APPELLATE CIVIL.

Before Addison and Ram Lall JJ.

1939

Feb. 8.

BAHAWAL (DEFENDANT) Appellant,

versus

AMIR (PLAINTIFF)
MST. BAHISHTAN (DEFENDANT) } Respondents.

Regular Second Appeal No. 1199 of 1933.

Pre-emption — Suit for possession of land — transfer of land in favour of vendee in lieu of money expended and service rendered in litigation — transfer whether a sale within the meaning of the term under the Pre-emption Act.

Mst. B. was engaged in litigation respecting property gifted to her by her father. She entered into an agreement with her father-in-law whereby she agreed to transfer one-quarter of the land then in dispute in return for his fighting out her case from start to finish, the sum of Rs.3,000 being fixed as the expenses incurred directly or indirectly to be the value of the land. She eventually won the case up to the High Court. The father-in-law brought an action against *Mst.* B to enforce the agreement and got a compromise decree which was followed by mutation. The plaintiff brought the present suit for pre-emption and the main question for determination was whether the transfer in this case was a ' sale ' within the meaning of the term under the Pre-emption Act. It was found that the father-in-law had spent cash and rendered service in the litigation and had further stated that he had approximately spent over Rs.3,000, which was the market value of the land.

Held, that it is a question of fact for the Court to consider in every case whether or not there has been a sale and the nature of the consideration is only one of several factors to be considered in arriving at that conclusion of fact.

That the transfer, in the circumstances of the present case, amounted to a ' sale ' within the meaning of the term under the Pre-emption Act.

Haji Muhammad v. *Mst. Bakhto* (1) and *Dhala Bahlak* v. *Dhala Lakhan* (2), relied upon.

(1) 54 P. R. 1889. (2) 1936 A. I. R. (Lah.) 612.

1939

BAHAWAL
v.
AMIR.

Ali Akbar Shah v. *Ghagar Shah* (1), dissented from.

Other case-law discussed.

Second appeal from the decree of K. B. Sheikh *Din Mohammad, District Judge, Gujranwala, dated 10th June, 1938, reversing that of Mr. A. Lazarus, Subordinate Judge, 1st Class, Mandi Baha-ud-Din, dated 29th November, 1937, and awarding the plaintiff possession by pre-emption of the land in dispute on payment of Rs.3,000 on or before 10th July, 1938, into Court failing which the suit to stand dismissed.*

ASADULLAH KHAN, for Appellant.

M. L. PURI, for Respondent.

RAM LALL J.

RAM LALL J.—One *Mussammat* Bahishtan was engaged in litigation connected with a gift of property made by her father which was challenged by his collaterals. During the course of this litigation she was helped by her father-in-law Bahawal, the present appellant, and she entered into an agreement with Bahawal on the 1st of February, 1932, whereby she agreed to transfer one quarter of the land which was then the subject of litigation in return for his fighting out her case and conducting it from start to finish. This case went up to the High Court and Bahishtan eventually won the case. Bahawal then brought a suit against Bahishtan to enforce the agreement and obtained a compromise decree on the 1st of May, 1935, the mutation in his favour being sanctioned on the 22nd of August, 1935. Just a year later, that is, on the 22nd of August, 1936, the plaintiffs respondents brought a suit for pre-emption on the ground that they had superior rights of pre-emption. The defendants in this suit were *Mussammat* Bahishtan, the vendor,

(1) 1930 A. I. R. (Lah.) 141.

1939

BAHAWAL
v.
AMIR.

RAM LALL J.

and Bahawal the vendee and while admitting the agreement of the 1st of February, 1932, they raised various pleas, and the principal one round which considerable dispute has arisen was that the transfer in this case was not a sale within the meaning of that term under the Pre-emption Act and that therefore the suit was not competent.

The agreement of the 1st of February, 1932, fixed Rs.3,000 as the expenses incurred directly or indirectly by Bahawal to be the value of the land and it was held by the trial Court that the real consideration for the transfer was the service rendered by Bahawal to Bahishtan and that therefore the transaction was not a sale within the meaning of the Pre-emption Act and he accordingly dismissed the suit.

An appeal was taken from this order to the learned District Judge, Gujranwala, who by his order, dated the 10th of June, 1938, held that though the transaction appeared to be a " cloaked gift " the defendants had made clumsy efforts to show that there was consideration and necessity and for this purpose they had imported the element of service rendered and money expended by Bahawal in the litigation in which Bahishtan was then engaged. The learned District Judge was of the opinion that Bahawal had by his own admission made out a case that he had spent in cash very nearly the amount which was the market value of the land in suit and therefore Bahawal should be fixed to his false position that the transaction was in fact a sale and not what it really was, namely, a gift in consideration of service rendered. In these circumstances he accepted the appeal leaving the parties to bear their own costs throughout.

A second appeal has been brought to this Court by Bahawal through *Chaudhri* Asad Ullah Khan and Mr. M. L. Puri has appeared for the contesting respondent.

It is common ground that the plaintiff respondent has the superior right of pre-emption if the transaction can be held to be a sale. It is urged on the one side that a sale connotes a cash transaction which is virtually missing in this case and as services rendered are not easily assessable in terms of money, the transfer is not a sale and therefore not pre-emptible. On the other hand it is urged that the defendant's own case was that he had spent over Rs.3,000 which was the market price of the land and even if this defence turns out to be false he cannot be allowed to resile from it when it suits him.

The term ' sale ' has not been defined anywhere in the Pre-emption Act. In *Haji Muhammad* v. *Mst. Bakhto* (1) the consideration for the transfer was that the transferee should bring a suit for the transferor and in the event of success certain land would be transferred to him in consideration of his service and money expended by him in prosecuting the suit. It was held by Roe and Frizelle JJ. that the transaction was a sale and as such pre-emptible, but as it was difficult, if not impossible, to assess in terms of money the value of the time and trouble spent by the tranferee the sale was held to be pre-emptible on payment of the market price to be ascertained. The learned Judges observed that the term ' price ' used in section 77 of the Contract Act should not be confined to a cash consideration only.

(1) 54 P. R. 1889.

1939

BAHAWAL
v.
AMIR.

RAM LALL J.

In *Ali Akbar Shah* v. *Ghagar Shah* (1) Bhide J. held that in the case before him the principal if not the sole consideration was service rendered and a transaction based on such consideration was not a sale. In deciding in this sense the learned Judge apparently doubted the correctness of the decision in *Haji Muhammad* v. *Mst. Bakhto* (2) and observed that this ruling did not appear to have been followed in any subsequent case.

Before Mr. Justice Bhide apparently the proposition that such a transfer was not a sale was not contested and a number of later decisions of the Punjab Chief Court were not brought to his notice.

In *Gul Muhammad Khan* v. *Khan Ahmad Shah* (3) a similar point was considered by Sir Meredyth Plowden and Frizelle J. In that case consideration for the sale was Rs.4,500 in cash in addition to one acre of land in another village and it was contended that the transaction was an exchange and not a sale and therefore not pre-emptible. The case was decided under the Punjab Laws Act before the present Pre-emption Act was enacted but as under the Punjab Laws Act too the word " sale " had not been defined the reasoning of this decision will be equally applicable to a case decided under the present Pre-emption Act. Sir Meredyth Plowden in delivering the judgment of the Court observed as follows :—

" Without attempting to define sale or exchange, we entertain no doubt that a permanent transfer of land in a village for a sum of money plus something that is not money, does not, merely because of such

(1) 1930 A. I. R. (Lah.) 141. (2) 54 P. R. 1889.
(3) 29 P. R. 1893.

addition, of necessity cease to be a sale within the meaning of the Act. If a transfer of land for Rs. 100 is a sale, we entertain no doubt that the parties to the transaction by agreeing that the price should be Rs.100 and (for example) a brass *lota*, could not alter the true character of the transaction, and exclude it from being the subject of a claim of pre-emption."

It was held that it was a matter for the Courts in each case to decide whether the particular transaction did or did not amount to a sale. Reference was made to the definition of the word " sale " in the Transfer of Property Act and in dealing with this matter the Judges observed they did not think that the word " sale " as used in the Punjab Laws Act could be interpreted by reference to the definition of " sale " or be affected by the definition of " exchange " in the Transfer of Property Act.

In *Kishen Singh* v. *Jai Kishen Das* (1) Chatterji and Harris JJ. held that an assignment of immovable property for money plus favour and past service was a " sale " within the meaning of section 9 of the Punjab Laws Act. In that case an assignment of land had been made by the Maharaja of Kashmir to an old servant of his for Rs.27,000 though the property was alleged to be worth about Rs.1,00,000. The deed of transfer mentioned the past services of the transferee and the learned Judges held that these services should be taken as part of the consideration and that an enquiry into the market value rendered these services capable of being estimated in money. In arriving at this conclusion the learned Judges followed and partially adopted the reasoning on which *Gul Muhammad Khan* v. *Khan Ahmad Shah* (2) was based. In

(1) 2 P. R. 1903. (2) 29 P. R. 1893.

1939

BAHAWAL v. AMIR.

RAM LALL J.

Ali Bakhsh v. *Sobha Singh* (1) Reid J. of the Punjab Chief Court held that a transfer of immovable property by a maternal uncle for a consideration which consisted partially of money and partially of past services and partially of natural love and affection amounted to a sale and therefore gave rise to a right of pre-emption. The principle enunciated in *Haji Muhammad* v. *Mst. Bakhto* (2) and *Gul Muhammad Khan* v. *Khan Ahmad Shah* (3) and *Kishen Singh* v. *Jai Kishen Das* (4) was upheld and affirmed.

Kalyan v. *Mst. Deorani* (5) was a case decided by the Allahabad High Court and it turned largely on the meaning of the word "sale" as used in the Transfer of Property Act which was and is in force in that Province. In that case a transfer in pursuance of a champertous agreement was held not to be a pre-emptible sale. The reasoning particularly of Sulaiman J. in that authority is that part of the consideration which is other than the cash price is not capable of exact valuation. It appears to me that this case is distinguishable on this ground alone that the Transfer of Property Act does not apply in the Punjab and I can see no reason why when exact valuation is not possible market value as ascertained by the Court should not be taken as the figure at which pre-emption can be ordered after the Court has come to the conclusion that in fact the transaction in question was a sale as contemplated by the Punjab Pre-emption Act.

On the whole, therefore, it appears to me that in *Ali Akbar Shah* v. *Ghagar Shah* (6) the authority of *Haji Muhammad* v. *Mst. Bakhto* (2) has not been

(1) 23 P. R. 1906.
(2) 54 P. R. 1889.
(3) 29 P. R. 1893.
(4) 2 P. R. 1903.
(5) I. L. R. (1927) 49 All. 488.
(6) 1930 A. I. R. (Lah.) 141.

correctly questioned and the 1930 case appears to have been decided largely on the admission at the bar that a cash consideration was an essential ingredient of a sale for Bhide J. says at the end of his judgment in that case as follows :—

" It was not disputed before me that a transaction cannot be considered to be a sale for the purpose of the Pre-emption Act unless the consideration consists mainly, if not wholly, of cash."

For the reasons stated already I am unable to accept this as a correct proposition of law and I am of the opinion, following the dicta of Sir Meredyth Plowden in the case referred to earlier, that it is a question of fact for the Court to consider in each case whether or not there has been a sale and the nature of the consideration is only one of several factors to be considered in arriving at that conclusion of fact. In this particular case the Subordinate Judge who originally tried this case felt constrained by the authority of *Ali Akbar Shah* v. *Ghagar Shah* (1) to decide that this transaction was not a sale on the sole ground that the consideration for the transfer was not cash. The learned District Judge held that it was a sale because for one reason or another Bahawal had put it forward as such and belittled the element of personal service which was in fact the main consideration. In *Dhala Bahlak* v. *Dhala Lakhan* (2) Agha Haidar, J. held that the word " price " should be interpreted in a liberal and generous manner and not according to the cast iron frame of section 54 of the Transfer of Property Act which did not apply to the Punjab. In the case before him certain persons had

(1) 1930 A. I. R. (Lah.) 141. (2) 1936 A. I. R. (Lah.) 612.

1939

BAHAWAL
v.
AMIR.

RAM LALL J.

agreed to help in carrying on litigation with regard to certain land then in dispute and had got executed an agreement in their favour that in the event of success a portion of the land in suit would be transferred to them. It was held that the consideration was the money which the transferees had to spend and the time and the trouble which they had expended and were going to devote for the benefit of the vendor and that therefore this transaction amounted to a sale. It appears to me that the present case is not distinguishable in principle from that reported in *Haji Muhammad* v. *Mst. Bakhto* (1) or the later case reported as *Dhala Bahlak* v. *Dhala Lakhan* (2). I would, therefore, hold in agreement with the learned District Judge, but not for the reasons stated by him, that the transaction in this case amounted to a sale which could be made the subject of a pre-emption suit.

It was half-heartedly argued that the suit was barred by limitation on the allegation that the transfer took place on the 1st of February, 1932, when the agreement between Bahishtan and Bahawal was entered into. This agreement, however, was to transfer the land on the happening of a certain event, namely, the passing of a decree in favour of Bahawal. This event did not take place till the 1st of May, 1935, and the mutation was not sanctioned till the 22nd of August, 1935. It was only on mutation that the possession of Bahawal became possession as of a transferee from Bahishtan and taking that date as the starting point of limitation the suit was within time and there is no force in the objection taken on the score of limitation.

(1) 54 P. R. 1889. (2) 1936 A.I. R. (Lah.) 612.

1939

BAHAWAL
v.
AMIR.

RAM LALL J.

ADDISON J.

For these reasons I would dismiss this appeal but having regard to all the circumstances I would leave the parties to bear their own costs throughout.

ADDISON J.—I concur.

A. K. C.

Appeal dismissed.

APPELLATE CRIMINAL.

Before Young C. J. and Blacker J.

MUZAFFAR KHAN AND OTHERS (CONVICTS) Appellants,

versus

THE CROWN—Respondent.

1939

Feb. 27.

Criminal Appeal No. 1099 of 1938.

Criminal Procedure Code (Act V of 1898), SS. 162 and 164 — Indian Evidence Act (I of 1872) S. 145 — Witness' previous statement made under S. 164 of the Code of Criminal Procedure — Whether should be proved first before cross-examining him — Illiterate witness — whether governed by different process of law.

Held, that there is no duty cast upon counsel, who wishes to cross-examine a witness by putting to him a previous statement made under S. 164 of the Code of Criminal Procedure first to prove that statement.

That S. 145 of the Indian Evidence Act, which has to be read with S. 162 of the Code of Criminal Procedure, quite clearly indicates that the attention of a witness is to be called to the previous statement before the writing can be proved. If the witness admits the previous statement, or explains any discrepancy or contradiction, it becomes unnecessary for the statement thereafter to be proved. On the other hand if the statement still requires to be proved that can be done by calling the person before whom the statement was made.

That the proposition that an illiterate person is imune from the processes of law with regard to contradiction by a