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sum advanced being Rs. 99, according to clause 12, Schedule A of Act X of 1862; and if either from the ignorance of the Stamp law, or from the fact that 8-anna stamps were not then available, the parties engrossed the deed on a higher stamp, I think it cannot be contended that merely from the circumstance of the stamp used being a stamp used for a transfer of an interest of the value of a sum above Rs. 100, the deed becomes a deed, registration of which is compulsory under Act XVI of 1864. I think therefore that the deed being a mortgage deed, and that mortgage being for a sum less than Rs. 100, the registration of such a deed was optional, and the fact of its not having been registered does not render it inadmissible in evidence in the cause.

The case is therefore remanded to the Court of the district Judge for a decision on the merits.

Costs to abide the result.

Before Mr. Justice E. Jackson, and Mr. Justice Mookerjee.

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March 9.

BRAJA KISHOR SURMA (PLAINTIFF) *v.* KIRTI CHANDRA SURMA (DEFENDANT).*

Mahomedan Law—Right of Pre-emption—Surrender of the Right before Sale.

Where an offer of sale was made, to a pre-emptor, and he refused to avail himself of it, and consented to a sale to a stranger, *held* that, after a sale to a stranger, he could not set up his right of pre-emption.

THE plaintiff in this case brought this action to enforce his right of pre-emption with respect to a certain piece of land. The defendant answered, that the plaintiff had not observed the preliminaries of *tulub-mawasabat* and *tulub-ishhad*; that the vendor had offered to sell the land to the plaintiff, who had refused to purchase the same; and after such refusal he had purchased it.

The Moonsiff laid down two issues:—

1. "Whether the plaintiff has satisfied all the preliminaries

* Special Appeal, No. 1452 of 1870, from a decree of the Subordinate Judge of Sylhet, dated the 26th April 1870, affirming a decree of the Moonsiff of that district, dated the 31st January 1870.

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"necessary to be performed before asserting a right of pre-emption."

2. "Whether at the time of the purchase in question the plaintiff had or had not refused to purchase the property."

On the first issue the Moonsiff held that the evidence adduced did not establish that the preliminaries of *tulub-mawasabat* and *tulub-ishhad*, had been duly performed.

On the second isssue the Court decided that the defendant had satisfactorily proved that his vendor had first made the offer of sale to the plaintiff, who deliberately refused to avail himself of his right of pre-emption, and expressly consented to a sale to a stranger. The Court was of opinion that upon such refusal the plaintiff could not claim to exercise his right after the property had been sold to another person, and dismissed the suit.

The plaintiff appealed against the Moonsiff's decision, and among other grounds as to sufficiency and credibility of the evidence adduced on both sides, and the findings of the Court below based upon it, he urged in appeal that, assuming the fact of the plaintiff's refusal to purchase when asked to do so by the defendant's vendor to be true, yet it did not amount to a waiver of the right of pre-emption. The right did not accrue until after the sale had been effected, so that a refusal to purchase when the right had not accrued, was not a waiver of such right.

The lower Appellate Court, upon the evidence, differed from the Moonsiff and held that it was sufficient to establish the performance of the two preliminaries of *tulub-mawasabat* and *tulub-ishhad*, but affirmed the finding of the first Court on the second issue. The Judge considered that the right only accrued at the time of sale, and not before, but still he was of opinion, on grounds of justice and equity, that the plaintiff should not be allowed to enforce such a right when he had deliberately refused to purchase on being asked to do so by the owner. The lower Appellate Court affirmed the decree of the Moonsiff. The plaintiff then preferred a special appeal to the High Court.

Baboo *Bamacharan Banerjee*, for the appellant, contended that the right of pre-emption did not accrue until after the absolute transfer of the property, and the plaintiff was entitled

to enforce his right, if he had performed all the legal preliminaries, though the vendor had previously offered to sell the land to him; and that as the Court below had found that the two preliminaries necessary had been performed by the plaintiff, he was entitled to succeed in this action. He urged, that, according to the law as contended for by him, the fact of the plaintiff's refusal to purchase when asked to do so by the vendor before any actual sale to a stranger had taken place, could not be construed to mean a waiver of his right of pre-emption, with respect to this property. He referred to the Hedaya, Volume III, page 568, Baillie's Mahomedan Law, page 500, and Macnaghten's Mahomedan Law, page 196. He also cited the case of *Sakina Khatun* v. *Gauri Sankar Sen* (1), decided by the late Sudder Court.

No one appeared for the respondent.

The following judgments were delivered

MOOKERJEE, J. (who, after stating the facts, continued.)—The plaintiff preferred this special appeal to us, complaining that the Courts below were in error in holding that a claim founded on a right of pre-emption is in any way affected by a waiver of the right to purchase previous to the sale of the land. He contends that as the right of *shaffa* only accrues after the sale, the surrender of that right, before a sale has taken place, is not valid under Mahomedan law. In support of this contention, Baboo Bama Charan cites Hedaya, Volume III, page 568; Baillie's Mahomedan Law, page 500; Macnaghten's Mahomedan Law, page 196, and a precedent laid down in the case of *Sakina Khatun* v. *Gauri Sankar Sen* (1). On referring to the authorities, however, we find that the Hedaya in page 568, Volume III, merely lays down that "the privilege of *shaffa* is established after the sale, for it cannot take place until it be manifest that the proprietor is no longer inclined to keep his house, and this is mainfested by the sale of it." This merely shows when the cause of action

(1) 5 Sel. Rep., 299.

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arises in a claim for pre-emption and when the right to claim *shaffa* accrues; but does not support the contention raised before us that a pre-emptor is free to assert his claim of *shaffa* after he has in distinct terms waived his right to do so, either immediately before the sale, or at the time of it.

In Baillie's Digest of Mahomedan law, page 500, occurs this passage: "The surrender of a right of pre-emption before a sale has taken place is not valid." This however is supported by no authority from the Mahomedan law books, and I would therefore hesitate to act upon this dictum. In the same paragraph however is found the following passages, "when the pre-emtor has said" I have surrendered the right of pre-emption in this mansion, "the surrender is valid;" and also "if he should say to the seller, I have surrendered the right of pre-emption in this mansion to thee, the mansion being still in the seller's possession, the surrender would be valid." These passages show that a right of *shaffa* can be surrendered by the pre-emptor, and if the surrender is made, it prevents the pre-emptor afterwards from asserting his claim to *shaffa*. The finding arrived at by the Courts below in this case is to the effect that the seller at the time of sale offered the land to the plaintiff for purchase, that the plaintiff thereupon not only refused the offer, but told the seller to sell his share to whomsoever he liked, and the purchaser relying on this surrender of the plaintiff's right of purchase under the law of premption, made the purchase from the seller. Under these circumstances, it appears to me to be monstrous to contend that after such a complete surrender of the plaintiff's right, he should be allowed by any court of Justice to assert his claim. He stood by when the defendant was selling the property to the purchaser, and in clear and unequivocal terms permitted him (the vendor) to sell and the purchaser to buy. No Court of Justice in the world would allow, or should permit the plaintiff to say that, though I had no intention to purchase when, you the defendant, purchased the land and therefore refused the offer of the vendor and gave him permission to sell to you, yet that I have subsequently changed my mind, and will now have the satisfaction to see that your purchase is invalidated, and all the costs incurred by you for

the purchase of stamp, &c., are so much loss to you. The plaintiff would be stopped in law from asserting a claim of this nature after having stood by and seen the vendee make the purchase without giving him any warning that he, the plaintiff, had the preferential claim to purchase, or that he intended to purchase, and that the defendant would purchase at his own risk. Now, instead of warning the purchaser or asserting his intention to purchase, he gives the vendor to understand that he has no objection whatever to the sale. This is a complete renunciation and surrender of the plaintiff's right of pre-emption, and I would hold that after this renunciation, he should not be permitted to claim the right to purchase. It would require very clear and distinct authority in the Mahomedan law to support such a view of it as is contended for by the appellant's vakeel, which I have no hesitation in holding is against all principles of justice, against equity, and against good conscience.

The case in Macnaghten's Mahomedan Law, page 196, is not in point; the question put to the law officer was simply when "the *shafee* or person who has a right to pre-emption declines to purchase the land at the price demanded by the proprietor, and states that he will not pay for it more than a certain sum," is the *shafee* at liberty to bring forward a claim for pre-emption when the proprietor has sold the land to a third person on receiving his own price? In the reply given to that question, the law officer states that the refusal by the *shafee* to pay the amount which had been paid by the purchaser amounts to a renunciation of the right of pre-emption. The reply, however, went on to say, and I think improperly, because unasked, that the claim of the *shafee* to a right of pre-emption cannot be adduced until after the land had been actually sold; and that a refusal to purchase, before the sale, cannot operate to defeat his (the *shafee's*) claim of pre-emption subsequently preferred. There is also in this reply no authority cited to support such a view of the law. The case also is not in point with the present, because in this case the pre-emptor at the time of sale repudiated all intention to become the purchaser, and induced the purchaser to buy; there is no question that the same price for which the land was sold

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to the vendee was not the amount for which the land was offered for sale to him. The case of *Sakina Khatun* v. *Gauri Sankar Sen* (1) does not decide the question. There is only an expression of opinion by the law officer, but the Sudder Court decided the case on quite a different point. This is, I apprehend, no authority at all. In the opinion given by the Mafti, I find also that he is unable to quote from any Mahomedan law book any passage or text to support his opinion.

A decision of a Division Bench in the case of *Sheo Puhul Sing* v. *Mussamut Ram Koer* (2), strengthens me in the view I have taken of the law. The opinion of the Judges, who decided that case, was approved of by another Division Bench, in the case of *In the matter of the petition of Jehangir Baksh* (3)

In this case, it is clear, that the plaintiff not only refused to purchase the property, when offered to him for sale, but actually accorded his permission to the vendor to sell the same to a third party, the purchaser, and that the purchaser, relying on that renunciation by the plaintiff, went to the expense of pur-

(1) 5 Sel. Rep., 299.

(2) W. R., 1864, 311.

(3) *Before Mr. Justice Kemp and Mr. Justice Glover.*

The 11th May 1869.

IN THE MATTER OF THE PETITION OF JEHANGIR BAKSH.

THE judgment of the Court was delivered by

KEMP, J.—The grounds taken in this review are, that under the Mahomedan law if a person having a right of pre-emption relinquishes such right, and assents to the sale of the property in question, he cannot again at any subsequent period claim that right. In support of this argument, our attention has been called to *Sheo Tuhul Sing* v. *Mussamat Ram Koer* (1). That case is a peculiar one, and the learned Judges who decided it did not quote any law in support of their ruling. In that case the purchase was not only refused by the plaintiff, but he gave his permission to its being sold to other parties. In this case, as we have already observed in our former decision, it was very doubtful whether the plaintiff had ever declined the purchase, and there is certainly nothing in the evidence to show that he gave permission to sel the property to another party. We adhere to our former judgment which we supported by authorities on the Mahomedan law, and we desire to add another authority in support of our view to be found at page 196 of Macnaghten's Precedents of Mahomedan law. The application for Review is therefore rejected with costs.

(1) W. R., 1864, 311.

Application for Review of judgment passed by the said Judges, on the 30th January '869, in Special Appeal No. 2479 of 1868. See 6 B. L. R., 42, note.

chasing stamp, &c., for the purchase of the property. I hold, therefore, that the suit of the plaintiff was rightly dismissed by the Courts below. Our Courts are to be guided by the principles of justice, equity, and good conscience. The Mahomedan law is only the law of this country so far as the Legislature has adopted it as the law of British India, and so far as we see clear authorities in it on a particular point. In all cases, therefore, where there is no clear and positive authority in the Mahomedan law, I think it is our duty to follow the dictates of justice and good conscience. Now it cannot be contended for a moment that it is equitable or just that a plaintiff who refused to purchase a property, when offered to him for sale, who has likewise induced the puachaser, to buy on reliance of his clear renunciation of his right to purchase, should be allowed to get rid of his renunciation, and to set aside the sales merely for the pleasure and satisfaction of seeing the whole thing rendered null and void, and the purchaser endamaged in costs.

If this be allowed, the consequence would be that no co-parcener of a property would be ablo to sell his share at a just and reasonable price, but must be compelled to sell to his co-sharer at his price however low and unreasonable. He will be completely at his mercy, and, though undoubtedly entitled to sell his share, will never practically be able to sell it at its proper value. If we allow the principle contended for by the appellant, we shall assuredly act against equity and justice, which is the law we are bound to administer, and assist the plaintiff in the perpetration of a gross fraud. I cannot imagine what greater precaution could possibly be taken by a co-parcener desirous of selling his property than what was taken by the vendor defendant in this case. He goes to the person who has a preferential right to purchase, namely, the plaintiff, and offers his share for sale. This offer is refused not on the score of the price offered being excessive, but the plaintiff's unwillingness to avail himself of the right given to him by the Mahomedan law and the vendor is further permitted to sell to any party he likes. He goes to the vendee, and the vendee, finding that the *shafee* has declined the purchase, accept the offer, and goes to considerable expense in perfecting his purchase. We

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are now asked to set aside this sale, to compel the purchaser to forego his purchase, and to suffer the loss of his money incurred in getting the bill of sale preformed and executed. I consider the Courts below were right in declining to give such an unjust and inequitable decree to the plaintiff. I would therefore uphold the order passed by the Courts below, and dismiss this appeal without costs, no one appearing for respondents.

JACKSON, J.—I am of opinion that even under the Mahomedan law the plaintiff is not entitled to exercise the rights of pre-emption as he had already relinquished the rights at the time of purchase and sale. I concur, therefore, with my learned colleague in dismissing this appeal without costs.

Appeal dismissed.

[APPELLATE CRIMINAL.]

Before Mr. Justice Loch and Mr. Justice Macpherson.

1871
March 25.

THE QUEEN *v.* MAHIMA CHANDRA CHUCKERBUTTY, APPELLANT.*

Criminal Procédure Code (Act XXV of 1861), *ss.* 170. 426.

In a suit by A. for arrears of rent above Rs. 100, a decree was passed against B., C., and D., wherein certain documents filed by them were held to be forgeries. A. applied for, and obtained an order from the Deputy Collector who tried the suit for leave to prosecute B. and C. in the Criminal Court. A. afterwards applied to the Collector for leave to prosecute B., C., and D., whereupon the Collector passed the following order:—"Sanction has already been given once by the Deputy Collector. I however have no objection to give it a second time as the petitioner desires it." D. was convicted by the Sessions Judge on a charge under section 471 of the Penal Code. On appeal by D.,—

Held, that no proper leave had been obtained to prosecute D., and this defect was not cured by the subsequent proceedings, and the conviction must be quashed.

* Criminal Appeal, No. 102 of 1871, from an order of the Sessions Judge of Backergunge, dated the 10th January 1871.