The 23rd April 1874.

Present:

The Hon'ble Louis S. Jackson and W. F. McDonell, *Judges.*

Pre-emption—Mahomedan Law.

Case No. 2063 of 1873.

Special Appeal from a decision passed by the Additional Subordinate Judge of the 24-Pergunnahs, dated the 4th August 1873, reversing a decision of the Moonsiff of Alipore, dated the 8th November 1872.

Nubee Buksh *alias* Golam Nubee and others (three of the Defendants), *Appellants,*

versus

Kaloo Lushker and others (Plaintiffs), *Respondents.*

Mr. Ameer Ali and *Baboo Anund Gopal Paleet* for Appellants.

Moonshees Mahomed Yusuf and *Abdool Baree* for Respondents.

As soon as a contract is ratified by acceptance, and the vendor has gone so far that he cannot legally draw back, it is time for the pre-emptor to step in.

A pre-emptor is not required to tender the purchaser's price or any price at the time of making his demand, and, so long as a party claiming a right of shuffa pays the amount which the Court considers to be the proper price, he brings himself in Court within a reasonable time.

On the question of pre-emption, the Court must act in strict accordance with the provisions of the Mahomedan Law, rather than on what it thinks just and equitable.

Jackson, J.—THIS was a case of asserted pre-emption on the part of the plaintiff, who sought to enforce that right under the Mahomedan Law. His suit was dismissed by the Moonsiff, who not only considered that the forms required by the Mahomedan Law on that subject had not been complied with, but entirely disbelieved the witnesses called by the plaintiff, and we are bound to say he assigned some very good reasons for disbelieving them. The decision was appealed against, and the Subordinate Judge, Baboo Kedaressur Roy, who heard the appeal, reversed the judgment of the Moonsiff, holding that the requisite forms had in substance been complied with, and that there was no ground for rejecting the testimony of the plaintiff's witnesses. He consequently gave the plaintiff a decree. Several objections have been taken to that decision: The learned Counsel for the appellant contended, in the first place, that the plaintiff's claim had not been made at the proper time, because the contract had not then been reduced to writing, and he showed that the kobala executed by the defendant bore a later date than that mentioned by the plaintiff as the date of purchase. On behalf of the respondent it is contended that a contract under the Mahomedan Law may be complete without being reduced to writing and engrossed on stamps, although the exigencies of the law of British India require that in certain cases a contract should not only be a written one, but must be engrossed on stamp, and also registered. It seems to us that, as soon as a contract between two parties is ratified by acceptance, and the vendor has gone so far that he could not legally draw back, and the purchaser might compel him specifically to perform his part of the contract, the sale is made so far as makes it time for the pre-emptor to step in. That, it is not denied, has taken place in the present instance.

A further question was as to the difference in price, for it appeared that the plaintiff wanted to take the property at a price less than what the purchaser had offered. On this point it seems to us that a pre-emptor is not required to tender the purchaser's price or any price at the time of making his demand, and, so long as a party claiming a right of *shuffa* pays the amount which the Court considers to be the proper price, we think he brings himself in Court within a reasonable time.

Another point was the alleged equal or superior right of the defendant. On this point it seems to us that the Subordinate Judge, although he does not come to a very clear finding on this question, has virtually found that the claim of the plaintiff is superior to that of the defendant.

There is one point, however, on which the judgment of the Lower Appellate Court is, we think, not sufficient, that is, as to the complete and strict observance of the forms required by the Mahomedan Law. This right

of *shuffa*, as has been repeatedly observed in this Court, is a very peculiar right, weak in its nature, and one which requires for the comfort of the community to be enforced by proper observance of all its essentials. One of those essentials is the performance of the ceremony called *tullubeh ist shehad*. Now, it seems to us that, on this part of the case, and we think also to some extent as to the respective rights of the plaintiff and the defendant on the question of pre-emption, the Subordinate Judge has looked rather in the light of what he thought just and equitable than in strict accordance with the express provisions of the Mahomedan Law. There is, it seems, at least in so far as is shown to us, only one witness, *viz.*, Jonab Ali, who has deposed to the express terms in which the ceremony called *tullubeh ist shehad* is made. We are willing to concede, if that witness could be entirely and absolutely believed, that the words to which he deposes may be accepted as a compliance with the terms of the law, regard being had to the parties claiming the right in this instance, who are persons of an inferior class, and not acquainted with the Arabic language, and for whom some allowance must be made; but it seems to us to be a very serious question whether this witness is to be believed. The Moonsiff, as we have already said, expresses himself in very strong terms as to the credibility of the plaintiff's witnesses, and the Subordinate Judge, before he overrules that conclusion, ought to give the very fullest weight to the opinion of the Judge who heard the witnesses. It is not competent to us, sitting here in special appeal, to determine finally whether this witness or that witness is to be believed. We think, therefore, that the case must go back to the Lower Appellate Court in order to determine carefully whether the witness, Jonab Ali, is to be believed in the statements that he makes, and whether the words, which he describes as having been used by the purchaser on this occasion, were words really intended to meet the requirements of the Mahomedan Law, or only ordinary expressions of a disappointed Bengalee purchaser. As the case is going back to the Lower Appellate Court, we think there ought to be a further direction to the Lower Appellate Court to consider and determine the question whether, under the Mahomedan Law, the plaintiff was entitled to a right of pre-emption over all, or at least over one, of the defendants.

The costs of this appeal will follow the result.

The 23rd April 1874.

Present:

The Hon'ble Louis S. Jackson and W. F. McDonell, *Judges.*

Ex-parte Decree—Act VIII. of 1859, s. 119—Appeal—Notice under s. 216.

Case No. 2060 of 1873.

Special Appeal from a decision passed by the Officiating Additional Judge of Jessore, dated the 11th June 1873, reversing a decision of the Moonsiff of Magoorah, dated the 16th July 1872.

Bimola Soondaree Dassee and another (two of the Defendants), *Appellants,*

versus

Kalee Kishen Mojoomdar (Plaintiff), *Respondent.*

Baboo Grija Sunkur Mojoomdar for Appellants.

Baboo Bungshee Dhur Sen for Respondent.

An *ex-parte* decree of June 1865 kept alive by successive applications for execution was subsequently set aside on an application of 14th August 1871 (within 30 days after attachment in execution) made under Act VIII. of 1859, s. 119, and a judgment was passed on the merits. The Lower Appellate Court reversed the order setting aside the *ex-parte* decree:

HELD that, in so far as the Moonsiff had decided that the application was in time, he did not come under s. 119, and therefore his order was not final, and the Lower Appellate Court had jurisdiction to inquire into his proceedings.

A notice under s. 216 stands upon a different footing from a summons or other notice which a party is bound to serve, and it must be presumed that a Court, until the contrary is proved, has duly issued such notice where required by law to do so.

Jackson, J.—THIS is a special appeal from the decision of the Additional Judge of Jessore, who reversed the decision of the Moonsiff of Magoorah, by which decision a suit by the plaintiff, Kalee Kishen Mojoomdar, commenced in or before the year 1865, was dismissed by a final order of the 16th July 1872. The plaintiff, it seems, got an *ex-parte* decree against the defendant on the 12th June 1865. An application was made, on the 17th May 1868, for execution of that decree, but the proceedings on that occasion did not go beyond notice to the debtor. A further application was made on the 14th June 1871. Notice was issued, and some property was attached on the 29th July, and, about 16 days afterwards, that is, on the 14th August 1871, the defendant made an application, under