Before Mr. Justice L. S. Jackson and Mr. Justice Mitter.

PROKAS SING, PLAINTIFF, *v.* JOGESWAR SING, DEFENDANT.*

1868
Sept. 9.

Mohammedan Law—Pre-emption—Ishtehad.

It is necessary to the enforcement of the right of pre-emption that all the prescribed formalities should be strictly complied with.

To the ceremony of Ishtehad, or Talad-Ish-had, it is essential that there should be an express invocation of witnesses.

THIS was a suit to enforce the right of pre-emption, by setting aside a deed of sale executed in favor of the defendant.

The defence set up was, that the plaintiff had failed to perform the preliminary ceremonies required by the Mohammedan law.

The Moonsiff dismissed the suit of the plaintiff, on the ground, that the evidence adduced by him in support of his claim was not reliable and satisfactory.

On appeal, the Principal Sudder Ameen affirmed the decision of the Moonsiff. He held that, "in enforcing the right of pre-emtion, the ceremonies of *Talab Mawasibat* and *Ishteńad* must be strictly observed; otherwise the right is lost. In the present case, supposing the evidence of the witnesses on the part of the plaintiff to be true, it only proves that the plaintiff observed the rite of *Mawasibat*; but the other rite of *Ishtehad*, or the affirmation by witnesses, was not followed. All that the witnesses state is, that the plaintiff, in the presence of the vendors and vendees, declared that he had the right of pre-emption, and asked them to accept the money and cancel the sale; but he called none to stand witness to his declaration by repeating the technical words, "O ye bear witness." It is not enough that the declaration was made in the presence of persons who accompanied the plaintiff to the spot where the sale had taken place, but he must call some of them by word of mouth, and use the aforesaid technical words. As this has not been done by the plaintiff, his claim therefore falls to the ground."

* Special Appeal, No. 166 of 1868, from a decree of the Officiating Principal Sudder Ameen of Shahabad, affirming a decree of the Moonsiff of Shaseram in that district.

1868

PROTAB SING v. JOGESWAR SING.

The plaintiff appealed.

Baboo *Chandra Madhab Ghose* (with him Baboo *Hem Chandra Banerjee*) for appellant.—The facts deposed to by the witnesses and not disbelieved by the lower Appellate Court, are sufficient to constitute a legal and valid performance of both the ceremonies of *Talab Mawasibat* and *Ishtehad*. When all the formalities sanctioned by law have been duly complied with by the pre-emptor, it matters little in what manner he proves the assertion of his right (1). All that the Mohammedan law enjoins is, that the right of pre-emption is to be asserted in the presence of witnesses, who are merely required to bear testimony to the fact. It is nowhere positively laid down, as held by the Principal Sudder Ameen, that, in the observance of the rite of *Ishtehad*, the use of the technical words, "O ye bear witness," is so essential as wholly to invalidate the claim of the plaintiff, merely because those words were not formally repeated.

Baboo *Krishna Sakha Mookerjee* for respondent.—The right of pre-emption is a peculiar custom, and a peculiar mode of proof in the assertion of that right is prescribed by the Mohammedan law to make it valid. It has always been held, that this right is so weak in its nature, that it is not even favoured by Mohammedan lawyers themselves, and Courts would not lend their assistance to enforce it, unless all the preliminary formalities, which the law enjoins, however trivial they might appear, are strictly complied with. To make the observance of the rite of *Ishtehad* complete, it is indispensably necessary that there should be an express invocation of witnesses by means of those technical words, when the pre-emptor declares his right at the time of sale of the property in dispute. But it is not denied that those words were not used by the plaintiff. Hence one of the essential requisities in the declaration of the right of pre-emption is wanting; and the suit of the plaintiff has, therefore, been rightly dismissed by the lower Courts. *Iswar Chunder Shaha* v. *Mirza Nisar Hossein* (2).

(1) 3 Hedaya, 571. (2) W. R., (Jan. to July 1864), 351.

1868

PROKAS SING v. JOGESWAR SING.

The judgment of the Court was delivered by

JACKSON, J.—In this case, which we have taken time to consider, it now appears to us that the judgment of the lower Appellate Court must be affirmed.

It was found, as a fact, that no express invocation of witnesses, such as is contemplated in the term *Ishtehad* had taken place, but that certain persons who had accompanied the pre-emptor, apparently for the purpose of carrying the money, which he intended to offer as the price of the property sold, were casual witnesses of what took place.

In the decision of the Full Bench, in the case of *Fakir Rawot* v. *Sheikh Emambaksh* (1), it was observed, that the right of pre-emption as created by the Mohammedan law, or established by custom in certain parts of India, amongst persons not Mohammedans, is a right, weak in its nature, and which cannot be enforced except upon compliance with all the formalities which are prescribed.

It is quite clear that the particular formality of *Ishtehad* was not observed in the present case, and if we were to admit, in lieu of that formality, something which the plaintiff might choose to consider tantamount to it, we should be opening the door to serious laxities, or carrying the law of pre-emption further than it has been yet carried, or than probably its originators contemplated.

We think, therefore, that the decision of the lower Appellate Court must be affirmed, and the special appeal dismissed with costs.

(1) No. 1116 of 1861 ; 28th Sept., 1863.