

Kashmir Singh v. Mehar Chand (Pandit, J.)

1856. In that case the Court was not called upon to decide whether any suit brought by a mortgagor or the mortgagee on the basis of a mortgage was within time or out of time. Only the claim of the mortgagees to the ownership of the mortgaged land was negatived. The learned counsel for the plaintiff-respondent, therefore, can derive no help from these two judgments.

(11) The question whether the Patiala Act was retrospective in operation or not does not arise for determination in this case in view of the fact that a sufficiently long period of 46 years remained for the filing of the suit when the Patiala Act was brought into force. No right of the mortgagor or mortgagee was extinguished by the coming into force of that Act; only the *terminus a quo* for the suit for redemption had started.

(12) For the reasons given above I hold that the suit of the plaintiff-respondent was barred by time and should have been dismissed on that ground. In view of that conclusion the appeal is accepted and the suit of the plaintiff-respondent is dismissed leaving the parties to bear their own costs throughout, as the point of law involved in the appeal was not free from difficulty.

D. S. Tewatia, J.—I agree.

K.S.K.

APPELLATE CIVIL.

Before Prem Chand Pandit and S. S. Sandhawalia, JJ.

KASHMIR SINGH,—Appellant.

versus

MEHAR CHAND,—Respondent.

Regular Second Appeal No. 819 of 1967.

November 26, 1970.

Limitation Act (XXXVI of 1963)—Article 97—Sale of an undivided share in property under mortgage with possession—Subject-matter of the sale—Whether admits of physical possession—Possession taken by the vendee by redemption of the mortgage—Suit for possession by pre-emption of the property—Limitation for—Whether starts from the date of taking such possession or from the date of registration of the sale deed.

Held, that under article 97 of the Limitation Act, 1963, the limitation of one year for instituting a suit for possession by pre-emption starts when the purchaser takes under the sale the physical possession of the whole or part of the property sold. If the subject-matter of the sale does not admit of physical possession of the whole or part of the property the limitation of one year will start from the date when the sale deed is registered. Where

a property comprised in a joint *khata* is in possession of a mortgagee and an undivided share out of the *khata* is sold by some of the co-sharers, the subject-matter of such a sale does not admit of physical possession of the whole or part of the property. If the vendee redeems the mortgage and takes the possession, the possession is not deemed to be taken under the sale. The limitation for a suit for possession by pre-emption of the property will not start from the date of taking such possession, but it will start from the registration of the sale-deed.

(Paras 9, 13 and 18)

Case referred by Hon'ble Mr. Justice Prem Chand Jain on 23rd. October, 1968 to a larger Bench for decision of an important question of law involved in the case. The Division Bench consisting of Hon'ble Mr. Justice Prem Chand Pandit and Hon'ble Mr. Justice, S. S. Sandhawalia, finally decided the case on 26th November, 1970.

Regular Second Appeal from the decree of the Court of Shri Sukhdev Singh Sidhu, District Judge, Hoshiarpur, dated the 22nd day of May, 1967, affirming that of Shri A. C. Rampal, Sub-Judge, 1st Class, Garhshanker, dated the 9th November, 1966, granting the plaintiff decree for possession by pre-emption of the land in suit on payment of Rs. 9,500 including the amount already deposited in Court, upto 9th December, 1966, otherwise the suit of the plaintiff would stand dismissed and leaving the parties to bear their own costs.

The appellate Court left the parties to bear their own costs.

G. C. MITTAL, AND P. C. JAIN, ADVOCATES, for the appellant.

MALUK SINGH, ADVOCATE, for the respondent.

JUDGMENT

PANDIT, J.—(1) The only point that arises for decision in this second appeal is whether the pre-emptor's suit had been filed within limitation or not.

(2) On 1st June, 1964, Gandharb Singh and others sold 57 Kanals and 3 Marlas of agricultural land, out of 103 Kanals 18 Marlas, in favour of Kashmir Singh for Rs. 9,500 by a deed, was registered on 31st December, 1964. On 29th December, 1965, Mehar Chand alias Swarn Singh brought a suit for possession of the said land by pre-emption on the ground that he was a brother of Gandharb Singh, vendor, and also a co-sharer in the joint *Khata*, of which the land in dispute formed a part and, therefore had a superior right of pre-emption to that of the vendee. It was also alleged by him that the sale-price entered in the deed was fictitious and he was entitled to pre-empt the sale on payment of Rs. 6,000 only.

(3) The suit was contested by the vendee on a number of pleas, but, we, in the present second appeal are only concerned with one of them, namely, that the suit was barred by limitation.

(4) The trial court decreed the suit on payment of Rs. 9,500. This judgment was affirmed on appeal by the learned District Judge, Hoshiarpur.

(5) Thereafter, a second appeal was filed in this Court by the vendee and it came up for hearing before P.C. Jain J. The only point that was urged before the learned Judge was that the suit was barred by limitation under Article 97 of the Limitation Act, 1963. The argument on behalf of the appellant was that the vendee had redeemed the property and obtained physical possession of the same on 12th June, 1964. Limitation under the said Article commenced from the date when physical possession was taken and not from the date of registration as was held by the Courts below. The contention was that possession obtained after redemption would be deemed to have been taken under the sale and as such the period of limitation would start from 12th June, 1964, and the case would be covered by the first part of the *terminus a quo* mentioned in Article 97.

(6) On the other hand, learned counsel for the pre-emptor submitted that according to the language of Article 97, the purchaser had to take physical possession of the whole or part of the property sold under the sale. If he got it after redemption or eviction of the tenants, then it could not be said that possession was taken under the sale. It was also argued that the suit land did not admit of physical possession as only a share out of the joint *Khata*, and no specific *Khasra* numbers, was sold.

(7) The learned Single Judge was of the opinion that the point of law involved in the case was of some importance and there was also a conflict of views in the authorities cited at the bar before him. He consequently referred the case to a larger Bench and that is how the matter has been placed before us.

(8) The facts are not in dispute. It is common ground that a number of co-sharers owned a joint *Khata* consisting of 103 Kanals and 18 Marlas. This entire land was under mortgage with possession. Some of the co-sharers, who owned one-half share in the joint *Khata*, sold 57 Kanals 3 Marlas, out of the said *Khata*, to the vendee. This joint *Khata* had not been partitioned and the sale in dispute was of an undivided share in a joint holding. Out of the sale-price, the mortgage amount of Rs. 5,549 was left with the vendee for payment to the mortgagees. In the sale-deed, it had been

mentioned that 57 Kanals 3 Marlas along with share in the wells, persian-wheel, trees etc. had been sold and symbolic possession had been given to the vendee. It was also stated therein that the land had to be redeemed and the vendee had been directed to make the payment of the mortgage amount before 15th June, 1964, otherwise, he would be liable for damages regarding the produce of the land. It is also undisputed that on 12th June, 1964, the vendee made the payment of the mortgage amount and got possession of the entire land, viz., 103 Kanals 18 Marlas, from the mortgagees. He kept the possession of 57 Kanals 3 Marlas with him and gave the rest to the other co-sharers. The suit, as already mentioned above, was brought on 29th December, 1965.

(9) It is the case of both the parties that Article 97 of the Limitation Act will apply to the present suit. According to the appellant, the limitation would start from 12th June, 1964, when the vendee took possession of 57 Kanals 3 Marlas, while, according to the pre-emptor it would commence from the date of the registration of the sale-deed that is, 31st December, 1964, because the subject-matter of the sale in the instant case did not admit of physical possession.

Article 97 reads :

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

(9) A bare reading of this Article would show that two types of cases are covered by it. Firstly, if it is proved that the purchaser has taken under the sale sought to be pre-empted, physical possession of the whole or part of the property sold, then the limitation of one year would start from the date when such physical possession was obtained. Secondly, if the subject-matter of sale did not admit of physical possession of the whole or part of the property, in that case the limitation of one year would start from the date when the sale-deed was registered.

(10) In order to apply the first part of the third column of the Article, one has to see whether the subject-matter of sale does admit of physical possession of the whole or part of the property and whether the purchaser has taken under the sale sought to be impeached such physical possession. If this test is satisfied; then the limitation of one year would start from the date when such physical possession was taken. Where, on the other hand, the subject-matter of the sale does not admit of physical possession of the whole or part of the property, then limitation would commence from the date of the registration of the sale-deed.

(11) It is undisputed that physical possession means actual personal possession and not symbolic or constructive possession. In the words of the Full Bench in *Ghulam Mustafa v. Shahab-Ud-Din Khan* (1), the term 'physical possession' means "personal and immediate possession."

(12) When is the capability of the property for physical possession to be judged? It has been held in a number of authorities that the said capability is to be determined with reference to the time of sale. In this connection, reference may be made to a Bench decision of the Lahore High Court, consisting of Shadi Lal C.J. and Fforde J. in *Ganwa and another v. Joti Prasad and others* (2), where it was held—

"Whether the subject of the sale does or does not admit of physical possession must be determined with reference to the date of the sale, and it is immaterial whether the property afterwards became susceptible of physical possession. The date of the sale is the crucial date for deciding whether the first part of the article governs the action.....".

(1) 49 P.R. 1908.

(2) A.I.R., 1924 Lah. 302.

It might be mentioned that the learned counsel for the appellant did not cite any authority taking a contrary view on this point.

(13) So the point to be determined in the instant case was whether on 1st June, 1964, when the property was sold, the whole or part of it did admit of physical possession and the purchaser had taken such possession under the sale. As I have already mentioned above, on that date, the entire land comprised in the joint *Khata* was in the possession of the mortgagees and an undivided share in the said *Khata* had been sold by some of the co-sharers by virtue of the sale-deed in question. Does the property in suit admit of physical possession? This point has been answered by the Privy Council in *Batul Begam v. Mansur Ali Khan and others* (3), where it was held :

“Where the property sold was an undivided share in certain villages, held, that the “subject of the sale” did not admit of “physical possession” within the meaning of article 10 of the Indian Limitation Act. The expression used by Stuart, C.J., in *Jageshar Singh v. Jawahir Singh* (4), in regard to the word “actual possession” is applicable with still more certainty to the words “physical possession”, by which is meant a “personal and immediate” possession. In the present case such possession could not have been taken by the mortgagee without enforcing partition : article 10 (which is equivalent to the present Article 97, though with a slight change, which, however, does not affect the point in dispute) therefore did not apply.”

(14) There are a number of other authorities also taking the same view that where a share in a joint and undivided property has been sold, then such a property does not admit of physical possession. In face of the above Privy Council ruling, however, it is not necessary to refer to them.

(15) That being so, it has to be held that on 1st June, 1964, the property sold did not admit of physical possession.

(16) This apart, I may mention that there are authorities, which have also taken the view that when land sold was in the occupation

(3) I.L.R. 24 All. 17.

(4) (1876) I.L.R. 1 All. 311.

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of a mortgagee with possession, then the purchaser could not be put in physical possession at the date of sale and that his purchase made him owner merely of the equity of redemption an incorporeal right, which did not admit of physical possession. See in this connection *inter alia* two Bench decisions of the Punjab Chief Court in *Bhawani Pershad v. Attar Singh and another* (5) and *Karam Ali v. Sultan and others* (6).

(17) It is also on the record that only symbolic possession was given to the vendee on the date of sale, as is the averment in the sale-deed, and the vendee actually got physical possession of the entire land, comprised in the joint *Khata*, including the property sold, only on 12th June, 1964, when the land was redeemed.

(18) It is clear, therefore, that on that date of sale, that is, 1st June, 1964, the subject-matter of the sale did not admit of physical possession of the whole or part of the property and further the purchaser did not take under the sale such possession on that date. The first part of column 3 of Article 97, consequently, would not be attracted in the instant case. In that situation, the second part of the said column would be applicable and the limitation of one year would start from the date of the registration of the sale deed.

(19) The learned Single Judge referred to two decisions, which, according to him, had taken a contrary view. The appellant had relied on a Single Bench decision of the Lahore High Court in *Tulsi Ram and others v. Ganwa and others* (7). The pre-emptor, on the other hand, placed his reliance on *Joginder Singh and another v. Kartar Singh and others* (8). In *Tulsi Ram's case* (7), Le Rossignol J. held :

“Where land sold was in the possession of tenants at the date of sale, held that constructive possession was taken by the vendee at the time of the sale and physical possession he took some time after when he ousted the tenants. And,

(5) 68 P.R. 1884.

(6) 30 P.R. 1911.

(7) A.I.R. 1924 Lah. 196.

(8) 1949 P.L.R. 389.

therefore, limitation began to run from the date when physical possession was taken."

(20) It is enough to say that Letters Patent Appeal against this very decision was accepted by Shadi Lal, C. J., and Forde, J., in *Ganwa's case* (2) referred to above. Therein, it was also observed by the learned Judges :

"Now it has been repeatedly held both by this Court as well as by the Allahabad High Court that property, which is in the possession of a tenant does not admit of physical possession within the meaning of that article (Article 10). This principle is firmly established, and it is now too late to question its correctness."

(21) In *Joginder Singh's case* (8) Bhandari J. held—

"Under Article 10 of the Limitation Act, limitation starts from the date when the purchaser takes, under the sale, physical possession of the whole of the property sold or where the subject of the sale does not admit of physical possession, when the instrument of sale is registered.

"When the land sold is in the possession of a mortgagee, it does not admit of the delivery of physical possession to the purchaser, and in such a case, limitation starts from the date of registration."

(22) In view of what I have said above, I am of the view that the Courts below had correctly held the suit to be within limitation. The appeal, therefore, fails and is dismissed. The parties are, however, left to bear their own costs in this Court as well.

(23) It was submitted by the learned counsel for the respondent that the purchase money deposited by his client had been withdrawn with the permission of the Court. The pre-emptor is, therefore, directed to deposit the said amount in the Court of the first instance on or before 11th January, 1971.

SANDHAWALIA, J.—I agree.

B. S. G.