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**(1955) 04 P&H CK 0002**

**In the Punjab And Haryana At Chandigarh**

**Case No :** Second Appeal No. 188 of 1951

Mst. Phula Wanti and Others APPELLANT

Vs

Kashmiri Lal RESPONDENT

**Date of Decision :** 12-04-1955

**Acts Referred:**
Limitation Act, 1963 — Article 10, 120, 18
Punjab Pre-emption Act, 1913 — Section 30

**Citation :** (1955) 04 P&H CK 0002

**Hon'ble Judges :** Chopra, J

**Bench :** Single Bench

**Advocate :** K.N. Tewari, for the Appellant; Atma Ram, for the Respondent

## Judgement

Chopra, J.—Kashmiri Lal Respondent''s suit for pre-emption, on the basis of contiguity, was dismissed by the trial Sub Judge as time-barred, the rest of the issues having been decided in his favor. The learned District Judge, Kapurthala, accepted the Plaintiff''s appeal and decreed the suit for possession on payment of the full consideration holding that the Plaintiff was kept ignorant of the sale by fraud and consequently the suit was within time. This is Defendant''s second appeal.

2. The only point agitated by the parties is one of limitation. The house in dispute is situate at Phagwara, to which place the Plaintiff belongs.. Mst. Durga Devi of Chatha is the vendor. On 6-6-1996 she sold the house in suit by three separate unregistered deeds, each relating to one-third share of the house and for a consideration of Rs. 100/-.

One of these deeds is in favour of Mst. Phula Wanti, wife of Shanti Parkash, another in favour of her two minor sons Sham La and Piara Lal and the third in favour of her other two minor sons, namely Mohan Lal and Sohan Lal. Shanti Parkash who was then alive, is alleged to be the real vendee, though the sale-deeds were executed in favour of his wife and minor sons.

At all material times, they wore residing at Chistian, Bahawalpur State. From there, on 16-9-1996, Shanti Parkash addressed a letter to Shiv Ram, brother of Kashmiri Lal Plaintiff, at Phagwara asking him not to build a stair-case in his own house but towards the adjoining house which had been purchased by the addresser. Nand Lal, Kashmiri Lal''s father, got a clue of the sale from this letter.

But even then what he could know from the letter or infer from the circumstances was that the entire house was sold by means of a single deed and that the sale was in favour of Shanti Parkash. Nand Lal consequently filed a suit for pre-emption against Shanti Parkash. This suit, filed on 22-2-1997, was decreed exparte on 22-4-1997. Shanti Parkash applied for setting aside the exparte decree. It was set aside on 4-1-1998.

In his written statement, filed thereafter on 13-1-1998, Shanti Parkash put forth the plea that the sale was not in his favour and he had, therefore, been wrongly impleaded as a Defendant.

There also he did not disclose as to who the vendees were or that the sale deeds were more than one. This put the Plaintiff on inquiry as to how the matters stood. On 6-11-1998, he submitted an application for amendment of the plaint and for impleading the-wife'' and the four minor sons of Shanti Parkash as Defendants.

This application was rejected and the suit dismissed by the Sub Judge. The prayer was how-ever accepted, in appeal by the District Judge and. the case, remanded. Amended plaint adding the ostensible vendees as Defendants was presented on 10-8-1999. The trial court accepted the Plaintiff''s plea of fraud, but dismissed the suit as time-barred holding that the Plaintiff had failed to prove the date of his knowledge of actual facts.

Learned District Judge is of the view that once, fraud-Was established it was for the defen-dant to prove as to when the influence of that fraud had ceased to operate. There being no evidence on the point, he accepted the appeal and decreed the suit.

3. Both the courts below are agreed that fraud was, practiced on the Plaintiff and it was because of that fraud that the Plaintiff remained ignorant about the names of the vendees as mentioned in the sale-deeds, and also about the number of the sale deeds executed. Even on hearing about the sale, the Plaintiff could hardly presume that the sale or sales was or were in favour of, the wife and minor sons of Shanti Parkash, who was himself alive. The facts that led to the influence of fraud are-

(1) The property is situate at Phagwara but the sale deeds were executed at Kala Sanghian, though'' none of the parties belongs thereto.

(2) The deeds were not registered even though the consideration for each sale was Rs. 100/-.

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(3) Three deeds were executed, each for one-third of the house, in favour or the minor sons and wife of Shanti Parkash.

(4) In his post-card addressed to Shiv Ram, brother of Kashmiri Lal Plaintiff, Shanti Parkash expressed himself to be the vendee.

(5) Neither in his application for setting aside the exparte decree, nor in his written statement thereafter, did Shanti Parkash disclose that the vendees1 were his wife and sons or that there were three sales in their favour.

(6) Physical possession of the house was not taken by the vendee or vendees for a long time after the sales.

4. Shri K.N. Tewari, learned Counsel for the Appellants contends that the vendees were not bound to inform the Plaintiff of the sales in their, favour and therefore, mere silence on their part, does not amount to fraud. It is correct that mere failure, or ''omission to give the pre-emptor information or notice of the sale is not, by itself, enough to bring the case within Section 18, Limitation Act, as it does not amount to keeping the pre-emptor from the knowledge of his right by means of fraud.

But where'' there is an active concealment or a willful misstatement of facts and the pre-emptor, is thereby kept from the knowledge of his right, this section would certainly come into play. It may hot always be possible to prove fraud by any direct evidence; It has generally to be inferred from circumstances, and a number of suspicious circumstances may, when combined, strongly lead to the Inference of fraud.

On the facts of the case, I do not think the courts below are wrong in drawing an inference of fraud in ''favour of the Plaintiff.

5. It is next-contended that since Shanti Parkash alone could be held guilty"of fraud, the period of limitation could not be extended as against the other Defendants. The contention is without substance. In the first instance, it was Shanti Parkash himself who was the real vendee; he negotiated the sale and paid the consideration, but, for reasons best known to him, he got the sales executed in favor of his wife and minor sons.

Moreover, Shanti Parkash alone cannot be said to be responsible for every one of the cir cumstances from which an inference of fraud may be drawn. In any case, throughout he acted on their behalf and as their representative, with their direct consent or connivance. They too are, therefore, equally guilty of the fraud.

6. Lastly, it is urged that the Plaintiff should fail as he did not prove the exact date when he came to know the actual facts. It is now well recognized that once fraud is established, the bur den shifts to the person, who has committed the fraud, to show that the person affected thereby did have knowledge of the transaction beyond the period of limitation. It is always for the party guilty of fraud to show that the continuing effect of fraud had been removed at a time too

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remote to allow a suit to be brought.

Again, it would not be sufficient for the Defendant to show that the Plaintiff had or could have some clues and hints. The knowledge ascribable to the Plaintiff must be clear and definite knowledge of the facts constituting the particular fraud. In this, the Defendant has totally failed.

7. There is another and more important aspect of the point in question, which has been totally over-looked by the courts below. Before the question of fraud comes in, it has to be seen if the suit is prima facie barred by time. Limitation for a pre-emption suit is provided by Article 10, Limitation Act, and in cases not falling under this article, by Section 30, Punjab Pre-emption Act, which has been made applicable to this State.

The first thing to be considered in applying Article 10 is to see whether the subject of sale admits of physical possession, at the date of the sale. If it does, limitation of one year starts from the time when the purchaser take physical possession of the whole of the property sold. If it does not, then the second part of the third column of the article will apply in cases where there is a registered instrument of sale, and the time will commence from the date of registration.

Where the property does not admit of physical possession at the date of sale and there is no registered instrument also, then this article will not apply at all and the starting point shall be determined by Section 30, Punjab Pre-emption Act. If the case does neither fall under Article 10 nor u/s 30, Pre-emption Act, it will be governed by Article 120, Limitation Act, and the limitation would be six years from the date of sale.

8. Now, in the present case, there is no evidence or even an indication that the house sold. did not, at the date of sale, admit of physical pos session. The original sale-deeds, which are in pos session of the Appellants, have not been produced on the record. The Plaintiff-could lay his hands merely on the extracts thereof contained in the petition-writer''s register, and the same he has produced.

These contain a recital that the entire house was in possession of the vendor on the date of the sale. Two of them further stated that possession had been. delivered to the vendees, Mohan Lal and Sohah Lal in the one and Sham Lal and Piarey Lal in the other. The formal recital in the sale-deed as to the delivery of possession is a very weak evidence even between the parties to the deed, but as against third persons it can have no evidentiary value.

The vendees were residing at Chistian, while the house is situate at Phagwara.

It is not denied that they did not take physical possession of the house till sometime after the suit was filed. Mere delivery of symbolical proprietary possession would be of no avail. According to Kashmiri Lal Plaintiff, examined as a D. W. Mst. Durga Devi, the vendor, was in possession of the house and his father, Nand Lal, obtained possession of the house from her in execution of the ex parte decree in his favour. He further states that Shanti Parkash and his sons,

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who used to reside at Mandi '' Ohistlan, got possession of the house after the exparte decree was set aside.

To some similar effect is the statement of Milkhi Ram P.W. who further avers that his son Devi Dyal used to live in this house. Exparte decree, it shall be remembered, was set aside on 4-1-1998. Limitation of one year provided by Article 10 started sometime after this date, when the vendees got physical possession of the house. Application for amending the plaint and imploding the ostensible vendees was presented on 6-11-1998. This application, dismissed in the first instance, was accepted in appeal and the vendees were allowed to be impleaded as Defendants. When a person is added as a party on an application made for the purpose, his addition is deem-to take effect from the date of the presentation of the application. This is so because a party should not be made to suffer for the delay caused by the time taken by the courts in passing the necessary order. The order when passed should be deemed to have been made at the date on which the jurisdiction of the court is properly invoked. The real vendee was already a party to the suit. Against the ostensible vendees as well, the suit which should be deemed to be instituted on 6-11-1998, was within time as provided by Article 10, Limitation Act.

9. Basing his argument on the statement of Milkhi Ram P.W. that his son Devi Dyal was in possession of the house, Shri Tewari contends that the property sold did not admit of physical possession and hence Article 10 would not be applicable. The witness does not say anything about the capacity in which Devi Dyal was in pos session.

It is not known whether the possession of Devi Dyal was permissive or adverse, or it was that of a tenant. It cannot, therefore, be concluded that physical possession could not be passed on to the vendees. Even if that be assumed, the matters do. not improve in favor of the Appellants. The sale-deeds being not registered, the limitation, u/s 30, Pre-emption Act would- be one year from the date of taking physical possession by the vendees of any of the property sold; and in its absence the limitation would be six years, under Article 120, Limitation Act, counted from the date of the sales.

Therefore, the suit would not be barred even Section 30, Pre-emption Act or Article 120, Limitation Act be said to be applicable.

10. No other point has been urged. The result, therefore, is that the appeal fails and is dismissed with costs.

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