A ZILA SINGH & ORS.

v.

HAZARI & ORS.

February 25, 1979

B [P. N. SHINGHAL AND D. A. DESAI, JJ.]

Code of Civil Procedure 1908—*S.* 47, *Or. XX r.* 14(1)(*b*), *Or. XXI r.* 16 *and S.* 146—*Whether purchaser of land from a pre-emptor who has secured a decree for pre-emption and possession, could execute the decree to obtain possession of the land.*

C The original vendor of the lands in dispute sold them to the first vendee. In the meantime three decrees for pre-emption were passed in favour of the pre-emptor and against the vendor and his vendees. After satisfying the conditions imposed in the decrees regarding deposit of certain sums of money the pre-emptor sold the lands to the appellants.

In the execution petition filed by the appellants the original vendor as well as the first vendees filed their objections challenging the right of the appellants to execute the decrees on the ground that the right of pre-emption D being a personal right of the pre-emptor, the decrees could not be assigned and that the present appellants being subsequent vendees from the pre-emptor were not entitled to execute the decrees granted in his favour.

Rejecting the objections of the first vendees the executing court held that the appellants were entitled to execute the decrees.

E On appeal the Additional District Judge held that the pre-emptor having complied with the directions contained in the decree his title to the lands was perfected and that the appellants were entitled to recover possession under s. 146, CPC.

In execution second appeals of the first vendees the High Court held that the right of pre-emption being a personal right, the decree for pre-emption would be a personal decree and was not assignable and even if the pre-emptor F had complied with the provisions of Or. XX r. 14 CPC, the appellants would not be entitled to execute the decree for possession because the decree was not assigned and s. 146 would not help the present appellants.

Allowing the appeals,

HELD : 1(i) The question whether the right of pre-emption was a personal right or it created an interest in property was concluded by the decision of G this Court between the same parties in an earlier round of litigation. The earlier litigation being inter partes and, therefore, binding on the respondents, it cannot be reopened or re-examined at the instance of the respondents. [226 H-227 B]

(ii) The contention that decree in a suit for pre-emption is a personal decree and creates no interest in land must fail. [228 B]

H (iii) The distinction between a voluntary inter vivos transfer and an involuntary transfer such as by way of inheritance is immaterial as for as the present case is concerned because the question in terms disposed of by

this Court in the earlier case is that the pre-emptor having complied with O. XX, r. 14 had become the owner of the lands and his legal representatives on his death were rightly substituted in the proceedings. [227 H-228 A] A

Hazari & Ors. v. *Neki & Ors.*, [1968] 2 SCR 833; referred to.

Section 146 CPC provides that where some proceedings could be taken or application could be made by a person under the Code of Civil Procedure any other person claiming under him is entitled to make and maintain such an application. The only limitation on the exercise of this right is in the expression, 'save as otherwise provided by this Code,' occurring in the section. [229 E] B

3. If the assignee of a decree can avail himself of the provisions contained under Or. XXI R. 16 by establishing that he is such an assignee he must only avail himself of that provision. But if he fails to establish his title as a transferee by assignment in writing or by operation of law within the meaning of Or. XXI r. 16, there is nothing in that provision which prohibits him from availing himself of s. 146 if the provision of that section can be availed of by him. [230 E] C

Jugal Kishore Saraf v. *Raw Cotton Co. Ltd.*, [1955] SCR 1369; referred to. D

In the instant case though the sale deed in respect of land would show that the decree itself was not assigned, the lands having been sold by the decree-holder after perfecting his title and purchased by the present appellants, they would be persons claiming under the original pre-emptor decree-holder and if he could have made an application for execution of the decree as decree-holder, the applications for execution by the present appellants would be maintainable under s. 146, and they are therefore entitled to execute the decrees for possession. [231 C-D] E

Smt. Saila Bala Dassi v. *Smt. Nirmala Sundari Dassi & Anr.*, [1958] SCR 1287; referred to.

CIVIL APPELLATE JURISDICTION : Civil Appeal Nos. 1806-1808 of 1969. F

From the Judgment and Order dated 30-5-1969 of the Punjab and Haryana High Court in Executive Second Appeals Nos. 1131-1133 of 1968.

H. K. Puri and *V. K. Bahl* for the Appellant. G

Janardhan Sharma and *Jitendra Sharma* for the Respondent

The Judgment of the Court was delivered by

DESAI, J. These appeals by certificate under Article 133(1)(c) of the Constitution granted by the High Court of Punjab & Haryana arise from three Execution Petitions filed by the present appellants for executing three decrees obtained by one Neki (since deceased) in three H

A suits bearing Nos. 313, 360 and 369 of 1961 filed by him for pre-emption, to recover physical possession of the lands involved in the suits. The decrees in favour of Neki were confirmed finally by this Court in Civil Appeals Nos. 1148, 1656 and 2341 of 1966 decided on 25th January 1968. The Judgment of this Court is reported in B *Hazari & Ors.* v. *Neki & Ors.*(1) The facts which ultimately resulted in decrees for pre-emption in favour of Neki are fully set out at pages 834-835 of the reported judgment and repeating the same would merely add to the length of this judgment. Suffice to state that there is no dispute that decrees for pre-emption were passed in favour of Neki against the original vendor Dhara Singh and his vendees Hazari and C others and the satisfaction of the condition in the decrees of pre-emption for payment or deposit of the amounts as directed by the Court within the stipulated time is not questioned in the present proceedings.

It appears that the trial court decreed the suits for pre-emption in favour of Neki on 7th November 1962 simultaneously imposing the condition to deposit certain amounts in the three suits by or before 3rd D December 1962. The various amounts were duly deposited in the three decrees by Neki, the decree holder, on 3rd December 1962. Soon thereafter, on 5th December 1962 Neki sold the lands in respect of which he got the decrees to Zila Singh and others, the present appellants. The present appellants are subsequent vendees but they will be E referred to as the appellants in this judgment. The former vendees would be referred to as 'first vendees', the sale in whose favour gave rise to the cause of action for pre-emption in favour of Neki against the original vendor Dhara Singh.

After the sale in favour of the present appellants, they applied to be joined as parties to the appeals preferred by the first vendees against F the decrees for pre-emption which were then pending in the High Court and the Court directed by its order dated 13th July, 1963 that the present appellants be joined as parties to the appeals subject to just legal exceptions. The appellants then filed Execution Applications Nos. 295, 296, 297/64 seeking to execute the decrees to recover actual possession of the lands purchased by them from Neki. Original Vendor G Dhara Singh and the first vendees filed their objections challenging the right of the present vendees to execute the decrees. Principal contention raised was that the sale deed of lands in favour of the appellants did not envisage assignment of the decrees and that the right of pre-emption being a personal right, the decrees could not be assigned and, H therefore, the present appellants who were subsequent vendees from pre-emptor Neki, were not entitled and had no locus standi to execute

(1) [1968] 2 S.C.R—833.

the decrees granted in favour of Neki. The executing court after examining the relevant provisions contained in section 47 and Order XXI, Rule 16, of the Code of Civil Procedure rejected the objections raised by the first vendees and held that the present appellants were entitled to execute the decrees and directed warrant for possession to be issued. The first vendees preferred three appeals being Nos. 25/14, 26/14 and 27/14 of 1968 to the District Court at Rohtak. The learned Additional District Judge who heard these appeals, by a common order rejected the appeals and confirmed the order of the trial Court observing that the pre-emptor having deposited the purchase price as directed by the Court, in accordance with the terms of the decrees, his title to the lands was perfected from the date of deposit as provided in Order XX, Rule 14 (1)(b), C.P.C., the appellants as purchasers of lands from the pre-emptor in whose favour the decrees for pre-emption including the one for possession had become final, were entitled to recover possession under section 146 C.P.C.

Hazari, Amar Singh and Bhan Singh the first vendees preferred three Execution Second Appeals Nos. 1131, 1132 and 1133/68 to the High Court of Punjab & Haryana. When these appeals came up before a learned single Judge of the High Court it was contended that in view of the decision in *Ram Singh & Ors.* v. *Gainda Ram & Ors.*(1), The assignee of a holder of a decree for pre-emption cannot seek the assistance of the Court for executing the decree for pre-emption because the decree is a personal one and, therefore, non-assignable. On behalf of the present appellants who were respondents before the High Court, reliance was placed on the decision in *Satyanarayana* v. *Arun Naik*(2) and *Ravi Parkash and Anr.* v. *Chunilal & Ors.*(3) The learned single Judge had certain reservations about the correctness of the decision in Ram Singh's case and, therefore, he considered it prudent to refer the matter to a Division Bench. The matter ultimately had to be referred to a Full Bench because there was another decision in *Mehrkhan and Shah Din* v. *Ghulam Rasul*(4), which also required reconsideration. That is how the matter came before a Full Bench.

The Full Bench formulated the question for its consideration as under :—

> "Whether the purchaser of land from a pre-emptor, of which the pre-emptor has become the owner in pursuance of a pre-emption decree after complying with the

(1) AIR 1953 Punjab 163.
(2) AIR 1965 AP 81.
(3) AIR 1967 Punjab & Haryana 268.
(4) 2 Lahore 282.

provisions of Order XX, Rule 14 Civil Procedure Code could execute the decree in order to obtain possession of the land purchased by him."

All the three Judges of the Full Bench wrote separate opinions. D. K. Mahajan, J. was of the opinion that assuming that a decree of pre-emption is a personal decree, the transferees of the land from the pre-emptor whose title was perfected by deposit as envisaged in O. XX, Rule 14 (1) (b) were entitled to execute the decree granted by the Court in favour of the pre-emptor and can seek assistance of the Court for recovering actual possession from the first vendees who had no right to continue in possession, apart from O. XX, Rule 16 under section 146 C.P.C. P. C. Pandit, J. and H. R. Sodhi, J., the other two members of the Full Bench were of the opinion that the right of pre-emption being a personal right, a decree for pre-emption will be a personal decree and is not assignable and even if title to the land passed to the vendees who purchased the land from the pre-emptor after the pre-emptor complied with the provisions contained in Order XX, Rule 14 yet they would not be entitled to execute the decree for possession because decree is not assigned and section 146 would not help the present appellants. In accordance with this majority opinion, the appeals preferred by the first vendees were allowed and the applications for execution filed by the present appellants were dismissed.

The High Court granted a certificate under Article 133 (1) (c) of the Constitution because in its opinion the question involved in the appeals was of considerable importance and was likely to arise frequently and that it deserved to be decided finally by the Supreme Court.

Mr. Janardan Sharma, learned counsel for the respondents urged that looking to the scheme of ss. 4, 6 and 15 of the Punjab Pre-emption Act, 1930, it is incontrovertible that foundation of the right of pre-emption being close personal relationship, it is a personal right and can be exercised only by the person in whom it vests under the law and if in exercise of such right such a qualified person seeks to pre-empt a sale by instituting an action in a Court of law, the resultant decree would be a personal decree. Urged Mr. Sharma further that if the decree is a personal one, obviously it cannot be assigned and the assignee gets no interest in a decree so as to enable him to execute the decree. The question whether the right of pre-emption conferred by the provisions of Punjab Pre-emption Act, 1913, is a personal right or it creates an interest in the property is

no more *res integra* and is concluded by a decision of this Court between the very parties who are parties to the present appeals, in an earlier round of litigation wherein the first vendees, the present respondents had challenged the right of Neki deceased pre-emptor to obtain a decree for pre-emption. Apart from the fact that the point is concluded by a decision of a Bench of three Judges of the Court, it is inter-partes and, therefore, binding on the respondents whom Mr. Janardan Sharma represents and at the instance of the respondents it cannot be re-opened or re-examined. As the matter calls for no examination at the hands of the Court it would suffice to quote what has been held in *Hazari & Ors.* v. *Neki & Ors.*(1) Ramaswami, J. speaking for the Court, observed as under:

> "In support of these appeals, learned counsel put forward the argument that the right of pre-emption claimed by Neki deceased plaintiff was a personal right which died with him upon his death and the legal representatives of Neki were not entitled to be granted a decree for pre-emption. The argument was that the statutory right of pre-emption under the Punjab Act was not a heritable right and no decree for pre-emption should have been passed by the lower court in favour of the legal representatives as representing the estate of Neki. We are unable to accept the argument put forward by the appellants. It is not correct to say that the right of pre-emption is a personal right on the part of the pre-emptor to get the re-transfer of the property from the vendee who has already become the owner of the same. It is true that the right of pre-emption becomes enforceable only when there is a sale but the right exists antecendently to the sale, the foundation of the right being the avoidance of the inconveniences and disturbances which would arise from the introduction of a stranger into the land. The correct legal position is that the statutory law of pre-emption imposes a limitation or disability upon the ownership of a property to the extent that it restricts the owner's right of sale and compels him to sell the property to the person entitled to pre-emption under the statute. In other words, the statutory right of pre-emption though not amounting to an interest in the land is a right which attaches to the land and which can be enforced against a purchaser by the person entitled to pre-empt."

Mr. Janardan Sharma, however, sought to distinguish the position under a voluntary *inter vivos* transfer and an involuntary

(1) [1968] 2 S.C.R. 833—836.

A transfer such as by way of inheritance and urged that in this case Neki having sold the lands to the present appellants by sale *inter vivos* they cannot enjoy the fruits of the decree. This distinction is immaterial as far as the present case is concerned because the question in terms disposed of by the Court is that Neki having complied with Order XX, Rule 14, had become the owner of the lands and his B legal representatives on his death were rightly substituted in the proceedings. The contention, therefore, that decree in a suit for pre-emption is a personal decree and creates no interest in land, the subject matter of pre-emption, must accordingly fail.

The next contention is that the deed evidencing the sale of lands C Ext. D-1 dated 15th February, 1963 merely transferred the lands but does not purport to assign the decree, then in the absence of such an assignment the purported assignee cannot execute the decree in view of the provision contained in Order XXI, Rule 16, and therefore, the execution applications at the instance of the present appellants are not maintainable. The Additional District Judge did D not decide the contention whether the Execution Applications at the instance of the present appellants, namely, subsequent transferees were maintainable under O. XXI, Rule 16, because in his opinion the present appellants were entitled to execute the decree under section 146 of the Code of Civil Procedure. The majority view of the E High Court is that the subsequent transferees, the present appellants, were not entitled to execute the decree under O. XXI, Rule 16 because the decree for pre-emption being a personal one cannot be assigned and alternatively if it could be assigned, as a matter of fact, it has not been assigned and therefore the applications for execution at their instance are not maintainable. They were further of the F view that section 146 would not assist the appellants as provisions contained in O. XXI, Rule 16 being a specific contrary provisions, section 146 cannot be invoked.

Order XXI, Rule 16 permits an execution of a decree at the instance of an assignee by transfer of a decree, the assignment may G be in writing or by operation of law and if such an application is made, the court to which an application is made shall issue a notice to the transferor of the decree and the judgment debtor and the decree cannot be executed until the Court heard their objections, if any, to its execution. Section 47 C.P.C. provides that all questions arising between the parties to the suit in which the decree was pass- H ed, or their representatives, relating to the execution, discharge or satisfaction of the decree shall be determined by the court executing the decree and not by a separate suit. Explanation appended to

section 47 provides that for the purposes of that section amongst others a purchaser at a sale in execution of the decree is deemed to be a party to the suit. It would have been interesting to examine the question whether the purchaser of land from a pre-emptor in whose favour a decree for pre-emption has been passed and who subsequent to the decree complied with the requirement of Order XX, Rule 14 and thereby perfected his title would be, on the analogy of a purchaser at a sale in execution of a decree, a party to the suit or at any rate the representative of the decree-holder or a successor in interest of the decree-holder, but as we are of the opinion that the applications for execution filed by the present appellants are maintainable under section 146 C.P.C. the larger question need not be decided in these appeals.

Section 146 reads as under :

> "Save as otherwise provided by this Code or by any law for the time being in force, where any proceeding may be taken or application made by or against any person, then the proceeding may be taken or the application may be made by or against any person claiming under him."

Shorn of unessentials the section provides that where some proceeding could be taken or application could be made by a person under the Code of Civil Procedure any other person claiming under him is entitled to make and maintain such an application. The limitation on the exercise of this right is to be found in the expression, 'save as otherwise provided by this Code'. It would mean that if the Code permits a proceeding to be taken or an application to be made by a party, then in the absence of a provision to the contrary, section 146 would enable any one claiming under such person as well to make the same application. The object behind the section appears to be to facilitate the exercise of right by a person claiming under the person whose right to maintain an application is beyond dispute.

Section 146 came in for consideration in *Jugalkishore Saraf* v. *Raw Cotton Co. Ltd.*(1) In that case the facts were that the plaintiffs in a pending suit for recovery of debt transferred to another person all book and other debts due to them including the debt involved in the suit. The transferees did not apply to be joined as parties in the pending suit and the suit continued in the name of the original plaintiffs and ended in a decree. Subsequently the

(1) [1955] S.C.R. 1369.

A transferees as decree-holders applied for execution of the decree against the judgment-debtor and upon a notice being issued, a contention was raised that the application was not maintainable under Order XXI, Rule 16. One submission was that even if the application for execution was not maintainable under O. XXI, Rule 16, it would certainly be maintainable at the instance of the transferees of the original debt under section 146. Accepting this contention Das, J. observed that a person may conceivably become entitled to the benefits of a decree without being a transferee of the decree by assignment in writing or by operation of law. In that situation the person so becoming the owner of the decree may well be regarded as a person claiming under the decree-holder. It was further held in that case that the transferees of the debt derived their title to the debt by transfer from the transferors and when the decree was passed in relation to decree they must also be regarded as persons claiming under the transferors and accordingly they would be entitled to make an application for execution under section 146 of the Code of Civil Procedure. Bhagwati, J. in a separate and concurring judgment on this point observed that the only meaning that can be assigned to the expression 'save as otherwise provided by this Code' in sec. 146 is that if a transferee of the decree can avail himself of the provision contained under Order XXI, Rule 16 by establishing that he is such a transferee he must only avail himself of that provision. But if he fails to establish his title as a transferee by assignment in writing or by operation of law within the meaning of O. XXI, Rule 16 there is nothing in that provision which prohibits him from availing himself of section 146 if the provision of that section can be availed of by him. It would thus appear that if the sale-deed in respect of land on its proper construction would show that the decree itself was assigned obviously the application for execution would be maintainable under O. XXI, Rule 16. But if the appellants do not fall within the four corners of O. XXI, Rule 16 and they appear not to fall within the four corners of it, because though the land, the subject matter of the decree is sold to appellants, the decree itself is not assigned, they would nonetheless be able to maintain application for execution under section 146 as persons claiming under the decree-holder. The respondents cannot have both the ways. If the deed evidenced transfer of decree by assignment then O. XXI, Rule 16 would be attracted but if, as it appears, there is no transfer of decree by assignment, the lands having been sold by the decree-holder after perfecting his title and purchased by the present appellants they would be persons claiming under the original pre-emptor decree-holder Neki and if Neki could have made an application for

execution of the decree as decree-holder, the present appellants, as purchasers of land from Neki would certainly be claiming under Neki and, therefore, their application for execution would certainly be maintainable under section 146. In this connection it would be advantageous to refer to *Smt. Saila Bala Dassi* v. *Smt. Nirmala Sundari Dassi and Another*(1) wherein it has been in terms held that section 146 was introduced for the first time in Civil Procedure Code 1908 with the object of facilitating the exercise of rights by persons in whom they came to be vested by devolution or assignment and being a beneficent provision should be construed liberally so as to advance justice and not in a restricted or technical sense. Viewed from this angle the present appellants must succeed because they purchased land from pre-emptor Neki and the validity of sale being now beyond dispute, they are persons claiming under Neki whose right to execute the decree was never disputed and, therefore, appellants claiming under the vendor Neki would be able to maintain an application for execution under section 146 of the Code of Civil Procedure. Appellants are thus entitled to execute the decree for possession.

Accordingly these three appeals are allowed and the decision of the High Court dated 30th May, 1969 in Execution Appeals Nos. 1131, 1132 and 1133 of 1968 is set aside and the decision of the Additional District Judge dated 15th July, 1968 is restored, but in the circumstances of the case there would be no order as to costs.

N.V.K. *Appeals allowed.*

(1) [1958] S.C.R. 1287.