

This disposes of the grounds on which the suit, out of which this appeal arises, is founded. We will now notice but not decide a plea raised in defence to the effect that the suit was barred by section 47 of the Code of Civil Procedure. As we are going to dismiss the appeal on merits we refrain from deciding the point raised by this plea.

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The result is that the appeal fails and is dismissed with costs.

Appeal dismissed.

APPELLATE CIVIL.

*Before Mr. Justice Gokaran Nath Misra and
Mr. Justice Muhammad Raza.*

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January, 30.

ZAHIRUDDIN (PLAINTIFF-APPELLANT) v. KHAN BAHADUR ALI HUSAIN (DEFENDANT-RESPONDENT).*

Pre-emption—fictitious price entered in the sale-deed—Pre-emption to be allowed on payment of fair market value not exceeding price entered in the deed—Market value, determination of—Price actually paid, how far a fair indication of market value.

If the plaintiff in a suit to enforce the right of pre-emption under the Oudh Laws Act succeeds in showing that the price stated in the sale-deed is fictitious, he is not entitled to acquire the property for the price actually paid, but he must pay for it a price equivalent to the fair market value to be determined by the court which should not exceed the sale-price mentioned in the deed. If there is no evidence given by the parties which may enable the court to determine the market value of the property sold it would be perfectly open in such a case to the court to consider the price paid as a fair indication

* Second Civil Appeal No. 260 of 1928, against the decree of Rai Bahadur Thakur Rachhpal Singh, District Judge of Fyzabad, dated the 30th of April, 1928, reversing the decree of Pandit Krishna Nand Parde, Additional Subordinate Judge of Sultanpur, dated the 3rd of December, 1927, decreeing plaintiff's suit.

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of the market value. *Musammam Wazir Begam v. Mohammad Ishaq Khan* (1), relied on. *Har Pershad v. Sheo Shankar*, (2), and *Mehtab Khan v. Mustafa Beg* (3), referred to.

Mr. *Ghulam Hasan*, for the appellant.

Mr. *M. Wasim*, for the respondent.

MISRA and RAZA JJ. :—This judgment will govern the two appeals Nos. 260 and 261 of 1928. The two appeals arise out of a pre-emption suit. One Abdul Ghafoor sold one third of his share in Khata Khewat No. 10 amounting to 4 pies and 24 decimals share and situate in village Teari Machrouli, district Sultanpur. The sale-deed was executed on the 9th of November, 1926, in favour of the defendant-respondent Khan Bahadur Ali Husain for a sum of Rs. 4,000. On the 1st of June, 1927, the appellant Zahiruddin brought a suit for pre-emption in the Court of the Subordinate Judge of Sultanpur against the defendant-respondent on the ground that he was a co-sharer in this *khata* being the own brother of the vendor and was, therefore, entitled to pre-empt the property sold against the defendant respondent who was a stranger to the said village. He also alleged that the price entered in the deed was fictitious, that the money actually paid consisted of Rs. 3,000, which was also the market value of the property sold. He therefore, asked for a pre-emption decree on the payment of Rs. 3,000.

The defendant-respondent admitted that he was a stranger to the village, but denied that the price entered in the deed was fictitious and alleged that it was the market value of the property sold. He contended that the price entered in the deed was the genuine price, for which he had purchased the property and asserted that it was also the market value thereof.

(1) (1901) 4 O. C., 158.

(2) (1925) 90 I. C., 679.

(3) (1887) 101 P. R.

The learned Additional Subordinate Judge of Fyzabad, to whose court the suit had been transferred for trial, came to the findings that the price entered in the deeds was fictitious and that the market value of the property sold was Rs. 3,572-8-0. He, therefore, passed a decree for pre-emption in favour of the plaintiff-appellant directing him to deposit in court within three months from the date of the decree the said sum of Rs. 3,572-8-0.

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On appeal the learned District Judge of Fyzabad affirmed the finding of the learned Subordinate Judge on the question of the fictitious nature of the price entered in the sale-deed, but held that the market value of the property sold was Re. 4,000, and he, therefore, directed the plaintiff-appellant to pay the said sum instead of that fixed by the first court.

In second appeal two points were urged before us; *firstly*, that the courts below having found that the price entered in the sale-deed was fictitious and having further found that the price actually paid was Rs. 3,000, it was not open to them to declare any sum more than Rs. 3,000 as the market value of the property sold and *secondly* that the market value determined by the learned District Judge was not correct.

We are of opinion that none of these points can be sustained.

As to the first point it appears to us that the law is quite clear on the question. It is provided in section 13 of the Oudh Laws Act, 1876, that if in the case of a 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. On the language of the section, therefore there can be no doubt that where the court arrives at a finding that the price fixed in the deed has not been

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fixed in good faith it is its duty to determine what is the fair market value of the property sold. Indeed this point was conceded in arguments by the learned advocate for the plaintiff-appellant. The main point which he argued was to the effect that because in the present case it had been found by both the courts that the price actually paid was Rs. 3,000 it was not open to the courts below to find any other sum as the market value of the property sold. We regret we cannot accept this contention. It may be that the market value that the Court may determine in a particular case may be less than the price actually paid or may be more than the price so paid. We are fully aware that in many cases the price actually paid is a very good indication for determining the fair market value of the property sold, and that it is an element which the courts must consider in determining the market value. We are, however, unable to lay down a broad rule like the one contended for by the learned Advocate for the plaintiff-appellant that in all cases the court in determining the market value of the property sold must treat the money actually paid as conclusive evidence of the market value. If there is no evidence given by the parties during the trial of the case which may enable the court to determine the market value of the property sold it would be perfectly open in such a case to the court to consider the price paid as a fair indication of the market value.

We must point out that this view has been consistently followed in Oudh and would mention the case reported in *Musammat Wazir Begam v. Mohammad Ishag Khan* (1). The case was decided by a Bench of two Judges of the late Court of the Judicial Commissioner of Oudh, they being Messrs. SCOTT and SPANKIE. Mr. SPANKIE observes on page 162 that in his opinion if the plaintiff in a suit to enforce the right of pre-

emption under the Oudh Laws Act succeeds in showing that the price stated in the sale-deed is fictitious, he is not entitled to acquire the property for the price actually paid, but must pay for it a price equivalent to the fair market value. We are in entire agreement with the above observation of the learned Judge of the late court, though we must further add that the market value so determined should not exceed the sale price mentioned in the deed. The same view was taken by Mr. DALAL, J. C., (now Mr. Justice DALAL) in a case reported in *Har Pershad v. Sheo Shankar* (1).

In the Punjab Chief Court the same view has been taken. Section 17 of Act IV of 1872 laid down a similar rule that in case the court was of opinion that the price had not been fixed in good faith, it should make a decree directing the defendant to sell such property to the plaintiff on such a price as appeared to it to be the fair market value of the property sold. The same rule exists in the pre-emption law, which is now in force in the Punjab, it being section 26 of Act I of 1913. The matter came up for decision before the Chief Court of the Punjab in a case reported in *Mehtab Khan v. Mustafa Beg* (2). The case was decided by a Bench of the said Court consisting of PLOWDEN and ROW, JJ. We would like to quote the following passage from their judgment:—

“To come to plaintiff’s appeal, the contention that the sum actually paid can alone be taken as the basis of a pre-emption decree is quite untenable. What is to be the basis is settled beyond doubt by section 16(17), Act IV of 1872. No doubt the Legislature might, if it had thought fit, have directed the courts merely to look to the price actually paid, or intended to be paid, and to decree pre-emption on pay-

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(1) (1925) 90 I. C., 679.*

(2) (1887) 101 P. R.,

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ment of this sum. But it has not done so; it has most clearly laid down that where the price entered in the deed, or otherwise alleged by the parties, has been found not to have been fixed in good faith, the price at which the plaintiff can claim pre-emption is the fair market value alone. No doubt the price actually paid is always an important fact to be duly considered in forming an estimate of the market value, but it must be considered in connexion with other facts."

We are entirely in agreement with the above observations. Our finding, therefore, on the first point is that the action of the courts below in determining the market value of the property sold was in this case perfectly justified.

As to the second question of market value we must point out that it is a question of fact and unless the learned Advocate for the appellant succeeded in pointing out to us an error of law in determining the market value the finding of the lower appellate Court could not be disturbed. The contention of the learned Advocate who appeared for the plaintiff-appellant was that the finding of the learned District Judge on this point was not binding on this Court because in determining the market value the learned Judge relied principally on a sale-deed of a plot of land situate in this very village which had been executed by one Hakim-uddin Ahmad in favour of Sheikh Sa'adat Ali on the 19th of May, 1927 (exhibit A3), and that he was not justified in doing so because there was no proof on record to show that the lands covered by the said sale-deed were of the same quality as the lands in dispute. There is no doubt that this contention is true. The learned Counsel for the respondent has not been able to point to us any evidence

on the record to show that the two kinds of lands are the same. We feel that without that evidence the relevancy of exhibit A3 would not be established. We must, however, point out that if we look at the amount of profits arising out of the land sold under exhibit A3 and the price entered therein, we would get a fair indication of the rate on which the property is sold in this village at the present time.

The profits of the land covered by the sale-deed exhibit A3 on our calculation come to about Rs. 5-8-0 and the profits of the share in dispute come to about Rs. 75. The price at which the property was sold under exhibit A3 was Rs. 300. According to this rate the market value of the property in dispute would come to a little over Rs. 4,000. Under these circumstances we hold that the market value fixed by the learned District Judge was correct and must be maintained.

We, therefore, dismiss these appeals with costs.

Appeal dismissed.

APPELLATE CIVIL.

*Before Mr. Justice Gokaran Nath Misra, and Mr. Justice
A. G. P. Pullan.*

1929
February, 4.

AMBIKA PRASAD (PLAINTIFF-APPELLANT) v. BENI
MADHO (DEFENDANT-RESPONDENT).*

Lease of land used for growing grass is a lease for agricultural purposes and so does not require writing and registration—Thekadar's failure to carry out certain conditions of the lease, effect of, on the lease—Remedy open to a party suffering from the non-compliance by another

* Second Civil Appeal No. 360 of 1928, against the decree of Syed Asghar Hasan, District Judge of Gonda, dated the 1st of August, 1928, reversing the decree of Babu Bhudar Chandar Ghosh, Subordinate Judge of Bahraich, dated the 24th of April, 1928.