1878

CHADAMI LAL v. MUHAMMAD BAKHSH.

that the village administration-papers are not binding on his vendor, who was no party to them, and that, as a matter of fact, the plaintiff refused the offer of the estates when made to him. The lower Court has dismissed the claim finding in favour of the answering defendant. The objections now taken in appeal by the plaintiff appear to us to fail. The *wajibularz* of Mahal Bagh was not signed by the vendor or any one he represents, and though in that of the zamindari mahal there is an endorsement to the effect that Gajadhar Lal attested it, there is nothing to show that, if he did so, he had any authority to do so. He was the lessee of the owner Musammat Banno, but this position did not give him authority to act for her at the settlement. In his evidence he states that he cannot remember about the attestation of the *wajibularz*, and he never had any power of attorney to act as her agent.

We concur with the lower Court in considering that it is not satisfactorily proved that the vendor or any one he represents was a party to the execution of the village administration-papers, or knowingly accepted their conditions. Whether or not any similar condition of pre-emption was entered in the previous administration paper cannot affect this claim, which is brought on the contract under the recent settlement-paper, and not on any well established custom apart from the contract made under the administration-paper, nor would the entry of the right of pre-emption in a former administration-paper necessarily establish, though it might be evidence towards proving, such a custom.

1878
January 22.

FULL BENCH.

Before Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Pearson, Mr. Justice Turner, Mr. Justice Spankie, and Mr. Justice Oldfield.

DWARKA DAS AND ANOTHER (DEFENDANTS) *v.* HUSAIN BAKHSH (PLAINTIFF).*

Pre-emption—Hindu Vendor—Muhammadan Law—Act VI of 1871 *(Bengal Civil Courts' Act), s.* 24.

Held (STUART, C. J., and PEARSON, J., dissenting) that where the vendor is a Hindu a suit to enforce a right of pre-emption founded upon Muhammadan law is not maintainable. *Chundo* v. *Alim-ud-din* (1) overruled. *Poorno Singh* v. *Hurry-churn Surmah* (2) followed.

* Special Appeal, No. 1358 of 1876, from a decree of H. W. Dashwood, Esq., Judge of Meerut, dated the 15th September, 1876, reversing a decree of Babu Kashi Nath Biswas, Subordinate Judge of Meerut, dated the 21st April, 1876.

(1) H. C. R., N-W. P., 1874, p. 28. (2) 10 B. L. R., 117.

1878

DWARKA DAS v. HUSAIN BAKHSH.

Per STUART, C. J., and PEARSON, J., *contra.*

THIS was a suit to enforce a right of pre-emption in respect of a dwelling-house, the suit being founded on Muhammadan law, the plaintiff claiming such right as a neighbour of the vendors, defendants in the suit, who were Hindus, the plaintiff and the purchaser, also a defendant in the suit, being Muhammadans. The defence to the suit raised the question whether a suit to enforce a right of pre-emption founded upon Muhammadan law was maintainable where the vendor was a Hindu. The Court of first instance did not determine this question but dismissed the suit on grounds which it is immaterial for the purposes of this report to state. On appeal by the plaintiff the lower Court of appeal, reversing the judgment of the Court of first instance, held, with reference to the case of *Chundo* v. *Alim-ud-din* (1), that a suit to enforce the right of pre-emption founded on Muhammadan law was maintainable where the vendor was a Hindu, and gave the plaintiff a decree.

The defendants appealed to the High Court again contending that, under s. 24 of Act VI of 1871, the vendors being Hindus, the Muhammadan law of pre-emption was not applicable.

The Court (SPANKIE and OLDFIELD, JJ.) referred to the Full Bench the question whether the Muhammadan law of pre-emption applied, with the following remarks:

The question was decided in the affirmative by a majority of three out of four Judges comprising a Full Bench of this Court in *Chundo* v. *Alim-ud-din* (1). One of the Judges composing the Court however dissented, and the Chief Justice subscribed to the view taken with hesitation. We have considerable doubts as to the correctness of the ruling, which is opposed to one by the High Court of Calcutta in *Poorno Singh* v. *Hurrychurn Surmah* (2), and thinking it desirable that the question be reconsidered, we refer it to the Full Bench of the Court.

Munshi *Hanuman Prasad* and Pandit *Ajudhia Nath*, for the appellants.

Mr. *Conlan* and Babu *Oprokash Chandar*, for the respondent.

The following judgments were delivered by the Full Bench:

(1) H. C. R., N.-W. P., 1874, p. 28 (2) 19 B. L. R., 117.

1878

DWARKA DAS v. HUSAIN BAKHSH.

STUART, C. J.—I am reminded by the order of reference that in the case of *Chundo* v. *Alim-ud-din* (1) I gave my judgment with hesitation. I did so no doubt but chiefly, if not solely, in consequence of the deference I felt for the opinion of my colleague Mr. Justice Spankie in the case of *Shumshoolnissa* v. *Zohra Beebee* (2), who had most carefully and anxiously considered the question now referred in the long judgment he therein delivered. I cannot, however, say for myself that I had any doubt, that is, any argumentative doubt, on the question then before us, and I remain of the opinion I then expressed and subsequently in the Full Bench in the above case of *Chundo* v. *Alim-ud-din* (1), and this is my answer to the reference.

PEARSON, J.—For the reasons given in my judgment of the 1st December, 1873, in Full Bench in the case of *Chundo* v. *Alim-ud-din* (1), I adhere to the opinion therein expressed.

TURNER, J.—I have never been able to accept the grounds on which it was contended that on the sale of the property by a Hindu a right of pre-emption arises. Our Courts are not strictly bound to enforce the law of pre-emption unless founded on custom or contract, though they have gone so far as to give effect to that law where the vendor is a Muhammadan. The circumstance that on a sale a right of pre-emption accrues greatly affects the value of the property, and it has always appeared to me most inequitable to allow such a claim to be asserted on the sale of the property by a Hindu, if it be not based on local custom or special agreement.

SPANKIE, J.—The point has been so exhaustively argued in the decision of this suit and in the Full Bench case cited in the order of reference that it is quite unnecessary to go over the ground again. I would say that, as the purchaser bought the property from a Hindu, there is no right of re-purchase from him under the Muhammadan law of pre-emption on the ground that the vendee and pre-emptor are both Muhammadans.

OLDFIELD, J.—The Muhammadan law recognises the right of pre-emption on the ground of avoiding the inconvenience to a neighbour which might arise by the sale of adjoining property to a stranger. The right can be claimed by all description of persons without reference to difference of religion. We find in the Hedaya

(1) H. C. R., N.-W. P., 1874, p. 28. (2) H. C.R., N-W. P., 1874, p. 2.

1878

DWARKA DA v. HUSAIN BAKHSH.

that "the privilege of Shaffa is established after sale, and the right of the Shaffee is not established until after demand be regularly made, &c." These and similar passages imply only that a complete title to claim the right of pre-emption accrues only on completion of sale, when the former owner's interest in the property has ceased, but the right itself would seem to spring out of a rule of Muhammadan law enacted in the interest of neighbours, and which would seem to be binding only on all those owners being vendors of property who are subject to Muhammadan law, and who necessarily hold their property subject to this rule of law, which will affect them and the property wherever a sale takes place to bring the rule of law into operation.

I concur in the view taken in *Poorno Singh* v. *Hurry Chutn Surmah* (1). I would reply that the Muhammadan law of pre-emption does not apply to the case referred.

APPELLATE CIVIL.

1878
January 25.

Before Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Turner.

MARATIB ALI (PLAINTIFF) *v.* ABDUL HAKIM AND OTHERS (DEFENDANTS).*

Pre-emption—Contract—Muhammadan Law—Custom—Wajibularz—Special Appeal

Where the existence in a certain village of the right of pre-emption was recorded in the village administration-paper as a matter of agreement and not of custom, and a suit was brought to enforce such right founded on the agreement, and was tried and determined in the lower Courts as so founded, the plaintiff could not in special appeal claim such right as a matter of custom in virtue of the entry (2).

A claim to the right of pre-emption founded on a special agreement does not exclude a claim to such right founded on Muhammadan law (3).

THIS was a suit to enforce a right of pre-emption in respect of a share in a certain village, the suit being founded on an agreement contained in the village administration-paper and on the Muhammadan law of pre-emption. The Court of first instance dismissed the suit on the ground that the administration-paper was not signed by the vendor and the agreement was consequently not binding on him, and on the further ground that the plaintiff had not fulfilled

* Special Appeal, No. 571 of 1877, from a decree of Rai Shankar Das, Subordinate Judge of Saháranpur, dated the 20th February, 1877, affirming a decree of Muhammad Imdad Ali, Munsif of Saháranpur, dated the 21st December, 1876.

(1) 10 B L. R., 117.

(2) See also *Chadami Lal* v. *Muhammad Bukhsh*, I. L. R., 1 All., 563, and note to that case.

(3) See also *Nehchul* v *Than Singh*, H. C. R., N.-W. P., 1870, p. 222.