1905
APRIL 17, 27.

APPELLATE CIVIL.

32 C. 982=9 C. W. N. 826.

(*ii*) because the formalities essential to the exercise of the right of pre-emption were not duly observed, inasmuch as the names of all the purchasers were not specified at the time of proclaiming the plaintiff's right.

We are unable to assent to either of these contentions.

The learned pleader for the appellants has cited the cases of *Poorno Singh* v. *Hurrychurn Surmah* (1), *Dwarka Das* v. *Husain Baksh* (2), *Abbas Ali* v. *Maya Ram* (3), and *Qurban Husain* v. *Chote* (4), and contends that these cases show that the law to be applied in suits for pre-emption is the personal law of the vendor. But no such rule of law is therein expressly laid down. On the other hand in Syed Amir Ali's Mahomedan Law, Vol. I, page 600, we find it said that "the Sunni-Hanafi law relating to the right of pre-emption is the law in force in this country either territorially or by custom." Again in Sir R. Wilson's Anglo-Muhammadan Law, page 397, in the note to section 351, it is observed that the "Shiah law never obtained official recognition under the Moghul Empire." Then in the case of *Abbas Ali* v. *Maya Ram* (3), both the pre-emptor and vendor were Shiahs. In *Qurban Husain* v. *Chote* (4), the pre-emptor was a Shiah, but the vendor a Sunni. So these cases favour the view taken by the District Judge that it is only when both parties are Shiahs that the law of the Shiah sect prevails. We, accordingly, consider that the District Judge was right in deciding this case by the Hanafi law, and according to which the plaintiff undoubtedly has a right of pre-emption in the property in dispute.

The learned pleader for the appellants has not been able to show us any authority for his second plea that the formalities of **[987]** pre-emption were not duly performed in this case, because the names of *all* the purchasers were not enumerated at the time of the *talab-i-mowasibat* and the *talab-i-ishtish-had*. The names of the purchasers were described as "Jogdeb Singh and others," and this was proclaimed at the houses of all the five purchasers. On the other hand, Syed Amir Ali, at page 606, lays down that "no particular formula is necessary, so long as the claim is unequivocally asserted." There appears to us to have been nothing equivocal in the assertion of the plaintiff's claim.

We, accordingly, see no ground for interference and dismiss this appeal with costs.

Appeal dismissed.

---

32 C. 988 (=9 C. W. N. 874.)

[988] APPELLATE CIVIL.

Before Mr. Justice Rampini and Mr. Justice Caspersz.

PARSASHTH NATH TEWARI *v.* DHANAI OJHA.*

[25th May, 1905.]

Mahomedan Law—Pre-emption, right of—Non-Mahomedans—Custom among Hindus of Behar—Pre-emptor a stranger in the district—Fictitious sale.

Where the custom of pre-emption is judicially noticed as prevailing in a certain local area it does not govern persons who, though holding lands therein for the time being, are neither natives of nor domiciled in the district.

---

* Appeal from Appellate Decree No. 1432 of 1903, against the decree of G. Gordon, District Judge of Chapra, dated the 1st April 1903, reversing the decree of Pankaja Kumar Chatterjee, Munsiff of Siwan, dated the 27th of June 1902.

(1) (1872) 10 B. L. R. 117.
(2) (1878) I. L. R. 1 All. 564.
(3) (1888) I. L. R. 12 All. 229.
(4) (1899) I. L. R. 22 All. 102.

Where, therefore, the pre-emptor was a Hindu co-sharer, neither a native of nor domiciled in Chapra, where the property was situate, but an inhabitant of the district of Balia in the United Provinces :—

1905 MAY 25.

Held that, although there may be a custom of pre-emption among the Hindus of Behar, he had no right of pre-emption. *Held further* that no right of pre-emption arises when the sale upon the contingency of which the right is claimed, is a fictitious transaction arranged so as to cheat the pre-emptor.

APPELLATE CIVIL.

32 C. 988=9 C. W. N. 874.

[Fol. 35 Cal. 575.]

SECOND APPEAL by the first defendant.

This was an appeal arising out of a suit for pre-emption brought by the plaintiff, a *brahmin* Hindu and an inhabitant of the district of Balia in the United Provinces, against the first and second defendants, both Hindus of the same caste, but resident in the Chapra district.

The plaintiff alleged that he and his nephew had bought an 8-anna share of mouza Tarwa Tewari in the district of Chapra from the second defendant, that on the 29th August 1901 the latter executed a deed of sale of the remaining half share without his knowledge in favour of the first defendant collusively overstating the consideration money in the deed, that he discovered the transaction when he went to the mauza on the 26th November [989] to collect his rents, and that he thereupon performed the preliminary ceremonies required by the Mahomedan Law.

The first defendant, who alone appeared, urged, *inter alia*, that the plaintiff had himself negotiated the sale to him, that the moiety of the estate was actually sold for the specified amount and that the legal ceremonies were not duly performed.

The Munsiff accepted this view and dismissed the suit.

The District Judge on appeal held that the conveyance of the 29th August was not a *bona fide* sale, as no consideration was paid, except perhaps one rupee, the rest of it being covered by bonds which had not yet been satisfied, that it was intended to defraud the appellant, who had no notice of the transfer and that immediately upon becoming aware of it he made the formal demands.

He reversed the Munsiff's decree, and the first defendant then appealed to the High Court.

Babu *Digamber Chatterjee* and Babu *Khetter Mohun Sen* for the appellant.

Babu *Saligram Singh* and Babu *Dwarkanath Mitter* for the respondent.

RAMPINI AND CASPERSZ, JJ. The suit out of which this appeal arises is of a rather peculiar nature. It is brought by one Hindu against another, for the purpose of enforcing an alleged right of pre-emption. The plaintiff says that he is an 8-anna shareholder in the estate and that, on the 29th August 1901, the remaining 8-anna share was sold to the defendant No. 1, but that since he came to hear of this sale, he asserted his right of pre-emption as *shafi khalit*, and that he has brought this suit to have his title according to Mahomedan law declared.

The Court of First Instance dismissed the suit. The District Judge gave the plaintiff a decree. The defendant No. 1, the purchaser of the property from the defendant No. 2, appeals to this Court, and the learned pleader, who appears on his behalf, contends *first* that there is no right of pre-emption between non-Mahomedans; *secondly*, that the District Judge has found that the sale of 1901 was not a *bona fide* transaction and, therefore, [990] there could be no right of pre-emption; and, *thirdly*, that the formalities necessary for enforcing the right of pre-emption had not been

1905 MAY 25.

APPELLATE CIVIL.

completed. It is unnecessary for us to say anything with regard to the third of these grounds of appeal, as the learned District Judge has found, as a matter of fact, that the plaintiff, immediately on becoming aware of the sale of 1901, made the formal demands; and we would not be justified in disturbing his finding on this point.

32 C. 988=9 C. W. N. 874.

We, however, think that the first two grounds urged by the appellant must prevail. The parties are non-Mahomedans, apparently Hindus of the *brahmin* caste, and although there may be a custom of pre-emption among the Hindus of Behar, yet we find that the plaintiff is not a resident of Behar, but of a village in the North-Western (now the United) Provinces. Now, in Sir Roland Wilson's "Digest of Anglo-Muhammadan Law" article 352, page 397, we find it laid down that "where the custom is judicially noticed as prevailing in a certain local area, it does not govern persons who, though holding land therein for the time being, are neither natives of, nor domiciled in, the district." It is clear to us that the plaintiff is not a native of Chapra, where the property is situate, nor is he domiciled there, because in paragraph 3 of his plaint he says that he resides in the district of Balia, and that when in Aghran 1309 F. S. he came to mouza Tarwa Tewari in pergannah Chowpar to collect rent, he became aware of the transfer: so that it was only on a visit to the place, where the property is situate, that the plaintiff came to know of the sale. That being so, it does not appear to us that the plaintiff has a right of pre-emption. Moreover, on the finding of the District Judge, we think that no right of pre-emption accrued to the plaintiff, even if he was entitled to pre-emption according to local custom, because the District Judge has distinctly found that the sale by the defendant No. 2 in favour of the defendant No. 1 was not a *bona fide* sale, but a sham transaction. He says that the transaction was arranged so as to cheat the plaintiff, and that this is evidenced by the fact that no consideration was paid except, perhaps, the sum of Re. 1 and that the rest of the consideration was covered by a couple of bonds, which have not yet been satisfied. According to the finding of the District [991] Judge, therefore, there has been no real sale. Now in Baillie's Digest of Mahomedan Law (1), it is laid down that "there must also be an entire cessation of all right on the part of the seller. There is, therefore, no right of pre-emption for an invalid sale. But if the purchaser under an invalid sale should sell by a valid sale, the pre-emptor has an option, and may take the mansion on the first or second sale."

The learned pleader for the plaintiff-respondent argues that it does not lie in the mouth of the defendant No. 1, the purchaser, to come forward and say that he has not bought the property and, therefore, the plaintiff has no right of pre-emption. It appears to us, however, that the defendant No. 1 has a right to come forward and argue, as he has been doing here, that on the finding of the District Judge no right of pre-emption arises.

In these circumstances we decree this appeal and dismiss the plaintiff's suit with costs. We understand that the pre-emptive price has been deposited in the Court below and taken out of Court by defendant No. 2. The money should now be returned.

Appeal allowed.

(1) Baillie's Digest, 1st Edit. p. 472.