APPELLATE CIVIL.

Before Sir Basil Scott, Kt., Chief Justice and Mr. Justice Beaman.

1917. *February* 5.

SITARAM BHAURAO DESHMUKH AND OTHERS (ORIGINAL DEFENDANTS), APPELLANTS *v.* SAYAD SIRAJUL KHAN NAWAB AMIR YAR JUNG BAHADUR OF SECUNDERABAD, DIED IN THE MIDST OF THE SUIT, BY HIS ADMINISTRATOR SYED JIAVAL HASAN KHAN SYED SIRAJUL HASAN KHAN UNDER A PROBATE GRANTED BY THANA COURT (ORIGINAL PLAINTIFF), RESPONDENT.*

Mahomedan law—Pre-emption—Property situate in Kolaba District—A co-sharer selling his share to a Hindu purchaser—Applicability of the law of pre-emption by agreement of parties—Observance of the formalities of Talab-i-Mowasibat *and* Talab-i—Ishhad *before the completion of sale, whether premature—Right of an administrator to continue the suit on the death of the pre-emptor* pendente lite*—Probate and Administration Act (V of 1881), section 89.*

S, a Mahomedan owner of an undivided one-fourth share in certain Inam villages in Kolaba District entered into an agreement with the defendants on the 14th October 1908 for the sale of his share for Rs. 30,000, the terms of the agreement being that if the owner of the three-fourths share (i.e. the plaintiff) was willing to purchase S's share and if S agreed to the purchase he should immediately return the amount received from the defendants. On the same day a notice was accordingly served on the plaintiff by S asking him if he was anxious to pre-empt the quarter share. On receipt of this notice, the plaintiff on the 15th October performed the *Talab-i-Mowasibat*. On the 17th October the plaintiff through his attorneys wrote a letter to S declaring his intention to exercise the right of pre-emption and at the same time performed *Talab-i-Ishhad*. The copies of S's notice and plaintiff's solicitor's reply of the 17th October were duly forwarded to the defendants and whilst the correspondence between S and the plaintiff was going on the former received the full amount of the purchase money from the defendants and executed a sale deed in their favour. The plaintiff thereupon sued to recover the share by right of pre-emption. The defendants contended *inter alia* that the right of pre-emption could not be exercised against them as they were Hindus; that the property over which it was claimed was not a small one; that the law of pre-emption was not made applicable to Kolaba District; that the *talabs* performed before the completion of the sale were premature. On these facts,

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Held, (1) that the defendants were bound to comply with the plaintiff's demand for a transfer of the quarter share in the villages to him, since it was clear from the contract and the subsequent correspondence that the defendants agreed with the vendor that the law of pre-emption applying between the vendor and his co-sharer should be applicable to the defendants' purchase;

(2) that the action of the plaintiff in performing the *talabs* was not premature as the intention of the parties as to the date when the bargain was to be considered as concluded was the date of the contract itself;

(3) that there was no limit to the size of the property of which pre-emption might be claimed by a co-sharer, though there was a limit in the case of those who based their claim on vicinage.

A question being raised as to whether on the death of a pre-emptor *pendente lite*, a suit can be proceeded with by his administrator under section 89 of the Probate and Administration Act 1881,

Held, that the suit could be proceeded with by the administrator as the relief sought, namely, conveyance of a share, could be enjoyed by a personal representative after the death of the pre-emptor inasmuch as it added the property in suit to the estate of the deceased.

FIRST appeal against the decision of R. B. Gogte, Additional First Class Subordinate Judge at Thana, in Suit No. 103 of 1909.

The plaintiff was the absolute owner of an undivided three-fourths share in the Inam villages of Vahal and Patowdhi situate in the Taluka Panvel, District Kolaba.

The owner of the other undivided one-fourth share in the said Inam villages was the plaintiff's brother, Syed Abdul Huk, who died on the 20th May 1896 leaving a will. His son and heir Sirdar Alikhan proved the will and obtained its probate on the 30th June 1907.

On the 14th October 1908, an agreement of sale for his one-fourth share in the Inam villages was made by Syed Sirdar Ali with the defendants for the sum of Rs. 29,999. Rs. 1,000 were paid as earnest money the same day, Rs. 14,000 were to be paid on the 17th

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October and the balance about twenty days afterwards. The agreement provided :—

"You should also give us a copy of the notice which you have to-day given to the owner of the three-forths share in respect of the sale of your share and a receipt of the acknowledgment of receipt which will be received from him on the day of the sale deed. We have purchased your said share with the arrears of rent due from the tenants up to this day and with the crops of the current year for the above mentioned Rs. 29,999. If the owner of the three-fourths share is willing to purchase your said share and if you and he agree to the purchase, you should immediately return us the rupees which you have received from us."

On the same day, the vendor Sirdar Ali Khan wrote to his uncle, the plaintiff, as follows :—

"I beg to intimate that I have this day sold my one quarter share in the village of Vahal and Patowdhi for a sum of Rs. 29,999 to essrs. Sitaram Bhavoo Deshmukh and his three brothers. As you are an Inamdar of the three-fourths share in the said villages, I give you this notice that if you are desirous of purchasing the said villages for the sum aforesaid, you will be good enough to send me a cheque for the amount, viz., Rs. 29,999, by return of post, and in the event of your not replying to this or paying the money, within two days after the receipt hereof, I shall, without any further intimation to you, close the bargain and obtain the sale proceeds."

On receipt of this letter on the 15th October, the plaintiff performed the *Talab-i-Mowasibat* in the presence of two witnesses and thus declared his intention of claiming his right of purchasing his said one-quarter share.

On the 17th October, the plaintiff's attorneys informed the vendor that if the defendants' offer was a genuine and *bona fide* one for the purchase of the quarter share the plaintiff declared his intention to exercise his right of pre-emption and gave notice that he was willing to give the same price for the absolute sale to himself free from all incumbrances.

On the same day the vendor's attorneys appointed a time for giving inspection to the plaintiff of the agreement between the vendor and the defendants

and stated that the purchasers had already paid Rs. 15,000 being part of the purchase money and that they were willing that the plaintiff should take over the one-fourth share for the price mentioned in the agreement upon the terms therein contained, and that the plaintiff must therefore first pay them the sum of Rs. 15,000 mentioned in the agreement and be ready to pay the balance on or before the 7th of November.

On the 21st October a letter was addressed by the vendor to the defendants from which it appeared that the vendor had sent to the defendants a copy of the letter of the 14th addressed to the plaintiff and his solicitor's reply of the 17th October 1908.

On the 28th October 1908, the vendor addressed a letter to the defendants in the following terms :—

"Nawbab Amir Yar Jung's solicitors have taken inspection of the agreement of sale entered into between us, and no letter has been received from his solicitors, after the 23rd idem. You need have no fear on this score, as he has not yet paid the Rs. 15,000 if he was going to acquire the property by exercising the right of pre-emption. According to law, as I understand it, he ought to have unconditionally tendered Rs. 30,000 without asking for any document, or for the matter of that even a receipt. However, I am not concerned with what he is going to do and have to look to you for the payment of the Rs. 15,000, the balance of the purchase money on or before the 7th November, 1908.

On the 30th idem, the plaintiff's attorneys wrote to the vendor's attorneys asking them to send title deeds for inspection and stating that the plaintiff had deposited with them a cheque for Rs. 15,000.

Notwithstanding this the vendor completed his bargain with the defendants, received the balance of the purchase money, and executed a sale deed in their favour on the 9th November 1908.

The plaintiff thereupon sued for a declaration that he as a Mahomedan co-sharer had a right of pre-emption

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with regard to the undivided one-fourth share of the estate of the late Sirdar Abdul Hak in the aforesaid Inam villages and the sale deed dated the 9th November 1908 taken by the defendants was null and void. The plaintiff based his claim on general principles of Mahomedan law and not custom.

The defendants contended that the share purchased by them was distinct and divided ; that the share was formerly sold at which the plaintiff had not claimed the right of pre-emption ; that the defendants being Hindus, the plaintiff could not claim that right against them ; that the law of the right of pre-emption had not been applied by law to the Kolaba District in which the properties were situate and there had been no custom to that effect in the Province ; that the property with regard to which the right was sought was a large one consisting of villages ; that both the plaintiff and the defendants' vendor being not residents of the Province plaintiff could not exercise the right ; that the plaintiff had been informed of the particulars of the contract of sale, but had not shown his desire of claiming the right of pre-emption before the defendants had taken a completed deed of sale ; that the ceremonies performed by the plaintiff being premature, the plaintiff was not entitled to pre-empt.

During the pendency of the suit before the Subordinate Judge the plaintiff died and his heirs made an application to the Court to allow them to continue the suit. The Court dismissed the suit on the ground that the right of pre-emption under the Hanafee law to which the plaintiff admittedly belonged was personal and did not survive to the heirs.

The heirs, thereupon, appealed to the High Court and the High Court by an interlocutory judgment allowed one of the heirs (present respondent) to take

out Letters of Administration and to continue the suit under the provisions of section 89 of the Probate and Administration Act, 1881.

The Subordinate Judge, on a remand, allowed the plaintiff's claim for pre-emption holding among other things that the law of pre-emption was applicable to the case on the grounds of justice, equity and good conscience; that the defendants had knowledge of the plaintiff's right of pre-emption before they completed their purchase and therefore it could be enforced against them though they were Hindus.

The defendants appealed to the High Court.

Jinnah and *N. M. Patwardhan* with *P. V. Nijsure*, for the appellant :—We submit that the law of pre-emption does not apply to the District from which this case arises. In a recent case of *Mahomed Beg Amin* v. *Narayan Meghaji*[1] this Court has held that the law of pre-emption is not consistent with the rules of justice, equity and good conscience and therefore it cannot be enforced against the appellants. All the High Courts except the Allahabad High Court have held the same view. In Allahabad the peculiar circumstances existing in that part and the predominance of the Mahomedan population have led that Court to apply the law of pre-emption; see *Gobind Dayal* v. *Inayatullah*[2]. Secondly, the defendants being Hindus the law which is applicable is the law of the defendants, i.e., the Hindu purchasers under section 26 of the Regulation IV of 1827 as has been held in the case of *Mahomed Beg Amin* v. *Narayan Meghaji*[1].

With regard to the words in the agreement, viz., "If the owner of the three-fourths share is willing to purchase your said share and if you and he agree to purchase,

(1) (1915) 40 Bom. 358. (2) (1885) 7 All. 775.

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you should immediately return us the rupees which you have received from us", we submit this is not a completed contract between our vendor and ourselves, but a reservation in favour of the vendor and the plaintiff cannot rely on it. If it would be construed as a contract then the plaintiff being not a party to the terms of the contract, he cannot base his suit on it. Moreover the whole correspondence does not disclose any completed contract between our vendor and the plaintiff. If it does it cannot bind us as we were not parties to the same and secondly we had no notice of it, which it is necessary under section 40 of the Transfer of Property Act (IV of 1882). Besides the plaintiff cannot take advantage of the same as he has not based his claim on contract but purely and simply on the law of pre-emption. The plaintiff's suit under the contract would also be barred by limitation.

Further we submit that the ceremonies were not performed in time. On the 14th October 1908, it was only an agreement of sale that was entered into and the *Talabs* were performed on the 15th and 17th October, 1908. The sale was completed on the 9th November, 1908, when really the *Talabs* ought to have been performed under the strict rules of the Mahomedan law. Under that law there must be a complete cessation of ownership of the vendor and whenever there is an option reserved in favour of the vendor the sale is not said to be completed. Therefore, the ceremonies performed on the 15th and 17th October were premature and do not help the plaintiff : see *Jadu Lal Sahu* v. *Janki Koer* [1] ; *Budhai Sardar* v. *Sonaullah Mridha* [2].

The right of pre-emption being personal the present respondents are not entitled to any relief. The right cannot survive to the heirs and, therefore, the suit

[1] (1908) 35 Cal. 575.

[2] (1914) 41 Cal. 943.

ought to be dismissed: *Muhammad Husain* v. *Niamat-un-Nissa*[1]; *Sheikh Kudratulla* v. *Mahini Mohan Shaha*[2].

The right of pre-emption being intended for the benefit of the vendor in order to prevent an obnoxious neighbour coming in is also excluded from the operation of section 89 of the Probate and Administration Act, 1881.

Lastly, we submit, taking the extent of the property into consideration, pre-emption should not be allowed on the ground of vicinage. The right of pre-emption extends to houses, gardens and not to large properties like those in dispute.

Coyajee with *W. B. Pradhan*, for the respondent.—We submit the right to claim pre-emption is impressed on the property. It is not purely personal. In Hamilton's Hedaya, Book 38, Chapter I, *Shafa* signifies becoming proprietors of land at the value at which the purchaser has bought it.

Regulation IV of 1827, section 26, says 'the law of the defendant' should govern the case. Our submission is the law of the defendant in this Regulation means not of the particular defendant who happens to be on the record but the law of the real defendant, i.e., in this case the vendor: see West and Buhler's Hindu Law, p. 7: *Sarkies* v. *Prosonomoyee Dossee*[3]; *Lakshmandas Sarupchand* v. *Dasrat*[4].

The law of pre-emption will also be enforced on the ground of justice, equity and good conscience: *Gobind Dayal* v. *Inayatullah*[5].

The case of *Sheikh Kudratulla* v. *Mahini Mohan Shaha*[2] is not a good authority in favour of the appellants. That decision was governed by Regulation VII

(1) (1897) 20 All. 88.
(2) (1869) 4 Ben. L.R. 134. (F.B.)
(3) (1881) 6 Cal. 794 at p. 805.
(4) (1880) 6 Bom. 168 at p. 182
(5) (1885) 7 All. 775.

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of 1832, section 9, which said that whenever the parties to the suit were of different persuasions, neither the rule of Mahomedan law nor Hindu law should apply. Those provisions were, however, subsequently repealed and therefore, in considering that case this fact should be borne in mind.

We further submit that he who stands in the position of the previous holder stands liable and the giving or withholding of the consent by the vendee is of no consequence : see *Jog Deb Singh* v. *Mahomed Afzal*[1] ; *Jadu Lal* v. *Janki Koer*[2].

As to the formalities being premature in consequence of their observance before the sale was completed, we submit, the sale must be completed according to Mahomedan law and we must have recourse to that law for knowing what is meant by 'sale completed' and not to Transfer of Property Act, section 54. According to Mahomedan law it is not necessary that the vendee must be put in possession for the purposes of enforcing this right. Even if the vendor remains in possession it can be enforced : see Wilson's Digest of Mahomedan Law, 4th edition, section 356, page 400. In Hedaya, Book 38, Chapter I, we find the privilege of *Shafa* is established after the sale. It is enough if the seller acknowledges the sale although the buyer denies. It is time for the pre-emptor to step in as soon as the contract is completed by acceptance and the vendor cannot go behind it : see Baillie's Mahomedan Law, pp. 488-489.

SCOTT, C. J. :—This suit was filed by the original plaintiff, a Mahomedan, against four Hindus, alleging that as the owner of a twelve-annas share in the Inam villages of Vahal and Patowdhi in the Panvel Taluka, in which his brother, the late Abdul Hak, was the owner of the other undivided four-annas share, he was on

(1) (1905) 32 Cal. 982. (2) (1912) 14 Bom. L. R. 436.

account of a contract entered into by Sirdar Ali Khan, the executor of Abdul Hak, for the sale of the latter's four-annas share to the defendants entitled under the Mahomedan law to a right of pre-emption of the four-annas share which had passed into the possession of the defendants under a sale-deed executed by their vendor.

The contract of sale was entered into on the 14th of October, 1908, and on the same date a letter was sent by the executor of Abdul Hak, the vendor, to the plaintiff intimating that he had sold the quarter share in the villages to the defendants for the sum of Rs. 29,999. That letter stated that as the plaintiff was the Inamdar of the three-fourths share in the villages, the executor gave him notice that if he was desirous of purchasing the villages for the sum to be paid by the defendants, he should send a cheque for Rs. 29,999 by return of post, and in the event of his not replying to the letter or paying the money within two days after receipt thereof the writer would close the bargain and obtain the sale proceeds.

The contract of sale of the same date was addressed by the defendants to their vendor. It recited that they had paid that day Rs. 1,000 as earnest money, and would pay Rs. 14,000 on the 17th of October and the remaining Rs. 15,000 after about twenty days following the 17th of October, and would take a *pucca* deed of sale, bearing the expenses of stamp and registration. It recited that certain documents of title had that day been obtained from the vendor, and stipulated that the vendor should also give them a copy of the notice sent that day to the owner of the three-quarter share in respect of the sale of the vendor's share, and the receipt of the acknowledgment which would be received from him. Then follows this passage:—"We have purchased your said share with the arrears of rent due from the tenants up to this day

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and with the crops of the current year for the above mentioned Rs. 29,999. If the owner of the three-fourths share is willing to purchase your said share and if you and he agree to the purchase, you should immediately return us the rupees which you have received from us ".

The plaintiff alleges that upon the receipt of the vendor's letter of the 14th of October he with the object of asserting and exercising his right of *Shaffa* or pre-emption under the Mahomedan law performed the *Talabi-i-Mowasibat* and declared his intention of claiming his right of purchasing the quarter share of the late Abdul Hak, and on the following day reiterated his demand and performed the *Talab-i-Ishhad* and made a demand according to Mahomedan law both by letter and verbally through his agent in the presence of witnesses and on the site of the villages themselves.

It is not argued in this appeal that the trial Court was wrong in holding that the plaintiff had gone through all the formalities necessary to entitle him to exercise his right of pre-emption, namely, the *Talab-i-Mowasibat* and the *Talab-i-Ishhad*. But it is contended that the formalities were observed too soon and were consequently ineffectual. Turning again to the correspondence: On the 17th of October the plaintiff's attorneys informed the vendor that as regards the alleged offer of the defendants if the sum mentioned was their genuine and *bona fide* offer for the purchase of the quarter share the plaintiff declared his intention to exercise his right of pre-emption and gave notice that he was willing to give the same price for the absolute sale to himself free from all incumbrances.

On the same day the vendor's attorneys appointed a time for giving inspection to the plaintiff of the agreement between the vendor and the defendants, and stated that the purchasers had already paid Rs. 15,000

being part of the purchase money and that they were willing that the plaintiff should take over the one-fourth share for the price mentioned in the agreement upon the terms therein contained and that the plaintiff must therefore first pay them the sum of Rs. 15,000 mentioned in the agreement and be ready to pay the balance on or before the 7th November. From a letter dated the 21st of October addressed by the vendor to the defendants it appears that the executor had sent to the defendants copy of the letter of the 14th addressed to the plaintiff and his solicitors' reply of the 17th.

On the 28th of October the vendor wrote to the defendants in reply to their letter of the 27th, which has not been produced, stating that the plaintiff's solicitors had taken inspection of the agreement of sale entered into between them, that no letter had been received from his solicitors since the 23rd instant, and there was no reason to fear on this score as the plaintiff had not paid Rs. 15,000, whereas according to law, as the vendor understood it, he ought to have unconditionally tendered Rs. 30,000, without asking for any document or even a receipt, and the vendor therefore said he was not concerned with what the plaintiff was going to do and looked to the defendants for payment of Rs. 15,000, the balance of the purchase money on or before the 7th of November.

On the 30th of October the plaintiff's attorneys wrote to the vendor's attorneys asking them to send title deeds for inspection and give the address of the purchaser, stating that the purchase money was ready and lying idle, and that the plaintiff had deposited with them a cheque for Rs. 15,000. No reply to this letter was sent and the vendor received from the defendants the balance of the purchase money and executed a sale-deed in their favour on the 9th of November which was subsequently registered.

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On the 15th the plaintiff's attorneys sent a reminder to the vendor's attorneys regretting that they had received no reply to their letter of the 30th of October.

The defendants denied in their written statement that the plaintiff was entitled to claim pre-emption under Mahomedan law for the following reasons :—

(*a*) Plaintiff is not the original owner of the Inam villages nor his descendants and still a separate three-fourths share has come to him as a purchaser of the same and similarly one-fourth share had gone to the defendants' vendor also as a purchaser of the same.

(*b*) The defendants having been Hindus, the plaintiff cannot claim that right against them.

(*c*) The one-fourth share, which has been now purchased by the defendants had been formerly sold at which time the owner of the three-fourths share had not claimed that right.

(*d*) The law of the right of pre-emption has not been applied by law to this District and there has been no custom to that effect in this province. And the said custom had never been enforced in the villages in suit also up to now.

(*e*) The plaintiff cannot claim the right of pre-emption unless he shows that he is the owner of the lands in the said Inam villages.

(*f*) The property over which the plaintiff is claiming the right of pre-emption is not a small one but it is the Inam villages.

(*g*) Because the vendors of the plaintiff and the defendant are not the residents of this Province, he cannot claim that right over the property in this Province.

(*h*) The plaintiff had been informed of the particulars of the contract of sale of the one-fourth share in the Inam

villages in suit to the defendants. He had not shown his desire of claiming the right of pre-emption before the defendants had taken a complete deed of sale and he, not having managed to pay the money at the very time, had given evasive answers. He cannot now therefore claim that right.

(*i*) Sardar Allikhan had advertised the property in suit for sale long before this transaction and the plaintiff had not then claimed the right of pre-emption. On the contrary he said that not only he did not want the property in suit but also that he was willing to sell his three-fourths share if any one would happen to buy it. He cannot therefore now claim the right of pre-emption.

Of these objections only those under heads (*b*), (*d*) and (*f*) have been argued upon this appeal. It is not disputed that the statements under head (*d*) are correct. The custom of pre-emption has not been enforced in any District of the Bombay Presidency except Gujarat, and there is no custom of the District in which these villages are situated that a co-sharer should have the right to pre-emption. Whether in a District where the right of pre-emption is not enforceable between Hindus and Mahomedans indiscriminately under the customary law, a Mahomedan claiming the right of pre-emption could enforce it against a Hindu purchaser is a matter upon which the High Courts have differed. In Madras it has been held that the law of pre-emption should not be applied even between Mahomedans. In the United Provinces the Allahabad High Court has held that the law of pre-emption can be enforced by a Mahomedan pre-emptor against a Hindu purchaser. In Bengal it has been held that outside the Province of Bihar a Mahomedan pre-emptor cannot enforce the right against a Hindu purchaser; and recently in Bombay it has been held that outside the District of

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Gujarat a Mahomedan pre-emptor cannot enforce the right against a Hindu purchaser. The reasons assigned for the conclusions arrived at in Calcutta, Madras and Bombay are not identical, nor is the reasoning of the two Judges of the Bombay High Court identical.

If it were not for the special facts of this case, it would be necessary to express an opinion upon various interesting questions which have been argued upon this appeal, such as whether notwithstanding the decision in *London and South Western Railway Co.* v. *Gomm* [1] a right of pre-emption creates no interest in land on the analogy of the concluding clause of section 54 of the Transfer of Property Act; whether notwithstanding the decision in *Gomm's case* [1] the positive right to call for a conveyance, assuming that the right of pre-emption does not create an interest in the land, is enforceable against a transferee for value with or without notice; whether under the general law of India applying in the Province of Bombay, the equitable rights which can be asserted in cases of this nature are not limited to those specified in section 40 of the Transfer of Property Act; and whether the right of a pre-emptor to take from a purchaser property which has passed to him under a completed agreement can be placed in the category of limitations upon the vendor's right to transfer; and lastly whether the Regulation applying the law of the defendant can be invoked in such a case as the present in favour of Hindu defendants.

In the special facts of this case, however, we are of opinion that the defendants are bound to comply with the plaintiff's demand for a transfer of the quarter share in the villages to him. It is competent for a party to a contract to agree that it shall be applied for

[1] (1882) 20 Ch. D. 562.

the purpose of imposing rights and liabilities according to a particular law which ordinarily would not be applicable: see *Hamlyn & Co.* v. *Talisker Distillery* [1]. It is clear from the contract and the subsequent correspondence that the defendants agreed with their vendor that the law of pre-emption applying between the vendor and his co-sharer should be applicable to the defendants' purchase and that the vendor should give notice to his co-sharer on that basis. Upon that footing the vendor informed the plaintiff that the purchasers were willing that he should take over the fourth share for the price mentioned in the agreement and upon the terms therein contained, and it was not until after the false assurance of the vendor that the purchasers need have no fear on the score of pre-emption (see his letter of the 28th of October), an assurance which was falsified on the 30th by the plaintiff's letter to the vendor, that the defendants finally completed the transaction by taking a conveyance of the property.

It has been argued as already noticed that, upon the footing of the Mahomedan law applying to the case, the action of the plaintiff in performing the *Talabs* was premature. The rules of the Hanifee law in this respect are somewhat confusing, as may be seen from a reference to them in Sir John Edge's judgment in *Begam* v. *Muhammad Yakub* [2], and the law would become still more confusing if the strictest reading of the Transfer of Property Act were applied to the case. It is under the circumstances safest to adopt the rule suggested by the Calcutta High Court in *Jadu Lal Sahu* v. *Janki Koer* [3], namely, to ascertain the intention of the parties as to the date when the bargain is to be considered as concluded. The contract

[1] [1894] A. C. 202. [2] (1894) 16 All. 344.

[3] (1908) 35 Cal. 575.

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between the defendants and their vendor leaves no doubt as to the date which should be taken. It is the day of the contract itself, as from which time the defendants say that they have purchased the share with arrears of rent due from the tenants up to that day. The plaintiff performed the *Talabs* immediately he received news of the transaction, and there is no reason upon the evidence recorded to suppose that the statement of his solicitors that the purchase money was lying idle and that a cheque for Rs. 15,000 had been deposited with them by the 30th of October was not correct.

We have also considered the alternative view that the correspondence between the plaintiff and the vendor establishes a contract for the sale of the quarter share of which the defendants had notice, and that they were therefore bound under section 40 of the Transfer of Property Act to hold the property for the plaintiff notwithstanding their registered conveyance. It may be doubted, however, whether the correspondence in so far as it contains a claim for a marketable title justifies the conclusion that there was a completed agreement for sale *de hors* the plaintiff's right of pre-emption as a Mahomedan co-sharer, nor is it certain that the defendants at the time of their conveyance had notice of all the letters passing between the plaintiff and the vendor up to the end of October. The special facts of the case justify, however, a decision in favour of the plaintiff on the ground that the Mahomedan law of pre-emption applies to the case by the agreement of parties, and that the plaintiff has taken all such steps as it was necessary that he should take according to that law.

The point argued under the heading (*f*) of the fourth clause of the written statement cannot help the defendants. There is no limit to the size of the property of which pre-emption may be claimed by a co-sharer:

though there is a limit in the case of those who base their claim on vicinage.

It remains to refer to a point based upon the fact that the plaintiff's case is now being prosecuted by his administrator appointed since the death of the plaintiff *pendente lite*. The administrator obtained Letters of Administration from the Thana Court and proceeded with the suit under the authority of an interlocutory judgment of this Court. It has, however, been contended that under section 89 of the Probate and Administration Act the right of the Administrator does not extend to the prosecution of this suit inasmuch as the relief sought could not be enjoyed after the death of the plaintiff. The argument is that the right of pre-emption arises on the right of a co-sharer or neighbour to take personal objection to the purchaser entering upon the land of another co-sharer or neighbour. It may be conceded that that proposition is not incorrect, but it does not follow that the relief sought, namely, conveyance of a share, cannot be enjoyed by a personal representative, or those on whose behalf he holds, after the death of the pre-emptor. Indeed it is in our opinion obvious that it can be enjoyed, inasmuch as it adds the property in suit to the estate of the deceased. For these reasons the decree of the lower Court must be affirmed and the appeal dismissed with costs.

Decree confirmed.

J. G. R.