

(1944) 12 AHC CK 0006**Allahabad High Court****Case No:** None

Sher Singh

APPELLANT

Vs

Kishori Lal and Another

RESPONDENT

Date of Decision: Dec. 15, 1944**Citation:** AIR 1945 All 237 : (1945) 15 AWR 35**Hon'ble Judges:** Iqbal Ahmad, C.J**Bench:** Division Bench**Final Decision:** Dismissed**Judgement**

Iqbal Ahmad, C.J.

This is a plaintiff's appeal arising out of a pre-emption suit. On 9th August 1939, one Jagdish Prasad sold 8 bighas 14 biswas and 5 biswansi of village Koshanpur Sadiq to Kishori Lal for a consideration of Rs. 400. Sher Singh plaintiff-appellant filed a suit to pre-emption the sale on the last day of limitation, viz., on 9th August 1940. Sher Singh was a cosharer. in the mahal whereas Kishori Lal was a total stranger to that mahal on the date of the execution of the sale deed. It has been found by the lower appellate Court that out of the property sold 1 bigha 16 biswas and 19 biswansi was situated within the limits of the Nagina Municipality and the rest of the area sold was outside those limits. Kishori Lal contested the suit inter alia on the ground that the Agra Pre-emption Act had no application to the portion of the area that was within municipal limits and as Sher Singh was not entitled to a decree for pre-emption with respect to that area, Kishori Lal had become a cosharer in the mahal and, as such, the suit for pre-emption as regards the area outside the municipal limits was also not maintainable. This contention of Kishori Lal found favour with the lower appellate Court and that Court, accordingly, dismissed the plaintiff's suit.

2. In our judgment, the decree of the lower appellate Court is perfectly correct and ought to be affirmed. In view of the provisions of Sub-clause (8) of S. I, Agra Pre-emption Act, it is clear that that Act has no application to such portion of the

area sold as was situated within the limits of Nagina Municipality. A claim for pre-emption with respect to that portion of the area could be maintained only if a custom of pre-emption, independently of the provisions of the Agra Pre-emption Act, was proved to exist. It appears that in the waji-b-ul-arz of the village in question there was an entry about the existence of a custom of pre-emption, but the incidence and the details of that custom were not specified in the wajib-ul-arz. It must, therefore, be held that the custom of pre-emption that prevailed in the village was co-extensive with the right of pre-emption recognized by the Mahomedan law. It is common ground that Sher Singh did not perform the preliminary demands enjoined by the Mahomedan law and it is, therefore, rightly conceded by the plaintiff's learned Counsel that Sher Singh's claim with respect to the area within the municipal limits was misconceived and was rightly rejected by the lower appellate Court. The question then arises as to whether the dismissal of Sher Singh's claim with respect to the area within municipal limits disentitles him to a decree with respect to the area outside those limits. In our judgment the answer to this question must be in the affirmative. Section 19, Agra Pre-emption Act, *inter alia* enacts that: No decree for pre-emption shall be passed in favour of any person unless he has a subsisting right of pre-emption at the time of the decree...

In the present case it is manifest that on the date that the trial Court decided Sher Singh's suit, Kishori Lal had obtained an indefeasible right with respect to the area within municipal limits and had become an absolute proprietor there of. On the date of the decree by the trial Court, no suit for pre-emption by any cosharer of the mahal with respect to the area within municipal limits would have been maintainable as against Kishori Lal. It follows that, on the date of the decree by the trial Court, Kishori Lal had become a co-sharer in the mahal in which the entire area sold was situated. It is not alleged that Sher Singh was pre-emptor in class 2 or class 3 of Section 12 (1), Agra Pre-emption Act, and it is conceded that his suit for pre-emption was based on the allegation that he was a co-sharer in the mahal and, as such came within class 4 of the pre-emptors recognized by that section. By virtue of having acquired an indefeasible interest with respect to the area within municipal limits, Kishori Lal also became a cosharer in the mahal. Sher Singh, therefore, had no preferential right of pre-emption against Kishori Lal and his suit was rightly dismissed by the lower appellate Court. The appeal is accordingly dismissed with costs.