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neither claims under separate causes of action nor claims affecting different defendants are contemplated by the peremptory provisions of Order II, Rule 2 of the Schedule of the Civil Procedure Code. It would not have mattered even if the two separate causes of action had *jointly* affected the different defendants and had not involved a *several* liability of each of the two different defendants. For they would still have been beyond the contemplation of the peremptory provisions of Order II, Rule 2, though within the permissive provisions of Order II, Rule 3 of the Schedule to the Civil Procedure Code.

I have ventured to add these remarks as it seems to me essential for the proper determination of these somewhat difficult questions of non-joinder and mis-joinder that not only should the causes of action in each case be exactly comprehended but that a clear distinction should be maintained between the permissive nature of the provisions of Order I, Rule 3 and Order II, Rule 3 and the peremptory nature of the provisions of Order II, Rule 2 of the 1st Schedule to the Civil Procedure Code.

*Decree reversed: suit remanded.*

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## APPELLATE CIVIL.

*Before Mr. Justice Batchelor and Mr. Justice Shah.*

1915.

*November* 16.

MAHOMED BEG AMIN BEG AND ANOTHER (HEIRS OF ORIGINAL PLAINTIFF No. 2) APPELLANTS *v.* NARAYAN MEGHAJI PATIL AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

*Pre-emption—Rule of pre-emption does not exist in the Khandesh District—Bombay Regulation IV of 1827, clause 26.*

In the District of Khandesh in the Bombay Presidency, the rule of pre-emption does not exist either as a rule of law or as a rule of justice, equity and good conscience.

* Second Appeal No. 198 of 1913.

SECOND appeal from the decision of J. Scotson, Assistant Judge of Khandesh, confirming the decree passed by M. G. Mehta, Subordinate Judge at Nandurbar.

Suit to enforce the right of pre-emption.

On the 3rd June 1909, plaintiff No. 1 (a Mahomedan woman) sold two fields bearing survey Nos. 189 and 197 to defendant No. 1, who was a Hindu. The plaintiffs who were Mahomedans and who owned fields adjoining those sold, brought the present suit to acquire the fields by the right of pre-emption.

It was contended by the defendant No. 1 *inter alia* that the rule of pre-emption did not exist in the District of Khandesh.

The Subordinate Judge found that the right of pre-emption did not exist in the District, on the following grounds :—

The right of pre-emption is a right to acquire by compulsory purchase in certain cases, immoveable property in preference to all other persons. It is not one of the matters in suit respecting which the Mahomedan law is expressly declared to be the rule of decision when the parties are Mahomedans (Wilson's *Anglo Mahomedan Law*, section 350, Ed. II). In *Nusrut Reza* v. *Umbul Khyr* (8 W. R. 309), Phear J. observes :—" The right to pre-emption...is founded on the supposed necessities of a Mahomedan family, arising out of their minute subdivision and inter-division of ancestral property ; and as the result of its exercise is generally adverse to public interest, it certainly will not be recognised by this Court beyond the limits to which those necessities have been judicially decided to extend." In *Deokinandan* v. *Sri Ram*, (I. L. R. 12 All. 234 ), Mahmood J. at p. 266 remarks as follows :—" Among those facts is a proposition which cannot be controverted, and which apparently was not pressed upon the attention of the learned Judges forming the majority of the Full Bench from whom Mr. Justice Roberts dissented, that as a matter of fact and not one of theoretical surmises or hypothesis, the right of *Shufa* or pre-emption is unknown in those parts of India where Mahomedan jurisprudence had not in days gone by had full sway, and where Mahomedan influence was not felt as vigorously as in this part of the country and other parts of upper India, in Bengal and in some parts of the Bombay Presidency, such as Guzerat. For

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instance it is unknown in the Madras Presidency, where the High Court in *Ibrahim Saib* v. *Muni Mir Udin Saib* (6 Mad. H. C. R. 26) have gone the length of holding that even in the case of Mahomedans the doctrine of pre-emption is not law in that Presidency." In the 6 Madras case, referred to above, Holloway, C. J. took the opportunity of laying down broadly that the Mahomedan rule of pre-emption was not the law in this Madras Presidency and said (Innes J. concurring) :—"It is clearly not so by positive enactment, or by customary law assimilating this rule of positive law and making it an existent rule of our law. It is needless to add that it is not so as the so-called *lex loci rei sitae* and, therefore, governing matters connected with the alienability and other incidents of real property. The question, therefore, resolves itself into whether it is consistent with equity and good conscience to import an exceptional rule, opposed to the principle of law administered here—perfect freedom of contract ?......The Mahomedan law binds Mahomedans no more than others except in the matters to which it is declared applicable. It is then law because of its reception as one of our law sources in the matter to which it applies. Where, however, not so received, it can only be prevailing law because consistent with equity and good conscience. I am of opinion that it is manifestly opposed to both, that no such obligation in this Presidency binds a Mahomedan or any one else, and that this appeal must be dismissed with costs." Where the custom of pre-emption is judicially noticed as prevailing in a certain local area, it does not govern persons who, though holding lands therein for the time being, are neither natives of, nor domiciled in the District (*Parsashth Nath* v. *Dhanai*, I. L. R 32 Cal., 988).

The above authorities, therefore, establish the following facts :—

(*a*) The right of pre-emption is a part of the Mahomedan law.

(*b*) The Mahomedan Law binds Mahomedans no more than others except in the matters to which it is declared applicable. In the Madras Presidency the right of pre-emption is not recognised even between the Mahomedans.

(*c*) The right of pre-emption is a customary law and it is confined to areas in which it is recognised and it does not extend to the whole of British India.

(*d*) The right of pre-emption is opposed to the principle of law—perfect freedom of contract—and is as well opposed to equity and good conscience.

The plaintiff's pleader has not been able to cite any authority showing the existence of the right of pre-emption in this part of this country, Khandesh District, nor has he been able to prove any instance in which the right of pre-emption was exercised or recognised even between the Mahomedans in the Khandesh District. He has cited two authorities *Jog Deb Singh* v. *Mahomed Afzal* (I. L. R. 32 Cal. 982) and *Krishna* v. *Kesavan* (I. L. R. 20 Mad. 305) but I fail to see how they go to support the plaintiff's case and prove the custom of pre-emption in Khandesh District.

On appeal, this decree was confirmed by the Assistant Judge.

The plaintiff No. 2 appealed to the High Court.

*D. C. Virkar* for the appellant.—The right of pre-emption is an independent right. It is entirely unaffected by the Transfer of Property Act 1882. It has been recognised by Courts: *Baijnath Ram Gaenka* v. *Ramdhari Chowdhry*[1]; *Jadu Lal Sahu* v. *Janki Koer*[2]; and *Digambar Singh* v. *Ahmad Sayed Khan*[3]. It arises only on the completion of sale: *Budhai Sardar* v. *Sonaullah Mridha*[4] and *Najm-un-nissa* v. *Ajaib Ali Khan*[5].

The case is governed by section 27 of Bombay Regulation IV of 1827. There is no statute law on the subject of pre-emption in Bombay: in the absence of usage, therefore, the law of the defendant must apply. The expression "the law of the defendant" has been interpreted in various cases: see *Azim Un Nissa Begum* v. *Clement Dale*[6]; *Sarkies* v. *Prosonomoyee Dossee*[7] and *Gobind Dayal* v. *Inayatullah*[8].

The rule of pre-emption is binding on Mahomedans. In the Bombay Presidency, it is binding, in the Districts of Surat and Broach, as a usage on the Hindus: *Gordhandas Girdharbhai* v. *Prankor*[9]; *Rewa* v. *Dulabhdas*[10]; *Ranchoddas* v. *Jugaldas*[11].

*P. B. Shingne* for the respondent:—"The law of the defendant" in clause 26 of Bombay Regulation IV of 1827 refers to the law of the vendee. If the vendee is a Hindu, the right of pre-emption cannot be enforced

(1) (1907) L. R. 35 I. A. 60.
(2) (1912) L. R. 39 I. A. 101.
(3) (1914) 37 All. 129.
(4) (1914) 41 Cal. 943.
(5) (1900) 22 All. 343.
(6) (1868) 6 Mad. H. C. R. 455.
(7) (1881) 6 Cal. 794.
(8) (1885) 7 All. 775 at p. 784.
(9) (1869) 6 Bom. H. C. R. 263 (A. C. J.)
(10) (1902) 4 Bom. L. R. 811.
(11) (1899) 24 Bom. 414.

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against him: *Sheikh Kudratulla* v. *Mahini Mohan Shaha*[1]. The right cannot be enforced on the grounds of "justice, equity and good conscience," which expression has been interpreted to mean the common law of England: *Dada Honaji* v. *Babaji Jagushet*[2] and *Waghela Rajsangi* v. *Shekh Masludin.*[3] The right is not recognised by the law of England. Even by the Mahomedan Law, it has been regarded with much disfavour. The High Court of Madras has declined to recognise the right: *Ibrahim Saib* v. *Muni Mir Udin Saib*[4].

*Virkar*, in reply, referred to Wilson's Anglo-Mahomedan Law, p. 381; Ameer Alli's Mahomedan Law, Vol. I, p. 722; the Punjab Laws Act, 1872; and the Oudh Laws Act, 1876.

BATCHELOR, J.:—The plaintiffs, who are the appellants before us, are two Mahomedan women, and they brought this suit to enforce their right of pre-emption in respect of two agricultural survey numbers which were sold by the 2nd defendant, a Mahomedan woman, to the 1st defendant, a Hindu. The plaintiffs own the fields adjoining the land sold.

The suit is from a village in the Nandurbar Taluka of the Khandesh District. Both Courts have held that the Mahomedan right of pre-emption does not exist in the Khandesh District and have accordingly dismissed the suit.

It is to be observed that no attempt was made in the trial Court to prove the right of pre-emption as a special custom or usage; but the plaintiffs relied exclusively on the doctrine of Mahomedan Law. It is now contended on behalf of the plaintiffs in this appeal that the

[1] (1869) 4 Beng. L. R. 134 (F. B.).
[2] (1865) 2 Bom. H. C. R. 36.
[3] (1887) 11 Bom. 551.
[4] (1870) 6 Mad. H. C. R. 26.

Mahomedan rule of pre-emption exists in the District of Khandesh and should be enforced here, notwithstanding that the purchaser was a Hindu. This contention is based on clause 26 of Regulation IV of 1827, and the reference there occurring to "the law of the defendant." Seeing that the principal defendant here, the purchaser of the property, is a Hindu, the appeal, it seems to me, would be exposed to many difficulties, even if the Court conceded the appellants' primary argument that the Mahomedan rule of pre-emption was operative in Khandesh. But in my opinion that argument cannot be conceded.

Clause 26 of the Regulation of 1827 is as follows :—

"The law to be observed in the trial of suits shall be Acts of Parliament and Regulations of Government applicable to the case ; in the absence of such Acts and Regulations, the usage of the country in which the suit arose ; if none such appears, the law of the defendant ; and, in the absence of special law and usage, justice, equity and good conscience alone."

It is admitted in argument that the phrase 'Regulations of Government' must to-day include the Acts of the Indian Legislature governing the sale of immoveable property, that is to say, the Indian Contract Act and the Transfer of Property Act. That being so, there does not here exist that absence of Regulations which alone permits the Court to have recourse to 'the law of the defendant,' and the appeal must be decided by reference to the Acts, not by reference to the defendant's personal law. It is urged that the Transfer of Property Act and the Indian Contract Act are merely silent upon the question whether the rule of pre-emption survives. But the answer, in my opinion, is that that rule cannot be recognized unless the provisions and principles of these Acts are disregarded. For, the rule is a clog or fetter upon that freedom of sale for which the Acts provide. This becomes, I think, the more clear if a comparison is made between Chapter III of the Transfer

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of Property Act, which deals with sales, and Chapter II, which deals with the general principles of the transfer of property and contains provisions regarding vested and contingent interests, or Chapter VII which deals with gifts. By section 2 (*d*) of the Act it is enacted that "nothing in the second Chapter shall be deemed to affect any rule of Mahomedan Law," and section 129 of the Act contains a similar provision saving the rules of Mahomedan law in regard to gifts. But the sections as to sales are quite general and contain no such restriction. Therefore, I do not think that the appellants can succeed by virtue of this doctrine as a naked rule of law. The pertinent rules of law, as I think, are those to be found in the Statute. This view is in accordance with the judgment of the Acting Chief Justice Holloway in *Ibrahim Saib* v. *Muni Mir Udin Saib*[1] and, in my opinion, that decision is applicable generally to this Presidency with the exception of Gujarat. It is true that the Mahomedan rule of pre-emption, at least as between Musalman litigants, is accepted by the High Courts of Allahabad and Calcutta. But this circumstance, so far from assisting the present appellants, really supplies, as I think, another sufficient reason for dismissing the appeal. For, in the United Provinces and Bengal, owing to local conditions which are not reproduced in this Presidency, there has been a course of judicial decisions in favour of the recognition of pre-emption; whereas in this district of Khandesh there is admittedly not a discoverable instance in which this right has been either allowed by the Court or even asserted by any litigant. And this fact, which, I think, is true of the Presidency generally except Gujarat, affords conclusive evidence that to enforce the rule of pre-emption now would be to introduce into the law of property an innovation

[1] (1870) 6 Mad. H. C. R. 26.

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which is as foreign to the practice of the people as it is to the Statutory law. I desire to say nothing as to what the result would be if there were evidence in this case establishing a local custom in favour of the rule of pre-emption. For, a custom is a local common law as it existed before the time of legal memory, as was said by Jessel M. R. in *Hammerton* v. *Honey*[1]. And I see nothing in Clause 26 of the Regulation which would prohibit the Court from giving effect to the established local custom in modification of the provisions of the Act, though whether the Court would do so or not is a matter which it is not now necessary to determine.

From what I have already said, it follows that, in my opinion, the appellants could not succeed under the Regulation even if they were able to show that the rule of pre-emption should be accepted by us as a rule of justice, equity and good conscience. Out of respect, however, to the arguments which have been heard upon the point, I will state that my own opinion is that this Court cannot recognize such a rule as a rule of justice, equity and good conscience. The decisions in *Dada Honaji* v. *Babaji Jagushet*[2] and *Waghela Rajsanji* v. *Shekh Masludin*[3] are authorities for the view that it is to the English law in general that we must look for guidance as to what is a principle of justice, equity and good conscience. And this particular rule, as I have said, is not in accordance with the principles of English law. On this point I desire to express my concurrence with what was said by Mr. Justice Phear in *Nusrut Reza* v. *Umbul Khyr Bibee*[4]: "The right to pre-emption is very special in its character. It is founded on the supposed necessities of a Mahomedan family, arising out of their minute sub-division and inter-division of ancestral property;

(1) (1876) 24 W. R. (Eng.) 603.
(2) (1865) 2 Bom. H. C. R. 36.
(3) (1887) 11 Bom. 551 at p. 561.
(4) (1867) 8 W. R. 309.

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and as the result of its exercise is generally adverse to public interest, it certainly will not be recognised by this Court beyond the limits to which those necessities have been judicially decided to extend." It seems almost unnecessary to add that the rational basis and justification for the rule of pre-emption has largely, if not entirely, disappeared in the mofussil on this side of India. As to the position in Gujarat upon which much was said in argument, that is now not so clear as it was, since the earlier decisions have been questioned by Mr. Justice Beaman and Mr. Justice Macleod in *Dahyabhai Motiram* v. *Chunilal Keshordas*[1]. Whether the earlier decisions should still be followed is a question upon which, since the point does not now arise, it would be improper for me to express an opinion. I may, however, say just this, as the result of considerable experience as District Judge of Ahmedabad, that the judicial recognition of pre-emption in Gujarat, particularly amongst Hindus in that province, has always appeared to me anomalous and artificial.

On these grounds I am of opinion that the appeal fails and should be dismissed with costs.

SHAH, J.:—I am of the same opinion. I desire to state briefly the grounds upon which I have arrived at the same conclusion.

The lower Courts have rejected the plaintiffs' claim for pre-emption, and the dispute now is substantially between the pre-emptors and the purchaser of the agricultural lands in suit.

Under section 26 of Regulation IV of 1827, "the law to be observed in the trial of suits shall be Acts of Parliament and Regulations of Government applicable to the case; in the absence of such Acts and Regulations,

(1) (1913) 38 Bom. 183.

the usage of the country in which the suit arose; if none such appears, the law of the defendant; and in the absence of specific law and usage, justice, equity and good conscience alone."

On behalf of the purchaser it is urged that the Transfer of Property Act and the Indian Contract Act are applicable to this case, that there is no saving clause in favour of the Muhammadan Law of pre-emption, that the provisions of the Acts are inconsistent with the right of pre-emption, and that the rules as to pre-emption must be deemed to have been abrogated by these Acts. There is considerable force in this argument. But Mr. Shingne has not been able to suggest any satisfactory answer to the two difficulties, which present themselves in the way of accepting it. Firstly in spite of these Acts, the right of pre-emption according to Muhammadan Law has been enforced in virtue of the usage of the country in certain parts of India outside this Presidency, and in Gujarat, or at least in certain parts of Gujarat, in this Presidency. Secondly, Chapter III of the Transfer of Property Act, which relates to sales of immoveable property, does not purport to deal with the right of the vendor to sell, but only provides the mode of effecting sales, and contains provisions as to the rights and obligations of the seller and the buyer, in the absence of a contract to the contrary. I, therefore, hesitate to accept Mr. Shingne's contention.

Assuming, however, without deciding, that there is no statutory provision applicable to the case, it is clear that the plaintiffs cannot rely upon the 'usage of the country,' as both the lower Courts have held that there is no custom of pre-emption recognised in the District of Khandesh and that there has been no instance of the right of pre-emption having been exercised in that District.

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The law of the defendant cannot justify, in my opinion, the application of a special rule of Muhammadan Law to a case of this kind, in which there are two defendants one a Muhammadan and the other a Hindu, the latter being substantially interested in his own right. There has been some difference of opinion in other parts of India as to whether a non-Muhammadan purchaser buys the property subject to the right of pre-emption according to the Muhammadan Law. It may be, that there is good reason for the view that the non-Muhammadan purchaser buys the property subject to the right of pre-emption in those parts of the country, where such a right is enforced on the ground of usage or as a rule of the Muhammadan Law. But that reason, as I understand it, is not that it is, 'the law of the defendant,' but that it is in accordance with justice, equity and good conscience to enforce the right of pre-emption against the non-Muhammadan purchaser in such a case.

Lastly, it is argued by Mr. Virkar that the right of pre-emption should be enforced as a rule of justice, equity and good conscience. I am quite unable to accept this argument. I agree generally with the observations relating to this point in *Ibrahim Saib* v. *Muni Mir Udin Saib*[1] and hold that the right of pre-emption according to Muhammadan Law cannot be enforced solely as a matter of justice, equity and good conscience.

Mr. Virkar has relied upon the case of *Gobind Dayal* v. *Inayatullah*.[2] The conclusions of Mahmood J. in that case cannot apply to the present case, as the words of section 24 of the Bengal Civil Courts Act, upon which they are based, are materially different from the words of section 26 of Bombay Regulation IV of 1827. The other Judges in that case apparently based their

(1) (1870) 6 Mad. H. C. R. 26. (2) (1885) 7 All. 775 at p. 784.

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conclusion upon the ground stated in the judgment of Oldfield J., that on grounds of equity the Muhammadan Law in claims of pre-emption had always been held to bind Muhammadans and had always been administered between them. The Muhammadans were found as between themselves to hold property subject to the rules of Muhammadan Law, and it was not considered equitable that persons, who were not Muhammadans, but who had dealt with Muhammadans in respect of property, knowing perfectly well the conditions and obligations, under which the property was held, should, merely by reason that they were not themselves subject to Muhammadan Law, be permitted to evade those conditions and obligations. This reasoning cannot apply to cases arising in a District where the right of preemption is not shown to have been exercised even as between Muhammadans, and where the persons not themselves subject to Muhammadan Law cannot be properly held to know that a Muhammadan holds the property in that District subject to the obligation of offering it to his neighbours before selling it to a stranger.

*Appeal dismissed.*

R. R.

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## APPELLATE CIVIL.

*Before Sir Basil Scott, Kt., Chief Justice and Mr. Justice Shah.*

1915. *December* 10.

GANGABAI PEERAPPA MINOR BY HER GUARDIAN *ad litem* HOWANNA BIN NILLAPPA (ORIGINAL DEFENDANT), APPELLANT *v.* BANDU BIN PEERAPPA (ORIGINAL PLAINTIFF), RESPONDENT.*

*Hindu Law—Sudras—Inheritance—Illegitimate son—Extent of share.*

Among Sudras an illegitimate son of a concubine stands on the same level as to inheritance as the *dasi putra*, and the extent of his share in competition with a legitimate daughter would be one-half of the share taken by the daughter, that is, one-third of the whole estate.

* Second Appeal No. 668 of 1914.