PRIVY COUNCIL.

P. C.* 1930 May, 1.

ABDUL RAHMAN KHAN (PLAINTIFF) *v.* PARSOTAM DAS AND OTHERS (DEFENDANTS).

[On Appeal from the Chief Court of Oudh.]

Pre-emption — Limitation — Hiba-bil-ewaz *— Alleged disguised sale—Fraudulent concealment—Oudh Laws Act (XVIII of* 1876), *chapter* 2*—Indian Limitation Act (IX of* 1908), *section* 18; *schedule I, article* 10.

By a registered deed of *hiba-bil-ewaz*, dated April 25, 1919, a Muhammadan transferred a village to respondents Nos. 2 to 6, who with their father, respondent No. 1, were members of a joint Hindu family. The deed stated that respondent No. 1 was an old friend of the donor who had provided him with money for litigation, and that the transfer was a gift "in consideration of favours, and kind treatment aforesaid, and of rights of friendship". Two days later respondent No. 1 gave the donor a receipt for Rs. 25,000. Respondents Nos. 2 to 6 took possession. In September, 1925, the appellant sued claiming under the Oudh Laws Act, 1876, to pre-empt the village for Rs. 25,000. He contended that the transaction was in reality a sale for that sum, and that there had been a fraudulent concealment within section 18 of the Indian Limitation Act, 1908, so that the period of one year prescribed by schedule I, article 10 did not begin until the fraud became known to him, which he alleged was in June, 1925.

Held, that it was not necessary to decide whether (1) the Chief Court had rightly held that no right of pre-emption arose, or (2) whether there had been a fraudulent concealment within section 18, because the appellant became aware in 1919 of the only material fact, namely the passing of the Rs. 25,000, and consequently the suit was barred by article 10 in any case.

A deed of *hiba-bil-ewaz* may fall or not fall within the pre-emption provisions of the Oudh Laws Act, 1876.

Decree of the Chief Court affirmed on different grounds.

Present: LORD THANKERTON, Sir GEORGE LOWNDES and Sir BINOD MITTER.

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APPEAL (No. 24 of 1924) from a decree of the Chief Court of Oudh (August 30, 1927) reversing a decree of the Subordinate Judge of Bahraich (November 30, 1926).

The appellant, on September 12, 1925, brought a suit against the respondents claiming under the Oudh Laws Act, 1876, chapter II, to pre-empt the village on payment of Rs. 25,000. He contended by his plaint that a transfer to respondents Nos. 2 to 6 effected by a deed of *hiba-bil-ewaz*, dated April 25, 1919, was in reality a sale and that accordingly a right of pre-emption arose under the above Act; further, that there had been a fraudulent concealment within section 18 of the Indian Limitation Act, 1908, and that he first knew of the fraud only in June, 1925, and that therefore the suit was not barred by schedule I, article 10.

The material facts appear from the judgment of the Judicial Committee.

The Subordinate Judge made a decree for possession upon payment of Rs. 25,000; he held that the transaction was a sale, and that the suit was not barred.

On appeal to the Chief Court the suit was dismissed. The learned Judges (STUART, C. J. and RAZA, J.) said by their judgment that the deed complied with all the conditions of a *hiba-bil-ewaz* under Muhammadan law. It had been held in *Lal Bibi* v. *Masum Ali Khan* (1) that a deed of gift in consideration of useful services rendered in the past created a binding *hiba-bil-ewaz*. Formerly, they said, the courts in Oudh had taken two differing views in pre-emption cases. One view was that if the court arrived at the conclusion that a transfer was made with intent to avoid pre-emption it should be considered a sale. The other view was that the question should depend upon the construction of the deed effecting the transfer. The latter view was expressed in *Majida Bibi* v. *Malik Fazl Karim* (2), and had been consistently followed since the institution of the Chief Court; they

(1) (1916) 20 Oudh Cases 41. (2) (1912) 16 Oudh Cases 9, 18.

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referred to *Shamshad Ali Khan* v. *Dharam Singh* (1), and four cases reported at 4 Oudh W.N. 137, 231, 265, 400. They said in conclusion "we have examined the document and find that it is a *hiba-bil-ewaz*, not a deed of sale. We have every reason to suppose that the transaction was thrown into that shape in order to prevent the exercise of a right of pre-emption, but we consider that the parties were at full liberty to take that course, and that it has the effect which they desire."

1930. March 10, 11, 12. *DeGruyther, K. C.* and *Abdul Majid*, for the appellant:—If the transaction of 1919 was in reality a sale a right of pre-emption arose under the Oudh Laws Act, 1876, chapter II. The terms of the instrument by which the transfer was effected cannot be conclusive as to the true nature of the transaction. The Chief Court erred in treating the unilateral deed as though it were an agreement between parties. In *Mohammad Ishaq* v. *Fakim-un-nissa* (2) decided by the Chief Court after the present case, it was rightly held that a disguised sale can be exposed, the decision in the present case being distinguished. The true inference is that there was an antecedent agreement as to the further advance and the giving of the receipt, and that the Rs. 25,000 was the sole consideration for the transfer. If that was so the transaction was in reality a sale. In the judgment of the Board delivered by SYED AMEER ALI in *Hitendra Singh* v. *Maharaja of Darbhanga* (3) it was stated that "under Muhammadan law a transfer by way of *hiba-bil-ewaz* is treated as a sale and not as a gift"; see also his "Muhammadan Law," 4th edn., p. 162, 163. It is conceded that those statements were not in relation to a right of pre-emption under the Act of 1876. The suit was not barred by limitation. Knowledge of the deed itself did not give the appellant a right of pre-emption as no price was stated. Price in section 10 of the Act of 1876 means money only: Shephard

(1) (1925) 29 Oudh Cases, 161.
(2) (1928) 5 O. W. N., 825.
(3) (1928) I. L. R., 7 Pat., 500, 508; L. R., 55 I. A., 197, 205.

and Brown on Transfer of Property Act, 7th edn., p. 175, and cases there cited. Concealment of the giving of the receipt was a fraudulent concealment within section 18 of the Indian Limitation Act, 1908. Therefore the period of one year prescribed by schedule I, article 10 did not begin to run until the appellant knew of the fraud, and that was only in June, 1925. Under section 18 time does not run until the fraud is actually known; it is not sufficient that the true facts might have been discovered earlier: *Rhimbhoy Hubbibhoy* v. *Turner* (1), *Biman Chandra Datta* v. *Nath Ghose* (2).

Dunne, K. C. and *Parikh*, for the respondents. The donees under the deed have been in possession since 1919. No facts have been proved showing a right of suit in 1925. The deed was a valid and binding *hiba-bil-ewaz* in Muhammadan law: *Rahim Bakhsh* v. *Muhammad Hasan* (3).—It was not proved that the transaction was a disguised sale, or that the Rs. 25,000 was the sole consideration.—The value of the village appears to have been more than Rs. 25,000. There was no fraud proved; the whole facts were openly stated in an earlier suit between the donor and donees. In any case the suit is barred by the Indian Limitation Act, 1908, schedule I, article 10, as the evidence shows that the appellant knew in 1919 or early in 1920 all the facts he now relies on.

DeGruyther, K.C., replied.

May 1. The judgment of their Lordships was delivered by Lord THANKERTON :—

By deed dated the 25th of April, 1919, which in form was a deed of *hiba-bil-ewaz*, Syed Ali Haidar transferred to the sons of respondent No. 1, Lala Parsotam Das, a village called Mundka or Murka. The deed was registered on the 9th of May, 1919, and the donees obtained possession on the 17th of October, 1919. The

(1) (1892) I. L. R., 17 Bom., 341; L. R., 20 I. A., 1.
(2) (1922) I. L. R., 49 Calc., 886. (3) (1888) I. L. R., 11 All., 1, 6, 7.

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respondent No. 1 and his sons are members of a joint Hindu family.

The appellant brought the present suit on the 12th of September, 1925, against the whole members of the joint family, claiming possession of the village of Mundka by right of pre-emption.

Three questions were debated before their Lordships, viz. :—(1) Whether the transaction was of such a nature as would fall within the provisions of chapter II of the Oudh Laws Act XVIII of 1876, whereby a right of pre-emption would vest in the appellant; (2) whether, assuming the right to pre-empt, the true nature of the transaction was fraudulently concealed so as to prevent the appellant from knowing that his right of pre-emption had arisen, thus deferring the commencement of the limitation period of one year prescribed by article 10 of schedule I of the Indian Limitation Act of 1908, to the time when the fraud first became known to the appellant, in virtue of section 18 of the Act, and (3) if so, whether the appellant had come to know of such fraud at a date less than one year prior to the date of suit.

In order to succeed in his claim the appellant requires a favourable decision on each of these three questions. The Trial Judge found in his favour on all three heads. On appeal, the Chief Court of Oudh found against him on the first head, and found it unnecessary to consider the other two.

The case was fully argued before their Lordships, and while, in view of the opinion formed by their Lordships on the third question, it becomes unnecessary to pronounce a decision on the first and second questions, a short description of some of the circumstances giving rise to these questions is a necessary preliminary to decision of the third question.

Respondent No. 1, Lala Parsotam Das, is a Hindu money-lender in Lucknow, and about 1916 became acquainted with Ali Haider, a Muhammadan, who was

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then resident in Lucknow. In August, 1918, Ali Haider became entitled by the death of a lady called Taiba Begam to certain property in the Bahraich district, of which the village Mundka formed part. His succession was disputed, but, after an appeal to the Commissioner and the Board of Revenue, he obtained a decision in his favour. Thereafter he executed the deed of gift on the 25th of April, 1919.

The deed of gift proceeded on the narrative of the intimate relations between Ali Haider and the respondent Lala Parsotam Das, of the large sum of money that the latter had provided towards the expenses of the succession proceedings and other favours and kindness, and "in consideration of favours and kind treatment aforesaid and of rights of friendship" made "a gift for consideration," in favour of the said respondent's sons. On the 11th of May, 1919, two days after the registration of the deed of gift, Ali Haider granted a receipt to the said respondent for a total amount of Rs. 25,000 made up of (*a*) principal and interest on pronotes Rs. 19,572, (*b*) expenses and purchase of stamp Rs. 1,100, and (*c*) a further advance of Rs. 4,328. It is admitted that head (*a*) represents the "large sums of money" which "Lala Parsotam Das gave me" referred to in the narrative of the deed of gift, that Ali Haider was under obligation to repay them—that obligation being satisfied by the deed of gift—and that the further advance in head (*c*) was part of the consideration for that deed.

The contention of the appellant was that the transaction was in substance one of sale of the village for Rs. 25,000, the price being provided by the discharge of the sums contained in the receipt, that the deed of gift was at first drafted as a contract of sale, but was redrafted as a deed of gift for the purpose of avoiding pre-emption, that the narrative of friendship and favours was untrue and was solely inserted so as to conceal—as it did—the monetary consideration or price of Rs. 25,000,

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which constituted the sole consideration. While their Lordships must not be taken as expressing any view as to the soundness of the conclusions of the Chief Court of Oudh, they are of opinion that a deed of *hiba-bil-ewaz*, may either fall or not fall within the pre-emption provisions of the Oudh Laws Act.

Accordingly, the only fact which the appellant, on his construction of the deed of gift, can claim to have been concealed from him was that Rs. 25,000 passed as the sole consideration for the deed of gift.

Assuming that contention to be well founded, counsel for the respondents admitted that such concealment would be fraudulent within the meaning of section 18 of the Limitation Act.

The appellant alleges that he first came to know of such fraud on the 28th of June, 1925—less than three months before the date of suit. The respondents, on the other hand, allege that the fact of the passing of the Rs. 25,000 was brought to the appellant's knowledge on five occasions during the years 1919 to 1922.

The learned Subordinate Judge, after dealing with the evidence as to each of these five occasions in detail, expresses his conclusion on them as follows :—

"The evidence led on behalf of the defendants to the effect that the plaintiff had knowledge of the real character of the deed in suit soon after its execution or, in any case, much earlier than the date on which he professes in the plaint to have acquired knowledge thereof, is extremely suspicious and cannot be believed. Besides, most of it, as shown above, is as improbable as ever. It cannot be believed, nor can it help the defendants. I, however, see no good reason to discredit the evidence of the plaintiff and his witness Pandit Budh Sagar, both of whom have, on the whole, given their evidence in a frank and straightforward manner and impressed me favourably."

It is obvious that this conclusion is mainly based on the improbability or incredibility of the respondents'

evidence, a view with which their Lordships are unable to agree, as they are of opinion that, taken by itself, there is nothing improbable or incredible in that evidence. Accordingly, the question is whether the respondents' evidence is effectively negatived by the plaintiffs evidence, which consists solely of the appellant's own evidence, for the evidence of the appellant's witness Pandit Budh Sagar has no relation to any of these earlier occasions except in so far as the appellant led him to believe in June, 1925, that he then learned for the first time of the Rs. 25,000 consideration.

Their Lordships find themselves unable to accept the appellant's evidence as to the first occasion, which respondent No. 1 places in July, 1919, and the appellant places at the end of 1919 or beginning of 1920.—From the other facts in the case, the former date appears to be the more correct. The statement of respondent No. 1 is that in July, 1919, he went to appellant's house, accompanied by Mata Prasad, who is now the latter's servant, and said :—

"Ali Haidar gave me possession, but he is now disturbing it. I gave him Rs. 25,000 for fighting the *taluqa* case, but he is quarrelling with me," that the appellant said, "Ali Haidar's conduct is ungentlemanly. You gave him money when nobody else would have given him a pice," that appellant further said, "If you will transfer one anna share in village Murka to me I will help you in maintaining your possession," that the witness then said, "I will not transfer any share in Murka to you because the property belongs to minors, but if you fix a reasonable sum I will pay it to you for obtaining your help," and that the appellant said, "If you grudge me one anna share, Lalaji, you will lose Rs. 25,000, and it will be difficult for you to maintain your possession."

The appellant admits the visit, but denies the presence of Mata Prasad, who was not called by him as a witness. He further denies any mention of the Rs. 25,000 consideration and any request for transfer of a one anna share. But the appellant admits that

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what the respondent No. 1 told him aroused his suspicions that the transaction was subject to pre-emption, that he neither was shown nor asked to see the deed of gift, and cannot remember whether he asked from defendant the reason of the gift. He further denies that he refused to intercede, and yet is unable to give any reason why he did not intercede with Ali Haidar as promised. His story is that, about a month later, he asked his pleader Mahesh Prasad to procure a copy of the deed of gift, and sent him with it to secure a legal opinion in Lucknow as to whether a suit of pre-emption could be brought, and that the opinion was adverse to such a suit. He admits that he paid no fee for the opinion and produces no corroborative evidence of this story. Their Lordships are unable to accept this evidence. The appellant was an honorary magistrate and lived within a mile of the village of Murka and was admittedly interested in the question of pre-emption. The gift was by a Muhammadan to a Hindu money-lender, and their Lordships cannot doubt that it was the mention of the Rs. 25,000 consideration that aroused the suspicions of the appellant as to pre-emption and, in the absence of corroborative evidence, they are not prepared to accept the appellant's story as to obtaining legal advice. The learned Sub-Judge appears to have thought that the appellant's long delay in bringing the present suit was incompatible with early knowledge by him of the true nature of the transaction in issue, but it may be sufficiently explained by the challenge of the deed of gift by Ali Haidar's sons, which was pending during the whole of this period, and in which the appellant was himself a witness for the plaintiffs.

If the defendants' evidence be accepted as regards the first occasion in July, 1919, that is sufficient to dispose of the appellant's case, but their Lordships would add that the appellant's evidence as to the occasion in 1921 in course of the suit to which his wife was a party

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is most unsatisfactory of itself and that they see no adequate reason for not accepting the evidence of Parbhu Dayal, an independent witness, as to the occasion in the autumn of 1919.

Their Lordships are therefore of opinion that the appellant became aware in 1919 of the only material fact, namely, the passing of the Rs. 25,000 as consideration for the deed of gift, even if it be assumed that this was the sole consideration of, and was concealed by, the deed of gift, that the suit is thereby statute-barred, and that the appeal should be dismissed with costs. Their Lordships will humbly advise His Majesty accordingly.

Solicitors for appellant: *Chapman-Walker* and *Shephard*.

Solicitors for respondents Nos. 1 to 6: *T. L. Wilson and Company*.

FULL BENCH.

Before Sir Louis Stuart, Knight, Chief Judge, Mr. Justice Wazir Hasan and Mr. Justice Muhammad Raza.

BACHCHA (DEFENDANT-APPELLANT) *v.* SETH JAMNA DAS AND OTHERS, PLAINTIFFS, AND ANOTHER, DEFENDANT, (RESPONDENTS)*.

1929 *July*, 22.

Tenant transferring scattered trees—Transferee, whether entitled to remove only timber or to enjoy the fruit so long as the trees stand.

Held, that unless a tenant having scattered trees in the village has a transferable right to the land on which the trees stand, even if he has a right to transfer the trees themselves, such transfer will not entitle his transferee to more than the timber of the trees.

Mohammad Akbar and another v. *Lachman Prasad* (1), and *Musammat Azamat-un-nisa* v. *Ganesh Prasad and others* (2), referred to.

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*Second Civil Appeal No. 428 of 1928, against the decree of Pandit Damodar Rao Kelkar, Subordinate Judge of Rae Bareli, dated the 24th of August, 1928, reversing the decree of Pandit Dwarka Prasad Shukla, Munsiff of Partabgarh, dated the 16th of February, 1928.

(1) (1927) 4 O. W. N., 970. (2) (1924) 1 O. W. N., 515.