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succeeding on this ground. In these circumstances I would dismiss this appeal also and in view of all the circumstances leave the parties to bear their own costs in this Court.

ADDISON J.—I agree.

A. N. K.

Appeal dismissed.

APPELLATE CIVIL.

Before Addison and Ram Lall JJ.

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Oct. 31.

KEWAL KRISHAN (PLAINTIFF) Appellant,

versus

JAIN BROTHERHOOD, LUDHIANA, AND OTHERS (DEFENDANTS) Respondents.

Regular First Appeal No. 143 of 1938.

Pre-emption — Vendee — simultaneous purchase by him of a house and two shops adjacent to it — Pre-emptor claiming pre-emption in respect of the house on the basis of previous purchase of another shop also adjacent to the house — Whether pre-emptor's right defeated.

The plaintiff sued J for possession by pre-emption of a house purchased by J. who had bought the same and two shops adjacent to it simultaneously by one sale-deed, the shops being distinct properties apart from the house and plaintiff's right of pre-emption being based on the fact that he had bought a shop previously which was also adjacent to the house in question. J. contended that the plaintiff's right of pre-emption was defeated because their own purchase of the shops adjoining the house in dispute had put them in the same position with respect to pre-emption.

Held (non-suiting the plaintiff) that just as a vendee whose purchase is otherwise open to attack, can defeat the plaintiff's right by removing his defect, *pendente lite*, and clothing himself with a status equal to that of the pre-emptor, so can a vendee defeat a pre-emptor's title, as in the present case, by buying other properties simultaneously with the property in dispute.

Sanwal Das v. *Gur Parshad* (1) and *Dhanna Singh* v. *Gurbakhsh Singh* (2), dissented from.

Het Ram v. *Dal Chand* (3), *Hayat Bakhsh* v. *Mansabdar Khan* (4) and *Abdul Rahman* v. *Haji Rashid Ahmad* (5), relied upon.

Hans Nath v. *Ragho Prasad Singh* (6), referred to.

First appeal from the decree of Lala *Har Dayal, Subordinate Judge, 1st Class, Ludhiana, dated 31st January, 1938, dismissing the plaintiff's suit.*

MEHR CHAND MAHAJAN, VISHNU DATTA, MANZUR QADIR, for Vir Sen Sawhney, for Appellant.

JAGAN NATH AGGARWAL and MELA RAM AGGARWAL, for Respondents.

The Judgment of the Court was delivered by—

ADDISON J.—The plaintiff, Kewal Krishan sued the defendants, namely, the Jain Brotherhood, Ludhiana, and Tilak Ram, for possession by pre-emption of a house, sold by the Official Receivers in the insolvency of the firm of Banarsi Das-Kapur Chand, owned by Tilak Ram, to the Jain Brotherhood by a sale deed dated the 11th March, 1934, the consideration being Rs.16,000. The suit was resisted on various grounds and has been dismissed. Against this decision the plaintiff has appealed.

The property purchased by the Jain Brotherhood consisted of a large oblong house and two shops adjoining and touching this house but not in the same line. The doors of the two shops opened on to Iqbal Gunj road while the house entrance is in the Rupa Mistri lane. The two shops occupy a very small area compared to the house. The trial Judge went to the

(1) 90 P. R. 1909 (F. B.).
(2) 91 P. R. 1909 (F. B.).
(3) I. L. R. (1933) 14 Lah. 421.
(4) I. L. R. (1935) 16 Lah. 921.
(5) 1937 A. I. R. (Lah.) 182.
(6) I. L. R. (1932) 54 All. 189 (P. C.).

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spot and has found that the bricks used for the building of the shops are of smaller size than those used for the building of the house and appear to be very old. In olden days bricks made in India were very small. There is no connection between the oblong house and the two shops, which touch the house at one corner but which project out from it. Even the plaintiff's witnesses had to admit that the two shops had been used as shops for 20 years and that they have no connection with the house except that they touch it. The word " attached " is sometimes used in the English record of the evidence but it is clear from the vernacular record that this word is used in the sense of ' adjacent.' At present they are still used as shops. There is a bazar in the street into which the two shops open. Even the plaintiff had to call them shops. In the evidence it was stated that one could not get on to the roof of the shops except through the staircase in the house. This may be so but that does not mean that the shops make up one property along with the house. It would be easy to get on to the roof by building a staircase in the shops or by a ladder from the street. The evidence, therefore, establishes that these two shops are distinct properties, apart from the house. The mere fact that they were sold by the Receivers in insolvency by one sale deed is of no consequence. Many properties can be disposed of by one deed. In fact, the plaintiff in this case purchased the shop, on the footing of which he seeks to pre-empt, from the same Receivers in insolvency and at the same time he purchased another property in another locality by the same deed. This sale deed in favour of the plaintiff by the Receivers is important as the western boundary of the shop, which the plaintiff bought, is given as *the shops* of Banarsi Das-Kapur Chand while the northern bound-

ary is given as *the house* of the same firm. The insolvent firm thus appears to have had three shops and the one house at this place. One shop was purchased by the plaintiff and the house and two shops were purchased later by the Jain Brotherhood. On the evidence, therefore, we are satisfied that the conclusion of the trial Court is correct that the two shops purchased by the Jain Brotherhood are not part of the house but separate entities.

This takes us to the second matter in dispute. It is admitted that, though the shop of the plaintiff adjoins the shops purchased by the Jain Brotherhood, no pre-emption is possible under the law with respect to the shops. Counsel for the plaintiff-appellant, however, argued that he could pre-empt the house as the shop he purchased in 1933 touched the house. Against this it was argued that, as the shops purchased by the Jain Brotherhood must remain the property of the Jain Brotherhood, they also had two shops adjoining the house in dispute and were thus in the same position with respect to pre-emption as the plaintiff who had one.

At one time it was held by the Chief Court of the Punjab that where the owner of the adjoining house sues for pre-emption in respect of one of two houses sold, to which his right alone extends, a vendee is not entitled to say that, by reason of his having under the sale deed become the owner of the other house, he stands on an equal footing with the plaintiff (both being owners of adjacent houses). This was so held by a Full Bench in *Sanwal Das* v. *Gur Parshad* (1). It was also held by the same Full Bench in *Dhanna Singh* v. *Gurbakhsh Singh* (2) that in a suit for pre-emption,

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

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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 the 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.

The Full Bench decision of the Chief Court in *Dhanna Singh* v. *Gurbakhsh Singh* (1) has already been dissented from by this Court. It was held in *Het Ram* v. *Dal Chand* (2) that the plaintiff in order to maintain a suit for pre-emption should have the right to pre-empt on three 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. In another decision of a Division Bench *Hayat Bakhsh* v. *Mansabdar Khan* (3) it was held that a vendee, whose purchase is otherwise open to attack, can defeat the pre-emptor's title by removing his defect *pendente lite* and clothing himself with a status equal to that of the pre-emptor. Thus the claim of the plaintiff 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. The dissentient judgment of Rattigan J. in *Dhanna Singh* v. *Gurbakhsh Singh* (1) was approved. Nothing was said about *Sanwal Das* v. *Gur Parshad* (4) as that was not in dispute. Another Division Bench decision to the same effect is reported as *Abdul Rahman* v. *Haji Rashid Ahmad* (5) where the Privy Council decision to the same effect reported in *Hans Nath* v. *Ragho Prasad Singh* (6), was relied upon.

(1) 91 P. R. 1909 (F. B.).
(2) I. L. R. (1933) 14 Lah. 921.
(3) I. L. R. (1935) 16 Lah. 921.
(4) 90 P. R. 1909 (F. B.).
(5) 1937 A. I. R. (Lah.) 182.
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There is thus no question that *Dhanna Singh* v. *Gurbakhsh Singh* (1) was wrongly decided and it now remains to be settled whether *Sanwal Das* v. *Gur Parshad* (2) was also wrongly decided.

The following remarks of Rattigan J. one of the two dissenting Judges, occur at pages 348 and 349 of *Sanwal Das* v. *Gur Parshad* (2) :—

" The case is this. A buys two houses B and C by one sale deed. These two houses adjoin each other. X has for some time prior to this sale, been owner of house D, which adjoins house C. X sues to pre-empt house C. To this claim A replies :—

' By the very sale deed by which I purchased house C, I became owner of the house B, which adjoins house C. As regards house C, therefore, I was in exactly the same position as the claimant, at the time when his alleged cause of action arose, that is to say, I was at the date of the sale an owner of immoveable property adjacent to the property claimed.'

" In my opinion, given with all due deference, A's reply is a complete defence. It is admitted that if A had bought house B five minutes before he purchased the house C, his position would be impregnable. This proposition is conceded. There is also ample authority for the proposition that if A had prior to the institution of the suit by X sold the house C to a person who had a superior right to or even an equal right with X, the latter's claim must fail. Further, there is good authority for the view that the vendee can defeat X's right, by himself purchasing subsequently to the date of the sale of the property in dispute, property from a person who by virtue of such property has an equal right of pre-emption with X. It is said that in this latter event, the vendee puts himself merely

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

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in the position of the former owner of that property. Admitting that this is so I fail to see why he cannot put himself in such position by buying that property simultaneously with the property in dispute; but be this as it may, we have it established that the vendee can defeat X's claim by purchasing other property (which puts him on a level with X) either immediately before or immediately after the sale to him of the property in dispute. Is it logical to say that though he can so defeat X's claim he cannot defeat it by buying such other property simultaneously with the property in dispute? I confess I am not myself able to appreciate the difference. It is urged however, that the pre-emptor X has a right to claim the property sold and this right exists in a potential form, prior to the sale to the vendee and that such sale is a violation of this right. I cannot admit the correctness of this proposition..... No person can be said to have a right to claim pre-emption until a sale has taken place nor till then has he any cause of action against any one."

Robertson J. who agreed with the above view remarked as follows :—

" After carefully considering the views expressed by the learned Chief Judge and my brother Reid and the judgment of my brother Rattigan, I am constrained to agree with the view taken by Mr. Justice Rattigan. I need not recapitulate what he has said. Briefly I have come to my conclusion mainly on the ground that I think that it cannot be said that at the moment of the purchase the pre-emptor had any right of pre-emption over the property claimed superior to that of the vendee and that unless he can show that he had, the burden lying upon him, the suit must fail 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."

It is difficult to add anything else to the arguments given by these Judges. It has always been admitted that the vendee can defeat the rights of the pre-emptor by acquiring other property which gave him an equal right with the pre-emptor after his first purchase but before the institution of the suit. This was not disputed in the two Full Bench cases referred to. It has now been settled that a purchase of property after the institution of the suit, which has the effect of giving the vendee an equal right of pre-emption with the pre-emptor, is sufficient to defeat the suit, this principle having been approved by their Lordships of the Privy Council. Logically, therefore, there can be no reason why a purchase, simultaneous with the purchase of the house in dispute, should not defeat the pre-emptor's title. As Robertson J. remarked, it cannot be said that at the moment of the purchase the pre-emptor had any right of pre-emption over the property claimed, superior to that of the vendee and, unless he can show that he had, the burden lying upon him, the suit must fail. Is it logical to say that though he can defeat X's claim (by buying property prior or subsequent to the institution of the suit) he cannot defeat it by buying such other property simultaneously with the property in dispute?

In our view there is no distinction. As no other point was argued, the appeal fails and is dismissed with costs.

A. N. K.

Appeal dismissed.