

APPELLATE CIVIL.

Before Mr. Justice Broadway and Mr. Justice Campbell.

LAL CHAND AND OTHERS (DEFENDANTS)—
Appellants,
versus

MST. BEGAM (PLAINTIFF)—Respondent.

1922

Oct. 27.

Civil Appeal No. 1179 of 1920.

Punjab Pre-emption Act, I of 1913, section 5 (a)—whether a building is a shop or a residential house.

Mussammat B, plaintiff-respondent, sued *L. C.* and *K. C.* for possession by pre-emption of an undivided half share in a building in Lahore City sold by her co-sharer, *F. D.* The defendant-appellants contended that the building in question was a shop, and was therefore not subject to the right of pre-emption.

Held, that the question whether a building is a shop or a residential house must be decided with reference to the chief or most important purpose to which the building is devoted, and as in the present case the primary value of the building lay in certain shops, the rest of the house being neglected and of comparatively insignificant value, no right of pre-emption existed in respect of the property in suit—*vide* Section 5 (a) of the Punjab Pre-emption Act.

Jaithu Mal v. Janaki Das (1), referred to

Dial Singh v. Bakhshish Singh (2), and *Hannu Mal v. Atma Ram* (3), distinguished.

First appeal from the decree of Khan Bahadur Munshi Rahim Bakhsh, Senior Subordinate Judge, Lahore, dated the 22nd March 1920, decreeing plaintiff's suit.

SHEO NARAIN, for Appellants.

TEK CHAND AND GOBIND RAM, for Respondent.

The judgment of the Court was delivered by—

CAMPBELL J.—This is a first appeal against a decree in favour of *Mussammat Begam* giving her possession by pre-emption of an undivided half share in a building in Lahore City sold by her co-sharer *Fazl Din* to *Lal Chand* and *Karm Chand*.

(1) (1916) 37 Indian Cases 843.

(2) 21 P. R. 1907.

(3) (1915) 27 Indian Cases 799.

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The trial Court held against the vendee-defendants that the right of pre-emption prevailed in the locality where the property was situate; that the property was not a shop and was subject to the right of pre-emption; that the ostensible price of Rs. 9,000 had been neither paid nor fixed in good faith, and that the market value, on payment of which the decree should be granted, was Rs. 6,700.

On appeal the two findings that the property is not a shop and that the ostensible price was not fixed in good faith are contested. In our opinion the vendee-appellants must succeed on the first point and the decree of the Court below must be reversed.

The building is an old one, and in its original shape the back wall, which was blank, faced what is now the Akbari Mandi bazar. The original entrance was in a back street called the Kucha Khajur. The building is two-storeyed and consists of four rooms and a *deorhi* on the ground floor and four rooms and an open yard on the second floor. About 40 years ago the wall facing the Akbari Mandi bazar was pierced, the two back rooms of the ground floor were converted into shops and doors were opened on the bazar side. A third small shop was also created, apparently by removing a portion of the party wall between these two rooms which appears from the plan on the record to have been exceptionally thick.

These three shops have been in existence and have been used as such ever since. The rest of the ground floor at the back is used for cattle and the upper storey has been occupied by the owners and is apparently now occupied by the plaintiff. Of the doors connecting the rooms converted into shops with the rest of the ground floor one has been built up entirely and the other has been nailed up in such a way as to be permanently closed. There is no staircase from the shops to the upper storey. The upper storey and the rest of the house, apart from the shops, are in a dilapidated condition. At present the shops yield a rent of Rs. 23 *per mensem* and the rent of the rest of the house is estimated by one of the plaintiff's witnesses to be Rs. 3 only.

These facts have been stated by the witnesses produced by the plaintiff herself, except that these witnesses

say that the shops have only been in existence for 10 or 12 years. The trial Court, however, has held that they date certainly from 1890 and are in fact some 40 years old. We agreed with this conclusion.

It has been argued by Mr. Tek Chand for the plaintiff respondent that the original character of the house should be regarded; that the upper storey of the shops is not used for any purpose connected with them, and that the intention of the proprietor in opening the shops was merely to augment his or her income and not to convert the building from a dwelling house into a shop. He relies upon two previous rulings of this Court, *Dial Singh v. Bakhshish Singh* (1) and *Hannu Mal v. Atma Ram* (2). Neither of these cases, however, appears to us to resemble the present. In each portion of the ground floor of a dwelling house had been converted into shops, but the shops had not been used continuously as such and were not so used at the time of the sale, which occasioned the suit.

Mr. Sheo Narain for the appellants has cited *Jaithu Mal v. Janki Das* (3), the facts of which more nearly approximate to, yet differ somewhat from, those of the present case, but in which the principle is emphasized that the question whether a building is a shop or a residential house must be decided with reference to the chief or most important purpose to which the building is devoted. This, we consider, is the correct method of dealing with cases of this kind.

Here we have it proved, that the two principal rooms of the house have been made into shops, and that the primary value of the building lies in those shops. The rest of the house is neglected and is of comparatively insignificant value. The shops open into a regular bazar full of other shops. They have been occupied continuously as shops for many years. It appears to us clear that 30 or 40 years ago the owner or owners of the house resolved to put it to its most profitable purpose and to take advantage of the bazar at the back by converting into shops every portion of the house that could be so used. So thoroughly was the scheme carried

(1) 21 P. R. 1907.

(2) (1915) 37 Indian Cases 799.

(3) (1916) 37 Indian Cases 843.

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out that a third small shop was hollowed out of the wall and squeezed in between the two main shops.

The building thus became a block of shops. The mere fact that the owner or owners continued to live in the uncared-for upper storey which could not be put to commercial purposes does not, in our opinion, take away from the building such a character, and although the upper storey may not be occupied by the lessees of the shops it is none the less a mere appendage to the shops in its present condition.

For these reasons we hold that under section 5, sub-section (a) of the Punjab Pre-emption Act no right of pre-emption exists in respect of the property in suit.

We accept the appeal, set aside the decree of the Senior Subordinate Judge and order that the plaintiff's suit be dismissed with costs.

The cross-objections fail and are dismissed.

A. R.

Appeal accepted.
