Before Sir Richard Garth, Knight, Chief Justice, and Mr. Justice Beverley.

1884 *July* 30.

NUNDO PERSHAD THAKUR (PLAINTIFF) *v.* GOPAL THAKUR (DEFENDANT).*

Pre-emption—Ceremonies—Claim where there are several co-sharers—Tender of price for the land claimed—One out of several co-sharer claiming a right to pre-emption.

A person seeking pre-emption declared his right thereto when he first heard of the sale, in the presence of witnesses; and, as soon as was possible on the same day, in the presence of the same witnesses, demanded his right from the vendors and the purchasers. *Held*, that it was unnecessary that he should again state when making his demand, or that his witnesses should testify to the fact, that he had declared his right as soon as he heard of the sale.

The principle of the law of pre-emption is, that the pre-emptor should assert his right as soon as he has heard of the sale; that he should demand his right from the vendor, or purchaser, or on the ground, in the presence of witnesses; and this assertion and demand may be simultaneous; but if they are not, the pre-emptor, when he makes the demand, is required to make a declaration before witnesses that he asserted his right when first he heard of the sale.

In a suit for pre-emption it is unnecessary to prove a tender of the actual price paid for the property claimed, it being sufficient if the person claiming the right to pre-emption states that he is ready to pay for the land such sum as the Court may assess as the proper price for the property.

Under the *Sunni* law the right of pre-emption may be exercised by one or more of a plurality of co-sharers.

THIS was a suit claiming a right of pre-emption over certain lands sold by defendants Nos. 4 and 5 to defendants Nos. 1, 2 and 3.

The plaintiff sued as a *shofa khulit* to obtain his right of pre-emption over a ten-gunda two-cowrie share in mouzah Bishenpur Lukhmi, bearing the touzi No. 1656. The share claimed was sold by defendants 4 and 5 to defendants 1, 2 and 3 under a kobala dated the 1st June 1881.

This kobala purported to sell a share in mouzah Rampur

* Appeal from Appellate Decree No. 659 of 1883, against the decree of Baboo Dinesh Chunder Roy, Subordinate Judge of Tirhoot, dated 29th of December 1882, reversing the decree of Moulvi Mahomed Nurul Hosain Munsiff of Tajpore, dated 31st of January 1882.

Bishen, as well as the share claimed in the suit, and the consideration for the two shares was set out as Rs. 700; no specified separate sum being set out as the value of either of the shares sold. It appeared that mouzah Bishenpur had been partitioned into two estates bearing touzi No. 1656 and 1657, and that the plaintiff was a shareholder in No. 1656, in which the defendants 4 and 5 had also a share; the defendants 1, 2 and 3 being the shareholders of No. 1657.

The plaintiff stated that he first learnt of the sale from one Jhullu Thakur who, on the 15th July 1881, at mouzah Bishenpur, informed him that the share claimed had been sold for Rs. 400. And that on the same day he performed the ceremony of *talubi-mowasibat*, by exclaiming,—"I have purchased the property sold for a consideration of Rs. 400;" and at the same time called upon the persons present in the assembly to bear witness; that on the same day he duly performed the ceremony *talubi-ishhad*, by taking with him the purchase money and witnesses and going to the house of the defendants 4 and 5 in mouzah Kusour, and after asserting his right of purchase, demanding the return of the *kobala*, and calling upon the witnesses to bear testimony; that on the refusal of the defendants 4 and 5 to return the *kobala*, he went accompanied by witnesses to the first defendant, Gopal Thakur, and asserted his right and asked for the return of the *kobala*, calling upon the witnesses to bear testimony; and that he subsequently went to the defendants 2 and 3, accompanied by witnesses, and in the same manner asserted his right of pre-emption and asked for the return of the *kobala*; and that he lastly went to the locality of the share claimed, and proclaimed his right of pre-emption in the presence of witnesses, and performed the ceremony of *talubi-ishhad*, calling upon his witnesses to bear testimony to the fact. That on the defendants refusing to return the *kobala* he brought this suit, asking that his right might be declared on payment of Rs. 400 or such other sum as might be found to be the value of the property claimed.

Defendants 1, 2 and 3 stated that, although mouzah Bishenpur had been partitioned by the Collector into two distinct kulums, and although they were not the proprietors of the kulum in which lay the share claimed in the suit, they were shareholders in the

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other kulum, and as the *julker* and *nimaksayer* and 70 bighas of cultured land had not been partitioned but belonged jointly to both kulums, they were therefore joint proprietors with the plaintiff in these lands and no right of pre-emption could be claimed as against them, and they further contended that the two ceremonies had not been duly performed, and that the plaintiff was aware of the sale prior to the 15th July 1881.

The Munsiff found that the defendants 1, 2 and 3 could not be considered co-sharers with the plaintiff, and that therefore the latter had a right to bring the suit; that the two ceremonies had been duly performed; and that the plaintiff was unaware of the sale until the 15th July 1881.

The defendants appealed.

The Subordinate Judge found that the plaintiff had other co-sharers in the estate No. 1656, who had not been made parties to the suit; and that the right of pre-emption was extinguished where there were several sharers in the estate claimed and where, as in this case, it had not been shown that the other co-sharers had surrendered their claim to pre-emption; and further that the plaintiff was bound to prove that Rs. 400 was the price given for the share he claimed, and that he had failed to do so; that he had duly made his claim in the *talubi-mowasibat*, and that the plaintiff had not declared, when performing the *talubi-ishhad*, nor had his witnesses testified to the fact, that the principal demand by invocation of witnesses had been duly made. He therefore allowed the appeal and dismissed the suit.

The plaintiff appealed to the High Court.

Baboo *Uma Kali Mookerjee* for the appellant.

Baboo *Rajendro Nath Bose* for the respondents.

Judgment of the Court was delivered by

GARTH, C.J.—We think the Court below has fallen into error on several points of law in this case.

The facts are these: Mouzah Bishenpur Lukhmi, otherwise called Gahi, has been partitioned into two estates, bearing Nos. 1656 and 1657 on the touzi of the Mozufferpore District. The plaintiff is a proprietor of No. 1656, in which the second

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party defendants had also a small share. This share they sold to the first party defendants, who are proprietors in estate No. 1657. The plaintiff accordingly brought this suit, to establish his right of pre-emption to purchase the property so sold.

Now it appears that at the time the butwara was made, the *julkur, nimaksayer*, and some 70 bighas of culturable land were left in the joint possession of the proprietors of both estates, and were not partitioned, and the plaintiff and the first party defendants were both joint co-proprietors in the same. The Subordinate Judge considers, that this circumstance gave the first party defendants a right equal to that of the plaintiff to purchase the property in question. But this clearly is not so. The plaintiff, who was a co-sharer of the defendants second party in No. 1656, had a preferential right of purchasing lands forming part of that patti as against the defendants first party. The case quoted by the Subordinate Judge *Golam Ali Khan* v. *Agurgeet Roy* (1) appears to be precisely in point. The Subordinate Judge attempts to distinguish it on the ground that in this case there were 70 bighas of "cultivated and ryatti lands" left ijmali; but we think this is a distinction which makes no difference in the present case.

Then it appears that there are other co-sharers in estate No 1656, and the Subordinate Judge seems to think, that for this reason the plaintiff's suit will not lie.

But here, again, we think he is in error. The provision of the Mahomedan law, on which he has relied, is peculiar to the Imamiyah Code, which is not generally applicable in this country. The Sunni law, which prevails here, allows the exercise of the right by one or more of a plurality of co-sharers (2). Moreover, it does not appear, that this objection was either taken in the written statement, or when the issues were framed between the parties.

The next point on which we think the Subordinate Judge erred, is this: It appears that atthe time when the first party defendants purchased the property in suit, they also by the same

(1) 17 W. R., 343.

(2) Tagore Law Lectures for 1873, pp. 518-19.

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conveyance purchased a share in another property; and the consideration paid for both properties was Rs. 700. The plaintiff alleged that the price assessed by the parties for the *property in suit* was Rs. 400, but he offered in his plaint to pay any further sum which the Court might find the property to be worth. The first party defendants did not deny this allegation, and no issue was raised upon the point. The allegation was, moreover, supported by the statement of one of the vendors. We think the Subordinate Judge therefore was wrong in saying that the plaintiff was bound to prove the alleged separate price for the land in suit, and in finding that he had not offered a proper price for the property. We think that it was impossible to gather from the defendant's written statement that this objection would be raised in the suit; and that if the Subordinate Judge considered it a proper objection to be taken for the first time in appeal, he should have remanded the case, in order to give the plaintiff an opportunity of proving his allegation. But in point of fact it has been frequently ruled, that a tender of the price paid is not necessary in such cases; and that it is sufficient if the person seeking pre-emption agrees to pay any sum which the Court may assess as the proper price of the property. See *Jahangeer Buksh* v. *Bhickaree Lall* (1); *Heera Lall* v. *Moorut Lall* (2); *Nubee Baksh* v. *Kaloo Lashker* (3); and *Lalga Prasad* v. *Debi Prasad* (4).

The real defence to the suit was not that the price offered was insufficient, but that the plaintiff was aware of the purchase long before the date on which he says he became aware of it; and that in fact the property was offered to him and that he declined to purchase it. This defence has, so far as we can see, completely broken down.

Lastly, the Subordinate Judge says: "Then as to the performance of the ceremonies of *talubs*, I see that the principal demand by invocation of witnesses was not, even according to the statements of the plaintiff's witnesses, duly made. For one of the main ingredients in the *talubi-ishhad* is the declaration by the *shofi* that he made the claim in the *talubi-mowasibat* (*i.e.*, immediately after the hearing of the sale) and this none of the plaintiff's witnesses testify that the plaintiff

(1) 11 W. R., 71.
(2) 11 W. R., 275.
(3) 22 W. R., 4.
(4) I. L. R., 3. All., 236.

did. That an omission to do this is fatal to the plaintiff's suit was held by the High Court, in accordance with the provisions of the Mahomedan law in a case which was cited from page 462, vol. 24 of Sutherland's Weekly Reporter."

Now, what the Subordinate Judge means in this passage is apparently this;—that the plaintiff's witnesses do not say that at the time of the *talubi-ishhad* the plaintiff stated, in their presence, that he had claimed his right of pre-emption, (in other words, performed the *talubi-mowasibat*) as soon as he heard of the sale. And this omission on the plaintiff's part, the Subordinate Judge, relying on the ruling of this Court in the case cited by him, considers to be fatal to his suit. The facts of that case are not set out in the report; and it may be that some considerable time elapsed between the performance of the two ceremonies. In the present case, however, the two ceremonies followed immediately upon one another, if indeed they were not performed simultaneously. It would appear from the authorities that the *talubi-ishhad*, or demand with invocation of witnesses, should take place *either in the presence of the vendor or of the purchaser, or on the land* which is the subject of dispute. The Hedaya says that the ceremony is performed "by the *shafi* taking some person to witness, either against the seller (if the ground sold be still in his possession) or *against* the purchaser, or upon the spot regarding which the dispute has arisen," and the form of affirmation should be to the following effect: "Such a person has bought such a house, of which I am the *shafi*; *I have already claimed my privilege of shafa and now again claim it*; be therefore witness thereof."—(Hedya III, 571-72). And the Futawa Alamgiri (V. 268) tells us, that this ceremony is only necessary "if at the time of making the *talubi-mowasibat* or immediate demand, there was no opportunity of invoking witnesses; as for instance,—*when the pre-emptor at the time of the hearing of the sale was absent from the seller, the purchaser and the premises.* But if he heard it in the presence of any of these and had called on witnesses to attest the immediate demand, it would suffice for both demands, and there would be no necessity for the other. The principle of the law indeed seems to be this: *First*, that the pre-emptor should assert his right assoon as he hears of the sale; and,

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secondly, that he should demand his right from the vendor or purchaser or on the ground in the presence of witnesses; and of course this assertion and demand may be simultaneous. But, if they are not, the pre-emptor, when he makes the demand, is required to make a declaration before the witnesses that he asserted his right when first he heard of the sale. And the reason of this seems to be, that in the absence of witnesses at the time of the assertion or *talubi-mowasibat*, the declaration of the pre-omptor himself shortly afterwards was good evidence that he had really asserted his right without delay. But in this case the witnesses in whose presence the plaintiff demanded his right from first the vendor, and then the purchasers, were also present when he first heard of the sale, and asserted his intention of claiming his right. It was therefore unnecessary for him to go through the form of reminding them that he had claimed his right as soon as he heard of the sale. The witnesses all say, that they proceeded at once with the plaintiff to the houses of the vendors and the purchasers, and that he then and there demanded his right of pre-emption. Under these circumstances we think that it was not necessary that the plaintiff should go through the empty form of reminding the witnesses of what they had just heard. We may add, that it does not appear that this objection was taken in the first Court.

Finding then, as we do, that the lower Appellate Court has fallen into several errors on points of law, we must set aside its decree, and send the case back for a new trial. We think that the costs in both Courts should abide the event.

Case remanded.

Before Mr. Justice Tottenham and Mr. Justice Norris.

1884 *August* 8.

A. B. MILLER, OFFG. RECEIVER OF THE HIGH COURT (IN RESPECT OF THE ESTATE OF KHETTERMONI DASSEE) (DEFENDANT) *v.* RAM RANJAN CHAKRAVARTI (PLAINTIFF).*

Receiver—Sanction of the Court for Receiver to sue and be sued.

The Receiver of the High Court does not represent the owner of the estate for which he is Receiver, but is merely an officer of the Court, and as such cannot sue or be sued, except with the permission of the Court.

* Appeal from Original Decree No. 268 of 1882, against the decree of S. H. C. Taylor, Esq., Judge of Beerbhoom, dated the 30th of June 1882.