

(1879) 07 CAL CK 0001

Calcutta High Court

Case No: None

Janger Mahomed

APPELLANT

Vs

Mahomed Arjad and
Others

RESPONDENT

Date of Decision: July 28, 1879

Citation: (1880) ILR (Cal) 509

Hon'ble Judges: Prinsep, J; Morris, J

Bench: Division Bench

Judgement

Morris, J.

We think that the Judge has not correctly stated the law on the point of pre-emption that is here raised, and has somewhat misunderstood the ruling which he has quoted in the case of Chamroo Pasban v. Pulwan Roy (16 W.R. 3). The question before the Court in that case seems to have been, whether it was necessary to render valid the ceremony of tulub-ish-had to make the affirmation before witnesses in the presence of either the purchaser or the vendor. The Court held, that "the affirmation before witnesses is required to be in the presence of the vendor and the purchaser, in order that they may know what is being done against their interests." And further on added--"It is quite clear that, whether it be the vendor or the purchaser, whoever is in possession of the lands, should be present to witness to the affirmation." We do not, however, understand the Court by this last sentence to lay it down as a distinct proposition of law, that if the purchaser only is present and not in possession of the land, the affirmation before him in the presence of witnesses would invalidate the right claimed.

2. In the Digest of Mahomedan Law by Bailie, page 489, the law on this point is thus stated--"To give validity to the tulub-ish-had, it is required that it be made in the presence of the purchaser or seller, or of the premises which are the subject of sale." And again (p. 490)--"If possession has not been taken of the things sold, the pre-emptor has an option, and may, if he please, make the demand in the presence

of the seller or of the premises; or he may make it in the presence of the purchaser, though he is not in possession, because he is the actual proprietor."

3. In the present case, there is no doubt that the invocation was made by the claimant, pre-emptor, in the presence of the purchaser on the premises. The Subordinate Judge was therefore wrong to dismiss the suit of the plaintiff on the ground that the ceremony had not been properly performed in this respect. We observe that the case generally has not been fully tried. The Subordinate Judge has not determined the validity or otherwise of the first ceremony of tulub-moowathubut, on which the Munsif expressed a strong opinion, and has confined himself to dealing only with the ceremony of tulub-ish-had. The case must, therefore, go back to the lower Court, in order that it may be re-tried. It will be necessary for the Court to determine, whether the ceremony of tulub-moowathubut, as well as the ceremony of tulub-ish-had, has been duly performed, and also the further issue, whether the plaintiff has a right of pre-emption at all.

4. Costs will abide the result.