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out of the proceeds. This rule of Muhammadan law, no doubt, has been modified and is not applicable in the present age, but the widow's right to retain possession of her husband's estate in lieu of her dower has sprung from this and is therefore not dependent on the consent of her co-heirs.

BY THE COURT.—The order of the Court is that the appeal will be dismissed with costs.

Appeal dismissed.

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April 29.

Before Mr. Justice Richards and Mr. Justice Tudball.

TAFAZZUL HUSAIN (PLAINTIFF) *v.* THAN SINGH AND ANOTHER (DEFENDANTS).*

Pre-emption—Muhammadan law—Partition after sale but before decree—Effect on suit.

The plaintiff sued for pre-emption of zamindari property, basing his claim upon the Muhammadan law and the fact that he was a co-sharer in the property sold. After the suit, but before decree, the property was partitioned and the plaintiff and the vendors became owners of different *mahals*. *Held* that the plaintiff was no longer, after the partition had been completed, entitled to a decree for pre-emption.

THE facts of this case were as follows :—

The suit was one for pre-emption—based on the Muhammadan law—of zamindari property. At the date of the sale sought to be pre-empted, the plaintiff pre-emptor and the vendor were both co-sharers in the village (mauza Kherua, pargana Jahanabad, district Pilibhit), and the plaintiff had a right of pre-emption as against the vendee. Some time after the institution of the suit for pre-emption by the plaintiff, he and other co-sharers applied for perfect partition of the village to the Revenue Court against the vendee as opposite party. This application was subsequently withdrawn; and then the vendee and other co-sharers, except the plaintiff, applied for perfect partition, and it was made and came into force before the pre-emption suit proceeded to a decree. As a result of the partition the plaintiff and the vendor became owners of different *mahals*. The Subordinate Judge dismissed the plaintiff's suit on the ground that by reason of the partition the plaintiff was no longer a co-sharer of the vendor within the

* Second Appeal No. 677 of 1909, from a decree of W. H. Webb, District Judge of Bareilly, dated the 10th of May 1909, confirming a decree of Girraj Kishor Datt, Subordinate Judge of Bareilly, dated the 9th of July, 1907.

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meaning of the Muhammadan law of pre-emption. On appeal the District Judge confirmed the decision of the Subordinate Judge.

The plaintiff appealed to the High Court.

Mr. *M. L. Agarwala* (with him Mr. *R. Malcomson*), for the appellant:—

The question is, what is the effect of the partition on the right of pre-emption? And also, whether the right to pre-empt should continue up to the date of the decree? The present case is one of pre-emption under the Muhammadan law; it is, therefore, not governed by the rulings in *Ram Gopal* v. *Piari Lal*, (1) and *Janki Prasad* v. *Ishar Das*, (2) which were both cases of pre-emption under the provisions of wajib-ul-arzes. The first of these was expressly confined to cases under the wajib-ul-arz; and the second expressly left the question open as to whether the right and status of the pre-emptor plaintiff should subsist up to the date of the decree.

The case of *Rohan Singh* v. *Bhau Lal*, (3) would be in my favour, but it also was a case of pre-emption under a wajib-ul-arz. There is a great difference between the incidence of pre-emption under the Muhammadan law and that under wajib-ul-arzes. Hamilton's *Hedaya* (by Grady), p. 564. Under the Muhammadan law it would be optional with the pre-emptor to abide by the partition or not; Baillie, *Digest of Muhammadan Law*, p. 504. The only passage against me is that in Hamilton, *Hedaya*, p. 562. But that contemplates a case where the pre-emptor has parted with, or been deprived of, the whole of the property which gave him in the first instance the right to pre-emption. In the present case the pre-emptor has not, by the partition, parted with any of his property. He still remains the owner of the same property (namely, the same fractional share in the village) which he owned before the partition. The only difference has been this, that the *mahal* in which lands corresponding to the vendor's share have been allotted is not the same as that in which the pre-emptor's allotment has fallen. It is not the *general* rule, if we except certain specified cases, under the Muhammadan law that the conditions giving rise to the right

(1) (1899) I. L. R., 21 All., 441. (2) (1899) I. L. R., 21 All., 374.
(3) (1909) 6 A. L. J., 699.

of pre-emption should continue up to the moment of passing the decree. If it were so, the right of pre-emption could be easily thwarted; one of two co-sharers might transfer to a stranger and thereafter partition off his share, and thereby defeat the other co-sharer's right of pre-emption. And this method would then have been mentioned in the text books as one of the successful devices for circumventing pre-emption. The conditions of pre-emption are enumerated in Baillie's *Digest of Muhammadan Law*, pp. 475-77. In the 6th condition it is not said that the *milk*, or ownership, in the mansion which exists at the time of the sale should continue up to the date of the decree. Hamilton, *Hedaya* (by Grady), Book XXXVIII, Ch. IV, p. 561, *et seq.*, deals *exhaustively* with the cases where the right of pre-emption having come into existence will be defeated by reason of other circumstances happening before the decree is passed. There are no other cases in which the right, having arisen, would be defeated. The present case does not come within chapter IV.

Mr. *Abdul Raoof* (for Maulvi *Ghulam Mujtaba*), for the respondent:—

Since the partition the plaintiff is not a partner in the *mahal* in which the property is situate. At the date of the decree, therefore, he was not a sharer. If the plaintiff's suit were to succeed, the result would be contrary to the object of pre-emption; for it would be introducing him within a *mahal* from which, as the result of the partition, he has been separated. The original meaning of the word *shafa* is "conjunction"; Baillie, *Digest of Muhammadan Law*, page 475; Hamilton, *Hedaya* (by Grady), page 547. If the pre-emptor is not a co-sharer in the *mahal*, his land cannot be said to "conjoin" that of the vendor. Hamilton, *Hedaya*, page 548, lays down that "the right of *shafa* holds in a partner who has not divided off and taken separately his share." The plaintiff, having divided off, is no longer entitled to a decree for pre-emption. Hamilton, *Hedaya*, page 561, 562, lays down that one of the circumstances which invalidate the right of *shafa* is the death of the *shafi* before the Qazi's decree. Thus, the continuance of the right of pre-emption to the date of the decree is not only contemplated but expressly mentioned

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by the Muhammadan law. "It is, moreover, a condition that the property of the *shafi* remain firm until the decree of the Kazee be passed." There is another passage which lays down that the death of the vendee does not extinguish the right of the pre-emptor, for "no alteration has taken place in the reasons or grounds of his right." It is implied, therefore, that such alteration would extinguish the right. There are other passages also showing that "the ground of *shafa*, namely, a conjunction of property" must still continue.

Mr. *M. L. Agarwala*, in reply:—

The passages relied upon by the other side all relate to the entire cessation of ownership, and not merely to the cessation of partnership.

RICHARDS and TUDBALL, JJ.:—This appeal arises out of a suit for pre-emption. The property sought to be pre-empted is zamindari, and the vendor and pre-emptor are Muhammadans. It is admitted that the right of pre-emption, if any, is based on Muhammadan law. The facts are quite clear. At the time of the sale the plaintiff pre-emptor was a co-sharer in the same mahal as the vendor. After the institution of the suit partition proceedings commenced. Indeed, they were originally commenced by an application of the plaintiff himself. It is said that he withdrew from this application and possibly this is correct. However, partition proceedings were had, with the result that there was a final decree, which took effect on the 1st of July, 1907. The decree of the court dismissing the plaintiff's suit for pre-emption is dated the 9th July, 1907. The suit was dismissed upon the ground that the plaintiff pre-emptor as the result of the partition was no longer a co-sharer in the *mahal* in which the property, the subject-matter of the suit, is situate. The plaintiff appealed, and the lower appellate court dismissed the appeal. The plaintiff comes here in second appeal. We think that the decisions of the courts below were correct. The plaintiff's right was based upon the fact that he was partner with the vendor. To quote Hamilton's translation of the Hedaya, *shafa* relates to a thing held in joint property and which has not been divided off. The right of *shafa* is founded on a precept of the Prophet who had said, "the right of *shafa* holds in a partner who has not

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divided off and taken separately his share." Having regard to what has happened, the plaintiff's property has been divided off. He is no longer a partner with the vendor. It is argued that inasmuch as the plaintiff was a partner at the time of the institution of the suit, it therefore does not matter that a partition has since taken place, particularly if the plaintiff was not the person who sought partition. Evidently the plaintiff did feel that if he had prosecuted the partition, it would be fatal to his suit, and this perhaps explains why he withdrew from the application for partition which he himself made in the first instance. It is expressly laid down in the *Hedaya*, Chapter IV, Book 33, that it is a condition that the property of the *shafi* remain firm until the decree of the Qazi be passed; and for this reason if the *shafi* previous to the decree of the Qazi sell the house from which he derives his right of *shafa*, the reasons or grounds of his right being thereby extinguished, the right itself is invalidated. Applying the same principle to the present case, plaintiff's right of *shafa* was founded upon the fact that he was a partner, that is to say, a co-sharer in the *mahal*. He has ceased to be such co-sharer. Therefore the reasons or grounds of his right had been extinguished before the decree of the court, and therefore the right itself is also extinguished. We dismiss the appeal with costs.

Appeal dismissed.

REVISIONAL CRIMINAL.

1910
May 4.

Before Mr. Justice Richards and Mr. Justice Tudball.

EMPEROR *v.* MUHAMMAD YAKUB AND OTHERS.*

Criminal Procedure Code, section 107—Security to keep the peace—Security demanded in respect of an act which was legal, although others might thereby have been led to break the peace.

To justify an order under section 107 of the Criminal Procedure Code, the Magistrate must believe that the person against whom he makes the order is about to commit a breach of the peace or to disturb the public tranquility or to do some *wrongful* act that may occasion a breach of the peace. The fact

*Criminal Revision No. 157 of 1910, from an order of Hanuman Singh Magistrate of the first class of Ghazipur, dated the 12th of March, 1910.