PUNJAB AND HARYANA HIGH COURT

Hukam Singh

Vs

Hakumat Rai

Regular Second Appeal No. 1183 of 1964

(A.N. Grover, Prem Chand Pandit and R.S. Narula, JJ.)

23.05.1967

JUDGMENT

R.S. Narula, J.

1. The question of law, which calls for decision in this Regular Second Appeal against the judgment of affirmance given by the lower appellate court upholding the decree of the trial Judge dismissing the suit of the appellant for a declaration to the effect that he is not liable to be dispossessed in execution of a pre-emption decree against the original vendee who inducted the appellant as a tenant on the land in dispute, is, "whether a successful pre-emptor is bound by the tenancy created by the vendee after the sale in his favour ?" In other words, the question is, whether relationship of landlord and tenant is or is not created by operation of law between a pre-emptor-decree-holder on the one hand and a tenant inducted by the vendee into the pre-empted property after the sale in his favour but before the decree in the pre-emption suit.

2. The undisputed facts necessary for deciding this appeal lie in a very narrow compass and may, first, be narrated. One Mansab Rai (hereinafter referred to as the original vendor) sold to Om Parkash (hereinafter called the vendee) agricultural land measuring 16 acres in village Shamas Din Chishti, tehsil and district Ferozepore, on or about January 2, 1962 At the time of the sale, substantial part of the land was in the actual physical possession of tenants, such as Balbir Singh and others. After the sale the vendee inducted Hukam. Singh, appellant, to whom I will hereinafter refer as the tenant, as a lessee in a portion of the said property measuring about 2-1/2 acres. This is stated to have happened in Kharif 1962. Hakumat Rai, respondent, hereinafter called the pre-emptor, claimed possession of the property in question including the land in the

occupation of the tenant on the basis of his right of pre-emption under the Punjab Pre-emption Act. The suit was decreed on October 24, 1963, on condition that the pre-emptor deposited in Court the sale price of Rs. 6,000, by January 31, 1964. The requisite deposit was made and execution of the decree for possession by pre-emption was taken out in or about January, 1964, by the pre-emptor against the vendee. At that stage the tenant filed objections against his dispossession in the executing Court. His objections having been dismissed on February 17, 1964, the suit, out of which the present appeal has arisen, was filed on February 18, 1964, by the tenant against the pre-emptor for a declaration to the effect that the tenant was not liable to be evicted from the land in his actual possession as a tenant of the vendee in execution of the decree obtained by the pre-emptor against the vendee, and, as a consequential relief, for an injunction restraining the pre-emptor from interfering with the actual possession or standing crops of the tenant in the said land. On the pleadings of the parties, the trial court framed the following issues :-

(1) Whether the suit is maintainable ?

(2) Whether the plaintiff is not liable to be ejected in execution of the pre-emption decree of the defendant against Om Parkash, vendee ?

(3) Relief.

3. With the consent of the counsel for the parties the first issue was treated as preliminary, and, after hearing arguments on the same the trial court dismissed the suit of the tenant by judgment dated June 12, 1964, on the ground that the pre-emptor was not bound by the tenancy created by the vendee after the sale in his favour. The tenant's first appeal against the decree of the trial court having been dismissed on September 14, 1964, by the District Judge, Ferozepore, he came up in second appeal to this Court. In pursuance of the order of Dua, J., dated November 11, 1965, referring the case to a larger Bench, this appeal came up before the said learned Judge and myself on March 23, 1966, and we directed it to be referred to a still larger Bench in view of the importance of the legal question involved in the case. This is how the appeal has come to be argued before the present Bench.

4. Mr. K.L. Sachdeva, the learned counsel for the tenant, has, firstly, argued on the authority of the judgment of Campbell. J., in *Hadayat Ullah v. Gulam Muhammad Beg*[1], and of the Division Bench judgment of the same High Court in *Nadir Ali Shah v. Wali*[2], and of the Full Bench judgment of that very Court in *Lachhman Singh v. Natha Singh*[3], as well as on the basis of the latest Full Bench judgment of this Court in *Ganga Ram and others v. Shiv Lal*[4], that title to the pre-empted property passes to the pre-emptor under a pre-emption decree in accordance with the provisions of Order 20, rule 14, of the Civil Procedure Code on deposit of the purchase money in terms of the decree and the title is deemed to pass to him from the date of the said deposit. Shri Nand Lal Dhingra, the learned counsel for the pre-emptor, has not only conceded this proposition of law but has further invited our attention to the authoritative pronouncement of their Lordships of the Supreme Court in *Bishan Singh v. Khazan Singh,*[5] to the effect that the right of pre-emption can be effectively exercised or enforced only when the pre-emptor has been substituted in the original bargain of sale and that such a substitution takes place only when the decree-holder complies with the condition about the payment of the specified amount within the prescribed time mentioned in the decree.

5. It was then argued on behalf of the tenant that if land is mortgaged with possession and the mortgagee inducts a tenant therein, such a tenant of the mortgagee is fully protected against eviction at the hands of the mortgagor consequent upon redemption, and that on the same analogy a tenant of the vendee, who has much better rights in the property than a mere mortgagee, is entitled to similar protection. Reference has been made by the learned counsel in this behalf to the Judgments of the Supreme Court in *Mahabir Gope v. Harbans Narain,*[6] , *Harihar Prasad v. Deonarain Prasad*[7], and *Prabhu v. Ramdeo*[8], In those cases it has been held that a mortgagee cannot ordinarily create an interest in the mortgaged property which would tenure beyond the termination of his interest as a mortgagee on account of the general rule that a person cannot, by transfer or otherwise, confer a better title on another than he himself has. As an exception to that rule it has been held that a mortgagee with possession may settle a tenant on the mortgaged property in the course of prudent management of the same in exercise of the statutory authority vested in a mortgagee by section 76(a) and (e) of the Transfer of Property Act. In such a case the tenant cannot be ejected by the mortgagor even after the redemption of the mortgage provided that the settlement of the tenant by the mortgagee was a *bona fide* one. At the same time, it has been made clear by the Supreme Court that even this exception to the general rule will not apply in a case where the terms of the mortgage prohibit the mortgagee to make any settlement of tenants on the land either expressly or by necessary implication. The mortgage deed in the case of Mahabir Gope was interpreted by their Lordships of the Supreme Court to disentitle, by implication, the mortgagee from locating tenants on the mortgaged land. In the case of Harihar Prasad the Supreme Court further held that a mortgagee is neither a proprietor nor a tenure-holder though he is, no doubt, a transferee of an interest in the immovable property and may in a loose sense be said to be the owner of that interest. It was, therefore, held that he does not fall within the definition of a 'proprietor' in the Bihar Tenancy Act, and that a tenant brought on the land by such a mortgagee in the course of prudent management of the land by virtue of the provisions of section 76(a) of the Transfer of Property Act is not entitled to claim occupancy rights over the land under the Bihar Tenancy Act, as right of occupancy is a creature of the statute and cannot be claimed independently of the provisions of the said Bihar Act. Prabhu's case dealt with the Rajasthan Tenancy Act (3 of 1955). The Supreme Court held that case that persons inducted into agricultural land as tenants by a usufructuary mortgagee who have become entitled to rights of Khatedar tenants by virtue of section 15 of Rajasthan Act 3 of 1955, cannot be ejected by the mortgagor on the ground that the mortgage of the land had been redeemed. This has been so held because there is nothing to prohibit tenants inducted by a mortgagee in possession improving their status by taking benefit of statutory provisions which might come into operation before the redemption of the mortgage.

6. Counsel then referred to a Division Bench judgment of this Court (Falshaw, C.J., as he then was, and Harbans Singh, J.) in *Bhola and others v. Jhundoo and others*[9], In that case this Court held that where a lease created by the mortgagee of agricultural land was of such character that a prudent owner of property would have granted in the usual course of management, the lease would be binding on the mortgagor on the redemption of the property because of the provisions of section 76 of the Transfer of Property Act.

7. It appears to me that a vendee of pre-emptible property cannot be equated to a usufructuary mortgagee. Whereas the status of a mortgagee with possession has been raised to that of a 'land-owner' by certain statutory provisions in some enactments, such a person is indeed not the owner of the property but has a limited interest therein. On the other hand, a vendee of a pre-emptible

property is as good an absolute owner thereof as of a non-pre-emptible property subject only to the right of the superior pre-emptor to follow the property in the hands of the vendee in certain circumstances. Certain tenants of mortgagees have been held to be protected against eviction after redemption as an exception to the general rule laid down by the Supreme Court in Mahabir Gope's case solely because of the statutory provisions contained in section 76 of the Transfer of Property Act, which have admittedly, no application to cases other than those of mortgage. The tenants cannot, therefore, derive any benefit from the abovesaid pronouncements of the Supreme Court.

8. Mr. Sachdeva then submitted that the appellant is protected against ejectment from the land tenanted to him by the provisions of section 9 of the Punjab Security of Land Tenures Act, 1953 (Punjab Act 10 of 1953 - hereinafter referred to as the 'Protection Act') because the pre-emptor is a 'land-owner' within the meaning ascribed to that phrase by clause (1) of section 2 of the said Act, and the appellant is a 'tenant' within the meaning of clause (6) of that section. 'Landowner' is described in the Protection Act to mean a person who is defined as such in the Punjab Land Revenue Act, 1887 (Act 17 of 1887 - hereinafter referred to as the 'Revenue Act'). The meaning of the expression 'land-owner' has been further extended for the purposes of the Protection Act in certain respects with which we are not concerned. In sub-section (2) of section 3 of the Revenue Act, a 'land-owner' is defined as below :-

> "Land-owner" does not include a tenant or an assignee of land-revenue, but does include a person to whom a holding has been transferred, or an estate or holding has been let in farm, under this Act for the recovery of an arrears of land-revenue or of a sum recoverable as such an arrear and every other person not hereinbefore in this clause mentioned who is in possession of an estate or any share or portion thereof, or in the enjoyment of any part of the profits of an estate".

9. In clause (6) of section 2 of the Protection Act it is stated that the expression 'tenant' has the same meaning in this Act as is assigned to it in the Punjab Tenancy Act, 1887 (Act 16 of 1887 - hereinafter called the 'Tenancy Act') and includes a sub-tenant and self-cultivating lessee with certain exceptions which are not relevant for deciding the present case. In sub-section (5) of section 4 of the Tenancy Act, 'tenant' is defined as below :-

> "'tenant' means a person who holds land under another person, and is, or but for a special contract would be, liable to pay rent for that land to that other person; but it does not include -
>
> (a) an inferior land-owner; or
>
> (b) a mortgagee of the rights of a land-owner; or
>
> (c) a person to whom a holding has been transferred or an estate or holding has been let in farm, under the Punjab Land Revenue Act, 1887, for the recovery of an arrear of land revenue or of a sum recoverable as such an arrear; or
>
> (d) a person who takes from the Crown a lease of unoccupied land for the purpose of sub-letting it".

In the Tenancy Act, a 'landlord' is defined to mean a person under whom a tenant holds land, and to whom the tenant is, or but for a special contract would be, liable to pay rent for that land. Subsection (7) of section 4 of the Tenancy Act provides that the expressions 'tenant' and 'landlord' include the predecessors and successors-in-interest of a tenant and landlord respectively. Section 9 of the Protection Act is in the following terms :-

> "9. (1) Notwithstanding anything contained in any other law for the time being in force, no land-owner shall be competent to eject a tenant except when such tenant -
>
> (i) is a tenant on the area reserved under this Act or is a tenant of a small land-owner; or
>
> (ii) fails to pay rent regularly without sufficient cause; or
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> (iii) is in arrears of rent at the commencement of this Act; or
>
> (iv) has failed, or fails, without sufficient cause, to cultivate the land comprised in his tenancy in the manner or to the extent customary in the locality in which the land is situate; or
>
> (v) has used, or uses the land comprised in his tenancy in a manner which has rendered, or renders it unfit for the purpose for which he holds it; or
>
> (vi) has sublet the tenancy or a part thereof; provided that where only a part of the tenancy has been sub-let, the tenant shall be liable to be ejected only from such part; or
>
> (vii) refuses to execute a *Qabuliyat* or a *Patta*, in the form prescribed, in respect of his tenancy on being called upon to do so by an Assistant Collector on an Application made to him for this purpose by the land-owner.

Explanation. - For the purposes of clause (iii), a tenant shall be deemed to be in arrears of rent at the commencement of this Act, only if the payment of arrears is not made by the tenant within a period of two months from the date of notice of the execution of decree or order, directing him to pay such arrears of rent.

> (2) Notwithstanding anything contained hereinbefore a tenant shall also be liable to be ejected from any area which he holds in any capacity whatever in excess of the permissible area;
>
> Provided that the portion of the tenancy from which such tenant can be ejected shall be determined at his option only if the area of his tenancy under the land-owner concerned is in excess of the area from which he can be ejected by the said land-owner;
>
> Provided further that if the tenant holds land of several land-owners and more than one land-owner seeks his ejectment, the right to ejectment shall be exercised in the order in which the applications have been made or suits have been filed by the land-owners concerned, and in case of simultaneous applications or suits the priority for ejectment shall commence serially from the smallest land-owner.

Explanation. - Where a tenant holds land jointly with other tenants, only his share in the joint tenancy shall be taken into account in computing the area held by him."

10. The argument of the tenant is that the pre-emptor is indisputably the owner of the property in question since the date he deposited the pre-emption money in Court under the pre-emption decree, and that the appellant being a person who does not hold the land in question in his own right as an owner but under 'another person' and is liable to pay rent for that land "to that other person", section 9 of the Protection Act has an immediate and complete impact on the situation and absolutely prohibits the ejectment of the tenant except in circumstances mentioned in section 9. The Position is, however, not as simple as Mr. Sachdeva has tried to assume. The appellant was, no doubt, a tenant, as he was holding the land in question under another person. But who was that other person ? It was the vendee. To whom was the tenant, therefore, liable to pay rent ? To the vendee. If the pre-emptor could be held to be a successor-in-interest of the vendee or if the vendee could be held in law to be a predecessor-in-interest of the pre-emptor, a relationship of landlord and tenant would have been created between the pre-emptor and the tenant by devolution of interest. But it has been repeatedly held that a pre-emptor is not a successor-in-interest of the vendee but gets substituted as a vendee in the original bargain and derives his title directly from the original vendor. As long ago as in 1911, it was laid down by Rattigan, J., in *Shamas Din v. Sarfraz*[10], (Page 960) that a successful pre-emptor is not the legal representative of the vendees and would not consequently be entitled to rely upon agreements between the latter and the former claimants for pre-emption in the event of his being sued for a share of the property. Similarly, Broadway, J., held in *Ali Bakhsh v. Ghulam Muhammad*[11], that a pre-emptor is not bound by the personal covenants entered into between a vendor and a vendee after the execution of the sale. The learned Judge held that the sale is a complete transaction in itself and that any subsequent agreement regarding the property cannot be read into the conveyance so as to vary its terms and the pre-emptor is bound by the conditions or obligations contained in the original sale deed.

11. It was held by a Division Bench of this Court (Harnam Singh and Kapur. JJ.) in *Dugar Mal v. Gobind Saroop*[12], that where a pre-emptor brings a suit for pre-emption, he must *ex necessitate* accept the title of the vendor and it is really on that basis that he claims his superior rights of purchase and cannot challenge the title of the vendor. The Division Bench held that when a pre-emptor brings a suit for damages for defect in title, he has to allege the said defect and thus his pleading is something opposite to what he has to plead to successfully pre-empt a sale. The learned Judges laid down that a covenant for indemnity is not a covenant running with the land and, therefore, if a transfer is in *invitum*, it does not pass to the transferee. On that basis, the learned Judges decided that a pre-emptor, who had been deprived of the property pre-empted by the sons of the vendor on their obtaining a degree for possession of the property on the ground that the property belonged to the Joint Hindu Family of which their father was the manager and that the sale was without consideration and necessity, sued the vendor to recover the purchase money relying on a covenant in the sale-deed that the vendor would return the sale money if his representatives or heirs filed any suit or in case of any dispute being set up, could not succeed as this was a personal covenant between the vendor and the vendee which could not enure for the benefit of the pre-emptor.

12. A later and more recent Division Bench of this Court (Mehar Singh, J., as my Lord, the Chief Justice, then was, and Tek Chand, J.) held on February 9, 1959, in *Amir Chand v. Amir Chand*

and others [13] that an indemnity of the kind referred to above runs with the land, and anyone who happens to own the land in any lawful manner is entitled to enforce such an indemnity. In all other respects the Bench affirmed the view taken by this Court in Dugar Mal's case to the effect that a personal covenant between a vendor and a vendee which is not a part of the bargain of the sale-cannot be enforced by a pre-emptor. In that context, the Bench observed in Amir Chand's case as follows :-

> "The rules contained in the Transfer of Property Act are modelled on the English Law relating to express and implied covenants. There is a distinction to be drawn in case of covenants by 'beneficial owner, in contradistinction to those, by a 'fiduciary owner', such as a trustee or a guardian selling land on behalf of *cestui que trust*, or a minor, persons conveying on behalf of those who are of unsound mind or under an order of the Court. In the case of covenants by persons other than beneficial owners they bind them for their own act. A trustee, for example, is deemed to covenant that he has done no act whereby the property is encumbered or his power of transfer restricted. In other words, fiduciary owner's responsibility is for breach of covenants created by themselves. Prior to the passing of the Conveyancing Act, 1881 (44 and 45 Vict. C. 41) the deeds of conveyance were of inordinate length and usually contained elaborate covenants for title, the object of which was to render the vendor liable in covenant if subsequently a flaw was discovered in his title. Since 1881, it has become unnecessary to expressly state covenants for title. If the sale of free-holds is by a 'beneficial owner' the statute implied certain covenants. Now under the Law of Property Act, 1925 (15 and 16 Geo 5, c. 20), vide sections 76, 77, 78, 79, 80 and Second Schedule, replacing section 7 of the Conveyancing Act, 1881, covenants for title are implied, and they run with the land. In other words, they are deemed to be not only between the parties to the covenant but also between their successors-in-title and the persons deriving title under them.

The usual covenants for title, given on a sale of free-hold by a beneficial owner are (i) for right to convey; (ii) for quiet enjoyment; (iii) for freedom from encumbrances; and (iv) for further assurance, - vide Halsbury's Laws of England, Second Edition, Volume 29, para 662, page 455). Covenant that a vendor has a good right to convey means that he is entitled to convey the interest which he has agreed to sell. The second covenant of quiet possession protects the purchaser against acts done by the vendor or by persons claiming under him. The third covenant assures the purchaser that the property is free from all encumbrances, claims and demands other than those to which the conveyance is expressly made subject. The last covenant obliges the vendor where the title conveyed is defective, to do everything, which is right and possible in order to perfect the title.

The above four covenants are enforceable against the vendor and his successors and by the vendee and his successors who take the estate. These covenants are thus enforceable not only by the covenantee and his representatives but by alienees who claim by privity of estate (vide Dart on Vendors and Purchases. Eighth Edition, Volume 2, Page 661). The benefit of the implied covenants for title is annexed and incident to and goes with the estate of the implied covenantee and is capable of being enforced by every person in whom that estate from time to time vests."

13. Counsel for the tenant picked up the following two sentences from the above passages divorced from their context and tried to build an argument on their basis to the effect that it has been impliedly held in Amir Cliand's case that a successful pre-emptor is a successor-in-interest of the original vendee:

> "In other words, they are deemed to be not only between the parties to the covenant but also between their successors-in-title and the persons deriving title under them".

and

> "The above four covenants are enforceable against the vendor and his successors and by the vendee and his successors who take the estate."

14. Mr. Sachdeva has, in my opinion, fallen in grave error in thinking that the Division Bench held any such thing as he is seeking to imply therein. The Bench, relying on section 55(2) of the Transfer of Property Act, differed with the earlier decision in Dugar Mal's case only to the extent that such a covenant runs with the estate and is not a personal covenant. No case has been shown to us where it might have been held that a successful pre-emptor is the successor-in-interest of the original vendee. Nor are we prepared to so hold. We think that the law in this respect laid down in Shamas Din v. Sarfraz and in Ali Bakhsh v. Ghulam Muhammad is correct. It is, therefore, held that a successful pre-emptor on becoming owner of the pre-empted property merely gets substituted for the vendee in the original bargain of sale and his predecessor-in-interest is the original vendor and not the vendee.

15. As soon as the appellant claims to be a tenant of the pre-emptor, he has to be asked as to how he has acquired that status under the pre-emptor. Tenancy can be created either by contract or by devolution of interest or by operation of law. There has, admittedly, never been any contract of lease between the pre-emptor and the tenant. The pre-emptor not being a successor-in-interest of the vendee (who was the original landlord of the tenant), there is no question of the appellant acquiring the status of a tenant under the pre-emptor by devolution of interest. The only thing that remains to be seen is whether he has become a tenant under the pre-emptor by operation of any law. There is no provision in the pre-emption Act which clothes the tenant inducted by a vendee with the status of a lessee under the pre-emptor. Nor has any provision in the Protection Act extended the operation of the protection contained therein to such a person. It appears that with the extinguishment of the superior title of the vendee by the operation of the pre-emption decree on payment of the price into Court under Order 20, rule 14, Civil Procedure Code, the inferior rights of the tenant inducted by the vendee automatically come to an end following the general principle laid down by the Supreme Court in Mahabir Gope's case and are not saved by any provision of law.

16. It was held by Rattigan, J., in *Pala v. Mussammat Manglan and others*[14], (Page 617) that a person who purchases property subject to the law of pre-emption takes a title which is defensible in the event of a pre-emptor coming forward within the time allowed by law with a claim for pre-emption, and during this period he cannot give a transferee from himself a better title than that which he himself possesses. The learned Judge held that if in such circumstances the vendee and his transferee choose to run the risk of dealing with the property upon the assumption that no claim to pre-emption will be preferred they do so with their eyes open and at their peril. In *Bogha*

Singh and others v. Gurmukh Singh[15], (Page 411) a Division Bench of the Chief Court of Punjab at Lahore had to consider a question which was almost similar to that we have been called upon to decide. Robertson, J., held that a mortgage created by the vendee of a pre-emptible property did not constitute a valid charge against the property in question in the hands of the pre-emptor, Clark, C.J., differed from that view. On reference to the third Judge, it was held by Harris. J., as follows

> "I am prepared to accept the view that pre-emption is not a re-purchase, but a substitution of the pre-emptor for the vendee. That view, which was expressed in *Gobind Dyal v. Inayat-ullah*[16], is cited with approval in C.A. No. 234 of 1892 of this Court, and is followed in *Hukam Singh v. Indar*[18]I would give due weight to the dictum in the Full Bench ruling in *Deokinandan v. Sri Ram*[17], to the effect that the pre-emptors' right of ownership only vests in him on decree, though the expression vesting is of a somewhat indefinite character. But those rulings do not decide what is vested, or with regard to what subject-matter is there substituted, in other words, whether it is the subject of bargain as it existed at the time of sale, or as it exists at the time of suit. That is the crucial question in this case. In my opinion the substitution and vesting are as to the bargain as it originally stood. The fact that a cause of action under the Punjab Laws Act arises at sale affords no conclusive argument. For that cause of action may be rendered non-existent by such subsequent events as re-sale, partition, or act of God. But though where the cause of action subsists at the time of suit it certainly is an argument that it is the original and whole cause of action which subsists, I would not lay too much stress upon that consideration. For an act of the vendee himself may destroy the cause of action, e.g., a re-sale by him to a superior pre-emptor, and in *Khan v. Mahanda*[19], it was recently held by a Bench of this Court that a partition at the application of the vendee might have that effect. But it will be observed that the general principle followed in all the cases is to give the pre-emptor the original bargain. It is not here contended that in *Mussammat Shakro v. Molar Mal*[20], *and Panju Ram v. Mussammat Niki Bai*[21], it was wrongly decided that the second vendee is to be compensated not by the pre-emptor but by the vendee. It is the vendee, and not the pre-emptor, who takes the intervening profits (Deokinandan v. Sri Ram) not because he has a complete legal title but because they are not part of the bargain, and so do not pass to the pre-emptor. A pre-emptor has to pay compensation for improvements by the vendee on the same principle. The pre-emptor is to stand in the vendee's shoes at the time of the bargain, and he is not only entitled to the whole bargain, but he is bound to take the whole, so far as his right extends.

Another aspect of the case which leads to the same conclusion appears on a consideration of the nature of the vendee's title. His is a defective title, a title in abeyance which may a or may not be perfected by lapse of time, a title liable to be defeated by a pre-emption suit. Can the vendee give his transferee a better title than he himself possesses ? Can the vendee bind the pre-emptor by any charge on the property he (the vendee) may choose to create ? If so, the object of pre-emption would be defeated, the pre-emptor getting something less than the bargain, or in some cases (such as a re-sale) nothing at all. These considerations lead me to the conclusion that the

substitution is a substitution at the time of sale, and not at a later period, and that if the word 'vesting' is to be used, it is a vesting in what was sold neither more nor less, subject to the extent of the pre-emptive right."

17. The argument of Mr. N.L. Dhingra, the learned counsel for the pre-emptor is that having obtained a decree for the delivery of the property in question against the vendee, the pre-emptor is entitled to have possession thereof delivered to him by removing any person bound by the decree who refuses to vacate the property (Order 21, rule 35, of the Civil Procedure Code). Under the ordinary law and in the absence of a statutory provision to the contrary, a tenant is no doubt bound by a decree for possession passed against his landlord in respect of the tenanted premises in his occupation. If any authority is needed in that respect, reference may be had to the judgment of the Madras High Court in *Appa Rao v. Venkappa*[22], wherein it was held that tenants or servants of a judgment-debtor, unless they are occupancy tenants, are bound by the decree against the judgment-debtor.

18. Lengthy arguments have been addressed before us by both sides on the nature of the right of pre-emption. Reference has been made in this behalf to the following observations in the judgment of Mahmood J., in *Gobind Dayal v. Inayat Ullah*[23]at page 809 :-

> "* * * 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; but 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 the 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."

19. Both sides have then relied upon the dictum of the Full Bench of the Allahabad High Court in Deokinandan v. Sri Ram (supra), to which Mahmood, J., was a party. In that case it was held that a pre-emption decree merely avoids the sale and divests the original owner of all interest in the property as from the date when the decree became final by the payment, in accordance with its terms, by the pre-emptor of the pre-emptive price decreed, and vested in the pre-emptor the rights of ownership from that date, and his rights were not postponed until he had obtained possession of the property. In that case it was further held that the profits of the property which accrued between the date of the sale and the date when the pre-emptor in accordance with the decree, paid the decretal pre-emptive price, belonged not to the pre-emptor, nor to the original vendor, but to the original vendees. The rider added to the above proposition by Mahmood, J., about the vendees being entitled to the profits up to the date of possession no more holds good after the change in the language of original section 214 of the Civil Procedure Code on the re-enactment of those provisions in Order 20, rule 14 of the Code of 1908.

20. Though the correctness of the description of the right of pre-emption as explained by Mahmood, J., in Gobind Dayal v. Inayat Ullah (supra) does not appear to have ever been seriously doubted, the proposition has very often been subjected to scrutiny in connection with various questions relating to the law of pre-emption. Right of pre-emption is not a right of re-purchase but of substitution. What does this mean ?

21. While deciding the above question, which has indirectly emerged in this appeal, a clear

distinction has to be borne in mind between the following different aspects of the legal rights of a successful pre-emptor to whom the original vendor did not offer the pre-emptible property :-

(1) the point of time at which the pre-emptor becomes owner of the property;

(2) the date with effect from which the property vests in him; and

(3) the extent and limitations of the property which so vests.

22. As stated in an earlier part of this judgment, it is settled law that such a property vests in the pre-emptor only if and after he deposits in Court the sale-price as determined by Court within the time allowed by the decree and at no earlier point of time.

23. Nor do I entertain any doubt that such vesting is only prospective and does not relate back to any earlier date so as to entitle the pre-emptor to claim anything like mesne profits from the original vendee. The pre-emptor becomes owner on and with effect from the date of payment under Order 20, rule 14 of the Cole of Civil Procedure. The relevant question, however, is as to what is the property of which he becomes owner with effect from the date of payment ? In my opinion, the answer to this question, is that whatever was sold by the original vendor vests in the pre-emptor on and with effect from the date of payment and neither anything more nor anything less. In Bishan, Singh v. Khazan Singh (supra), it was held that the right of pre-emption is not a right to the thing sold but a right to the offer of a thing about to be sold which is called the primary or inherent right; and that the pre-emptor has a secondary or remedial right to follow the thing sold. This latter right has been described as one of substitution and not of re-purchase. The Supreme Court has succinctly explained this expression to mean that the pre-emptor takes "the entire bargain" while stepping into the shoes of the original vendee. This is a right to acquire the whole of the property sold and not a share or part of it. Right of pre-emption in Punjab is the statutory right of a person to acquire pre-emptible property within certain time on certain conditions. In exercise of this right the pre-emptor takes the entire bargain, that is, the entire bundle of rights and liabilities and advantages and disadvantages "pertaining to the original sale". He can neither split the bargain nor be bound by any action of the vendee. The latter is liable to the pre-emptor for any prejudicial action committed by him though he is entitled to keep and enjoy any profits accrued to him before compliance by the pre-emptor with the decree. As held by the Supreme Court, the right of pre-emption consists of two parts. The first is the primary right to get the property offered by the vendor before its sale to someone else. The secondary or remedial right is "to follow the thing sold" as it existed on the date of the original sale. The pre-emptor acquires an indefeasible right to the pre-empted property on making payment pursuant to the terms of the pre-emption decree and the property, which he acquires, is the same which was the subject-matter of the original bargain of sale. If this were not so, the right of pre-emption would become absolutely illusory, and it would be open to a vendee to defeat, the same in various ways. The right of substitution means that the pre-emptor succeeds to the original vendor by completely obliterating, by fiction of law the sale in favour of the original vendee and normally excluding everything done by the vendee to the prejudice of the property during the *interregnum.* The secondary or remedial right of pre-emption referred to by the Supreme Court in Bishan Singh's case is to follow the whole of the property sold and not only some interest therein which has survived any alienations made by the vendee. The substitution is to the original bargain and not to what has been left out of it as a result of the property having been handled by

the vendee in the meantime.

24. Test of a correct solution of the problem before us is that it should be compatible and consistent with certain well settled principles of the law of pre-emption. First such principle is that a pre-emptor has no interest in the property till he pays for it within the time allowed to him by the pre-emption decree. He may follow the property by filing a suit or may not. Even after obtaining a decree, if he does not deposit the price fixed by the Court within time, his right is extinguished. His title to the property comes into existence only after making payment. That is why it has been held in various cases including a judgment of the Lahore High Court in *Muhammad Akram Khan v. Muhammad Azirn Khan*[24], that a successful pre-emptor is vested with the rights of the vendee whom he dislodges, not from the date of the sale, but from the date on which he enforces his rights, that is, from the date on which he satisfies the conditions of his decree and brings it into operation. Since he gets only what was the subject-matter of the original sale, he has no claim to the income from the property which might have accrued to the vendee during the *interregnum.* The second principle, which flows from the first, is that the profits from the pre-emptible property earned by the vendee during the *interregnum* belong to him and neither the original vendor nor the pre-emptor has any claim to them. The third principle is that if the vendee creates an encumbrance on the property during the time he is its owner, the pre-emptor does not take the property subject to the charge, howsoever honest and *bona fide* may be the manner in which the charge might have been created. Still another principle, which is well recognised, is that if the vendee *bona fide* makes improvements in the property in question after purchasing it and before the institution of the suit by the pre-emptor, he is to be compensated for the same, as the pre-emptor is entitled to obtain in exercise of his right of pre-emption only that property which was originally sold and not the improvements made by the vendee thereon without paying for them.

25. In *Smt. Ganga Rani v. Piara Singh and others*[25], it was held by a learned Single Judge of this Court that a tenant, who had been brought on the land by the vendee long before the pre-emption money was paid, cannot be ejected in the execution of the pre-emption decree and the pre-emptor is entitled to only symbolical possession because title to the pre-empted property passes to the pre-emptor when the pre-emption money is deposited in Court. The learned Single Judge is, no doubt correct in holding that title to the pre-emption money passed only if, when and after the pre-emption money is deposited in Court. With the greatest respect to the learned Judge, however, it appears that in such an eventuality what passes to the pre-emptor is title to the property originally sold and not the property as available at that time in the hands of the vendee. For the same reason the vendee is made liable to the pre-emptor for any wilful loss or damage caused to the property during the interval it vested in him.

26. The practice of the Courts to award compensation for improvements to a vendee, who has made them in good faith or who may appear to be equitably entitled to it, was recognised as long ago as in 1892 in *Aziz Din v. Sham Dass and others*[26], as being in the nature of a counterclaim needing adjudication on principles of justice, equity and good conscience.

27. All the above-mentioned aspects of the law of pre-emption appear to me to fit squarely into the answer given by me to the question before us.

28. Counsel for the tenant relied on the judgment of a learned Single Judge of this Court

(Shamsher Bahadur, J.), in *Bhajan Lal and another v. The Financial Commissioner, Punjab, and another*[27], wherein it was held that the protection afforded by section 18 of the Protection Act is intended for the benefit of a tenant who has been in continuous occupation of the lands comprised in his tenancy for the requisite period of six years and that the said provision does not protect a landlord who may have acquired the land and held it for a period of less than six years. On the analogy of the law laid down in Bhajan Lal's case, it was argued by Mr. Sachdeva that even if the pre-emptor is entitled to the original bargain, he is not permitted to obtain vacant possession of the land in the occupation of the tenant, as vacant possession of the same was not delivered by the original vendor to the vendee at the time of the sale. At that time (it is shown from the pleadings) Balbir Singh and others were tenants in the entire land including the portion now in dispute. Mr. Sachdeva is, no doubt, right in his contention to this extent that if the tenants of the original vendor who were in actual possession of the land at the time of the sale had continued to be in possession, they would have been fully protected against eviction by virtue of section 9 of the Protection Act. Inasmuch as those tenants surrendered possession of the portion now in dispute and the appellant was inducted by the vendee himself, the pre-emptor is not bound by this new demise of any interest in the property created by the vendee for the first time.

29. Mr. Dhingra referred to sections 6 and 16 of the Protection Act and argued that the scheme of the Act shows that protection is sought to be given by the Act only to such a tenant as was on the land on the relevant dates mentioned in those sections. The provisions of section 9 of the Protection Act appear to be independent of the other rights conferred on a tenant by some other provisions of that Act. Section 9 is intended to take away the normal right of a landlord to eject his tenant except in circumstances enumerated in that provision. It applies to tenants irrespective of the date on which their tenancy started. In this view of the matter, the argument based on the mention of certain dates in sections 6 and 16 of the Protection Act appears to be misconceived.

30. For the foregoing reasons, it is held :-

(i) The title of a pre-enmptor in respect of the pre-empted property accrues from the date on which payment of the purchase money and costs (if any) is made by him in accordance with the provisions or Order 20, rule 14 of the Civil Procedure Code;

(ii) on such title accruing to him the pre-emptor is entitled to delivery of possession of the property in question from the vendee including any person who has happened to possess the property through the vendee after the original sale;

(iii) a vendee of pre-emptible property is entitled to deal with it in the same manner as a full owner, but any demise of the property or of any interest therein created by the vendee does not affect the rights of the pre-emptor;

(iv) a tenant inducted into pre-emptible property by a vendee after its sale in his favour does not become the tenant of the pre-emptor after title to the property passes to the latter by devolution of interest, as the vendee is not the predecessor-in-interest of the pre-emptor; and

(v) the tenant inducted by a vendee of pre-emptible property does not become tenant of the pre-emptor by operation of law so as to claim the protection of section 9 of the Punjab

Security of Land Tenures Act (10 of 1953) and is, therefore, liable to be dispossessed in execution of the decree for possession against the vendee.

31. In view of the findings recorded above, the pre-emptor is entitled to obtain actual possession, and not merely symbolic possession, of the pre-empted property from the tenant under Order 21 rule 35 of the Civil Procedure Code. The Courts below were, therefore, correct in dismissing the suit of the tenant for declaration and injunction on the admitted facts of the case without proceeding to record any evidence;

32. This appeal, therefore, fails and is dismissed but, in view of the intricate question of law involved in it, the parties are left to bear their own costs throughout.

A.N. Grover, J.

33. I agree.

. **P.C. Pandit, J.**

34. While dealing with the true nature right of Pre-emption. Mahmood. J., in the Full Bench decision of the Allahabad High Court in Gobind Dayal v. Inayatullah (supra), observed

> "The right of pre-emption is not a right of re-purchase either from the vendor or from the vendee, involving any new contract of sale; but it is simply a right of substitution, entitling to 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 the 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."

35. This enunciation of the law has indisputably stood the test of time.

36. Now the question is as to when the pre-emptor will stand in the shoes of the vendee. Order 20 Rule 14 of the Civil Procedure Code says that where the Court decrees a claim to pre-emption in respect of a particular sale of property and the purchase money has not been paid into Court, the decree shall (a) specify a date on or before which the purchase money shall be so paid, and (b) direct that on payment into Court of such purchase money together with costs, if any, decreed a against the plaintiff, on or before the day referred to in clause (a), the defendant shall deliver possession of the property to the plaintiff whose title thereto shall be deemed to have accrued from the date of such payment.' Interpreting this provision, a Full Bench of this Court in Ganga Ram and Others v. Shiv Lal (supra), held, that title to the pre-empted property passed to the pre-emptor in a pre-emption decree cm deposit of the purchase money in the terms of the decree and was deemed to pass to him from the date of the deposit. That means the pre-emptor is substituted in place of the vendee on the date he deposits the purchase money. What does he get on this date ? The vendee's name would be rubbed out and the pre-emptor's name would be inserted in its place in the sale-deed. No other change will be made therein. In other words, he will get all what the vendee had purchased from the vendor by means of the sale-deed. Nothing less and nothing

more. That being so, if the vendee inducts some tenant on the land, after the sale in his favour and before the deposit of the purchase money by the pre-emptor, the pre-emptor will not be bound by this act of the vendee, since he has to take the original bargain as it stood at the time of the sale, when admittedly there was no such tenant on the land. If it were to be held that the pre-emptor had to accept the tenant along with the land, that would amount to his re-purchasing the property from the vendee, which would be against the true nature of the right of pre-emption mentioned above, namely, that the right of substitution and not of re-purchase. From this, it also follows that such a tenant's rights come to an end along with the vendee's interest in the land on the deposit of the purchase money by the pre-emptor. He can, under no circumstances, be considered to be tenant of the pre-emptor and consequently, he cannot seek protection under section 9 of the Punjab Security of Land Tenures Act, 1953.

37. With these observations I agree with Narula, J.

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