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to which we refer are *Shankar Dat Dube* v. *J. G. Harman and Co.*, (1) and *Imdad Ali* v. *Jagan Lal* (2). The plaintiff's suit was, in our opinion, barred by section 244 of the Code of Civil Procedure.

We allow this appeal with costs, and, setting aside the order of the Court below, we dismiss the appeal to the Court below with costs, and restore and affirm the decree of the Court of first instance.

Appeal decreed.

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March 12.

Before Mr. Justice Banerji and Mr. Justice Aikman

MUHAMMAD YUNUS KHAN AND ANOTHER (DEFENDANTS) v. MUHAMMAD YUSUF (PLAINTIFF).*

Pre-emption—Muhammadan law—Effect of offer by pre-emptor to purchase from vendee—Talab-i-ishtishhad—Witnesses—Servants of pre-emptor.

Held that where a pre-emptor continues to assert his pre-emptive right, and on the strength of that right and in his character of pre-emptor offers to take the property from the purchaser by paying him the sale price, without resorting to, and with a view to avoid litigation, he cannot be said to have acquiesced in the sale and waived his right of pre-emption.

Held also that in the making of the *talab-i-ishtishhad* the servants of the pre-emptor are competent witnesses. The disability in this respect imposed by the Muhammadan law is limited to minors and persons convicted of slander.

Muhammad Nasir-ud-din v. *Abdul Hasan* (3) followed. *Habib-un-nissa* v. *Abdul Rahim* (4) referred to.

In this case the plaintiff, Muhammad Yusuf, sued for possession by right of pre-emption of a house and compound sold by Hafiz Abdul Karim to Muhammad Yunus Khan and Muhammad Isa Khan, defendants on the 27th of June, 1893. The plaintiff based his claim on Muhammadan law and also on the *wajib-ul-arz*. The defendants, vendees, pleaded that the Muhammadan law did not apply under the special circumstances of the case, and that the formalities required by that law had not been observed by the plaintiff. The other pleas taken by the defendants related to the claim so far as it might be based on the *wajib-ul-arz*.

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*First Appeal No. 71 of 1894, from a decree of Babu Bepin Behari Mukerji, Subordinate Judge of Aligarh, dated the 22nd January 1895

(1) I. L. R., 17 All., 245.
(2) I. L. R., 17 All., 478.
(3) I. L. R., 16 All., 300.
(4) I. L. R., 8 All., 275.

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The Court of first instance (Subordinate Judge of Aligarh) found on the two most material issues in the case, *viz.* (1) whether the plaintiff had a right of pre-emption under the Muhammadan law); and (2) whether the plaintiff had duly performed the ceremonies of *talabi-i-muasibat* and *talab-i-ishtishhad* in favour of the plaintiff, and accordingly gave the plaintiff a decree.

The defendants, vendees, appealed to the High Court.

Munshi *Ram Prasad* and Pandit *Moti Lal*, for the appellants.

Pandit *Sundar Lal* and Maulvi *Ghulam Mujtaba*, for the respondent.

BANERJI and AIKMAN, JJ.—The suit out of which this appeal has arisen was brought by the respondent to enforce his right of pre-emption in respect of the sale of a house and compound, made in favour of the appellants on the 27th of June 1893. The plaintiff is the owner of an adjoining house, and he founded his claim on Muhammadan law, and also on the *wajib-ul-arz*. The defence of the defendants, vendees, was that the plaintiff had refused to purchase the property, that he did not perform the preliminary demands required by the Muhammadan law, and that he was not entitled to pre-empt the property. The Court below has found in favour of the plaintiff and granted him a decree.

The first contention raised before us in appeal is that the plaintiff acquiesced in the sale, and thereby forfeited his right of pre-emption. In our opinion, there is no evidence to support this contention. The only evidence to which our attention has been drawn is the deposition of Mr. Shapurji. He states that before the purchase by the defendants he had a conversation with the plaintiff about the purchase of the property in question, and that the plaintiff told him that he did not care to purchase the property. There is nothing to show that after the terms of the sale had been settled with the appellants, and the sale to them had been arranged, the plaintiff was asked if he would purchase the property on the same terms and declined to make the purchase. On the contrary we find that on the 8th of October 1892 he wrote to the vendor expressing his willingness to purchase the

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property and in fact asking him to convey it to him. That letter clearly shows that the plaintiff was insisting on his right of pre-emption, and there is nothing to prove that subsequently to the date of that letter he changed his mind.

Mr. *Moti Lal* on behalf of the appellants next contends that, as it appears from the deposition of the plaintiff himself that after the purchase by the defendants vendees he, the plaintiff, expressed his willingness to purchase the property from them, this circumstance was enough to extinguish the right of pre-emption of the plaintiff. In support of his contention he referred us to the case of *Habib-un-nissa* v. *Abdul Rahim* (1). The same question was considered by another Bench of this Court in a later case, *viz.*, *Muhammad Nasir-ud-din* v. *Abdul Hasan* (2). In that case it was held, that "where a pre-emptor continues to assert his pre-emptive right, and on the strength of that right, and in his character of pre-emptor, offers to take the property from the purchaser by paying him the sale price, without resorting to, and with a view to avoid litigation, he cannot be said to have acquiesced in the sale and waived his right of pre-emption." With the latter ruling we agree. As in this case the plaintiff offered to purchase the property from the vendees whilst insisting on his right as pre-emptor, he did not by that offer forego his right of pre-emption.

The next contention on behalf of the appellants is that the respondent failed to prove that he had complied with the preliminary requirements of the Muhammadan law. With reference to this contention we may observe that the respondent is a lawyer and a Muhammadan; it may therefore be presumed that in asserting his right of pre-emption he would do all that was required by Muhammadan law. We have in this case the evidence of the plaintiff himself that as soon as he heard of the sale in question he made the first demand, that is, the *talab-i-muasibat*, and that he then proceeded to the spot where the property is situated, and there, in the presence of two witnesses who had also been present

(1) I. L. R., 8 All. 275. (2) I. L. R., 16 All., 300.

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at the time of making the first demand, made the invocation in the presence of witnesses called *talab-i-ishtishhad.* It has been urged that the *talab-i-ishtishhad* was not performed in compliance with the Muhammadan law, inasmuch as it was made in the presence of persons who were the servants of the plaintiff, and who, it is said, were on that account not competent witnesses according to that law. We may observe that the disability as competent witnesses under the Muhammadan law is limited to minors and persons convicted of slander and does not extend to servants. There is therefore no basis for the contention that the servants of the plaintiff, in whose presence the *talab-i-ishtishhad* was performed, were not competent witnesses. Further, it is laid down in Baillie's Muhammadan law, at p. 489, that "invocation of witnesses is not required to give validity to that demand, but only in order that the pre-emptor may be provided with proof, in case the purchaser should deny the demand." That being the object of the invocation of witnesses, any persons who under the law as now administered would be competent witnesses can attest the fact of the demand with invocation being made.

These being the only pleas pressed before us, this appeal fails and is dismissed with costs.

Appeal dismissed.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Blair.

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MADHO PRASAD (DECREE-HOLDER) *v.* KESHO PRASAD (OBJECTOR).*

Execution of decree—Limitation—Act No XV of 1877 *(Indian Limitation Act). Sch. ii, Art.* 179*—Civil Procedure Code, sections* 234, 248*—Applications for execution made without any representative of the deceased judgment-debtor being brought on to the record.*

Applications for the execution of a decree made after the death of the judgment-debtor and without either any representative of the judgment-debtor being brought upon the record or there being any subsisting attachment of the property against which execution is sought are not good applications for the purpose of saving limitation. *Sheo Prasad* v. *Hira Lal* (1) distinguished.

THE facts of this case sufficiently appear from the judgment of the Court.

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* First Appeal No. 8 of 1895 from a decree of Rai Anant Ram, Subordinate Judge of Jaunpur, dated the 28th September 1894.

(1) I. L. R., 12 All., 440.