Sahadeo Singh vs Kuber Nath Lal And Ors. on 1 May, 1950

Equivalent citations: AIR1950ALL632, AIR 1950 ALLAHABAD 632

JUDGMENT

Desai, J.

1. This is an appeal by a plaintiff whose suit for pre-emption of an alleged sale has been dismissed by the Courts below. In 1907, Fazal Ali Khan and Jahandar Khan usnfructuarily mortgaged with Bhoja Kuer their 23 ganda share in the village for Rs. 636/-. Bhoja Kuer entered into possession and received the profits of the mortgaged share, It is said that the mortgage debt was discharged completely from the profits before 1939, but that she would not surrender possession to Asfandyar Khan, Nawab Khan and Rahrnatullah Khan, the sons of Pazal Ali and Jahandar Khan who had died, as Asfandyar Khan, etc. thought of filing a suit against; Bhoja Kuer for recovery of possession of the mortgaged share, but had no money. Consequently he negotiated with Kuber Nath and Sudeehra Kuer the sale of 9 gandas out of the 23 gandas mortgaged. The negotiations were successful, and Kuber Nath and Sudeshra Kuer agreed to file a suit against Bhoja Kuer for recovery of the entire 23 ganda share, keep 9 gandas to themselves and band over the remaining U gandas to Asfandyar Khan, etc and to defray all the expenses of the litigation upto the Judicial! Committee. Accordingly on , 6th April 1939, Asfandyar Khan, etc. executed a deed purporting to be one of sale in favour of Kuber Nath and Sudeshra Kuer in respect of 9 gandas. It was registered the same day. The conditions on which the sale was made are mentioned in the deed and one of them is that Kuber Nath and Sudeshra Kuer (who will hereafter be known as the vendees) were to file a suit within a month to recover possession over the 23 gandas share from Sahdeo Singh, the son and heir of Bhoja Kuer who had died. Accordingly, on 24th April 1939, the vendees instituted a suit for redemption of the usufructuary mortgage under Section 12, Agri. Culturists' Relief Act against Shahdeo Singh, impleading Asfandyar Khan, etc. (to be known as vendors) as pro forma defendants. The suit was resisted by the mortgagee on the ground that Rs. 17,851/- were still due to him. On 8th December 1942, the parties compromised the matter ; the vendees agreed to pay Rs. 400/- within two months to the mortgagee who in turn agreed to deliver possession over 9 gandas to them. There was one more suit pending between the vendors and the mortgagee and other persons and that also was compromised on the same day. That compromise deals with the remaining 14 gandas share, I do not say anything about it because we are not concerned with it. On 8th February 1943 the vendees deposited Rs. 400/- in Court for payment to the mortgagee. On 8th February 1944, the mortgages himself sued to pre-empt the sale of 6th April 1939. He pleaded that he had a preferential claim to purchase the 9 gandas share, that it had been sold by the vendors to the vendees for Rs. 400/- only, and that he was entitled to purchase the property for Rs. 400/-. The suit was contested by the vendees on the grounds that the transaction carried out on 6th April 1939 was not a pre-emption sale, and that the suit was barred by time. They admitted that the plaintiff had a preferential right to purchase the property. In reply the plaintiff contended that as the vendors were out of possession and the vendees deposited the sum of Rs. 400/- in Court on 8th February 1943, the sale must be

deemed to have been completed on 8th February 1943 and that, computing the period of limitation from that date, his suit was within time. The trial Court held that the transaction of 6th April 1939 was not a sale and that the suit was barred by time. The lower appellate Court accepted the trial Court's finding that the transaction was not a pre-emptible sale, but curiously enough, while discussing the question of limitation, accepted that it was a sale. Taking it to be a sale completed on 6th April 1939, it also held the suit to be barred by time.

2. The case is governed by the Agra Preemption Act which gives a right of pre-emption only against sale, as defined in the Transfer of Property Act. What we have to see first is, whether the transaction of 6th April 1939, is a sale as defined in Section 54, T. P. Act, viz.

> "a transfer of ownership in exchange for a pries paid or promised or part-paid and part promised."

It is stated in the deed that the vendors were the owners of 23 gandas share. The operative part of the deed is that the sale-deed was being executed in favour of the vendees "in exchange for the pairvi and expenses of the redemption suit," that from that day the ownership of 9 gandas share vested in the vendees and that they would take possession of it on obtaining a decree for redemption. The vendees were to be deemed to be the owners of the 9 gandas share whether the vendors joined with them in the suit or not. The dead is described as a contract of sale and it is repeated that 9 gandas share was sold in exchange for the pairvi and expenses of the suit. It is clear that the vendors transferred in preasenti the ownership over the property in dispute through the deed. They were the owners, though not in possession. They had not received the consideration before the execution of the deed but the consideration had been promised. Neither the fact that the consideration had not been paid; nor the fact that the vendors were not in actual possession, could prevent the transaction from operating as a sale. The definition quoted above does not take possession into account at all and expressly allows a sale to take place even though the price has not been paid, provided it has been promised. Any number of authorities may be cited in support of the proposition that a sale may be complete even though the full price has not been paid. I would satisfy myself with quoting only Baijnath Singh v. Paltu, 30 ALL. 125 : (5 A. L. J. 96), Sagaji v. Namdev, 23 Bom. 525 : (1 Bom. L. R. 5) and Sib Lal v. Bhagwan Das, 11 ALL. 244: (1889 A. W. N. 96). In Narain Das v. Mt. Dhama,, 38 ALL. 154: (A. I. R. (3) 1916 ALL. 366), Bannerjee J. with whom Walsh J. agreed, stated that the only light of an unpaid vendor is to retain the title deeds and to charge the property with the unpaid price and that he cannot retain possession on the ground that the price has not been paid. The large number of decrees for possession passed in suits brought by vendors against their Vendees supports the proposition that ownership can be transferred even without delivery of possession or by an owner who himself is not in possession.

3. In cases decided before the Transfer of Property Act of 1882, it was held that if property was sold by an owner in circumstances similar to those in the instant case, it would be not a sale bat a contract for sale. See for instance Rani Bhabo Soonduree Dossee v. Issur Chunder Dutt, 18 W. R. 140 : (ll Beng. L. R. 36). In that case the deed was described as a sale-deed and the operative words were 'I sell the same to you." Still their Lordships held that "the bill of sale in such a case can only be evidence of a contract to be performed in future."

In Abdul Wahid Khan v. Shaluka Bibi, 21 Cal. 496 : (21 I. A. 26 P. C.), the Judicial Committee dismissed a pre-emption suit on the ground that what was sought to be pre-empted was only "a sale of a share in a law suit" and not on the ground that there could be no sale at all when the vendor was out of possession. Their Lordships did observe:

> "The consideration was, providing the money necessary for carrying on the suit, the amount of which could not be estimated. If tin defendant succeeded and the suit was dismissed there would have been no property to be sold."

But they did not mean that there could have been no valid sale even if the consideration were given in cash. In Kalyan v. Mt. Desrani, A. I. R. (14) 1927 ALL. 361 : (49 ALL. 498), Sulaiman J., as he was then, made it clear that:

> "A sale is duly effected and the proprietary interest in the property passes no matter whether the vendor is or is not in actual possession," (p. 363).
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> Abdul Wahid Khan v. Shaluka. Bibi, 21 Cal. 496 : (21 I. A. 26 P.C.) was cited before the Judicial Commissioner of Oudh in Muntazim Husain v. Ahmad Husain, 23 O. C. 13: (A. I. R. (6) 1919 Oudh 58), which also was a case of a sale by an impoverished owner who was out of possession of the property and had no means of filing a suit to recover possession. It was contended before the learned Judicial Commissioner that the sale was not genuine and that what was sold was simply a share in a law suit. To this the reply of Stuart J. C., was that the question should be decided on the facts of each case and that :
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> "The mare fact that legal proceedings are necessary to obtain possession of the property sold is no ground for holding that the sale does not give rise to a right of pre-emption" (p. 16).
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> He distinguished the transfer in that case from transfer of a purely speculative claim having no more than a possible right to recover possession. The claim of Asfandyar Khan, etc., could not possibly be said to be a speculative claim having no more than a possible right to recover possession. There is a well-understood distinction between a contract of sale and a contract to sell or for sale. The former is an executed contract and the latter is an executory contract. Sale creates a jus in rem as it passes ownership immediately when it has been executed, while a contract to sell is jus ad rem, for it only creates an obligation attached to the ownership of property not amounting to an interest therein. See Shib Lal v Bhagwan Das, 11 ALL. 244 : (1889 A. W. N. 96). It is not always that ownership passes on the execution of a deed of sale, when the ownership passes is a question of intention of the parties. They may intend that the ownership would pass not immediately on execution of the deed, but on a subsequent date on the happening of a certain event. This postponement of the passing of title does not convert a contract to sell into a contract for sale. The criterion to decide whether there is a sale or merely a contract for sale is whether

another deed would be required to pass the title or ownership. Under the Transfer of Property Act, there must be a deed transferring ownership of immovable property which is not in the vendor's possession. If there is only a contract foe sale, no ownership would be transferred unless another deed for sale is executed. A contract for sale simply gives a right to the contractee to a deed of sale. But in the case of a sale with postponed transfer of title, that deed itself transfers the title on the happening of the particular event and another deed to transfer it is not required and would even be meaningless. If this distinction is borne in mind, one would have absolutely no hesitation in saying that the deed of 6th April 1939 is a deed of sale and not of an agreement or contract for sale. Even if it be said that the passing of the title is postponed to the date on which the vendee would obtain possession from the mortgagee, the title would pass under this very deed and no other deed would be required to be executed by the vendors to pass the title. This deed itself gave them a right to sue for possession; were it only a contract for sale, they would first have to obtain a sale deed from the vendors before being in a position to sue for possession. They did sue for possession by redemption and the suit was decreed against the vary parson who now contends that there wag no sale but only a contract for sale. Had there been only a contract for sale, he should have defeated the suit of the vendees on that very ground. After allowing the decree for redemption to be passed against him, it does not lie in his mouth to plead that the title had not passed to the vendees on 6th April 1989.

4. The ownership over the 9 ganda share was transferred immediately on execution of the deed. It is recited in the deed that the vendees became the owners from that vary day. There is absolutely nothing to suggest that the transfer of ownership was postponed to the date on which they obtained a decree for possession against the mortgagee or took delivery of possession in execution of the decree. The recital that they would keep 9 ganda share with themselves and hand over possession over the remaining 14 gandas to the vendors does not mean that the ownership of the 9 ganda share was not to be transferred to them until they obtained possession of is. As the suit for redemption was to be brought by themselves without the necessity of joining the vendors, only they could obtain delivery of possession over the entire 23 ganda share. As co-mortgagors they could file a suit for redemption of the entire mortgage and obtain a decree. As they were expected to obtain possession over the entire 23 ganda share, it was mentioned in the deed that they would retain 9 gandas and hand over possession over 14 gandas to the vendors. This recital had absolutely nothing to do with the question of passing of ownership or title.

5. Where the plaintiff-pre-emptor encounters serious difficulty is in meeting the proposition that in a sale the ownership must be transferred in exchange for a price. In the present instance the ownership was transferred in exchange for the labour and expenses involved in filing a suit for redemption for the entire mortgage The labour involved in the litigation was incapable for being ascertained in terms of rupees, annas and pies. The expenses of litigation were capable of being but were not at all, ascertained. When the suit was compromised the vendees had to pay Rs. 400/- to the mortgagee, but that cannot be said to be the price. As a matter of fact, when the deed was executed on 6th April 1939 the vendors and the vendees did not expect that they would have to pay

any thing to the mortgagee for the redemption. That is why the consideration for the sale is stated to be only the labour and expenses of the litigation and there is no mention of anything to be paid to the mortgagee for redemption. The expenses of the litigation are not known even now. They are certainly not equivalent to the costs taxed in the decree, because it is common knowledge that the actual expenses are much more than the taxed costs. I am of the opinion that the labour and expenses of the litigation cannot be said to be the price within the meaning of Section 54, T. P. Act, Madam Pillai v. Badrakali Animal, 45 Mad. 612: (A. I. R. (9) 1922 Mad. 911) dealt with a transfer of land by a husband to his wife to be enjoyed by her during her lifetime in discharge of future maintenance and the question arose whether it was a sale or gift. The Pull Bench decided that the word "price" includes money, only. Schwabe, C. J. stated at page 617:

> "Price has a well-defined meaning. It means money, but not necessarily money handed over in current coin at the time but includes money which might be already due, or might be payable in the future."

Courts-Trotter J., agreeing with the learned Chief Justice pointed out that the ownership must be exchanged for a "price" and not "valuable consideration", and that the word "price" cannot be construed to mean "valuable consideration". The consideration must be money, but neither need it be paid in cash, nor need it be capable of easy ascertainment. If the transferee has to spend money in exchange for the ownership, it would be an exchange for a price. Therefore, the mere fact that the costs of the litigation were not capable of easy ascertainment and were to be paid, not to the vendors, but to other persona, would not prevent the exchange from being one for a "price". In Haji Mohammad v. Mt. Bakhto, 54 P. R. 1889, the facts were similar to those in the present case and the deed was held to be a sale-deed and not a deed of exchange. It could not be an exchange because there was no ownership of anything transferred by the vendee to the vendors in return for the land; he only agreed to bring a suit against the trespasser and to spend money in the litigation. It was also held that the word "price" is not confined to a cash consideration only.

6. Though the facts that the vendees had to give the money, not to the vendors, but to other persons such as their pleaders and witnesses and that they would have to pay it on future dates and at their sweet will, would not prevent the consideration from being treated as "price", the facts that they had to undergo labour and that they bad to file the suit on behalf of the vendors also prevent the consideration from being treated as "price". In Jagat Prasad v. Deo Nath, A. I. R. (29) 1942 ALL. 71: (I. L. R. (1942) ALL. 169 F.B.), Muntazim Husain v. Ahmad Husain, (23 O. C. 13: A. I. R. (6) 1919 Oudh 58) and Badri Prasad v. Bijai Nand, 64 ALL. 9051 (A. I. R. (19) 1932 ALL. 685), the properties were transferred for cash and hence the deads were held to be sale-deeds. There was no question of the vendees suing for the joint benefit of themselves and their vendors. The properties were not in possession of the vendors and the vendees had to sue to recover possession; but the labour and expenses were no part of the consideration of the sale. In Jagat Prasad's case, (A. I. R. (29) 1942 ALL. 71: I. L. R. (1942) ALL. 169 F.B.), the Full Bench distinguished Kalyan v. Desrani: (A. I. R. (14) 1927 ALL. 361: 49 ALL. 488), on the ground that in the latter case, besides the cash consideration, there was an undertaking on the vendee's part to pay the costs of a joint suit to be brought in his and the vendors' names. The only consideration in Jagat Prasad's case: (A I. R. (29) 1942 ALL. 71: I. L. R. (1942) ALL. 169 F. B.), Was of Rs. 400/- paid in cash. In Muntazim Husain's case (23 O. C. 13: A. I.

R. (6) 1919 Oudh 58) also emphasis was laid on the fact that the entire property had been sold by the vendor and the vendee did not have to bring a suit for the joint benefit of himself and the vendors. He had to sue the adverse possessor for possession, but he had to do so entirely, in his interest and the labour and expenses involved in the suit were not part of the consideration for the sale. Badri Prasad v. Bijai Nand (54 ALL. 905 : A I. R. (19) 1932 ALL. 685) also distinguished Kalyan v. Desrani (A. I. R. (14) 1927 ALL. 361 : 49 ALL. 488). The facts in the latter case were these. A Hindu widow alienated her husband's estate in favour of X. R. who was the nearest reversioner, had no money to file a suit to challenge the alienation. So on 13th September 1923, he executed a sale deed in respect of a portion of that proparty is favour of K for Rs. 1,000/-. K did not pay the price, but kept the money with himself in order to file a suit against X. He filed a suit which was compromised. K and R got a portion of the property under the compromise on 17th April 1924. On 6th September 1924, a suit for preemption was filed by one P. The question arose whether there was a real sale by R. to K. Sulaiman J. observed at page 363 :

> "There may be cases where the cash price paid or promised is not the sole consideration for the transfer but in addition thereto there is an undertaking by the vendee to fight oat a litigation and to incur all its costs as well as to run the risk of losing his money. In such cases that part of the consideration which is other than the cash price is not capable of exact valuation. It is therefore, difficult to see how a pre emptor can be given a decree for pre emption of the property sold in such a way."

He held that a sale which is not in lieu exclusively of a cash price or such price as can be definitely ascertained, is not capable of pre-emption. On a similar ground, the sale in Rajjo v. Lajja, 26 A. L. J. 169 : (A. I. R. (15) 1928 ALL. 204), was held to be not pre-emptible. The sale there was in favour of a maintenance-holder in full discharge of her claim to maintenance arrears and also in consideration of her surrendering her right as a charge-holder over the other property of the vendor. Had the sale-deed been executed only in lieu of arrears of maintenance, it would have been a pre-emptible sale but when the vendee in addition to the monetary consideration surrendered her right as a charge-holder, the total consideration became one which could not be expressed in terms of money, It was not possible to ascertain the monetary value of the surrender by the vendee of her right as charge-holder. When a considerations is partly cash and partly something which cannot be expressed in terms of money, the whole taken the character of the latter part.

7. The right of a pre emptor is to stand in the shoes of the vendee. If lie succeeds, he gets all the rights of the vendee and is saddled with all his liabilities. If it is not possible for him either to get all his rights or to be saddled with all his liabilities, it follows that ha cannot step into his shoes, in other words, that he cannot pre-empt the sale. This is the reason why in Kalyan v. Desrani, (A. I. R. (14) 1927 ALL. 361: 49 ALL. 488), etc., the sale was held to be not pre-emptible. I think what was held is that there was no sale at all and not that there was a sale but not of pre-emptible variety. Every sale is pre-emptible under the Agra Pre-emption Act and there is no division of sales into two classes, one of pre-emptible sales and the other of sales which cannot be pre-empted. In the present case, the liability of the vendees was to file a suit for redemption against the mortgagor at their own expense and fight it out to the bitter end. It is impossible for the pre-emptor now to be placed in the shoes of the vendees and to undertake that liability. The vendees have already filed the suit at their

own expense and labour and the pre-emptor cannot file any other suit. He cannot now undergo the labour and expense which the vendees underwent in the suit. Ha cannot pre-empt the sale simply by paying Rs. 400/- or even Rs. 400/- plus the actual costs incurred by the vendees, because there would still remain the labour spent by them which cannot be valued in terms of money. Further, the contract that the vendees should undertake the litigation was a personal contract depending upon the relations existing between the vendors and the vendees and the trust reposed by the former in the latter. The vendors entered into this transaction with Kubernath and Sudeshra Kunwar, but might not have entered into it with other persons such as the pre-emptor. The pre-emptor could not force the vendors to enter into that transaction with him if they had no confidence in him. Farther it would be an absurd state of affairs if the vendors had to sell the property to the pre-emptor in order that he should bring a suit against his own self (as mortgagee) for possession of the mortgaged property. Therefore, even before the institution of the suit by the vendees, the pre-emptor could not have succeeded in stepping into their shoes.

8. In Khurshaid Alt v. Rashid Husain, 9 O. C. 331 and Ajudhiya Prasad v. Ram Autar, 80 I. C. 83: (A.I.R. (12) 1925 Oudh 253), the transaction was held to be not a sale. In Bisheshar Dayal v. Har Raj, A. I. R. (8) 1921 Oudh 248 : (66 I. C. 622), it was held to be an agreement or contract for sale. Part of the consideration was the promise to spend labour and effort in defending a suit and this was held to be not a price. The facts in Achal Ram v. Kazim Husain, 27 ALL. 271 : (32 I. A. 113 P. C.), were slightly different. The suit was by a person out of possession and in respect of a portion of the property. The vendor and the vendee joined in the suit to recover possession of the property and the defendant contested the suit pleading that the sale by the vendor to the vendee was champertous. This Court held that there was nothing wrong in the sale, that it was a present transfer of his ownership by the vendor and that the vendee got a good title to half of the property. The consideration for the sale was fixed in the deed, but was not paid in cash by the vendee and was left with him in order to defray the expenses of the litigation and to pay a monthly allowance to the vendor. There was no question of part of the consideration being the labour and efforts in the litigation. The entire consideration was in the form of money, though payable to different persons and on different dates. Raja Moham Singh v. Roop Singh, 15 ALL. 352 : (20 I. A. 127 P. C.), decided by the Judicial committee lays down that there is nothing against public policy in disposing of a part of the property in consideration of the vendee's undertaking litigation for the joint benefit of the vendor and the vendee to recover possession from the adverse possessor, there the sale-deed was executed in consideration of the vendee's paying the costs of appeal filed by the vendor before the Judicial Committee. It was a case of consideration consisting exclusively of money. These cases are to be distinguished from the present case.

9. It was contended on behalf of the pre-emptor that the condition in the deed of sale that if the vendees defaulted in performing their part of the contract the sale deed would stand cancelled, means that there was no completed sale. The exact words used are: "Khilafwarzi Karen to us suratmen bainama haza mansukh mutasawwr hoga". This does not mean that there was to be no sale unless the vendees fulfilled their part of the contract. It is not stipulated that the sale would be effective only on the vendees' performing their part of the contract. The deed contemplates the sale being effective at once but lays down the condition that if the vendees do not perform their part of the contract the sale which has already come into effect would 'be deemed cancelled'. It is true that

when a sale is effected and the vendee does not pay the price, the vendors' remedy is not to annul the sale but to sue for the price. But this is when the parties themselves do not fix a penalty for the breach of the obligation by the vendee. If the contract does provide a penalty that provision would have effect. It was observed in Bakhtawar Ram v. Naushad Ali, 55 I. C 659: (A. I. R. (7) 1920 Oudh 29) that a deed of sale may expressly provide that the sale would be void unless the price or the balance of the price was paid in a fixed time. So it was open to the parties to agree that the ownership would pass immediately on execution of the deed of sale but that it would revert to the vendor in the event of the vendees' breaking their promise. Even it such a condition be void under law, it would be ignored, but the deed would still remain a deed of sale.

10. I find that the transaction in question is not a sale, at any rate, in the words of Sulaiman J. a 'pre-emptible sale'.

11. The plaintiff fails not only on the ground that there is no sale but also on the ground that the suit was barred by time. The limitation for the suit is admittedly governed by Article 10 which prescribes the period of one year from the date on which the vendee takes physical possession of the property or the date on which the instrument of sale is registered. The sale here was of equity of redemption of a usufructuary mortgage. Such an equity of redemption is not capable of physical possession : vide Ghaffar Khan v. Sattar, (160 P. R. 1889), Shiam Sunder v. Amanat Begam, 9 ALL. 234 : (1887 A. W. N. 24) and Narendra Bahadur v. Wali Mohammad, 28 I. C. 208 ; (A. I. R. (2) 1915 Oudh 121). "Physical possession" has been explained by the Judicial Committee to mean "personal and immediate possession"; see Batul Begum v. Mansur Ali Khan, 24 ALL. 17 : (28 I. A. 248 P. C. referred to in the case of Narendra Bahadur v. Wali Mohammad, 28 I. C. 208 : (A. I. R. (2) 1915 Oudh 121) In the case of Shiam Sunder, (9 ALL. 234 : 1887 A. W. N. 24) Straight and Tyrrell JJ. observed on page 239.

> "It seems to us that in a statute, such as the law of limitation, which contemplates notice, express or implied, to the party to be affected by some act done by another in respect of which a right accrues to him to impeach it, and as to which time begins to run against him, quoad his remedy, from a particular point the word 'physical' implies some corporeal or perceptible act done, which of itself conveys or ought to convey to the mind of a person notice that his right has been prejudiced."

12. Where the property is not capable of physical possession, registration of the deed is supposed to be sufficient notice of the sale to the public. Lachmi Narain Lal v. Sheombar Lal, 2 ALL. 409, which computed the period of limitation for a pre-emption suit from the date on which the contract of sale became complete on payment of the price, was decided on facts of its own. The sale was of equity of redemption of a possessory mortgage in favour of the mortgagee himself for the consideration of Rs. 200/- cash and Rs. 98/- to be set off against the mortgage debt. A pre-emptor sued to pre-empt the sale, but the suit was dismissed on the ground that the contract of sale had not become complete because the mortgagee-vendee had not paid Rs. 200/- to the mortgagor-vendor. Subsequently, the mortgagee-vendee paid Rs. 200/- to the mortgagor-vendor and the plaintiffs sued again within one year. The suit was contested on the ground that it was Sled more than a year from the date of execution of the sale deed. This objection was overruled. When it was once decided in the earlier suit

that it could not be maintained because the sale was not complete, it was not open to the vendee to contest the subsequent suit on the ground that the sale had been complete on the date on which the deed was executed. The vendee could not be permitted to blow hot and cold. So the judgment in that case was correct on its facts, but the reason given by Oldfield J. that "as the purchaser in the case before us was also the mortgagee in possession, he must be held to have taken physical possession under the sale from the date when the contract of sale became complete,"

> does not appeal to me just as it did not appeal to the learned Judges deciding Gaffar Khan's case, (160 P. R. 1889). The period of limitation in the present case commenced on 6th April 1939 the date of registration of the sale-deed under Part 2, Col 3 of Article 10. The suit was admittedly barred by time, if the period of limitation was calculated from 6th April 1939.

13. The pre-emptor wants the period of limitation to be calculated from 8th February 1943, the date on which the vendee deposited Rs. 400/- in Court for payment to the mortgagee. Under Article 10 which, in my opinion, exhausts the law relating to limitation for suits for preemption, the limitation is to be calculated either from the date of the taking of physical possession or from the date of registration of the sale deed. It cannot possibly be calculated from a third date such as the date of decree or the payment of price. Article 10, Limitation Act is as follows:

> "10. To enforce One Year. When the purchaser a right of pre-emption takes, under the whether the sale sought to the right is founded on impeachad, physical possession law, or general of the property sold or, where usage, or on special the subject of the sale does not admit contract. of physical possession, when the instrument of sale is registered

14. This article governs suits for pre-emption of all kinds without any exception, in other words, exhausts the law of limitation in respect of pre-emption suits and one would not be justified in referring to any other article for determining the period of limitation for any suit of pre emption. There are qualifications in Col. 3 but there are none in col. 1 and it is Col. l which decides to what suits the period of limitation mentioned in Col. 2 applies. It may appear that the article is defectively worded inasmuch as Col., 3 does not exhaust all the circumstances in which a suit for pre-emption may be brought. For instance it does not state how the period of limitation is to be computed when the property is not capable of physical possession and the instrument of sale is not registered. Gaffar Khan v. Sattar, 160 P. R. 1889, laid down that the period of limitation for a suit for pre-emption of a sale of equity of redemption is governed by Article 120 and not Article 10. Article 120 prescribes the period of limitation for a suit for which no period has been provided elsewhere in the schedule. When Col. l of Article 10 is general and provides for the period of limitation for all suits of pre-emption, I feel difficulty in saying that it does not provide for the period of limitation for a suit for pre-emption of a sale through an unregistered deed of property not capable of physical possession. Actually, however, there is no difficulty in the article. It should be read along with Section 54, T. P. Act which explains how a sale can be made. Under the law contained in that section it is impossible to sell property incapable of physical possession except through a registered instrument. If the property is tangible it is always capable of physical possession, and the question

whether the instrument of sale is registered or not would not arise. If it is intangible the sale can be made only by a registered instrument. It is because the law does not contemplate a sale of a property incapable of physical possession through an unregistered instrument of sale that the law of limitation contained in Article 10 while purporting to be exhaustive, does not deal with a sale of a property incapable of physical possession through an unregistered instrument of sale. It is not possible either to apply Article 120 in the present casa or to calculate the period of limitation from 8th February 1943. It is not known where and when the vendees took possession over the 9 ganda share. If the property sold can be said to be capable of physical possession and if the vendees have not yet taken physical possession, the suit would fail on the ground of its being premature.

16. The appeal should therefore be dismissed, with costs.

Mustaq Ahmad, J.

16 I agree.

17. By the Court.-- The appeal is dismissed with costs.