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9th of February 1920 declining to go on with the inquiries with regard to the assets of the deceased was incorrect, and that the learned Judge should be directed to continue the inquiry with regard to the objections raised by the defendant to the administrator's report. If the result is unsatisfactory to the defendant, then he will be able to appeal against the final decree. The Rule, therefore, will be made absolute with costs.

SHAH, J. :—I agree.

Rule made absolute.

J. G. R.

PRIVY COUNCIL.

SITARAM BHAURAO DESHMUKH (SINCE DECEASED, AND OTHERS) (DEFENDANTS) *v.* JIAUL HASAN SIRAJUL KHAN (PLAINTIFF).

[On appeal from the High Court at Bombay.]

1921.

May 9.

Pre-emption—Sale by Mahomedan to Hindu—Co-sharer's claim to pre-emption —Law applicable—Intention of parties.

One of two Mahomedan co-sharers in two villages in the Presidency of Bombay agreed to sell his share to a Hindu, the agreement being made subject to a right in the co-sharer to pre-empt, and as a complete and immediate sale although part of the purchase price was to be paid later and a sale deed executed. The vendor informed his co-sharer that he had sold, and invited him to pre-empt the share sold. The co-sharer thereupon performed the ceremonies of pre-emption and claimed as pre-emptor to recover the share from the purchaser.

Held, that the co-sharer had a right of pre-emption in accordance with the intention of the parties, which had to be looked at to determine what system of law was to apply, and what was to be taken as the date of the sale with reference to which the ceremonies were performed.

Judgment of the High Court affirmed.

APPEAL (No. 149 of 1919) from a judgment of the High Court (February 5, 1917) affirming a judgment of the Additional First Class Subordinate Judge of Thana.

* *Present* :—Viscount Haldane, Lord Atkinson, and Sir John Edge.

The suit was brought by the original plaintiff in 1909 claiming a declaration that he was entitled under Mahomedan law to a right of pre-emption of a one-fourth share in two villages in the Kolaba District in the Bombay Presidency. The plaintiff died before the Subordinate Judge settled the issues in the suit, and the present respondent, the administrator of his estate, was permitted by the High Court to continue the litigation.

The facts, which were not in dispute upon the appeal, are stated in the judgment of the Judicial Committee, and more fully in a report of the proceedings in the High Court at I. L. R. 41 Bom. 636.

The High Court, affirming the decree of the Subordinate Judge, held that the plaintiff had a right of pre-emption. The reasons of the learned Judges (Sir Basil Scott C. J., and Beaman J.) appear from the report above mentioned.

1921, May 6th—Sir George Lowndes, K. C., and *Parikh* for the appellant :—Both Courts in India found that the right of pre-emption, if any, was governed by the Hanafi School of Mahomedan law. On the death of the original plaintiff therefore the suit abated, for the right was a personal one and did not survive to his administrator. If however the suit did not abate it was not maintainable. It is well established that the principle of pre-emption does not form part of the general law applicable in the Bombay Presidency. In any case the principle had no application upon a sale to a Hindu *Furman Khan* v. *Bhurut Chunder Shah Chowdhry*[1] The High Court recognized that the Mahomedan principle of pre-emption did not of itself govern the transaction, but decided on the basis of a contract. That decision was erroneous, (1) because, even if the offer

[1] (1869) 13 W. R. (F. B.) 21 at p. 23.

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contained in the letter of October 14th, 1908, was accepted by the deceased plaintiff, the appellant was not a party to the contract so made; and (2) because the offer was not accepted according to the conditions subject to which it was made. The suit was brought to enforce a right arising under Mahomedan law, and the plaintiff having failed to establish that right could not validly proceed upon the basis of a contract. The ceremonies were performed too soon and were not effectual. The sale was not a complete and absolute sale at that time. In Mahomedan law a right of pre-emption does not arise until all interest of the vendor in the property has ceased to exist: *Jadu Lal Sahu* v. *Janki Koer* [1]. Further, section 54 of the Transfer of Property Act, 1882, was superimposed upon the Mahomedan law, and precludes the present claim. Mahomedan law is only part of the general law so far as it has been adopted and that does not extend to the Mahomedan law of vendor and purchaser: *Mahomed Beg Amin* v. *Narayan Meghaji* [3].

[Sir John Edge referred to *Begam* v. *Muhammad Yakub* [2].]

De Gruyther, *K. C.*, and *E. B. Raikes* for the respondent were not called upon.

The judgment was delivered by

VISCOUNT HALDANE:—In this case several points have been referred to in the course of the argument which, if they arose, would be of great importance; but, in the view their Lordships take, these points do not arise, and they therefore find themselves in a position to intimate at once the advice which they will tender to His Majesty.

[1] (1908) 35 Cal. 575 at pp. 597, 598.
[2] (1915) 40 Bom. 358 at pp. 363-364.
[3] (1894) 16 All. 344.

The suit in which the question arises was brought by the original plaintiff, who was the father of the present respondent, as administrator, to recover from the appellants a quarter undivided share in two villages, on the ground that the original plaintiff was entitled to a right of pre-emption in regard to them under Mahomedan law. The question is whether the original plaintiff had such a right of pre-emption. The case was heard before the Additional Subordinate Judge at Thana, and it went to the High Court at Bombay on appeal. It came before the Additional Subordinate Judge and before the High Court on various interlocutory points, but finally a decision was given on the issue defined by the Subordinate Judge, and that decision was affirmed by the High Court on somewhat different grounds, which are sufficient, in their Lordships' opinion, to dispose of the merits of the case.

The original plaintiff, who is now dead, was in the middle of October, 1908, entitled, as co-sharer with his nephew, to the two villages. The original plaintiff had an undivided three-fourths' share, and the nephew had the remaining undivided quarter. On the 14th October, 1908, the nephew sold to the present appellants, who are Hindus. The document is called by the parties, a deed of agreement of sale, and it states that the nephew being the owner of the fourth share in the two villages certain persons, including the appellants, have agreed to purchase the same for Rs. 29,999, Rs. 1,000 paid down, and the remainder payable in two quick instalments, and that there was to be a pukka deed of sale, which it was obviously contemplated would be registered. Then they say this, which is important:—"You" (that is, the nephew) " should also give us a copy of the notice which you have to-day given to the owner of the three-fourths' share, and a receipt of the notice which he will receive on the day

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of the sale deed"—And a little further on—"If the owner of the three-fourths' share is willing to purchase your said share, and if you and he agree to purchase, you should immediately return to us the rupees which you have received from us."

That is an important document because it shows not only that the parties considered that they had a full preliminary deed of contract of sale, to be carried out, no doubt, by a pukka deed to be registered afterwards, but they knew that, under whatever was the law, the uncle might have a right of pre-emption under Mahomedan law or under some other law, and the whole transaction was made subject to the exercise by the uncle of that right. That they knew this is plain from the document itself, and contemporaneously with it there was a letter written by the nephew to the uncle, also on the 14th October, 1908, which is in these terms :—" My dear Uncle, I beg to intimate that I have this day sold my one-quarter share in the villages of Wahal and Patawdhi, for a sum of Rs. 29,999, to "—the first appellant and his brothers. " As you are an Inamdar of the three-fourths' share in the said villages I give you this notice that if you are desirous of purchasing the said villages for the sum aforesaid, you will be good enough to send me a cheque for the amount, viz., Rs. 29,999, by return of post, and in the event of your not replying to this, or paying the money within two days after receipt hereof, I shall, without any further intimation to you, close the bargain and obtain the sale-proceeds."

The effect of that, which was obviously the document which the appellants contemplated should be sent, appears to their Lordships to be a recognition that the uncle had a right of purchase as pre-emptor under the law which was treated as applying. It is far from

clear that if that were true the nephew had the right to say: "If you do not reply to this letter or pay off the money within two days after receipt hereof, I will close the bargain and obtain the sale-proceeds." On the contrary the effect of the document is an intimation, an admission, that there is a law of pre-emption which is doubtless, from the way in which it is referred to, a general law, and that the uncle holds under that general law. It is therefore to the general law that reference has to be made to see what these rights were. The uncle took the view, which indeed if the letter addressed to him were true he was entitled to take, that there had been a sale. The letter says: "I have this day sold my one-quarter share." The uncle thereupon performed the ceremonies—there are concurrent findings that the ceremonies were fully performed—and asserted his rights. He died, and ultimately an administrator was appointed in whom his right, such as it was, was treated by the Courts below as having vested, the reason being this: that it was not a case of an unexercised option which was said to have passed to the administrator, but an option which the uncle in his lifetime had actually exercised, because the uncle, almost immediately on the 17th October, 1908, gave through his solicitor a formal notice to the vendor, declaring his intention to exercise his right of pre-emption and asking for the address of the purchaser and inspection of the deeds. The nephew, taking the view that the uncle had not complied with the terms of his—the nephew's—letter within two days after receipt thereof, and that he had lost his rights, went on with the transaction. Whether he was within the time or not is not clear, because there is some evidence that the letter of the 14th October, 1908, was not received until the afternoon of the 15th, and two days from the date of the receipt thereof, which

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was the expression used in the letter of the 14th, would not be until the 17th, and the letter of explanation is dated the 17th October. However, it is not necessary to go into that, because if the view suggested is the correct one, the rights of the parties would be governed, not by the mere terms of the letter, but by the general law.

The uncle having died, his administrator brings the Suit to recover the land. The nephew had parted with it to the Hindus, assuring them that their right was a right that was incontestable, inasmuch as the uncle had not come forward within the time stipulated, and that they could safely complete, which they did, and ultimately a sale-deed to them was registered. The proceedings are proceedings on the part of the representative of the uncle to get the land back. The learned Subordinate Judge who decided in favour of the respondent did so on a variety of grounds, but when the case came to the High Court, the learned Judges there thought that it was not necessary to go into the question whether there was a local custom of pre-emption, or whether, if there was, it could be enforced by a Mahomedan entitled to it against a Hindu purchaser, which was another important point made in the case, the appellants being Hindus, or whether, if there was a mere right of pre-emption, it could be enforced against a purchaser with notice of it, because they said the simple and obvious way of dealing with the matter was that all the parties had considered that there was a law of pre-emption which applied between the vendor and his co-sharer and that it was applicable to the purchaser, and that the appellants had, in effect, assented to that view. Upon the question when the sale had taken place, which was material, inasmuch as it was with regard to that date that the question of whether the requisite religious and other formalities had been

performed at the proper time must be determined, they thought they ought to look to what the parties represented to each other, and they followed a decision of the Calcutta High Court in a case of *Jadu Lal Sahu* v. *Janki Koer*[1]. In that case there was a question as to whether there had been a sale for the purpose of determining the application of the Mahomedan principle of pre-emption, and the learned Judges who decided it laid down that the real solution was to be found in determining in each case what was the intention of the parties. In the case before them they thought there was no doubt that the vendor and vendee did not regard the sale as a complete sale until the price had been paid and the deed registered.

In the present case their Lordships agree with the learned Judges in the Bombay High Court in thinking that the parties represented a full sale as having taken place on the 14th October, 1908, sufficient to justify the uncle in proceeding at once to the ceremonies, and treating that as the crucial time. The view taken by High Court is consistent with what was said in the case of *Begam* v. *Muhammad Yakub*[2] The Chief Justice Sir John Edge, there observes at page 351, in connection with the question whether the Transfer of Property Act, which required registration, had altered the principle of the Mahomedan law, which determined what was a sale for the purposes of the date in reference to which the ceremonies should be performed :— "I cannot think that it was the intention of the Legislature, in passing Act No. IV of 1882 " (the Transfer of Property Act), " to alter directly or indirectly the Mahomedan law of pre-emption as it existed and was understood for centuries prior to the passing of Act No. IV of 1882."

[1] (1908) 35 Cal. 575.

[2] (1894) 16 All. 344

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That at all events is in harmony with the conclusion come to by the High Court at Bombay. The conclusion is, that you are to look at the intention of the parties in determining what system of law was to be taken as applying and what was to be taken to be the date of the sale with reference to which the ceremonies were performed. That view is expressed at length in the judgment of the High Court, and their Lordships agree with it. If that view is right, as their Lordships think it is, it disposes of the whole of the controversy in this case, with the result that the appeal fails and must be dismissed with costs, and their Lordships will therefore humbly advise His Majesty accordingly.

Solicitor for appellant: Mr. *E. Dalgado.*

Solicitors for respondent: Messrs. *T. L. Wilson & Co.*

Appeal dismissed.

A. M. T.

ORIGINAL CIVIL.

Before Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Fawcett.

1920. *October* 12.

IN THE MATTER OF THE SPECIFIC RELIEF ACT, 1877, IN THE MATTER OF THE EXCESS PROFITS DUTY ACT, 1919, AND IN THE MATTER OF DORAISWAMI IYER & Co.

Excess Profits Duty Act (X of 1919), secs. 3, 15, Sch. I—"Offices or employments," meaning of—"Excepted business"—Agents of a mill company remunerated by commission—Indian Income-Tax Act (VII of 1918), sec. 51—Reference on application of assessee—Finance (No. 2) Act, 1915 (5 & 6 Geo. 5 c. 89), sec. 39—Specific Relief Act (I of 1877), sec. 45—High Court's power of interference.

The petitioners, who acted as agents of a mill company and were remunerated by a commission, claimed to be exempted from the excess profits duty under clause 2 of Schedule I of the Excess Profits Duty Act, 1919. The Collector and the Chief Revenue-Authority in appeal decided that the petitioners were not exempt from such duty inasmuch as they constituted a separate firm whose business was different from that of the mill company and was not an "office or