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nto a better position for dealing with the case than he now is. The Munsif sent the Magistrate "a proceeding embodying the facts of the case," and charging Juala Prasad definitely with falsely denying in a civil suit, that a certain specified receipt had been written by him; and imputing to Wilayat Husain the similar criminal offence of falsely declaring in the same suit, that another specified receipt had been written by the same Juala Prasad. The records will be returned and the Magistrate will proceed with the case.

APPELLATE CIVIL.

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August 12.

Before Mr. Justice Tyrrell and Mr. Justice Mahmood.

FIDA ALI AND ANOTHER (PLAINTIFFS) *v.* MUZAFFAR ALI AND ANOTHER (DEFENDANTS).*

Muhammadan Law—Pre-emption—"Stranger"—"Sale"—Assignment by way of dower—Assignment in lieu of dower—Debt.

The heirs to a Muhammadan have no legal interest or share in his property so long as he is alive and cannot therefore be regarded as in any sense co-sharers or co-parceners in his property, so as to be entitled to claim the right of pre-emption in case of a sale by him of his property.

Held, therefore, where a husband sold his share of an undivided estate to his wife, that, although one of his heirs, she had not on that account a right of pre-emption in respect of such sale.

A husband transferred certain property to his wife in consideration of a certain sum which was due by him to her as dower. *Held* that such transfer was a "sale", within the meaning of the Muhammadan law of pre-emption, and gave rise to the right of pre-emption. *Pearee Begum* v. *Sheikh Hushmut Ali* (1) followed.

The meaning of "stranger" and "sale," as used in the Muhammadan law of pre-emption, explained.

THE plaintiffs in this suit, Fida Ali and Gauhar Ali, sued the defendants, their brother Muzaffar Ali and his wife Kaniz Bano, to enforce their right of pre-emption in respect of the transfer of certain shares of certain undivided estates by Muzaffar Ali to his wife Kaniz Bano. The plaintiffs claimed under the Muhammadan law of pre-emption, on the ground that they were co-sharers in such estates, and Kaniz Bano was a "stranger." The transfer which gave rise to the suit took place on the 3rd March, 1880, when

* Second Appeal No. 169 of 1882, from a decree of J. H. Carter, Esq., Judge of Jaunpur, dated the 7th November, 1881, modifying a decree of Mirza Abid Ali Beg, Subordinate Judge of Jaunpur, dated the 16th May, 1881.

(1) N.-W. P. S. D. A. Rep., 1864, vol i, p. 475.

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Muzaffar Ali executed a deed of sale conveying the shares in suit to his wife "in lieu of Rs. 2,000 out of Rs. 25,000 dower due to her." Both the lower Courts concurred in dismissing the suit on the ground that the vendee, being the wife of the vendor, and therefore entitled to inherit from him, could not be regarded as a stranger under the Muhammadan law, and the sale to her therefore did not involve infringment of the right of pre-emption. The Courts further held that the property in suit having been transferred to the vendee in lieu of her dower, the transfer did not constitute such a sale as would give rise to the right of pre-emption under the Muhammadan law. The Court of first instance (Subordinate Judge) observed on the first point as follows :—"When the object of pre-emption is that a stranger should be prevented from causing inconvenience or loss to a co-sharer, a stranger in this sense would be a person who, under the law of inheritance, would not be entitled to the possession of that property in future : the Court thinks that it could not in any way have been the intention of the founder of the Muhammadan law, that any person who could take a share in the property under the law of inheritance should be prohibited from sharing by reason of one's right of pre-emption. According to the tenets of the Shiah sect, the wife, a member of the same family, as the female defendant is in this case, can share under the law of inheritance, and therefore, in the opinion of the Court, the female defendant does not come within the definition of 'stranger' given in the rules of pre-emption." The opinion of the Subordinate Judge on the second point will be found stated in the judgment of the High Court. In second appeal the plaintiffs impugned the grounds on which the suit had been dismissed.

Babu *Aprokash Chandar* and Lala *Lalta Prasad*, for the appellants.

Mr. *Conlan*, Shah *Asad Ali*, and Lala *Jokhu Lal*, for the respondents.

The judgment of the Court (TYRRELL and MAHMOOD, JJ.) was delivered by

MAHMOOD, J. (After stating the facts of the case and the view of the Subordinate Judge on the question whether Kaniz Bano was a a stranger," continued :)—The Subordinate Judge has cited no

authority in support of this view, and we have no hesitation in holding that it is an innovation which is not warranted by any principle of the Muhammadan law, whether of the Sunni or of the Shiah school. It is true that among Shiahs, as among Sunnis, the wife is entitled to inherit a share in the property of her husband along with his other heirs. But the right of inheritance under the Muhammadan law confers no vested interest so long as the owner of the property is alive. Till the devolution of inheritance takes place by the death of the proprietor, his heirs have no legal interest or share in the property, and can in no sense be regarded as co-sharers or co-parceners in the property. The rights of a Muhammadan proprietor are absolute, and so far as his proprietorship is concerned, his heirs have no more rights than absolute strangers wholly unconnected by consanguinity or marriage. The word "*stranger*" as used in the Muhammadan law of pre-emption has no reference to any relationship arising from consanguinity or marriage. The word is a correlative term to "*pre-emptor.*" A "*shafi*" or pre-emptor is a person who possesses the right of pre-emption,—all persons who do not possess such right are "*strangers*" under the Muhammadan law of pre-emption. In a case like the present the criterion is whether the vendee could have enforced the right of pre-emption if the sale had taken place in favour of a stranger. It is not contended before us that Kaniz Bano holds any such position, by virtue of her marriage with Muzaffar Ali, as would have entitled her to question a sale made by him in favour of a stranger, on the ground that she had the right of pre-emption. According to the *Sharáya-ul-Islám*, a book of as high an authority among the Shiahs as the *Hedáya* is among the Sunnis, "the *shafi* is every owner of a share in a joint and undivided property who is able to pay the price" (of the share sold). It has already been shown that Kaniz Bano, as an heir to her husband, has no vested interest in his property, and that she can in no sense be regarded as a co-sharer of her husband. It therefore follows that she had no right of pre-emption in respect of the property sold to her, and must be regarded as a stranger a sale in whose favour involves infringement of the right of pre-emption under the Muhammadan law.

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The Subordinate Judge's opinion upon the second point in this case is expressed in the following terms :—"There cannot be a claim for pre-emption when a house is given for dower. In the opinion of the Court the fact that the property be fixed as dower and given to the wife, or that a certain sum be fixed as her dower, and afterwards, with the mutual consent of the husband and the wife, a property be given in lieu of the dower, makes no difference. The result, in the opinion of the Court, is that, when any property is given to the wife in lieu of her dower, there can be no claim for pre-emption." This view of the law is only partially correct, and its inaccuracy lies in ignoring the great distinction which exists between assigning a property as dower and selling it in payment of the dower-debt. The rule of the Shiah law upon this point is thus expressed in the *Sharáya-ul-Islám* :—"If the share has been assigned as a dower, or given in charity, or bestowed by way of gift, or in compromise, it is not subject to the claim of pre-emption."

The *Mafatih*, another book of authority on the Shiah law, explains the rule in similar terms :—"The transfer must be by sale. So, if the transfer be made as dower, or as a gift, or in compromise, then, according to the prevalent doctrine, there is no right of pre-emption." The rule, that *sale* is an essential condition precedent to the operation of the right of pre-emption, is a well-established principle of Muhammadan law, and in this respect no serious difference exists between the doctrines of the Sunni and the Shiah schools. But the lower Courts have erroneously applied the rule to the transfer in question in the present case. Under the Muhammadan law, *sale* is defined to be "the exchange of property for property by consent of the parties," each property being regarded as the price of the other. "Price," as a term of Muhammadan law, includes not only money, but also any other kind of property capable of being valued at a definite sum of money. But when a transfer of property takes place for a consideration, not capable of being estimated at a definite money value, such transfer is not regarded as sale at all, and does not give rise to the right of pre-emption. Since the payment of the price by the pre-emptor is an essential condition precedent to his acquiring the property by virtue of his pre-emptive right, it follows, *ex necessitate rei*, that the

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right of pre-emption can operate and be effectively enforced only in those cases in which the consideration for the transfer is either already fixed at a definite money-value, or is capable of being so ascertained. Now, the Muhammadan law imposes no limit upon the amount of dower which may be settled on a wife in consideration of marriage. Therefore when a man, on marrying a woman, does not fix the amount of dower at a money-value, but assigns property to her as her dower, the right of pre-emption cannot have any operation —the transfer not being a sale, and the consideration thereof being unascertained and unascertainable at a definite money-value. But no such impediment to the operation of the right of pre-emption exists in cases in which the dower was originally fixed at an ascertained amount, and property is subsequently sold in lieu of a part or the whole of such amount of dower. Dower under the Muhammadan law is regarded as a debt due by the husband to the wife.

It is an equally well-recognized rule of that law that transfer of property by the debtor to the creditor in payment of the debt constitutes sale, and the rule is wide enough to include transfer of property by the husband to the wife in payment of her ascertained dower. In the present case the deed of sale clearly states the amount of dower and the part thereof in payment of which the sale took place. The lower Courts were therefore wrong in holding that the transfer did not give rise to the right of pre-emption. This view of the law is supported by the ruling of the late Sadr Diwani Adalat of these Provinces in the case of *Pearee Begum* v. *Sheikh Hushmut Ali*, dated 14th May, 1864. published at page 475 of the Reports for that year. The judgment in that case proceeded principally upon the authority of the *Hedaya*, and it is therefore to be inferred that the parties to that suit were Sunnis. The reason of the rule, however, is common to both the Sunni and the Shiah schools of the Muhammadan law. The learned pleader for the respondents, in attempting to draw a distinction between the Sunni and the Shiah doctrines on the subject, has pointed out a passage in the *Man-la-yahzur-hul Faqih*—a book of *Hadis*, or traditions of recognized authority among the Shiahs—which contains a tradition related by *Hasan Ibn Mahbub* on the authority of

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Abu Jaafar. The following is a literal translation of the original Arabic text of the tradition :—

"I asked him in regard to a man who married a woman in lieu of (Ar: *ala* علی) an apartment of a house whilst having co-sharers in that house. He said that it was lawful for him and for her, and none of the co-sharers had a right of pre-emption against her."

Whilst fully recognizing the authority of the tradition in the Shiah law, we are of opinion that it does not support the contention of the learned pleader for the respondents. The original Arabic expression *ala baitin* (علی بیت) which occurs in the tradition, if translated absolutely literally and regardless of idiom, means "*on* an apartment," but the word *ala* علی (*on*), as it occurs in the tradition, necessarily implies by its context that the assignment of the apartment of the house as dower must have been made at the time of the marriage when dower was originally settled. Therefore the tradition only supports and does not go beyond the rule laid down in the *Sharáya-ul-Islám* and the *Mafatih* already cited. The learned pleader for the respondents, who is a Muhammadan lawyer, acquainted with the original Arabic texts, has been unable to point out any authority which would support his contention that a distinction exists between the Sunni and the Shiah doctrines upon the point under consideration.

For these reasons we are of opinion that neither the circumstance that the vendee is the wife of the vendor, nor the fact that the sale took place in lieu of a portion of the vendee's dower, can operate as an impediment to the enforcement of the right of pre-emption in this case. The Court of first instance does not appear to have excluded any evidence in the case; but neither of the lower Courts has disposed of the remaining pleas urged by the defendants on the merits. We therefore set aside the decree of the lower appellate Court, and remand the case to that Court under s. 562, Civil Procedure Code, for a proper adjudication of the case.