APPELLATE CIVIL.

Before Justice Sir Shah Muhammad Sulaiman and Mr. Justice Banerji.

MUHAMMAD YUNIS KHAN (PLAINTIFF) *v.* MUHAMMAD SALEH KHAN (DEFENDANT).* 1930 *July*, 25.

Muhammadan law—Pre-emption—Exchange of immovable property with an option to take back—No right of pre-emption, as transfer not absolute—Option reserved to either party during his life time to take back the property exchanged—Right of pre-emption can accrue on extinguishment of option by death of party.

Under the Muhammadan law a conditional exchange of immovable property, with a reservation entitling either party at any time during his life to cancel the exchange and, take back his property, does not give rise to a right of pre-emption, as there is no absolute transfer completely extinguishing the right of property of the transferor.

If, in such a case, a right of pre-emption accrues at a subsequent date by the death of a transferor without his having exercised his option, the necessary demands for pre-emption must then be made, and for this purpose any demands which might have been made at a time when the right had not accrued would be of no avail.

Mr. *Akhtar Husain Khan*, for the appellant.

Messrs. *Iqbal Ahmad*, *T. A. K. Sherwani* and *A. M. Khwaja*, for the respondent.

SULAIMAN and BANERJI, JJ. :—This is a plaintiff's appeal arising out of a suit for pre-emption under the Muhammadan law. On the 25th of October, 1922, the plaintiff's sister Mt. Rabia Begam executed a deed of exchange in favour of the defendant Haji Muhammad Saleh Khan, in which shares in twelve villages were transferred to him in return for a bigger share in another village transferred by him to her. There was another deed of exchange, dated the 5th of December, 1922, between Haji Saleh Khan and Haji

*First Appeal No. 125 of 1925, from a decree of Mirza Nadir Husain, Second Additional Subordinate Judge of Aligarh, dated the 12th of December, 1924.

1930

MUHAMMAD YUNIS KHAN v. MUHAMMAD SALEH KHAN.

Yusuf Khan. Two suits for pre-emption were instituted by the plaintiff in respect of these two transactions. In these deeds of exchange there was a condition for the annulment of the transaction at the option of either party. The plaintiff alleged that he had made demands as required by the Muhammadan law, and that he was entitled to pre-empt half of these properties because he was a co-sharer on the same footing as the transferees. He also alleged that the real consideration was Rs. 12,000 and not Rs. 20,000. The claims were resisted by the defendants on the ground that the deeds of exchange on account of the reservation clause were not pre-emptible under the Muhammadan law; it was further pleaded that the demands required by the Muhammadan law had not been performed under that law, and lastly it was alleged that the consideration entered in the deeds was genuine.

The learned Subordinate Judge has dismissed the claim, holding that the conditional transfer was not pre-emptible, and has also held that the demands were not proved to have been duly performed.

With regard to the question of the performance of the demands, . . . as we are convinced that the suit must fail on the question of law, it is unnecessary to consider the oral evidence at length.

The deeds of exchange contained the following covenants: "From this date the parties became the permanent owners in possession of their respective rights in the property exchanged on this condition that both the parties shall have powers to cancel the exchange at their will during their life-time and to enter into possession of their respective properties, as they had been before the execution of the deed of exchange, whenever they feel any deviation, loss, inconvenience or difficulty in the arrangement which has been made for the facility of management of the property exclusively held by them, or find that the object

for which this exchange and arrangement has been made is not fulfilled. The parties shall abide by this condition. This condition should not be binding upon their heirs and representatives." It is quite clear that the deeds of exchange reserve an option to both the parties to annul the transaction and get back the properties transferred in their life-time. This, therefore, amounted to a conditional sale and not an out-and-out absolute sale which would completely extinguish the rights of the transferor.

In volume III, chapter 38, page 559 of Hamilton's Translation of the Hedaya, the rule of law is stated in the following words: "*It cannot take place with respect to a property sold under a condition of option.* If a man sell his house under a condition of option, the privilege of *shaffa* cannot take place with respect to that house, the power reserved by the seller being an impediment to the extinction of his right of property; but when he relinquishes that power, the impediment ceases, and the privilege of *shaffa* takes place, provided the *shaffi* prefer his claim immediately. This is approved."

Under the Muhammadan law, so far as the rights of pre-emption go, sales and exchanges are treated on the same footing. It therefore follows that even a conditional exchange with a reservation entitling either party to take back the property would not give rise to a right of pre-emption.

As laid down in the Full Bench case of *Begam* v. *Muhammad Yakub* (1) the Muhammadan law is to be applied in considering whether or not a right of pre-emption arises. The present claim being under the Muhammadan law, it is quite clear that under that law it was not a complete transfer extinguishing the rights of the parties and giving a right of pre-emption. We accordingly agree with the view taken by the court below that no suit for pre-emption can be maintained.

(1) (1894) I.L.R., 16 All., 344.

1930

MUHAMMAD YUNIS KHAN v. MUHAMMAD SALEH KHAN.

The learned advocate for the appellant has argued that Haji Yusuf Khan has since died and the option has therefore come to an end. He has alleged that the plaintiff should therefore be given a decree, as the transfer has already become absolute. We cannot accept this contention. On the date when the demands are alleged to have been made the claim was premature and no right of pre-emption had accrued to the plaintiff. If at a subsequent stage a right of pre-emption accrues, there are to be fresh demands and a fresh claim for pre-emption. This follows from the last sentence in the passage quoted from the Hedaya.

In this view of the matter, we consider it unnecessary to go into the evidence regarding the true consideration. Both the appeals are dismissed with costs.

REVISIONAL CRIMINAL.

Before Mr. Justice King.

KALLU v. BASHIR-UDDIN.*

1930

July, 25.

Criminal Procedure Code, sections 356 and 537—Depositions not recorded in vernacular—Magistrate recording depositions in English—Irregularity not going to the root of the proceeding—Curable if parties not prejudiced thereby.

In certain proceedings under section 145 of the Criminal Procedure Code the evidence of the witnesses was not recorded in the vernacular either by the Magistrate himself or by any other person in his presence as required by section 356 of the Criminal Procedure Code, but the Magistrate recorded in English the evidence at length and in great detail. There was no suggestion that the English record did not contain a full and accurate account of the depositions; nor was any complaint made by the party against whom the Magistrate decided the case that they were prejudiced in any way by the omission to record the depositions in the vernacular. On the question whether the non-observance of the provisions of section 356 vitiated the whole proceedings,—

*Criminal Reference No. 314 of 1930.