

Mohammad Niaz Khan and ors. Vs. Mohammad Adrees Khan and anr.

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Court : Allahabad

Decided On : Jan-16-1918

Reported in : AIR1918All263; 44Ind.Cas.227

Judge : Henry Richards, C.J. and ;Tudball, J.

Appellant : Mohammad Niaz Khan and ors.

Respondent : Mohammad Adrees Khan and anr.

Judgement :

1. This appeal arises out of a suit brought for pre-emption, under the Muhammadan Law. The property transferred is a small piece of land in the town of Zamania. The transfer was made in the form of a perpetual lease. The amount paid down was the sum of Rs. 250 and a nominal rent of 2 annas per annum was reserved. The Court of first instance decreed the suit, holding that there was a sale and that the plaintiff had a right. The lower Appellate Court held that preemption under the Muhammadan Law did not apply to the case of leases, accordingly without deciding the other issues the lower Appellate Court reversed the decree of the Court of first instance and dismissed the suit. We think, reading the judgment of the lower Appellate Court, that the learned District Judge never intended to overrule the finding of the Court of first instance that the transaction though carried out in the form of a lease was in reality a sale. We think that he intended to decide that a Muhammadan could make the transfer in the form of a lease, notwithstanding that the real intention of the parties was a sale and so to defeat

pre-emption, in other words, that such devices are not unknown in the Muhammadan Law and are legitimate. In our opinion the Court was entitled and bound on the issue being raised to consider at the instance of the plaintiff claiming preemption what was the real nature of the transaction. It was entitled to consider the sum which was paid down, the smallness of the rent and the value of the property, and if after considering all these matters it came to the conclusion that the transaction was in truth and fact a sale, it should hold that the right of pre-emption arose and proceed to consider whether the plaintiff by due observance of the requirements of the Muhammadan Law was entitled to get the property. If the Court came to the conclusion that in truth and substance--and not merely in form--the transaction was a lease, then the suit should be dismissed on the ground that the Muhammadan Law does not apply to transfers by way of leases. It has been more than once decided in this Court that where a custom of pre-emption prevails upon sale, the vendor and vendee cannot defeat the pre-emptor by dressing up the transaction in the garb of a lease. The same thing has been held in the Punjab, where apparently the right of pre-emption is regulated by Act. We can see no good reason why the same principle should not apply to cases where the right is one under the Muhammadan Law. It is clear that the case must go back to the lower Appellate Court. We accordingly allow the appeal, set aside the decree of the lower Appellate Court and remand the case to that Court with directions to re-admit the appeal upon its original number in the file and proceed to hear and determine the same according to law, regard being had to what we have stated. Costs here and heretofore will be costs in the cause.