amount claimed being realized by herself as plaintiff. We have [981] no doubt at all that the object of the gift was merely to get over the technical difficulty, which was raised in the previous suit and that there never was any intention to utilize that gift except for that particular purpose. The deed of gift is not before us, but that this is so seems clear from all the circumstances of the case. Having regard to the fact that the husband's estate is represented in this suit, and that no other party to the suit has any real interest in raising the purely technical objection now put forward, we do not consider the objection sound.

Under these circumstances we think that the Subordinate Judge was wrong in dismissing the suit and we accordingly direct that the judgment and decree of the Lower Court be set aside with the costs of this Court, and that the case be remanded to the Lower Court in order that the other issues, which have not yet been tried, may now be tried.

Appeal allowed, Case remanded.

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

[982] APPELLATE CIVIL.

Before Mr. Justice Rampini and Mr. Justice Caspersz.

JOG DEB SINGH *v.* MAHOMED AFZAL.*

[17th and 27th April, 1905.]

Mahomedan Law—Pre-emption—Shiah vendor—Hindu purchaser—Right of Sunni co-sharer to pre-empt in the case of a Shiah vendor and Hindu purchasers—Sunni law—Talab-i-ishtish-had—Names of all the purchasers not specified at the time.

The law applicable to a suit for pre-emption by a Sunni co-sharer against a Shiah vendor and Hindu purchasers is the Sunni law.

Poorno Singh v. ***Hurrychurn Surmah*** **(1),** ***Dwarka Das*** v. ***Husain Bakhsh*** **(2),** ***Abbas Ali*** v. ***Maya Ram*** **(3),** ***Qurban Husain*** v. ***Chote*** **(4) referred to.**

No particular formula is necessary for the assertion of the pre-emptor's claim on the occasion of the performance of the preliminary formalities, so long as the claim is unequivocally made.

Where, therefore, the vakil of the pre-emptor proclaimed in the presence of two of the purchasers and at the empty doors of the other three that "J. S. and others have "purchased," without specifying the names of the others:—

Held **that there was nothing equivocal in the formulation of the claim and that the *talab-i-ishtish-had* was duly performed in this respect.**

[Ref. 36 All. 438; Not appl. 16 I. C. 109=9 A. L. J. 769.]

SECOND APPEAL by the Hindu defendants.

The plaintiff, Sunni Mahomedan, was the proprietor of an eight annas odd share in mouza Majahedpore, the remaining share in which belonged to other co-sharers and was sold at a revenue sale and purchased by Akbar Ali Khan, the first defendant, and Muhammad Ibrâhim, both of the Shiah sect, in equal shares. On the 30th March 1901 the first defendant sold his interest in the mauza by a registered deed for Rs. 1,495, in equal shares, to defendants Nos. 2 to 6, who were *babhan* Hindus living in mouza

* Appeal from Appellate Decree No. 1133 of 1903, against the decree of H. Holmwood, District Judge of Patna, dated the 30th March 1903, affirming the decree of M. Hamiduddin, Munsiff of that district, dated the 29th of September 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.

1905
APRIL 17, 27

APPELLATE CIVIL.

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

[983] Parsawan, close to Majahedpore, whereupon the plaintiff bought up the share of Muhammad Ibrahim by a registered deed of sale dated the 6th May 1901.

The plaintiff sued Akbar Ali and the Hindu purchasers for a declaration of his right of pre-emption and for possession of the property sold to the Hindus. He alleged that the sale transaction of the 30th March had been kept concealed from him, that he became aware of the sale only on the 29th April, and that on being apprised of the fact he immediately performed the ceremony of *talab-i-mowasibat*. He further stated that on the same day he appointed a *sharai-vakil* (legal agent) to perform the *talab-i-ishtish-had* before the defendants, and that he himself performed the same ceremony in the presence of the servants of the first defendant, who was then absent from home on a pilgrimage. The Hindu defendants stated in their written statements that the plaintiff had knowledge of the intended sale and did not try to purchase the share sold to them, and that the requisite preliminary ceremonies had not been duly performed. The Munsiff found that the defendants had kept the transaction concealed; that the plaintiff got information of it on the 29th April, and as soon as he heard of it he performed the *talab-i-mowasibat*; that he directed his agent to declare at the time of the *talab-i-ishtish-had* that the pre-emptor had performed the *talab-i-mowasibat* and to invoke witnesses; and that the agent had carried out his instructions. He decreed the suit with costs.

On appeal the Judge found that on the 29th April the plaintiff's gomasta, Gyas Singh, informed him of the sale; that after hearing the latter's story to the end he jumped up and said "*ham-khariddar*" three times; that he then instructed his agent to perform the *talab-i-ishtish-had* at the defendants' houses, which he did; that the form used on the occasion was "*Jogdeb Singh and others have purchased*;" and that this was repeated in the presence of two of the purchasers and at the empty doors of the other three. He also found that the agent was instructed to say that the plaintiff had claimed his right of pre-emption, and had said: "*I have purchased*" three times, and that the plaintiff went to the first defendant's house and performed the *talab-i-ishtish-had* in his absence before his dewan and servants.

[984] He accordingly affirmed the decree of the Munsif, whereupon the Hindu defendants appealed to the High Court.

Moulvi *Mahomed Yusuf* (with him Babu *Surendro Mohan Das*) for the appellants. The law applicable to the case is the law of the vendor; *see Poorno Singh* v. *Hurrychurn Surmah* (1); *Dwarka Das* v. *Husain Bakhsh* (2), which overruled *Mussumat Chundo* v. *Hakeem Alim-ood-deen* (3); *Abbas Ali* v. *Maya Ram* (4) dissenting from *Sheikh Daim* v. *Asooha Bebee* (5); *Qurbán Husain* v. *Chote* (6); *Gobind Dayal* v. *Inayatulla* (7); and *see* also *Ramrutun Sing* v. *Chunder Naraen Rai* (8). The liability to the claim of the pre-emptor is an incident to the ownership of the property in the hands of the Mahomedan vendor: see *per* Macpherson J. in *Sheikh Kudratulla* v. *Mahini Mohan Shaha* (9). If the Shiah law is applicable, there is no right of pre-emption, where there are more than two co-sharers; *Abbas Ali* v. *Maya Ram* (4); *see* Tagore Law Lectures, 1874, page 447, and Amir Ali's Mahomedan Law, Vol. I, page 607. As to the preliminary

(1) (1872) 10 B. L. R. 117, 121.
(2) (1878) I. L. R. 1 All. 564.
(3) (1873) 6 All. H. C. 28.
(4) (1888) I. L. R. 12 All. 229.
(5) (1870) 2 All. H. C. 360.
(6) (1899) I. L. R. 22 All. 102.
(7) (1885) I. L. R. 7 All. 775.
(8) (1792) 1 S. D. R. 1.
(9) (1869) 4 B. L. R. F. B. 134, 166.

1905
APRIL 17, 27.
APPELLATE CIVIL.
32 C. 982=9 C. W. N. 826.

ceremonies, the right of pre-emption is of a very special character, and the Mahomedan Law countenances devices to defeat it : see *Nusrut Reza* v. *Umbul Khyr Bibee* (1) ; *Sheikh Kudratulla* v. *Mahini Mohan Shaha* (2). The right of pre-emption being derogatory to private rights, the legal preliminaries must be strictly enforced : Amir Ali's Mahomedan Law, Vol. I, page 597. In this case there were five purchasers of separate and distinct, though equal shares. For convenience the five separate sales were engrossed on one piece of paper, but they must, for the purposes of this case, be treated as five separate transactions with separate individuals. The *talabs* should, therefore, have been performed before each purchaser separately. Merely reciting that "*Jogdeb Singh and others have purchased, and I claim the right of pre-emption*" is not sufficient. Each separate purchaser's name, with his share and amount of purchase-money, ought to have been stated. The sale should not have been treated as a joint sale to all the five as one body of joint purchasers, **[985]** but as five different sales giving rise to a right of pre-emption against each of the five purchasers ; so that there are really five cases of pre-emption. Though one suit only was brought and not objected to, there might have been five different suits. The *talabs* were not duly performed because they were performed under the impression of one joint sale to Jogdeb Singh and others ; *see* Baillie's Digest, 1st edition, pages 481-484. The performance of the *talab-i-ishtish-had* was bad further because it was not stated with distinctness that the *talab-i-mowasibat* had been already performed. This ought to have been done with respect to each purchaser separately : *Rujjub Ali* v. *Chundi Churn Bhadra* (3) ; *Akbar Husain* v. *Abdul Jalil* (4) ; *Abbasi Begam* v. *Afzal Husen* (5).

Babu *Saligram Singh* for the respondent. No case has been cited to show that where the pre-emptor is a Sunni, although the vendor is a Shiah, the law of the latter is applicable. The Sunni law should be applied in this case. It is in force territorially or by custom : *see* Amir Ali's Mahomedan Law, Vol. I, page 600. Sir R. Wilson in his Anglo-Muhammadan Law says, at page 397, that the Shiah law never obtained recognition under the Moghul Empire. The *talab-i-ishtish-had* was duly performed by the citation of the purchasers as "*Jogdeb Singh and others.*" This was proclaimed at the houses of all the purchasers : *see* Amir Ali, Vol. I, page 606.

Moulvi *Mahomed Yusuff* in reply.

RAMPINI AND CASPERSZ, JJ. The suit out of which this appeal arises is one for pre-emption. The facts are set forth in the judgments of the Courts below. It is unnecessary to recapitulate them. It is sufficient for the disposal of this appeal to state that the plaintiff is a Sunni, the vendor defendant a Shiah, and the purchaser defendants are Hindus.

The District Judge, as well as the Munsiff, has held the plaintiff to be entitled to the right of pre-emption claimed, and has given him a decree.

[986] The purchaser defendants appeal. On their behalf it has been argued that the Courts below are wrong :—

(*i*) because the vendor defendant is a Shiah, and, according to the Shiah law, no right of pre-emption exists in the case of a property, which belongs to more than two co-sharers, and

(1) (1867) 8 W. R. 309.
(2) (1869) 4 B. L. R. F. B. 134, 166.
(3) (1890) I. L. R. 17 Cal. 543.
(4) (1894) I. L. R. 16 All. 393.
(5) (1896) I. L. R. 20 All. 457.

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.

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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.

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* 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.