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of purchasing and despatching the goods and to do certain acts there also. His negligence or misconduct, if any, occurred there.

The language of the section has been altered in the present Act in that in place of the words "The cause of action arises" and Explanation III of section 17 the words "The cause of action in whole or in part arises" have been substituted. This has not in our opinion altered the law as to what is the cause of action in suits arising out of contract. Explanation III of section 17, Act XIV of 1882, though it does not appear in the present Act, is a correct statement of what the law still is and shows clearly the true meaning of the words "cause of action" in the case of suits arising out of contracts.

In our opinion, therefore, the cause of action in the present suit arose wholly at Karachi and the lower appellate court's order was sound. We therefore dismiss the appeal with costs.

Appeal dismissed.

Before the Hon'ble Mr. H. G. Richards, Chief Justice, and Mr. Justice Banerji.

MUHAMMAD NAZIR KHAN (PLAINTIFF) v. MAKHDUM BAKHSH AND ANOTHER (DEFENDANTS.)*

1911 *July* 31.

Pre-emption—Muhammadan law—Talab-i-mawasibat.

Where a person immediately on hearing of the sale of a house exclaimed "*mera hak shafa hai*" and without any delay took the price and brought it to the vendee and claimed the house, *held* that the expressions used by him coupled with the circumstances constituted a sufficient first demand. *Muhammad Abdul Rahman Khan* v. *Muhammad Khan* (1) distinguished.

THIS was an appeal under section 10 of the Letters Patent from a judgement of KARAMAT HUSAIN, J. The facts of the case are fully stated in the judgement under appeal, which was as follows:—

"This was a suit for pre-emption on the basis of the Hanafi Law and the question to be decided is whether the expressions used by the pre-emptor in making the *talab-i-mawasibat* do or do not amount to a claim for pre-emption. The first court came to the conclusion that they did not. The lower appellate court came to the conlusion that they did and decreed the suit. The defendant comes here in second appeal and his learned counsel contends that the expressions used by the pre-emptor are not sufficient to constitute the first demand. The lower appellate court in its judgement remarks as follows: 'In the present case the words used were *mera shafa* repeated twice. The plaintiff

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Appeal No. 47 of 1911 under section 10 of the Letters Patent.

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also asked those present to bear witness to it. He then immediately went inside the house, brought the money and being accompanied by witnesses went to the vendee, offered him the money and made the second demand. The words uttered at the first demand amply and clearly show that the plaintiff had a clear intention of demanding his right, *vide* Weekly Notes, 1897, pp. 23 and 93 ; 6 A. L. J. R., 15.'

"The Hanafi Law on the question of first demand is very clear. Some expression showing that the pre-emptor claims pre-emption must be used. The expression used in the present case, as found by the lower court is *mera shafa*, which only gives an information that the pre-emptor has the right to pre-empt. There is nothing in the expression to show that, in addition to the information given by him, he claims to pre-empt. A pre-emptor may say 'I am a pre-emptor, but I do not claim to pre-empt,' or he may say 'I am a pre-emptor and I claim to pre-empt.' The fact that the expression 'I am a pre-emptor' may be used together with a claim to pre-empt as well as with a waiver of that claim conclusively shows that the expression 'I am a pre-emptor,' does not in any way convey the idea that the pre-emptor does claim to pre-empt. The point is covered by an unreported decision of this Court in S. A. 1059 of 1901, decided on the 1st of December, 1903, and I quote the following extract from the judgement :—'As to the decision of the case upon the principles of Muhammadan Law, we find ourselves driven to the conclusion that no right has been acquired by the plaintiff under that law. We cannot find that merely for the plaintiff to say "I am a pre-emptor, my right extends to the land" constitutes a *talab-i-mawasibat* either by express terms or by implication. There is abundance of authority upon the subject. It is immaterial, according to the Hedaya, in what words the claim is preferred. It is sufficient that they indicate a claim. But we have nothing in the expressions used in this case to make it possible to say that such a claim has been made or can be inferred. Mr. Justice AMEER ALI in his work upon Muhammadan Law, Vol. I, p. 597, following the past authorities, says :—"If a pre-emptor were to say to the purchaser, I am thy pre-emptor or *shafee*, it would be void." The result of this is clear that a mere expression or declaration of his right does not itself show that he wishes to enforce that right. We find ourselves constrained to overrule the claim of the pre-emptor appellant and hold that the first demands necessary under the Muhammadan law have not been made.'

"In addition to the authorities cited in the unreported case I cite the following from Baillie's Muhammadan law :—'There is some difference as to the words in which the demand should be expressed. But the better opinion is that it is lawful in any words that intelligibly express the demand. So that if the pre-emptor should say 'I have demanded' or 'I demand pre-emption,' it would be lawful, but if he were to say 'I am thy *shafee* or pre-emptor' or 'I take thy mansion by pre-emption it would be void.' (Book on Pre-emption, Chapter III, p. 467, edition 2).

"There is nothing technical in this rule of Muhammadan law. It is based on the canons of interpretation which determine the intention of a person. intention is to be gathered from expressions used by that person and not from words which have not been used by him. The expression 'I am a pre-emptor'

only gives information that the speaker is a pre-emptor not of what the pre-emptor is going to do—but the words 'I have demanded' or 'I do demand pre-emption' show an intention to *claim* pre-emption.

"The case *Ihsanul Huq* v. *Kallan* (1) has no application to the facts of the present case, because, according to the remarks made by the learned Judges in that case it appears that a demand was made. The learned Judges say :—'The plaintiff in his evidence states that as soon as he heard of the purchase from a friend he at once said "I am a pre-emptor, I have a claim (*main shafi hun* ; *mera haq hai*)"....'The words the plaintiff used were probably equivocal, but a witness, named Abdul Ghafur, was called and he says that when the plaintiff was informed that the house was sold, he at once said that he was a pre-emptor and would take the house, and told Nanhe, his brother, to take money and asked us to accompany him.' The rulings in *Ahmad Shah Khan* v. *Abadi Begam* (2) and *Muhammad Yunis Khan* v. *Muhammad Yusuf* (3) do not apply to the facts of these cases.

"The result is that I hold that the expression found by the lower appellate court to have been used by the pre-emptor *mera shafa*, does not constitute a *talab mawasibat* within the meaning of that expression under the Muhammadan law. I therefore allow the appeal, set aside the decree of the lower appellate court and restore that of the court of first instance with costs."

Mr. *Muhammad Ishaq Khan* (with him Munshi *Gobind Prasad*), for the appellant.

Mr. *Abdul Raoof* (with him Mr. *Ahmad Karim*), for the respondents.

RICHARDS, C. J. and BANERJI, J. :—This appeal arises out of a suit for pre-emption under the Muhammadan law. The court of first instance dismissed the claim. The lower appellate court decreed the claim reversing the court of first instance, and a learned Judge of this Court reversed the lower appellate court and restored the decree of the court of first instance.

The question is whether the preliminaries required by the Muhammadan law have or have not been performed. The evidence is that the plaintiff pre-emptor immediately upon learning that the sale had taken place said "*mera haq shafa hai.*" This he repeated three times calling upon certain persons who were present to bear witness. On the moment without any delay he took the price of the house and brought it to the vendee and claimed the house, informing him of the fact that he had already made his demand. So far as the question is a question of fact it rested with the lower appellate court to decide that question,

(1) (1909) 6 A. L. J., 15. (2) Weekly Notes, 1897, p. 23.
(3) Weekly Notes, 1897, p. 93.

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and it was not competent for this court in second appeal to set aside the finding of the lower appellate court. It is said, however, that the words which were used could under no possible circumstances constitute a good first demand under the Muhammadan law. There is no doubt that certain expressions appear in the authorities as illustrations of what constitutes a good demand and the expression used in the present case is not amongst them. It is laid down by Mr. Ameer Ali, at page 606 of volume I of the last edition of his work on Muhammadan law that "no particular formula is necessary so long as the claim is unequivocally asserted." He cites abundant authority for this proposition. There cannot be the least doubt that it was the intention of the plaintiff in the present case to assert and demand his right of pre-emption. It is possible if the words he used were the only evidence in the case that it might be said that the words were equivocal, and did not necessarily show that he was making a demand of pre-emption, but the circumstances and what actually took place at the very moment that he used these words, do in our opinion demonstrate that it was his intention to make the demand; not merely to assert that his claim to pre-empt existed, but actually to demand it. He called the attention of witnesses to the fact and he at once went and got the money. All these things happened simultaneously with the uttering of the words, not after the lapse of some time. Our attention has not been called to any authority which lays down that we are not entitled to take into consideration what actually occurred at the moment to enable us to come to a conclusion whether or not the pre-emptor was demanding pre-emption when he used the particular expressions. If the Court is entitled to consider these circumstances, then it was quite open to the lower appellate court to arrive at the conclusion at which it did arrive and the question becomes a question of fact binding in second appeal. We think that it is impossible to lay down any hard and fast rule as to what expressions constitute a good first demand: each case must be considered and decided upon its own peculiar facts and circumstances.

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Reliance has been placed on the case of *Muhammad Abdul Rahman Khan* v. *Muhammad Khan* (1). In that case the words used were :—" I am pre-emptor and my right extends to the land. " It was held that these words were not sufficient to constitute a *talab-i-mawasibat*. The learned Judges say at page 271, after referring to the Hidaya :—" But we have nothing before us upon which it is possible to say that such a claim has been made or can be inferred. " In our opinion this case is clearly distinguishable from the present case. In the present case there are circumstances which occurred at the very moment at which the words were used from which it can reasonably be inferred that the demand was in fact being made. We think that the decision of the lower appellate court ought to be restored.

We accordingly allow the appeal, set aside the decree of this Court and restore the decree of the lower appellate court with costs of the two hearings in this Court.

Appeal allowed.

PRIVY COUNCIL.

P. C.
1911
November 1.

JIT SINGH AND OTHERS (DEFENDANTS) *v.* MAHARAJ SINGH (PLAINTIFF).

[On appeal from the High Court at Allahabad.]

Privy Council, practice of—Point of law as a ground of appeal which had not been dealt with by the courts below—Appeal heard ex parte.

It is contrary to the practice of the Judicial Committee to allow a point to be raised on appeal before them which has not been discussed in the courts below, and on which their Lordships have not got the assistance of those courts.

APPEAL from a judgement and decree (20th February, 1907) of the High Court at Allahabad, which reversed a decree (18th March, 1904) of the court of the Subordinate Judge of Shahjahanpur.

The facts of the case as alleged by Maharaj Singh the plaintiff (respondent) were that the three sons of one Nehchal Singh, namely Harihar Singh, Himmat Singh and Bahadur Singh, separated in the lifetime of Harihar Singh, after whose death his

Present :—Lord MACNAGHTEN, Lord ROBSON, Sir JOHN EDGE and Mr. AMEER ALI.

(1) (1903) 8 A. L. J., 270.