Before Mr. Justice Field and Mr. Justice O'Kinealy

JARFAN KHAN (ONE OF THE DEFENDANTS) *v.* JABBAR MEAH (PLAINTIFF.)* 1884 *January* 28.

Mahomedan Law—Pre-emption—Ceremonies.

In order to sustain a claim for pre-emption in Mahomedan law, it is essential that the ceremony of *Tulub-i-mowashibat* should be properly performed.

THE case is thus stated in the judgment of the lower Appellate Court:—

The suit was to enforce a right of pre-emption. Plaintiff alleged that he was entitled to preference to defendant No. 2 in purchasing a certain plot which defendant No. 2 purchased from defendant No 1, and that defendant No. 1 gave him no opportunity. The plaintiff on the 13th July 1880 having been away elsewhere returned home, and was informed of the sale. On hearing of the sale, he took all needful steps and offered to return to the defendant No. 2 the money paid; defendant, however, refused to hand over the land to plaintiff.

The plaint states that on hearing of the sale, in the presence of the public, the plaintiff stated his wish to buy, and then, very shortly afterwards, taking with him the price, Rs. 47-4, went with suitable witnesses to defendant No. 1's residence and offered the money. He states that he is ready now to pay whatever price the Court may direct. Defendant No. 1, in her written statement, alleged that the plaintiff had not performed the ceremonies of *Tulub-i-mowashibat* and *Tulub-i-shad* as he stated, and had not deposited the purchase-money with the plaint, and therefore plaintiff could not maintain the suit; the defendant No. 1 before selling the land frequently offered plaintiff and his brother Abdul Meah and his nephew Macfaruddi opportunities of exercising the right of pre-emption which they refused; also that the defendant No. 2 had a superior right of pre-emption to plaintiff; and consequently defendant No. 1 sold him the property on the 23rd December 1879 by *kabala*. The *kabala* is filed. It is admitted that Rs. 47-4 was the price. The defendant No. 2 supported these allegations. He, in his written statement, set forth that, after her husband's death, defendant No. 1 had gone to her father's; subsequently she desired to sell this property, and therefore informed defendant No. 2, and he desired to buy. Consequently "in a public place in the presence of several persons, on giving defendant a proper price, she executed a kabala

* Appeal from Appellate Decree No. 2044 of 1882, against the decree of T. M. Kirkwood, Esq., Judge of Mymensingh, dated the 1st of July 1882, reversing the decree of Baboo Nilmony Nag, First Munsiff of Atia, dated the 28th December 1880.

1884

JARFAN KHAN v. JABBAR MEAH.

in his favor. Plaintiff or his brother or his nephew at no time wished to buy the land."

The Munsiff found at the out-set that plaintiff was not entitled to maintain this suit for the following reasons, on his own evidence without going into any other issues. Plaintiff's evidence, he held, showed that one day in Pous, when plaintiff came home, his wife told him that the land had been sold by defendant No. 1 to defendant No. 2; plaintiff thereupon entered his house, opened his chest, took out Rs. 47-4, called the witnesses, proceeded to the premises and there cried aloud that he had a right of pre-emption, and would exercise that right; and then and there offered to defendant No. 2 the refund of the purchase-money, which tender defendant No. 2 refused. Plaintiff then went with the witnesses to defendant No. 1's house, and there also plaintiff went through the same formal declaration of his rights. The Munsiff held that, while all this was right enough, yet plaintiff had omitted to shout out his demand for the land the instant he heard about it from his wife's lips. This omission the Munsiff held to be fatal, and so dismissed the suit.

The evidence shows that there are two huts with a common compound part used by plaintiff and part used by defendant No. 1), and a common well and drainage. That one hut was the property of the widow, the defendant No. 1, and that the other was the property of the plaintiff; that the plaintiff, coming home, was in the common yard when his wife told him; that he then entered his house, opened his chest, and came back into the yard with the money, Rs. 47-4, and in the presence of three neighbours, one of whom was already sitting there (the two others, whose *baris* adjoin, came up on hearing plaintiff commence the proclamation of his rights), went to the widow's hut, proclaimed his right of pre-emption, and called on the defendant No. 2 who was not present, but in his own *bari* hard by, to give it up to him and take the purchase-money. The defendant No. 2 refused, answering from his *bari*. Plaintiff then went with witnesses to the defendant No. 1's father's house where the defendant No. 1 lived (a mile or so distant), and claimed his right, and offered to pay the price for it. She then refused, saying she had sold it to the defendant No. 2. The defendant No. 1 is the widow of the plaintiff's cousin. The hut in question had belonged to that cousin, the *bari* being the ancestral *bari* of both plaintiff and that cousin. The plaintiff had come home on this day at noon, and went to the claimed hut and proclaimed his rights before 1 P.M., and went to the defendant No. 1's father's house, and returned therefrom before 2 P.M. Defendant No. 2's *bari* is two *baris* off to the north of plaintiff's *bari*. The defendant No. 2 is plaintiff's cousin on his mother's side.

The plaintiff's allegation that he did return home on the 13th Pous is not traversed by the defence; nor is there any evidence on the part of the defence (save the statement of a witness who is quite unreliable, and denies

plaintiff's having gone to defendant No. 1's residence with the money) contradictory of the evidence adduced by plaintiff to show the manner in which he went through the formalities. The evidence for the defence is almost entirely confined to plaintiff's refusal to purchase before the sale, and his permission to defendant No. 1 to sell to any one.

The lower Court has dismissed the suit even on the assumption that the facts are as above given by the plaintiff, because it is not shown that plaintiff *at once*, at the very moment of receiving the information from his wife, proclaimed his right and his intention to insist on it. If plaintiff has any right at all in the matter, such a *dictum*, if supported, would appear to me to be going as nearly as possible to a negation of that right. I cannot conceive that the law is as the Munsiff has interpreted it. I turn to the authorities.

Jamilan v. *Latif Hossein* (1) states: "The *Tulub-i-mowashibat* may be, and constantly is, a private act which the purchaser against whom the right is claimed has no power of questioning or refuting; and the *Tulub-i-shad* is the only public act connected with the claim to pre-emption, of which the purchaser has necessarily any cognizance." The *Tulub-i-shad* must take place with the least practicable delay. It has clearly taken place on the present instance with the least practicable delay. Baillie's Digest states page 484: "The *Tulub-i-mowashibat*, or immediate demand, is first necessary, then the *Tulub-i-shad* or demand with invocation, if, at the time of making the former, there was no opportunity of invoking witnesses, as, for instance, when the pre-emptor at the time of 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 his immediate demand, it would suffice for both demands, and there would be no necessity for the other." It appears to me that the above quotation covers the present case, and that the demand made in the presence of witnesses and of the premises within some minute, perhaps half an hour at the outside, after hearing of the sale, is the sort of *Tulub-i-mowashibat* which renders unnecessary any subsequent *Tulub-i-shad*. It seems to me that plaintiff not only made this demand in the presence of witnesses on the premises, but his demand was answered by the purchaser from a neighbouring *bari*, and that plaintiff then promptly went off to the vendor's residence (some distance off), and in the presence of witnesses made demand of her. It seems that all the necessary formalities have been gone through; the question is, were they commenced and concluded with sufficient promptitude? I think the commencement is the only really debatable point; it cannot be contended that, when once commenced, all the necessary formalities were not promptly and continuously gone through.

(1) 8 B. L. R., 160; 16 W. R. F. B. 13.

1884

JARFAN KHAN v. JABBAR MEAH.

Mona Singh v. *Mosrad Singh*, (1) lays down that the act of going into one's house to get the money before making demand is a delay which forfeits the pre-emptor's title. The words used by Macnaghten are: "It is necessary that the person claiming this right should declare his intention of becoming purchaser immediately on hearing of the sale." In a ruling, *Jadu Singh* v. *Rajkumar* (2), Kemp, J., remarks: "There is no absolute necessity for the pre-emptor to make the *Tulub-i-mowashibat* in the presence of witnesses. It is usually done in the presence of witnesses, in order that the pre-emptor may be provided with proof in case the purchaser should deny the demand." This seems no me to indicate as permissible a reasonable delay for the purpose of getting witnesses before the demand is made.

But in *Ram Charan* v. *Nabrir Mahton* (3) it has been held that where the pre-emptor heard the news of the sale at his own house, which was adjacent to the lands whereof pre-emption was claimed, and then went from his own to the land in dispute, and then made the demand, the delay, though very short, forfeited the right.

Page 569, Vol. III, of the Hedaya, states: "If the man claim his *shuffa* in the presence of the company amongst whom he may be sitting when he received the intelligence, he is the *shuffee*, his right not being invalidated unless he delay asserting it till after the company have broken up, because the power of accepting or rejecting the *shuffa* being established, a short time should necessarily be allowed for reflection in the same manner as time is allowed to a woman to whom her husband has given the power of choosing to be divorced or not." This passage was quoted with approval in *Amjad Hossein* v. *Kharag Sen Sahu* (4).

It seems to me that if this is a correct statement of the law then the plaintiffs are well within the law in the present case. I think the above opinion is not in conflict with the ruling in *Ali Muhammad* v. *Taj Muhammad* (5) where twelve hours' delay in making the first demand was considered excessive. I must hold that in the present case the formalities required by law have been commenced and gone through with sufficient expedition.

The second defendant appealed to the High Court on the ground that the Judge was wrong in holding that formalities prescribed by Mahomedem law had been complied with.

Baboo *Jogesh Chunder Dey* for the appellant.

Baboo *Juggut Chunder Banerjee* for the respondent.

(1) 5 W. R., 203.
(2) 4 B. L. R. A. C. 171; 13 W. R., 177.
(3) 4 B L R. A. C., 216; 13 W. R., 259.
(4) 4 B. L. R. A. C., 203; 13 W. R., 299.
(5) I. L. R., 1 All., 283.

1884

JARFAN KHAN v. JABBAR MEAH.

The judgment of the Court (FIELD and O'KINEALY, JJ.) was delivered by

FIELD, J.—This is a case of pre-emption. The Munsiff held that the plaintiff was not entitled to succeed because he had not, in compliance with the requirements of Mahomedan law, performed the ceremony of *Tulub-i-mowashibat*. The Munsiff says in his judgment: "The plaintiff on hearing this," that is, on hearing the fact of the sale from his wife, "entered his house, opened his chest, took Rs. 47-4, called the witnesses, proceeded to the premises, the subject of sale, and there cried aloud the following words: 'That he has the right of pre-emption to purchase the said land and he shall exercise the said right, let the defendant No. 2 receive the refund of the consideration money and make over the land to him (the plaintiff).' The defendant No. 2 refused to accept the offer, on which the plaintiff went with the witnesses to the place where the defendant No. 1 was residing, and there also the plaintiff performed the said ceremony, that is, ceremony of *Tulub-i-shad*. Now, it is clear that immediately upon hearing of the sale of the property the plaintiff did not make the demand or perform the ceremony of *Tulub-i-mowashibat*. At page 481 of Baillie's Digest of Mahomedan Law, there is the following passage, in which the law on the subject is stated: "By *Tulub-i-mowashibat* is meant that when a person who is entitled to pre-emption has heard of a sale he ought to claim his right immediately on the instant (whether there is any one by him or not), and when he remains silent without claiming the right, it is lost;" and then is given the instance of a person reading a letter in the beginning or middle of which the information as to the sale is contained. If he wait till he finish the whole letter without making the *Tulub-i-mowashibat* the right of pre-emption is lost. The Judge quotes and relies upon a passage from the same work, p. 484, which is as follows: "The *Tulub-i-mowashibat* or immediate demand is first necessary, then the *Tulub-i-shad*, or demand with invocation, if at the time of making the former, there was no opportunity of invoking witnesses, as, for instance, when the pre-emptor at the time of 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

1884

JAFFAN KHAN v. JABBAR MEAH.

and there would be no necessity for the other." Now the facts of the present case do not fall within the meaning of the passage last quoted. The plaintiff did not, on hearing of the sale, immediately call witnesses to attest the immediate demand. He made a delay, went into the house, got the money, and then called the witnesses, and this being so, it is clear that the case is not one to which the second quotation from Mr. Baillie's work would apply. We may refer to the cases of *Mona Singh* v. *Mosrad Singh* (1) and *Ram Charan* v. *Narbir Mahton* (2), which have been cited by the vakeel for the appellant, as instances of what is required by the law in conformity with the first of the above extracts from Mr. Baillie's work. We think that in the present case the requirements of the law have not been complied with.

The decision of the District Judge must therefore be set aside and that of the Munsiff restored with costs of both Courts.

Appeal allowed.

Before Mr. Justice Field and Mr. Justice O'Kinealy.

1884 *January* 31.

RAM COOMAR SEN AND ANOTHER (PLAINTIFFS) *v.* RAM COMUL SEN (DEFENDANT.)*

Small Cause Court—Proceeds of Immoveable Property—Jurisdiction—Act XI of 1865, *s.* 6—*Money had and received—Sale of tenure—Co-sharers—Arrears of Rent.*

The plaintiff and the defendant were co-owners of a certain taluq. The zemindar brought a suit for arrears of rent of the taluq against the defendant, obtained a decree, and in execution of that decree sold the tenure. The proceeds of the sale, after satisfying the zemindar's decree, were taken by the defendant; and the plaintiff instituted the present suit to recover an 8-annas share thereof.

Held, that the plaintiff was entitled to recover; and, *held*, further, that such a suit was not cognizable by a Small Cause Court.

ON the 5th of May 1871, the plaintiff Ram Coomar Sen brought a suit in the Court of the Munsiff of Kooshtea against the defendant Ram Comul Sen for possession and mesne profits of

* Appeal from Appellate Decree No. 963 of 1882, against the decree of Baboo Uma Churn Kastogiri, First Subordinate Judge of Tipperah, dated the 13th March 1882, affirming the decree of Baboo Ram Judub Talapatra, Second Munsiff of Kooshtea, dated the 31st January 1881.

(1) 5 W. R., 203. (2) 4 B. L. R. A. C., 216; 13 W. R. 259.