APPELLATE CIVIL.

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

1920.
August 12.

JAGJIVAN HARIBHAI (ORIGINAL DEFENDANT NO. 1), APPELLANT *v.* KALIDAS MULJI (ORIGINAL PLAINTIFF), RESPONDENT AND VICE VERSA*.

Mahomedan law—Pre-emption—Custom of pre-emption—Hindus in Surat—Pre-emption of agricultural lands—Proof of custom.

Though the Hindus in Surat have adopted the Mahomedan law of pre-emption by a long established custom with regard to houses, it is an open question whether they have adopted the law with regard to agricultural lands.

CROSS appeals from an order passed by V. V. Kalyanpurkar, Judge of the Court of Small Causes at Surat, with appellate powers, reversing the decree passed by, and remanding the suit to, M. M. Bhatt, Subordinate Judge at Surat.

Claim for pre-emption.

On the 24th February 1916, defendant No. 2 sold his land at Katargam in the District of Surat, to defendant No. 1. The plaintiff who owned land which was contiguous with the land sold came to know of the sale on the 19th March following, when he performed the *talab* which gave him the right to pre-empt.

The plaintiff filed the present suit on the 25th March 1916 to pre-empt the land.

The Subordinate Judge fixed several issues for trial, of which the following were tried as preliminary issues :—

2. "Has plaintiff the right of pre-emption with respect to the land in suit whether according to law or to any local custom"?

3. "Does defendant show that the right of pre-emption does not extend to or cannot be exercised in respect of agricultural land"?

These issues were found in the negative and the suit dismissed.

* Cross Appeals Nos. 3 and 8 of 1919 from Order

On appeal, the lower appellate Court reversed the decree and remanded the following issue for trial :—

"Does plaintiff prove the existence of an ancient and invariable custom of pre-emption among Hindus of the Surat District in respect of agricultural lands ?"

Both parties preferred cross-appeals to the High Court against the order of remand.

M. H. Mehta and *M. R. Vidyarthi*, for the plaintiff:—The lower Court should have held that as the custom of pre-emption has been recognised in the District of Surat and Broach, it extended to all kinds of properties. No distinction should have been made between houses and agricultural lands. The word used in the text "akar" is land and not houses : and includes agricultural lands also.

M. B. Dave, for defendants :—The right of pre-emption is one that restrains the liberty of the owner of lands ; and it must be kept within the strict limits of decided cases: *Dahyabhai Motiram* v. *Chunilal Keshordas*[1]. There is no decision of our Court which extended the right to agricultural lands ; all the cases are confined to houses in City.

Pre-emption on the ground of vicinage, can be exercised only with regard to houses, gardens and small parcels of land : see Tyabjee's Mahomedan Law, p. 698 (Second Edition), and Baillie, Vol. I, 472, N. 2, 474, N. 1.

The word "akar" (land) in the texts has a restricted meaning : *Sheikh Mahomed Hosein* v. *Shaw Mohsin Ali*[2]. It means some place enclosed by wall. Even the Mahomedan authorities are not in agreement as to the application of the word "akar" to lands such as we have in this case.

[1] (1913) 38 Bom. 183.

[2] (1870) 6 Beng. L. R. 41 at p. 50.

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JAGJIVAN HARIBHAI v. KALIDAS MULJI.

MACLEOD, C. J. :—The plaintiff sued for a declaration that he was entitled to a right of pre-emption in reference to the plaint land, which admittedly was agricultural land. In the trial Court the 2nd issue was : "Has plaintiff the right of pre-emption with respect to the land in suit whether according to law or to any local custom"? The 3rd issue was : "Does defendant show that the right of pre-emption does not extend to or cannot be exercised in respect of agricultural land"? That issue was founded on the contention in the defendants' written statement that the right of pre-emption did not extend to agricultural lands. The trial Court dismissed the suit finding issues Nos. 2 and 3 in the negative. In appeal this decree was set aside and the case was remanded for disposal on the merits after substituting this issue: "Does plaintiff prove the existence of an ancient and invariable custom of pre-emption among Hindus of the Surat District in respect of agricultural lands", for the original issues Nos. 2 and 3. I think it can no longer be doubted that this Court has recognised that Hindus in Surat have adopted the Mahomedan law of pre-emption by a long established custom with regard to houses. The only cases which have come before the Courts either from the District of Surat or from other Districts of Guzerat have related to houses and it must be certainly an open question whether Hindus have adopted any law which gives a right of pre-emption with regard to agricultural lands. It even seems doubtful from the authorities on Mahomedan law whether Mahomedans themselves recognised the right of Mahomedans to pre-emption with regard to agricultural lands. However that may be, it is quite possible that, even assuming the Mahomedans themselves recognised that right, Hindus from the District of Surat recognised that the right of pre-emption, as far as they were concerned, should be

confined to pre-emption of houses and it may well have been, considering the uncertainty of the Mahomedan law, they did not adopt any such law with regard to agricultural land.

It is certainly not advisable, in my opinion, to extend any customary law which is in conflict with the personal law of the parties unless there is evidence that such alien law has been adopted and it is certainly desirable and right that the issue set out by the learned appellate Judge should be tried.

I think, therefore, both the appeals fail and should be dismissed with costs.

Appeals dismissed.

R. R.

APPELLATE CIVIL.

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

1920.

August 16.

DATTATRAYA SITARAM GAIHARI (ORIGINAL PLAINTIFF), APPELLANT *v.* THE SECRETARY OF STATE FOR INDIA IN COUNCIL (ORIGINAL DEFENDANT), RESPONDENT*.

Indian Limitation Act (IX of 1908), section 5—Presentation of appeal in wrong Court—Appeal subsequently presented in proper Court—Excuse of delay—Sufficient cause—Good faith—Acting on advice of pleader—Bombay Civil Courts Act (XIV of 1869), section 16.

An Assistant Judge having dismissed a suit in which the claim was valued at Rs. 248, the plaintiff relying on the advice of his pleader filed an appeal in the High Court. The appeal was eventually returned to the plaintiff for its presentation to the District Court, where it was presented long after the prescribed time. The District Judge refused to excuse the delay in presenting the appeal, as he was of opinion that the plaintiff had no sufficient cause since the question as to which Court the appeal lay was not involved in any doubt. The plaintiff having appealed :—

Held, that the plaintiff had under the circumstances shown sufficient cause for not presenting the appeal in time, since in acting upon the advice of his pleader he was to be regarded as having acted in good faith.

* Second Appeal No. 906 of 1919.