[FULL BENCH.]

1871
June 8.

Before Mr. Justice Norman, Officiating Chief Justice, Mr. Justice Kemp, Mr. Justice L. S. Jackson, Mr. Justice Macpherson and Mr. Justice Mitter.

MUSSAMAT JAMILAN AND ANOTHER (TWO OF THE DEFENDANTS) *v.* LATIF HOSSEIN (PLAINTIFF) AND ANOTHER (DEFENDANT).*

Mahomedan Law—Pre-emption—Tulub-ishhad.

It is not a binding rule of law that the *Tulub-ishhad* by a pre-emptor, if made within a day after the receipt of intelligence of the purchase, is necessarily in time for the preservation f the right of pre-emption. The due and sufficient observance of the formality of *tulub-ishhad*, as to time, is a question to be decided in each case by the Court which has to deal with the facts.

THE plaintiff, who was a sharer in Mauza Ghowspore Goorwar, brought this suit to recover by right of pre-emption the share of Mussamat Hamdan, which she gave out that she had sold on the 8th October 1869 to Mussamats Hafizan and Jamilan for a consideration of Rs. 1,900. It was alleged by the plaintiff that the sale was really made to Wahid-ul-huq, and for Rs. 1,450 only.

Wahid-ul-huq denied that he had any interest in the property; and that any formal demand had been made of him by the plaintiff.

Jamilan and Hafizan asserted that they were the actual purchasers, and had paid Rs. 1,900 for the property, and among other things stated that the plaintiff had not made such a demand as, in Mahomedan law, a pre-emptor is bound to make.

The Judge who tried the case in the Court below, said in his judgment:—"The plaintiff states that he reached Behar on the evening of the 11th October 1869 at 7 P. M., and then heard of the sale to defendants from Mahomed Khalil, whereupon he immediately performed the *'tulub mawasabat;'* and that on the 12th at about 5 P. M., he went to the vendor's house in Behar to perform the *' tulub-ishhad.'* " The Judge considered that

* Regular Appeal, No. 174 of 1870, from a decree of the Judge of Patna dated the 1st June 1870

the plaintiff had failed to account for the delay in making the *tulub-ishhad* which is required by the Mahomedan law to be made with the least practicable delay; but considering himself bound by the ruling laid down in *Mahomed Waris* v. *Hazee Emamooddeen* (1), gave a decree for the plaintiff.

On appeal to the High Court by the defendant, the case came on for argument before Mr. Justice L. S. Jackson and Mr. Justice Macpherson. It was contended, on behalf of the appellant, that the delay, of one day, if not accounted for, was fatal to the claim of the pre-emptor by the Mahomedan law, while the respondent's pleader contended that, as a matter of law, the Court would not require a plaintiff claiming by right of pre-emption to explain one day's delay; that, if a man heard of a sale of his co-sharer's property on one day, and on the following day he made his demand, there was no delay according to Mahomedan law to be accounted for.

The following question was referred by the learned Judges to a Full Bench:—"Whether it is a binding rule of law that the *tulub-ishhad*, if made within a day after the receipt of intelligence of the purchase, necessarily is in time for the preservation of the right of pre-emption, or whether the due and sufficient observance of that formality, as to time, is not a question to be decided in each case by the Court which has to deal with the facts."

The question was referred with the following remarks by

JACKSON, J.—It appears to me that the Division Bench of this Court in 1866 could hardly have intended to hold that, as a matter of law, a person claiming a right of pre-emption must be held to be in good time if he completed the formality of *tulub-ishhad* within one day after he heard of the purchase to which he objects, but that the Court which has to deal with the facts must be at liberty in each case to determine whether the *shafee* has complied with the dictates of Mahomedan law in carrying out the *tulub-ishhad* with proper diligence and promptitude. But, as the case in question is certainly capable of

(1) 6 W. R., 173.

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bearing that construction, and, as it is based on a ruling of the late Sudder Court passed in 1857, in the case of *Hakimmooddeen Bhooya* v. *Zuhiroodeen Bhooya* (1), it appears to us advisable to refer this question to the Full Bench.

Mr. *Twidale* for the appellant.—It cannot be laid down as a matter of law that, where a pre-emptor hears of a sale one day, and calls on the vendor on the evening of the next, there is no delay or neglect on his part to fulfil the requirements of Mahomedan law. The law is exact and peremptory, and does not allow a moment's delay where it can be helped. When a pre-emptor receives intelligence of a sale during the night, and is unable to go out and call upon witnesses to attest his demand, but does so as soon as it is morning, his demand is valid. But he should go out and make his demand in the morning as soon as the people are stirring about their usual avocations—Ballie's Mahomedan Law, page 484.

The Judge felt himself bound by the ruling in *Mahomed Waris* v. *Hazee Emamooddeen* (2), but this Court is not bound by it. The ruling is contrary to Mahomedan law. It follows the ruling in an old case of the Sudder Court *Hakimmooddeen Bhooya* v. *Zuhiroodeen Bhooya* (1), which rests on no higher authority than the opinion of the *kazi-ul-kuzat*. No authority from any work on Mahomedan law is cited in support of the proposition that a man may delay one day. The rule I contend for is still more clearly laid down in a well-known Arabic work not yet translated into English. The Mayuk (3) which says:—"Nihaya says from Zakhira that, when the *shafee* is absent and afterwards was informed of the sale, then he should make *mawasabat*, and after that he should get so much time as will enable him to go to the purchaser or seller of the property for *ishhad*; but if this time has expired, and he did not himself go, or send some one, then the *shaffa* is invalid."

Mr. *C. Gregory* for the respondent.—The practice of this Court has been uniformly in favor of my contention. I may cause great inconvenience to alter it now. It ought not to be altered without some substantial reason. It only amounts to

(1) S. D. A., 1857, 454.
(2) 6 W. R., 173.
(3) Volume IV, p., 251.

this that the Court must give some reasonable time. It is absurd to say the pre-emptor must start at once on getting the information, and not stop until he finds the vendor or the purchaser. One day is not an unreasonable time to give. This is the only way a Court of Equity can carry out some of the strict and apparently absurd conditions of the Mahomedan law. I rely upon *Mahomed Waris* v. *Hazee Emamooddeen* (1)and upon *Hakimmoodeen Bhooya* v. *Zuhiroodeen Bhooya* (2), and also on the uniform practice of the Court as clearly indicated by those cases.

The Judgment of the Full Bench was delivered by,

NORMAN, J.—This case nas been submitted to a Full Bench in consequence of two decisions in the cases of *Mahomed Waris* v. *Hazee Emamooddeen* (1) and *Hakimmoodeen Bhooya* v. *Zuhiroodeen Bhooya* (2), in both which cases it was held that a delay of one day in making the *tulub-ishhad*, when a Mahomedan is making a claim for pre-emption, is not such a delay as to interfere with, or prejudice, the plaintiff's right to pre-emption under the Mahomedan law.

Now we may observe that, in the case in the Sudder Reports of 1857, Mr. Trevor and Mr. Money, who were the Judges forming the majority of the Court, admitted that the *fatwa* of the *kazi-ul-kuzat* on which they acted was not in accordance with the rule laid down by Sir William Macnaghten. That rule, which as we think is correctly stated, is as follows:—"It is necessary that the person claming the right of pre-"emption should declare his intention of becoming the "purchaser immediately on hearing of the sale" (which I may observe is the *tulub-mawasabat*), "and that he should, with the "least practicable delay, make affirmation by witness of such his "intention, either in the presence of the seller or of the purchas-"er, or on the premises."

The rule then stated by Sir William Macnaghten is that the *tulub-ishhad* should be made with the least practicable delay. Now on referring to the authorities on Mahomedan law which have been brought before the Court by Mr. Twidale, it is clear

(1) 6 W. R., 173. (2) S. D. A., 1857, 454.

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that the rule is one fairly deducible from those authorities. The first to which I may refer is Baillie's Digest of Mahomedan Law. At page 483 he says:—"The making of this demand (of "pre-emption) is measured by the ability to do. And when one "is able to make the demand in the presence, either of the pur- "chaser or the seller (though only by letter or a messenger), "and fails to do so; the right of pre-emption is annulled, to prevent "injury to the purchaser. If he (that is the claimant) leave the "nearest to go to one more remote, all being in the same city, "the right is not annulled on a favorable construction; other- "wise, if the more remote be in another city, or in one of "the villages belonging to the same city." It is plain, therefore, that if the pre-emptor, instead of going to the persons who reside nearest to him, goes either to the seller or purchaser who lives in another city at a distance, without taking care to give prompt notice to one that is nearest, he loses his right.

There is also a passage cited by Mr. Twidale from the Nihaya, a commentary on the Hedaya, which is thus spoken of by Mr. Morley in his Digest of Indian Cases. He says that it was written by Sheikh Akmalad-din Mahomed Ben Mahmud, who died in the Hijri year 786, A. D. 1384, and adds, "the Nihaya is much esteemed for its studious analysis "and interpretation of the text." In that book, Volume IV, page 251, commenting on the last line of the 1st paragraph, page 573 of the Hedayah, where the author of the Hedayah is speaking of the delay of the litigation, the commentator says:— "Nihaya says from Zakhira that, when the *shafee* is absent, "and afterwards was informed of the sale, then he should make "*mawasabat*, and after that he should get" (that is be allowed) "so much time as will enable him to go to the purchaser or "seller of the property for *ishhad*; but if this time has expired, "and he did not himself go, or send some one, then the *shaffa* is "invalid."

Mr. Samuels, the Judge who was in the minority when the case was before the Sudder Court, puts the rule, as it appears to me, upon the true ground. He says:—"The *fatwa* of the law "officer is quite irreconcileable with the principal stated by

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"Macnaghten and no authority is given for the doctrine, "which it enunciates on the sebject of the *tulub-ishhad*. It is "the opinion of the law officer apparently that *tulub-ishhad* may take place at any time, sbusequent to the *tulub-mawasabat* within the period of limitation. Were this the "law of pre-emption, no purchaser of property from a "Mahomedan would be safe; for *tulub mawasabat* may be and "constantly is a private act which the puchaser against whom "the right is claimed, has no power of questioning or refuting, "and the *tulub-ishhad* is the only public act connected with the "claim to pre-emption of, which the purchaser has necessarily "any cognizance. It appears to me clear from the text-books "that the *tulub-ishhad* is the public affirmation of the *tulub-mawasabat*, and that it must take place as soon after the *shafee* "has heard of the sale, and pronounced the *tulub-mawasabat*, as "he can procure witnesses and proceed to the premises, or to "the presence of the seller or purchaser. What may be 'the "'least practicable delay' in such cases is matter of evidence. "The Court must decide in each case whether due diligence "has been used or not."

We are of opinion then that the first branch of the question put to this Full Bench must be answered in the negative, and the second in the affirmative.

Before Sir Richard Couch, Kt., Chief Justice, Mr. Justice Bayley, Mr. Justice L. S. Jackson, Mr. Justice Macpherson, Mr. Justice Glover, and Mr. Justice Mitter,

1871 Dec. 22.

PANDIT SHEO PROKASH MISSER (DEFENDANT) *v.* RAM SAHOY SING (PLAINTIFF.)*

Occupancy, Right of—Ryot—Act X of 1859, *ss.* 6 *and* 7—*Act VIII of* 1869 (*B.C.*), *ss.* 6 *and* 7.

A ryot who has held or cultivated a piece of land, continuously, for more than twelve years, but under several written leases or pottas, each for a specific term of years, is entitled to claim a right of occupancy in that land, unless there is in the potta an express stipulation contrary thereto.

THE plaintiff brought this suit to recover possession of 20 bigas and 10 katas of land cultivated by him in Mauza

* Special Appeal, No. 692 of 1870, from a decree of the Officiating Judge of Bhaugulpore, dated the 20th January 1870, reversing a decree of the Deputy Collector of that district, dated the 3rd August 1869.