(1872) 09 CAL CK 0002

Calcutta High Court

Case No: Regular Appeal No. 204 of 1871

Hurrychurn Surmah		APPELLANT
	Vs	
Poorno Singh Monipooree and Others		RESPONDENT

Date of Decision: Sept. 4, 1872

Judgement

Sir Richard Couch, Kt., C.J.
In the first of these appeals Poorno Singh, Goona Singh, and Jadab Singh, Monipoorees, the defendants, Nos. 2, 13, and 38 in the original suit, are the appellants, and the principal abjection 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 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.

2. The plaintiff who claims the right of pre-emption is a Hindu, and the vender, Mr. Ackroyd, is a European. The Deputy Commissioner on the issue which was farmed, "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 issues 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 4 B.L.R., F.B., 134 where it was held by the late Chief Justice and Kemp and Mitter, JJ., 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, JJ., 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 Justice were relied upon as showing that the vender need not by 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 vender 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.

3. 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 19th May. The evidence on these points is perfectly good." We think there may be some; if not considerable, doubt whether

the preliminary conditions were performed, and whether there was any thing more than attempt by the plaintiff to induce the purchasers to give up their bar gain to him; and it would be mere satisfactory if the judgment showed that the Deputy Commissioner had carefully considered the evidence. He may hope 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.