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might have a remedy by ordinary suit, the proceeding by way of writ of *mandamus* was obsolete, and that there was, in fact, no procedure by which the questions between the parties could be properly raised and tried: and, possibly, if this had been clear, it would have been proper for us to express our opinion that the present proceedings could not be maintained. But without entering at all into the question whether the party in this case had any other remedy, we think it sufficient to say that there has never been any doubt that the High Court has still the power, which the Supreme Court certainly had, to issue a writ of *mandamus* in such cases as the present.

The judgment of the Court is that the appeal be dismissed, and that the appellants do pay the respondents their costs to be taxed on scale No. 2.

Attorneys for the appellants: Messrs. *Berners, Sanderson,* and *Upton.*

Attorneys for the respondents: Messrs. *Carruthers* and Dignam.

[APPELLATE CIVIL.]

Before Mr. Justice Macpherson and Mr. Justice Glover.

RAMDULAR MISSER AND ANOTHER (PLAINTIFFS) *v.* JHUMACK LAL MISSER AND ANOTHER (DEFENDANTS).*

1872 *Feby.*15.

Mahomedan Law—Pre-emption—Performance of Preliminary Ceremonies—Talab-i-ishtehad—Custom among Hindus in Behar.

To the due performance of the ceremony of *talab-i-ishtehad*, it is not necessary that any particular form of words should be employed.

The right of pre-emption exists among Hindus in Behar.

THIS WSS a suit to enforce the right of pre-emption to a one-fourth share of Mauza Bissunpur and to obtain possession thereof on the ground that the plaintiffs were *shafee sharik,* or partners,

*Special Appeal, No. 792 of 1871, from a decree of the Judge of Bhaugulpore dated the 3rd May 1871, reversing the decree of the Subordinate Judge of that district, dated the 8th June 1870.

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and that they had carried out the requirements of the Mahomedan law, *viz.*, *talab-i-mawasibat* and *talab-i-ishtehad*, and that the purchaser was a stranger.

The defence set up by the purchaser Jhumack Lal was (*inter alia*) that the plaintiffs had not carried out the requirements of the Mahomedan law.

The Subordinate Judge found that the plaintiff, on hearing of the sale, had exclaimed three times that he had purchased the share in dispute, and that subsequently he had made the affirmation before witnesses when he offered the price at which the share was sold and had asked for the kabala to be returned. He further found that the law of pre-emption was applicable to the Hindus of Behar. He accordingly passed a decree in favour of the plaintiffs.

On appeal the Judge held that no claim of pre-emption could be established until the pre-emptor clearly showed that he had carried out the requirements of the Mahomedan law by a due invocation of witnesses; that the plaintiff had not done this; that the plaintiff in his deposition had said that he took money with him, accompanied by Durmil (who was the only witness examined) and Mahibat Rai and Dhuruni Chowdhry (who had not been examined), and went to a certain place where he had met the vendor and vendee of the property in dispute; that he there had said three times "I have bought" and "I have brought the money, take it and give back the kabala;" and that both the vendor and vendee had refused; and that having heard this, he had said, "I have made all the persons who came with me witnesses." The Judge further found that the witness Durmil confirmed the story of the plaintiff up to the point of refusal by the vendor and vendee; that the next statement of Durmil was that "then plaintiff three times mentioned the matter (*bât*) of purchase, and made (*gawa râkhâ*) us all witnesses." He held that, when the money was refused, the plaintiff should have used words to the following effect, *viz.*, "I have claimed the right of pre-emption of such and such property, and it has been rejected. Bear ye witness." And as he did not consider there was anything in the evidence showing that any such ceremony was gone through, he dismissed the suit. The Judge in his judgment

cited—*Jadu Sing* v. *Raj Kumar* (1), *Prokas Sing* v. *Jageswar Sing* (2), *Mussamut Hosseinee Khanum* v. *Mussamut Lallun* (3), and *Issur Chunder Shaha* v. *Mirza Nisar Hossein* (4).

The plaintiff appealed to the High Court.

Baboo *Chandra Madhab Ghose*, for the appellant, contended that no strict form of words was necessary for performance of the ceremony. The calling in people to be witnesses was sufficient. Upon the finding of the fact by the Judge, a decree should have been passed in favor of the plaintiff. The words used by the plaintiff were sufficient to satisfy the requirements of the law.

Baboo *Rames Chandra Ghose*, for the respondent, contended that, in the performance of the *talab-i-ishtehad*. the precise words are necessary. There must be invocation of witnesses. The pre-emptor must make use of certain words calling upon them to become witnesses—*Jadu Sing* v. *Raj Kumar* (1) and *Issur Chunder Shaha* v. *Mirza Nisar Hossein* (4). As the parties were Hindus, it should have been shown that the custom of pre-emption prevails in the district, which had not been done in this case.

The judgment of the Court was delivered by.

MACPHERSON, J.—In this appeal the only question is whether the Judge was wrong in law in holding that, on the facts found by him, the plaintiff had not complied with the provision of the Mahomedan law as to the ceremonies which ought to attend the *talab-i-shtehad* by the person who claims to enforce the right of pre-emption. The parties to the suit are Hindus, and the object of the plaintiff is to enforce a right of pre-emption. The Judge is of opinion that the plaintiff failed to prove that he had complied with the requirements of the Mahomedan law.

(1) 4 B. L. R., A. C., 171.
(2) 2 B. L. R., A. C., 12.
(3) W. R., 1864, 117.
(4) *Id.*, 351.

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I think that the Judge was wrong in law, and that the plaintiff did substantially comply with the requirements of the Mahomedan law. Having made the demand three times, and having said that he had bought the property, and having offered the money to the vendor and vendee, he demanded back the kabala. After that, he made the persons who were with him, and who had been present during the time when all this took place, witnesses. The words he used were "*gawa rakha*," which means that he made them witnesses, or called on them to bear witness. This was in my opinion a substantial compliance with the requirements of the Mahomedan law; for I am not aware that it is imperative that the precise words which are given in the Hedaya, or in any other of the Mahomedan law books, should be used. In so holding, I in no way depart from the rules laid down either in *Issur Chunder Shaha* v. *Mirza. Nisar Hossein* (1), or in *Judu Sing* v. *Raj Kumar* (2). In the first of these cases no witnesses had been called at all, that is to say, no witnesses were referred to, and formally told to bear witness, or, so to say, were constituted witnesses by the claimant of the right. So in the case of *Jadu Sing* v. *Raj Kumar* (2), the parties did not go through the same formalities as the plaintiff did in the present case. In the present case we have the demand made of the vendor and vendee before witnesses, and we have the refusal before the same witnesses to receive the money, or to give back the kabala; and with reference to what passed, the plaintiff called the attention of the persons present to these facts, and constituted them his witnesses. Having done so, it appears to me that he is entitled to succeed, as having substantially done all that the Mahomedan law required him to do.

For the respondent a question is raised that the parties being Hindus, and residents of Bhaugulpore, which is in Behar, the plaintiff cannot succeed in the absence of proof that the right of pre-emption does exist by custom amongst Hindus in Behar.

The Court of first instance held that the custom did prevail, and had been recognised by the Courts. So far back as 1863, in the case of *Fakir Rawat* v. *Sheikh Imambaksh* (3), it was held

(1) W. R., 1864, 351. (2) 4 B. L. R., A. C., 171. (3) B. L. R., Sup Vol., 35.

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that a right of pre-emption does exist by custom among Hindus in Behar; and in the judgment in which this declaration is made, many older cases are referred to in which the custom had been recognised and acted on by the Courts. There are also several cases of latter date in which the same thing has been held. There can be no doubt that for years it has always been considered to be settled law that the right of pre-emption exists amongst Hindus in Behar; and therefore it is not now open to the respondent to raise any objection upon this point.

I would reverse the decision of the lower Appellate Court, and restore and affirm that of the Court of first instance with all costs.

Decision of the lower Appellate Court reversed, and that of the Court of first instance restored.

[ORIGINAL CIVIL.]

Before Sir. Richard Couch, Kt., Chief Justice, and Mr. Justice Macpherson

MACFARLANE AND OTHERS (DEFENDANTS) *v.* CARR AND OTHERS (PLAINTIFFS.)

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Feby 21.

Contract of Sale—Part Acceptance by Defendant of Goods not according to Contract—Rate at which such Goods should be paid for.

The defendants contracted to purchase from the plaintiffs "2,000 maunds of fresh, clean and good up-country indigo seed, guaranteed growth of season 1870-71, at Rs. 11 per maund, to be delivered to the defendants' agent at Hajipure in all February next." In part performance of this contract, the plaintiffs delivered, and the defendants' agent at Hajipur accepted, 865 maunds of seed, no objection as to quality being then taken. But when the remainder of the seed was tendered in February, the defendants refused to accept it on the ground that it was not according to contract. At the same time and upon the same grounds, they refused to pay the contract price for the seed already accepted and tendered instead the market price at the time of delivery. In an action to recover the contract price of the 865 maunds delivered, and damages for loss on re-sale of the remainder of the seed, the Judge of the Court below found on the facts that the seed was not "seed of the growth of 1870-71" as far as it was reasonably possible to procure it, and that, though there was evidence to show that seed of the previous season, if of good quality and in good preservation, was occasionally mixed with the new seed, and that seed so mixed had been accepted as a performance of contracts for 1870-71, yet there was no evidence that, under such contracts as the present, the seller was by custom at liberty to mix seeds of two crops so as to bring the sample