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should make a personal decree against the defendant for the payment of the debt within a specified time, and on his failure to pay, to direct an inquiry to be held by the Court of the Subordinate Judge as to the sums legitimately attributable to the endowment under the Hindu law, and a receiver should be appointed to realize the rents and profits of the debottar estate, and the mahant's share, after payment of a maintenance allowance to be fixed by the Court, should be allocated for the payment of the plaintiff's debt(1).

Their Lordships will humbly advise His Majesty accordingly. The first respondent will pay the costs of the appeal.

Solicitors for appellant: *Watkins & Hunter.*

Solicitors for respondents: *W. W. Box & Co.*

APPELLATE CIVIL.

Before Adami and Macpherson, JJ.

MUSSAMMAT SHEORATNI

v.

MUNSHI LAL.*

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July, 8.

Pre-emption—sale of house in a city—owner of adjoining vacant plot, whether entitled to pre-empt—"hait" and "akar", meaning of.

Defendant no. 1 having sold to appellant a house situate in Patna City, plaintiff, who was the owner of a plot of home-

(1) Although it was held that the mortgage was for necessity, and accordingly binding upon the property, the decree directed appears to be based solely on the mahant's personal liability; the receiver being appointed to realize his beneficial interest in the entire endowed property.—A.M.T.

*Appeal from Appellate Decree no. 31 of 1924, from a decision of B. Lala Damodar Prasad, Subordinate Judge of Patna, dated the 5th October 1923, confirming a decision of Maulavi Muhammad Khalil, officiating Munsif of Patna, dated the 9th September 1923.

stead land adjoining the house, claimed the right of pre-emption on the ground of vicinage :

Held, that the plaintiff was entitled to pre-empt.

Mahomed Hossein v. *Shaw Mohsin Ali* (1), *Ejnash Kooer* v. *Sheikh Amzudally* (2), and *Abdul Azim* v. *Khondkar Hamid Ali*(3) referred to.

Appeal by defendant no. 2.

The facts of the case material to this report are stated in the judgment of Macpherson, J.

N. C. Sinha and *N. C. Ghose*, for the appellant.

A. B. Mukharji and *B. B. Mukharji*, for the respondent.

MACPHERSON, J.—The plaintiff sued for pre-emption of a house in mohalla Gudri in Patna City which the appellant had purchased from the owner, defendant no. 1. The suit was decreed and the appeal of the vendee having been dismissed, she has preferred this second appeal.

The plaintiff claimed the right of pre-emption on the ground of vicinage as owner of a plot of homestead land adjoining the house brought by appellant. All the points raised in the Courts below have been determined in his favour and in second appeal Mr. Naresh Chandra Sinha on behalf of the appellant raises only one point. It is that the right of pre-emption on the ground of vicinage does not extend to the case of a person like the plaintiff whose property contiguous to the subject of pre-emption is only a plot of land on which no house stands, and which is not alleged to be a garden or walled enclosure.

The findings of fact are that the plot of the plaintiff is homestead land, that there are on it the remains of a house though these remains cannot at present be described as a house, and that the plaintiff intends to

(1) (1871) 6 Ben. L. R. 41, F. B. (2) (1865) 2 W. R. 261.
(3) (1869) 2 Ben. L. R. (A. C.) 63.

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build upon it. His present dwelling-house is sixteen houses distant. It was conceded in the trial Court on behalf of the defendant-appellant that the owner of the house in suit would have a right of pre-emption in respect of plaintiff's plot.

MACPHERSON, J.

The learned Advocate for the appellant contends that only the owner of a house or a garden contiguous to the subject of pre-emption has a right of pre-emption on the ground of vicinage. In support of this contention he refers first to the fact that the object of the right is the exclusion of one who might be a disagreeable neighbour. But obviously it may be as desirable to ward off a disagreeable individual from proximity to the plaintiff's building site as from proximity to his garden and for the same reasons. He then cites paragraph 539 of Tyabji's ' Principles of Muhammadan Law ' first as showing that ' akar ' of land alone can validly be the subject of pre-emption, and then for the statement

" (*1*) that 'âkár ' according to the Fatawa Alamgiri strictly means space covered with buildings " and (*2*) that " the Prophet has said that there is no shoofa except in a ruba or mansion, and a háit or garden."

Now all these statements are based on Baillie's Digest and the portions relied upon give, to say the least, an inadequate idea of the original. At page 472 we have

" The thing sold must be ' âkár ', *or what comes within the meaning of it*, whether the ' âkár ' be divisible or indivisible, as a bath or well, or a small house."

To this statement in the text there is a foot-note *2*.

" 2. The strict meaning of the word is ' a space covered with buildings ', so that properly speaking the term is not applicable to a zuyut (Fut. Al., vol. iii, p. 605). But according to the Kifayah (vol. iv, p. 940) and the Inayah (vol. iv, p. 263), *âkár, in the sense in which it is liable to pre-emption*, includes a zuyut. According to Freytag, zuyut is a field, whether arable or pasture."

Again at page 473 we have the following in the text :—

" ' Our ' masters have said that movables are not directly or by themselves proper objects for the right of pre-emption, but that they

are so as accessories to âkár; and that âkár, such as mansions, vineyards, and other kinds of land (literally ' and the rest from among lands ') are directly the objects of the right. There is no pre-emption in movables, because the Prophet has said, there is no shoofa except in a ruba or mansion, and a háit or garden.'

There is a footnote to this statement :—

" *1.* Hidayah, and Kifayah,, vol. iv, p. 940. Háit means properly a wall, or that which surrounds, though applied elliptically to the enclosure (Freytag). Comparing this with note 8, p. 471, and note 2, p. 472, it would seem that the right of shoofa is, strictly speaking, applicable only to houses and *small enclosures of land*....It has been held, however, to extend to a whole mauza or village—S. D. A. Calcutta Reports, vol. iii, p. 85."

As to shoofa, Baillie says

" In law it is a right to take possession of a purchased parcel of land " (bukut— a " piece or fragment of land " Note 3, p. 471).

Clearly, therefore, the argument finds no support from the quotations when they are read in their context. It is obvious that âkàr in the sense in which it is liable to pre-emption has an extended meaning. It is not confined to land covered with buildings. It may be a well or a bath, no less than a house It need not be a ' garden ' in our sense of that term but may be a vineyard and if not all, at least certain other lands, besides the site of a house, well or bath and a vineyard, at least if the land is a small enclosure. It is difficult to see what ' other lands ' could be more suitable subjects of shoofa than such as the plot now in controversy, which is less than one katha in area or rather more than the site of the house in suit which extends to half a katha.

It may be observed that the author of the text-book referred to sets out that the ' jar ' or neighbour who may be a pre-emptor " is the owner of property adjoining the subject of pre-emption ", and he appears to consider that the property may be ' neighbouring land ' of any kind. No doubt the view expressed in Wilson's Digest of Anglo-Muhammadan Law is that pre-emption can only be claimed on the ground of mere vicinage as between contiguous houses and gardens. But the only reference given [*Mahomed*

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MACPHERSON, J.

Hossein v. *Shaw Mohsin Ali*(1)], does not support the proposition as it is stated. As will presently be indicated, the view which obtained in that case was that a neighbour's rights extend only to houses, gardens and *small plots of land*. Mr. Ameer Ali in his "Muhammadan Law" appears to approve that view. In my judgment the word háit in the saying of the Prophet is not adequately represented by the English word 'garden', probably not even literally and certainly not in the sense in which háit is liable to pre-emption. In the latter contingency it includes if not zuyut in the sense of any field arable or pastoral, certainly a small enclosure in the shape of a plot of homestead land, whch has been and is to be utilised as a site for a house, especially when it is situated in a thickly populated area of a large town.

Support is obtained for this view in the observations made in the judgment in *Mahomed Hossein* v. *Shaw Mohsin Ali*(1) and in cases there cited. The decision was indeed that a neighbour cannot claim the right of pre-emption, on the ground of vicinage, in respect of a mauza or a large estate; but in delivering the judgment of the Full Bench, Couch, C.J., remarked that "the better opinion might be that âkár should be constructed to mean houses and small enclosures of land. But we rely rather on the uniform series of decisions, which very clearly recognize that the right of pre-emption, on the ground of vicinage, does not extend to estates of large magnitude, but only to houses, gardens, and *small parcels of land*".

The same question had in 1856 been stated by the Judges of the Agra Sadr Court as "whether entire mahals or estates were intended, or merely *parcels of lands, gardens, and the like*", the latter view being supported by the saying of the Prophet already quoted. In *Ejnash Kooer* v. *Sheikh Amzudally*(2) the principle is considered to be that, "when *either houses or small holdings of land* make

(1) (1871) 6 Ben. L. R. 41, F. B. (2) (1865) 2 W. R. 261.

parties, in fact, such near neighbours as to give a claim on the ground for convenience and mutual service, the claim in right of pre-emption will lie ".

In *Abdul Azim* v. *Khondkar Hamid Ali*(1) it was remarked that " the law was intended to prevent vexation to holders of *small plots of land* who might be annoyed by the introduction of a stranger among them ".

It would seem clear, therefore, that the Courts even when referring to the saying of the Prophet never contemplated that the word ' háit ' there used was restricted to a garden as ordinarily understood; and any small enclosure of land is included at least if it is of the nature of homestead land or what we may call compound land where the convenience of the owner would be impaired by a distasteful neighbour.

On behalf of the respondent it is further pointed out that the doctrine of pre-emption is based upon reciprocity and the appellant having admitted that the owner of the house in dispute would have been entitled to claim pre-emption of the plaintiff's homestead plot, it follows that the plaintiff is entitled to claim pre-emption of the appellant's house and site. The contention has force; but I prefer to rest the decision in this case upon the view that the plot of plaintiff is âkar and that ' háit ' does not merely mean ' garden ' but includes also other lands among which the plaintiff's plot is certainly included.

Upon this view this appeal is without merits and I would dismiss it with costs.

ADAMI, J.—I agree.

Appeal dismissed.

(1) (1904) 2 Ben. L. R. (A. C.) 68.