

## FULL BENCH

Before Eric Weston, C.J., Khosla and Harnam Singh, JJ.

KHARATI RAM,—Appellant,

versus

RAM LAL AND OTHERS,—Respondents.

1950

Dec. 8th

Letters Patent Appeal No. 120 of 1947.

*Punjab Pre-emption Act (I of 1913)—Section 30 (3) and Indian Limitation Act (IX of 1908), Articles 10 and 120—Sale of equity of redemption—property in possession of mortgagee—Whether capable of physical possession at the time of sale—Suit to enforce right of redemption—Which provision of Limitation governs it.*

Held that a suit to enforce a right of pre-emption in the case of an equity of redemption of urban immovable property, when the pre-emptor pre-empts the immovable property treating the sale of equity of redemption to the mortgagee in possession as being a sale of the property itself, does not fall within subsection (3) of section 30 of the Punjab Pre-emption Act, 1913, but is governed by article 120 of the Indian Limitation Act.

For the application of first part of last column of article 10 of the second schedule of the Indian Limitation Act it must be possible for physical possession to be given at the time of the sale, the rule resting upon the use of the words 'personal and immediate' as held by the Privy Council in *Batal Begam v. Mansur Ali Khan and others* (1).

PER *Weston, C. J.* The wording of section 30 of the Punjab Pre-emption Act suggests the desire of the Legislature to make this section a residuary clause, excluding, so far as possible, Article 120 of the Schedule II with its six years period, but clearly if the taking of physical possession of any part of the property in consequence of the sale is not possible or is not effected, Section 30 (3) can have no application. The principle underlying both Article 10 and Section 30 is that of the notice afforded to the pre-emptor by the transfer of physical possession, or by the registration of the sale deed. If the transaction of sale is effected in such a manner that such notice has not occurred, resort to the residuary Article 120 of the Indian Limitation Act is unavoidable.

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(1) I. L. R. (1902) 24 All. 17 (P. C.)

Kharati Ram *Letters Patent appeal under clause 10 of the Letters*  
*v. Patent from the Judgment of Hon'ble Mr. Justice Mehr*  
 Ram Lal and Chand Mahajan in R. S. A. No. 266 of 1946 decided on the  
 others 21st December, 1947, reversing the decree of Fateh Khan,  
 District Judge, Jullundur, dated the 24th January 1946, who  
 affirmed that of Shri Y. L. Taneja, Sub-Judge, 1st Class,  
 Jullundur, dated the 7th July 1945, granting the plaintiff a  
 decree for possession by pre-emption against the defendants  
 on payment of Rs 1,450 within one month from the 7th July  
 1945, and further directing that the sum shall be paid to  
 defendant No. 1, Ram Lal only and further holding that if  
 plaintiff makes the payment he shall have his costs of the  
 suit otherwise the same shall stand dismissed with costs.

SHAMAIR CHAND, S. D. BAHRI, P. C. JAIN and RUP CHAND,  
 for Appellant.

A. N. GROVER and H. L. SARIN, for Respondents.

ORDER OF DIVISION BENCH REFERRING THE CASE TO THE  
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Harnam  
 Singh J.

HARNAM SINGH, J. This is a Letters Patent  
 Appeal arising out of a suit for possession by pre-  
 emption of the house, detailed in the plaint and situat-  
 ed in Jullundur City, Kucha Pathanan, Mohalla  
 Rangrezan.

To appreciate the point of law involved in these  
 proceedings the facts, so far as material, must be set  
 out in some detail.

On the 18th of January 1934, Nasir Din and  
 Mohammad Haji mortgaged with possession the house  
 in suit for rupees 1,400 to Ganga Singh and Ram Lal  
 on the foot of the deed of mortgage, Exhibit D. 3. On  
 the same day the mortgagors executed a rent deed,  
 Exhibit D. 4, in favour of the mortgagees under which  
 they took the house on lease from the mortgagees on  
 an annual rent of Rs. 36, with the result that the  
 actual possession of the house remained with the  
 mortgagors. Ganga Singh, mortgagee, gifted his  
 mortgagee rights to his daughter Mst. Sardhi. Nasir  
 Din, mortgagor, died and on the 11th of August 1939,  
 Mohammad Haji and Mst. Fazal Bibi, widow of Nasir

Din, on the foot of unregistered sale-deed, Exhibit D. 5, sold the equity of redemption in the house for rupees 50 in favour of Mst. Sardhi and Ram Lal, the two co-mortgagees. By the purchase of the equity of redemption Ram Lal and Mst. Sardhi became full owners of the house in suit. Later on, on the 29th April 1940, Mst. Sardhi sold her share in the house to Ram Lal for rupees 700 on the foot of document, Exhibit D. 2. Thus Ram Lal became the absolute owner of the house in suit on the 29th of April 1940.

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On the 16th of August 1944, Kharati Ram, plaintiff, instituted a suit, out of which these proceedings have arisen, for possession of the house described above by pre-emption on payment of rupees 1,450.

Ram Lal, defendant-vendee, resisted the suit on a number of pleas and on the pleadings of the parties the following issues arose—

- (1) Has plaintiff a right of pre-emption against the vendee ?
- (2) Was the suit within time ?
- (3) Was plaintiff estopped from suing by his words and deeds
- (4) Was there a custom of pre-emption in the *Mohalla* in which the suit house was situated ?
- (5) Did the defendant No. 1 make any improvements ? If so, at which cost and was he entitled to claim the same ?
- (6) Relief.

Issue Nos. 1, 2 and 4 were found in favour of the plaintiff, while issues Nos. 3 and 5 were found against the defendant-vendee. In accordance with these

**Kharati Ram** conclusions the trial Court decreed with costs the  
 v. plaintiff's suit for possession by pre-emption against  
**Ram Lal and** the defendant-vendee on payment of rupees 1,450 with-  
 others in one month from the 7th of July 1945.

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From the decree passed by the trial Court Ram Lal, defendant-vendee, went up in appeal under section 96 of the Code of Civil Procedure, 1908. In the memorandum of appeal filed in the Court of first appeal the decree passed by the trial Court was challenged on a number of grounds but it appears that the learned counsel for the appellant addressed arguments only on the point of limitation in that Court. The Court of first appeal, however, found that the property, at the time of the sale, being in possession of the tenants, was incapable of physical possession and that, in any case, *the sale was made of a right which was not capable of physical possession and upon those findings dismissed the appeal with costs.* Ram Lal, defendant-vendee, came up in further appeal under section 100 of the Code of Civil Procedure to this Court. In the further appeal Mahajan, J., said :

“The plaintiff pre-empted the whole house treating the sale of the equity of redemption to the mortgagees, as being a sale of the house itself. The point for determination is whether subsequent possession of the house by the vendee after it was vacated by the tenants, who occupied it on the date of the sale, furnished a *terminus a quo* for limitation under section 30 of the Punjab Pre-emption Act or not. It appears to me that section 30 has been drafted so as to make it a residuary provision of limitation applicable to all pre-emption cases and the application of article 120 has been expressly excluded if a case can at all be brought within the ambit of that section. In cases of sale of agricultural property the date of mutation has been mentioned as the *terminus a quo* for limitation where

the property does not "admit of physical possession". This date generally happens to fall a considerable time after the actual sale and is subsequent to it. Within a period of one year from this date a suit for pre-emption has to be brought. In regard to cases of urban immovable property falling within sub-clause (3) of section 30 it has been mentioned that the *terminus a quo* of limitation is *the date when under the sale the vendee takes physical possession of any part of the property*. It seems to me that this date is bound to be subsequent to the date of the sale. The question is what provision of law is applicable to a case where the property is not capable of physical possession at the date of the sale, because it is in the hands of a tenant but comes in possession of the vendee a few days or a few months or a few years after the date of the suit. The plain language of sub-clause (3), in my opinion covers a case of this kind."

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Finding that the suit fell within subsection (3) of section 30 of the Punjab Pre-emption Act, 1913, Mahajan, J., allowed the appeal, set aside the decrees of the Courts below and dismissed the plaintiff's suit leaving the parties to bear their own costs throughout, but in view of the fact that the law on the subject was not clear Mahajan, J. has allowed a Letters Patent Appeal from his judgment.

Now, the law of limitation in this part of the country applicable to all transactions subject to pre-emption is provided for by articles 10 and 120 of the Indian Limitation Act, 1908, and section 30 of the Punjab Pre-emption Act, 1913.

In this appeal, it is said that article 10 of the Indian Limitation Act, 1908 and section 30 of the Punjab Pre-emption Act, 1913, have no application to

**Kharati Ram** suits for pre-emption arising out of sales of urban im-  
*v.* **Ram Lal and** *movable property by unregistered deed or oral con-*  
*others* **and** *tract where the subject-matter of sale does not admit*  
**Harnam** *of physical possession and that such suits fall within*  
**Singh J.** *article 120 of the Indian Limitation Act.*

Article 10 of the Limitation Act reads :—

Description of suit.	Period of limitation.	Time from which period begins to run.
10. To enforce a right of pre-emption, whether the right is founded on law or general usage or on special custom.	One year	When the purchaser takes under the sale sought to be impeached, physical possession of the whole of the property sold, or, where the subject-matter of the sale does not admit of physical possession, when the instrument of sale is registered.

Now, a suit for pre-emption arising out of a sale when neither the whole of the property sold admits to physical possession nor is the instrument of sale registered does not come within article 10. Authority for this view is to be found in *Shiam Sundar v. Amanat Begum* (1). In that case Straight and Tyrrell, JJ., said :

“Now, an equity of redemption is the right not defined by statute, which entitled a mortgagor at the proper time and place, upon satisfaction of the mortgage debt, either by payment of the amount to the mortgagee in possession, or after realization of it from the usufruct of it from the mortgaged estate, to require him to deliver

(1) I. L. R. (1887) 9 All. 234.

up possession to the mortgagor, and to execute an instrument retransferring it, or to have registered acknowledgment in writing that the mortgage has been extinguished. It follows, therefore, that when, as in the case before us, the mortgagee is in possession, the sale by the mortgagor to the mortgagee of such right to redeem has the effect of extinguishing such right; or in other words, there is a merger of the two estates in the mortgagee, who, therefore, became the proprietor of the property mortgaged. We do not think, in a transaction of this description, it can properly be said that any property is sold which is capable of 'physical possession' within the meaning and intention of article 10 of the Limitation Act.

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Indeed, in the judgment under appeal Mahajan, J., has ruled out the application of article 10 to suits for pre-emption where the subject matter of the sale is the equity of redemption of urban immovable property.

I now pass on to an examination of section 30 of the Punjab Pre-emption Act, 1913. Section 30 begins by saying "in any case not provided for by article 10" and then proceeds to give the time from which limitation is to be reckoned in particular kinds of cases. Section 30 reads :—

"In any case not provided for by article 10 of the Second Schedule of the Indian Limitation Act, 1908, the period of limitation in a suit to enforce a right of pre-emption under the provisions of this Act shall, notwithstanding anything in article 120 of the said schedule, be one year—

(1) in the case of a sale of agricultural land or village immovable property, from

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the date of the attestation (if any) of the sale by a Revenue Officer having jurisdiction in the register of mutations maintained under the Punjab Land Revenue Act, 1887, or from the date on which the vendee takes under the sale physical possession of any part of such land or property, whichever date shall be the earlier,

(2) in the case of a forecloser of the right to redeem village immovable property or urban immovable property, from the date on which the title of the mortgagee to the property becomes absolute,

(3) in the case of a sale of urban immovable property,

from the date on which the vendee takes under the sale physical possession of any part of the property."

The property sold in the present case is the *equity of redemption of urban immovable property* to the mortgagees in possession. Clearly, subsections (1) and (2) of section 30 do not govern the suit. The question that then arises for determination is whether the suit falls within subsection (3) of section 30. For reasons mentioned above Mahajan, J., has found that the plain language of subsection (3) covers a case of this kind.

Now, subsection (3) of section 30 provides that the period of limitation in a suit to enforce a right of pre-emption under the provisions of the Punjab Pre-emption Act, 1913, shall be one year in the case of a sale of urban immovable property, from the date on which the vendee *takes under the sale physical possession of any part of the property*. In the present case, the urban immovable property sold is the equity



of redemption of a house situate in Jullundur town. The property sold, namely the equity of redemption, does not admit of "physical possession" and that being so, it is not possible for the vendee to *take under the sale* physical possession of any part of that property. The expression "physical possession of any part of the property" in subsection (3) means "physical possession of the immovable property sold" and where "the urban immovable property sold" is an equity of redemption of a house situate in a town, subsection (3) can have no application for "the urban immovable property sold" is not susceptible of "physical possession". In deciding the application of subsection (3) of section 30 the sole test is the nature of the property sold.

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In the judgment under appeal Mahajan, J., seems to think that the words "physical possession of any part of the property" in subsection (3) of section 30 means "physical possession of any part of the property affected by the sale. In this case the property affected by the sale is the house in suit which was not capable of physical possession at the date of the sale, because it was then in the possession of a tenant and came in physical possession of Ram Lal vendee sometime between April and October, 1940 and later in the year 1942 when Hans Raj's lease terminated.

As observed by Mahajan, J., there is no case which in very clear terms covers the precise point, that has been raised in these proceedings and that being so, we think that the point arising in these proceedings should be settled by a larger Bench. We accordingly frame the following question for reference to a Full Bench of this Court for decision : —

"Whether a suit to enforce a right of pre-emption in the case of a sale of an equity of redemption of urban immovable property where the pre-emptor pre-empts the immovable property treating the sale of equity of redemption to the mortgagees in possession, as being a sale of the property itself

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comes within subsection (3) of section 30  
of the Punjab Pre-emption Act, 1913

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The papers will be laid before the Hon'ble the  
Chief Justice for constituting a Bench for the decision  
of the point set out above.

JUDGMENT OF THE FULL BENCH.

Weston, C. J.

WESTON, C.J. The question referred to the Full  
Bench is in these words—

“Whether a suit to enforce a right of pre-emption in the case of a sale of an equity of redemption of urban immovable property when the pre-emptor pre-empts the immovable property treating the sale of equity of redemption to the mortgagee in possession as being a sale of the property itself comes within subsection (3) of section 30 of the Punjab Pre-emption Act, 1913.”

The question indicates that in the suit from which the reference has arisen the pre-emptor has claimed not only to pre-empt the rights sold to the mortgagee in possession, but to pre-empt the entire property so as to extinguish all rights of the mortgagee. Under section 4 of the Punjab Pre-emption Act the right to pre-empt is created in respect of sales. It is well established that there is no right of pre-emption of a mortgage. By pre-emption the pre-emptor is substituted in the place of the seller at the date of sale. It seems arguable that a suit to enforce a right of pre-emption, which is a special right created in the Punjab by statute, must be a suit simpliciter for that purpose. I do not wish, however, to express an opinion one way or the other whether a composite suit for pre-emption and redemption is competent, for by the reference we are concerned only with the question of limitation.

The material provisions of the law of limitation relating to pre-emption suits are article 10 of the

second schedule to the Limitation Act, section 30 of the Punjab Pre-emption Act, 1913, and the general residuary article 120 of the second schedule to the Limitation Act. The question referred recites that the property is urban immovable property, and the referring order shows that the sale by the mortgagor, which is the cause of action for the pre-emption suit, was for a consideration of Rs 50 and was affected by unregistered instrument.

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Article 10 of the second schedule of the Limitation Act is as follow :—

Description of suit.	Period of limitation.	Time from which period begins to run.
10. To enforce a right of pre-emption, whether the right is founded on law or general usage or on special custom.	One year	When the purchaser takes under the sale sought to be impeached, physical possession of the whole of the property sold, or, where the subject-matter of the sale does not admit of physical possession, when the instrument of sale is registered.

It has been held in a number of cases that, for the application of the first part of the last column, it must have been possible for physical possession to have been given at the time of the sale. This rule seems to rest upon the use of the words "personal and immediate" by the Privy Council in *Batul Begum v. Mansur Ali Khan and others*(1), and I assume that it represents correct law. I do not think, however, that this rule removes altogether from the operation of article 10 cases of sales of property (not by registered instrument which property is subject to mortgage.

(1) I. L. R. (1902) 24 All. 17 (P. C.)

Kharati Ram Under the Transfer of Property Act, and where the principles of that Act apply in India, execution of a mortgage of immovable property does not transfer to the mortgagee all interest in the property, leaving the mortgagor only with an incorporeal equity of redemption. The mortgagor remains owner of the property subject to the mortgage, and his right to redeem is not an equity but a statutory right under the Act. When there has been a simple mortgage of property followed later by a sale by the mortgagor, it may well be that no impediment exists to the purchaser from the mortgagor taking under the sale immediate physical possession of the whole of the property, which naturally will include the "whole of the property sold." If this is so, and if in fact possession is so taken, article 10 has obvious application. In most cases where the property is subject to usufructuary mortgage, physical transfer of possession under the later sale will not be possible. But there may be instances, for example where possession under the usufructuary mortgage has not been taken by the mortgagee, when immediate physical possession under the later sale deed is possible, and to such instances article 10 may apply.

Coming now to section 30 of the Punjab Pre-emption Act, 1913, omitting sub-clauses (1) and (2), which do not relate to urban immovable property, the section reads thus :—

"In any case not provided for by article 10 of the Second Schedule to the Limitation Act, 1908, the period of limitation in a suit to enforce a right of pre-emption under the provisions of this Act shall, notwithstanding anything in article 120 of the said schedule, be one year.

(1) \* \* \* \* \*

(2) \* \* \* \* \*

(3) in the case of a sale of urban immovable property, from the date on which the

vendee takes under the sale physical possession of any part of the property.”

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The wording suggests the desire of the legislature to make section 30 a residuary clause, excluding so far as possible article 120 of the second schedule with its six years period. But clearly if the taking of physical possession of any part of the property in consequence of the sale is not possible or is not effected, section 30(3), can have no application. The principle underlying both article 10 and section 30 is that of the notice afforded to the pre-emptor by the transfer of physical possession or by the registration of the sale-deed. If the transaction of sale is effected in such manner that such notice has not occurred, resort to the residuary article 120 is unavoidable.

Each case must depend upon its particular facts. If possession under the sale has been taken, article 10 or section 30 will apply. If no possession has been taken under the sale, and I understand the reference to relate to such a case, article 120 will apply.

KHOSLA, J. I agree.

Khosla J.

HARNAM SINGH, J. I agree that a suit of the type falling within the question referred to us for decision comes within article 120 of the Indian Limitation Act, 1908, and I wish to give my reasons.

Harnam Singh  
J.

The answer to the question of law involved in this reference turns upon the interpretation of section 30 of the Punjab Pre-emption Act, 1913, though in the reference made the question is put as follows :—

“Whether a suit to enforce a right of pre-emption in the case of a sale of an equity of redemption of urban immovable property when the pre-emptor pre-empts the immovable property treating the sale of equity of redemption to the mortgagee in possession as being a sale of the property itself comes within subsection (3) of section 30 of the Punjab Pre-emption Act, 1913.”

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The facts which are material to the question now before us may be stated briefly. On the 18th of January, 1934, Nasir Din and Mohammad Haji mortgaged with possession the house in suit for Rs 1,400 to Ganga Singh and Ram Lal on the foot of the deed of mortgage, Exhibit D. 3. On the same day the mortgagors executed rent-deed, Exhibit D. 4, in favour of the mortgagees under which they took the house on lease from the mortgagees on an annual rent of Rs 36, with the result that the actual possession of the house remained with the mortgagors. Ganga Singh, mortgagee, gifted his mortgagee rights to his daughter Mst. Sardhi. Nasir Din, mortgagor, died and on the 11th of August, 1939, Mohammad Haji and Mst. Fazal Bibi, widow of Nasir Din, on the foot of unregistered sale-deed, Exhibit D. 5, sold the equity of redemption in the house for Rs 50 in favour of Mst. Sardhi and Ram Lal, the two co-mortgagees. By the purchase of the right of redemption Ram Lal and Mst. Sardhi became full owners of the house in suit. On the 29th of April, 1940, Mst. Sardhi sold her share in the house to Ram Lal for Rs 700, on the foot of sale-deed, Exhibit D. 2. Ram Lal thus became the absolute owner of the house on the 29th of April, 1940.

On the 16th of August, 1944, Kharaiti Ram, plaintiff, instituted civil suit No. 781 of 1944, out of which these proceedings have arisen, for possession of the house described above by pre-emption on payment of Rs 450.

Ram Lal, defendant-vendee, resisted the suit on a number of pleas. In Letters Patent Appeal No. 120 of 1947, we are concerned with issue No. 2 reading :

“Was the suit within time” ?

Section 60 of the Transfer of Property Act, 1882, is a statement of the “right to redeem”. The mortgagor’s right of redemption after the date fixed for payment, is called in English Law the *equity of redemption*. The expression “*equity of redemption*” indicates that the right was a creation of the Courts of Equity which, while giving relief against forfeiture,

allowed the right to continue even after default on due date. In India the right of redemption is a statutory right. In cases reported in books the expression "equity of redemption" has been used by Courts in India for the expression "right of redemption" created by section 60 of the Transfer of Property Act, 1882. In this judgment I have used the expression right of redemption in preference to the expression equity of redemption.

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As stated above the answer to the question of law involved in the reference turns upon the interpretation of section 30 of the Punjab Pre-emption Act, 1913, hereinafter referred to as the Act. Section 30 of the Act reads as under :—

"In any case not provided for by Article 10 of the Second Schedule of the Indian Limitation Act, 1908, the period of limitation in a suit to enforce a right of pre-emption under the provisions of this Act shall, notwithstanding anything in Article 120 of the said Schedule, be one year—

- (1) in the case of a sale of agricultural land or village immovable property, from the date of the attestation (if any) of the sale by a Revenue Officer having jurisdiction in the register of mutations maintained under the Punjab Land Revenue Act, 1887, or from the date on which the vendee takes under the sale physical possession of any part of such land or property, whichever date shall be the earlier,
- (2) in the case of a foreclosure of the right to redeem village immovable property or urban immovable property, from the date on which the title of the mortgagee to the property becomes absolute,

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(3) *in the case of a sale of urban immovable property,*

*from the date on which the vendee takes under the sale physical possession of any part of the property."*

The property sold on the foot of sale-deed, Exhibit D. 5, is the right of redemption of urban immovable property. The sale is to the mortgagees in possession. Clearly, subsections (1) and (2) of section 30 do not govern the suit.

Section 30 (3) of the Act prescribes period of limitation for a suit to *enforce a right of pre-emption* under the provisions of the Act in the case of a sale or urban immovable property. As stated above, the sale sought to be pre-empted in the suit out of which these proceedings have arisen is the sale of the right of redemption of urban immovable property. The question that then arises for decision is whether the property sold is capable of "physical possession" within the meaning of section 30(3) of the Act. A similar point arose in *Shiam Sundar v. Amanat Begam* (1). In deciding that case Straight and Tyrrell, JJ., said :—

"Now, an equity of redemption is the right now defined by statute, which entitles the mortgagor, at the proper time and place, upon satisfaction of the mortgage debt, either by payment of the amount to the mortgagee in possession, or after his realization of it from the usufruct of the mortgaged estate, to require him to deliver up possession to the mortgagor, and to execute an instrument retransferring it, or to have registered an acknowledgment in writing that the mortgage has been extinguished. It follows, therefore, that when, as in the case before us, the mortgagee is in possession, the sale by the mortgagor to the mortgagee

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(1) I. L. R. (1887) 9 All. 234.



of such right to redeem has the effect of extinguishing such right, or *in other words*, there is a merger of the two estates in the mortgagee, who, therefore, became proprietor of the property mortgaged. We do not think, in a transaction of this description, it can properly be said that *any property is sold which is capable of "physical possession"* within the meaning and intention of Article 10 of the limitation law. It seems to us that in a statute, such as the law of limitation, which contemplates notice, express or implied, to the party to be affected by some act done by another in respect of which a right accrues to him to impeach it, and as to which time begins to run against him, *quoad* his remedy, from a particular point, the word 'physical' implies some corporeal or perceptible act done, which of itself conveys or ought to convey to the mind of a person notice that his right has been prejudiced. We are of opinion, that an *equity of redemption is not susceptible of possession of this description under a sale by which it is transferred*, and that for the purposes of pre-emption a pre-emptor impeaching such a sale has one year from the date of registration of the instrument embodying it within which to bring his suit."

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Mr. Amar Nath Grover basing himself on *Jai Ram v. Sita Ram* (1), urges that a sale by the mortgagor to the mortgagee in possession of the right to redeem is the sale of the mortgaged property which does admit of physical possession, whether at the time of sale such property be in possession of the mortgagor or in possession of the mortgagee. In that case Stavon, A. J. C., said at p. 944 :—

"In England, if you sell land which you have mortgaged or leased for a term you

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transfer an equity of redemption or an estate of reversion. In India in such a case you sell your land.”

Harnam Singh  
J.

In deciding the point I prefer to follow the reasoning in *Shiam Sunder v. Amant Begum* (1), to what was said in *Jai Ram v. Sita Ram* (2) and hold that in India when a mortgagor sells the right of redemption to the mortgagee in possession the mortgagor does not sell any property which is capable of physical possession within the meaning and intention of section 30 of the Act. In such a case the property sold is the right of redemption though the sale by the mortgagor to the mortgagee of such right to redeem has the effect of extinguishing such right and by a merger of the two estates in the mortgagee, the mortgagee becomes the proprietor of the property mortgaged. In other words, the mortgagor sells the right of redemption and the mortgagee becomes the proprietor of the property mortgaged by operation of law.

That being the situation of law, it is plain that section 30(3) of the Act does not apply to a suit to enforce a right of pre-emption under the provisions of the Act in the case of a sale of a right of redemption of urban immovable property. In such a case it is not possible for the vendee to take possession of any part of the property sold.

And I may here say that the conclusion set out in the preceding paragraph follows from an analysis of the *right of pre-emption* created by section 4 of the Act. In *Gobind Dayal v. Innayat Ullah* (3), Mahmood, J., said :—

“The right of pre-emption is not a right of ‘repurchase’ either from the vendor or from the vendee, involving any new contract of

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(1) I. L. R. (1887) 9 All. 234.

(2) 1887) 52 I. C. 940.

I. L. R. (1885) All. 775 (F. B.)

sale; but it is simply a *right of substitution*, entitling the pre-emptor, by reason of a legal incident to which the sale itself was subject, to stand in the shoes of the vendee in respect of all the rights and obligations arising from the sale under which he has derived his title. *It is in effect as if in a sale-deed the vendor's name was rubbed out and pre-emptor's name inserted in its place.*"

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In construing section 4 of the Act the rule laid down in *Gobind Dayal v. Innayat Ullah* (1), has been consistently followed by the Punjab Chief Court and the High Court at Lahore. Indeed, it was not disputed in these proceedings that there is no right of pre-emption in respect of a mortgage and by pre-emption the pre-emptor is substituted in place of the seller.

That being so, the right of Kharaiti Ram, plaintiff, pre-emptor, was limited to pre-empt the sale of the right of redemption by Mohammad Haji and *Mst. Fazal Bibi*, in August, 1939, to *Mst. Sardhi* and Ram Lal, on the foot of the unregistered sale-deed, Exhibit D. 5, and we have to decide whether such a suit falls within subsection (3) of section 30 of the Act. For the reasons given above, the decision must be that for purposes of limitation such a suit does not come within section 30(3) of the Act.

But it is said that as Kharaiti Ram instituted civil suit No. 781 of 1944 treating the sale of the right of redemption to the mortgagees in possession as being the sale of the property itself, the suit falls within section 30(3) of the Act.

In the first place, it is doubtful whether a composite suit of the description which was instituted by Kharaiti Ram is competent in law. Rule 4 of Order II of the Civil Procedure Code, enacts that no cause of action shall, unless with the leave of the Court, be joined with a suit for the recovery of

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(1) I. L. R. (1885) All. 775 (F. B.)

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immovable property, except the claims specified in the three clauses of that rule. Rule 4 then enacts that nothing contained in that rule shall be deemed to prevent any part in a suit for redemption from asking to be put into possession of the property mortgaged. The point is not before us and I hold myself free to express a considered opinion on the point when it becomes necessary. In the present proceedings assuming without deciding that a composite suit for pre-emption and redemption is competent I do not think that the period of limitation prescribed in section 30(3) of the Act governs such a suit. Such a suit proceeds upon two causes of action and for purposes of limitation each part of the suit is governed by different provisions of law. The question is, whether for purposes of limitation a suit *simpliciter* to enforce a right of pre-emption under the provisions of the Act in the case of sale of right of redemption of urban immovable property comes within section 30(3) of the Act. In deciding the application of section 30(3) of the Act the sole test is the nature of the property sold and the fact that a plaintiff sues to enforce right of pre-emption treating the sale of the right of redemption of urban immovable property to the mortgagee in possession as being a sale of the property itself does not bring the suit within section 30(3) of the Act. Indeed, such a suit is not a suit to enforce a right of pre-emption under the provisions of the Act.

As was said by me in the referring order subsection (3) of section 30 of the Act provides that period of limitation in a suit to enforce a right of pre-emption under the provisions of the Act shall be one year in the case of sale of urban immovable property, from the date on which the vendee takes under the sale "physical possession of any property". In case the urban immovable property sold is the right of redemption, the property sold does not admit of "physical possession", and that being so, it is not possible for the vendee to take under the sale "physical possession" of any part of the property. The expression "physical possession of any part of the property" in subsection 3 of section 30 of the Act means "physical

possession of the property sold" and where the property sold is a right of redemption of a house situate in a town, subsection (3) of section 30 of the Act can have no application for "the urban immovable property" sold does not admit of "physical possession". The opinion I have expressed above receives full support from what was said in *Gaffar Khan v. Sattar Khan and others* (1), and it is significant to note that the Legislature in enacting section 30 of the Act in 1913 should be deemed to have accepted the law laid down in *Gaffar Khan v. Sattar Khan and others* (1), to be correct.

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—  
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J.

For the foregoing reasons, my answer to the question referred to us for decision is in the negative.

#### APPELLATE CRIMINAL

Before Bhandari and Soni, JJ.

CHHATAR, SON OF SITA, (2) BADLU, SON OF SITA,—  
Convicts-Appellants,

versus

THE STATE,—Respondent

Criminal Appeal No. 398 of 1950.

*Criminal Trial—Certain witnesses named by prosecution but not produced on the ground that they had been won over and were not likely to state the truth—Whether prosecution bound to produce all witnesses—Discretion of Counsel for prosecutor as to what witnesses should be called for prosecution—Court not to interfere with the exercise of that discretion unless it could be shown that prosecution had been influenced by some oblique motive.*

*Held* that the prosecution is not bound to produce witnesses, who according to it are not witnesses of truth. The prosecutor has a discretion as to what witnesses should be called for the prosecution and the court will not interfere with the exercise of that discretion unless, perhaps, it can be shown that the prosecutor has been influenced by some oblique motive. It is, however, consistent with the discretion of the counsel for the prosecutor that it should be a

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Dec. 29th