Hari Singh And Ors. vs Kallu And Ors. on 3 October, 1950

Equivalent citations: AIR1952ALL149, AIR 1952 ALLAHABAD 149

JUDGMENT

Sapru, J.

1. This is a vendee's appeal in a preemption case. The property in the suit is situate in mauza Mathurapur and is admittedly governed by the custom of pre-emption. The case of the plaintiffs was that they were co-sharers in holding No 2 of the said village in which the land, sought to be pre empted, was situate, and that they had, for that reason, a preferential right of purchase and pre-emption as against defendants 1 to 11. Their case was that defendants 12 to 16, who are the vendors in this case, had sold the property by two deeds, one dated 22-0-1943, and the other dated 77.1943, to defendants 1 to 11, who are strangers, without their knowledge. They pleaded that the deed of 22-6-1941 had been fictitiously described as a deed of gift in respect of 10 biswas of land. It was, in point of fact, part of one and the same transaction. What the vendors had according to the plaintiffs done was to sell the entire land, including the 10 biswas of land, in respect of which they bad executed the deed of gift, to the defendants vendees for a total sum of Rs. 23,000 and had given to the first deed the garb of a deed of gift in order to defeat the right of the plaintiffs to preempt the property.

2. The suit was contested by the defendant-vendees. Separate written statements were filed by defendants 1 to 9 and 11 who were the vendees in the case and defendants 12 to 16. The line taken in both of them was practically the same. Shortly put, their defence was that the deeds dated 22-6-1943 and 7-7-1943 represented two independent transactions. The first of them was a deed of gift in respect of 10 biswas of land. The result of this deed was that the defendant vendees who were strangers became co-sharers in the khewat in which the property which was subsequently purchased by the defendant-vendees by the deed dated 7-7-1943 lay. It was, for that reason, not open to the plaintiffs to claim any right of pre-emption. It was also pleaded that the plaintiffs had been offered to purchase the property in salt, that they had refused be do so and that they were, therefore, estopped from claiming it.

3. On these pleadings, the two important issues, apart from the one which related to the general relief, framed by the trial Court were :

> "(1) Whether the Bale deed and the gift deed form part of one transaction of sale of the property in suit for Rs. 23000 and if not have defendants 1 to 11 become co-sharers by the gift deed and how does it affect the suit? (2) Was the disputed sale transaction entered into after the plaintiffs' refusal to purchase and is the suit barred

by estoppel?"

The Court below came to the conclusion that the two deeds formed part of one transaction of sale, that the sale consideration of the property in suit was Rs. 23,000. The learned Judge held that the gift deed was not a genuine gift but it was also a part of the same transaction of sale of the entire property in suit, disguised as a gift deed to obstructs the plaintiffs' suit for pre-emption, that there had been no refusal on the part of the plaintiffs to purchase the property before the execution of the sale-deed and that for that reason their suit was not barred by estoppel. It accordingly decreed the plaintiffs' suit for possession by enforcement of the right of pre-emption, subject to their depositing in Court Rs. 23,000 within a certain period. It is against this judgment and decree of the trial Court that the defendant-vendees have come up in appeal to this Court.

4. The question which we have be consider is whether the documents to which reference has been made above form part of the same transaction. The position, as it has crystallised itself, is that if the first transaction was in the nature of a sale, the plaintiffs will have a right to pre-empt, unless, of course, it can be held that they had been offered and had refused be purchase the property before the sale was effected. If, on the other hand, the deed of gift, dated 22.6.1913, was not intended be operate as a deed of gift at all but was, in point of fact, a sale, the price of the 10 biswas comprised in it having been taken into consideration in fixing the sale amount of as. 23,000 (for which, according to the sale deed of 7-7-1943, the property, excepting the 10 biswas, found abated to have been gifted to the defendant-vendees, was sold, the plaintiffs are out of Court. I may observe that in my opinion, issue No 1 was not happily framed. The real issue which the learned Civil Judge had to try was whether the deed of gift represented a genuine transaction or not. This depended not upon whether the deed of gift was conceived of as a method of defeating the plaintiffs' claim for pre-emption, but upon whether in calculating the price, which the vendees had paid for the property sold to them under the deed of 7-7.1943, the sum for which the property comprised in the gift deed of 1943 had been sold was included or not.

5. I shall now proceed to give a few facts which are relevant for the purpose of under, standing the case of both the parties. The deed of gift, which was admitted as Ex. A-2 in the case, is dated 22-6-1943. It was executed on that date, but not presented for registration till 8-7-1943 between l & 2 p.m. Its registration no. is 3319 at pp. 259 & 260 of book no. 1, vol. 705. The sale-deed purports to have been executed on 7-7-1943 and was presented for registration on 8-7-1943 between 1 & 2 P.M. Its registration No. is 1321 on pp. 261 be 264 of vol. 705, register No. 1. It is to be noted that both in point of execution and registration the deed of gift was prior to the deed of sale. It may be stated that the witnesses who attested the deed of gift also attested the deed of sale. The fact, however, that these two transactions were conceived of both about the same time or even the same time and that from this circumstance as also from the evidence in the case the conclusion is irresistible that the main purpose behind the deed of gift was to defeat the plaintiffs' right of pre-emption would not make the two transactions one transaction. What we have to look to 13 the intention of the executants. If the deed of gift was intended to operate as a deed of gift, then the position is clear that at the time the sale-deed was executed, defendants l to 11 had become co-sharers in the khewat and they could defeat the plaintiff's claim of pre-emption. Muslim jurists recognise the validity of devices to prevent pre-emption. The legitimacy of an act which defeats pre-emption by employing a device

which is not illegal is beyond question. It was held in the case of Shiam Sunder Lal v. Sarmadi Begam A. I. R. (27) 1940 ALL. 171, that:

> "Where before the data, of a suit for pre-emption the defendant vendee had become a co-sharer in the mahal by reason of a deed of gift executed before the date of the suit no decree for pre-emption can be passed is favour of the plaintiff because he has not a subsisting right of preemption at the time of the decree."

6. In an earlier case, Randhir Singh v. Randhir Singh, 1937 ALL, L. J. 743, the facts established were these:--Prior to purchasing property in a village, the vendee acquired a small fractional share in the village from the vendor under a deed of exchange which purported to transfer a very small fractional share in village Sondhi in exchange for another very small fractional share in village Itauli. The deed of exchange was executed on 10-12-1929 and though presented for registration on the same day, was actually registered on 11-12-1929. The stamp paper for the deed of exchange had been purchased some months before on 16 9-1929. The sale deed was executed on 11-12-1929 and was presented for registration on the same date, but was not actually entered in the register until the day following, i.e. 12-12-1929. The facts disclosed that the stamp paper for the sale deed had been purchased on 11-12-1929, There was an express provision in the sale dead excluding from the transfer the small share in village Sondhi which had been previously transferred under the deed of exchange. Admittedly, the object of the deed of exchange was to defeat the plaintiff's right of pre-emption. There was no doubt as to the two transactions having been thought of together and they were insisted upon by the vendee. From the defendants' own evidence it was clear that the idea of having these documents arose at one and same time and that these two transactions were part and parcel of the same transaction between the parties. It was held on these facts that inasmuch as it was the intention of the parties that the small fractional share should pass to the vendee under the deed of exchange, then, even though the professed object of the transaction was to defeat the plaintiff's right of pre-emption, the vendee would acquire rights thereunder and become a co-sharer so as to be placed on the same footing as the plaintiff. The learned Judges who decided that case had, on the evidence, come to the conclusion that the idea of these two documents arose at one and the same time, and that these two transactions were part and parcel of the same transaction between the parties. From the mere fact that the exchange and sale were part of the same transaction, the necessary inference could not be drawn that the deed of exchange was a bogus or fictitious transaction, namely, that is was not the intention of the parties thereto that the property should pass from one to another. They held that it could not fee inferred that it was nothing more than a mere paper transaction without there being any intention of any transfer of any property at all. The questions raised by this appeal have, therefore, to be considered in the light of these two authorities which, in my opinion, correctly lay down the law.

7. I shall now proceed to consider this appeal on the merits, in the light of the case law applicable to it Ordinarily, this Court rightly attaches weight to the estimate of the evidence of witnesses whose demeanour the trial Court had the advantage of watching. This rule, however, has no application to a case where the lower Court's estimate of the evidence is based upon a misconception of the law which must govern the relations of the parties. The real question which the trial Court had to decide was whether the deed of gift dated 22-6-1943 was a genuine or bogus document. The deed of gift in

this case is a document which was both attested and registered prior to the deed of sale. Admittedly it was not obtained from the defendant-vendors by coercion, fraud or any such misrepresentation as would invalidate it. It was for the plaintiffs to prove that the deed of gift is not what it purports to be, namely, a gift but a sale. For this he relied upon the evidence of three witnesses, namely, Sis Ram, Ram Chandra and Gobinda,. (After discussing the evidence the judgment proceeded) The conclusion to which we have been driven is that the evidence led by the plaintiffs has failed to prove that, the gift deed was a paper transaction and was intended to operate as a sale-deed, the sale price for which had been taken into consideration in calculating the price of the entire lands sold. The plaintiffs' evidence, therefore, fails to establish the case set up by them.

8. Learned counsel for the respondents has, however, argued that the deficiency, if any, in the evidence led on behalf of his clients has been made good by that which was tendered in evidence by the defendant-appellants. It has been argued that the statement of Babu Har Narain who was acting as the agent of his mother-in law, Mst. Jainti Devi, that the gift deed was executed as a safeguard against pre-emption at the suggestion of the vendees that an inflated sale consideration should be shown in the sale-deed is inconsistent with the recital in the deed of gift that the operative reason which had influenced Jainti Devi to make the gift was that the defendants during her visits at qasta Dasna, had respected her like their mother and bad behaved with respect and courtesy towards her. It is further pointed out that according to the recital in the deed of gift, it was at the request of the vendees that, in order to safeguard their vendees' right and to become co-sharers, Jainti Devi executed a deed of gift which is the subject-matter of controversy in this appeal. Babu Har Narain's statement is that he was acting as an agent of his mother-in-law for the purposes of the sale of the properties in village Mathurapur, that he had convened a panchayat in village Mabhurapur on 18th or 19-5-1935, that the vendees were present at that panchayat, that the vendees had bold him that Nathua and Hari Singh had purchased some property in some village, that they had subsequently lost it owing to the existence of the custom of pre-emption and that they therefore wanted a safeguard in the shape of an inflated sale price against pre-emption. The counter suggestion that he (i.e. Har Narain) made was that he would persuade his mother-in-law to give them some property worth Rs. 100 as a gift and that the value of this gift would be left out of account in settling the sale price. At that time the price settled was Rs. 21,500 and he persuaded his mother-in-law to execute a gift deed which was joined by him, his mother-in-law & some others. At the time the original bargain of Rs. 21,500 was settled between Nathua & Hari Singh, on the one side, & himself, on the other, Har Narain was acting on behalf of his mother-in-law. He, however, wanted the parties to deposit one foartu of the price as earnest money when the bargain was struck. Both, Nathua & Hari Singh, were at first prepared to pay the earnest money; that it appears that 3 or 4 days later Nathua, under the influence of his relations changed his mind & basked out. After Nathua had dropped out other vendees appeared on the scene & they agreed to purchase the property for Rs. 21.600.

9. A difficulty, however, was created by some of the vendees at the instance of one Chhajju Singh of Daliana by their insistence that Har Narain's wife a sons should join Mt. Jainti Devi in executing the sale deed. This insistence gave him an opportunity of bargaining with them for a higher price. He told them that the other persons whom they wanted to be joined with Mt. Jainti Davi as executants would be prepared to join her in executing the deed if they would pay Rs. 33,000 instead of Rs. 21,500. which was the price which was being offered by one Chandrabhan of Shahpur who has

appeared as a witness in this case. In view of the fresh developments that had taken place, Har Narain convened another panchayat at which Kallu & Nathua as also Chandrabhan & others ware present & the sale transaction was settled for Rs. 23,000. Thus it was the insistence of the vendees upon some persons, other than Mt. Jainti Devi, joining in the execution of the sale deed & the offer of Chandrabhan that enabled Har Narain to settle the final bargain at Rs. 23,000. It is to be noted, however, that Har Naran categorically states that the sum of Rs. 23,000 was the value of the property included in the sale-deed only & not of the gifted property, Thereafter, handbills which are marked as Ex A 3 were printed & distributed in the villages in which the property lay & in the neighbouring villages & he asked his Mukhtar-e-am to got it announced by beat of dram in the villages that he wanted to sell his property. Much has been made of the fact that in cross-examination, Har Narain stated that his intention was to sell the entire property, that he had not gifted any other property to any other tenant of Matharapur, though he had about 80 or 90 tenants, that in the handbill which was circulated before 23-6-1943 when the gift deed was executed the property was advertised for sale for Rs. 21,500 & that his statement 13 that it was only subsequently that Jainti Devi agreed to execute a deed of gift of property worth Rs. 100 & a sale-deed of the rest of the property for Rs. 23,000. Stress has also been laid upon the fact that Har Narain himself admits that Rs. 23,000 was the proper price of the entire property of Machurapur, & that he categorically states that he was not ready to execute a deed of gift unless the sale-deed was executed. It is urged that Har Narain's own statement shows that no property was to be gifted away apart from the sale transaction & that he had settled the sale transaction & the gift transaction with that intention in mind. I shall consider shortly the legal consequences that counsel for the respondents urges flow from this statement a little later. Meanwhile, I would like to complete the story given by the witnesses for the defts.

10. I may now refer to the evidence of the deft, himself, Hari Singh He was examined before Har Naraio & his story is that Mt. Jainti gifted 10 biswas to him & a deed was executed by her for that purpose. He stated categorically that the lands comprised in the sale-deed had no connection with the land which had already been gifted to him. He states that originally the land had been agreed to be sold to him for Rs. 21,500. He was to take half & the other half was to go to the plffs. along with Nathua. According to him, a settlement had been made in the chaupal of the village & earnest money had been settled at Rs. 4,000; but before he could bring the earnest money & return to the chaupal, Nathua refused to take the land. Thereafter, Har Narain sent for other people & subsequently the purchase price was settled at Rs. 21,500. Thereafter, he received a letter from Har Narain that either be & the others who were tenants must purchase the property for Rs. 23,000 or he would make the sale in favour of Chindrabhan. Thereafter they were all called at the Bbondumal Dharamshala at Ghaziabad & they subsequently agreed to purchase the property for Rs. 23,000. In the concluding part of his cross-examination, he stated that he had accepted Rs. 23,000 as the price of the entire property instead of Rs. 21,500 Stress has been laid upon the fact that the word "entire" his been used, it being urged that the price which had been fixed at Rs. 23.000 included that of the portion which was gifted. I am not disposed to attach importance to the casual use of the word "entire." The context in which it is used is not inconsistent with the possibility that it was the entire property in the sale deed & not the entire property in the village which Hari Singh had in mind.

11. Nanak Chand who is one of the attesting witnesses of the deed of gift & the sale-deed states that at the time the gift deed was executed, there was no mention of the sale deed & that the sale-deed was executed separately leaving aside the gifted property. He further states that Chandrabhan backed out after reading the will of the husband of Mt. Jainti Devi & that thereafter the sale was settled with the vendees at Rs. 23 000. In his cross examination, be definitely stated that Har Narain bad a mind to sell all the property of Mathurapur with the exception of 10 biswas which had been gifted & that in his presence the transaction for the disputed property was settled on the same day that the gift deed was executed. The transaction of gift not having been settled in his presence, be did not profess be know the private understanding between the parties about the gift deed. He says that is his presence no reason was assigned as to why the gift deed was executed.

12. Chandrabhan who is a land holder & pays Rs. 467 as land revenue says that he made an offer of Rs. 23,000 in Ghaziabad at a panchayat where people of Mathurapur had gathered but that subsequently after looking into the will of Kirpa Krishna, the husband of Jainti Devi, he backed out & Hari Singh purchased the property.

13. No reference is necessary to the rebuttal evidence of Kallu as he is a witness who deposes to esoppel & that point has not been seriously argued Before us.

14. I have already summarised the evidence in this case as I think it important to fix our attention on certain central facts which are necessary for deciding whether the deed of gift was or was not a fictitious transaction. Admittedly, Har Narain was anxious to dispose of the entire property. Admittedly he was acting for Shrimati Jainti Devi & I am not disposed to attach much importance to the fact that Jainti Devi was not produced as a witness in this case. It is quite clear that no question of a gift to the vendees would have arisen, had they net agreed to purchase the property comprised in the sale deed. The gifted property was not worth more than a hundred rupees. In a sale deed the consideration of which was Rs. 23,000, it is obviously difficult to say with definiteness whether Har Narain took Rs. 100 less than the market value of both the gifted & the sold properties. From the sale deed, however, it would appear that the property comprised in the gift deed was excluded in calculating the capitalised value of the property. This is the version in substance of Har Narain who was acting both as one of the vendees & as an agent of the other vendees & Hari Singh who is one of the vendors in this case. There is, in ray opinion, ample evidence, if regard is had to all the circumstances of the case that the gift deed was accepted both by the vendors & the vendees, for the object of both was to defeat the plffs'. right of pre emption. It was felt by them that the best method of defeating the pre-emptora' right of pro-emption was a gift deed of an infinitesimal & negligible part of the property, & that the vendees could, by virtue of their becoming co-sharers in the mahal gifted, resist any successful claim put forward on behalf of the pre-emptors for pre-emption of the property. This is particularly so as the method of putting an inflated sale price in the sale-deed had been ruled out by Har Narain.

15. The argument which has been advanced by learned counsel for the respondents is that the gift was no gift at all as there was consideration behind it. It is urged that the consideration being the sale of the portion of the property which was not comprised in the sale deed, the two transactions are so inter connected that the sale deed must be regarded as the consideration for the gift deed.

This argument is based upon the definition of "gift" in Section 122, T. P. Act. That section is reproduced below:

> "'Gift' is the transfer of certain existing moveable or immiveable property made voluntarily & without consideration, by one person, called the donor, to another, called the donee, & accepted by or on behalf of the donee." The argument is that it cannot be said that the gift here was without consideration as admittedly it was the fact that vendees were going to purchase the property comprised in the sale deed which influenced the gift deed There is a fallacy underlying this argument. It confuses consideration with motive as the reason behind an act. Shephard & Brown in their Edn. 7 p. 444 state that;
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> "The first condition of a gift, as distinguished from other alienations, is that it should be an not of liberality on the giver's part, in this sense that whatever may be his motive, the act is not clone in obedience to any legal obligation, nor with the purpose of placing the donee under any legal obligation. It is an act therefore which imports a clear gain to the donee, an acquisition to which property which he could not have demanded & for which he cannot be compelled to make a return."

It is quite certain in this case that the motive which influenced the gift deed, notwithstanding the recital which may or may not be true as there is no evidence either way that Mt Jainti Devi had developed a certain regard for the vendees who were her tenants, was the fact that they were only prepared to purchase the property if they could be assured that they would not be cheated, of their purchase by a co-sharer claiming a preferential right of pre-emption. The motive behind the deed of gift was thus a clear & unequivocal intention on the part of the vendors to give to the vendees a title which would act as a safeguard against any claim for pre-emption. On the assumption that it was the cagerness of Har Narain to have the property, included in the sale deed, sold (& this property comprised the entire property in Matturapur minus a tiny little fraction which was the subject-matter of the gift on 22nd June & which admittedly was not, in terms of money, valued more than Rs. 100), it cannot but be said that the transaction embodied in the gift deed which, if it was intended to serve as a safeguard against pre-emption, must have been intended to be acted upon, amounted in law to a sale because the gift deed would never have been executed had it not been for the fact that the donees under it had also at the time that it was thought of & executed, e greed to sell the property in respect of which a sale, deed was executed on 7-7-1943.

16. Section 64, T. P. Act, defines sale in the following terms:

> "'Sale' is a transfer of ownership in exchange for a price paid or promised or part paid & part promised." It is evident that in all sales price is an essential ingredient & price means money & where a property is transferred in exchange for something other than money, the transaction is not a sale, The legal conception of a consideration is not the same as the dictionary meaning of the term. Cheshire & Fifoot in their Law of Contract, 1945 Edn. p. 47 observe that:

> "It seems better, therefore, to approach the problems of consideration through the language of purchase & gale, The plff, must show that be has bought the deft's promise either by doing some act in return for it or by offering a counter promise." They go on to add that:
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> "It is not, indeed, every act or promise which will be accepted as a sufficient consideration," & that "the idea of the purchase price, the offer of money or money value for the deft's promise remains the eaaence of consideration."

17. In Deli Saran v. Nand Lal. A. I. R. (16) 1929 Pat. 591, the view expressed by Kulwant Sahai J. in a bench case was that the "consideration contemplated by Section 122 is valuable consideration, that is, consideration either of money or of money's worth,"

> He pointed out that: "there must be some sort of consideration in every gilt, for instance, a consideration of an expectation of spiritual or moral benefit, or consideration of love & affection."

Consideration in this sense is the motive behind the act. It means the reasons which have influenced the mind in acting as it has done. This is not, however, the sense in which the word "consideration" is used with reference to contractual obligations or those which come, say, under Section 122, T. P. Act. Can it be said that the sale which was settled at Rs. 23,000 was the consideration for the gift? Admittedly, the gift was conceived of as a method for securing a safe title for a purchaser who wanted to be certain that the property that he acquired by sale would not pass into the hands of a pre-emptor with a preferential right over him. It was, in other words, a safeguard of title which the vendor had agreed to provide for a purchaser who was purchasing his property. What the vendor in effect said to the purchaser was, "I will make a small gift of property worth about Rs. 100 to you. That will make you a co-sharer in the village before the sale takes place & that will help you in any litigation to defeat the pre-emptor a claim for pre-emption". That was an allowable method in law for the vendor to give an effective guarantee of title. That guarantee could be effective only if it was intended that the deed of gift should operate as a gift & that the donee should get possession of the gifted property as a donee. Is there anything in the evidence in this case to prove that the gift deed was not intended to be acted upon as a deed of gift? T think not. The mere fact that at the time that the bargain of sale was struck, the primary consideration with the donor was to dispose of the property & get a good price for it by inducing the donee to agree to a contract of sale by this method of a gift would not be enough in law to convert the deed of gift into a deed of sale, unless, of course, it can be shown by positive evidence that a price was exacted for the deed of gift & that that price was included in computing the amount for which the property was to be sold. A casual statement by the vendor Hari Singh that what was sold was the entire property & that on that day he bad accepted Rs. 23,000 as the entire price instead of RS. 21,500 is not, in my opinion, enough to prove that the price of the gifted property was included in the sale transaction. We do not know exactly how the cross examiner framed his question. We have to read Hari Singh's evidence as a whole. The sale-deed expressly exempts the 10 biswas which were gifted to the vendee by an earlier deed of gift. According to the deed of gift itself, the value of the entire property which was 10 biswas of pakhta land was not worth more than Rs. 100 according to the market value. There is no evidence on behalf

of the plaintiff-pre-emptors to show that in the sale deed this amount of Rs. 100 was included in the sale deed. Indeed, the inclusion of it in calculating the price would have defeated the very purpose for which the deed of gift was being executed, namely, to defeat a Possible right by the pre-emptor against the vendees. That being the case, I am clearly of the opinion that the plaintiff pre-emptors have not discharged the burden which rested upon them of proving that the gift deed was not what it purported to be, i.e. a deed of sale and not a deed of gift. That being so, I am clear in my mind that the principle of the cases referred to by me, namely, those of Shiam Sunder Lal v. Sarmadi Begam, A. I. R. (27) 1940 ALL. 171 and Randhir Singh v. Randkir Singh, 1937 ALL. L. J. 743, apply. I would, for the reasons given above, hold that it has been proved in this case that the deed of gift was intended to convey a title and this made the donees owners of the property covered thereby. I would further hold that the vendees did not become owners of the property covered by the sale deed which was registered on the same day but a little later by virtue of that deed. The position, therefore, is that at the time the deed of sale was executed, the vendees were co-sharers in the village. This appeal must, therefore, succeed.

18. For the reasons given above, I would allow the appeal, act aside the decree of the Court below and dismiss the plaintiffs' suit with costs in both Courts.

P.L. Bhargava, J.

19. This appeal arises out of a suit for pre-emption. Shrimati Jayanti Devi, her daughter and her daughter's sons, who were defendants 12 to 16 in the suit, executed a sale deed on 7-7-1948, which was presented for registration on the following day, in favour of Hari Singh and others, who have preferred this appeal and were defendants 1 to 11 in the suit. The vendors executed another deed in favour of the vendees, which was described as a deed of gift. It appears to have been executed on 22-6 1943, but it was also presented for registration on 8-7-1943, at about the same time when the sale deed was presented. It covers two biswas "pukhta" land out of the entire share of the vendors in each of the khata khewats Nos. 1, 2, 7, 8 and 9 of village Mathurapur. Under the sale deed the entire share of the vendors in the said khata khewats, with the exception of two biswas in each of the khata khewats aforesaid, appears to have been sold for a consideration of Rs. 23,000.

20. The plaintiffs are the co-sharers in the village. They instituted the suit for pre-emption of the property covered by the two deeds, on the following allegations: The deed of 22-6-1943, was really a sale deed; it was fraudulently described as a deed of gift. The two deeds formed part of one and the same sale transaction. The entire property covered by the two deeds was sold for Rs. 23,000. The vendees were strangers and as such they were not entitled to purchase the property.

21. The defence set-up by the defendants-appellants was that the deed of gift was duly executed on 22 6-1943, and it was a perfectly valid and independent transaction, which had no connection with the sale deed of 7.7.1943; that on the date of sale they were co-sharers in the village and, therefore, the plaintiffs had no right to pre-empt the sale; and that the sale deed was executed within the knowledge of the plaintiffs and after they had refused to purchase the property; hence, they were estopped from suing for preemption.

22. The learned civil Judge, who tried the suit, found that the sale deed and the deed of gift formed part of one transaction of sale of the property in suit for Rs. 23,000 and that the deed of gift was not a genuine transaction and it was part of the same transaction of sale of the entire property disguised as a deed of gift to obstruct the plaintiffs' suit for pre-emption. He further found that the plaintiffs had never refused to purchase the property and the sale transaction had not taken place after any such refusal and the plaintiffs were consequently not estopped from maintaining the suit. He also found that the plaintiffs were entitled to pre-empt the entire property on payment of Rs. 23 000 as they were co-sharers in the village and the custom of preemption had been established. The suit was, accordingly, decreed and the defendants vendees have preferred this appeal.

23. The main question for consideration in this appeal is whether there was only one transaction between the vendors and the vendees and that was the transaction of sale of the entire share of the vendors in different khata khewats of village Matharapur for Rs. 23,000, in respect whereof two deeds were executed, one of which was fraudulently described as a deed of gift. In other words, whether the deed, dated 22-6-1943, which purports to be a deed of gift, is a sham transaction, the property covered thereby having been actually sold along with the rest of the property for Rs. 23,000, or was it a genuine transaction which was intended to operate as a deed of gift.

24. The question has been dealt with by the trial Court under the first issue, which is in these terms:

> "1. Whether the sale deed and the gift deed form part of one transaction of sale of the property in suit for Rs. 23,000 and if not have defendants 1 to 11 become co-sharers by the gift deed and how does it affect the suit?"

It has been contended on behalf of the appellants that the issue did not cover the entire scope of the inquiry. The issue could certainly have been put in a better and more specific form; but even as it stands it is comprehensive enough to include all the relevant points raised in and arising from the pleadings of the parties. The first part of the issue covers the question whether there was one transaction of sale of the entire property in suit for Rs. 23,000 and the second part covers the question whether the document described as a deed of gift was a sham transaction or was it intended to operate as a deed of gift. The parties produced their evidence and were not in any manner misled by the form of the issue.

25. The learned counsel for the appellants has strenuously argued that the onus lay on the plaintiffs to show that the "deed of gift" was really a sale deed and in order to establish that fact it was necessary for them to prove by positive evidence that price was paid for the property mentioned therein, and that the plaintiffs had entirely failed to discharge the burden of proof. No doubt, the plaintiffs had to prove that the "deed of gift" was really a sale; but the parties having led evidence on the issue, the question of burden of proof was no longer material and we have to see what that evidence establishes.

26. In considering the evidence on the record we have to bear in mind the finding recorded by the trial Court, which has not been challenged before us, that the plaintiffs had no knowledge of the transaction. When the sale transaction was kept a secret from the likely pre emptors the

negotiations about a transaction, which is said to have been entered into with a view to defeat the right of pre emption, must have been kept a close secret. The evidence of the persons who took part in settling the bargain will have an important bearing on the fact in issue. The plaintiffs examined three witnesses Sis Ram plaintiff 2, Ram Chandra and Gobinda, to prove that there was one transaction of sale of the entire village of the vendors in village Mathurapur for Rs. 23,000. Among the witnesses examined on behalf of the appellants are Hari Singh, one of the vendees, and Har Narain, 'son-in-law of the principal vendor Jayanti Devi, who settled the transaction acting as her agent. The other vendors are the wife and the sons of Har Narain. That is the reason why at several places in his evidence Har Narain has described the property as his own. The entire evidence must be read and considered together.

27. First witness examined on behalf of the plaintiffs was Sis Ram, plaintiff 2, who was not present when the transaction was settled. His evidence is, therefore, not at all material. The next witness, Ram Chandra, started by saying that there was no settlement about the property in suit in his presence, but went on to say that he was present in the chaupal where a talk about the sale was going on between Hari Singh and Tirmal, on the one side, and Har Narain, on the other, and he beard a talk about the sale of the lands in Mathurapur for Rs. 23,000 In his cross-examination he, no doubt, stated that no sale deed was executed in his presence; but that had nothing to do with the talk which he had heard. It has not been suggested that the talk about the sale, the final settlement and the execution of the sale deed had taken place on the same day.

28. The veracity of this witness has been challenged on four grounds. Firstly it has been pointed out that he was a "boy" when he talk is and to have taken place and as he was not at all interested there was no particular reason for him to remember the details which he had given. His statement was recorded in September 1944, when he gave his age as 22 years. The talk about which he was deposing had taken place in the previous year; so he was not a mere 'boy" then. He was capable of understanding that a particular person was selling his entire property in the village for Rs. 21,000 and remember about it. The property was actually sold for Rs. 23,000. He did not give any other detail. Secondly, our attention was invited to a note made by the trial Judge that he had answered a question about relationship with "marked reluctance". The learned Judge did not attach any importance to that note; and we see no reason whatsoever to reject his testimony on account of this note Thirdly, it has been said that he admitted that no settlement had taken place in his presence; but he had come forward to depose about the talk which he bad heard in the chaupal in the village and which he did not consider amounted to a "settlement". That there was an inconclusive talk about the sale in the village chaupal is evident from the statements of Hari Singh and Hir Narain, D. Ws. They speak about a settlement for Rs. 21,500, while the witness says the talk was about the sale of property for Rs. 23,000, and it will be shown hereafter that the latter statement is correct. Lastly, it has been urged that he was unable to state the period which had elapsed between the talk and the date of the sale deed. As he did not know when the sale deed was executed he could not possibly speak about it. He stated that a sale deed for Rs. 23,000 was executed, as it was a fact and he had heard about it.

29. The last witness examined on behalf of the plaintiffs was Gobinda, who made a statement similar to that of Bam Chandra. It was elicited in his cross-examination that Har Narain had no

paper at the time when the talk had taken place and there was no mention of bighas and biswas of land that was being sold. That, however, cannot affect his statement that the sale transaction was settled for Rs. 23,000. It is significant that his presence at the time when the transaction was settled for Rs. 23,000 is admitted by Hari Singh D. W.

30. The evidence of this witness has been attacked on the ground that he has stated that "no land was agreed to be gifted" and that no one else was present, while Ram Chandra, the previous witness, says that he was present. The talk about the gift would not have taken place so openly in the chaupal, Consequently, no significance attaches to the statement of the witness that "no land was agreed to be gifted". The witness was not questioned about the presence of Bam Chandra As Ram Chandra was a person unconcerned with the transaction and the matter was over a year old he should have been specifically asked about his presence. Moreover, the transaction might not have been settled at one sitting.

31. The evidence of these witnesses is supported in material particulars by the statements of Hari Singh, Har Narain and Nanak Chand, who were examined on behalf of the appellants. We have it from Hari Singh D. W. that several months before the sale the residents of Mathurapur and neighbouring villages knew that "the lands in suit were being sold" and "Har Narain bad distributed notices for selling the disputed lands". The "lands in suit" and "disputed lands" include the entire share of the vendors in village Mathurapur. Surely, he knew what the property in dispute was,--he used the abovementioned terms in his examination in chief when no one was trying to mislead him. Har Narain D. W. stated that his "intention was to sell the entire property of Mathurapur" and he wanted to sell it in one lot and that he was demanding Rs. 21,100 for the property of Mathurapur, which was advertised for sale in the hand-bill Ex. A-3. That hand bill mentions the entire property of the vendors in Mathurapur as the property "intended to be sold". He is a retired Advocate of the Lahore High Courts and it has not been suggested that he was or could be misled.

32. The Patwari Nanak Chand D. W. has stated that Har Narain wanted to sell his entire property of Mathurapur and that Hari Singh agreed to purchase it. Chaudra Bhan, D. W., also has stated that he was intending to purchase the property in dispute. So the witnesses did not casually mention "entire property" without understanding the significance of the term.

33. That portion of the statements of these witnesses in which they tried to make out that the plaintiffs and every one else knew about the sale has been rightly rejected by the trial Court. Their evidence, leaves no room for speculation about the property that was intended to be sold--it was the entire share of the vendors in village Mithurapur.

34. Now, let us see what was the property actually sold and the price settled for it. Hari Singh D. W. has stated that the sale of property was first settled with him, the plaintiffs and Nathua for Rs. 21,500; that he was to take half the property and the plaintiffs and Nathua were to take the other half; that Rs. 4,000 was to be paid as earnest money and that he went to his house and brought his share of earnest money, paid it to Har Narain and obtained a receipt for the same; but the plaintiffs and Nathua refused to pay their share, in consequence whereof the bargain fell through. He has further stated that Har Narain then called other persons of the village to join him in purchasing the

property (a rather unusual course) and that some other persona came and he along with them agreed to purchase the property for Rs. 21,600. He has also stated that thereafter Har Narain sent a letter from Agra demanding Rs. 23,000 and they agreed to pay the said amount "as the price of the entire property instead of Rs. 21 500."

35. The learned counsel for the appellants has pointed out that the words "entire property" used by Hari Singh referred to the property which was sold and not to the property which he had stated had been gifted to the vendees and that the cross-examining counsel left the whole thing vague. As already stated, Hari Singh had used the words "lands in suit" and "disputed lands" in his examination-in-chief. It is clear from his statement that at first the property was agreed to be sold for Rs. 21,500 and later on the price of the same property was fixed at Rs. 23,000. He does not Bay that when the bargain was settled for Rs. 21,500 there was any talk about the execution of the deed of gift. Obviously, he was being questioned and had given answers with reference to the property which was intended to be sold. In any case, if there was any ambiguity in the answers given by the witness in cross-examination it was open to the appellants' counsel to clear that ambiguity in re-examination. That was, however, not done.

36. Har Narain D. W. also speaks about the settlement of the sale transaction for Rs. 21,500 with the plaintiffs, Nathua and Hari Singh in the village. He would have us believe that Nathua and Hari Singh were afraid of pre-emption and had refused to purchase the property unless there was some safeguard against pre-emption; that they proposed inflation of the sale price, but he did not agree and promised to persuade his mother-in-law (Jayanti Devi) to give them "some property worth about Rs. 100" and asked them to settle "this bargain leaving out of the account land worth about Rs. 100" and that thereupon the bargain was settled for Rs. 21,500. If the plaintiffs and Nathua were purchasing the property they being co-sharers in the village would not have been afraid of pre-emption. By making this statement, Har Narain attempted to supply the omission in the statement of the previous witness Hari Singh who did not say anything about it. In his cross-examination, no doubt, Hari Singh has stated about his expressing fear of pre-emption when there was a talk of sale at the house of Jayanti Devi in village Dusana and when Rs. 50,000 were demanded for the property and he was not willing to pay a single pie. He said nothing about the possibility of pre-emption when he stated that "the price was settled at Rs. 21,500 then and the transaction was settled for the entire property" or on the day when he "accepted Rs. 23,000 as the price of the entire property instead of Rs. 21,500". If there had been any talk about pre-emption or safeguards to defeat it he must have been asked and said about it.

37. In this connection, it has been pointed out that Har Narain has stated that the sum of Rs. 23,000 was the value of the property included in the sale deed only and not of the gifted property; but that statement stands negatived by his subsequent statement. In his cross examination he had to admit that he considered Rs 93,000 as the proper price for the entire property of Mathurapur and the bargain was actually settled for that amount.

38. The statement made by Hari Singh and Har Narain that the sale transaction was first settled for Rs. 21,500 and then the price was raised to Rs. 23,000 appears to be based on an after, thought. They are not unanimous about the circumstances in which the price is said to have been increased

from Rs. 21,500 to Rs. 28,000. Hari Singh has stated that after the transact on had been settled for Rs. 21,500, Har Narain sent him a letter from Agra to the effect that if they agreed to purchase the property for Rs. 28,000 the sale would be effected in their favour; otherwise, it would be made in favour of Chandrabhan of Shahpur; that after the receipt of the letter they were called to Ghaziabad where Otandrabban, Sis Bam, Kallu, Likhiram, Gobinda P. W. and others were present and that there they (vendees) agreed to purchase the property for Rs. 23,000. Har Narain has given a different explanation, He has stated that when the vendees insisted that his wife and sons should join in the execution of the sale deed he demanded Rs. 1,600 more and the vendees accepted because Chandrabhan of Shabpur was willing to pay Rs. 23,000. That Chandrabhan was ever willing to purchase the property for Bs. 23,000 is open to considerable doubt. In the first place, he pays Rs. 457 only as land revenue, and it is difficult to believe that he had sufficient means to purchase property worth RS. 23,000. In the next place, it is said that immediately after making the offer he withdrew the same on seeing a certain "will". It is impossible to believe that he would have agreed to purchase the property worth Rs. 28,000 without making proper inquiry. In any case, if Chandrabhan had backed out immediately the vendees would not have readily agreed to pay the increased price. It is, therefore, difficult to believe that the transaction was originally settled for Rs. 21,500 and the price was subsequently raised to Rs. 23,000.

39. Consequently, there is no reason to disbelieve the evidence of the plaintiffs' witnesses, Ram Chandra and Gobinda, when they say that the entire property of the vendors was sold for Rs. 23,000.

40. The nest point, which arises for consideration, is whether there was any settlement between the patties to execute a deed of gift in order to defeat the right of pre-emption, or for any other purpose. In the deed of gift, it is recited that long ago Jayanti Devi, who is a resident of village Dasna, had gone to see her zamindari in village Mathurapur; that the vendees who were her tenants had looked after her comforts, rendered services and obeyed her to a great extent; that she was very much pleased and satisfied with their hospitality, services and obedience; that subsequently the vendees visited her once or twice in a year to inquire about her health and she was very much impressed by their behaviour towards her; that they respected her like a mother; that in the course of their visits "with a view to safeguard their future rights and to become co-sharers" requested her to make a gift in their favour of only a small area, that is 2 biswas pukhta land out of her share in the village, and she promised to do so; and that in order to redeem her promise the deed was being executed. Jayanti Devi has not come into the witness-box; and there is no other evidence on the record to prove these recitale. Har Narain has given a different story. He asks us to believe that when the sale transaction wag being settled with the plaintiffs and others Nathua and Hari Singh told him that they would not purchase the property unless some safeguard was provided against preemption and they suggested inflation of the sale consideration; that he did not agree to their proposal and suggested:

> "I shall persuade my mother-in-law to give you some property worth about Rs. 100 and you strike this bargain leading out of account land worth about Rs. 100", and that thereupon the bargain was settled for Rs. 21,500. Even if we were to assume for the sake of argument that the bargain was at any time settled with the plaintiffs, Nathua

> and Hari Singh for Rs. 21,500 it is difficult to believe that it was settled with the condition aforesaid attached to it. Firstly, the plaintiffs as well as Nathua were co-sharers in the village and they would not have been anxious for any safeguard; secondly, as already stated the reason mentioned in the deed of gift was entirely different; thirdly, Hari Singh does not say that there was any talk about the execution of the deed of gift when the bargain was settled for Rs. 21,500; and lastly Har Narain has admitted that his intention was to sell the entire property of Mathurapur and he was demanding Rs. 22,500 for that property which had been advertised for sale. Whether the settlement was for Rs. 21,600 or Rs. 22,500 or Rs. 23,000, it was for the entire property.

41. Hari Singh, one of the vendees, has only stated that Jayanti Devi had gifted 10 biswas of land to him for which a deed was executed and that he paid no price for that land. The appellant's learned counsel pointed out that Hari Singh was not cross-examined on this point. It, however, appears that his entire cross-examination was directed towards disproving his allegation that part of the property in dispute was gifted to him. The cross-examining counsel attempted to show that the settlement was for the sale of the entire property for Rs. 23,000, and he succeeded in his attempt to demolish the appellants' case that part of the property in dispute had been gifted.

43. The statement of Har Narain clearly shows that it was never intended that a deed of gift should be executed. He has admitted that he or Jayanti Devi had no consideration to execute the deed of gift and that his intention was to sell the entire property of Mathurapur for which he was demanding the price, which was ultimately settled. Towards the end of his cross-examination he made the following statement:

> "My personal intention was that no property should be gifted away apart from the sale transaction and I settled the sale transaction and the one of gift with that intention in my mind."

He has made another very significant statement:

> "I did not get the gift deed registered at once fearing that if Hari Singh and his party would back out from the sale transaction the gifted property would go out of our hands. I was not ready to execute a deed of gift unless the sale deed was to be executed. I wanted to dispose of the property of Mathurapur in one lot."

43. This statement clearly shows that the donors had no idea of executing the deed of gift, and they were not prepared to divest themselves of the ownership of the properly until the sale deed was completed and their intention was to dispose of the entire property in one lot.

44. According to his own showing Har Narain is a man of doubtful antecedents having once been prosecuted for an offence punishable under Section 420, Penal Code and, in the circumstances pointed out above, it is not possible to accept the explanation offered by him for the execution of the deed of gift. There is no other evidence on the record to show that there was any settlement between

the vendors and the vendees regarding the execution of a deed of gift. It is true that the vendees must have been anxious to obtain a deed of gift to defeat any claim for pre-emption; but it should have been proved, like any other fact, that there was any agreement between the parties to execute a document for that purpose. We have seen above that the vendors were never anxious to execute any deed of gift; and there is no reliable evidence on the record to show that at any time they agreed to do so. Therefore, even if the vendees were anxious to obtain a gift, that would not be sufficient to prove the existence of a valid and legally enforceable deed of gift,

45. In connection with the plaintiffs' contention that the deed of 22-6-1943, was fraudulently described as a deed of gift, the following facts and circumstances which appear on the record, assume importance. The stamp paper for the deed of gift was purchased on 22-6-1943, while the stamps required for the sale deed were purchased on 23 6 1943. The two documents are written by the same person Chandrabhushan Sharma, the deed writer of Ghaziabad, and they have been attested by the same persons. The document which purports to be a deed of gift appears to have been written on 22-6 1943, and the sale deed was written on 7-7-1943. Both the deeds were presented for registration at the office of the sub-registrar of Ghaziabad on 8-7-1943, between land 2 p. m, and the execution of both the deeds was admitted before the sub-registrar on 8-7-1943, between 7 and 8 p. m. when he went to the house of Jayanti Devi. The statement of Hari Singh that both the deeds were attested before being presented for registration is capable of interpretation that they were attested on 8-7-1943. In this connection the statement of Har Narain that he did not get the gift deed registered at once fearing that if Hari Singh and his party would back out from the sale transaction the gifted property would go out of their hands, becomes significant. If he was not prepared to get it registered being a lawyer he would not have taken the risk of having its execution completed. As we have already seen, the entire property was advertised for sale and the price of the entire property was settled at Rs. 23,000,Therefore, the two documents were part and parcel of the same transaction.

46. On behalf of the appellants, it has been contended that the parties to the transaction could agree to execute two documents, one sale deed and the other a deed of gift, and both of them would be perfectly valid documents. If there was a valid and independent transaction by which the property had been gifted, there would have been no difficulty in the case. It, however, appears that the deed of gift was not intended to operate independently of the sale deed. The vendors were not prepared to part with the property mentioned in the deed of gift unless the sale deed was completed, and they had not intention to execute a deed of gift. When the sale deed came to be executed in pursuance of the settlement to sell the entire property for Rs. 23,000, a document was also executed in respect of the property worth Rs. 100 only and it was described as a deed of gift. It is obvious that it was an entirely sham transaction and it was never intended to operate as a deed of gift.

47. It would thus appear that there was one transaction of sale of the entire share of the vendors in different khata khewats of village Mathurapur for Rs. 23,000, in respect whereof two deeds were executed, one of which was fraudulently described as a deed of gift and that the last-mentioned document was a sham transaction, the property covered thereby having been actually sold along with the rest of the property for Rs. 23,000 and it was never intended to operate as a deed of gift. In view of this finding the cases reported in Skiam Sunder Lal v. Sarmadi Begum, A. I. B. (27) 1940

ALL. 171 and Randhir Singh v. Randhir Singh, 1937 ALL. L. J. 743 have no application to the present case; nor is it necessary to discuss the argument put forward on behalf of the plaintiffs that the deed of gift was no gift at all as there was consideration behind it, the consideration being the sale of a portion of the property which was not comprised in the sale deed.

47. For the reasons stated above, I am led to the irresistible conclusion that the decision of the trial Court is correct and must be upheld. I would, therefore, dismiss the appeal with costs.

48. By the Court.--There is a difference of opinion in regard to the order to be passed in this case between us. Let the papers of this case be laid before the Hon'ble the Chief Justice for reference to a third Judge.

[The papers were placed before Seth J. by order of the C. J. but were returned to the Division Bench for formulating the questions on which the Judges differed, whereupon the questions were formulated as follows:--]

49. Sapru J.--By an order dated 12-5-1949 the papers of this appeal were directed by us to be laid before the Hon'ble the Chief Justice for reference to a third Judge as there was a difference of opinion between us in regard to the order to be passed in this case. Seth J., before whom this appeal was placed by an order of the Hon'ble the Chief Justice has sent back the appeal to us as in his opinion the order of reference passed by us does not appear to be in accordance with law. He has invited our attention to Section 98, Civil P. C., and Clause 27, Letters Patent and added that only, points of difference are to be stated for the opinion of a third Judge. We proceed now to state the points of difference between us; (a) Whether the deed of gift dated 22-6-1943 was not intended to operate as a deed of gift at all but was, in point of fact, a sale, the price of the 10 biswas comprised in it having been taken into consideration in fixing the amount of sale consideration of Rs. 23,000? (b) Whether the plaintiff-pre-emptors have, in the light of the principles laid down in Shiam Sunder Lal v. Sarmadi Begam, A. I. R. (27) 1940 ALL 171, and Randhir Singh v. Randhir Singh. 1937 ALL. L. J. 743, discharged the burden which rested upon them of proving that the gift deed was not what it purported to be, i.e. a deed of sale and not a deed of gift? If so or not, what is its effect?

[On the matter going before Seth J. again his Lordship delivered the following judgment.]

50. Seth J.--The learned Judges constituting the Bench which heard this appeal, being divided in opinion as to the decision to be given on certain points, those points have been stated and referred for decision to me.

51. The appellants are the transferee defendants against whom a decree for pre-emption has been passed. The property in dispute, which is zemindari property situate in khata khewats Nos. 1, 2, 7, 8 and 9 of village Mathurapur, belonged to Smt. Jayanti Devi, and was being managed by her son-in-law, Har Narain. Smt. Jayanti Devi being desirous of selling this property, Har Narain moved in the matter and settled the transaction of sale with the appellants for a sum of Rs. 23,000. The appellants were, however, apprehensive of pre-emption and desired that some step should be taken to prevent a claim for pre-emption being successfully asserted. It was, therefore, agreed, that a very

small fraction of the zamindari, worth about Rs. 100 be gifted to the appellants and the rest conveyed to them by means of a gale deed for Rs. 23,000.

51a. According to this arrangement, the entire property in village Mathurapar, belonging to Smt. Jayanti Devi, was conveyed to the appellants by two documents, (1) a deed of gift, dated 22-6-1943, and (2) a sale-deed, dated 7-7-1943. A total of ten biswas, consisting of two biswas from each of the S aforesaid khata khewata, was conveyed by the deed of gift and the remaining 739 bighas, 9 biswas and 15 biswansis were conveyed by the sale-deed. The two documents while executed on different dates, were presented for registration on the same date, 8-7-1943, between 1 and 2 P.m. Very prob. ably they were presented together. The sale deed was executed not only by Smt. Jayanti Devi but also by her daughter. Smt. Bishan Devi, her son-in law, Har Narain, and her daughter's minor eons, Dayal Saran and Prem Saran. The last four persons appear to have been joined as executants, ex abundanti cautela, for the satisfaction of the vendets.

52. Har Narain, one of the executants of the sale-deed, was examined as a witness on behalf of the defendants. He stated;

> "Hari Singh and his party were not ready to pay Rs. 23,000 unless a gift deed in their favour was executed. I was to execute the gift deed in favour of Hari Singh and his party so that the price might be settled at Rs. 23,000, I was considering Rs. 23,000 as the proper price for the entire property of Mathurapur .....I did not get the gift deed registered at once fearing that if Hari Singh and his party would back out from the sale transaction the gifted property would go out of our hands. I was not ready to execute & deed of gift unless the sale-deed was to be executed. I wanted to dispose of the property of Mathurapur in one lot."

A straight question was then pub to this witness as follows :

> "Q. Is it not a fact that you were not prepared to part with any portion of Mathurapur property by gift apart from the sale transaction?"

The reply of the witness to this question was :

> "My personal intention was that no property should be gifted away apart from the sale transaction and I settled the sale transaction and the one of gift with that intention in my mind"

I see no reason to doubt the veracity of the aforesaid statement made by Har Narain

53. The plaintiffs alleged on these facts, that the entire transaction evidenced by the two documents was one of sale and that they had a right to pre-empt it. The defendants pleaded, that there were, in fact, two distinct transactions, one of gift and the other of sale, that the defendants had become co. sharers in all the five khata khewats before the sale deed was executed in their favour, and that, therefore, the sale was not liable to pre-emption. The learned 1st Civil Judge of Meerut accepted the

plaintiff's case and decreed the suit for pre-emption of the entire property covered by the deed of gift and the sale-deed on payment of Rs. 23,000.

54. My learned brother Bhargava agrees with the decision of the Court below and has stated his conclusions as follows :

> "It would thus appear that there was one transaction: of sale of the entire share of the vendors in different khata khewats of village Mathurapur for Rs. 23,000 in respect whereof two deeds were executed, one of which was fraudulently described as a deed of gift and that the last mentioned document was a sham transaction, the property covered thereby having been actually sold along with the rest of the property for Rs. 23,000 and it was never intended to operate as a deed of gift."

55. On the other hand, my learned brother Sapru is of the opinion, that the ostensible deed of gift is, in fact, a deed of gift by reason of which the plaintiffs are precluded from claiming a right of pre-emption. He has stated his conclusions in the following words:

> ".... I am clearly of the opinion that the plaintiff pre emptors have not discharged the burden which rested upon them of proving that the gift deed was not what it purported to be, i.e. a deed of sale and not a deed of gift ..... I would further hold that the vendeea did not become owners of the property covered by the sale deed which was registered on the same day but a little later by virtue of that deed. The position, therefore, is that at the time the deed of sale was executed, the vendees were co sharers in the village."

56. Under these circumstances the following two points have been stated for my opinion :

> "(a) Whether the deed of gift dated 22-6-1943 was not intended to operate as a deed of gift at all but was, in point of fact, a sale, the price of the 10 biswas comprised in it having been taken into consideration in fixing the amount of sale consideration of Rs. 23,000?
>
> (b) Whether the plaintiff pre-emptors have, in the light of the principles laid down in Shiam Sunder Lal v. Sarmadi Begam, A. I. R. (27) 1940 All. 171, and Randhir Singh v. Randhir Singh, 1937 All. L. J. 743, discharged the burden which rested upon them of proving that the gift deed was not what it purported to be, i.e., a deed of sale and not a deed of gift? If as or not, what is its effect?"

57. I agree with brother Sapru that it is permissible to resort to a device, if it is not illegal, to defeat a claim for pre-emption. I would, how-ever, like to formulate the rule differently, for the rule, so formulated, appears to favour evasion and has a look of being an unjust rule, whereas, in fact, it is not a rule of this kind, for the rate permits neither evasion nor any unjust encroachment on the right of others. It only permits a proposed vendee to improve his position vis-a-vis the likely pre emptors by acquiring a status equal or superior to theirs. He may do so by acquiring property in the village,

mahal or the sub-division of the mahal, which he intends to purchase, by a transaction which is not liable to pre-emption. Exchange and gift are two such transactions which are most frequently resorted to.

58. Whenever a proposed vendee, before purchasing the property, acquires a small bit of it by exchange, the only matter that requires investigation is, whether the transaction of exchange is a genuine transaction or only sham and bogus, for sometimes without any intention of conveying any title to the properties purported to be conveyed, the parties to a deed of exchange only make a pretence and show of having conveyed them. In such a case, each party to the deed remains in possession and continues to exercise acts of dominion over the property, which he purports to convey. The document in such a case remains inoperative and the transaction is, what is known as a mere 'paper transaction' or a sham or bogus transaction. As already stated, in such a case the only question that calls for determination is, whether the parties did, in fact, intend to convey the properties which they had purported to convey, for if the intention be there, the deed of exchange would convey a perfectly good title, against which a claim for pre-emption would be of no avail.

59. Randhir Singh v. Randhir Singh, 1937 ALL. L. J. 743 provides an instance of this kind. As held by this Court in that case, it is immaterial in such a case that the exchange and the sale form part and parcel of the same transaction and that the exchange would not have been made if the sale was not to be effected; and as pointed out by the learned Judges.

> "Reading Sections 54 and 118, T. P. Act, there can be no doubt, that where a party not only pays a cash consideration but also gives some property in addition, in lieu of property acquired by him, the transaction is not a Bale within the meaning of Section 54 but is an exchange within the meaning of Section 118."

In a case like this, if the transaction be deemed to consist of two transactions, one of them, namely, the prior one, remains a transaction of exchange, not liable to be pre-empted; and if the entire transaction be regarded to be a single indivisible transaction, it, nevertheless, remains a transaction of exchange for the reasons set out in the above quotation. In such a case, the only way in which a pre-emptor can get rid of the obstacle created by the transaction of exchange is by proving that the transaction of exchange was not intended to be effective and is, in reality, sham or bogus.

60. I do not consider that Randhir Singh's case (1937 ALL. L. J. 743) is an authority for the proposition that a Court is not entitled to consider the combined legal effect of the two transactions, if they are so inter-related, in fact, as to form part of a transaction which can be treated to be a single transaction, although this case is an authority for the proposition, that if the intention of the parties be to exchange small bits of properties, even though with the avowed object of defeating a claim for pre-emption, the transaction will not cease to be an exchange merely because it defeats a right of pre-emption. 61. Where an intending vendee acquires some little property by gift from a person other than the intending vendor, in order to acquire a statue equal or superior to that of likely pre emptors, as in Shiam Sunder Lal v. Sarmadi Begam, A. I. E. (27) 1940 ALL. 171, to meet a claim for pre emption, the plaintiff-pre-emptor can succeed in his suit only if he can prove that the ostensible gift is sham and bogus or that it is, in fact; a sale. He can establish that the gift is sham or bogus

either by showing that the donor did not intend to give effect to it and went through a paper transaction only, or by showing that the property purported to be conveyed by the gift deed does not exist or does not belong to the donor. He can establish that the ostensible gift is, in reality, a sale, by proving that a price was paid for the property conveyed by the ostensible gift deed, although it has not been mentioned in the deed of transfer and a false recital has been inserted in it with a view to screen the real nature of the transaction. It is not possible to contend in such a case, that the ostensible gift is in reality, a sale, on the ground that the gift and the sale form part and parcel of one indivisible transaction and that they together amount to sale, for whatever be the motive of the donor in such a case, the transfer by him cannot be treated to be a sale, for he receives no money compensation for the property conveyed by him.

62. Where, however, the intending vendee acquires property by an ostensible gift deed from the intending vendor under similar circumstances, the position is somewhat altered. With great respect to my learned brother Sapru, I find myself unable to concur in his opinion, that in such a case also the intention of the ostensible donor or of the parties to the transaction is, the sole determining factor. The legal effect of a transaction cannot always be controlled by the intention of the parties. Where property is transferred for a money consideration, the transaction cannot be treated to be a gift and not to be a sale merely because the transferor or the parties intended it to be a gift and not a sale.

63. To give a concrete illustration, if A, desiring to acquire some property from B, should make a gift in favour of B of the money for which B is willing to part with the property, and B should, in return of the gift in his favour, convey the property to A by means of a gift deed, the transaction, in the eye of law, would nevertheless be one transaction of sale and not two transactions of mutual gift, even though the parties might have so intended. In my opinion, it makes no difference when the transaction is not carried through in this exact form, but instead of the whole property being conveyed by means of a gift deed, only a portion of it is so conveyed and the rest of it is conveyed by a sale deed and instead of a gift being made of the money, it is shown as consideration for the sale of that portion of the property only which is mentioned in the sale deed. In all such cases, it is the substance of the transaction, and not the garb in which it is clothed, that really matters. A Court of law should not be deceived by the garb but should penetrate through it and having discovered the reality, give effect to the reality so discovered.

64. I desire to make it clear that I do not hold, that in no case is it possible for an intending purchaser to acquire some little property from an intending vendor by means of a gift deed, in order to avoid pre-emption, for, it may be possible to conceive of cases where a gift made with such an object would not become a sale; but I do hold, that where one party only pays money and the other party conveys certain property on receipt of money consideration and that that other party would have conveyed no portion of the property if the entire amount of money agreed to be paid had not been paid, the entire transaction amounts, in law, to one indivisible transaction of sale, in whatever form the transfer may be made; and it makes no difference that a portion of the property is conveyed by a gift deed and the rest of it by a deed of sale. In such a case, the payment of the money is the consideration for the transfer of the entire property covered by both the deeds, for the obstensible donor would not have conveyed the property mentioned in the ostensible gift deed if the

entire sum agreed upon had not been paid to him, although in the form of consideration for that part of the property only which is mentioned in the sale deed.

65. To hold otherwise will result in recognising something which is not a mere legitimate device to defeat the claim of certain pre empbors, but which is a fraud on the law of pre-emption itself and which will completely abrogate it, for a vendor loses nothing by conveying a portion of the property, intended to be transferred, by a gift deed so long as he gets the desired price for the entire property.

66. So far as the present case is concerned, I am fully satisfied from the statement of Har Narain that the two ostensible transactions of gift and sale amount, in law, to one indivisible transaction of sale. Har Narain is a witness fort the defendants themselves. He is not only one of the executants of the sale deed, but he is also the person who carried out all the negotiations on behalf of the vendors. I have, therefore, no reason to doubt the veracity of his statement so far as it is in favour of the plaintiffs. I have already quoted in an earlier part of this judgment, the relevant extracts from his deposition, from 'which it is proved beyond doubt that the defendants-transferors were not prepared to part with any part of the property mentioned in the two-deeds of transfer, unless they were paid a sum of Rs. 23,000.

67. Of course, Har Narain states, that he had asked the vendees to settle the price of the property after leaving out of account property worth about Rs. 100 of which a gift would be made in favour of the vendees. He does not, however, say that the vendees would have been required to pay anything more if the property conveyed by the gift deed had been included in the sale deed and no separate document of conveyance had to be executed to avoid pre-emption. He admits that:

> "I was not ready to execute a deed of gift unless the sale deed was to be executed. I wanted to dispose of the property of Mathurapur in one lot," and further that, "I did not get the gift deed registered at once fearing that if Hari Singh and his party would back cut from the sale transaction, the gifted property would go out of our possession."

68. It is thus evident, that the conveyance of the property, mentioned in the ostensible gift deed, was dependent on the transferees paying to the transferors a sum of Rs. 23,000 ostensibly for the property to be mentioned in the gale deed only, that the transactions were not to be dissociated from each other in any way, that the whole property of Mathurapur was to be conveyed is one lob. In substance, the transaction, therefore, was one indivisible transaction in which the transferees were to pay a sum of Rs. 23,000 in all to the transferors and the transferors were to convey their entire property in village Mathurapur in consideration of that payment. Such a transaction amounts, in law, to a transaction of sale and not to two transactions, one of gift and the other of sale, whatever the intention of the parties may be and in whatever form the transaction may be clothed.

69. My learned brother Sapru has laid great emphasis on burden of proof in this case. I agree generally with him that initially the burden of proof lay upon the plaintiffs to prove, that the ostensible transaction of gift is really a transaction of sale, but as observed by their Lordships of the Judicial Committee in Yellappa Ramappa, v. Tippanna, 1929 ALL. L. J. 4:

> "In any case onus protandi applies to a situation in which the mind of the Judge determining the suit is left in doubt as the point on which side the balance should fall in forming a conclusion. It does happen that as a case proceeds the onus may shift from time to time. There never is any duty upon the part of the Judge to be blind to facts established before him. . . .. "

70. On the facts established in this case, unless I choose to be blind to them, I have no doubt that the balance falls in favour of the plaintiffs and even if it be assumed that the facts established in the case do not put the matter beyond doubt, I consider that after Har Narain's statement the onus had definitely shifted on to the shoulders of the defendants and that they have failed to discharge it.

71. It was argued before the Bench that the ostensible gift is, in fact, not a gift, because it is not a transfer made without consideration, even though it might have been made without any money consideration having been received for it. My learned brother Sapru has discussed at considerable length the meaning of the term 'consideration' in that connection and has endeavoured to show that 'consideration' is something different from 'motive'. It seems to me that it is not necessary to enter into this question for the decision of this appeal, which depends upon, whether the document dated 22-6-1943, does or does not re-present a transaction of sale, and not upon whether it does or does not represent a transaction of gift, for if it does not represent a transaction of sale, the transaction evidenced by it is not pre-emptible even though it may not amount to a transaction of gift.

72. My opinion on the first point is that the ostensible gift and sale together constitute but one transaction of sale, evidenced by two documents, one deed of gift and the other a sale deed, and that, for this reason, the deed of gift, dated 22-6-1943, even though it might have been intend-ed to operate as a deed of gift, amounts, in law, to a sale deed. I am further of opinion that the whole property was intended to be conveyed by the defendants transferors to the defendants transferees on payment of Rs. 23,000 to the defendants transferors, and that, therefore, the value of ten biswas of the property was not taken into consideration separately but that this ten biswas property was taken into consideration by the parties when the sale consideration of Rs. 23,000 was fixed.

73. So far as the second point is concerned, I have discussed the case of Randhir Singh v. Randhir Singh, 1937 ALL. L. J. 743 in some detail, and I have pointed out that there is nothing in that case to indicate that a Court is precluded from going behind the form in which a transaction is garbed and from ascertaining the substance and real nature of the transaction. I have, however, failed to discover in Shiam Sunder Lal v. Sarmadi Regain, A. I. R. (27) 1940 ALL. 171 any principle guiding the decision of this case, escept that it may be supposed that Shiam Sunder Lal's case implicitly decides, that the burden of proof lies upon the plaintiff pre-emptors to establish that an ostensible transaction of gift is not a gift in reality. Keeping in view what has been said in these two cases, I am of opinion that the facts established in this case leave no room for doubt that the deed of gift does not evidence a transaction of gift, but the con veyances purporting to have been made by means of the two documents in suit, in substance and reality, amount to one transaction of sale, for a consideration of Rs. 23,000.

74. Let the papers is laid before the referring Bench with this opinion.

Sapru, J.

75. On the points on which there was difference of opinion between us, the opinion of Seth J., to whom this case was referred by the learned Chief Justice has now arrived. In accordance with that opinion, we dismiss this appeal with costs and affirm, the judgment and decree of the trial Court.