

FULL BENCH.

Before Sir Shadi Lal, Chief Justice, Mr. Justice Broadway,
Mr. Justice Martineau, Mr. Justice Harrison and Mr.
Justice Campbell.

ARJMAND KHAN (DEFENDANT), Appellant,

versus

SHANKAR LAL (PLAINTIFF)
Mst. SAKINA BEGAM AND OTHERS } Respondents.
(DEFENDANTS)

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Feb. 7.

Civil Appeal No. 1607 of 1921.

Pre-emption—Rival pre-emptors—Consent to sale by one pre-emptor—Whether complete waiver.

Held, that a person who has once waived his right of pre-emption is debarred from asserting it afterwards and that it is immaterial whether he occupies the position of a plaintiff or that of a defendant.

Nabbi Bakhsh v. Kaka Singh (1), *Abdul Rab v. Muhammad Ji* (2), *Fatteh Chand v. Nihal Singh* (3), *Ahsan Ullah v. Jowahir Lal* (4), *Nabi Bakhsh v. Fakir Muhammad* (5), and *Shib Dial v. Indar Singh* (6), followed.

Bhola v. Bhikka (7), disapproved.

Sheo Narain, for the defendant-appellant—The *dictum* of Plowden J. as laid down in *Nabbi Bakhsh v. Kaka Singh* (1), is not based on statutory law, common law, equitable principle or the law of estoppel. The law of pre-emption which is codified in this province contains no provision in support of it. There is only an estoppel by notice to the pre-emptor under the Pre-emption Act, and the estoppel under section 115 of the Indian Evidence Act is only applicable to the person to whom the representation was made. A

(1) 42 P. R. 1878.

(4) 87 P. R. 1896.

(2) 8 P. R. 1882.

(5) 25 P. R. 1903.

(3) 106 P. R. 1880.

(6) 106 P. R. 1916.

(7) 8 P. R. 1919.

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pre-emptor may have no objection to a particular purchaser of the property but there is nothing to prevent him from asserting his right as against a rival pre-emptor. The subsequent Punjab cases *Fatteh Chand v. Nihal Singh* (1), *Abdul Rab v. Muhammad Ji* (2), *Ahsan Ullah v. Jowahir Lal* (3), *Nabi Bakhsh v. Fakir Muhammad* (4), and *Shib Dial v. Inder Singh* (5), follow Mr. Justice Plowden's *dictum* without discussion. *Liakat Hussain v. Rashid-ud-Din* (6), and *Bhola v. Bhikka* (7), support my contention.

Moti Sagar (with him G. C. Narang and Shamair Chand) for the respondents—The right of pre-emption is not a right of *repurchase* either from the vendor or from the vendee, involving any new contract of sale. It is simply a right of *substitution*, entitling the pre-emptor, by reason of a legal incident to which the sale itself was subject, to stand in the shoes of the vendee in respect of all rights and obligations arising from the sale under which he has derived his title. It is, in effect, as if in a sale deed the vendee's name were rubbed out and the pre-emptor's name inserted in its place. See *Gobind Dayal v. Inayatullah* (8), and especially the observation of Mahmud J., at page 809. The cause of action arises when a sale takes place. If a person entitled to pre-emption once refuses to have his name substituted for that of the vendee in the deed of sale, his right is gone altogether. A cause of action once lost does not arise again when another person comes forward as a pre-emptor. One who waives his right loses the right to sue or to compete with other rival pre-emptors. Considerations of what is desirable and what is not desirable do not arise. The

(1) 106 P. R. 1880.

(2) 8 P. R. 1882.

(3) 87 P. R. 1896.

(4) 25 P. R. 1903.

(5) 106 P. R. 1916.

(6) (1906) I. L. R. 29 All. 125.

(7) 8 P. R. 1919.

(8) (1885) I. L. R. 7 All. 775, 809
(F. B.).

question is one of principle of law. The Punjab authorities (mentioned by counsel for the other side) are practically all in favour of my contention. The only contrary ruling is *Bhola v. Bhikka* (1), a Single Bench case in which there is no discussion of the previous cases. It is submitted that that ruling does not lay down sound law.

Sheo Narain, replied.

Second appeal from the decree of Rai Bahadur Lala Sri Ram Poplai, District Judge, Hissar, dated the 17th June 1921, reversing that of Sardar Ali Hussain Khan, Kazilbash, Senior Subordinate Judge, Hissar, dated the 5th October 1920, dismissing the claim.

The order of Broadway and Harrison, J.J., dated 27th March 1923, making the reference to the Full Bench.

The plaintiff in this case sued to pre-empt the land sold by defendant A to defendant B. A third defendant C was joined because he also had instituted a rival suit for pre-emption. After all the evidence had been heard and the case was adjourned for arguments the vendee B sold the land to defendant C. (There had been an intermediate sale of a portion of the land to another rival pre-emptor but this does not affect the question now before us.) A fresh issue was then framed as to whether the sales in favour of C were legal, *bonâ fide*, etc. The plaintiff contended that defendant C had waived all his rights by consenting to the original sale to B. It has been held as a fact that he did so consent and the plaintiff relying on *Nabbi Bakhsh v. Kaka Singh* (2) and the long series of rulings which have followed that decision and the principle there enunciated, contend that the plaintiff having once waived his right to a sale of land in favour of a stranger cannot assert that right as against a pre-emptor who seeks to be substituted for that stranger. As against this ruling a single Judge in *Bhola v. Bhikka* (1) has held that whether or no such a right can be asserted by a plaintiff, it

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(1) 8 P. R. 1919.

(2) 42 P. R. 1878.

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can be pleaded by a defendant in order to defeat a pre-emption suit. This distinction between a plea taken by a plaintiff and the same when urged by a defendant has not been recognized in *Nabi Bakhsh v. Fakir Muhammad* (1) though then the finding on the point was an "*obiter dictum*," and we are of opinion that the plea must be either open to both parties or to neither. We have serious doubts as to the correctness of the view taken in *Nabbi Bakhsh v. Kaka Singh* (2) and we are inclined to agree with LeRossignol J. that the defendant is not barred by a previous waiver in favour of the vendee from resisting a pre-emptor's claim. We are also at present inclined to think that the same principle should be extended to a plaintiff on the ground that the waiver is a personal matter and the fact that a person having a right of pre-emption has no objection to a sale in favour of a certain individual should not debar him from objecting to the land passing into the hands of some body wholly different. We, therefore, refer to a Full Bench the question of whether a waiver once given debars the giver from all further action regarding the sale to which he has consented.

The judgment of the Full Bench was delivered by—

SIR SHADI LAL C. J.—This reference arises out of a suit for pre-emption, and the question formulated for determination is whether a person, who has assented to a sale in favour of a stranger, can assert his right of pre-emption in order to defeat an action for pre-emption brought by another person. In other words, suppose A sells a plot of land to B, and C gives his consent to the sale. D. brings a suit for pre-emption in respect of that sale. Can C, who has, somehow or other, obtained possession of the land, resist the suit by pleading his own right of pre-emption; or is he precluded from raising that plea by reason of his having consented to the sale?

(1) 25 P. R. 1903.

(2) 72 P. R. 1878.

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Now, there can be no doubt that, if C comes into Court as plaintiff and claims possession of the property by invoking his right of pre-emption, his suit is bound to be dismissed on the short ground that he has already waived his right by consenting to the sale and is consequently debarred from now asserting it. He cannot get over the plea of waiver by saying that he had no objection to the sale in favour of B, but, as another person D has come forward to oust the vendee, he (C) himself would like to get the property in preference to D. It is clear that he could derive his right of pre-emption only from the sale, and, as he has forfeited that right by his own conduct, he cannot be allowed to found his action upon that sale simply because another person seeks to enforce his right of pre-emption. He cannot waive his right of pre-emption in favour of a particular person and reserve it as against others. As observed in *Ahsan Ullah and others v. Jowahir Lal and others* (1), when a sale has actually taken place, a person entitled to pre-emption must decide once for all whether he will enforce or forego his right. He cannot say "I will forego it as long as the land remains with the first vendee, but should it pass to, or be claimed by, any one else, I will revive and enforce my right." If he affirms the sale, he is out of the contest; and he cannot be permitted to come back and intervene simply because another person has entered the arena. In the domain of the pre-emption law there is no such thing as a conditional waiver or waiver to enure for the benefit of a particular person only.

The same observations apply to C when, instead of bringing an action to enforce his right of pre-emption, he pleads that right as a defence to the action brought by a person whose right is superior to that of

(1) 87 P. R. 1896.

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the vendee. It is indisputable that C cannot be allowed to retain the property unless he satisfies the Court that he has a right of pre-emption superior, or at least equal, to that of the plaintiff. But, as pointed out above, his right of pre-emption could arise only in respect of the sale in favour of B, and by assenting to the transaction he has given up all rights springing therefrom which he might have been otherwise competent to assert. The rights having been once extinguished cannot now be revived.

It will be observed that C has to refer to the sale as the only source of his right, whether he desires to acquire the property as plaintiff or to retain it as defendant. It is manifest that he cannot get away from the sale. At the same time, it is clear that he cannot be regarded as a person aggrieved by that transaction when he has himself affirmed it. He has surrendered the only weapon which he could wield, and without that weapon he can neither attack the purchaser nor protect himself from the attack of a person who is stronger than the purchaser.

These principles alone, apart from any judicial decision, warrant the conclusion that the consent given by a person to a sale precludes him from taking any action either to acquire or to retain the property affected by the transaction. The matter is, however, by no means *res integra*. A Division Bench of the Punjab Chief Court decided in *Nabbi Bakhsh v. Kaka Singh* (1), that a pre-emptor, who has once waived his right to accept or insist upon an offer of sale, cannot afterwards come forward and reassert his right against another person who has claimed pre-emption with regard to the sale. This exposition of the law has been subsequently endorsed in several judgments *vide, inter alia, Abdul Rab v. Muhammad Ji and another* (2).

(1) 42 P. R. 1878.

(2) 8 P. R. 1882.

It has also been held that the rule in Nabbi Bakhsh's case is equally applicable to a defendant who have waived his right of pre-emption seeks to exercise it as against a person who by reason of his superior right to that of the vendee comes forward to take over the bargain, *vide*, *Fatteh Chand v. Nihal Singh, Sher Singh and Ditta* (1), *Nabi Bakhsh v. Fakir Muhammad and others* (2) and *Shib Dial and others v. Indar Singh and others* (3). The only case in which this rule was not applied to a defendant is the judgment in *Bhola v. Bhikka and others* (4). A perusal of that judgment, however, shows that the learned Judge, who decided the case was referred only to the rulings in which the claim of the plaintiff-pre-emptor was disallowed on the ground of waiver; and that his attention was not invited to the cases mentioned above in which the same doctrine was held to be applicable to a defendant who puts forward his own right of pre-emption in order to defeat the suit of another pre-emptor. With all due deference to the learned Judge I am unable to endorse the view that a person who has forfeited his right of pre-emption can revive it if he happens to be a defendant.

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My answer to the question, therefore, is that a person, who has once waived his right of pre-emption, is debarred from asserting it afterwards; and that it is immaterial whether he occupies the position of a plaintiff or that of a defendant.

BROADWAY J.—I concur.

MARTINEAU J.—I concur.

HARRISON J.—I concur.

CAMPBELL J.—I also concur.

A. N. C.

(1) 106 P. R. 1880.

(2) 25 P. R. 1903.

(3) 106 P. R. 1913.

(4) 8 P. R. 1919.