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APPELLATE CIVIL.

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July 3.

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

MUHAMMAD USMAN (PLAINTIFF) *v.* MUHAMMAD ABDUL GHAFUR AND ANOTHER (DEFENDANTS).*

Pre-emption—Muhammadan law—Demand made "on the premises"—Demand made in the abadi which was part of the premises sold.

Where a person claiming pre-emption in respect of a certain zamindari share proved that he had made the demand with witnesses while sitting on his *chabutra* in the *abadi*, which formed part of the premises sold, it was *held* that the demand of pre-emption was a good demand made "on the premises" within the meaning of the Muhammadan law. *Kulsum Bibi* v. *Faqir Muhammad Khan* (1) followed.

THIS was a suit for pre-emption of a zamindari share, the claim being based on the Muhammadan law. The court of first instance (Munsif of Muhammadabad Gohna) dismissed the suit holding that the requirements of the Muhammadan law as to the preliminary demands had not been complied with. The claimant had in fact made the demand in the presence of witnesses as soon as he heard of the sale, while sitting on his *chabutra* in the *abadi* of the village of which the property sold formed part. The plaintiff appealed, but his appeal was dismissed by the District Judge on grounds which are stated in the judgement of the High Court. The plaintiff thereupon appealed to the High Court.

Maulvi *Ghulam Mujtaba*, for the appellant.

Mr. *Abdul Raoof*, for the respondents.

RICHARDS, C. J., and TUDBALL, J.—This appeal arises out of a suit for pre-emption based on Muhammadan law. The

* Second Appeal No. 1328 of 1910 from a decree of Ram Autar Pande, District Judge of Azamgarh, dated the 26th of September, 1910, confirming a decree of Iftikhar Husain, Munsif of Muhammadabad Gohna, dated the 12th of February, 1910.

(1) (1896) I. L. R., 18 All., 298.

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property consisted of a zamindari share. It is suggested, and it appears to be the case, that there has been an imperfect partition under which the vendor holds exclusive possession of a certain part of the zamindari. The *abadi*, however, remains common property of the proprietors of the mahal, and there can be no doubt that the vendor and the plaintiff are each owners of fractional shares in the mahal. The plaintiff alone produced evidence on the question of compliance with the Muhammadan law of demand. The moment that the news of a sale was received, the plaintiff demanded his *shufa* and invoked witnesses. He alleged in the plaint that after this notice was given to the vendee. The court of first instance decided against the plaintiff on the ground that two separate demands were necessary and that the two demands could not be combined. The lower appellate court confirmed the decree of the court of first instance, holding, first, that the demand with witnesses being made by the plaintiff while sitting on his *chabutra* in the *abadi*, could not be deemed a good demand under the Muhammadan law; and, secondly, that there had been at one time a contract of pre-emption entered into between the co-sharers, and that this contract must be held once and for all to have abrogated all right of pre-emption based on Muhammadan law, and this, notwithstanding that the period covered by the contract had determined on the expiry of the settlement. It has not been argued before us that the two demands could not be combined, and the respondent, as we think rightly, has not relied on the decision of the lower appellate court that the contract abrogated the plaintiff's right under the Muhammadan law. The question before us has been confined to whether or not the demand with witnesses made on the plaintiff's own *chabutra*, can be deemed a good second demand according to Muhammadan law. Muhammadan law requires that the second demand shall be in the presence of the vendor or on the premises. It is quite clear that the demand was not made in the presence either of the vendor or of the vendee. It was however made in the *abadi*, which undoubtedly was part of the premises sold. It is quite true that it was the plaintiff's own *chabutra* in the sense that it was the *chabutra* belonging to his residence in the village.

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In the case of *Kulsum Bibi* v. *Faqir Muhammad Khan* (1) it was held that the demand made in the village, a fractional share of which had been sold, was a good demand on the premises according to Muhammadan Law. We find it impossible to distinguish the present case from the case cited. The plaintiff when making the demand was actually standing on joint property. It is contended that the demand was not *bonâ fide*, and the court below had found, as a matter of fact, that the demand was not *bonâ fide*. We do not think that the court arrived at any such finding. The Court was merely quoting a passage from the judgement of the Bench which decided the case of *Kulsum Bibi* v. *Faqir Muhammad Khan*. The demand was a perfectly *bonâ fide* demand if it was openly made with the intention of asserting the right to pre-emption. We have already stated that in the plaint the plaintiff alleged that after the demand had been made, actual notice was given to the defendant vendee, and this allegation was admitted in the written statement. Under the circumstances it is quite impossible to hold that there was any *mala fides* about the demand. We think that it must be held that the demand was a sufficient compliance with the Muhammadan law. The case, however, was decided upon a preliminary point and must be remanded. We accordingly allow the appeal, set aside the decrees of both the courts below, and remand the case to the court of first instance, through the lower appellate court, with directions to re-admit it under its original number and determine the same according to law. Costs here and heretofore will abide the result.

Appeal allowed.

(1) (1896) I. L. R., 18 All., 29