

1936
 FEROCZE DIN
 v.
 MOHAMMAD
 DIN.

Court fees on that amount. The case will be posted for hearing before us on that day and the appellant has been warned that the appeal will be dismissed if Court fees are not paid by then.

P. S.

Order accordingly.

APPELLATE CIVIL.

Before Addison and Din Mohammad JJ.

1936
 Nov. 2.

GANESHA (VENDEE) (DEFENDANT) Appellant

versus

SADIQ (PRE-EMPTOR) (PLAINTIFF) } Respondents.
 CHIRAGH ALI (VENDOR) (DEFT.) }

Civil Appeal No. 438 of 1936.

Indian Limitation Act, IX of 1908, Section 18 — Pre-emption Suit — in respect of a sale — disguised as a transfer of occupancy rights — and kept from the knowledge of plaintiff by fraud — Limitation.

The plaintiff sued in 1934 for pre-emption in respect of a sale which was found to have been really made in 1930, but disguised as a transfer of occupancy rights, and followed in 1933 by a mutation of the proprietary rights in consideration of the *nazrana* originally paid for the occupancy rights and no more. Plaintiff alleged that he had no knowledge of the sale till this mutation was effected and brought his suit within one year from that date.

Held, that although the sale had actually taken place in 1930 the suit was within time, as plaintiff had been kept in ignorance of it till 1933 by the fraud of the defendant-vendee within the meaning of section 18 of the Indian Limitation Act.

Second appeal from the decree of Mr. S. M. Haq, District Judge, Hissar, dated 7th January, 1936, affirming that of Sheikh Abdul Rashid. Subordinate:

Judge, 3rd Class, Hissar, dated 9th May, 1935, awarding the plaintiff, possession by pre-emption of the land in dispute on payment of Rs.339.

1936
—
GANESHA
v.
SADIQ.

N. C. PANDIT, for appellant.

L. M. DATTA, for (Plaintiff) Respondent.

[The case was heard originally by Jai Lal J. and referred by him to a Division Bench.]

The judgment of the Court was delivered by—

DIN MOHAMMAD J.—This case has been referred to us by Jai Lal J. before whom it originally came on for hearing.

The facts are these. One Chiragh Ali successfully pre-empted the sale of village Nadhori some time in 1930, but as he himself was not in a position to pay the entire sale price at which the suit had been decreed in his favour, he raised the necessary sum by selling small parcels of land in favour of sundry persons. He however did not describe the transactions as sales before the revenue officers but professed to have created occupancy rights in favour of the purchasers. One such purchaser was the appellant Ganesha who was already in possession of the land sold to him as a non-occupancy tenant. By virtue of the transaction that took place in 1930, he was entered as an occupancy tenant like others. On the 9th June, 1933, a fresh mutation was attested in his favour by which the land in his possession was sold to him by Chiragh Ali. No consideration passed on that date, but reference was made to Chiragh Ali's having already received a sum of Rs.339 by way of *nazrana* at the time when he created the occupancy rights in favour of the vendee.

On the 6th June, 1934, the respondent Sadiq instituted the suit out of which this appeal has arisen for pre-emption of the said sale in favour of Ganesha.

1936

GANESHA
v.
SADIQ.

He alleged among other things, that the original transaction by which Ganesha had been let into the possession of this land as an occupancy tenant was a colourable transaction and that its true nature had come to light only on the 9th June, 1933. Not admitting the status of Ganesha as an occupancy tenant by virtue of the transaction of 1930, Sadiq claimed a superior right of pre-emption.

Ganesha resisted the suit on various grounds. Among other things, he pleaded that, inasmuch as the sale in his favour had taken place in 1930, the present suit was time-barred. He further contended in the alternative that if the transaction that had taken place on the 9th June, 1933, be treated as a sale and hence liable to pre-emption, even then the plaintiff could not succeed as being merely an occupancy tenant, the plaintiff had no preferential right over him.

Both the Courts below came to the conclusion that the original transaction of 1930 was not a genuine transaction and the real nature of that transaction came to the knowledge of the plaintiff only on the 9th June, 1933. They, consequently, held that the plaintiff's suit was not time-barred and as no occupancy rights had been created in Ganesha's favour in 1930, the plaintiff's right was superior to Ganesha's.

On second appeal, Jai Lal J. agreed with the Courts below on the point of limitation but referred the case to a Division Bench on the ground that the issue had been complicated by an apparent clash between two fundamental principles of law and that if, on the one hand, a party was entitled to have recourse to any legitimate device to defeat the claim of pre-emptors, on the other, a party was not entitled to take advantage of his own fraud.

1936

GANESHA

v.

SADIQ.

In our view, however, on the facts of the present case, the questions envisaged by the learned Judge do not arise, inasmuch as it has been rightly held by the Courts below that the transaction which took place in 1930, did not confer on Ganesha the status of an occupancy tenant but was an out and out sale, the nature of which was disclosed only in June 1933. Chiragh Ali has clearly admitted that the transaction of 1930 was a sale and that he did not characterize it as such, as he was afraid of losing his own case for pre-emption. Ganesha, too, has practically conceded this aspect of the case. This conclusion further gains support from the fact that on the date when the sale is alleged to have taken place, no consideration passed. Ganesha's version of the affair that the transaction of 1933 amounted to a gift in his favour, does not stand the test of reason. This being so, the only point that falls for determination in the present case is whether the plaintiff was aware of the fraud at the time when it was committed. If this knowledge is brought home to the plaintiff, his claim must fail, as in that case time will run against him from that date. If, on the other hand, no such knowledge is established, his suit must succeed, as the transfer being a sale from its very inception, Ganesha as a non-occupancy tenant will not be in a position to resist the plaintiff's claim.

Both the trial Court and the District Judge have found that the plaintiff was not aware of the fraud that was perpetrated by Chiragh Ali and Ganesha in 1930, and this being a finding of fact cannot be disturbed in second appeal. Section 18 of the Indian Limitation Act lays down that "where any person having a right to institute a suit * * * * has, by means, of fraud, been kept from the knowledge of such

1936

GANESHA
v.
SADIQ.

right * * * the time limited for instituting a suit * * * against the person guilty of the fraud or accessory thereto * * shall be computed from the time when the fraud first became known to the person injuriously affected thereby." The plaintiff's suit being within time and his right being superior to that of Ganesha, no further question arises in this case.

We accordingly affirm the decision of the Courts below and dismiss this appeal with costs.

A. N. C.

Appeal dismissed.

APPELLATE CRIMINAL.

Before Addison and Din Mohammad JJ.

IMAM BAKHSH—Appellant

versus

THE CROWN—Respondent.

Criminal Appeal No. 1931 of 1936.

Indian Penal Code, Act XLV of 1860, Section 300, Exception 1, Proviso — Grave and sudden provocation — not sought — what amounts to.

The appellant was informed by K. of an intimacy between his sister *Mst.* Kauran and Shera but he was not convinced. On the night in question K. saw Shera entering the *kotha* of *Mst.* Kauran at midnight and, having quietly locked the door from outside, went and informed the appellant, who picked up an axe and went straight to the *kotha* of *Mst.* Kauran. Appellant asked K. for the key of the door but the latter refused to give it to him, saying that all he should do was to inform the Police. Appellant then broke open the lock with his axe and killed both his sister and Shera, who were inside the *kotha*.

Held, that the provocation was not sudden and was sought by the accused himself and, therefore, Exception 1 to section 300 of the Indian Penal Code did not apply to the present case.

Mehra Mistak v. Emperor (1), relied upon.

1936

Nov. 10.