1926

SHIBBI v. HARDHIAN SINGH.

been adjudicated upon in the suit, he does not remain a party to the suit for the purposes of section 47 of the Code of Civil Procedure and his claim petition in respect of properties delivered in execution of the decree to the decree-holder falls under order XXI, rule 100, of the Code." This ruling is relied upon by the learned counsel for the appellant. Although partially the principle of the ruling would support the appellant's case it is not necessary to discuss it because it is not on all fours with the case before us.

For reasons given above I would allow the appeal, set aside the decree of the court below and remand the appeal to the lower appellate court for disposal on the merits.

BY THE COURT.—We allow the appeal, set aside the decree of the lower appellate court under order XLI, rule 23, of the Code of Civil Procedure and remand the case to it for disposal on the merits. Costs here and hitherto will abide the result.

Appeal allowed.

Before Mr. Justice Lindsay and Mr. Justice Sulaiman.

AHMAD HAKIM (PLAINTIFF) v. MUHAMMAD HIKMATULLAH AND OTHERS (DEFENDANTS).*

1926 *December*, 2.

Muhammadan law—Pre-emption—First demand followed promptly by a second, in presence of witnesses and vendees, but witnesses not asked to bear testimony—Demand held valid.

In a suit for pre-emption, under the Muhammadan law, the plaintiff made the first demand, as required by law, in the presence of two witnesses, and asked them to accompany him to the vendees in order that the second demand might be made in their presence. They both stated that they heard the second demand being made and their attention was attracted to it.

* Second Appeal No. 1123 of 1925, from a decree of Ganga Nath, First Subordinate Judge of Moradabad, dated the 24th of February, 1925, reversing a decree of Riaz-ud-din Ahmad, Munsif of Amroha, dated the 29th of August, 1924.

1926

AHMAD HAKIM v. MUHAMMAD HIKMAT-ULLAH.

Held, that the omission on the part of the plaintiff to ask the witnesses in express terms to bear testimony was not fatal. *Ganga Prasad* v. *Ajudhia Prasad* (1) and *Sadiq Ali* v. *Abdul Baqi Khan* (2), distinguished.

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

Munshi *Sarkar Bahadur Johari*, for the appellant.

Mr. *Muhammad Husain*, for the respondents.

LINDSAY and SULAIMAN, JJ. :—This is a pre-emption plaintiff's appeal arising out of a suit for pre-emption under the Muhammadan law. There were two rival suits, one of which stands dismissed and has not come up before us. We are here concerned with the suit brought by the plaintiff Hakim-ullah. The court of first instance believed the plaintiff's evidence which was to the effect that as soon as he heard of the sale he shouted out "I am the pre-emptor and I demand pre-emption." After that he took two witnesses, Muhammad Ibrahim and Munshi Farh t-ullah, who were present at the time when he made the first demand, to the diwan-khana of the vendees, and addressing all the vendees he made a second demand in the following words :—

"I am the pre-emptor, and I demand pre-emption from all of you. As soon as I heard of the sale, there and then I fulfilled the condition of pre-emption. After deducting the price of the materials which you have realized I would pay the price in full. Please take it from me and execute a sale-deed."

The learned Munsif held that the plaintiff had, in making his second demand, referred to the first demand, and that inasmuch as he had taken the witnesses with him it was not necessary for him specifically to ask them to bear testimony.

(1) (1905) I.L.R., 28 All., 24. (2) (1922) I.L.R., 45 All., 290.

1926

AHMAD HAKIM v. MUHAMMAD HIKMAT-ULLAH.

The lower appellate court has come to a contrary conclusion. Relying on the case of *Ganga Prasad* v. *Ajudhia Prasad* (1), it has held that the omission of the plaintiff to invoke the witnesses is fatal. In our opinion this view was not correct. In the case relied upon by the lower appellate court the plaintiff had neither taken the witnesses with him to the spot nor had he asked them to be witnesses to the demand. These persons simply happened to be present at the time when he made the second demand. It was, therefore, held that the second demand was invalid. In the present case the plaintiff had actually made the first demand in the presence of the witnesses and had asked them to accompany him to the vendees in order that a second demand might be made in their presence. They both stated that they heard the second demand being made and their attention was attracted to it. The mere omission to ask them in express terms to bear testimony would, therefore, not be fatal.

The learned counsel for the respondents relies on the case of *Sadiq Ali* v. *Abdul Baqi Khan* (2). That case, however, is clearly distinguishable, inasmuch as there the main point considered was that in making the second demand no reference whatsoever had been made to the first demand. All the authorities quoted in the judgement referred to cases where at the time the second demand was made no reference whatsoever was made to the first demand. A mention of the first demand is necessary in order to inform the vendee that it was promptly made as required by law. That is not so in the present case, for here a reference to the first demand was in fact made.

Only two points were raised before the lower appellate court; one was the question of law which we

(1) (1905) I.L.R., 28 All., 24. (2) (1922) I.L.R., 45 All., 290.

1926

AHMAD HAKIM v. MUHAMMAD HIKMAT-ULLAH.

have just disposed of, and the other was the question of the amount of the sale consideration which has not been decided by that court. We accordingly allow this appeal and set aside the decree of the lower appellate court, but before passing a final decree we call for a finding on the question of the consideration under order XLI, rule 25, of the Code of Civil Procedure.

Appeal allowed.

REVISIONAL CIVIL.

Before Mr. Justice Lindsay.

1926 December, 3.

SALIK RAM (PLAINTIFF) *v.* WALI AHMAD (DEFENDANT).*

Act No. X of 1873 (Indian Oaths Act), sections 9 to 11—Party agreeing to be bound by the statement of a particular witness—Circumstances in which party may be allowed to resile from agreement.

A party who has agreed, in accordance with the provisions of the Indian Oaths Act, 1873, to be bound by the statement on oath of a particular person is not in all circumstances irrevocably bound by such agreement. If such party satisfies the court that there is good ground for retracting, the court would probably exercise a wise discretion in refusing to administer the oath, but when a party puts forward frivolous reasons for retracting, the court is justified in administering the oath notwithstanding the retraction. *Thoyi Ammal* v. *Subbaroya Mudali* (1), followed.

THE facts of this case, so far as they are necessary for the purposes of this report, appear from the judgement of the Court.

Munshi *Bhagwati Shankar*, for the applicant.

The opposite party was not represented.

* Civil Revision No. 141 of 1926.

(1) (1899) I.L.R., 22 Mad., 234.