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minority and his statement is one which we believe to be correct. In these circumstances the only sum which the plaintiff is entitled to recover is the sum of Rs.200 for which he made himself responsible in respect of the decree against his uncle. We set aside the decree of the lower Court and grant the plaintiff a decree for the recovery of Rs.200 from the defendant, with interest at 6 per cent. per annum from the 10th June, 1927, up to the date of realisation. To this extent only the appeal is accepted. The defendant will receive half his costs from the plaintiff in both the Courts.

P. S.

Appeal accepted in part.

APPELLATE CIVIL.

Before Addison and Beckett JJ.

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June 15.

BHAGWANA (DECEASED) AND OTHERS (DEFENDANTS) Appellants

versus

SHADI (DECEASED) AND OTHERS (PLAINTIFFS) Respondents.

Civil Appeal No. 2429 of 1928.

Indian Limitation Act, IX of 1908, section 18 : Fraud—Sale—disguised in form of mortgage—burden of proof—Pre-emption—Land sold to persons, some of whom had equal rights with plaintiff, and others no rights of pre-emption—Nature of contract—Pre-emptor—whether entitled to pre-empt.

Held, that where a suit is on the face of it barred, it is for the plaintiff to prove in the first instance the circumstances which would prevent the statute from having its ordinary effect. A plaintiff, who, in such circumstances, desires to invoke the aid of section 18, Indian Limitation Act, must establish that there has been fraud, and that, by means of such fraud, he has been kept from knowledge of his right to sue, or of the title whereon it is founded. Once this is

established the burden is shifted on to the other side to show that the plaintiff had knowledge of the transaction beyond the period of limitation. Such knowledge must be clear, and definite knowledge of the facts constituting the particular fraud, mere suggestions of fraud not amounting to such knowledge.

And, that it is a fraud on the pre-emptor within the meaning of section 18 to disguise a sale in the form of an ordinary mortgage.

Rahimbhoy Habibbhoy v. *Turner* (1), *Gordhan Dass* v. *Ahmed* (2), *Biman Chandra Datta* v. *Promotha Nath Ghose* (3), and *Abdul Rahman Khan* v. *Parshotam Das* (4), relied upon.

Jagdish v. *Man Singh* (5), and *Mihan Chand* v. *Ishar Das* (6), referred to.

Held further, that where land was sold to more persons than one, some of whom had an equal right of pre-emption with the plaintiff, while others had an inferior right, there being only one sale transaction which as regards the vendor was one and indivisible, the plaintiff was entitled to pre-empt the whole land.

Achhra v. *Labhu* (7), *Tota Ram* v. *Kundan* (8), and *Kesar Singh* v. *Punjab Singh* (9), followed.

First Appeal from the decree of Lala *Munshi Ram, Subordinate Judge, 1st Class, Delhi, dated the 8th May, 1928, decreeing the plaintiffs' suit with costs.*

MEHR CHAND MAHAJAN, for Appellants.

SHAMAIR CHAND and QABUL CHAND, for Respondents.

The judgment of the Court was delivered by—

ADDISON J.—On the 27th July, 1911, Ram Partap mortgaged 3/4ths of 66 *bighas* and 10 *biswansis* in favour of Roshan and Khimman in equal

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(1) (1893) I. L. R. 17 Bom. 341 (P.C.).
(2) 34 P. R. 1904.
(3) (1922) I. L. R. 49 Cal. 886 (F.B.).
(4) 1930 I. L. R. 5 Luck. 492 (P.C.).
(5) 100 P. R. 1895 (F.B.).
(6) (1931) I. L. R. 12 Lah. 488.
(7) 48 P. R. 1907.
(8) (1928) 112 I. C. 704.
(9) 66 P. R. 1896.

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shares—1/3rd, and Nihal and Bihal in equal shares—2/3rds. The amount of the mortgage was Rs.5,000, and the mortgage could not be redeemed for ten years. Power was given to the mortgagees to plant a garden, build houses, etc. and, on redemption, the cost of these improvements, together with interest at 6 per cent., had to be paid. On the 26th September, 1911, he sold the remaining 1/4th of the 66 *bighas* 10 *biswansis* in favour of Shadi and Tej Ram for Rs.1,800. On the 15th March, 1920, Ram Partap sold the equity of redemption of the 3/4ths to Tej Ram for Rs.10,800 of which Rs.5,000 were left with the vendee to redeem the mortgage. There was a clause in the sale deed that the vendee had to pay whatever was found to be due to the mortgagees.

On the 9th October, 1920, Tej Ram gave notice to the mortgagees that he wished to redeem the mortgage on payment of Rs.5,000, but was told by them that redemption was not possible as the mortgage transaction was in reality a sale, disguised as a mortgage, in order to defeat pre-emption. On the 7th July, 1921, he again gave notice of redemption, adding that he had redeemed Khimman's 1/6th share. Ultimately in 1921 Tej Ram instituted a suit for redemption against the mortgagees other than Khimman. The defendants pleaded that the transaction was a sale. On the 4th October, 1923, the suit was referred to arbitration. The arbitrators gave their award on the 13th February, 1924. They held that the transaction was in reality a sale and that the suit should be dismissed. Objections were taken before the Judge to this award. He upheld the award and granted a decree on the 18th May, 1925, in accordance therewith. Khimman's share was not incorporated in the decree as he was not sued. The Judge

added that he left the parties to bear their own costs as he considered that the defendants would have lost their case had there been no reference to arbitration.

Thereupon Shadi and Har Gyan instituted this suit on the 28th August, 1925, for pre-emption of the mortgaged land, on the ground that it was a sale which had been kept from their knowledge. They stated that they were co-sharers in the *patti* and were entitled to pre-empt and that the suit was within limitation by reason of section 18 of the Limitation Act. The suit was decreed with costs, on payment of Rs.5,000 by the 31st May, 1928, and it was also ordered that the plaintiffs should pay Rs.6,000 as the value of improvements before taking possession. Against this decision the defendants have appealed.

Only two grounds were argued before us. The first was that the suit was barred by time. In this connection it was first urged that there was no fraud within the meaning of section 18 of the Limitation Act. What was said was that the defendants were entitled to disguise their sale in the form of a mortgage and that it was open to the plaintiffs to have sued within one year of the original transaction to pre-empt the sale. It has been held in *Jagdish* v. *Man Singh* (1) and *Mihan Chand* v. *Ishar Das* (2), that a plaintiff can come into Court alleging that a mortgage is in reality a sale and that he is entitled to pre-empt the bargain. Although this is the case this does not mean that section 18 of the Limitation Act does not apply. That section runs as follows :—

" Where any person having a right to institute a suit has, by means of fraud, been kept from the knowledge of such right or of the title on which it is

(1) 100 P. R. 1895 (F.B.). (2) (1931) I. L. R. 12 Lah. 488.

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founded, the time limited for instituting a suit (*a*) against the person guilty of the fraud or accessory thereto, or (*b*) against any person claiming through him otherwise than in good faith and for a valuable consideration, shall be computed from the time when the fraud first became known to the person injuriously affected thereby."

The mortgage in the present case certainly had all the appearance of a mortgage and there was nothing to indicate that it was a sale and, therefore, there can be no question that the parties acted fraudulently in giving the transaction the shape of a mortgage. The plaintiffs were, therefore, entitled to compute limitation from the time when that fraud first became known to them.

The law on this question is not in doubt. Their Lordships of the Privy Council laid down in *Rahimbhoy Habibbhoy* v. *Charles Agnew Turner* (1) that, in order to make limitation operate when a fraud has been committed by one who has obtained property thereby, it is for him to show that the injured complainant has had clear and definite knowledge of the facts constituting the fraud at a time which is too remote for the suit to be brought. The suggestion of his having been defrauded did not amount to such knowledge as was required by section 18 of the Limitation Act. This burden was not discharged by proof of the fact that some hints and clues had reached the official assignee which might have led to such knowledge. The Chief Court of the Punjab held in *Gordhan Das* v. *Ahmad* (2) that where an original transaction is tainted by fraud, it lies on the party, against whom fraud is found, to prove that the

(1) (1893) I. L. R. 17 Bom. 841. (2) 34 P. R. 1904.

plaintiff had clear and definite knowledge of the fraud for more than the period of limitation allowed. A Full Bench of the Calcutta High Court in *Biman Chandra Datta* v. *Promotha Nath Ghose* (1) held that where the plaintiff had been kept from knowledge, by the defendant, of the circumstances constituting the fraud, the plaintiff could rely upon section 18, to escape from the bar of limitation. The true position is that, where a suit is on the face of it barred, it is for the plaintiff to prove in the first instance the circumstances which would prevent the statute from having its ordinary effect. A person, who, in such circumstances, desires to invoke the aid of section 18 must establish that there has been fraud, and that, by means of such fraud, he has been kept from the knowledge of his right to sue, or of the title whereon it is founded. Once this is established, the burden is shifted on to the other side to show that the plaintiff had knowledge of the transaction beyond the period of limitation. Such knowledge must be clear and definite knowledge of the facts constituting the particular fraud. The same subject came before the Privy Council in a case reported as *Abdul Rahman Khan* v. *Parshotam Das* (2).

In the case before us the plaintiffs have clearly established that there was fraud and that by means of this fraud they were kept from the knowledge of their right to sue and of the title whereon this right was founded. The burden is, therefore, upon the defendants to show that the plaintiffs had knowledge of the transaction beyond the period of limitation. Such knowledge must be clear and definite knowledge of the facts constituting the particular fraud. In this case

(1) (1922) I. L. R. 49 Cal. 886 (F.B.). (2) (1930) I. L. R. 5 Luck. 492 (P.C.).

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the fraud was that a sale was disguised in the form of an ordinary mortgage.

There is good evidence that the plaintiff-pre-emptors came to know that the defence set up in Tej Ram's redemption suit was that the transaction was in reality a sale. They were both present when the arbitrators were hearing evidence in the village to this effect. The contention, however, of Tej Ram was that the transaction was a mortgage as it certainly appeared to be. It was argued on behalf of the appellants that it must be held that the plaintiffs had knowledge of the fact that it was a sale during the arbitration proceedings in 1923 or early in 1924 and, therefore, this suit, having been instituted on the 28th August, 1925, was barred by time. On the other side it was contended that it could not be said that the plaintiffs had knowledge that the transaction was a sale until the Court upheld the award on the 18th May, 1925, in which case the suit would be well within limitation. On the authorities it is clear that mere suggestions of fraud do not amount to such knowledge as is required by section 18 of the Indian Limitation Act and that the knowledge must be clear and definite knowledge of the facts constituting the particular fraud. The Court which upheld the award did not allow costs on the ground that the award appeared to go against the merits of the case. All that the plaintiffs knew was that one side was contending that it was a sale while the other side was contending that it was a mortgage as it certainly appeared to be. The allegation that it was a sale might easily have been the usual false defence so commonly set up in this country and, in our opinion, knowledge of this allegation did not amount to clear and definite knowledge of the facts constituting the fraud in question. That

knowledge did not become definite and clear till the award was upheld and the suit of Tej Ram for redemption dismissed. The suit is thus within limitation.

The trial Judge held that as Nihal and Bihal also held land in the *patti* the plaintiffs had not a superior claim to pre-empt compared with those two persons. If Nihal and Bihal, therefore, had been the sole purchasers the plaintiffs' suit for pre-emption must have failed. As, however, they associated with themselves two persons in the sale who had no right to pre-empt, namely, Roshan and Khimman, the trial Judge held that the plaintiffs were entitled to pre-empt the whole sale. There is no doubt that this is the view consistently taken by this Court. In *Achhra* v. *Labhu* (1), a Division Bench of the Punjab Chief Court held that, if a purchaser having an equal right of pre-emption associates with himself in the purchase a person with rights inferior to those of the pre-emptor, he is not entitled to resist the claim of such pre-emptor to enforce his rights even as to his share of the purchase. There are many other rulings but it is only necessary to refer to one of the latest, namely, *Tota Ram* v. *Kundan* (2). These decisions are based on another Division Bench judgment, *Kasar Singh* v. *Punjab Singh* (3). It was held there that in the case of a sale to various persons, the contract of sale as regards the vendor was one and indivisible, the specification of the shares in the sale-deed being merely an arrangement among the purchasers *inter se*, which did not affect the vendor, who had contracted to take the purchase money for the whole land, and could not have been compelled to sell to one or other of the

(1) 48 P. R. 1907. (2) (1928) 112 I. C. 704.
(3) 66 P. R. 1896.

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vendors his specified share on payment of a proportionate share of the purchase-money. With great respect this seems to be the correct view. There is only the one sale transaction which is indivisible and the plaintiffs are, therefore, entitled to pre-empt. No other point was argued.

For the reasons given, the appeal is dismissed with costs.

P. S.

Appeal dismissed.

MISCELLANEOUS CIVIL.

Before Addison and Sale JJ.

1934

June 22.

RULIA MAL - RAUNAK RAM (ASSESSEES) Petitioners

versus

COMMISSIONER OF INCOME TAX Respondent.

Civil Miscellaneous No. 351 of 1933.

Indian Income-tax Act, XI of 1922, section 13, proviso : Complete accounts not produced — whether Income Tax Officer can proceed to estimate profits — Bad debts — decision of — whether rests with Income Tax Officer.

Held, that the Income Tax Officer is the sole arbiter as to whether it is possible to estimate the income, profit and gains of the assessee from the method of accountancy employed by the latter, and when he finds as a fact on the evidence that complete accounts had not been produced before him, he can proceed to estimate the income under the *proviso* to section 13 of the Act.

Gokal Chand - Jagan Nath v. *Commissioner of Income Tax* (1) followed.

Held also, that the questions whether a debt is a bad debt and when it becomes bad, are questions of fact to be determined in case of dispute, not by the assessee but by

(1) (1926) 2 I. T. C. 180.