

## APPELLATE CIVIL.

*Before Justice Sir Shah Muhammad Sulaiman and  
Mr. Justice Young.*

AMJAD ALI KHAN (PLAINTIFF) *v.* SAADAT BEGAM  
AND ANOTHER (DEFENDANTS)\*

1931  
January,  
10.

*Agra Pre-emption Act (Local Act XI of 1922), sections 1(3),  
3 (proviso) and 16—Partial pre-emption—Sale of land in  
village along with house in town—Pre-emption of land  
under the Act and of the house under Muhammadan law  
—Failure of latter claim—Whether whole suit must fail.*

Zamindari property in a village and a house in a city were sold together by the same sale deed. The plaintiff brought a suit for pre-emption, claiming to pre-empt the land by virtue of the Agra Pre-emption Act and the house under the Muhammadan law. He failed to establish the due performance of the demands required by the Muhammadan law and so his claim to pre-empt the house failed. *Held* that the claim to pre-empt the land was not thereupon liable to be dismissed on the score of partial pre-emption. Section 16 of the Agra Pre-emption Act, even as it stood before its amendment by Act (Local) No. IX of 1929, was intended to be applicable to areas to which the Pre-emption Act was made applicable, and not to the case of any area within a city, to which, by section 1(3), the Act itself did not apply and therefore the proviso to section 3 did not apply. The claim to pre-empt the house in the city not being within the scope of the Act at all, its failure could not lead to the consequent failure of the claim regarding the land, to which the Act applied.

Dr. *M. L. Agarwala*, for the appellant.

Mr. *Mushtaq Ahmad*, for the respondents.

SULAIMAN and YOUNG, JJ. :—This is a plaintiff's appeal arising out of a suit for pre-emption. Certain shares of zamindari property in a village along with a house in the city of Moradabad were sold under one sale

\*Second Appeal No. 1972 of 1928, from a decree of Kanshtabha Nand Joshi, Subordinate Judge of Moradabad, dated the 19th of June, 1928, reversing a decree of Mithan Lal, Munsif of Moradabad, dated the 19th of January, 1928.

1931

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 AMJAD  
 ALI KHAN  
 v.  
 SAADAT  
 BEGAM.

deed to the defendants. The plaintiff brought his suit to pre-empt the zamindari property by virtue of his right under the Pre-emption Act and to pre-empt the house property under the Muhammadan law. He alleged that he had made the necessary demands required by the Muhammadan law. Both the courts below have come to the conclusion that he failed to prove that he made the demands which would entitle him to succeed under the Muhammadan law, so far as the house was concerned. The first court dismissed the claim with regard to the house but decreed it as regards the zamindari property. On appeal the lower appellate court has dismissed the entire suit. Following the case of *Abdul Khan v. Shakira Bibi* (1) the lower appellate court has held that having lost his right to pre-empt the house, the plaintiff's suit as regards the zamindari property also failed on the ground of partial pre-emption. The plaintiff has come up on appeal and on his behalf it is contended that the view of the lower appellate court is not right.

Section 16 of the Agra Pre-emption Act has been amended (by Local Act No. IX of 1929) since the pronouncement of the judgment quoted above, and the amendment indicates the mind of the legislature. But it being an amending Act and not a declaratory one, the addition of the words "under this Act" at the end of section 16 would not have a retrospective effect. We have therefore to apply section 16 as it stood before the amendment.

In the case quoted above the Bench reluctantly came to the conclusion that the previous interpretation of the common law had remained unaffected. That was, however, a case in which both the zamindari property and the house property were situated within a village which was a rural area to which the Pre-emption Act

(1) (1927) I.L.R., 50 All., 348.

1931

AMJAD  
ALI KHAN  
v.  
SAADAT  
BEGAM.

applied. The Bench thought that because the proviso to section 3 left the Muhammadan law intact where there was no right of pre-emption under section 5, the claim to pre-empt the house was in accordance with the provision of section 3. At another place in the judgment it was remarked that the enforcement of such a right under the Muhammadan law would also be a pre-emption under the Act. This last expression was certainly inaccurate, but that was a case to which the Act in its entirety was applicable.

The learned advocate for the appellant distinguishes the present case from the reported case on the ground that here the house is situated not in the village to which the Act applies but in the city of Moradabad to which the Act does not apply. Section 1, sub-section (3) of the Act expressly lays down that the Act does not apply to any area included within the limits of a Municipality. It is therefore obvious that the Act is not applicable to the city of Moradabad at all. It follows that no section of the Act is applicable to the city of Moradabad, nor is any proviso to a section. Of course it does not follow from this that the law which stood in the areas to which the Act does not apply has in any way been superseded; the Act merely does not touch such laws or rights. There would be no necessity to lay down a proviso in respect of an area to which the Act is expressly not made applicable. It is, therefore, reasonable to construe the proviso to section 3 as applying to areas to which the Act applies but in which there is no right of pre-emption under section 5. In the same way it follows that section 16 must have been intended to be applicable to areas to which the Act was made applicable. Under that section 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. In view of the opinions expressed in the earlier cases we assume

that the expression, "entitled to pre-empt", would be wide enough to cover the case where there was an initial right to pre-empt although it was lost on account of the failure to make the demands. But we think that there is force in the contention that the legislature could not have intended to include within this expression any right to pre-empt which the plaintiff may possess in areas to which the Act is not applicable. A statutory right to pre-empt the zamindari property has been conferred on the plaintiff under sections 5, 11 and 12 of the Act. That statutory right cannot be taken away by any common law outside the Act. The only way to defeat such a right would be by applying section 16, if it were applicable. We see no reason for holding that section 16 contemplates the exercise of a right in areas to which the Act is expressly made not applicable. It therefore seems to us that the present case is distinguishable from the reported case, and in the case before us we cannot hold that simply because the plaintiff did not properly exercise his right under the Muhammadan law in respect of the house in the city of Moradabad, to which the Act is not applicable, he has also lost his right to pre-empt the property within the village to which the Act applies.

We therefore think that the decree of the court of first instance was right. We accordingly allow this appeal and setting aside the decree of the lower appellate court restore that of the court of first instance.

1931

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 AMJAD  
 ALI KHAN  
 v.  
 SAADAT  
 BEGAM.