APPELLATE CIVIL.

Before Mr. Justice Wazir Hasan and Mr. Justice Muhammad Raza.

1927 *August*, 22.

ASAFUDDAULA KHAN (DEFENDANT-APPELLANT) *v.* ABDUL GHAFFAR AND OTHERS (PLAINTIFFS) AND ONE DEFENDANT (RESPONDENTS).*

Pre-emption—Oudh Laws Act (XVIII of 1876) section 13—Words "in good faith" in section 13, meaning of—Property sold for excessive or fancy price, whether a sign of bad faith.

The mere fact that an excessive or a fancy price is paid for the property, or that the vendee fails to make proper inquiries about the property, does not establish that the price was not fixed in good faith.

The words "in good faith" under section 13 of the Oudh Laws Act mean "honestly" and the word "honestly" applied to the fixing of the price of the property sold, which is subject to pre-emption, must import that the price fixed was meant to be actually paid and was not to be false or fictitious one in order to make out the value to be higher than the reality and to defeat pre-emption.

A court in a pre-emption suit can decide on facts whether the property was sold for a fancy or fictitious price, and can further determine its market value if it holds that the sale price was fixed in bad faith. But, in the absence of actual evidence to show that the price was so fixed, no legal presumption to that effect can arise in a case where it is found that the price paid by the vendee, as well as even that offered by the pre-emptor, are, in view of the recorded income of the property, such as no reasonable man actuated by business principles would offer. *Shambhu Dat* v. *Jagannath and others* (1), relied upon.

Messrs. *Ali Zaheer* and *Mahabir Prasad*, for the appellant.

Messrs. *Niamatullah*, *Naimullah* and *Mirza Mahmud Beg*, for the respondents.

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*First Civil Apeal No. 145 of 1926, against the decree of Ziauddin Ahmad, officiating Subordinate Judge of Gonda, dated the 28th of August, 1926.

(1) (1916) 3 O.L.J., 543.

HASAN and RAZA, JJ. :—This is a defendant's appeal in a pre-emption case.

Sheo Saran Gir (defendant No. 2) sold the property in suit (66·14 acres = 317 bighas land in village Gaur, district Gonda), to Asafuddaulah Khan (defendant No. 1), by a registered deed, dated the 22nd of April, 1925, in which the consideration is stated to be Rs. 30,000. The deed was duly registered on the 23rd of April, 1925. The present suit was instituted on the 22nd of April, 1926 (only one day before the expiration of the limitation period). The plaintiffs, who are co-sharers of the village Gaur, brought the suit, alleging that the price entered in the sale-deed was fictitious, that the property was really sold to the defendant No. 1 for Rs. 14,878-9-8, and that the market value of the property was not more than Rs. 14,878-9-8. No notice was, admittedly, given to the pre-emptors, as required by the Oudh Laws Act.

The suit was contested by the vendee (defendant No. 1). He denied that the property in suit was sold to him for Rs. 14,878-9-8 as alleged in the plaint, and asserted that the property was sold to him for Rs. 30,000, and that Rs. 30,000 was the market value of the property. He admitted the plaintiff's title, and stated that he had no objection to the plaintiff's claim being decreed by the court, should they pay Rs. 30,000, the full price of the property in suit. He claimed also Rs. 452-2-0 over and above Rs. 30,000 on account of stamp and registration expenses, etc.

The learned Subordinate Judge framed three issues and found as follows :—

(1) The price in the sale-deed is fictitious.

(2) The fair market value of the property in suit is Rs. 15,000.

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(3) The plaintiffs are entitled to a decree, on payment of Rs. 15,000 only.

The defendant No. 1 (vendee) has appealed to this Court.

The principal point for determination in this appeal is:—Whether or not the price was fixed in good faith. The court cannot go into the question of the market value, till it finds that the price entered in the sale-deed was not fixed in good faith. [*See* section 13 of the Oudh Laws Act (Act XVIII of 1876)].

In the sale-deed (exhibit A1), the consideration is stated to be Rs. 30,000, made up of the following items:—

	Rs. a. p.
(1) Left with the vendee for payment to Abdul Wahid and others for a decree ...	13,817-9-8
(2) Left with the vendee for payment to Mehdi Hasan on account of a pronote, dated 4th of January, 1925 ...	2,000-0-0
(3) Paid in cash before the Sub-Registrar	14,182-6-4

The correctness of the first item is not questioned by the plaintiffs. They question, however, the correctness of the second and third items. It is said that the second item is entirely fictitious. Rupees 1,061 only are admitted out of the third item. It is said that Rs. 420 were paid for stamp and registration expenses before the execution of the sale-deed, that only Rs. 641 were paid in cash before the Sub-Registrar, and that the balance was simply shown before the Sub-Registrar, and was not actually paid to the vendor.

To prove their case, the plaintiffs have examined the vendor, Sheo Saran Gir (defendant No. 2), and the

two attesting witnesses of the sale-deed, namely, Bhagwati Prasad Patwari of Gaur and Mohammad Omar, zamindar of Karmahya. They give evidence in support of the plaintiffs' case, of course; but in our opinion their evidence is not reliable at all and appears to have been manufactured. The vendor, who has nothing to lose now, has, surely, colluded with the plaintiffs. His evidence on the point under consideration is quite inconsistent with what he himself had stated in the sale-deed (exhibit A1) and also with the Sub-Registrar's certificate endorsed on the deed. The evidence given by these three witnesses is quite inconsistent with what the Sub-Registrar had noted in his certificate, on the back of the deed. The certificate shows clearly that Rs. 14,182-6-4 were paid in cash to the vendor (defendant No. 2) before the Sub-Registrar, at the time the deed was presented for registration. The Sub-Registrar was bound to note in his certificate " payment of money " and " admission of receipt of consideration ", made in his presence, under section 58 of the Registration Act (Act XVI of 1908) and as the sum of Rs. 14,182-6-4 was paid in cash to the vendor in his presence, the fact was duly noted by him in his certificate. Under section 60 of the Registration Act, the Sub-Registrar's certificate " shall . . . . be admissible for the purpose of proving that the facts mentioned in the endorsements . . . . . have occurred as therein mentioned."

The defendant No. 1 has examined Wazir Ali, the third attesting witness of the sale-deed. His evidence shows that the fact mentioned in the Sub-Registrar's certificate is true and correct. He states that the money, which was in seven bags and seven bundles, was counted in two or three hours, and that a sum exceeding Rs. 14,000 was paid in cash to the vendor (defendant No. 2) before the Sub-Registrar. He cannot, of course,

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be expected to give the exact amount noted in the certificate. We are inclined to believe his evidence on the point under consideration. In our opinion it is satisfactorily established that Rs. 14,182-6-4 were really paid in cash to the vendor (defendant No. 2) in the presence of the Registering Officer. We think Sheo Saran Gir (P. W. 1) and Bhagwati Prasad (P. W. 2) have stated dishonestly that Rs. 641 only were paid to the vendor before the Sub-Registrar, and that a bundle containing some rupees more which were not counted, was simply shown to him (vendor) in the presence of that officer. Sheo Saran Gir goes so far as to state that the bundle in question was not even opened in the Sub-Registrar's office. He makes contradictory statements in speaking of defendant No. 1's presence at the time of the execution and registration of the sale-deed. The evidence given by Bhagwati Prasad (P. W. 2) and Mohammad Omar (P. W. 6) shows that the defendant No. 1 was present there at that time. Mohammad Omar's statement appears to be untrue on the very face of it. He makes the following statement :—

"I had gone to the registration office to get a sale-deed executed. I asked the defendant No. 1 at what rate he was purchasing the property. He told me that he was purchasing at Rs. 46 per bigha. I asked him how much he was going to pay before the Sub-Registrar. He said Rs. 641. He said that some more money would be shown before the Sub-Registrar. I went inside the Registration Office. The vendor was paid Rs. 641. He was shown some money and the son of the defendant No. 1 took it away. I do not recollect; if the defendant No. 1 went inside the Registration Office or not. I asked the defendant No. 1 about the pronote entered in the deed. He

> said that he had got one fictitious pronote executed in the name of his *karinda*. He said that he did this for fear of pre-emption . . . . The vendor was present when I had the above talk with the defendant No. 1. The defendant No. 1 told me that he purchased the property for nearly Rs. 15,000 . . . . I cannot say how much money was shown to the vendor. I think Rs. 1,000 or Rs. 1,500 in all was shown."

This witness rather proves too much.

It is impossible to believe that the vendee (defendant No. 1) had that conversation so openly with the witness on that occasion. Bhagwati Prasad (P. W. 2) admits that the sale transaction was not settled in his presence. Mohammad Omar's evidence shows that he also was not present at the time the sale transaction was settled. There is no reliable evidence on record to show that at the time when the sale transaction was settled, it was agreed between the vendor and the vendee that Rs. 14,182-6-4 would be entered fictitiously in the deed and some money in a bundle would simply be shown to the vendor in the presence of the Sub-Registrar.

We have carefully considered the evidence given by the plaintiffs' witnesses named above. We have no hesitation in rejecting their evidence. It should be borne in mind that it is not the plaintiffs' case that Rs. 14,182-6-4 were paid to the vendor, in the presence of the Sub-Registrar, but the money was handed back to the vendee or his men outside the Sub-Registrar's office after the deed was presented for registration.

We hold, disagreeing with the learned Subordinate Judge, that Rs. 14,182-6-4 were really paid to the vendor in the presence of the Sub-Registrar, as noted in the certificate endorsed on the deed and that that item (i.e. the third item) is a genuine item.

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As to the second item of Rs. 2,000 we think it is also a genuine item. It is true that the pronote has not been produced, but it is in evidence that it has been destroyed. The defendant No. 1 has examined Mehdi Hasan and has also produced the receipt given to him by Mehdi Hasan. Mehdi Hasan's evidence shows that he had advanced Rs. 2,000 to Sheo Saran Gir and had obtained a pronote from him. He received Rs. 750 from the defendant No. 1, in *Jeth* before last year, and Rs. 1,250 on the 7th of May, 1926, and then he destroyed the pronote. It should be noted that Rs. 1,250 were paid to Mehdi Hasan before the Sub-Registrar (*see* exhibit A2). We see no sufficient reason to reject the evidence of Mehdi Hasan, on the point under consideration. The mere fact, that the defendant No. 1 did not get back the pronote from Mehdi Hasan or that he paid the money to him (Mehdi Hasan) after the institution of the suit, does not establish that the item in question was fictitious. Sheo Saran Gir had made the amount payable to Mehdi Hasan under the sale-deed, and the defendant No. 1 had to pay it to him. It was not necessary for the defendant No. 1 to make inquiries about the nature of the debt or the circumstances under which the pronote was executed by Sheo Saran Gir. It was not also necessary for him to get back the pronote from Mehdi Hasan. He paid Rs. 2,000 to Mehdi Hasan as directed by Sheo Saran Gir, and this is what he had to do under the sale-deed. We should like to note that the defendant No. 1's witness, Wazir Ali, has made a statement about the pronote in question in his cross-examination. We think, he has made the statement under some misapprehension. The fact is that no pronote was shown to the Sub-Registrar at the time the sale-deed was presented for registration and nothing was paid to Abdul Rahman (father of Mehdi Hasan) on account of that pronote at that time. The pronote was not also destroyed at that time. It was destroyed

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after the defendant No. 1 had paid the money to Mehdi Hasan in May, 1926.

The defendant No. 1's evidence shows that he had made no inquiries about the property personally. It appears that he had relied on what Mehdi Hasan had said to him about the property and had then sent for the defendant No. 2 and settled the transaction with him. The evidence given by the village Patwari shows that the income of the property in suit is Rs. 450 a year. It is contended that it is improbable that any person would pay Rs. 30,000 for a property yielding an income of Rs. 450 a year only, and that the defendant No. 1's conduct shows that the price was not fixed in good faith. But it is a matter of common knowledge that sometimes an excessive or a fancy price is paid for the property sold. We are unable to see how a fraud can be perpetrated on pre-emptors by the vendee paying an excessive or a fancy price for the property sold or failing to make proper inquiries on business principles. The mere fact that an excessive or a fancy price is paid for the property or that the vendee fails to make proper inquiries about the property, does not establish that the price was not fixed in good faith. Under section 13 of the Oudh Laws Act "if in a case of sale, the court finds that the price was not fixed in good faith, the court shall fix such price as appears to it to be the fair market value of the property sold." According to the General Clauses Act "a thing shall be deemed to be done in good faith where it is in fact done honestly, whether it is done negligently or not" (*see* section 3, clause 20). We think the words "in good faith" under section 13 of the Oudh Laws Act mean "*honestly*", and the word "honestly" applied to the fixing of the price of the property sold, which is subject to pre-emption, must import that the price fixed was meant to be actually paid, and was not to be false or fictitious one in order to make out the value to be

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higher than the reality and to defeat pre-emption. As pointed out in the case of *Shambhu Dat* v. *Jagannath and others* (1), a court in a pre-emption suit can decide on facts whether the property was sold for a fancy or a fictitious price, and can further determine its market value if it holds that the sale price was fixed in bad faith. But in the absence of actual evidence to show that the price was so fixed, no legal presumption to that effect can arise in a case where it is found that the price paid by the vendee, as well as even that offered by the pre-emptor, are, in view of the recorded income of the property, such as no reasonable man actuated by business principles would offer.

We have examined the evidence on record carefully. In our opinion it is not satisfactorily established in this case that the price was fixed in bad faith. We need not and should not, therefore, go into the question of market value in this case. The pre-emptors must pay the price entered in the sale-deed. That price is the price which, we find, was agreed on and actually paid and received. The defendant No. 1 cannot get any sum over and above the sale price. The sale price does not include the amount in question (Rs. 452-2-0) and the only thing which the pre-emptors can be ordered to pay is the sale price.

The result is that we allow this appeal and modifying the decree of the lower court, give the plaintiffs a decree for pre-emption in respect of the property in suit on payment of Rs. 30,000 to the defendant No. 1. The plaintiffs should deposit the money in court on or before the 22nd of November, 1927. If the money is deposited as ordered, the plaintiffs will get half of their costs of the suit from the defendant No. 1 (vendee). If they fail to deposit the money as ordered, the suit shall stand dismissed and the defendant No. 1 will get his costs of the

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suit from the plaintiffs. The appellant (Asafuddaula Khan) will get his costs from the respondents Nos. 1 to 3 (Abdul Ghaffar, Raghubar Dayal Singh and Munawwar Khan) in this Court in all events.

Appeal allowed.

APPELLATE CIVIL.

Before Sir Louis Stuart, Knight, Chief Judge and Mr. Justice Gokaran Nath Misra.

MAHESH BAKHSH SINGH (PLAINTIFF-APPELLANT) v. BALA DIN (DEFENDANT-RESPONDENT).*

1927 *August,* 25.

Pre-emption—Suit by a person not a co-sharer in the village but only related to the mortgagor, maintainability of— Wajib-ul-arz *conferring a right of pre-emption on a mortgage or sale—Suit for pre-emption not on mortgage but on foreclosure, maintainability of.*

Held, that no right of pre-emption exists in Oudh, whether under a custom recorded in the *wajib-ul-arz* or under the Oudh Laws Act, in a person who has got no proprietary right in a village. Relationship alone is not sufficient to confer a right of pre-emption on any one; the claimant must be a co-sharer in the village also.

Where under the terms of a *wajib-ul-arz* a mortgage gives rise to a right of pre-emption and the person entitled to that right does not chose to enforce his right at that time, he cannot enforce the same right when the said mortgage is foreclosed under the terms of the same *wajib-ul-arz*.

Messrs. *Ram Bharose Lal* and *Raj Narain Shukla*, for the appellant.

Mr. *Radha Krishna*, for the respondent.

STUART, C. J., and MISRA, J. :—This is an appeal in a pre-emption suit. In the year 1917 one Lachman Singh, defendant-respondent No. 2, mortgaged a share

*First Civil Appeal No. 3 of 1927, against the decree of Pandit Damodar Rao Kelkar, Subordinate Judge of Rai Bareli, dated the 18th of October, 1926, dismissing the plaintiff's claim.