APPELLATE CIVIL.

Before Addison and Din Mohammad JJ.

HAYAT BAKHSH (DEFENDANT) Appellant

versus

MANSABDAR KHAN (PLAINTIFF)
DADAN AND OTHERS (DEFENDANTS) } Respondents.

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Jan. 8.

Civil Appeal No. 1108 of 1934.

Pre-emption — Sale to three vendees with specified shares — whether an indivisible transaction — Vendee — associating with himself a stranger — whether loses his right of resistance — Vendee — removing his defect pendente lite, *and clothing himself with a status equal to that of pre-emptor — whether can defeat pre-emption suit — Punjab Pre-emption Act, I of 1913, section 28-A.*

On 3rd November, 1931, one F. D sold his land to H, G and D in equal shares. On 21st October, 1932, M brought a suit for pre-emption alleging a preferential right on the ground of ownership. Two of the vendees, H and D, resisted the suit on the grounds that they were also owners and as their shares were specified in the sale-deed, the transaction was divisible and the pre-emptor could not exercise his rights against them. It was found that G, the only stranger-vendee, had re-sold his share in favour of H in February, 1933, *i.e.* during the pendency of the suit, and it was urged that consequently the pre-emptor could not succeed against the vendees at all as his right was only equal to theirs.

Held, that the transaction of sale was indivisible in spite of the fact that the fractional share of each of the purchasers was specified in the deed, the specification being merely an arrangement between the purchasers *inter se* which did not affect the oneness of the transaction so far as the vendor was concerned.

Held further, that the policy of the Pre-emption Act is to keep out strangers and thus maintain the exclusiveness of the estate. If a vendee, therefore, having an equal right of pre-emption associates with himself in a joint purchase a stranger, or a person having no right to first refusal under

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the Act, he loses his right of resistance and cannot be allowed to retain even his own share of the purchase.

Bhagwana v. *Shadi* (1), relied upon.

Held however also, that vendees, whose purchase is otherwise open to attack, can defeat the pre-emptor's title by removing the defect *pendente lite*, and clothing themselves with a status equal to that of the pre-emptor—thus, the claim of the pre-emptor can be defeated if before obtaining the decree he loses his preferential right, even if he possessed it at the time of the sale as well as at the time of the institution of the suit.

Dissentient judgment of Rattigan J. in *Dhanna Singh* v. *Gurbakhsh Singh* (2), *Sanwal Das* v. *Gur Parshad* per Robertson J. (3) and *Het Ram* v. *Dal Chand* (4), followed.

Manga v. *Imam Din* (5), disapproved.

Second Appeal from the decree of Mr. D. Falshaw, District Judge, Rawalpindi, dated 23rd March, 1934, affirming that of Khawaja *Ghulam Mohammad, Subordinate Judge, 3rd Class, Rawalpindi, dated 27th October, 1933, granting the plaintiff a decree for possession by pre-emption of 104* kanals *and 6* marlas *of land in suit against the vendees on payment of Rs.1,300.*

HARNAM SINGH, for Appellant.

MOHAMMAD ALAM and MOHAMMAD TUFAIL, for (Plaintiff) Respondent.

The judgment of the Court was delivered by—

DIN MOHAMMAD J.—This is a second appeal from the decision of the District Judge, Rawalpindi, dated the 23rd March, 1934, confirming that of the Subordinate Judge, 3rd Class, dated the 27th October, 1933, decreeing the plaintiff's claim for pre-emption.

(1) (1935) 36 P. L. R. 114.
(2) 91 P. R. 1909 (F. B.).
(3) 90 P. R. 1909 (F. B.), p. 376.
(4) (1933) I. L. R. 14 Lah. 21.
(5) 1933 A. I. R. (Lah.) 117.

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The facts bearing upon the points of law involved in this case may shortly be stated. Fateh Din sold his land to Hayat Bakhsh, Ghulam Mohammad and Dadan in equal shares on the 3rd November, 1931. The one-third share of each individual purchaser was specified in the sale-deed. On the 21st October, 1932, Mansabdar brought the present suit for pre-emption alleging a preferential right on the ground of ownership of the estate and asserting that the vendees were not such owners, and even if any one of them was an owner like himself, he had lost his right by joining with himself a stranger in the sale-deed. Hayat Bakhsh and Dadan, vendees, resisted the suit on the grounds that they were owners of the estate and that, as their shares were specified in the sale-deed, the transaction was divisible and the pre-emptor could not, therefore, exercise his right against them. As regards the allegation of their having lost their right by associating with themselves a stranger, they averred that Ghulam Muhammad, who alone was the stranger, had re-sold his share in favour of Hayat Bakhsh on the 11th February, 1932, and consequently the plaintiff could not succeed against them, as his right was only equal to theirs. Ghulam Muhammad supported them in these pleas. In proof of the alleged re-sale, reliance was placed on a copy of the mutation which showed that the entry about this transaction was made on the 26th January, 1933, and attested on the 3rd February, 1933. The Subordinate Judge decided this suit on the 27th October, 1933, and came to the conclusion that the sale was indivisible despite the specification of the shares and that Hayat Bakhsh and Dadan, who were no doubt owners of the estate, had lost their right by joining Ghulam Mohammad with them in this transaction, and that even if the re-sale

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by Ghulam Muhammad in favour of Hayat Bakhsh were genuine, the plaintiff's claim could not be defeated, as he admittedly had a preferential right at the time of the institution of the suit.

On appeal, the District Judge held the re-sale in favour of Hayat Bakhsh to have been proved by the copy of the mutation referred to above, but all the same affirmed the decision of the trial Court on the authority of *Manga* v. *Imam Din* (1). The vendees' appeal to this Court came for hearing before Agha Haidar J. who has sent the case to us for decision on the ground of "conflict of authority on some of the points arising in this appeal."

We may say at once that the transaction of sale was indivisible in spite of the fact that the fractional share of each of the purchasers was specified in the deed. This specification was merely an arrangement between the purchasers *inter se* and did not affect the oneness of the transaction so far as the vendor was concerned. There is ample authority in support of the proposition that such specification does not split up the transaction. In these circumstances, therefore, this plea cannot help the vendees.

We are also of opinion that the policy of the Pre-emption Act is to keep out strangers and thus maintain the exclusiveness of the estate. If a vendee, therefore, having an equal right of pre-emption, associates with himself in a joint purchase a stranger or a person having no right to first refusal under the Act, he loses his right of resistance and cannot be allowed to retain even his own share of the purchase. If any authority is needed for this proposition, reference may be made to a recent judgment of this Court in *Bhagwana* v. *Shadi* (2).

(1) 1933 A. I. R. (Lah.) 117. (2) (1935) 36 P. L. R. 114.

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The only question for determination, therefore, in this case is whether the vendees whose sale is otherwise open to attack can defeat the pre-emptor's title by removing the defect *pendente lite* and clothing themselves with a status equal to that of the pre-emptor. In other words, we have merely to decide whether the claim of the pre-emptor can succeed if before obtaining the decree he loses his preferential right, even if he possessed it at the time of the sale as well as at the time of the institution of the suit. For the pre-emptor reliance is placed on the authority cited by the District Judge, as well as on the remarks made by Shah Din J. at page 431 of the report in *Sanwal Das* v. *Gur Parshad* (1) and on *Dhanna Singh* v. *Gurbakhsh Singh* (2) and *Hira* v. *Bansi Lal* (3). The vendees, on the other hand, rely on *Het Ram* v. *Dal Chand* (4), a Division Bench judgment of this Court to which one of us was a party. It will be necessary, therefore, to examine these authorities in some detail and to find out which of these lays down the law correctly.

In *Sanwal Das* v. *Gur Parshad* (1), the real question was whether when two houses which adjoined one another were sold jointly and the owner of the adjoining house sued for pre-emption in respect of one of the two houses sold, to which his right extended, the vendee was not entitled to say that by reason of his having under the sale-deed become owner of the other house, he stood on an equal footing with the plaintiff and that the plaintiff could not, therefore, pre-empt the house adjoining his own. A full Court consisting of six Judges was constituted to decide this question and by a majority of four to two, Robertson

(1) 90 P. R. 1909 (F. B.).
(2) 91 P. R. 1909 (F. B.).
(3) 90 P. R. 1919.
(4) (1933) I. L. R. 4 Lah. 421.

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and Rattigan JJ. dissenting, came to the conclusion that the vendee could not successfully resist the pre-emptor's claim in these circumstances. Shah Din J., who was one of the majority, wrote a very lengthy and elaborate judgment in that case and in the course of his discussions made the following observations at page 431 of the report :—" It seems to me, with all deference, that it is a wrong application of the law of pre-emption to hold that the pre-emptor is bound to show that he had a preferential right of purchase as against the vendee, not only at the date of the sale of the property in dispute but also at the time of the institution of his suit. The question of priority as between the pre-emptor and the vendee must be decided in advertence to the state of things existing at the time of the sale and not at any later period and also with special reference to the rights possessed by the pre-emptor and the vendee, respectively, against the vendor and to the vendor's obligation to offer the property in dispute to one of them in preference to the other before a sale actually takes place." These remarks were not necessary for the disposal of the question then before the Court and were obviously of the nature of *obiter dictum*. The case was evidently confined to the consideration of the effect of contemporaneous acquisition by the vendee of a right equal to that of the pre-emptor and did not cover the subsequent improvement of the vendee's status and in these circumstances any expression of opinion on an analogous question, which in the view of the learned Judge threw any light on the point referred, did not form the real basis of decision.

In *Dhanna Singh* v. *Gurbakhsh Singh* (1), the question involved was similar to the one now before us

(1) 91 P. R. 1909 (F. B.).

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and the decision arrived at, no doubt, supports the pre-emptor. It was laid down by the Full Bench (Rattigan J. dissenting) that in a suit for pre-emption based on the ground, that at the date of sale the pre-emptor was a proprietor in the village in which the property sold is situate, and the vendee was not, the vendee cannot defeat plaintiff's claim by becoming a proprietor in the village, whether by gift or otherwise, after the date of the institution of the suit, but before the passing of the pre-emption decree. It appears, however, from the opening remarks in the judgment of Clark C. J., who wrote the main judgment in the case, that he was mainly influenced by the decision of the Full Court in *Sanwal Das* v. *Gur Parshad* (1); although, as remarked by Shah Din J. in his referring order, the question referred there was different from the one before them then.

Hira v. *Bansi Lal* (2) is a Single Bench judgment of the Punjab Chief Court and need not be discussed at any great length, as it was based on the two Full Bench decisions mentioned above, which could not be ignored by the learned Judge sitting singly. *Manga* v. *Imam Din* (3) is a Single Bench judgment of this Court and does not discuss any authority bearing on this point and none was cited by either counsel before the learned Judge.

An analogous question came before a Division Bench of this Court in *Het Ram* v. *Dal Chand* (4), and the learned Judges after discussing certain authorities of this Court and the other High Courts decided that "the plaintiff, in order to maintain his suit for pre-emption, should have the right to pre-empt on three

(1) 90 P. R. 1909 (F. B.).
(2) 90 P. R. 1919.
(3) 1933 A. I. R. (Lah.) 117.
(4) (1933) I. L. R. 14 Lah. 421.

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important dates, namely, (1) the date of the sale, (2) the date of the institution of the suit, and (3) the date of the first Court's decree." It may be mentioned here that *Sanwal Das* v. *Gur Parshad* (1) and *Dhanna Singh* v. *Gurbakhsh Singh* (2), were not discussed in that judgment.

Let us now see which way we should lean. By section 4 of the Pre-emption Act the right of pre-emption has been defined to mean the right of a person to acquire agricultural land * * * * * in preference to other persons and this would naturally imply that this right should be in existence when the actual acquisition is to be made. It cannot be disputed, in our opinion, that the actual acquisition by a pre-emptor is made not at the time when the property is sold to another, nor at the time when the suit is instituted, but at the time when the decree is made. The preferential right that a person possesses at the time of the sale and retains till the institution of the suit merely entitles him to move the Court in his favour, but in order to succeed he must retain this position up to the time of obtaining the decree. It is no doubt true that in ordinary parlance " pre-emption " means a right of first refusal and refers to the time when the sale takes place, but a Court of law is to take into consideration the legal significance of the term and not its popular meaning. Even the Legislature itself has now recognised the possibility of a pre-emptor losing his right by being divested of it before obtaining the decree.

Section 28-A has been recently enacted which lays down :—

" (1) If in any suit for pre-emption any person bases a claim or a plea on a right of pre-emption

(1) 90 P. R. 1909 (F. B.). (2) 91 P. R. 1909 (F. B.).

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derived from the ownership of agricultural land or other immovable property, and the title to such land or property is liable to be defeated by the enforcement of a right of pre-emption with respect to it, the Court shall not decide the claim or plea until the period of limitation for the enforcement of such right of pre-emption has expired and the suits for pre-emption (if any) instituted with respect to the land or property during the period have been finally decided.

"(2) If the ownership of agricultural land or other immovable property is lost by the enforcement of a right of pre-emption, the Court shall disallow the claim or plea based upon the right of pre-emption derived therefrom."

If this be so, we do not see any reason why this right should not be lost when the only ground that the plaintiff could urge for his preference disappears by the subsequent acquisition of the requisite qualification by the vendee over whom the pre-emptor claims a preference. The following remarks of Rattigan J. in his dissentient judgment in *Dhanna Singh* v. *Gurbakhsh Singh* (1) are worth perusal :—

"From the above summary it is clear that a pre-emptor, who has an undoubted cause of action at the time of the institution of the suit, can lose his right to a decree, even after the institution of the suit, if (*a*) he himself parts with the property by reason of which he claimed pre-emption, or (*b*) the vendee transfers the property sought to be pre-empted to a person against whom the plaintiff has no right of pre-emption. The principle enunciated in the authorities which establish these propositions is, I take it,

(1) 91 P. R. 1909 (F. B.).

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founded on the broad ground that a right of pre-emption is a right of preferential purchase, and that the object of the law in recognising this right is to retain property in the hands of persons who are more or less intimately connected with it and who very naturally desire to keep out strangers. So long, therefore, as a plaintiff who claims pre-emption can assert that he has a more intimate connection with the property than the vendee, the law gives him the exceptional privilege of compelling the latter to transfer the property to him. But surely in order to obtain this privilege he must be in a position to satisfy the Court, at the time when it is proceeding to pass its decree, that he does actually stand in this singularly privileged position with regard to the property, and if it be once admitted (as it is) that his right to a decree fails if he has lost that position at any time prior to the date of the decree owing to his own property having been transferred by him or to the property in suit having been transferred to one who has rights equal to his own, the logical inference would certainly seem to be that he no less effectually loses his right if, at any time prior to the passing of the decree, the vendee can on any other ground satisfy the Court that the plaintiff's position and rights are in no whit superior to his own, and that *qua* the property claimed he is no more a stranger than the plaintiff."

We are in full accord with this view and hold, therefore, in respectful disagreement with *Manga* v. *Imam Din* (1), as well as *Dhanna Singh* v. *Gurbakhsh Singh* (2), that the principle laid down in *Het Ram* v. *Dal Chand* (3), represents the correct view of the law on the point. It would appear to be anomalous that a

(1) 1933 A. I. R. (Lah.) 117. (2) 91 P. R. 1909 (F. B.).
(3) (1933) I. L. R. 14 Lah. 421.

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pre-emptor should be permitted to divest a vendee of the property that he has legally acquired on the ground of a preferential right, although at the time when the vendee is being so deprived the pre-emptor does not possess any such preference. In the words of Robertson J. at page 376 in *Sanwal Das* v. *Gur Parshad* (1), "A right of pre-emption is not one which is to be held sacrosanct and if we are to lean one way or the other—other things being equal—we should lean rather against the interference with the general rights of free contract by a vendor than in favour of such interference on a claim set up by a plaintiff." For these reasons, we are clearly of opinion that the vendees are entitled to resist the claim of the pre-emptor on the ground of the removal of their disqualification by the subsequent acquisition of Ghulam Mohammad's share by Hayat Bakhsh.

We, therefore, accept this appeal with costs, set aside the decisions of the Courts below and dismiss the pre-emptor's suit. In view of the conflict of authority, however, we leave the parties to bear their own costs in all other Courts.

P. S.

Appeal accepted.

(1) 90 P. R. 1909 (F. B.), p. 376.