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For the above reasons we allow this appeal and dismiss the suit of the plaintiff with costs throughout.

Appeal allowed.

Before Mr. Justice Sulaiman and Mr. Justice Iqbal Ahmad.

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ABDUL KHAN (DEFENDANT) *v.* SHAKIRA BIBI (PLAINTIFF).*

Act (Local) No. XI of 1922 *(Agra Pre-emption Act), sections* 4 (3) *and* 16—*Pre-emption—Claim based on the Act and partly on the Muhammadan law—Effect of failure of one ground—"Land".*

The property which was the subject of a suit for pre-emption consisted of a zamindari share and also a one-third share in a house and a sugarcane pressing mill. The plaintiff sued to pre-empt the zamindari under the provisions of the Agra Pre-emption Act, 1922, and the share in the house and the mill on the basis of the Muhammadan law. She failed in her claim under the Muhammadan law because the necessary demands had not been properly made.

Held, that the whole claim should be dismissed, section 16 of the Agra Pre-emption Act not having made any change in the law in this respect.

Muhammad Wilayat Ali Khan v. *Abdul Rab* (1), *Mujib-ullah* v. *Umed Bibi* (2), *Abdul Rahman* v. *Hedayat-ullah* (3) and *Puech* v. *Aziz Fatima Bibi* (4), followed.

Aliter, if the claim for pre-emption of the house and the sugarcane pressing mill was based on the plaintiff's right to pre-empt these properties under the Act as being attached to the land upon which they stood, and if the whole of such land was included in the sale.

THE facts of this case sufficiently appear from the judgement of the Court.

Maulvi *Mukhtar Ahmad*, for the appellant.

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*Second Appeal No. 1159 of 1926, from a decree of Priya Charan Agarwal, Subordinate Judge of Azamgarh, dated the 25th of March, 1926, confirming a decree of Bijaypal Singh, City Munsif of Azamgarh, dated the 2nd of December, 1925.

(1) (1888) I.L.R., 11 All., 108. (2) (1898) I.L.R., 21 All., 119.
(3) (1913) 12 A.L.J., 88. (4) (1920) 19 A.L.J., 107.

Munshi *Sheo Dihal Sinha,* for the respondent.

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SULAIMAN and IQBAL AHMAD, JJ. :—This is defendant's appeal arising out of a suit for pre-emption. The property sold by the vendor consisted of a zamindari share as well as a one-third share in a house and a sugar-cane pressing mill. The plaintiff sued to pre-empt the zamindari under the provisions of the Agra Pre-emption Act, and the share in the house and the mill on the basis of the Muhammadan law. On the date fixed for hearing her witnesses were not present, but an application unaccompanied by an affidavit was filed asking for an adjournment. That application was disallowed and the plaintiff's claim as regards the last two items was dismissed on the ground that she had not performed the necessary demands required by the Muhammadan law; but her claim for pre-emption of the zamindari was decreed on payment of a proportionate price. That judgement has been affirmed by the lower appellate court.

The contention before the courts below was that it was the duty of the plaintiff to pre-empt the entire property which was sold by the vendor, and that inasmuch as by not having performed the necessary demands she disqualified herself from pre-empting part of the property under the Muhammadan law, her claim based on the provisions of the Act must also fail on the ground of partial pre-emption.

The lower appellate court overruled this contention on the ground that an amendment proposed by a member in the Legislative Council for adding the words " in accordance with the provisions of this Act " at the end of section 16 was opposed because it was thought unnecessary and superfluous and was lost, and that therefore the expression " entitled to pre-empt " in that section must be deemed to mean " pre-empt under the Act ". It is not proper to refer to the proceedings of the Legislative

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Council in order to determine the true interpretation of the language of a section. We have to interpret the section as it stands, irrespective of what might have been thought by any individual member of the Legislative Council.

There can be no doubt that, prior to the passing of the Act, it was laid down by this Court that a pre-emptor must pre-empt the entire property sold, whether he has a right of pre-emption on the basis of a custom or the Muhammadan law. This view was first expressed in the case of *Muhammad Wilayat Ali Khan* v. *Abdul Rab* (1), where the plaintiff, having disqualified himself from pre-empting a portion of the property under the Muhammadan law, was not allowed to pre-empt the rest under the *wajib-ul-arz*. The learned Judges, at page 110, however, remarked that it was a question on which, although they had affirmed an opinion, they expressed that opinion with some hesitation. That view was consistently followed in a number of cases by this Court, and by some Judges perhaps reluctantly: *Mujib-ul-lah* v. *Umed Bibi* (2), *Abdul Rahman* v. *Hedayat-ul-lah* (3) and *Puech* v. *Aziz Fatima Bibi* (4).

Although from one point of view the rule of law was perfectly sound, namely, that a pre-emptor should not be allowed to pick and choose, there was also much to be said for the contrary view that the rights of pre-emption based on custom, contract or Muhammadan law are separate and distinct, and a pre-emptor might very well rely on one such right and not on all. Properties may be sold under one sale-deed, to some of which a person has right under a prevailing custom, to another portion under some special contract between the parties and to a third under the Muhammadan law provided he fulfils the necessary conditions. A pre-emptor might well abandon his right based on any special contract which might be

(1) (1888) I.L.R., 11 All., 108.
(2) (1898) I.L.R., 21 All., 119.
(3) (1913) 12 A.L.J., 88.
(4) (1920) 19 A.L.J., 107.

difficult to prove, or on the Muhammadan law, in which case also the oral demands may be difficult to prove, and may fall back exclusively on his right under the custom. In the case of a specific performance of a contract of pre-emption there may be special circumstances under which a court may refuse to exercise its discretion. In cases under the Muhammadan law the uncertainty of convincing a court as to the performance of the demands by producing oral evidence of mere relations or friends, might be felt to be very great. There is, therefore, a certain amount of hardship on a pre-emptor who has undoubtedly the right under the custom, if he is called upon to come to court on the basis of a contract as well as the Muhammadan law. In view, however, of the series of rulings of this Court, it is not possible for us to make a departure unless we are satisfied that the new Act has made an alteration.

The latter portion of section 16 of the Act lays down that no suit shall lie for enforcing a right of pre-emption in respect of a portion only of the property which the plaintiff is entitled to pre-empt. The courts below have thought that this section is exhaustive and embodies the whole law of partial pre-emption, and that the words "in accordance with the provisions of the Act" must be deemed to be understood at the end of the section. In our opinion this is not a sound inference. Even if we assume that the word " pre-empt " at the end of the section means " pre-empt under the Act ", the conclusion is not justified. The proviso to section 3 specifically lays down that where there is no right of pre-emption under section 5, the provisions of the Muhammadan law of pre-emption shall not be affected in case the vendor and the pre-emptor are both Muhammadans. It is thus obvious that where there is no right under section 5, the right under the Muhammadan law is maintained. An enforcement of a right of pre-emption under the Muham-

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madan law would therefore also be a pre-emption under the Act. In a case in which a zamindari and a house are sold together, the claim to pre-empt the zamindari would be under section 5 read with section 11 and the claim to pre-empt the house under the Muhammadan law would be in accordance with the provisions of section 3. Both claims would therefore be under the Act and section 16 would require that the plaintiff must pre-empt the whole of the property which he is entitled to pre-empt.

Another significant circumstance is the use of the word "property" instead of the word "land" in section 16. Had it been intended that a pre-emptor is bound to pre-empt only the landed property sold and need not include in his claim house properties, one would have expected to find the prohibition confined to landed property which the plaintiff is entitled to pre-empt, instead of the use of the more comprehensive word "property".

Although we consider it unfortunate that the old rule which caused serious difficulties has not been altered, we are constrained to hold that the language of section 16 does not do away with the former interpretation of the law.

It is next contended that even if the claim under the Muhammadan law for pre-emption of the house and the sugarcane pressing mill fails, the plaintiff has a right to pre-empt these properties under the Act as the definition of land is wide enough to cover such properties. There is no doubt that under the old law houses and buildings, other than those which automatically pass with the zamindari, could not be pre-empted. Section 4 (3) of the Pre-emption Act, however, defines land as "(including things attached to the earth or permanently fastened to anything attached to the earth, when sold or foreclosed along with the land to which they are attached, but not otherwise". The expression "attached to the earth" has been defined in section 3 of the Transfer of Property

Act and there it undoubtedly includes buildings. That definition, however, must be deemed to have been intended for the purposes of that Act only and cannot be imported into the Pre-emption Act. Nevertheless the use of the two expressions "attached to the earth" and "permanently fastened to anything attached to the earth" does indicate that it was intended that buildings which are built upon land should be included. The wide scope of the definition could not have been intended to apply to trees only. We must therefore hold that under the Act "land" includes buildings standing upon it.

But in order to be pre-emptible such buildings must be sold along with the land to which they are attached, but not otherwise. If, therefore, the sites occupied by the house and the sugarcane pressing mill were the exclusive property of the vendor and had been completely sold under the deed, there would be no difficulty in holding that they also are pre-emptible. This would have been the case also if the whole zamindari had been sold. But in the present case only a one anna and odd share in the zamindari has been transferred. If the sites are joint lands then only a corresponding share in those sites has been transferred. It would then be very difficult to hold that the sugarcane mill and the house have been sold along with the lands to which they are attached, inasmuch as they would be deemed to be attached to the sixteen annas shares in the lands, whereas only a one anna and odd share has been sold.

We accordingly send down the following issue to the lower appellate court for a finding :—

(1) Whether both or either of the sites occupied by the house and the sugarcane pressing mill were the exclusive property of the vendor or the joint property of the co-parcenary body.

As this aspect of the question was overlooked, we direct that the parties should have the opportunity of

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producing any further evidence on this issue which they may choose to do. The finding should be returned by the 31st of October, 1927, and the usual ten days will be allowed for objections.

Issue remitted.

FULL BENCH.

Before Mr. Justice Lindsay, Acting Chief Justice, Mr. Justice Iqbal Ahmad and Mr. Justice Sen.

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DAYA RAM (PLAINTIFF) *v.* THE SECRETARY OF STATE FOR INDIA IN COUNCIL (DEFENDANT).*

Act No. XII of 1884 (*Agriculturists Loans Act*), *section* 4—Taqavi *loan—Act* (*Local*) *No. III of* 1901 (*United Provinces Land Revenue Act*), *sections* 145, 183, 233(*m*)—*Alleged wrongful attachment of property to realize* taqavi—*Payment under protest followed by suit against Secretary of State.*

One RN having died owing a certain sum to Government as *taqavi*, the revenue authorities attached a she-buffalo in the possession of DR on the ground that the latter was the heir of RN and that the buffalo was the property of the deceased. DR objected to the attachment, but his objection was overruled. He thereupon paid under protest the amount of *taqavi* claimed, and got back the buffalo, but meanwhile its calf had died owing to its separation from the mother. He then sued the Secretary of State for India in Council for refund of the money paid, for damages for the death of the calf, and for the price of the milk of which he had been deprived owing to the alleged wrongful attachment.

Held, that section 183 of the United Provinces Land Revenue Act applied, and the applicant was competent to maintain a suit against the Secretary of State, but only for the recovery of the amount paid and not for damages.

*Civil Revision No. 98 of 1927.