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which were suspended on May 11th, 1911, by the order of the Subordinate Judge consigning the record to the record room. The appeal is dismissed with costs.

Appeal dismissed.

1915 *May*, 25.

Before Sir Henry Richards, Knight, Chief Justice, and Mr. Justice Tudball.

NATHU AND OTHERS (DEFENDANTS) *v.* SHADI (PLAINTIFF).*

Muhammadan Law—Pre-emption—Sale—Demands—Assignment in lieu of dower-debt.

If at the time of *talab-i-mawasibat* the pre-emptor has an opportunity of invoking witnesses, in the presence of the seller or the purchaser or on the premises, to attest the immediate demand, it would suffice for both the demands, and there would be no necessity for the second demand. *Nundo Pershad Thakur* v. *Gopal Thakur* (1) referred to.

Held further that when property is sold by a husband to his wife in lieu of dower a suit for pre-emption can be maintained by a person entitled to a preferential right to purchase that property. *Fida Ali* v. *Muzzaffar Ali* (2) followed.

THE facts of the case were as follows :—

One Ilahi Baksh sold his zamindari to his wife, Musammat Nathu. The sale was made in lieu of her dower-debt. The plaintiff brought the present suit to pre-empt the sale. It was admitted that when the sale came to the knowledge of the plaintiff the vendee was present and the witnesses were also present, and he at once claimed his right of pre-emption, invoking the witnesses. The claim was decreed by the lower courts.

The defendant appealed to the High Court.

Dr. *S. M. Sulaiman*, for the appellants :—

The property was conveyed to the wife in lieu of her dower and consequently no right of pre-emption arose. Such a sale did not give a right of pre-emption under the Muhammedan Law; Amir Ali's Muhammadan Law, page 713. Further, the Muhammadan Law required two demands to be made. The two demands could be made simultaneously but all the formality must be complied with. There was no finding that requirements of

* Second Appeal No. 338 of 1914, from a decree of D. Dewar, District Judge of Saharanpur, dated the 17th of December, 1913, confirming a decree of Peare Lal Chaturvedi, Munsif of Saharanpur, dated the 24th of April, 1912.

(1) (1884) I. L. R., 10 Calc., 1008. (2) (1882) I. L. R., 5 All., 65.

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the second demand were fulfilled. The suit therefore should have been dismissed. *Mubarak Husain* v. *Kaniz Bano* (1).

Mr. *Ishaq Khan* (for Nawab *Abdul Majid*) and Babu *Durga Charan Banerji*, for the respondent:—

There was nothing in the Muhammadan Law to prevent the pre-emption of a sale made in favour of a wife. This Court had laid down that such a sale could be pre-empted. *Fida Ali* v. *Muzzaffar Ali* (2). Further, a second demand need not be made when the first demand was made in the presence of the vendee; Amir Ali's Muhammadan Law, page 727. *Nundo Pershad Thakur* v. *Gopal Thakur* (3).

RICHARDS, C.J., and TUDBALL, J.—This is a defendant's appeal arising out of a suit for pre-emption. The pre-emptor's claim was based on Muhammadan Law. Both the courts below have decreed the claim and the defendant vendee comes here in second appeal. The vendor is the husband of the vendee and the property was sold to the lady in lieu of her dower debt. The plea taken before us is that the preliminary demands were not properly satisfied and, therefore, the suit ought to have been dismissed. The facts are that at the time when the sale came to the knowledge of the plaintiff pre-emptor the vendee was present and witnesses also were present. The plaintiff at once claimed his right of pre-emption invoking the witnesses. It is urged that the two demands ought to have been made separately, one immediately after the other; that practically only one demand was made and that does not satisfy the requirements of Muhammadan Law. The authorities are against the appellants as Mr. Amir Ali in his book points out; if at the time of the *talab-i-muwasibat* the pre-emptor had an opportunity of invoking witnesses in the presence of the seller or the purchaser or on the premises to attest the immediate demand, it would suffice for both the demands and there would be no necessity for the second. The reason of this is obvious. A pre-emptor under the Muhammadan Law, directly he hears of the sale, has at once to make a demand wherever he may be, whether the purchaser or the seller are or are not present, whether witnesses are or are not

(1) (1904) I. L. R., 27 All., 160. (2) (1882) I. L. R., 5 All., 65.

(3) (1884) I. L. R., 10 Calc., 1008.

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present, but it is necessary for him to convey knowledge of his demand to the vendee or the vendor and to call attention to the fact that he did make his first demand and to invoke his witnesses to that effect. Where all the parties are present, and the witnesses are present, it is sufficient for him to make his claim and call the attention of the witnesses to the fact that he is doing so and that he insists upon his right. See the remarks in *Nundo Pershad Thakur* v. *Gopal Thakur* (1).

The next contention is that no right of pre-emption can arise where property is transferred by a husband to his wife in lieu of the dower debt. This contention is based upon a passage to be found in Mr. Amir Ali's book, page 713, Vol. I (4th edition). No other authority has been cited. On the other hand there is a decision of this Court in *Fida Ali* v. *Muzaffar Ali* (2), which is based upon a much older decision of the Sader Dewani Adaulat of 1864. Mr. Amir Ali challenges this decision saying that it appears to proceed on a wrong interpretation of the law but he does not point out the error or discuss the question any further. We think that we should follow the ruling of this Court and we therefore hold that under the circumstances of the present case the right of pre-emption did arise.

The result is that the appeal fails and is dismissed with costs.

Appeal dismissed.

1915
May, 25.

Before Sir Henry Richards, Knight, Chief Justice, and Mr. Justice Tudball.

BARU MAL AND OTHERS (PLAINTIFFS) *v.* TANSUKH RAI AND ANOTHER (DEFENDANTS). *

Pre-emption – Wajib-ul-arz—Evidence—Custom—Finding of fact—Second appeal.

In a suit for pre-emption brought on the basis of custom if the court considers the proper issue in the case namely whether the custom alleged does or does not exist, and on the evidence comes to the conclusion that it does not exist, the finding is one of fact and is binding on the High Court in second appeal.

THE facts of this case were as follows :—

The plaintiff is a co-sharer. The vendee is a stranger. The plaintiff adduced in evidence in support of the existence of the

* Second Appeal No. 205 of 1914, from a decree of D. Dewar, District Judge of Saharanpur, dated the 13th of January, 1914, confirming a decree of Peare Lal Chaturvedi, Munsif of Saharanpur, dated the 27th of September, 1913.

(1) (1884) I. L. R., 10 Calc., 1008. (2) (1882) I. L. R., 5 All., 65.