APPELLATE CIVIL.

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

ABID ALI KHAN (PLAINTIFF-APPELLANT) *v.* PANDIT HAR PRASAD AND ANOTHER (DEFENDANTS-RESPONDENTS).* 1929 *May*, 8.

Pre-emption—Fictitiousness of consideration—One item of sale consideration fictitious, effect of, on the entire consideration of the deed—Market value, determination of—Burden of proof—Slight evidence by pre-emptor of fictitious nature of consideration shifts the onus to the vendee.

In a suit for pre-emption if one item of the consideration is proved to be fictitious the entire consideration entered in the sale deed of which this item forms part must be deemed to be fictitious and it should be held that the sale consideration entered in the deed was not *bona fide*.

In order to determine the market value of the property in a suit for pre-emption the court should determine what amount was actually paid under the sale deed since it is a guide in helping the court in determining the market value if it is not otherwise fully established. *Abhilakh* v. *Babban Singh* (1), relied on.

It is a settled rule of law that in a suit for pre-emption a very slight proof as to the fictitiousness of the consideration will shift the burden to the vendee to prove the actual payment of the price entered in the deed. *Dwarika* v. *Ludar* (2), relied on.

Messrs. *K. P. Misra, S. M. Husain* and *Behari Lal Nigam*, for the appellant.

Messrs. *A. P. Sen, S. C. Das* and *Lakshmi Narayan*, for the respondents.

MISRA and RAZA, JJ. :—This appeal arises out of a pre-emption suit. One Akhtar Ali who is the defendant No. 3 in this suit sold a 2 annas 9 pies' share out of

*First Civil Appeal No. 87 of 1928, against the decree of Pandit Sheo Narayan Tewari, Subordinate Judge of Unao, dated the 15th of May, 1928.

(1) (1907) 10 O.C., 88. (2) (1900) 4 O. C., 247.

1929

ABID ALI KHAN v. PANDIT HAR PRASAD.

the entire village situate in patti Salabat Khan of village Bhugaita, district Unao, to Pandit Har Prasad and Pandit Ganga Sewak *alias* Manni Lal for Rs. 12,500. The sale deed was executed on the 14th of August, 1926. The consideration as stated in the deed was made up of the following items :—

Misra and Raza, JJ.

	Rs.	a.	p.
(1) Due under a mortgage deed, dated the 24th of July, 1924, executed by Akhtar Ali in favour of Har Prasad and Ganga Saran ...	4,804	5	3
(2) Due under 5 pro-notes of different dates executed by Akhtar Ali in favour of these very gentlemen ...	2,052	0	0
(3) To be paid to the plaintiff Abid Ali under a pronote executed by Akhtar Ali in favour of Abid Ali ...	2,350	0	0
(4) Cash paid at the time of the registration ...	3,000	0	0
(5) Costs of stamp and registration expenses	293	10	9
Total ...	12,500	0	0

The plaintiff appellant Abid Ali Khan is a co-sharer in patti Salabat Khan of village Bhugaita and therefore has brought the present suit claiming pre-emption in respect of the share sold. The main allegation on which he brought the suit was that the consideration entered in the sale deed was fictitious, and denied that the first item was actually due on the mortgage deed, dated the 24th of July, 1924. He admitted the genuineness of that item of the consideration to the

1929

ABID ALI KHAN v. PANDIT HAR PRASAD.

extent of Rs. 2,713-12-0, but denied the pro-notes alleging that they were all fictitious and therefore denied the genuineness of the entire item shown in the sale deed as due on that account. The rest of the items were admitted. The result was that he admitted the genuineness of the consideration entered in the sale deed to the extent of Rs. 8,063-12-0. He alleged that that was the real price for which the property had been sold. He further alleged that the third item consisted of Rs. 2,350 which was due to the plaintiff under a pro-note executed in his favour and which had not been paid by the vendees and out of the first item he also alleged that Rs. 1,000 shown in the mortgage deed, dated the 24th of July, 1924, to be payable to one Chandika Singh, who was in possession of a portion of the property as a prior mortgagee, had not been paid and consequently the plaintiff was entitled to deduct that amount also. In all he claimed a deduction for Rs. 3,350 leaving a balance of Rs. 4,713-12-0 on the payment of which amount he said he was entitled to claim pre-emption.

Misra and Lucas, JJ.

The vendees who are defendants-respondents in this case contended in their defence that none of the items was fictitious and that the price entered in the sale deed was actually the price which was settled between the parties. They said that Rs. 12,500 was also the market value of the property in suit and even if any portion of the consideration money was found to be fictitious, the plaintiff-appellant could not claim pre-emption on payment of any sum less than Rs. 12,500. It is not necessary to mention other pleas taken in defence since none of them were pressed in the trial court and all of them were therefore over-ruled.

The two main points around which the contest raged in the trial court were the question of fictitious nature of the consideration and the market value of the property sold. The learned Subordinate Judge of

1929

ABID ALI KHAN v. PANDIT HAR PRASAD.

Misra and Raza, JJ.

Unao who tried the case found that no item of the consideration was fictitious, but he held that the sum of Rs. 1,000 payable to Chandika Singh under the mortgage deed, dated the 24th of July, 1924, had not been paid nor had the item of Rs. 2,350 payable to the plaintiff been paid. The learned Subordinate Judge also found that Rs. 12,500 was the market value of the property sold. He, therefore, passed a decree for pre-emption in favour of the plaintiff-appellant on payment of the entire consideration money, *minus* the sums mentioned above. The result was that he allowed pre-emption on payment of Rs. 9,150. The date of his decree is the 15th of May, 1928.

In appeal the same two points have again been urged, and we have heard arguments in this case at considerable length.

We now proceed to give our findings in respect of both these two points.

As to the fictitiousness of the consideration it is a settled rule of law that a very slight proof will shift the burden to the vendees to prove the actual payment of the price entered in the deed—*vide Dwarika* v. *Ludar* (1).

As to the first item entered in the sale deed due on account of the deed dated the 24th of July, 1924, we are clearly of opinion that the amount entered in the sale deed was a fictitious item. The learned Counsel for the plaintiff-appellant contended that the sum actually due on account of the mortgage deed at the time when the sale deed was executed was only Rs. 2,713-12-0. He arrived at this sum by calculating the compound interest from the 24th of July, 1924 to the 14th of August, 1926, and by adding it on to the principal amount. We have ourselves calculated the amount and it appears to us that

(1) (1900) 4 O.C., 247.

the compound interest on Rs. 2,500 at annas 9 per cent. per mensem compoundable yearly calculated from the 24th of July, 1924 to the 14th of August, 1926, comes to Rs. 358, total Rs. 2,858; but it is admitted by the parties that out of the sum of Rs. 2,500, Rs. 1,000 payable to Chandika Singh had not been paid. The sum due to the defendants-respondents under the mortgage deed was Rs. 1,500 plus compound interest thereon at annas 9 per cent. per mensem compoundable yearly which comes to Rs. 215. The total sum, therefore, due to the mortgagees was Rs. 1,715. In place of this the mortgagees entered Rs. 4,804-5-3 as due to them under the deed. We are, therefore, clearly satisfied that this item of the consideration is a fictitious one, not being due on the date when the sale deed was executed.

The learned Counsel for the respondents admitted that no interest should have been charged on Rs. 1,000 payable to Chandika Singh nor should that item have been included in the principal sum due under the mortgage deed. He, however, contended as was contended on behalf of his clients before the trial court that his clients were entitled to charge interest for ten years, the period fixed in the mortgage deed. The argument put forward was that if the property had been sold to a third person the mortgagees were entitled to claim interest for the entire period fixed in the mortgage deed. We do not think that the mortgagees were entitled to claim interest for this period when they themselves had purchased the property, the fact of their purchasing the property having in our opinion the effect of extinguishing the mortgage. If the mortgage was extinguished we fail to see how it could be kept alive for the purpose of calculating interest. We are, therefore, of opinion that the item of Rs. 4,804-5-3 was a fictitious item not having been due on the date when the sale took place.

1929

ABID ALI KHAN v. PANDIT HAR PRASAD.

Misra and Raza, JJ.

As to the item due under the five pro-notes we are not inclined to disagree with the finding of the learned Subordinate Judge. We think that the fictitious nature of the item of consideration due on these pro-notes is not established. We have not thought it proper to go into detail in regard to the items due on account of these five promissory notes, because our finding in regard to item No. 1 makes it unnecessary for us to deal at length with the said item. If one item of the consideration is proved to be fictitious the entire consideration entered in the sale deed of which this item forms part must be deemed to be fictitious. Our finding, therefore, on the first point is that the consideration entered in the sale deed dated the 14th of August, 1926, is a fictitious item, and that the sale consideration entered in the deed was not *bona fide*.

Having arrived at this conclusion it is necessary for us to determine the market value of the property in suit. In order to determine the market value we proceed first to determine what amount was actually paid under the sale deed. According to our finding all the items of consideration under the sale deed are genuine except the first item under which head only Rs. 1,715 had been paid. If the item payable to Chandika Singh be added, it would come to Rs. 2,715. The item actually entered in the deed on this account was Rs. 4,804-5-3. The excess which was not due and which was entered in the deed, therefore, comes to Rs. 2,089-5-3. Deducting this from the entire sum of Rs. 12,500 we get the figure at Rs. 10,410-10-9. We have only tried to ascertain this sum since it will be a guide to help us in determining the market value, if it is not otherwise fully established—*vide Abhilakh* v. *Babban Singh* (1).

On the question of the market value the learned Subordinate Judge has principally relied on the sale

(1) (1907) 10 O.C., 88.

transaction embodied in exhibit A32 which is dated the 28th of January, 1924. A suit for pre-emption was lodged by the plaintiff himself in respect of this sale deed and the decree passed in his favour is exhibit A20. The sale deed was in respect of 3 annas 3 pies' share in patti Salabat Khan and was for a sum of Rs. 13,500. Calculating the price according to the rate entered in this sale deed the price of 2 annas 9 pies' share would come to Rs. 11,423. It was urged by the learned Counsel for the plaintiff appellant that the price entered in this sale deed was also a fancy price and should not be considered as a true criterion for determining the market value of the share in dispute, and in support of his contention he relied upon a counter claim for pre-emption put forward by the defendants respondents in respect of this very sale, as will appear from exhibit 4. In this document the defendants-respondents alleged that the market value of the property sold was not more than Rs. 11,500. Although a decree was passed in this case in favour of the plaintiff-appellant in preference to the defendants-respondents on payment of Rs. 13,500 it does not appear from the record as to whether the question of the market value of the share sold was actually determined, or whether the decree was passed merely on confession or compromise of the parties. In the absence of any such material to help us we think that it would be safe for us if we put the market value of the property in suit at Rs. 11,000, which comes roughly to about fifty times the profits of the property. The sum of money actually paid under the deed according to our finding on the first point comes to Rs. 10,410-10-9 and the price according to the rate entered in exhibit A32 comes to Rs. 11,423. We, therefore, prefer to take a rough average and fix the market value of this property in suit at Rs. 11,000.

The learned Subordinate Judge has also relied in this connection upon a mortgage deed executed by the

1929

ABID ALI KHAN v. PANDIT HAR PRASAD.

plaintiff appellant in respect of this very property, but in our opinion that can be no test for determining the market value of the same. The mortgage may be a mortgage to the very hilt or it may be with a little margin. Under these circumstances we do not consider it safe to rely upon that transaction as a guide for determining the market value.

Misra and Raza, JJ.

On behalf of the respondents reliance was placed on two other sale deeds, which were executed on the 22nd of March, 1919 and the 7th of July, 1923, and which were in respect of a 2 annas 8 pies' share of patti Wali Muhammad. They are exhibits 2 and 3 respectively. As they belong to a different patti altogether and as there is no definite proof before us as to what is the difference in the quality of land of patti Wali Muhammad and patti Salabat Khan we discard these documents from our consideration.

Our finding, therefore, is that the market value of the property in suit is Rs. 11,000.

We, therefore, modify the decree passed by the learned Subordinate Judge to this extent that the plaintiff-appellant will be entitled to pre-empt the property in suit on payment of Rs. 11,000, instead of Rs. 12,500 as decreed by the Subordinate Judge. Out of this sum of Rs. 11,000, the plaintiff-appellant will be entitled to deduct Rs. 3,350, i.e., Rs. 2,350 on account of the sum payable to the plaintiff-appellant himself which has not yet been paid by the vendees and Rs. 1,000 which they have not paid to Chandika Singh under the mortgage deed, dated the 24th of July, 1924. The total sum to be deposited by the plaintiff will thus be Rs. 7,650.

Regarding costs our order is that as both parties have partially succeeded and partially failed and as the pre-emptive right of the plaintiff appellant is not questioned we direct that the parties should bear their own costs in the lower court as well as in this court.

Appeal partly allowed.