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the provisions of No. 62 of the Limitation Act, and that the limitation properly applicable was that provided by No. 120.

Babu *Jogindro Nath Chaudhri*, for the appellant.

Pandit *Ajudhia Nath* and Pandit *Sundar Lal*, for the respondents.

OLDFIELD and TYRRELL, JJ.—We are of opinion that art. 97 of the Limitation Act may be applied to this suit, and, if not, art. 120 would apply. The suit is not governed by art. 62, as the Judge considers. In the above view the suit is not barred by limitation, and we set aside the decree of the lower appellate Court, and remand the case for trial on the merits. Costs to follow the result.

Appeal allowed.

Before Mr. Justice Tyrrell and Mr. Justice Mahmood.

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April 20.

HABIB-UN-NISSA AND ANOTHER (PLAINTIFFS) *v.* BARKAT ALI AND ANOTHER (DEFENDANTS.)*

Muhammadan law—Pre-emption—Acquiescence in sale—Relinquishment of right.

According to the Muhammadan law, if a pre-emptor enters into a compromise with the vendee, or allows himself to take any benefit from him in respect of the property which is the subject of pre-emption, he by so doing is taken to have acquiesced in the sale and to have relinquished his pre-emptive right.

In a suit to enforce the right of pre-emption founded on the Muhammadan law it appeared that the purchasers, by an agreement made with the plaintiffs on the same date as the sale in respect of which the suit was brought, agreed to sell the property to the plaintiffs any time within a year, and if the latter paid the price and purchased the property for themselves.

Held that by the very fact of their taking the agreement, the plaintiffs had relinquished their right of pre-emption, and were precluded from enforcing it.

THE plaintiffs in this case, Muhammadans, claimed to enforce the right of pre-emption in respect of the sale of a house and certain land appertaining thereto. The right was founded on Muhammadan law. The vendor, Barkat Ali, and the vendee, defendants, were Muhammadans, and the property was sold on the 27th October, 1883. On the day of the sale the vendee gave the plaintiffs an agreement in writing to sell the property to them, the terms of which were as follows:—"I have to-day purchased the house of

* Second Appeal No. 1305 of 1885, from a decree of H. A. Harrison, Esq., District Judge of Meerut, dated the 24th June, 1885, confirming a decree of Babu Mritonjoy Mukerji, Subordinate Judge of Meerut, dated the 15th April, 1885.

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Jalâl-ud-din from Barkat Ali : counting from to-day, if (plaintiffs) within one year pay me what I have paid for the house, I will sell it to them, provided that they purchase for their own use and residence and not for sale to another."

The defence to the suit was that the plaintiffs had not, as required by the Muhammadan law of pre-emption, made the "*talab-i-mawasabat*," or immediate demand, and had therefore lost their right, and that they had also lost it, according to the same law, by accepting from the vendee the agreement set out above, and thereby acquiescing in the sale to him.

The Court of first instance dismissed the suit on the ground that the plaintiffs had not made the "immediate demand." The plaintiffs appealed, and the lower appellate Court affirmed the decree of the first Court on that ground, and on the further ground that they had relinquished their right, by accepting the agreement from the vendee. The plaintiffs appealed to the High Court.

Munshi *Hanuman Prasad* and Babu *Durga Charan*, for the appellants.

Mr. *T. Conlan* and Maulvi *Abdul Majid*, for the respondents.

MAHMOOD, J.—Having heard the learned pleader for the appellants, I am of opinion that the appeal should be dismissed with costs.

The suit was one for pre-emption, arising out of a sale made on the 27th October, 1883, in favour of Abdul Rahim, defendant-respondent, by one Barkat Ali, the other defendant-respondent. The pre-emptors are two ladies, who claim pre-emption under the Muhammadan law. The questions of law to be considered are two, namely,—(i) whether the "*talab-i-mawasabat*," or immediate demand, had been properly made as required by the Muhammadan law; (ii) if it was, have the plaintiffs relinquished their right by entering into the agreement dated the 27th October, 1883, with Abdul Rahim?

This agreement was made on the same date as the sale, and thereby the purchasers agreed to sell the property to the plaintiffs pre-emptors any time within a year, and if the latter paid the price and purchased it for themselves. Now, according to the Muham-

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madan law, if the pre-emptor enters into a compromise with the vendee, or allows himself to take any benefit from him in respect of the property which is the subject of pre-emption, he by so doing is taken to have acquiesced in the sale, and to have relinquished his pre-emptive right. Mr. Baillie, in his celebrated *Digest of Muhammadan Law*, at page 499, which reproduces a passage of the Fatawa Alamgiri, states the law as follows :—"The right of pre-emption is rendered void by implication, when anything is found on the part of the pre-emptor that indicates acquiescence in the sale, as, for instance, when knowing the purchase, he has omitted, without a sufficient excuse, to claim his right (either by failing to demand it on the instant, or by rising from the meeting, or taking to some other occupation, without doing so, according to the different reports of what is necessary on the occasion); or, in like manner, when he has made an offer for the house to the purchaser ; or has asked him if he will give it up to him ; or has taken it from him on lease, or in *moozaraut*—all this with knowledge of the purchase."

This passage is conclusive, and leaves no doubt that by the very fact of their taking the agreement referred to above, the plaintiffs have relinquished their right of pre-emption and are precluded from enforcing it.

In this view of the question it is unnecessary to consider the first question. I would dismiss the appeal with costs.

TYRRELL, J.—I am quite of the same opinion.

Appeal dismissed.

Before Mr. Justice Brodhurst and Mr. Justice Tyrrell.

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April 27.

ZAINAB BEGAM (PLAINTIFF) *v.* MANAWAR HUSAIN KHAN AND ANOTHER (DEFENDANTS.)*

Civil Procedure Code, ss. 556, 558—*Non-attendance of appellant at hearing of appeal—Dismissal of appeal on the merits—Application for re-admission.*

In an appeal before an appellate Court, the appellant did not attend in person or by pleader, and the Court, instead of dismissing the appeal for default, tried and dismissed it upon the merits. Subsequently, the appellant applied to the Court, under s. 558 of the Civil Procedure Code, to re-admit the appeal, explaining her absence

* First Appeal No. 39 of 1886, from an order of Maulvi Zain-ul-Abdin Subordinate Judge of Moradabad, dated the 19th September, 1885.