
(1871) 06 CAL CK 0018

Calcutta High Court

Case No: Regular Appeal No. 174 of 1870

Latif Hossein and
Another

APPELLANT

Vs

Mussamat Jamilan and
Another

RESPONDENT

Date of Decision: June 8, 1871

Judgement

Norman, Officiating C.J.

1. This case has been submitted to a Full Bench in consequence of two decisions in the cases of Mahomed Waris v. Hazee Emamooddeen 6 W.R., 173 and Hakimmoodeen Bhooya v. Zuhiroodeen Bhooya S.D.A., 1857, 454, in both which cases it was held that a delay of one day in making the tulub-ishhad, when a Mahomedan is making a claim for pre-emption, is not such a delay as to interfere with, or prejudice, the plaintiff's right to pre-emption under the Mahomedan law. Now we may observe that, in the case in the Sudder Reports of 1857, Mr. Trevor and Mr. Money, who were the Judges forming the majority of the Court, admitted that the fatwa of the kazi-ul-kuzat on which they acted was not in accordance with the rule laid down by Sir William Macnaghten. That rule, which as we think is correctly stated, is as follows:-- "It is necessary that the person claiming the right of preemption should declare his intention of becoming the purchaser immediately on hearing of the sale" (which I may observe is the tulub-mawasabat), "and that he should, with the least practicable delay, make affirmation by witness of such his intention, either in the presence of the seller or of the purchaser, or on the premises."

2. The rule then stated by Sir William Macnaghten is that the tulub-ishhad should be made with the least practicable delay. Now, on referring to the authorities on Mahomedan law which have been brought before the Court by Mr. Twidale, it is clear that the rule is one fairly deducible from those authorities. The first to which I may refer is Baillie's Digest of Mahomedan Law. At page 483 he says:-- "The making of this demand (of preemption) is measured by the ability to do. And when one is able to make the demand in the presence, either of the purchaser or the seller (though only by letter or a messenger), and

fails to do so, the right of preemption is annulled, to prevent injury to the purchaser. If he (that is the claimant) leave the nearest to go to one more remote, all being in the same city, the right is not annulled on a favorable construction; other-wise, if the more remote be in another city, or in one of the villages belonging to the same city." It is plain, therefore, that, if the pre-emptor, instead of going to the persons who reside nearest to him, goes either to the seller or purchaser who lives in another city at a distance, without taking care to give prompt notice to one that is nearest, he loses his right.

3. There is also a passage cited by Mr. Twidale from the Nihaya, a commentary on the Hedaya, which is thus spoken of by Mr. Morley in his Digest of Indian Cases. He says that it was written by Sheikh Akmalad-din Mahomed Ben Mahmud, who died in the Hijri year 786, A.D. 1384, and adds, "the Nihaya is much esteemed for its studious analysis "and interpretation of the text." In that book, Volume IV, page 251, commenting on the last line of the 1st paragraph, page 573 of the Hedayah, where the author of the Hedayah is speaking of the delay of the litigation, the commentator says:-- "Nihaya says from Zakhira that, when the shafee is absent, and afterwards was informed of the sale, then he should make mawasabat, and after that he should get" (that is be allowed) so much time as will enable him to go to the purchaser or seller of the property for ishhad; but if this time has expired, and he did not himself go, or send some one, then the shaffa is invalid."

4. Mr. Samuels, the Judge who was in the minority when the case was before the Sudder Court, puts the rule, as it appears to me, upon the true ground. He says:-- "The fatwa of the law officer is quite irreconcilable with the principles stated by Macnaghten, and no authority is given for the doctrine, which it enunciates on the subject of the tulub-ishhad. It is the opinion of the law officer apparently that tulub-ishhad may take place at any time, subsequent to the tulub-mawasabat within the period of limitation. Were this the law of pre-emption, no purchaser of property from a Mahomedan would be safe; for tulub-mawasabat may be and constantly is a private act which the purchaser against whom the right is claimed, has no power of questioning or refuting, and the tulub-ishhad is the only public act connected with the claim to pre-emption of which the purchaser has necessarily any cognizance. It appears to me clear from the text-books that the tulub-ishhad is the public affirmation of the tulub-mawasabat, and that it must take place as soon after the shafee has heard of the sale, and pronounced the tulub-mawasabat, as he can procure witnesses and proceed to the premises, or to the presence of the seller or purchaser. What may be "the least practicable delay" in such cases is matter of evidence. The Court must decide in each case whether due diligence has been used or not." We are of opinion then that the first branch of the question put to this Full Bench must be answered in the negative, and the second in the affirmative.