1872

KISTOKINKER GHOSE ROY v. BURRODACAUNT SINGH ROY.

Their Lordships, therefore, will humbly advise Her Majesty that this appeal ought to be allowed; that the orders of the Zillah Judge and of the High Court ought to be reversed; and that the appellants ought to be declared entitled to sue out execution of the decrees, and to recover also the costs of the proceedings in execution in both the Indian Courts. They will also be entitled to the costs of this appeal.

Appeal allowed.

Agent for appellants: Mr. *Barrow.*

Agent for respondents: Mr. *Wilson.*

APPELLATE CIVIL.

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

POORNO SINGH MONIPOOREE, AND OTHERS (DEFENDANTS) *v.* HURRYCHURN SURMAH (PLAINTIFF).*

1872
Sept. 4.

Pre-emption—Europeans—Cachar.

The right of pre-emption arises from a rule of law by which the owner of the land is bound. It is essential that the vendor should be subject to the rule of law. Therefore, where the vendor of certain land situate in Cachar was a European, the Court held that there was no right of pre-emption.

THIS was a suit brought by Hurrychurn Surmah against Thomas Ackroyd, as am-mooktear of Charles Koeglar and A. Huni, vendor, and Poorno Singh, Monipooree, and others, purchasers, to enforce his right of pre-emption and to obtain possession of certain land in Mouzah Nemye Chandpore, in Pergunnah Hallakandy, in Cachar.

The defendants contended that although, by local custom, the law of pre-emption applied to Hindus in some places, it had nothing to do with Europeans; that, even if it did apply to Europeans, the preliminaries had not been duly performed; and that the plaintiff was neither a neighbour nor a co-partner.

The Deputy Commissioner of Cachar fixed (*inter alia*) the following issues:—

* Regular appeal, No. 204 of 1871, from the decrees of the Officiating Deputy Commissioner of Cachar, dated the 11th June 1871.

1872

POORNO SINGH MONIPOOREE, v. HURRYCH URN SURMAH.

"Are Europeans bound by the law of pre-emption in Cachar?" and "Are the purchasers and pre-emptor affected by the fact that the vendor is a Christian?"

He found that no proof had been adduced by the plaintiff to prove that the custom applied to Europeans; that the plaintiff's right was not thereby lost, as the purchaser was a Hindu; that the custom of pre-emption prevailed in Cachar; that the right belonged to the Hindu pre-emptor. He further found that the preliminaries had been duly performed. He accordingly passed a decree in favor of the plaintiff for possession of the land in dispute on payment of Rs. 6,500, and dismissed the suit as against Thomas Ackroyd with costs.

The defendants, Poorno Singh, Goona Singh, and Jadub Singh, Monipoorees, appealed to the High Court.

The *Advocate-General, offg.* (Mr. *Paul*), (Mr. *Collis* with him) for the appellant.

Mr. *Woodroffe* (Baboo *Tarruckinath Sen* with him) for the respondents.

The *Advocate-General* (for the appellant) contended that there was no evidence that the custom of pre-emption prevailed throughout Cachar. It must be proved that the custom is applicable to Christians; it must be shown that they have adopted it—*Baboo Moheshee Lal* v. *Christian* (1). The plaintiff must show that the claim was binding against the defendants—*Baboo Mohesh Lall* v. *Christian* (2). Mahomedan law of pre-emption is not binding on any purchaser other than a Mahomedan—*Sheikh Kudratulla* v. *Mahini Mohan Shaha* (3). The right of pre-emption exists against the vendor only, who moreover must be a Mahomedan.

Mr. *Woodroffe* (for the respondents) contended that the custom prevails in Cachar. The right of pre-emption does not create a disability in the vendor, but it is the right of the pre-emptor. A local custom binds all the people of the locality.

(1) 6 W. R., 250 (2) 8 W. R., 443. (3) 4 B. L. R., F. B., 134.

The right can be claimed by all persons without distinction of creed; see Macnaghten's Mahomedan Law, Ch. iv, para. 4. As the custom prevails in Cachar, the defendants are bound by the custom. *Baboo Mohesh Lall* v. *Christian* (1) does not apply to the present case. The right of pre-emption attaches against the purchaser, not against the vendor, therefore the creed of the vendor is immaterial—*Mussamut Ladun* v. *Bhyro Ram* (2). [BAYLEY, J.—The law directs the pre-emptor to go to the vendor to cry aloud,—" I have purchased, &c."] The pre-emptor may go to the vendor or vendee, or to the land sold. The person to be diseised, is the person against whom the right is claimed, that is, the vendee, for the right of pre-emption does not arise before the sale is complete. If any right remained in the vendor, no right of pre-emption would arise—*Gurdayal Mundar* v. *Raja Teknarayan Sing* (3).

The Advocate-General in reply.

COUCH, C.J.—In the first of these appeals Poorno Singh, Goona Singh, and Jadub Singh, Monipoorees, the defendants, Nos. 2, 13, and 38 in the original suit, are the appellants, and the principal objection taken in the grounds of appeal is that the right of pre-emption claimed by the plaintiff did not exist as to all or any part of the land in suit, as the vendors to the appellants and their co-defendants were Europeans.

No issue was raised in the suit as to whether the law of pre-emption prevailed by local custom in Cachar where the land is situated, or as to whether the appellants as Hindus were bound by it. The appellants in their written statement alleged that the law had nothing to do with Europeans from whom they purchased; that the plaintiff was not a co-sharer or a " neighbour;" and that he never legally performed, or observed the necessary preliminaries. This being a regular appeal, if it appeared to us essential to the right determination of the suit upon the merits that the other questions should be determined, we might, under s. 354 of the Code of Procedure refer them to the Lower Court to

(1) 8 W. R., 446. (2) 8 W. R., 255. (3) B. L. R., Sup. Vol., 166,

1872

POORNO SINGH, MONIPOOREE, v. HURRYCHURN SURMAH.

be tried; but we think it is not essential, as, in our opinion, the case is not within the law of pre-emption, assuming that it does prevail in Cachar, and that the appellants, the purchasers, are governed by it.

The plaintiff who claims the right of pre-emption is a Hindu, and the vendor, Mr. Ackroyd, is a European. The Deputy Commissioner on the issue which was framed, "Are Europeans bound by the law of pre-emption in Cachar?" says he finds that only two cases are on record in the Courts in Cachar in which Christians or Europeans have been parties in cases of this nature, and that he does not think that these two cases afford any positive evidence on the subject. Having said this and found that issue for the defendant Ackroyd, upon which he dismissed the suit against him with costs, he proceeded to decide upon the last issue he had framed as to whether the purchasers and pre-emptor are affected by the fact that the vendor is a Christian, that they are not. The reasons he gives for this are that it does not appear to him to be just that the privilege should extend to the Hindu purchasers who have nothing to do with the seller's exemption, and that it seems to him that in Cachar it is most important that the right of a sharer in land to pre-emption should be most carefully guarded. The law of pre-emption was much considered in *Sheikh Kudratulla* v *Mhini Mohan Shaha* (1), where it was held by the late Chief Justice, and Kemp and Mitter, J.J., that a Hindu purchaser is not bound by the law in favor of a Mahomedan co-partner, although the co-partner from whom he purchased was a Mahomedan, the plaintiff having failed to prove that the Hindus in the district had adopted the custom. On the other hand, Norman and Macpherson, J.J., held that, whenever a Mahomedan has a right of pre-emption, it is not defeated by the mere fact that the purchaser is a Hindu. The question was referred to a Full Bench in three cases, but in all of them the vendor was a Mahomedan, and the question raised in this appeal did not arise. In the argument before us for the respondent, some expressions of Mitter, J., and the Chief

(1) 4 B. L. R., F. B., 134.

Justice were relied upon as showing that the vendor need not be a Mahomedan, but I think no such inference can be drawn from them. That question was not under consideration, and the words were used with reference to a case in which the vendor was a Mahomedan. Mr. Woodroffe, who appeared for the respondent, admitted that he could not produce any case in which the law of pre-emption had been applied, and the vendor was not governed by it either as a Mahomedan or by custom. The absence of any such case, the law being frequently insisted upon, goes far to show what is the law. It appears to us that the right of pre-emption arises from a rule of law by which the owner of the land is bound. When a Mahomedan acquires land, it becomes subject to the law in the same manner as it becomes subject to his law of inheritance. If there ceases to be an owner who is bound by the law, either as a Mahomedan or by custom, the right no longer exists. It is not annexed to the land so as to continue to affect it when it has been transferred to a person not bound by the law. The right also is not a mere personal one in the pre-emptor. "The cause of it is the junction of the property of the *shafee*, or person claiming the right with the subject of purchase," Baillie, 471. He has it only as a co-sharer or neighbour, and on his ceasing to be either his right is gone. We think it is essential that the vendor should be subject to the rule of law. If it were not so, a Mahomedan might become a partner in an estate owned by Christians or Hindus, which they could not prevent, and then he might prevent their selling their shares to any other person.

The decision of the Lower Court that the law of pre-emption applied in this case is therefore, in our opinion, wrong; and on this ground the decree should be reversed, and the suit dismissed with costs as against all the defendants.

Upon the fourth issue, the Deputy Commissioner says—"There can be no doubt whatever that Haro Thakoor (the plaintiff) fully and exactly performed all the preliminary conditions necessary to enforce the right of pre-emption when he heard of the sale on the spot to the purchasers and the seller, that is to say, if the real sale was the sale on 18th May. The evidence on these points is perfectly good." We think there may be some, if not

1872

POORNO SINGH MONIPOOREE v. HURRYCHURN SURMAH.

considerable, doubt whether the preliminary conditions were performed, and whether there was any thing more than an attempt by the plaintiff to induce the purchasers to give up their bargain to him; and it would be more satisfactory if the judgment showed that the Deputy Commissioner had carefully considered the evidence. He may have done so, and we must suppose that he has: but his judgment on either issue raises a suspicion that he has not given the question the full consideration it required. As we are of opinion on the other ground that the suit should be dismissed, we think it is not necessary to decide whether the preliminaries were duly performed.

Appeal allowed.

ORIGINAL CIVIL.

Before Mr Justice Macpherson.

MOTHOORMOHUN ROY *v.* JADOOMONEY DOSSEE AND ANOTHER.

1872
Dec. 11.

Jurisdiction of High Court—Cause of Action—Promissory Note—Letters Patent, 1865, *cl.* 12.

The High Court has no jurisdiction to entertain a suit brought upon a promissory note made without, but payable within, the local limits of its jurisdiction leave to institute the suit not having been first obtained.

See also 14 B.L.R. 368. 13 B.L.R. 464.

THIS was a suit to recover the principal and interest due on a promissory note executed by the defendants at Shamnugger, and made payable to the plaintiff in Calcutta. Leave to sue had not been obtained before the institution of the suit.

Mr. *Branson* and Mr, *Sutherland* for the plaintiff.

Mr. *Woodroffe* and Mr, *Fergusson* for the defendants.

Mr. *Woodroffe* took the preliminary objection that the Court had no jurisdiction.

Mr. *Branson*.—The defendant's written statement does not raise the question of want of jurisdiction, and it is too late to raise it now. [Mr. *Woodroffe*.—The plea of want of jurisdic-