1922.

SAGARMAL MARWARI v. LACHMISARAN MISIR.

DAWSON MILLER, C. J.

of judgment in open Court, what the judgment in fact was. We are told that in many cases it is not the practice to pronounce judgment in open Court. If that is so I can only say that it is a direct breach of the practice laid down in Order XX, rule 1, and in all cases in my opinion that rule ought to be complied with. The appellant is entitled to his costs of this application which has been strenuously opposed by the respondents.

MULLICK, J.—I agree.

Application granted.

APPELLATE CIVIL.

Before Coutts and Das, J.J.

1922.

July, 4.

SAIYID FAZAL KARIM

v.

MUSSAMMAT BIBI FATMATUL KUBRA.*

Pre-emption—application of custom of, to non-Mahomedans—whether becomes part of the personal law.

Where, by custom, the law of pre-emption applies among non-Mahomedans in a certain area, it does not become a part of the personal law of such persons.

Bynath Pershad v. *Kopilmon Singh*(1), referred to

Therefore, when a non Mahomedan who is amenable to the law of pre-emption in a particular locality is the owner of a property in another locality where a similar custom exists, he is not necessarily amenable to the custom in the latter locality.

Huree Churn Surmah v. *Thomas Ackroyd*(2) *and Paras Nath Tewari* v. *Dhani Ojha*(3), referred to.

Appeal by the defendant.

---

* Appeal from Appellate Decree No. 307 of 1921, from a decision of Lala Damodar Prashad, Subordinate Judge of Patna, dated the 20th November, 1920, confirming a decision of Babu Krishna Sahay, Munsif of Patna, dated the 28th February, 1920.

(1) (1875) 24 W. R. 95. (2) (1871) 18 W. R. 441.

(3) (1905) I. L. R. 32 Cal. 988.

A Hindu who resided at Delhi sold certain property which he owned in Patna City to the defendant who was a Muhammadan, residing in Patna City. The plaintiff sued to pre-empt. He died during the pendency of the suit and his widow was substituted in his place. The trial Court decreed the suit.

The facts of the case material to this report are stated in the judgment of Coutts, J.

Sultan Ahmed (with him *Hasan Jan*), for the appellant.

Kulwant Sahay, for the respondent.

COUTTS, J.—This is an appeal against a decision of the Subordinate Judge of Patna, in a suit for pre-emption. The property which it was sought to pre-empt is in Patna City, the vendor is a Hindu who is a native of and resides in Delhi and the defendants are Muhammadans residing in Patna City. The suit was originally brought by one Hakim Abdul Majid who died during the course of the litigation and his widow has been substituted for him and is continuing the litigation.

The suit was decreed in the Court of first instance and on appeal this decree has been confirmed by the Subordinate Judge. The defendant has appealed to this Court.

It is admitted that if the vendor had been a Hindu who was a native of or domiciled in Bihar, the plaintiff would have been entitled to succeed, but it is contended by Mr. *Sultan Ahmed*, for the appellant, that the owner of the property being a Hindu who is not either a native of, or domiciled in Bihar the law of pre-emption does not apply. He also contends that even if this were not so and even if the original plaintiff were entitled to succeed his widow would not be entitled to carry on the litigation. Two questions, therefore, arise in this appeal: (*1*) Is the plaintiff entitled to pre-empt when the vendor is a Hindu who is neither a resident of nor domiciled in Bihar? and (*2*) is the

1922.

SAIYID FAZAL KARIM v. MUSSAMMAT BIBI FATMATUL KUBRA.

COUTTS, J.

widow of the original plaintiff entitled to carry on the suit after the death of her husband during the pendency of the suit?

In regard to the first point the law, as stated in Wilson's *Anglo-Muhammadan Law* (Fifth Edition, 1921), at paragraph 352, is as follows:

> "Where the custom is judicially noticed as prevailing among non-Muhammadans in a certain local area, it does not govern non-Muhammadans who, though holding land therein for the time being, are neither natives of, nor domiciled in the district."

This was the view of the law as expressed in *Huree Churn Surmah* v. *Ackroyd* (1) and *Byjnath Pershad* v. *Kopilmon Singh* (2). These decisions have been followed in *Paras Nath Tewari* v. *Dhani Ojha* (3) and there can be no doubt that this is the correct view of the law.

Ordinarily, therefore, in a case such as the one now before us the owner not being a native of or domiciled in Bihar the plaintiff would not be entitled to pre-empt. It is contended, however, by Mr. *Kulwant Sahay*, for the respondent, that, although this is so, the present case is different because the owner of the property which is the subject-matter of the suit is a native of Delhi where a custom of pre-emption also exists among non-Muhammadans. In these circumstances he contends—and this is the view which has been taken by the learned Subordinate Judge—that the law of pre-emption applies. His contention is that in localities where the custom exists it has become a part of the personal law of those non-Muhammadans who are natives of or domiciled there, that when such non-Muhammadans leave such locality they carry with them the custom so that in a case such as the one now before us, where the owner is a native of Delhi where the custom exists the custom applies also to property in Patna City of which he is owner. Mr. *Kulwant Sahay* relies in support of his contention on the

(1) (1871) 18 W. R. 441.

(2) (1875) 24 W. R. 95.

(3) (1905) I. L. R. 32 Cal. 988.

following passage in Agarwala's *Law of Pre-emption* (3rd edition, 1916), page 218, paragraph 177(6).

> "It is respectfully submitted that the whole question turns upon whether the Hindus of a particular locality adopted the law of pre-emption as part of their personal law or not."

He also relies on a certain passage in the judgment of Glover, J., in the case of *Byjnath Pershad* v. *Kopilmon Singh* (1) to which I shall presently refer.

With all respect to the opinion which has been expressed by Dr. Agarwala, I am unable to accede to the suggestion that the Hindus of Bihar or other localities where the custom exists have adopted the law of pre-emption as part of their personal law and there is no judicial authority for such a proposition. As Mr. Ameer Ali has said,

> "The Sunni-Hanafi Law of pre-emption was introduced in India with the Mahommedan Government, and in certain places it has become a part of the *lex loci*, for example in Behar, parts of the Punjab and the United Provinces, both Hindus and Mahommedans are entitled to claim the right of pre-emption. And so well-established is that right, that it is almost invariably recorded in greater or less detail in the village administration papers called the *Wajib-ul-arz* [Ameer Ali's Mahommedan Law, Vol. I (Fourth Edition), Chapter XXVIII, page 712].

The passage on which Mr. *Kulwant Sahay* relies in the judgment of Glover, J., in the case of *Byjnath Pershad* v. *Kopilmon Singh* (1), runs as follows:

> "And I think that in the present case the plaintiff was bound, in the first instance, to show that the vendor of the defendant, an inhabitant and native of Lower Bengal where no custom of pre-emption amongst Hindoos existed, was subject to the rule of law prevailing amongst Hindoos of Behar, by reason of his being domiciled within that province."

Mr. *Kulwant Sahay* contends that by this the learned Judge meant that if the vendor in the case had been an inhabitant and a native of a locality where the custom of pre-emption amongst Hindus existed then he would have been subject to that rule of law in respect of the property owned by him in Bihar. This is an ingenious interpretation of the passage but I am unable to accept it as correct. The question was not

(1) (1875) 24 W. R. 95.

1922.

SAIYID FAZAL KARIM v. MUSSAMMAT BIBI FATMATUL KUBRA.

COUTTS, J.

before the learned Judges and they neither considered nor decided it; and it appears to me that unless it be that the custom has been adopted as part of the personal law the contention must fail. If the view were correct, a Hindu who was a native of Bihar and who owned property in Calcutta would be bound in respect of that property by the law of pre-emption, but I know of no case in which this has been held nor have I ever heard it suggested that this is so. It seems to me clear that the law of pre-emption has not been adopted as the personal law of non-Muhammadans in Bihar or in the other localities where the custom exists, it is merely *lex loci* as Mr. Ameer Ali has said.

If this view be correct it disposes of the whole question, because if the law of pre-emption is not part of the personal law of non-Muhammadans it is not carried outside the locality in which the custom prevails; and if a non-Muhammadan who is by custom amenable to the law of pre-emption in a particular locality is the owner of a property in another locality where a similar custom exists, he is not amenable to the custom in the new locality for although it is a similar custom it is not the same custom to which he has become amenable by reason of the fact that he is a native of or domiciled in a particular locality.

In the present case, therefore, the owner being a native of Delhi he is not bound by the custom which exists in Bihar even although there is a similar custom in Delhi. The appeal, therefore, succeeds on the first point which has been urged by Mr. *Sultan Ahmed* and it is unnecessary to discuss the other point. I would accordingly set aside the decision of the Lower Appellate Court.

The appeal is decreed and the suit is dismissed with costs throughout.

DAS, J.—I agree.

Appeal decreed.