
(1953) 09 P&H CK 0005

In the Punjab And Haryana At Chandigarh

Case No : Second Appeal No"s. 660 and 661 of 1949

Sajan Singh Naghia and Others

APPELLANT

Vs

Phuman Singh Bir Singh and Others

RESPONDENT

Date of Decision : 15-09-1953

Acts Referred:

Transfer of Property Act, 1882 — Section 118, 54, 8

Citation : AIR 1954 P&H 115

Hon'ble Judges : Kapur, J

Bench : Single Bench

Advocate : M.L. Wadehra, for the Appellant; M.R. Aggarwal, for the Respondent

Final Decision : Dismissed

Judgement

Kapur, J.—This judgment will dispose of two appeals B. S. A. 660 and B. S. A. 661 of 1949.

2. These appeals are by the defendants against an appellate judgment and decree of the Senior Subordinate Judge Mr. Gurcharan Singh dated the 1st of July, 1949 reversing the decree of the trial Court and thus decreeing the plaintiffs suit for pre-emption.

3. On the 6th of April, 46, Duman Singh defendant no. 1 exchanged with Sajjan Singh and others, defendants 2 to 5, his land by a registered deed. It was registered the same flay. It is attested by Gurbaehan Singh & Dai Singh as witnesses. The stamp paper was purchased on the same day and bears tn timer register No. 72. On the same day Duman Singh sold the land in dispute to Banta Singh by Ex. D. I. It was registered on the same day and this also was attested by the same witnesses. Both the sale deed and the deed of exchange seem to have been presented for registration at about the same time and pears the registration Nos. 1035 and 1066.

4. Phuman Singh, a brother of Duman Singh, brought a suit for declaration that the sale would not affect his reversionary rights and in the alternative for pre-

emption. Another collateral of Duman Singh, Harnaman, brought a similar suit and he also attacked the sale made by Duman Singh in favour of Banta Singh. The trial Court held this transaction to be a transaction of ex-change and not a dale. On appeal the learned Senior Subordinate Judge held it to be one of sale, and defendants a to 5 i.e., Sajjan Singh and others have come up in appeal to this Court. Mr. Nathu Lal Wadehra contends that this is not a sale but merely an exchange. According to his submission in order to determine whether a particular transaction is a sale or an exchange it is necessary to see whether any money has passed or not and he relied on the definition of the word "sale" as given in section 54 of the Transfer of Property Act and on the definition of the word "exchange" as given in the same Act in section 113. He secondly submits that a transaction such as this is not a sale but is an exchange and he has referred me to a Judgment of the Judicial Commissioner of Peshawar, Almond J, C., reported in - "Fazal Mohd. v. Ghulam Haidar", AIR 1944 Pesh 15 (A).

5. In transactions which become the subject-matter of a suit for pre-emption a duty is cast; upon the Courts to determine the nature of the transaction when such a question arises on the pleadings and the Courts cannot be satisfied merely by looking at the cloak which, the parties choose to give to the transaction to be entered into. In - "Bahawal v. Amir" AIR 1939 Lah 3431 (B), where the facts were somewhat different, this was the proposition laid down, and there are a large number of cases in our Law Reports which show that the Courts must look into the nature of the transaction rather than the apparent- tenor of it. I would therefore hold that it was necessary in this case to see whether the transaction was ft sale or an exchange.

6. The other question which arises is whether as a matter of fact the transaction is a sale or an exchange. Mr. Mela Bam has relied on the circumstances of this case and has supported the judgment of the learned Senior Subordinate Judge by reference to those grounds and also by a reference to a Division Bench judgment of the Chief Court in - "Gul Muhammad v. Sabz Ali Khan" AIR 1919 Lah 127 (C). I have already given the circumstances and I may again say that they are that the alleged exchange took place on the 6th April, 1946. The stamp for the document which evidences this was purchased from the stamp vendor and bears No. 72. It is attested by two witnesses Dal Singh and Gurbachan Singh. The sale by Duman Singh which, followed this is of the same day. The purchase and execution of the stamp paper for the sale appears to be almost simultaneous. It bears the number 73. The attesting witnesses are the same. Both these documents were presented to the Registrar at the same time or almost the same time and the registration numbers are 1065 and 1066. From these circumstances Mr. Mela Ram rightly asks me to draw the inference that they are really one transaction and not two transactions.

7. The case which has been quoted by Mr. Mela Ram seems to be on all fours with the one before me. There Khair Muhammad and Haidran Khan had exchanged almost equal area of land with Gul Muhammad. Two days later Khair

Muhammad and Haidran Khan sold the land for Rs. 12,000/- and from this an inference was drawn that they had no desire to acquire for themselves the land which they purported to take in exchange and that the cloak of an exchange was employed in order to effect the transfer of their land to Gul Muhammad without his being exposed to an attack by a pre-emptor. Le Rossignol J., who delivered the judgment, said:

"On behalf of the appellant Mr. Shaft has contended that the transaction on the face of it was clearly an exchange and that the Court should not go behind the document. But this doctrine we are quite unable to accept, and we have no doubt that it is the business of the Court in every such case to determine what the real intention of the parties was as opposed to their apparent intention, and in this case we have no hesitation whatever in finding that what the parties intended in effect was a sale and not an exchange."

8. Mr. Nathu Lal Wadehra has drawn my attention as I have said before to a judgment of Almond J. C. where the Chief Court view was not accepted. The learned Judicial Commissioner was of the opinion that if A and B exchange their respective pieces of land, it is immaterial whether one of them intends to transfer the land which he takes in exchange from the other, and that the act of one should not prejudice the rights of the other nor should the intention with which the land was taken from the other. This loses sight of the policy of the law of pre-emption which requires that the Courts must look into the nature of the transaction which necessarily must mean the intention of the parties. In the present case I can draw no other inference from the facts than this that the object of Duman Singh was to sell the land to defendants 2 to 5 Sajjan Singh and others, without their being exposed to a suit for pre-emption. I respectfully agree with the view taken by the Division Bench of the Chief Court and In my opinion if I may respectfully say sc the learned Judicial Commissioner has lost sight of the fact that the intention of the parties was a necessary ingredient In the determination of the nature of the transaction in cases of pre-emption. I would therefore dismiss these appeals with costs. Parties will bear their own costs throughout.