aside. We give the plaintiffs their costs against the parties to this suit.

Appeal decreed.

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KALIAN RAI v. RAM RATAN.

1896. *March* 24.

Before Mr. Justice Knox and Mr. Justice Blair.

ALI MUHAMMAD KHAN (DEFENDANT) *v.* MUHAMMAD SAID HUSAIN (PLAINTIFF).

Pre-emption—Muhammadan Law—Talab-i-ishtishhad—Demand made to vendee not in possession—Demand made by agent of pre-emptor.

Held, that if the *talab-i-ishtishhad* is made in the presence of the vendee, it is not necessary that such vendee should at the time the demand is made be actually in possession of the property in respect of which pre-emption is claimed. *Chamroo Pasban* v. *Puhlwan Rai* (16 W. R., 3) explained. *Jhootee Singh* v. *Komul Roy* (10 W. R., 119), *Janger Mohamed* v. *Mohamed Arjad* (I. L. R., 5 Calc., 509), *Goluck Ram Deb* v. *Brindabun Deb* (14 W. R., 265) and *Shaikh Dayemoollah* v. *Kirtee Chunder Surmah* (18 W. R., 530) referred to.

Held, also that the ceremony of *talab-i-ishtishhad* need not necessarily be performed by the claimant for pre-emption in person, but may be performed by a duly constituted agent on his behalf. *Syed WajidAli Khan* v. *Lala Hanuman Prasad* (4 B. L. R., A. C. J., 139) and *Mussammut Ojheeonissa Begum* v *Sheikh Rustum Ali* (W. R., 1864, 219) referred to.

THE plaintiff sued for pre-emption, under the Muhammadan law, of a certain zanana house. The defendants pleaded *inter alia* that the plaintiff had not performed the necessary rites of pre-emption prescribed by the Muhammadan law. An issue was framed upon this point, which in argument resolved itself into two questions: first, whether the pre-emptor could make a valid demand from the purchaser when the latter was not in possession of the property sold, and secondly, whether the demand could be made otherwise than by the pre-emptor in person, the pre-emptor being under no physical disability. The court of first instance (Munsif of Moradabad) relying upon a ruling of the Calcutta High Court in *Chamroo Pasban* v. *Puhlwan Roy* (1) found against the plaintiff on this issue. The plaintiff appealed.

The Lower Appellate Court (District Judge of Moradabad), following the ruling in *Janger Mohamed* v. *Mohamed Arjad* (2) overruled the decision of the Munsif on this point, and finding that the requirements of the Muhammadan law as to both *Talab-i-ish-*

(1) 16 W. R. 3. (2) I. L. R., 5 Calc., 509.

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tishhad and *talab-i-muasibat* had been fulfilled by the plaintiff, remanded the case to the court of first instance under section 562 of the Code of Civil Procedure.

Against this order of remand the defendant vendee appealed to the High Court.

Maulvi *Ghulam Mujtaba* for the appellant.

Mr. *Abdul Majid* for the respondent.

KNOX and BLAIR, JJ.—This is an appeal from an order of remand passed under section 562 of the Code of Civil Procedure. The plaintiff, who is respondent before us, is seeking to enforce a right of pre-emption which he claims under the Muhammadan law. The Court of first instance found that the plaintiff had not performed certain rites and ceremonies which that Court considered necessary before he could enforce the right of pre-emption claimed. It therefore dismissed the suit. On the matter going into appeal, the Appellate Court dissented from the view taken by the Court of first instance, considered that all the essential requisites under the Muhammadan law had been complied with, and remanded the case under the order which is complained of in this appeal for determination upon the merits.

In appeal before us, it is now contended that the order of remand is bad on two grounds, the first being that the *talab-i-ishtishhad* was in the present case made to the vendee, who had not, at the time when the demand was made, obtained possession of the land over which the respondent seeks to enforce his pre-emptive rights; the second is that the demand is bad, inasmuch as it was not made by the pre-emptor himself, but by an agent. The main authority for the former of these contentions is based upon the argument that the procedure in such matters laid down by the *Durrul Mukhtar*, which appears to be of a more liberal and lax nature, differs from the stringent rule laid down upon the same subject in the *Hidayah*, and it is urged that where these two are at variance, the *Hidayah* is the authority which should be followed by us. We have not before us the passage from the *Hidayah*, but we were referred to a note (*q*) to be found in the Tagore Law

Lectures, 1873, at page 522, in which it is given as a quotation from the *Fatawa-i-Alamgiri*, vol. 5, p. 267. That passage is as follows:—"It is therefore necessary afterwards to make the *talab-i-ishtishhad wa taqrir*, which is done 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 we were also referred to the precedent *Chamroo Pasban* v. *Puhlwan Rai* (1) as an authority for the proposition that the *talab-i-ishtishhad* to be valid must be made in the presence of the vendor or vendee who may be at the time when the demand is made in possession of the premises, the subject-matter of the pre-emption. The case cited is not a very full and clear authority. The learned Judges who decided it had before them a case in which no demand had been made either in the presence of the vendor or vendee, and their attention was not directly brought to bear upon the question whether the demand in order to be valid could only be made before the person in possession at the time of demand. This is really all the authority upon which this contention rests. We have, on the other hand, a chain of decisions beginning with a case of *Jhootee Singh* v. *Komul Roy* (2) if not earlier, and extending down to the case of *Janger Mohamed v. Mohamed Arjad* (3). There are cases between, viz:—*Goluck Ram Deb* v. *Brindabun Deb* (4) and *Shaikh Dayemoollah* v. *Kirtee Chunder Surmah* (5). The Calcutta Court in these cases has throughout laid down that the demand *talab-i-ishtishhad* must be made in the presence of the vendor or purchaser, or upon the premises and in the presence of witnesses. In the case in 10 Weekly Reporter, the learned Judges were certainly not disposed to make any relaxation, and fully bore in mind the fact that the right of pre-emption was one in which they should not be disposed to relax any of the rules by which the Muhammadans themselves found it necessary to confine its operation. In *Janger Mohamed* v. *Mohamed Arjad*, the precedent of *Chamroo Pasban* v.

(1) 16 W. R., 3.
(2) 10 W. R., 119.
(3) I. L. R., 5 Calc., 509.
(4) 14 W. R., 265.
(5) 18 W. R., 530.

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Puhlwan Roy was quoted, and the learned Judges considered it to amount to nothing further than that the demand must be made either before the vendor or the purchaser or on the premises; in other words, the matter deemed essential was that the affirmation should be made in the presence of witnesses and before the vendor or purchaser who might be deemed to be in possession of the lands. The fact of the purchase would seem to be considered as giving, at any rate, a constructive possession for such purposes, and we see no reason to rule otherwise.

As regards the second point, the main authority cited to us is a passage from Macnaghten's Principles and Precedents upon Muhammadan Law, Edition 1890, p. 183, where it is said that the party claiming must make the demand, and, it is added, he may also depute an agent, provided he is at a considerable distance and cannot afford personal attendance, and, if unable to depute an agent, he may communicate with the seller or purchaser by letter. Along with this, which after all does not appear to be of higher authority than an answer made, as the practice then was, by a person considered an authority in Muhammadan law to a question put by Judges, we were referred to the case of *Syed Wajid Ali Khan* v. *Lala Hanuman Prasad* (1). In that case a Subordinate Judge had expressed an opinion that the ceremony of *talab-i-ishtishhad* could only be performed by the pre-emptor in person and could not be done through an agent. The learned Judges who decided that case remarked that they were not referred to any authority for this dictum, and the law is otherwise enunciated in Muhammadan law books. The restriction that the demand should be made by the pre-emptor in person depends upon his ability to perform it, and the question of ability would seem to be one lightly dealt with, the preference being given to the rule which prevails in Muhammadan Law as elsewhere, that an agent can do what a principal can do, except where prohibited by law or where his power is restrained. In the case of *Mussamut Ojheeonissa Begum* v. *Sheikh Rustum Ali* (2), the Judges held that unless

(1) 4 B. L. R., A. C. J., 139. (2) W. R., 1864, p. 219.

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there was a clear provision in the law that the claimant must go to the spot or to the seller or to the purchaser, his act could be done by a duly constituted agent. As in that case, so in this, we think that the evidence shows that the needful ceremonies of Muhammadan law have been complied with to all intents and purposes, and that the learned Judge was right in so considering and in making the order of remand. The appeal is therefore dismissed with costs.

Appeal dismissed.

1896

March 28.

Before Mr. Justice Banerji.

MURARI DAS AND OTHERS (DECREE-HOLDERS) *v.* THE COLLECTOR OF GHAZIPUR AND ANOTHER (RESPONDENTS).

Act No. X of 1877, *section* 326—*Civil Procedure Code, sections* 322, 325, 326—*Execution of decree—Right of creditor under a simple money decree obtained after property of debtor has been taken over by the Collector to be entered in list of creditors prepared under section* 322*B*.

Held that the assignees of a decree for money obtained against a person whose property had been taken over by the Collector under section 326 of Act No. X of 1877, whilst such property was under the management of the Collector, were not entitled to be placed on the list of creditors prepared by the Collector under section 322 of Act No. XIV of 1882; and that in any case application to be placed on the said list of creditors should have been made to the Collector and not to the District Judge.

THE facts of this case are sufficiently stated in the judgment of Banerji, J.

Babu *Jogindro Nath Chaudhri* and Munshi *Madho Prasad* for the appellants.

Mr. *E. Chamier* for the respondents.

BANERJI, J.—The facts which have given rise to this appeal are these:—

Several decrees having been passed against Babu Har Shankar Prasad Singh, one of the respondents to this appeal, the Collector of Ghazipur, in which district a part of Babu Har Shankar Prasad's property was situated, was appointed by the District Judge of Ghazipur under section 326 of Act No. X of 1877 to take

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First Appeal No. 162 of 1895 from an order of Kuar Bharat Singh, District Judge of Ghazipur, dated the 17th May 1895.