

Sukhdeo Singh and ors. Vs. Sukhdeo Singh and ors.

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Court : Rajasthan

Decided On : Feb-05-1980

Reported in : 1980WLN212

Judge : C.M. Lodha, C.J., and; Miss Kanta Bhatnagar, J.

Appeal No. : D.B. Civil First Appeal No. 96 and 104 of 1970 and 14/71

Appellant : Sukhdeo Singh and ors.

Respondent : Sukhdeo Singh and ors.

Advocate for Def. : Mr. M.M. Singhvi

Disposition : Appeal dismissed

Judgement :

Lodha, C.J.

1. These three appeals can be conveniently disposed of by a single order as the only question involved in all the three appeals is the same namely, whether the right of preemption accrues on the sale of Khatedari rights in agricultural land under the provisions of the Rajasthan Preemption Act, 1966 (hereinafter to be referred to as 'the Act of 1966') The suits instituted by the preemptors in all the three case were dismissed by the trial court. When First Appeal No. 104 of 1970 came up for hearing before the learned Single Judge, he noticed that there were

two Single Bench decisions of this court taking conflicting views in the matter. In *Prabhu Dayal v. Mahadeo Math* 1972 WLN 455, It was held by Gattani J., as he then was, that a suit for preemption In respect of sale of Khatedari rights is maintainable. However, in civil revision petition No. 53 of 1959 *Kishan Gopal v. Shivjiram and Ors.*, decided on January 20, 1969, Jagat Narayan J. as he then was dismissed summarily the appeal filed by the plaintiff preemptor on the ground that there can be no preemption of tenancy rights under the Rajasthan Preemption Act of 1966. S.N. Modi J. before whom these appeals came up for hearing, having noticed the aforesaid conflict of views, has referred this case to a larger Bench. The two other appeals, namely, First Appeal No. 96 of 1970 and First Appeal No. 14 of 1971, have, also been connected with First Appeal No. 104 of 1970.

2. Since the point arising in all the three cases is purely one of law we do not consider it necessary, to narrate the facts(SIC) each case-Suffice it to say that the plaintiff in all the three cases, instituted-suits for preemption In respect of transfer of Khatedari rights in agricultural land. The learned Additional District Judge, Sri Ganganagar, upheld the contention raised on behalf of the defendants that no suit for preemption can lie in respect of sale of Khatedari right in agricultural land and dismissed the suits.

3. For a correct appraisal of, the, contentions raised by the learned Counsel for the parties, it is necessary to notice the relevant provisions of the Act of 1966.

Section 2(iv) Immovable property meant land of house property wherever situate in the State;

Section 2(v). - 'Land' includes things attached to the earth or permanently fastened to anything attached to the earth, when sold or foreclosed along with the land to which they are attached but not otherwise;

Section 2(vii). - 'Sale' means a transfer of ownership in Immovable property in exchange for a price paid or promised or partly promised;

Section 2(viii). - 'transfer' means a sale, or a mortgage where the final decree for foreclosure in respect thereof has been passed.

Section 3 - 'Right of preemption' defined the 'right of preemption' is the right accruing under Section 4 of this Act, upon and to be substituted as the transferee thereof in place of and in preference to the original transferee and preemption' means a person having a right of preemption.

Section 4. - Cases in which right of preemption accrues: subject to the provisions contained in Section 5, the right of preemption shall, upon the transfer of any Immovable property, accrue to the persons mentioned in Section 6

Section 5 Cases in which right of preemption does not accrue: (1) The right of preemption shall not accrue

(a) upon the transfer of a shop, karta, sarai, musafirkhana, dharamshala, temple, mosque or other similar buildings; or

(b) upon a sale

(i) by or to the Central or the State Government.

(ii) by or to any local authority, or

(iii) to any company under the provisions of part VII of the Rajasthan Land Acquisition Act, 1953 Rajasthan Act 24 of (1953), or

(iv) for the purpose of manufacturing industry, or

(c) on a transfer to any of the persons mentioned in Section 6 to any person who has an equal or inferior right of preemption; or

(d) In the case of a transfer by joint owners, to a part to such transfer; or

(e) in respect of

(i) any sale in execution of a decree of a civil or revenue court, or

(ii) any sale in default of payment of land revenue or of any sum legally recoverable as an arrear of land revenue:

Provided that, in the case contemplated by Sub-clause (iv) of Clause (b) the right of preemption that accrue, subject to the other provisions of this Act, on the expiry of one year from the date of the registration of the tale deed, in case such sale is made without a registered deed from the date of taking physical possession of the immovable property sale if such property has not been used in good faith for the purpose for which it was ostensibly purchased.

(2) Nothing in this Act shall.

(a) effect the provisions of Rule 88 of Order XXI of the Code of Civil Procedure 1908 (Central Act 5 of 1908) or the provisions of Rajasthan Tenancy Act, 1955 (Rajasthan Act 3 of 1955) or of the Rajasthan Land Revenue Act, 1956 (Raj. Act 15 of 1955), or of the Rajasthan Colonisation Act 1964 (Rajasthan Act 27 of 1954), or

(b) confer on any person the right of preemption to respect of any immovable property which such person is not entitled to purchase under any law for the time being in force.

Section 6. Person to whom right of preemption 'accrues-(1) Subject to the other provisions of this Act, the right of preemption in respect of any immovable property transferred shall accrue to, and vest in, the following classes of persons, namely.

(1) co-sharers of or partners in the property transferred, (ii) owners of other immovable property with a staircase or an entrance or other right or amenity common to such other property and the property transferred.

(2) Among the different classes of persons mentioned in Sub-section (1), persons of the first class will exclude those of the other classes persons of the second class will exclude those of the third class

(3) Among persons of the same class claiming the right of preemption, the person nearer in relationship to the person whose property is transferred will exclude the more remote.

(4) Where two or more persons of the same class, claiming the right of preemption are equally entitled thereto in all respects, the court may, -

(a) determine, by drawing lots, the person in whose favour preemption may be decreed, or

(b) after taking into consideration the circumstances of the case and the respective requirements of all such persons:

(i) determine which of such persons may be allowed to exercise the right in preference to rest, or

(ii) direct the division of the property equally among all such persons, each of them paying an equal share of the consideration for the transfer.

A glance at the above provisions of the Act of 1966 makes it clear that in order that a preemptor may enforce the right of preemption, there must be a transfer of immovable property. In other word, in order to give rise to preemption, it is necessary that there must be either sale or a mortgage where the final decree for foreclosure in respect thereof has been passed. In the present case, we are required to deal with a question of sale and therefore, we must address ourselves to the definition of the term 'sale'. 'sale' has been defined to mean a transfer of ownership in immovable property in exchange for a price paid or promised.

4. It has not been disputed before us that the land In question falls within the ambit of the term 'immovable property'. It is also beyond dispute that Khatedari rights in respect of the land in dispute have been transferred and the right of the plaintiffs to preempt as coshares has also not been called into question. The point that has been canvassed before us, is whether transfer of Khatedari rights can be said to be transfer of ownership in immovable property. Mr. Lekh Raj Mehta, has urged that there need not be a transfer of absolute ownership. Even transfer of limited ownership gives rise to the right of preemption. He endeavoured to show by reference to the various provisions of the Rajasthan Tenancy Act, 1955 (No. 3 of 1955) (hereinafter to be referred to as 'the Act of 1955') that Khatedari rights have all the necessary attributes of ownership, though there are certain restrictions placed on the rights of Khatedars His contention, in short, is the for giving rise to the right of pre-emption, it is 'sufficient if there is transfer of even a limited ownership on the other hand, Mr. M.M. Singhvi learned Counsel for the

respondents, has contended that the right of preemption is a weak right and unless. It can be clearly spelled out from the provisions of the statute, it cannot be given effect to. His submission is that Khatedari rights are pure and simple tenancy rights. A Khatedar is not an owner of the land but he is only a tenant with certain privileges and therefore transferor Khatedari rights cannot give rise to right of pre-emption, as in case of such a transfer, it cannot be laid that there has been a transfer of ownership in immovable property.

5. At this juncture, we may refer to the relevant provisions of the Act of 1955 to bring out the nature of Khatedari rights:

Section 5(43).-'tenant' shall mean the person by whom rent is, or, but for a contract, express or implied, would be, payable and, except when the contrary intention appears, shall include:

(a) in the Abu area, a permanent tenant or a protected tenant;

(b) in the Ajmer area, an ex proprietary tenant or an occupancy tenant or a hereditary tenant or a non occupancy tenant or a Bhooswami or a Kahtedar

(c) in the Sunel area, an ex-proprietary tenant or a pakka tenant or an ordinary tenant,

(d) a co-tenant (e) a grove-holder

(f) a village servant (g) a tenant of Khudkashi (h) a mortgagee of tenancy rights, and (I) a sub-tenant;

but shall not include a grantee at a favourable rate of rent or an ijaredar or a thekadar or a trespasser.

Section 14. Class of tenants. For the purposes of this Act, there shall be the following classes of tenants, namely:

(a) Khatedar tenants,

(aa) Maliks; and

(b) Tenants of Khudkashi, and

(c) Ghair Khatedar tenants.

Section 15. Khatedar tenants (1) Subject to the provisions of Section 16 and Clause (d) of Sub-section (1) of Section 180 every person who, at the commencement of this Act, is a tenant of land otherwise than as a sub-tenant or a tenant of Khudkasht or who is, after the commencement of this Act, admitted as a tenant otherwise than as a sub-tenant or a tenant of Khudkasht or an allottee of land under, and in accordance with, rules made under Section 101 of the Rajasthan Land Revenue Act, 1956 (Rajasthan Act 15 of 1956 or who acquires Khatedari rights in land in accordance with the provisions of this Act or of the Rajasthan Land Reforms and Resumption of Jagirs Act, 1952 (Rajasthan Act VI of 1952) or of any other law for the time being in force shall be a Khatedari tenant and shall, subject to the provisions of this Act be entitled to all the rights conferred, and be subject to all the liabilities imposed on Khatedar tenants by this Act:

Provided that no Khatedari rights shall accrue under this section to any tenant, to whom land is or has been let out temporarily in Gang Canal, Bhakra Chambal or Jawai Project area, or any other area notified in this behalf by the State Government.

(2) Notwithstanding anything contained in Sub-section (1), Khatedari rights shall not accrue thereunder to any person to whom and had been let out before the commencement of this Act by the State Government in furtherance of the 'Grow More Food Campaign' or under special order or subject to some specified conditions or in pursuance of some statutory or non-statutory rules and who shall have, before such commencement made & default in securing the objective of such complain or a breach of any such order, condition or rule.

(3) Any person referred to in Sub-section (2) may within three years from the date of commencement of this Act and on payment of a court-fee of twenty-five naye paise apply to the Assistant Collector having jurisdiction praying for a declaration that he acquired Khatedari rights under Sub-section (1) in the land held by him.

(4) Such application may be made on any of the following grounds, namely:

(a) that the land held by him was, let out to him after the commencement of this Act.

(b) that it was not let out to him in any of the circumstances specified in Sub-section (2);

(c) that when the land was so Set out to him, he was cot apprised of such circumstances;

(d) that he had before such commencement, made DO default or breach of the nature specified in Sub-section (2).

(5) The Assistant Collector shall, upon the presentation of an application under Sub-section (3), make inquiry in the prescribed manner and afford reasonable opportunity to the applicant of being heard and shall, if he does not reject the application declare the applicant to have become a khatedar tenant of his holding in accordance with the subject to the provision of Sub-section (1).'

Section 38. Interest of tenants - Save as provided in this Act, the interest of a tenant in his holding is heritable but not transferable.

Section 39. Bequest. A Khatedar tenant may, by will bequeath his interest in the holding or part thereof in accordance with the personal law to which he is subject.

Section 40. Succession of tenants. When a tenant dies intestate, his interest in his holding shall devolve in accordance with the personal law to which he was subject at the time of his death.

Section 41. Transferability of Khatedar's interest. The interest of a Khatedar tenant shall be transferable, otherwise than by way of sublease, subject to the condition specified in Sections 42 and 43,

Section 41. General restrictions on sale, gift and request. - The sale, gift or bequest by a Khatedar tenant of his interest in the whole or part of his holding shall be void, if-

(a) it is not of a survey number except when the area of the survey number so sold, gifted or bequeathed is in excess of the minimum area prescribed for the purpose of Sub-section (1) of Section 53, in which case also the area not transferred shall not be fragment.

Provided that this restriction shall not apply if the area so transferred becomes merged into a contiguous survey number.

Provided further that this restriction shall not apply if the sale, gift or bequest is of the entire interest of a tenant in the survey number;

(b) such sale, gift or bequest is by a member of a Scheduled Caste in favour of a person who is not a member of the Scheduled Caste, or by a member of a Scheduled Tribe in favour of a person who is not a member of the Scheduled Tribe,

Section 43. Mortgage. - (1) A khatedar tenant, or, with the general or special permission of the State Government or any officer authorised by it in this behalf, a Ghair Khatedar tenant, may hypothecate or mortgage his interest in the whole or part of his holding for the purpose of obtaining loan from the State Government or a Land Development Bank of defined in the Rajasthan Cooperative Societies Act 195 (Act 13 of 1965) or a Co operative society registered or deemed to be registered as such under the said Act or any Scheduled Bank or any other institution notified by the State Government in that behalf.

(2) A Khatedar tenant may transfer his interest in the whole or part of his holding in the form of usufructuary mortgage to any person but such mortgage must provide that the mortgage amount shall be deemed to be paid off by the usufruct of the property within a specified time not exceeding ten years, and in the absence of such period being specified such mortgage shall be deemed to be for ten years

Provided that on or after the publication of the Rajasthan Tenancy (Amendment) Act, 1970, in the official Gazette no Khatedar tenant being a member of a Scheduled Caste or Tribe shall so transfer his rights in the whole or a part of his holding to any person who his not a member of a scheduled caste or a scheduled

tribe.

(3) A usufructuary mortgage under Sub-section (2) shall, upon the expiry of the period mentioned herein before, be deemed to have been satisfied in full without any payment what so ever by the mortgagor, and the mortgage debt shall, be deemed to have been extinguished and the mortgaged land redeemed and the possession thereof shall be delivered by the mortgagee to the mortgagor free from all encumbrances.

(4) A usufructuary mortgage of any land made before the commencement of this Act shall, upon the expiry of the period mentioned in the mortgage deed or twenty years from the date of execution thereof, whichever period is less, be deemed to have been satisfied in full without any payment whatsoever by the mortgagor and the mortgage debt shall accordingly be deemed to have been extinguished and thereupon the mortgaged land shall be redeemed and possession thereof shall be delivered to the mortgagor free from all encumbrances.

(6) If the mortgagee does not so redeliver the possession of the land mortgaged, he shall be deemed to be a trespasser and liable to ejectment in accordance with Sub-section (1) 183.

Section 45 Restriction on letting and sub-letting:

(1) No holder of Khudkasht shall let and no Khatedar tenant or fail holding at any one time for a term exceeding five years.

(2) Where a lease or sub-lease has once been granted for any term under Sub-section (1), no further lease or sub lease, as the case may be in respect of the same land be granted within two years of the expiry of the first mentioned shall lease or sub lease.

(3) No Ghair Khatedar tenant shall sub-let the whole or any part of his holding for a term exceeding one year.

(4) No sub-tenant or tenant of Khudkasht shall sublet the whole or any part of his holding except in circumstances mentioned in Section 46 Section.

54. Sale of holding in it certain cases: (1), Wherever in any suit for the division of one or more than one holding the court finds that such division among the persons entitled thereto will result in shares of less area than the minimum prescribed under Sub-section (1) of Section 53, of the court shall, instead of proceedings to divide the holding or holdings, direct a sale of the same and a distribution of the proceeds thereof among such persons.

(2) when the sale of a holding is ordered under Sub-section (1), the court shall order a valuation of the same to be made, and offer it for sale in order of priority to the following persons:

- (a) a co-tenant of such holding,
- (b) a sub-tenant of such holding,
- (c) an agricultural or other labourer or servant of the village community who permanently resides in village,
- (d) a person not being the landholder who cultivates land and resides in the village,
- (e) the landholder.

Provided that where two or more persons, belonging to the same class being a class mentioned in Clauses (a), (b), (c) or (d) claim to take such interest preference shall be given to the claimant who cultivates the smaller area in the village; and where two or more claimants cultivate the same area of claim to take such interest, the claim shall be decided in the prescribed manner.

Provided further that in the case of such sale of the holding of a member of a scheduled caste or a scheduled tribe preference shall be given among rival claimants belonging to the classes mentioned in Clauses (a), (b), (c), and (d) to the claimants of a particular class who is a member of scheduled caste or a scheduled tribe.'

Section 213. Sale of Khatedar tenant's interest in execution of decree for arrears of rent: (1) Subject to the provision of Section 42, the interest of a Khatedar tenant

in his holding or in any part thereof may be sold in execution of a decree for arrears of the rent of such holding and unless such interest is purchased by the landholder thereof, the purchaser shall, subject to the provisions of Sub-section (b), have the same Interest in such holding or part and be subject to the same liabilities in respect thereof as the tenant.

(2) Before selling the interest of a Khatedar tenant in a part only of his holding in accordance with Sub-section (1), the court executing the decree shall, in accordance with the rules made by the Board, , distribute the rent of the holding over such part and the remainder of the holding.

(3) When such interest is sold

(a) a sub tenant, or

(b) an agricultural or other labourer or a

(c) village servant, who resides in the village, or

(c) any agriculturist who resides in the village, or

(d) the landholder, other than the State Government or an EState holder, or

(e) the estate holder,

may, in the above order or priority, within fifteen days of the date of sale, claim to take such interest, preference shall be given to the claimant who cultivate the smallest area in the village & when they cultivate an equal area the claim shall be determined in the prescribed manner,

Provided further that if two or more persons belonging to the same class mentioned in Clause (b) claim to take such interest, the claim shall be determined in the prescribed manner.

(4) Notwithstanding anything contained in Sub-section (3) where the Khatedar tenant whose interest is sold under this section is a member of a Scheduled Caste or a Scheduled Tribe, preference among rival claimants belonging to any of the

classes mentioned in Clause (a), (b) and (c) shall be given to the claimant of particular class who is a member of a Scheduled Caste or Scheduled Tribe.

6. The provisions of the Act of the 1955, extracted above, would show that Khatedar is a tenant i.e a person by whom rent is or but for a contract, express or implied, would be payable, who can be 'Khatedar tenant', has been laid down in Section 15 of the Act. Chapter IV of the Act of 1955 provides that the interest of a tenant is heritable but is, not transferable except as provided in the Act. A Khatedar tenant can also bequeath, by will, his interest in the holding or a part thereof in accordance with his personal law. Section 40 of the Act of 1955 lays down the rule of devolution of khatrdari rights on the death of a khatedar tenant. Section 41 provides that the interest of a khatedar tenant is transferable otherwise than by way of lease and subject to the conditions specified in Sections 42 and 43. Sections 42 and 43 deal with the general restrictions on the right of a Khatedar in the matter of transfer of his holding.

7. It is thus clear that a Khatedar tenant has not got absolute or Unlimited right of ownership to the land. The fact that he is a tenant and is liable to pay rent is of course inconsistent with his right of ownership. To say that owner of immovable property is liable to pay rent for occupying same is contradiction in terms.

8. As to what is ownership, reference may be made to Salmond on jurisprudence by P.J. Fitzgald, 12th edition at pp. 248-249. While dealing with 'ownership' under Chapter 8, the author has enumerated certain incidences of ownership; (i) the owner will have a right to possess a thing which he owns, (ii) the owner normally has the right to use and enjoy the thing he owns, the right to manage it i.e., right to decide how it shall be used and the right to income from it, (iii) the owner has the right to consume destroy or alienate the thing, (iv) ownership has the characteristic of being indeterminate in duration i.e., the interests of the owner endure theoretically for ever, and (v), ownership has a residuary character. The author observes thus: (p. 44)

The rights of the owner, then can be contrasted with the lesser rights of the possessor and of the encumbrancer. The owner's rights are indeterminate and residuary in a way in which these other rights are not. As we have seen, the

possessor's rights do not extend in time to infinity as do the owner's and on the extinction of the possessor's rights those of the owner revive. As compared with the rights of an encumbrancer those of the owner are again Indeterminate and residuary but on a different plane. An encumbrancer is one who has a right over the property of another.

Again, summing up the position the author observed as follows at page 110: (P.415)

Summing up the conclusion to which we have attained, we may define the rights of ownership in a material thing as the general, permanent, and inheritable right to the uses of that thing.

9. Austin, in his book on Jurisprudence, 3rd edition, page 817, defines the right of ownership as 'a right Indefinite in point of user, unrestricted in point of disposition, and unlimited in point of duration over a determinate thing.'

10. In Salmond's Jurisprudence, 6th edition, Chapter 12, the author points out that although strictly nothing can be owned except abstract rights, yet a very common form of speech enable us to speak of the ownership of a material thing and that (on P. 22):

The ownership of a material thing means the ownership of a *jus in re propria* in respect of that thing... The ownership of a *jus in realiena* is always incorporeal, even though the object of that right is a corporeal thing... In its full and normal compass a *jus in re propria* over a material object is a right to the entirety of the lawful uses of that object. It is a general right of use and disposal, all *jura in realiena* being merely special and limited rights derogation from it in special respects. It is only this absolute and comprehensive right - this *universum jus* that is identified with its object... This compass, however, may be limited to any extent by the adverse of *jura in realiena* vested in other persons. The rights of the owner of a thing may be all out eaten up by the dominant rights of lessees, mortgagees, another encumbrances. His ownership may be reduced to a mere name rather than a reality. Yet he nonetheless remains the owner of the thing, while all the others own nothing more than rights over it.

17. In *Mst. Chandra Kanwar v. Uda* 1967 RLW 253, I.N. Modi J. while dealing with Bapidar or Khadamdar, observed as follows:

In fact, the plaintiffs themselves accept in their plaint that they were recorded as Khadamdars or bapidars, that is, a particular class of tenants in the settlement of the State of Mewar which was made in Smt. 1998. Thereafter when the Act of 1955 came into force, the plaintiffs at the best could have become Khatedar tenants thereunder, and no more, and it is this right only which they can and do essentially and substantially claim in these suits against the defendants. The question is whether a right like this can be treated or accepted to be a proprietary right. The answer to this question can only be in the negative. As I look at the matter, to say that a person who had been a tenant with respect to certain land or could have thereafter been recorded as such, is a proprietor of, or has proprietary right in, that land is a contradiction in terms. It may be that the Bapidar of the older days in Mewar or a Khatedar under the Act of 1955 enjoys certain rights as respects the transferability or hereditability of the lands under his occupation but it will be an entire misnomer to call him a proprietor of such lands. It also appears from the plaint in each of these that these tenants had been paying rent to the State, and this is yet another ground for coming to the conclusion that they are not proprietors of lands.

11. In *Fateh Singh v. Gopi* 1964 RLW 423. Chhangani J., while dealing with a suit for specific performance of an agreement of sale of agricultural land, observed as follows:

Examining the present case in the light of these principles, it must be observed that the defendants were merely khatedar tenants of the land in dispute. They had no proprietary rights in the land, and therefore, there could be no question of their attempting to sell the land. It is not infrequent that in an instrument of transfer of 'interest in land' the term 'land' is sometimes loosely used for 'interest in land' and I think it is in this loose manner that the term 'land' has been used in the sale deed Ex. 2.

12. Thus, taking into consideration the totality of the rights of a khatedar. It cannot be said that the residuary rights in the land vested in the khatedar. As held in two

decisions of this court referred to above viz., Fateh Singh's case 1964 RLW 423 (supra) and Mst. Chandra Kanwar's case (2) (supra), a khatedar tenant is not a proprietor though he enjoys, certain rights as respect the transferability or hereditarity of the land under his occupation. In this view of the matter, a khatedar tenant cannot be said to be the owner of the land and when he transfers his rights the in land, he does not transfer the ownership of the land which he has none but he transfers only his khatedari lights as enumerated in the Act of 1955.

13. Learned Counsel for the appellant has urged that for enforcing the light of pre-emption, it is not necessary that there must be a transfer of absolute or full ownership but that a right of preemption can accrue even when limited ownership is transferred by the transferor. We may observe, that if this proposition were accepted then even the transfer of mortgagee's lights would give rise to the right of pre-emption and so also the transfer of rights of lessee. But the definition of 'transfer' contained in the Act makes it clear that it is only sale or final decree of foreclosure that can give rise to the right of preemption. In this view of the matter, we are inclined to hold that when a Khatedar tenant transfers his khatedari rights, it cannot be said that there is a transfer of ownership in the land.

14. Learned Counsel for the appellant has also invited our attention to Sections 54 and 213 of the Act of 1955 to show that in case of sales of holdings through a court, the offer for sale is to be made in order of priority. That may be so. That is a provision contained in a special Act but that cannot lead to the inference that the general law of pre-emption contained in the pre-emption Act, 1966, would be applicable to agricultural holding possessed by khatedar tenants. In the present case, the question of pre-emption will have to be decided on the basis of the provisions of the Pre-emption Act itself

15. We may, now, turn to the reasoning given by Gattani J. in Prabhu Dayal v. Mahadev Nath, (1) (supra). The learned Judge has held that since a Khatedar has got the right to transfer his khatedari rights by will, gift, sale, exchange or Mortgage, and the same are heritable, it must be held that a Khatedar has got proprietary right in his holding In coming to this conclusion, the learned Judge placed reliance on Jassuram v. State of Rajasthan ILR 1962 (12) Raj. 900. In

Jassuram v. State of Rajasthan ILR 1962 (12) Raj. 900 (supra), the question was whether Khatedari rights constitute property, as contemplated under Article 31 of the Constitution, as it then stood. The argument of the Advocate General was that since a Khatedar is not the owner of the land it would not constitute any property. This argument was repelled by the learned Judges and it was held that the khatedari rights are 'property' within the meaning of Article 31 of the Constitution. We may point out that property and ownership are not synonymous. Even a mortgagee's right is property and so also a lessee's right, but the mortgagee or the lessee cannot be said to be the owner of the property mortgaged or leased, as the case may be.

16. Another ground relied upon by the learned Judge was that Section 5 of the Act speaks of the cases in which right of preemption does not accrue, and as there is nothing in Section 5 to show that sales of agricultural land or Khatedari rights are excepted from pre-emption, it must be inferred that there is a right of pre-emption in respect of transfer of Khatedari rights. It is sufficient to point out that the question of exception will arise only if the condition laid down in Section 4 as to transfer of ownership, is fulfilled and if there is no transfer of ownership, no question of pre-emption can arise under the Act. The learned Judge also relied upon Section 254 of the Land Revenue Act, 1956, which provides that when any land sold under Section 235 or Section 237 is a portion of an estate, any recorded co sharers in the estate, other than the person whose land has been sold, may, if the lot has been knocked down to a stranger, claim to take the said land at the sum last bid; provided that the said demand of pre-emption be made within seven days of sale and provided that the claimant fulfills all other conditions of the sale. It may be mentioned that Section 235 of the Land Revenue Act deals with sale of defaulter's specific area, patti or estate and so also Section 237 deals with powers to proceed against interest of defaulter in property other than that in respect of which default is made. It may be pointed out that this is a special provision in respect of pre-emption by co sharers of Khatedari rights but that does not mean that there accrues a right of preemption in respect of transfer of Khatedari rights by a private sale, under the provisions of the Pre-emption Act. We are also unable to subscribe to the view taken by the learned Judge that the State is owner of all agricultural land is, more or less, a legal fiction otherwise, the ownership, for all

purposes, vests in the Khatedar, in whose name, the particular holding is recorded.

17. As already stated above, the right of pre-emption is a weak right as it introduces a restriction on the right to hold properly and therefore, it cannot be availed of unless it clearly flows from statute. As discussed above taking into consideration the entirety of the rights of a Khatedar tenant, we have come to the conclusion that a Khatedari tenant is not the owner of the holding under his occupation, though his rights may be larger than the rights of a Ghair Khatedar tenant. We are, therefore, of opinion that right of preemption does not accrue upon the transfer of Khatedari rights in agricultural land by a Khatedar tenant. In this view of the matter, we dismiss all the three appeals, but make no order as to costs.

18. Learned counsel for the appellant prays for grant of certificate under Art. 133 of the Constitution. We are of opinion that the case does involve a substantial question of law of general importance and the said question needs to be decided by the Supreme Court. Accordingly, certificate for appeal to the Supreme Court is granted.