

(1872) 02 CAL CK 0010

Calcutta High Court

Case No: Special Appeal No. 792 of 1871

Ramdular Misser and
Another

APPELLANT

Vs

Jhumack Lal Misser
and AnotherRESPONDENT

Date of Decision: Feb. 15, 1872

Judgement

Macpherson, J.

In this appeal the only question is whether the Judge was wrong in law in holding that, on the facts found by him, the plaintiff had not complied with the provision of the Mahomedan law as to the ceremonies which ought to attend the talab-i-ishtehad by the person who claims to enforce the right of pre-emption. The parties to the suit are Hindus, and the object of the plaintiff is to enforce a right of pre-emption. The Judge is of opinion that the plaintiff failed to prove that he had complied with the requirements of the Mahomedan law. I think that the Judge was wrong in law, and that the plaintiff did substantially comply with the requirements of the Mahomedan law. Having made the demand three times, and having said that he had bought the property, and having offered the money to the vendor and vendee, he demanded back the kabala. After that, he made the persons who were with him, and who had been present during the time when all this took place, witnesses. The words he used were "gawa rakha," which means that he made them witnesses, or called on them to bear witness. This was in my opinion a substantial compliance with the requirements of the Mahomedan law; for I am not aware that it is imperative that the precise words which are given in the Hedaya, or in any other of the Mahomedan law books, should be used. In so holding, I in no way depart from the rules laid down either in *Issur Chunder Shaha v. Mirza Nisar Hossein W.R.*, 1864, 351, or in *Jadu Sing v. Raj Kumar* 4 B.L.R., A.C., 171. In the first of these cases no witnesses had been called at all, that is to say, no witnesses were referred to, and formally told to bear witness, or, so to say, were constituted witnesses by the claimant of the right. So in the case of *Jadu Sing v. Raj Kumar* 4 B.L.R., A.C., 171, the parties did not go through the same formalities as the plaintiff did in the present case. In the present case we have the demand made of the

vendor and vendee before witnesses, and we have the refusal before the same witnesses to receive the money, or to give back the kabala; and with reference to what passed, the plaintiff called the attention of the persons present to these facts, and constituted them his witnesses. Having done so, it appears to me that he is entitled to succeed, as having substantially done all that the Mahomedan law required him to do.

2. For the respondent a question is raised that the parties being Hindus, and residents of Bhaugulpore, which is in Behar, the plaintiff cannot succeed in the absence of proof that the right of pre-emption does exist by custom amongst Hindus in Behar.

3. The Court of first instance held that the custom did prevail, and had been recognised by the Courts. So far back as 1863, in the case of Fakir Rawat v. Sheikh Imambaksh B.L.R., Sup. Vol., 35, it was held that a right of pre-emption does exist by custom among Hindus in Behar; and in the judgment in which this declaration is made, many older cases are referred to in which the custom had been recognised and acted on by the Courts. There are also several cases of later date in which the same thing has been held. There can be no doubt that for years it has always been considered to be settled law that the right of pre-emption exists amongst Hindus in Behar; and therefore it is not now open to the respondent to raise any objection upon this point.

4. I would reverse the decision of the lower Appellate Court, and restore and affirm that of the Court of first instance with all costs. Decision of the lower Appellate Court reversed, and that of the Court of first instance restored.