights have also been maintained. In these circumstances, the learned counsel argues that the plaintiff-trust is left with no remedy but to seek the possession of the suit property.

6. I am afraid that the aforesaid argument is misconceived in law.

7. The learned first appellate Court has noticed the facts and has held that prior to the creation of the mortgage, the defendant was a tenant on the suit property. On creation of the mortgage, the relationship of the parties became that of the mortgagor and mortgagee but at no point of time the tenancy rights of the defendant were surrendered. On redemption of the mortgage, the tenancy of the defendant shall stand automatically revived. Thereafter, the relationship between the parties shall be that of landlord and tenant. As a landlord of the suit property, the plaintiff-Trust would always have its remedy to seek ejectment of the tenant in accordance with law.

8. No question of law, much less any substantial question of law arises in the present appeal.

9. With the aforesaid observations, I do not find any merit in the present appeal. The same is, accordingly, dismissed.

Appeal dismissed.

PUNJAB AND HARYANA HIGH COURT

Before Mr. Justice Hemant Gupta

Regular Second Appeal No. 2972 of 1979

Decided on 01.03.2006

Ajmer Singh

Appellant

Versus

Dharam Singh

Respondent

For the Appellant: Shri Hawa Singh Hooda, Senior Advocate with
Shri Mukesh Kumar Verma, Advocate.

For the Respondent: Ms. Nirmaljit Kaur, Advocate.

A. Punjab Pre-emption Act, 1913 (1 of 1913), Section 15(1) – Pre-empt right -- Pre-emptor must possess his right to pre-empt right from the date of sale till the date of decree of the first Court, and loss of that right after the date of decree either by own act, or an act beyond his control or by any subsequent change in legislation which is prospective in operation during pendency of the appeal filed against the decree of the Court of first instance would not affect the right of pre-emptor.

I have heard learned counsel for the parties at length. Both the parties have relied upon the judgment delivered by the Constitution Bench of Hon'ble Supreme Court in **Shyam Sunder's case (supra)**. Hon'ble

Supreme Court has examined the issue of right of pre-emption and held the pre-emptor must possess his right to pre-empt right from the date of sale till the date of decree of the first Court, and loss of that right after the date of decree either by own act, or an act beyond his control or by any subsequent change in legislation which is prospective in operation during pendency of the appeal filed against the decree of the Court of first instance would not affect the right of pre-emptor.

(Para 10)

B. Punjab Pre-emption Act, 1913 (1 of 1913), Section 15(1) -- Amended by Haryana Act No. 10 of 1995 -- Pre-empt right -- Claimant must possess right of pre-emption on the date of sale -- Claimant must possess the same right on the date when the suit is instituted and that right should continue to exist on the date of adjudication of the suit -- However, it is a matter of no consequence, whether the trial court decrees or dismissed the suit -- Dismissal of the suit by the learned trial court will not defeat the right of pre-emption on account the enactment of the Haryana Act No.10 of 1995.

(Para 10)

C. Punjab Land Revenue Act, 1887 (XVII of 1887), Section 123 -- Partition -- Private partition -- Non-affirmation of -- Revenue record by itself neither create or extinguish title -- Since co-owners by mutual consent have entered into separate portions of land and are in the enjoyment of their respect portions, merely the said private partition has not been formally affirmed will not relegate the parties to pre-partition status.

In view of the above binding precedents, it is apparent that the revenue record by itself neither create or extinguish title. Since co-owners by mutual consent have entered into separate portions of land and are in the enjoyment of their respect portions, merely the said private partition has not been formally affirmed will not relegate the parties to pre-partition status. The role of the revenue officer in section 123 of the Act is that of "affirmation" of partition. The said affirmation is subject to verification of the factum of partition only. The inquiry in terms of sub-section (2) of Section 123 of the Act is restricted to the effect to point out that, in fact, partition has been made. Therefore, non affirmation of partition by the revenue officer will not render a private partition redundant but such affirmation will only determine the rights of an owner in respect of their obligation to pay land revenue to the State in terms of the provisions of the Act.

(Para 17)

D. Punjab Land Revenue Act, 1887 (XVII of 1887), Section 123 -- Partition -- Private partition -- Non-affirmation of -- Role of the revenue officer in section 123 of the Act is that of "affirmation" of partition -- Said affirmation is subject to verification of the factum of partition only -- Non affirmation of partition by the revenue officer will not render a private partition redundant but such affirmation will only determine the rights of an owner in respect of their obligation to pay

land revenue to the State in terms of the provisions of the Act.

In view of the above binding precedents, it is apparent that the revenue record by itself neither create or extinguish title. Since co-owners by mutual consent have entered into separate portions of land and are in the enjoyment of their respect portions, merely the said private partition has not been formally affirmed will not relegate the parties to pre-partition status. The role of the revenue officer in section 123 of the Act is that of "affirmation" of partition. The said affirmation is subject to verification of the factum of partition only. The inquiry in terms of sub-section (2) of Section 123 of the Act is restricted to the effect to point out that, in fact, partition has been made. Therefore, non affirmation of partition by the revenue officer will not render a private partition redundant but such affirmation will only determine the rights of an owner in respect of their obligation to pay land revenue to the State in terms of the provisions of the Act.

(Para 17)

E. Punjab Land Revenue Act, 1887 (XVII of 1887), Section 123 – Partition – Private partition – Non-affirmation of -- There is no provision in the Act which entails any penal consequences of not recording private partition in the revenue record -- Affirmation of revenue officer of the private partition in the revenue record is a directory provision -- Purpose of such affirmation is only to determine the right of the State to recover land revenue and to keep its record update -- Mere fact that such private partition has not been recorded in the revenue record will not render an act of the parties as totally redundant.

It is open to any of the co-sharers to seek such affirmation who may apply to the revenue officer. There is no provision in the Act which entails any penal consequences of not recording such private partition in the revenue record. Thus, the affirmation of the revenue officer of the private partition in the revenue record is a directory provision. The purpose of such affirmation is only to determine the right of the State to recover land revenue and to keep its record update. Mere fact that such private partition has not been recorded in the revenue record will not render an act of the parties as totally redundant. It is well settled that entries in the revenue record do not determine, create or extinguish the title of any person. The revenue record is corroborative of the fact recorded in the revenue record as it is maintained in normal course of the affairs of the State and carries presumption of truth. But failure to seek affirmation of private partition, if otherwise proved on record, cannot be negated only for the reason that the same has not got the affirmation from the revenue authorities.

(Para 18)

F. Punjab Land Revenue Act, 1887 (XVII of 1887), Section 123 – Partition – Private partition – Non-affirmation of -- Entries in the revenue record do not determine, create or extinguish the title of any person -- The revenue record is corroborative of the fact recorded in the revenue record as it is maintained in normal course of the affairs

of the State and carries presumption of truth -- But failure to seek affirmation of private partition, if otherwise proved on record, cannot be negated only for the reason that the same has not got the affirmation from the revenue authorities.

It is well settled that entries in the revenue record do not determine, create or extinguish the title of any person. The revenue record is corroborative of the fact recorded in the revenue record as it is maintained in normal course of the affairs of the State and carries presumption of truth. But failure to seek affirmation of private partition, if otherwise proved on record, cannot be negated only for the reason that the same has not got the affirmation from the revenue authorities.

(Para 18)

Cases referred:

1. Lachhman Singh v. Pritam Chand and another, 1970 PLR 341.
2. Shyam Sunder v. Ram Kumar and another, AIR 2001 SC 2472.
3. Bhartu v. Ram Sarup, 1981 PLR 204.
4. Suba Singh v. Mohinder Singh and others. 1983 P.L.J. 429.
5. Sushil Kumar v. National Insurance Co. Limited and others, 1986 PLR 458.
6. Darbara Singh and another v. Gurdial Singh and another, 1994 PLJ 5.
7. Sankalchan Jaychandbhai Patel and others v. Vithalbhai Jaychandbhai Patel and others, 1996(6) SCC 433.
8. Durga Das v. Collector and others, 1996(5) SCC 618.
9. Baleshwar Tewari (dead) by LRs and others v. Sheo Jatan Tiwary and others, 1997(5) SCC 112.
10. Pritam Singh v. Jaskaur Singh, 1992 P.L.J. 435.
11. Mohan Singh and others v. Lachhman Singh, 1992 P.L.J. 403.
12. Bhagwan Ram and another v. Brij Lal and others, 2000(3) PLR 49.

JUDGMENT

HEMANT GUPTA, J. – The plaintiffs are in second appeal aggrieved against the judgment and decree passed by the courts below whereby their suit for possession by way of pre-emption was dismissed.

2. One Sumer Singh sold 12 Bighas 14.3/4 biswas of land to Dharam Singh, vendee in RSA No. 2972 of 1979, vide registered sale deed dated 24.3.1974. Similarly, another portion of land measuring 12 Bighas 14.3/4 Biswas of land was sold to Arjun Singh on 24.3.1974 i.e. Subject matter of challenge in RSA No. 2971 of 1979. The plaintiffs have sought to pre-empt the sales made on 24.3.1974 in favour of Dharam Singh and Arjun Singh on the ground that the plaintiffs are co-sharers in the joint Khata and, thus,

have a superior right over the vendee who is a stranger.

3. Both the suits were consolidated and were dismissed. Both the Courts have decided the question of plaintiff being a co-sharer in the context whether the sale is of a share in a the joint Khata or of specific Khasra number. It was held that the sale is of specific Khasra number which, according to the recitals in the sale deed, has come to the vendor under private partition and the vendees have acquired right and title under the sale only to the extent of said specific Khasra numbers and, therefore, the vendees have not become co-sharers in the joint Khata. It was, thus, concluded that the plaintiffs are co-sharers in the suit land and have no preferential right to pre-empt any of the two sales in question.

4. The appeal against the said judgment and decree was also dismissed. Reliance was placed upon a Full Bench judgment of this Court reported as **Lachhman Singh vs. Pritam Chand and another, 1970 Punjab Law Reporter, 341**, wherein it was held that if specific Khasra number has been sold then the purchaser does not become a co-sharer in the entire land and the sale cannot be pre-empted by the other co-sharers.

5. The present second appeal came up for hearing before this Court on 3.7.1997 when the same was dismissed as it was found that a co-sharer has no longer a right to pre-empt the land in view of the amendment in the Punjab Pre-emption Act, 1913, by way of Haryana Amendment Act No.10 of 1995. However, in Civil Appeal Nos.6405 and 6406 of 2003, the said order has been set aside and the matter was remanded back to the High Court for disposal on merits in view of constitutional Bench of Hon'ble Supreme Court reported as **Shyam Sunder Vs. Ram Kumar and another AIR 2001 SC 2472**, holding that the amendment operates only prospectively and the rights that had arisen prior to the amendment are not affected. The matter has been, thus, placed before me for final disposal, after remand.

6. Learned counsel the appellant has vehemently argued that the finding recorded by the Courts below that the plaintiff was not a co-sharer in the land in dispute is not sustainable in view of the later judgment of the Full Bench reported as **Bhartu vs. Ram Sarup, 1981 Punjab Law Reporter, 204**, which has considered the earlier judgment in **Lachhman Singh's case (supra)**. It has been held in later Full Bench judgment that a sale by a co-sharer is that of a share in the joint holding. The right transferred is share of the joint land and not specific khasra numbers. Therefore, the findings that the plaintiffs are not co-sharers is not sustainable in view of the Full Bench judgment of this Court.

7. The learned counsel for the respondents has disputed, inter alia, the findings recorded by the courts below that the parties have not affected private partition prior to sale, are based on misreading of evidence and against the known principles of law. The findings on an issue relating to plea of estoppel is also sought to be disputed apart from the argument raised that the plaintiff cannot be now granted decree, since the suit was dismissed by the courts below. The right of the plaintiff to seek possession

by way of pre-emption was not subsisting on the date of decree of the learned trial court.

8. The following substantial questions of law arise for consideration:-

1. Whether the plaintiff is entitled to seek Possession of Land by Pre-emption as co-sharer in a suit filed prior to the enactment of Act No. 10 of 1995 ?
2. Whether, the finding that the parties have not affected private partition is based upon misreading of evidence and by ignoring material evidence on record?
3. Whether, the private partition not affirmed by Revenue Authorities, in terms of Section 123 of Punjab Land Revenue Act, 1887, is not binding and can be ignored by any of the parties?

9. The first question arises in view of fact that right to seek pre-emption of the land under section 15(1), fourthly, of the Act by a co-sharer has been taken away by Haryana Amendment Act No.10 of 1995. Learned counsel for the appellants has vehemently argued that the plaintiffs would be deemed to be co-sharers on the date when the trial Court dismissed the suit in view of the ratio of Full Bench decision in **Bhartu's case (supra)** and, therefore, such right of possession cannot be affected by the subsequent amendment in the statute taking away right of the co-sharer to pre-empt the land. On the other hand, it has been argued that it is well settled that right of pre-emption has to subsist on three material dates i.e., date of sale, date of filing of suit and date of decree. It is argued that since both the Courts below have dismissed the suit, therefore, the relevant date of decree would be the date of decision of the High Court and, admittedly, no such right as co-sharer is available to the appellants after the amendment by Haryana Act No.10 of 1995.

10. I have heard learned counsel for the parties at length. Both the parties have relied upon the judgment delivered by the Constitution Bench of Hon'ble Supreme Court in **Shyam Sunder's case (supra)**. Hon'ble Supreme Court has examined the issue of right of pre-emption and held the pre-emptor must possess his right to pre-empt right from the date of sale till the date of decree of the first Court, and loss of that right after the date of decree either by own act, or an act beyond his control or by any subsequent change in legislation which is prospective in operation during pendency of the appeal filed against the decree of the Court of first instance would not affect the right of pre-emptor. It has been held that claimant must possess right of pre-emption on the date of sale. The claimant must possess the same right on the date when the suit is instituted and that right should continue to exist on the date of adjudication of the suit. However, it is a matter of no consequence, whether the trial court decrees or dismissed the suit. In view of the said judgment, in respect of first question, it is concluded that dismissal of the suit by the learned trial court will not defeat the right of pre-emption on account the enactment of the Haryana Act No.10 of 1995.

11. In respect of the question of private partition, both the Courts

below have relied upon statement of Sumer Singh wherein Sumer Singh has allegedly admitted in cross-examination that he and plaintiff used to exchange the land for the purposes of cultivation as and when desired according to convenience. It is argued that the finding recorded by the Courts below is based upon misreading of evidence.

12. Admittedly, in Exhibits D-1 and D-2, the sale deeds executed by Sumer Singh, the sale is of specific Khasra numbers with a stipulation that such Khasra numbers have fallen to the share of vendor in private partition. Although he has stated that the partition is not through the process of the Court but there was a settlement by which certain portion was to remain in possession of his father and some with Ajmer Singh. It is further apparent from his statement that both the co-sharers have got possession of equal area of land and that Khasra numbers were separated after summoning Patwari and after all calculations. He has stated that he used to exchange Khasra numbers as per convenience but the said statement is in past tense i.e., prior to such partition they were exchanging the land. It is, thus, apparent that with the assistance of the revenue officials, the co-sharers have demarcated their separate parcels and were in cultivation thereof. The exchange of land for cultivation as per convenience is something which is a matter of past. The plaintiff in the very first line of cross-examination has admitted that they are in cultivation of their portion of land and the land sold was in possession of the vendees. He has also admitted that the parties have started construction but after the filing of the suit. Defendant Dharam Singh has deposed that the cultivation of Ajmer Singh and Sumer Singh was separate for the last about 25 years and that both have planted sheesham trees to show the boundaries of their holdings. Still further, DW7 Suresh Kumar, Clerk Consolidation Office, Karnal, has brought the record in respect of application dated 10.06.1975 regarding mutation of partition. The application was sent by the Consolidation Officer to the Assistant Consolidation Officer who has further sent to the Kanungo and Kanungo sent the same to Patwari. The witness could not depose whether the mutation has, in fact, been sanctioned.

13. It is, thus, apparent that both the Courts below have not discussed the oral evidence of various witnesses examined by the parties and have based finding on the basis of one line in the cross-examination of DW1 Sumer Singh. If the entire statement of DW1 Sumer Singh is read along with other statements, it leaves no manner of doubt that the parties were in separate possession prior to the sale in favour of the defendant. The findings recorded by the learned Courts below are, thus, suffering from not only from misreading of evidence but also ignoring the material evidence on the record. Thus, the said finding is not sustainable and is, therefore, reversed. The substantial question of Law framed above stands answered accordingly.

14. However, the question which is vehemently argued by learned counsel for the appellant was that such private partition cannot be recognized till such time private partition is affirmed by the revenue authorities in terms of Section 123 of the Punjab Land Revenue Act, 1887,

(hereinafter to be referred as "the Act"). Reliance is placed upon **Suba Singh vs. Mohinder Singh and others, 1983 P.L.J. 429; Sushil Kumar vs. National Insurance Co. Limited and others, 1986 P.L.R. 458; and Darbara Singh and another vs. Gurdial Singh and another, 1994 P.L.J.**

5. Before proceeding further, section 123 of the Act is reproduced below:-

"123. Affirmation of partition privately affected:--

- (1) In any case in which a partition has been made without the intervention of a Revenue Officer, any party thereto may apply to a Revenue Officer for an order affirming the partition.
- (2) On receiving the application, the Revenue Officer shall inquire into the case, and if he finds that the partition has in fact been made, he may make an order affirming it and proceed under Sections 119, 120, 121 and 122, or any of those sections, as circumstances may require, in the same manner as if the partition had been made on an application to himself under this Chapter".

15. A perusal of the said provision would show that Section 123 of the Act is a provision for affirmation of partition privately affected. Chapter IX of the Act deals with both situations i.e., where intervention is sought of the revenue authority for partition of the land and for a situation where the parties effect partition privately. A further reading of section 123 of the Act shows that liberty is given to any party who "may" apply to a revenue officer for an order confirming partition. Sub-section (2) contemplates an enquiry to find out whether the partition, in fact, has been made. If partition has been made, the revenue officer has to distribute the revenue and the rent after partition and draw the instrument of partition.

16. Hon'ble Supreme Court in **Sankalchan Jaychandbhai Patel and others vs. Vithalbhai Jaychandbhai Patel and others, (1996) 6 Supreme Court Cases 433**, has held that mutation entries are only to enable the State to collect revenue from the person in possession and enjoyment of the property and the right, title and interest as to the property shall be established de hors the entries. The entries are one of the modes of proof of enjoyment of the property, mutation entries do not create any title or interest therein. Later, in **Durga Das vs. Collector and others, (1996) 5 Supreme Court Cases 618**, Hon'ble Supreme Court held that title to the property should be on the basis of the title they acquired to the property and not by mutation entries. In **Baleshwar Tewari (dead) by LRs and others vs. Sheo Jatan Tiwary and others, (1997) 5 Supreme Court Cases 112**, Supreme Court observed to the following effect:-

".....Entries in Revenue records is the paradise of the Patwari and the tiller of the soil is rarely concerned with the same. So long as his possession and enjoyment is not interdicted by due process and course of law, he is least concerned with entries. It is common knowledge in rural India that a raiyat always regards the land he ploughs as his dominion and generally obeys, with moral fibre the command of the intermediary so long as his possession is not

disturbed. Therefore, creation of records is a camouflage to defeat just and legal right or claim and interest of the raiyat, the tiller of the soil on whom the Act confers title to the land he tills”.

17. In view of the above binding precedents, it is apparent that the revenue record by itself neither create or extinguish title. Since co-owners by mutual consent have entered into separate portions of land and are in the enjoyment of their respect portions, merely the said private partition has not been formally affirmed will not relegate the parties to pre-partition status. The role of the revenue officer in section 123 of the Act is that of “affirmation” of partition. The said affirmation is subject to verification of the factum of partition only. The inquiry in terms of sub-section (2) of Section 123 of the Act is restricted to the effect to point out that, in fact, partition has been made. Therefore, non affirmation of partition by the revenue officer will not render a private partition redundant but such affirmation will only determine the rights of an owner in respect of their obligation to pay land revenue to the State in terms of the provisions of the Act.

18. It is open to any of the co-sharers to seek such affirmation who may apply to the revenue officer. There is no provision in the Act which entails any penal consequences of not recording such private partition in the revenue record. Thus, the affirmation of the revenue officer of the private partition in the revenue record is a directory provision. The purpose of such affirmation is only to determine the right of the State to recover land revenue and to keep its record update. Mere fact that such private partition has not been recorded in the revenue record will not render an act of the parties as totally redundant. It is well settled that entries in the revenue record do not determine, create or extinguish the title of any person. The revenue record is corroborative of the fact recorded in the revenue record as it is maintained in normal course of the affairs of the State and carries presumption of truth. But failure to seek affirmation of private partition, if otherwise proved on record, cannot be negated only for the reason that the same has not got the affirmation from the revenue authorities.

19. In **Suba Singh, Arjun and Darbara Singh's cases (supra)**, Single Judge Bench judgments relied upon by learned counsel for the appellant, it has been concluded that private partition becomes valid only if the same is brought to the notice of the revenue authorities and consent is obtained. The said judgments run counter to the decisions of the Supreme Court referred to above. The said judgments have not noticed the fact that private partition is nothing but mutation of separate portions of the land which has fallen to their respective shares and, therefore, it is open to the parties to lead evidence independent of order of affirmance under section 123 of the Act to prove that there is a private partition. Learned counsel for the appellant has also relied upon a Division Bench of this Court reported as **Pritam Singh vs. Jaskaur Singh, 1992 P.L.J. 435**, to contend that the joint status of the parties comes to an end only when the partition order has been passed and partition has not been effected in terms of instrument of partition. In fact, the said case is not of private partition between the parties, therefore, reliance on the said judgments are untenable.

20. On the other hand, learned counsel for the respondent has relied upon judgment of this Court reported as **Mohan Singh and others vs. Lachhman Singh, 1992 P.L.J. 403**, and **Bhagwan Ram and another vs. Brij Lal and others, 2000 (3) Punjab Law Reporter, 49**. In the said cases, it has been found that if it is proved that partition, in fact, has taken place and was accepted by the parties for some time then partition is normally given effect thereto.

21. Keeping in view the fact that the judgments of the Supreme Court referred to above are the subsequent judgments, then the judgments relied upon by the learned counsel for the appellant and the fact that the jurisdiction of the revenue authorities in respect of private partition is only of affirmation of partition and that too is directory, I find that it is open to the parties to prove private partition de hors the affirmation of partition by the learned authorities in terms of Section 123 of the Act. Thus, in respect of the third substantial question of law, it is concluded that non affirmance of private partition in revenue record will render such partition as nugatory.

22. Since on the basis of evidence discussed above it has been found that partition was already affected between the parties, therefore, the plaintiff was not a co-sharer on the date of sale of land and, thus, not entitled to decree of pre-emption.

23. Consequently, I do not find any ground to interfere in the impugned judgment and decree, though on different ground than recorded by courts below.

24. Dismissed.

Appeal dismissed.

PUNJAB AND HARYANA HIGH COURT

Before Mr. Justice Hemant Gupta

Civil Revision No. 5217 of 2004

Decided on 28.02.2006

Satnam Channan

Petitioner

Versus

Darshan Singh

Respondent

For the Petitioner: Shri Sudeep Mahajan, Advocate.

For the Respondent: Shri Harsh Bunker, Advocate.

A. East Punjab Urban Rent Restriction Act, 1949 (III of 1949), Section 13-B – NRI landlord – As a co-owner, NRI landlord is entitled to seek ejectment for his bonafide use and occupation of the premises in possession of tenant. Kewal Krishan's case 2006(1) L.A.R. 179 relied.

Learned counsel for the petitioner has vehemently argued that the family settlement alleged by the respondent has not been proved. Though