SPECIAL BENCH.

Before N. R. Chatterjea A. C. J., Greaves, Rankin, Suhrawardy, Panton, Mukerji and Mallik JJ.

1926

Aug. 23.

ENATULLAH

v.

KOWSHER ALI.*

Mahomedan Law—Co-parceners—Right of pre-emption—Special Bench to overrule a Full Bench decision—Procedure.

A Mahomedan co-parcener has the right of pre-emption even when another co-parcener happens to be the purchaser.

Lalla Nowbut Lall v. *Lalla Jewan Lall* (1) overruled.

It is discretionary for the Chief Justice to form a Special Bench at the request of a Division Bench to reconsider the decision of a Full Bench.

The plaintiff, the defendant and one Ismail were co-sharers entitled to certain shares in the property in suit. Ismail sold his share to the defendant; thereupon the plaintiff instituted this suit to enforce his right of pre-emption under the Mahomedan Law. The plaintiff was unsuccessful in the Court of original jurisdiction and in appeal, and thereafter preferred a second appeal in the High Court. The Division Bench hearing the appeal being doubtful of the correctness of decision in *Lalla Nowbut Lall* v. *Lalla Jewan Lall* (1) referred to a Special Bench the following question:—

"Whether under the Mahomedan Law one co-"parcener has any right of pre-emption where another "co-parcener happens to be the purchaser—a question "which directly arises in the present case—was not "correctly answered by the Full Bench in the case of "*Lalla Nowbut Lall* v. *Lalla Jewan Lall* (1)".

* Special Bench from Appeal from Appellate Decree No. 243 of 1924

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The Chief Justice formed a Special Bench for the purpose and made the following note :—

SANDERSON C. J. I have made enquiries, and I understand that in a case in which a Division Court doubts the correctness of a Full Bench decision, by which the Division Court is bound, and the Division Court considers that the matter should be considered by a Bench, specially constituted, it has been the practice for the Division Court to bring the matter to the notice of the Chief Justice and to consult him as to the propriety of a Bench being specially constituted to consider the matter.

A decision of a Full Bench is binding on all Division Courts, unless it is subsequently reversed by a Bench specially constituted or by a rule laid down by the Judicial Committee of the Privy Council, and it is obvious that it might lead to serious results if a Division Court, whenever it felt inclined to differ from a decision of a Full Bench, could refer the matter to a Special Bench and the Chief Justice was compelled to form such Special Bench whether he thought it necessary or not.

In this case, I think that there are sufficient reasons why the decision of the Full Bench in the case of *Lalla Nowbut Lall* v. *Lalla Jewan Lall* (1) should be further considered, and that a Special Bench should be appointed when it is possible, having regard to the other work in the Court.

Dr. Jadu Nath Kanjilal (with him *Babu Nripendra Chandra Das*), for the appellant. A Mahomedan co-sharer does not lose his right of pre-emption because another co-sharer has purchased the property. They have equal rights of pre-emption. The decision in *Lalla Nowbut Lall* v. *Lalla Jewan Lall* (1) was

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erroneous. In the case of *Amir Hasan* v. *Rahim Bakhsh* (1), all the arguments were exhausted. All the cases were referred to in *Nadir Husain* v. *Sadiq Husain* (2), *Vithaldas* v. *Jametram* (3). Referred to Hamilton's Hedaya, Vol. III, Bk. XXXVIII, Ch. I, p. 566. Ameer Ali's Mahommedan Law (4th Edn.), Vol. I, p. 729. Baillie's Digest (1865), Book VII, Ch. VI, p. 494 and Wilson's Anglo-Muhommedan Law (2nd Edn.), p. 401, Art. 358.

Dr. Dwarka Nath Mitter (with him *Mr. Heramba Chandra Guha* and *Babu Jnan Chandra Roy*), for the respondent. Rule as to pre-emption is governed by the rule of equity, justice and good conscience; it is not like the law of succession to be governed by purely Mahomedan Law. The underlying principle is that a stranger is to be excluded. The object is not to exclude a co-parcener. Hamilton's Hedaya (Grady's Edition), Bk. XXXVIII, Ch. I, p. 548, Col. (*ii*). "Dakheel" means a new comer, really a stranger. The principle on which the Allahabad case was decided might apply to neighbours. The right of pre-emption cannot be exercised unless the sale is to a stranger. The right does not arise if the sale is to a co-parcener. *Diyambar Singh* v. *Ahmad Said Khan* (4). As the decision has stood for more than half a century it is not competent for a Court of Justice to upset it. Since 1866 the current of authorities in this Court have been all one way. *Moheshee Lal* v. *Christian* (5), *Teeka Dharee Singh* v. *Mohur Singh* (6), *Lalla Nowbut Lall* v. *Lalla Jewan Lall* (7), *Saligram Singh* v. *Raghubardyal* (8). Before the decision in

(1) (1907) I. L. R. 19 All. 436.
(2) (1925) I. L. R. 47 All. 324.
(3) (1920) I. L. R. 44 Bom. 867.
(4) (1914) L. R. 42 I. A. 10, 18.
(5) (1866) 6 W. R. 250.
(6) (1867) 7 W. R. 260.
(7) (1878) I. L. R. 4 Calc. 831.
(8) (1887) I. L. R. 15 Calc. 224.

Amir Hasan v. *Rahim Bakhsh* (1), Allahabad also took that view and so did Bombay.

Dr. Kanjilal, in reply. The doctrine of *stare decisis* does not stand in the way of a Special Bench overruling the decision of a Full Bench. *Chandra Binode Kundu* v. *Sheikh Ala Bux Dewan* (2).

Cur. adv. vult.

CHATTERJEA A. C. J. The question referred to the Special Bench is whether under the Mahomedan Law one co-parcener has any right of pre-emption where another co-parcener happens to be the purchaser.

The question was decided by a Full Bench of this Court in the negative in the case of *Lalla Nowbut Lall* v. *Lalla Jewan Lall* (3). Since then the Allahabad High Court and a Full Bench of the Bombay High Court have taken the opposite view, and having regard to the original authorities on the point which were not placed before the Full Bench in *Lalla Nowbut Lall's case* (3), a Division Bench of this Court was of opinion that the Full Bench decision should be reconsidered, and hence this reference to the Special Bench.

In the case of *Lalla Nowbut Lall* v. *Lalla Jewan Lall* (3), Garth C. J. delivering the judgment of the Full Bench said: "There appears to be no reason, "either upon principle or authority, why the right "of *shaffa* should exist as between co-parceners; and "the rule as laid down in Hamilton's Hedaya, Vol. III, "Bk. 38, Chap. I. appears to have been misunderstood "in this respect. That rule merely prescribes that "any one partner (or co-parcener) of a property has a "right of *shaffa* as against a stranger, who purchases

(1) (1897) I. L. R. 19 All. 466. (2) (1929) 24 C. W. N. 818.
(3) (1878) I. L. R. 4 Calc. 831.

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"a share from his co-partner, and does not mean that "the right exists as between co-partners who may "purchase shares from one another. The object of "the rule, as explained in that chapter and in Chapter "III, is to prevent the inconvenience which may "result to families and communities from the intro- "duction of a disagreeable stranger as a co-parcener "or near neighbour. But it is obvious that no such "annoyance can result from a sale by one co-parcener "to another. The only result of such a sale would be "to give the purchaser a larger share in the joint "property than he had before, and perhaps larger "than the other co-parceners have ".

But the Hedaya nowhere says that the right of pre-emption can be exercised only against a stranger and not against a co-parcener who also can claim as a pre-emptor. On the other hand, there are indications in it to show that one co-parcener can claim pre-emption against another. In Vol. III, Book XXXVIII, Chap. I (see Hamilton's Hedaya, Grady's 2nd Edition, page 549), it is laid down that "when there is a "plurality of persons entitled to the privilege of "*shaffa*, the right of all is equal.". . . . ."The argu- "ment of our doctors is, that the parties being all "equal with respect to the principle on which their "right of *shaffa* is grounded (namely, a conjunction "with the lands sold), they are all consequently equal "in the right itself". It follows from these passages that all co-parceners have got equal right to *shaffa*. To hold that one co-parcener has no right of pre-emption against another would be to deny him the right of equality and would be a violation of the Hedaya rule that the rights of all are equal. It seems that it is only in conformity with this rule of equality that the Hedaya says (page 549): "If some of the "partners happen to be absent, the whole of the *shaffa*

"is to be decreed equally amongst those who are "present; for it is matter of uncertainty whether "those who are absent would be inclined to demand "their right; and the rights of those who are present "must not be prejudiced on a mere uncertainty. If, "however, the Kazee should have decreed the whole "of the *shafa* to one who is present, and an absentee "afterwards appear and claim his right, the Kazee "must decree him the half; and so likewise if a third "appear, he must decree him one-third of the shares "respectively held by the other two; in order that "thus an equality may be established amongst them".

It appears, therefore, that the Hedaya supports the right rather than negatives it. On the other hand, the other authorities are distinctly in favour of such right. They are all collected in the case of *Amir Hasan* v. *Rahim Bakhsh* (1). The learned Judges referred to passages, and quoted the original texts, from Takmila Bahr-ur-Raik, Tatar Khaniyah, Durr-ul-Muktar, Fatawa Alamgiri, Inayah or Aini and Radd-ul-Muktar, which are works of very high authority, and the last of which, according to Ameer Ali, is "certainly esteemed as the best authority on Hanafi "law", and observed as follows:—"These texts, the "authority of which has not been questioned by Mr. "Abdul Majid on behalf of the respondents, establish, "as we have said, two propositions; first, that even "when the buyer is himself a pre-emptor, that is a "person who would have the right of pre-emption "against an outsider, other persons having a similar "right of pre-emption are entitled to claim pre-emption "against the buyer; and, secondly, that in such a case "the rights of the claimants to pre-emption should be "determined in the same way in which they would have

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"been determined, had the buyer acquired the "property by enforcing his right of pre-emption "against a stranger, in the absence of the other pre-"emptors and the absentee pre-emptors had appeared "subsequently and claimed pre-emption. In this "view, as all persons having equal right of pre-"emption are only entitled under the Mahomedan "Law to divide the property equally *per capita*, and "as the purchasers in this case are two in number, the "plaintiff appellant is entitled to only a third share "of the property sold". The case was followed in *Abdullah* v. *Aman-atullah* (1) and *Nadir Husain* v. *Sadiq Husain* (2).

A Full Bench of the Bombay High Court in *Vithaldas* v. *Jametram* (3) following the case of *Amir Hasan* v. *Rahim Bakhsh* (4) held that under the Hanafi School of Mahomedan Law, neighbours have equal rights to pre-empt, and there is nothing which is contrary to the principles of justice, equity and good conscience in allowing to neighbours who have equal rights of pre-emption to exercise them.

In Baillie's Digest of Mahomedan Law, Book VII, Chapter VI, page 494, it is stated: "Pre-emption, "according to 'us' is by heads (*per capita*). When a "mansion is owned by three persons, one of whom "has a half, another a third, and another a sixth, and "the owner of the half having sold his share, it is "claimed by the other two under their right of pre-"emption, it is to be decreed between them in halves. "Or if the owner of the sixth should sell his share, it "is to be divided between other two in halves. And "if one of them should cause his right to drop, the

(1) (1899) I. L. R. 21 All. 292.
(2) (1925) I. L. R. 47 All. 324, 326.
(3) (1920) I. L. R. 44 Bom. 887.
(4) (1897) I. L. R. 19 All. 466.

"whole belongs, *per capita*, to those that remain. Or "if one is absent, decree is to be given, *per capita*, "to those who are present. But if after decree of the "whole to one who is present, a second should appear, "half is to be decreed to him; and if a third should "appear, decree is to be given to him for a third of "what is in the hands of each of the other two. If "the one who is present should surrender after decree "has been given in his favour for the whole, the "person who arrives is entitled to no more than a "half".

In Ameer Ali's Mahommedan Law, 3rd Edition, Vol. I, page 597, it was stated: "When one "co-sharer conveys his share to another co-sharer, no "other co-sharer, if any, can have a right of pre-"emption, the rights of all being equal, and the "reason on which the right is founded, therefore, "being absent. In other words, no right of pre-"emption arises in favour of a co-parcener when the "purchaser himself is a co-sharer of the vendor and "the claimant". No authority was cited in support of the proposition.

In the 4th Edition of the book at page 729, the learned author referring to the case of *Lalla Nowbut Lall* v. *Lalla Jewan Lall* (1), states: "A Full Bench "of the Calcutta High Court has held that when one co-"sharer conveys his share to another co-sharer, no "other co-sharer, if any, can have a right of pre-emp-"tion, the right of all being equal and the reason on "which the right is founded being therefore absent", the latter portion of the passage in the 3rd Edition quoted above being omitted, and referring to the view taken in the Allahabad case of *Amir Hasan* v. *Rahim Bakhsh* (2) observed: "This view is undoubtedly in

(1) (1878) I. L. R. 4 Calc. 831. (2) (1897) I. L. R. 19 All 466.

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"conformity with the enunciations of the Maho-"medan jurists. The principle is based on the "following ground. As all the pre-emptors have "equal rights against a stranger, their rights are the "same *inter se*, and it would be unfair to give prefer-"ence to one sharer over the others. And any one pre-"emptor may pre-empt in respect of his specific "share : *Abdullah* v. *Amanatullah* (1)". In Wilson's Anglo-Mahomedan Law, 2nd Edition, page 401, section 358, it is stated : "If the claim is made by two "or more persons belonging to the same category, "they are entitled to equal shares of the pre-empted "property on tendering their respective quotas of the "purchase money".

On behalf of the respondent, reliance is placed upon the opposite view which was taken in the Full Bench case of *Lalla Nowbut Lall* v. *Lalla Jewan Lall* (2), and some cases which preceded it. In *Mohesh Lall* v. *G. Christian* (3), the dispute was between two non-Mahomedans, but the Mahomadan Law of pre-emption had been adopted by the Hindus in the locality. The learned Judges, Bayley and Pundit JJ. observed : "If Mr. Christian was a co-parcener, "no right of pre-emption as *against a co-parcener* "could exist". No authority was cited, and the case was remanded for trying the issue (among others) whether custom makes pre-emption binding on a Christian in Bhagalpur.

In *Teeka Dharee Singh* v. *Mohur Singh* (4), the same learned Judges (Bayley and Pundit JJ.) held that the Mahomedan Law of pre-emption was never intended to apply to a case in which the purchaser is not a stranger, but one who is already a shareholder or a

(1) (1899) I. L. R. 21 All. 292
(2) (1878) I. L. R. 4 Calc. 831.
(3) (1866) 6 W. R. 250
(4) (1867) 7 W. R. 260.

neighbour. They observed: "Both the lower Courts "were presided over by two Mahomedan Maulvis and "the special appellant's pleader also a Moulvi, cannot "quote any text of law in support of his claim". So no text of Mahomedan Law was quoted in either case.

In the Full Bench case of *Lalla Nowbut Lall* v. *Lalla Jewan Lall* (1) as already stated, neither the passages from the Hedaya supporting the right (cited above) nor any other text of Mahomedan Law was referred to or discussed in the judgment. Garth C. J. in delivering the judgment of the Full Bench apparently based the decision on the ground that the object of the rule of *shaffa* is to prevent the inconvenience which may result to families and communities from the introduction of a disagreeable stranger as a co-parcener or a near neighbour. But the doctrine of *shaffa*, as it is at present accepted, does not appear to be based entirely on that object. According to the Hedaya "grand principle of *shaffa* is the conjuction of property": Volume III, Book XXXVIII, Chapter III. page 558, and it was on a conjunction with the lands sold that the right of *shaffa* is grounded: Volume III, Book XXXVIII, Chapter I, page 549.

The original idea of the rule of *shaffa* might have been to prevent vexation and inconvenience resulting from a disagreeable neighbour. But apparently the equality of the right of all *shaffee* came to be fully recognized. It would be neither fair nor equitable to refuse their rights now only on the ground that the enjoyment of these rights would not be necessary for the original object with which the rule of *shaffa* might have been started.

We are also referred to Tyabjee's Mahomedan Law, 2nd Edition, section 527, and Abdur Rahim's Tagore Lectures, page 273. Tyabjee does not give any decided

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opinion on the point. In Abdur Rahim's Tagore Lectures, it is stated that the reason "why this right "is allowed is that the introduction of a stranger is "likely to give rise to dissensions and inconveniences "and the principle on which it is based is that each "co-sharer having a right in every particle of the "property, one co-sharer selling his share would "thereby affect the enjoyment of his share by the "other co-owner, and this he cannot do without his "consent". The reason stated is no doubt one of the reasons, but the learned lecturer was not dealing with the right of the co-parceners claiming right of pre-emption *inter se*, and there is nothing in it against the right.

It is contended that the law as laid down by the Full Bench and the cases which preceded it having stood for a period of about 60 years, we should not disturb the decision of the Full Bench, that we are not bound to apply the strict rule of Mahomedan Law to cases of pre-emption but should decide such cases according to the principles of justice, equity and good conscience. But in the first place, as already observed, neither the passages from Hedaya referred to above nor the original text from the works of eminent jurists [cited in the Allahabad case of *Amir Hasan* v. *Rahim Bakhsh* (1)] were referred to or discussed by the learned Judges in the Full Bench case or in the other cases of this Court.

In the next place, although the Courts are not bound to decide cases strictly according to the rules of Mahomedan Law in matters of pre-emption, there is nothing in the rule laid down by the Mahomedan jurists which is contrary to the principles of justice, equity and good conscience. On the contrary, the rule is based upon equality of rights of co-parceners, and

(1) (1897) I. L. R. 19 All. 466.

Ameer Ali, as stated above, observes that "it would be "unfair to give preference to one sharer over the "other". So that according to the learned author and the Mahomedan jurists, it is the view taken by the Allahabad Court and not that taken by the Full Bench of this Court which would be in consonance with the principles of justice, equity and good conscience. Lastly, it is true that the Full Bench decision has stood for over half a century and upon the principle of *stare decisis* the Court should not upset the well-settled law, especially the decisions of a Full Bench. But cases of pre-emption are very rare in the province of Bengal (as now constituted), and our decision cannot affect many titles, specially as after the lapse of one year the right of the purchaser cannot be challenged. Had there been conflict of opinion among Mahomedan jurists we would not have been disposed to disturb the rule laid down by the Full Bench of this Court. But it appears that the original texts of Mahomedan Law are all in support of the view contended for on behalf of the appellant: the view is not contrary to any principle of justice, equity and good conscience, and has been taken by the Allahabad and Bombay High Courts, and accepted as good law by the modern text writers. In these circumstances, we think we would be justified in giving effect to what according to Ameer Ali, is "undoubtedly in conform-"ity, with the enunciations of the Mahomedan "jurists".

We accordingly hold that the case of *Lalla Nowbut Lall* v. *Lalla Jewan Lall* (1) was wrongly decided and answer the question referred to us in the affirmative.

As the reference is made in a second appeal we have to dispose of the appeal itself.

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The plaintiffs are entitled to a decree for one-half of the property—the subject matter of the pre-emption on payment of half the purchase money.

Each party will bear its own costs in all the Courts.

GREAVES J. I agree.

RANKIN J. I agree.

SUHRAWARDY J. I agree with the judgment just delivered by the learned Chief Justice. All authorities under the Mahomedan Law are at one on the question, and no authority or text has been cited to the contrary view. It is not necessary to multiply authorities to those given in *Amir Hasan* v. *Rahim Bakhsh* (1).

PANTON J. I agree with the learned Chief Justice.

MUKERJI J. I agree.

MALLIK J. I agree with the learned Chief Justice.

N. G.

(1) (1897) I. L. R. 19 All. 466.