

(1920) 01 AHC CK 0039**Allahabad High Court****Case No:** None

Jhandi Lal

APPELLANT

Vs

Shiam Lal and Others

RESPONDENT

Date of Decision: Jan. 5, 1920**Citation:** AIR 1920 All 134 : 54 Ind. Cas. 756**Hon'ble Judges:** Tudball, J; Rafique, J**Bench:** Division Bench**Final Decision:** Dismissed**Judgement**

1. This second appeal arises out of a suit for pre-emption. The property, according to the sale-deed, had been sold for the sum of Rs. 700. The plaintiff, who is the appellant before us, maintained that the Actual price paid was only. Rs. 300 and sought to pre-empt on the payment of that sum. The Court of first instance held on the evidence that Rs. 700 had actually been paid by the vendee. It, therefore, gave the plaintiff a decree conditional on his paying into Court the sum of Rs. 700 within a period of 60 days. The plaintiff, being dissatisfied with this decision as to consideration, appealed to the lower Appellate Court. He did not pay the sum of Rs. 700 into Court within the 60 days. While the appeal was pending, he asked the Appellate Court by a miscellaneous application to grant an extension of time. This the Court refused to do, and rightly refused. It could not vary the decree of the first Court on a miscellaneous application. It could only vary that decree by hearing and deciding the appeal. When the appeal came up for hearing, the lower Appellate Court directed the appeal to be struck off without going into the merits at all. The sole basis for its order was that the plaintiff had failed to pay the sum of Rs. 700 into Court within the period of 60 days allowed by the Court of first instance. The plaintiff, therefore, comes here on second appeal. The decision " of the Court below is obviously incorrect. The matter is already covered by a decision of this Court in the case of Khurshed un nissa v. Alim un nissa 17 Ind. Cas 868 : 10 A.L.J. 421. The Appellate Court ought to have gone into the merits of the appeal, as the appeal was

directed solely towards the condition laid down by the Court of first instance. If the Appellate Court had found on hearing the appeal that a sum less than Rs. 700 had been the Actual consideration, it would naturally have extended the time for payment. The appellant is entitled to a decision on the question of the amount of consideration. We do not think it necessary to send the case back to the lower Appellate Court for a decision on the point. The evidence is on the record before us and it will save time and expense for us to take up the issue and decide it ourselves. The Court of first instance rightly laid the onus upon the defendants of proving the Actual consideration paid in view of the evidence produced by the plaintiff in respect to the market value. The defendants produced the document with its endorsement. One of them went into the witness-box, and an attesting witness was also called. It was clearly established that Rs. 625 at least was paid in the presence of the Sub-Registrar. The evidence of the plaintiff's own witnesses shows that the profits of the property are approximately Rs. 28. So that the vendee was buying his property at a profit of 4 per cent. only. This is by no means an unusual occurrence in this country and in this Province, more especially where the land is cultivated by the owner thereof. We think that the decision of the Court of first instance was correct and that the sum of Rs. 700 was actually paid by the vendee for the property. In this view, therefore, the appeal to the Court below was bound to fail. We are asked to extend the time. To extend the time now would be to vary the decree of the Court below, and we can see no Justice in doing so, for that would be equal to allowing the appeal in part. The plaintiff clearly was not ready with his money when he sued, as he ought to have been, and litigation of this description is not to be encouraged. We, therefore, dismiss the appeal. The respondent will have his costs in both this and the lower Appellate Court.