APPELLATE CIVIL.

Before Mr. Justice Morris and Mr. Justice Prinsep.

JANGER MAHOMED (PLAINTIFF) *v.* MAHOMED ARJAD AND OTHERS (DEFENDANTS).* 1879 *July* 28.

Mahomedan Law—Pre-emption—Tulub-ish-had.

The ceremony of *tulub-ish-had*, or affirmation before witnesses, may, at the option of the pre-emptor, be performed in the presence of the purchaser *only*, though he has not yet obtained possession.

Chamroo Pasban v. *Pulwan Roy* (1) referred to.

THIS was a suit instituted by the plaintiff to establish an alleged right of pre-emption. The plaint stated that the taluq, in which the lands in dispute were comprised, was originally in the joint possession of the defendant Achintaram Surma (the vendor) and his brother Brojo Gobind Surma, each being entitled to an undivided eight-anna share therein; and that, on the 11th Pous 1283 (25th December 1876), the plaintiff and certain of his co-sharers (who were also made defendants in this suit), purchased from Brojo Gobind Surma half of his eight-annas share, and thus became the joint proprietors of an undivided four-annas share in the taluq, and as such became entitled to a right of pre-emption over all the land comprised in the taluq; that afterwards, on the 14th Assar 1283 (2nd June 1877), the defendants Mahomed Arjad and others (the purchasers), without the knowledge of the plaintiff, purchased from the defendant Achintaram Surma his eight-annas share in the taluq without giving the plaintiff an opportunity of exercising his right of pre-emption; that the plaintiff, immediately upon hearing of this purchase, performed the ceremony of *tulub-moowathubut*, and then, in the presence of the purchaser-

* Appeal from Appellate Decree, No. 1423 of 1878, against the decree of Baboo Ram Coomar Pal Chowdhry Roy Bahadoor, Subordinate Judge of Zilla Sylhet, dated the 3rd of May 1878, affirming the decree of Baboo Jogendro Nath Roy, Munsif of Sonamgunge, dated the 22nd of November 1877.

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defendants, the ceremony of *tulub-ish-had*, and offered to return them the purchase-money which they had paid to the vendor-defendants; that, notwithstanding his having done so, the purchaser-defendants refused to accept the refund and afterwards got into possession.

The defendants pleaded :—(1*st*) That they had not yet obtained possession; (2*nd*) that the sale had taken place with the knowledge of the plaintiff; (3*rd*) that the plaintiff had not properly or at all performed the ceremonies of *tulub-moowathubut* and *tulub-ish-had*; and (4*th*) that the plaintiff had no right of pre-emption.

The Munsif who tried the case in the first instance, without going into any of the other issues, tried only the third, and upon it found that neither of the ceremonies had been performed at all; and further, that even if the ceremony of *tulub-ish-had* had been performed, it had not been performed as required by law, as it had not been performed in the presence of the *vendors*, and therefore dismissed the suit. On appeal to the Subordinate Judge of Sylhet, that officer expressed no opinion as to whether the *tulub-moowathubut* had been performed or not, but found that the *tulub-ish-had* had been performed in fact in the presence of the purchaser-defendants, after the sale, but before they had obtained possession of the lands sold to them. He, however, on the authority of the case of *Chamroo Pasban* v. *Pulwan Roy* (1), held, that so long as the seller continued in possession, the *tulub-ish-had* must be performed in his presence, and accordingly dismissed the appeal.

From this decision the plaintiff appealed to the High Court.

Baboo *Joy Gobind Shome* for the appellant.

Baboo *Bama Churn Banerjee* for the respondents.

The judgment of the Court (MORRIS and PRINSEP, JJ.) was delivered by

MORRIS, J.—We think that the Judge has not correctly stated the law on the point of pre-emption that is here raised,

(1) 16 W. R., 3.

and has somewhat misunderstood the ruling which he has quoted in the case of *Chamroo Pasban* v. *Pulwan Roy* (1). The question before the Court in that case seems to have been, whether it was necessary to render valid the ceremony of *tulub-ish-had* to make the affirmation before witnesses in the presence of either the purchaser or the vendor. The Court held, that "the affirmation before witnesses is required to be in the presence of the vendor and the purchaser, in order that they may know what is being done against their interests." And further on added—"It is quite clear that, whether it be the vendor or the purchaser, whoever is in possession of the lands, should be present to witness to the affirmation." We do not, however, understand the Court by this last sentence to lay it down as a distinct proposition of law, that if the purchaser only is present and not in possession of the land, the affirmation before him in the presence of witnesses would invalidate the right claimed.

In the Digest of Mahomedan Law by Baillie, page 489, the law on this point is thus stated—"To give validity to the *tulub-ish-had*, it is required that it be made in the presence of the purchaser or seller, or of the premises which are the subject of sale." And again (p. 490)—"If possession has not been taken of the things sold, the pre-emptor has an option, and may, if he please, make the demand in the presence of the seller or of the premises; or he may make it in the presence of the purchaser, though he is not in possession, because he is the actual proprietor."

In the present case, there is no doubt that the invocation was made by the claimant, pre-emptor, in the presence of the purchaser on the premises. The Subordinate Judge was therefore wrong to dismiss the suit of the plaintiff on the ground that the ceremony had not been properly performed in this respect. We observe that the case generally has not been fully tried. The Subordinate Judge has not determined the validity or otherwise of the first ceremony of *tulub-mowathubut*, on which the Munsif expressed a strong opinion, and has

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confined himself to dealing only with the ceremony of *tulub-ish-had*. The case must, therefore, go back to the lower Court, in order that it may be re-tried. It will be necessary for the Court to determine, whether the ceremony of *tulub-moowathubut*, as well as the ceremony of *tulub-ish-had*, has been duly performed, and also the further issue, whether the plaintiff has a right of pre-emption at all.

Costs will abide the result.

Case remanded.

Before Mr. Justice Ainslie and Mr. Justice Broughton.

1879 *June* 24.

HUNSBUTTI KERAIN AND OTHERS (DEFENDANTS) *v.* ISHRI DUTT KOER AND OTHERS (PLAINTIFFS).*

Declaratory Decree—Alienation by Hindu Widow of accumulations beyond her lifetime.

The Court will not, in a declaratory suit, decide intricate questions of law, where no immediate effect, and possibly no future effect, can be given to its decision, and when the postponement of the decision, to a time when there may be before the Court some person entitled to immediate relief, will not prejudice a plaintiff's right in any way.

Quære.—Whether a Hindu widow has power to alienate, beyond her own life-interest, property which she has purchased from accumulations of income derived from her late husband's estate, made after his death, and while she was entitled to a Hindu widow's interest in such estate?

THIS was a suit brought to have it declared that a deed of gift executed by two Hindu widows in favor of a third person, purporting to deal with certain properties which formerly belonged to their deceased husband, and certain other properties which were stated to be acquired out of the profits of the husband's estate since his death, was void as against the reversioners of the husband's estate.

It appeared that the common ancestor of the family was one Madho Koer, and that he left him surviving four sons. Budhnath Koer, one of the four sons, became separate in estate, and died leaving two widows and a daughter Dyjhi Objhain. The

Regular Appeal, No. 14 of 1878, from a decision of W. DaCosta, Esq., Subordinate Judge of Tirhoot, dated the 17th September 1877.