

(1870) 02 CAL CK 0012

Calcutta High Court

Case No: Regular Appeal No. 223 of 1869

Jadu Sing

APPELLANT

Vs

Rajkumar and Others

RESPONDENT

Date of Decision: Feb. 16, 1870

Judgement

Bayley, J.

The plaintiff appeals against this decision, and urges both as to the merits of the case and the law that he has established his claim. As to the merits, he refers to the evidence of his witnesses as being sufficient to prove that he duly performed both the preliminaries above-mentioned, to the fact that he tendered his own evidence in the case, and especially that he asked that the defendant-purchaser, Durga Prasad Sing, might be examined, stating at the same time that he was willing to rest his case on that evidence, As to the law it is pressed by the pleader for the appellant that it is not necessary that the precise terms, as required by the Arabic text of the Mahomedan law, should be shown to have been employed in performing the preliminaries; that it is sufficient to show that the first claim, tulub-mawasabat, was made with reasonable promptitude and in substance with the formalities required by the Mahomedan law; and that it is sufficient that the tulub-ishhad be made by an invocation of witnesses; and that the evidence adduced by the plaintiff in this case shows that both these formalities had been thus duly observed. The only question we have to decide is whether the plaintiff did actually perform the preliminaries necessary to maintain his claim.

2. Now, commencing with the case on the merits, we have the evidence of Dhari Sing. This witness is the person from whom it is stated that the information of the sale emanated. His evidence is to the effect that, being at Shewhore to visit a relation on leave granted him by the plaintiff, his master, he went to the Deputy Magistrate's tent where the cutcherry was held, for the purpose of seeing the tamasha; that it was about 4 or 5 P. M.; that the Deputy Magistrate had the deed of Harnath presented to him; that, on being questioned as to the character of the deed, Harnath answered that it was a bill of sale of Mauzahs Hulpore, Barabil, and Bhoolwae executed by him in favor of Durga Prasad;

that Harnath then admitted that he received the purchase-money, but did not state the amount; that the Deputy Magistrate, as Sub-Registrar, then registered the deed; that a little while after, he, the witness, Dhari Ring, saw Tilack Lal, a mooktear in the cutcherry, who told him, apparently without any question on his part, that he knew all about the sale; that the mauzas were really sold for rupees 23,812; but that, in order to defeat the claim of pre-emption, a false consideration of rupees 37,000 had been recited in the deed. It does not, however, appear from the evidence that any mention as to the right of pre-emption was made by Dhari to Tilack, but the statement by Tilack as to the object of the sale being to defeat the plaintiff's right of pre-emption appears to have been made by him entirely of his own motion gratuitously. The evidence of the same witness goes on to show that he, the day after, told the plaintiff about the sale, upon which the plaintiff suddenly started up while sitting on his bed, and exclaimed three times "I have bought," "I have bought," "I have bought." The two other witnesses for the plaintiff, Ramkishan and Gadhar Sing, also deposed to the same effect. It is true that there is one strong point in the plaintiff's favor, viz, that he tendered his own evidence in the case; but it is also true that there are some discrepancies between that evidence and the evidence of the persons whom he called in proof of the fact that he performed the preliminary of tulub-ishhad, and to these I shall have to refer presently; but in the meantime I must say that to my mind there is exceeding doubt as to the credibility of the witness Dhari and the strange occurrence of the circumstances above stated in which he, Dhari, happened to go to the Deputy Magistrate's cutcherry, and quite a propos to see the deed registered, how equally a propos he met Tilack there, who told him quite causelessly and gratuitously that the object of the sale was to defeat the right of pre-emption, and how he subsequently brought back the news to the plaintiff. It must at the same time be borne in mind that this witness was a servant of the plaintiff going to Shewhore on leave from his master, the plaintiff. I have also strong suspicion as to the evidence owing to the tutored appearance of the statements of Dhari Sing, Ramkishan, and Gadhar Sing, with regard to the thrice-repeated words "I have purchased," "I have purchased," "I have purchased," and the manner in which each of the witnesses set forth specifically that the plaintiff started up immediately on hearing of the sale, and made his exclamations above-mentioned. It is curious that three Hindus should have in the same manner spoken of the plaintiff having instantly started up at the news; for this circumstance would entirely fill up the requirement of the test of the Ma homed an law as to the necessity of tulub-mawasabat being immediately performed. On the whole I concur with the Subordinate Judge who had the advantage of having the witnesses before him, and remarking upon their demeanour, that the evidence "in this case is not sufficiently credible to prove the plaintiff's right of preemption. I would add that the proof required from a plaintiff in a case of pre-emption must be of the strongest kind. Such have been the concurrent rulings of late years in this Court, and this has been strongly laid down, with reference to the policy of the law and the weak character of the right of pre-emption in two cases, one Isser Chunder Shaha v. Mirza Nisar Hossein (1864) W.R. 351, the other [Prokas Sing Vs. Jogeswar Sing](#) . Looking to all the circumstances, I would say that the plaintiff has not given sufficient evidence to render his story, with regard to the performance of the necessary preliminaries to support

his claim of pre-emption, credible.

3. I do not however wish to dispose of the case solely on that ground. I would further wish to give my opinion, as to the point discussed on both sides, as to what is sufficient with regard to the performance of tulub-ishhad," and whether that has been duly performed in this case or not. The first of the authorities that I will cite is to be found at page 572, Book 38, Volume III, Hedaya. It says:--"The manner of claim by affirmation and taking to witness is, the claimant saying such a "person has bought such a house, of which I am the shafee; I have already claimed my privilege of shaffa, and now again claim it, be therefore witness thereof." Now clearly there is neither in the evidence, nor in the actual words spoken by the plaintiff, anything approaching the terms, I have already claimed my privileges of shaffa, and I claim it "again." No doubt there are words such as "I have right," "I have cited witnesses; but as to their sufficiency in this particular case, with reference to the time and occasion on which they were employed, I shall have to observe hereafter.

4. Macnaghten in his work on Mahomedan Law, page 184, also states that the tulub-ishhad should be performed by the pre-emptor stating--"I have claimed pre-emption," or the like, I am a claimer of pre-emption," or I have a right of pre-emption to which I have laid claim, and I still claim it. Bear witness therefore to the fact." It is true that in page 483 of Baillie's Digest Mr. Baillie says, that the invocation of witnesses is not necessary to the tulub-mawasabat, and draws the distinction between that demand and talab-ishtehad. He says: By tulub-ishhad, or demand with invocation of witnesses, (also styled lukreer) is meant a person calling on witnesses to attest his tulub mawasabat. or immediate demand. The invocation of witnesses is not required to give validity to that demand, but only in order that the pre-emptor may be provided with proof in case the purchaser should deny the demand saying, "you did not demand your right when you heard of the sale--nay you abandoned your right;" while the pre-emptor says, on the other hand, "I did demand it." When the word being with the purchaser, the onus probandi would be cast on the other. To give validity to the tulub-ishhad, 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 the person claiming the right of pre-emption should say, in the presence of one or other of them "such a one has purchased this mansion," or a mansion (specifying its boundaries) and I have demanded the pre-emption and now so demand; bear ye witness to this." The reason of the distinction is given in the Hedaya, Vol., III, page 571, it is stated that, "to give validity to tulub-ishhad or demand with invocation, the invocation of witnesses is not "required; 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;" but there can be no question in this case that the plaintiff did not act up to the legal requirements or to the tulub-ishhad. It is clear from the evidence that all his words amounted to nothing more than these--"I have a right," not specifying what right, you be witnesses." I think therefore that, in a case of pre-emption, where the claim itself is one of good policy, and the law requires strict proof from the plaintiff of all the formalities being minutely observed, the plaintiff has not,

upon the evidence, fulfilled the conditions of tulub-ishhad.

5. In regard to the witnesses, Jay Gabind Sing and Ramtahal Sing, their evidence is merely to the effect that the plaintiff proposed to Durga Prasad to pay him the money for which the mauzas were purchased by him, and asked him to return the deed of sale, as he was a coparcener with a right (what right that was, is not mentioned); but that Durga Prasad refused to do so. These witnesses also depose that the transactions took place at Durga Prasad's house at Madhuban. The plaintiff, however, in his deposition says that, when he went to Mauza Barahil, Ramtahal and Tilak Sing were cited by him as witnesses. The plaintiff also says that he went to Shewhore and told Harnath that he had a right to the mauzas which had been sold to Durga Prasad, and asked him to receive the real purchase-money, and obtain a return of the bill of sale from the vendee. The plaintiff, however, did not say that he called Nanda Lal and Fowzdar Sing to witness the refusal of Harnath; but in the depositions of those two witnesses, we find that, after the plaintiff had offered Harnath the purchase-money, and asked him for the bill of sale, Harnath refused, and the plaintiff called those persons to be witness thereof. There is nothing in the deposition of the patwari Nanda Lal, or any one examined after him, to show that they were called to witness the performance of the tulub-ishhad.

6. On the whole I am unable to say that, with all this evidence before him, and with reference to all the circumstances above-stated, the Subordinate Judge has been wrong in dismissing the plaintiff's suit. I would, therefore, dismiss this appeal with costs.

Kemp, J.

7. I am of the same opinion. The plaintiff, appellant, bases his right of pre-emption as being a sharik or partner in the thing sold, not as a "shafa khalit," i.e., a partner in the rights, as of water or way.

8. It is certainly very probable that he would claim such right; as, the estate being joint, it would inconvenience him to admit an entire stranger as a co-sharer. It may also be that he would give a higher price than that offered by a third party.

9. The Subordinate Judge, who had the witnesses before him, and who was competent from his knowledge of the language in which the evidence was given, and of the habits of the people, to arrive at a right estimate of the value of the evidence, has come to the conclusion that the witnesses who have deposed to the observance by the plaintiff of the requirements of the Mahomedan law, viz., the tulub-mawasabat and the tulub-ishhad are not to be believed. I am not prepared to say that he has come to a wrong conclusion; and unless the Court is satisfied that he was clearly wrong in his conclusion, we should not be justified in setting aside his finding on a question of fact.

10. I am, however, clearly of opinion that the plaintiff, even admitting his witnesses to be entitled to belief, has failed altogether to establish that he complied with the requirements of the law, of which there must be strict proof. My learned colleague has given the

authorities on the subject taken from the Hedaya and decisions of this Court. The precedents quoted by Macnaghten, in his work on the Mahomedan law, are as stated in the preface to the work "legal expositions which have been observed in Courts of Justice." The precedent from Macnaghten referred to by Mr. Justice Bayley is in accordance with the text of the Hedaya. There is no absolute necessity for the pre-emptor to make the tulub-mawasabat in the presence of witnesses. It is usually done in the presence of witnesses, in order that the pre-emptor may be provided with proof, in case the purchaser should deny the demand. I am also of opinion that it is not material in what precise words the tulub-mawasabat is made, so long as the words used intelligibly express the demand; but with reference to the record, and the more important requirement of the Mahomedan law, viz., the tulub-ishhad, I am clearly of opinion that the Mahomedan law requires a strict adherence to rules, however technical they may be. The plaintiff has not complied with these rules, either in substance or in form. He did not state to the vendor, to the vendee, or on the land sold, that he was the shafee; that he had already claimed his privilege of shufa by making the tulub-mawasabat; and that he again claimed it, calling upon others to be witnesses thereof.