because the law of registration prevents it. If it is sought to use them in any other way, they can only be used as subsidiary papers and are of no use whatever until there is evidence altogether outside them, that the partition was made and was given effect to in some such way as these papers suggest. But that is not proved in this case.

I think, therefore, as I began by saying, that the appeal must be dismissed with costs.

Decree confirmed.

J. G. R.

FULL BENCH.

APPELLATE CIVIL.

Before Sir Norman Macleod, Kt., Chief Justice, Mr. Justice Heaton, and Mr. Justice Kajiji.

VITHALDAS KAHANDAS SONI (ORIGINAL DEFENDANT No. 1), APPELLANT *v.* JAMETRAM AND ANOTHER (ORIGINAL PLAINTIFF AND DEFENDANT No. 2), RESPONDENTS[*].

1920. *January*, 21.

Pre-emption—Mahomedan law—District of Bulsar—Hanafi School of Mahomedan law—Neighbours entitled to pre-empt in equal rights—Exercise of right not contrary to the principles of justice, equity and good conscience.

In the District of Bulsar where the Hanafi School of Mahomedan law prevails, neighbours will have equal right to pre-empt and there is nothing which is contrary to the principles of justice, equity and good conscience in allowing two neighbours who have equal rights of pre-emption to exercise them.

Gokaldas v. *Partab*[1], not followed.

Amir Hasan v. *Rahim Bakhsh*[2], followed.

SECOND appeal against the decision of W. Baker, District Judge of Surat, reversing the decree passed by T. N. Desai, Additional Subordinate Judge at Bulsar.

[*] Second Appeal No. 509 of 1918.

(1) (1916) 18 Bom. L. R. 693. (2) (1897) 19 All. 466.

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Suit to enforce right of pre-emption.

There were four houses (W, X, Y and Z) in a block separated by a court-yard in the town of Bulsar. They formally formed one house belonging to the same owner. Plaintiff was the owner of house W. Defendant No. 1 owned houses Y and Z and he purchased house X from defendant No. 2. The plaintiff claimed the right of pre-emption as regards house X and sued to obtain a sale-deed of the house from defendant No. 2. The parties were Hindus from the District of Bulsar.

Defendants contended, *inter alia*, that the law of pre-emption was not in force in the town of Bulsar; that the plaintiff had no right of pre-emption; that the defendant No. 1 had a preferable right to pre-empt as he and defendant No. 2 were participators in appendages; that the plaintiff had not declared his intention to purchase the house in suit; and that he had not gone through any of the formalities required by law.

The Subordinate Judge held that the law of pre-emption was in force in the town of Bulsar and that the plaintiff and defendant No. 1 had equal rights to pre-empt; but he dismissed the suit on the ground that the plaintiff had not performed all the necessary formalities to enable him to claim the right of pre-emption.

On appeal the District Judge reversed the decree holding that the plaintiff had performed all the formalities necessary under the Mahomedan law; that the law of pre-emption applied to Hindus in the town of Bulsar and that the plaintiff and the defendant being participators in appendages, plaintiff was entitled to pre-empt in equal right. He directed that defendant No. 1 should pass a sale-deed to the plaintiff of half the house X on payment of Rs. 912-8-0.

Defendant No. 1 appealed to the High Court.

The second appeal was originally heard by Macleod C. J. and Heaton J. on 26th November 1919, when the learned Chief Justice delivered the following judgment :—

MACLEOD, C. J. :—The plaintiff sued to obtain a deed of conveyance of the plaint house from the 2nd defendant by right of pre-emption. The parties are all members of one family, a pedigree of which is set out at page 13. The 1st defendant was the owner of houses Z and Y, and the 2nd defendant was the owner of house X, and the plaintiff bought house W from Thakordas, the 1st cousin of the 1st and 2nd defendants. Then the 1st defendant bought house X from the 2nd defendant. The plaintiff claimed that he had a right to obtain a deed of conveyance of this house by pre-emption. The parties come from Bulsar, and I think it is too late now to dispute the ruling in *Gordhandas Girdharbhai* v. *Prankor*[1], in which it was held that by local custom the Hindus of Gujarat have adopted the Mahomedan law of pre-emption. Except that that case was considered in a case which came from Kaira, viz., *Dahyabhai Motiram* v. *Chunilal Kishordas*[2], where Mr. Justice Beaman and myself declined to extend its decision beyond the limits of Surat and Broach. It is admitted then that if the Hindu inhabitants of Bulsar can be said to have adopted the Mahomedan law of pre-emption, the plaintiff in this case has a right to pre-empt. But supposing the 2nd defendant had sold his house to a stranger, then the 1st defendant would also have a right to pre-empt. The plaintiff's case is based on the assumption that if defendant No. 2 sold his house to defendant No. 1 and not to a stranger, he, the plaintiff,

(1) (1869) 6 Bom. H. C. (A.C.J.) 263. (2) (1913) 38 Bom. 193.

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alone had a right to pre-empt. Therefore he claimed the whole house. Against that the 1st defendant claimed that he certainly had a right to pre-empt which was equal to that of the plaintiff, but that as he bought the house the plaintiff's right to pre-empt was excluded.

The trial Court dismised the suit on the ground that the plaintiff had not satisfactorily proved that he had performed the proper ceremonies without undue delay. This decision was reversed in appeal, and the learned District Judge directed that the 1st defendant should pass a sale-deed to the plaintiff of half the house X on payment of Rs. 912-8-0. The learned Judge referred to two conflicting rulings on the point whether the plaintiff was entitled to pre-empt in the circumstances of this case. We have considered those rulings, viz., *Lalla Nowbut Lall* v. *Lalla Jewan Lall*[1] which supports the appellant, and the other *Amir Hasan* v. *Rahim Bakhsh*[2], which is in favour of the respondents, and it seems to me from the latter decision, which considers all the texts on the point, certainly that the great preponderance of textual authority is in favour of the respondents. We, therefore, think that the judgment of the learned District Judge was right and the appeal fails and must be dismissed with costs. The cross-objections are dismissed with costs.

ON the 3rd December 1919, the appellants' pleader having mentioned the case the Court passed the following order :—

MACLEOD, C. J. :—Since this case was argued, and before the judgment was signed, we have been referred to the case of *Gokaldas* v. *Partab*[3], in which this Court has taken a different view to that

(1) (1878) 4 Cal. 831.
(2) (1897) 19 All. 466.
(3) (1916) 18 Bom. L. R. 693.

which we have expressed. We think, therefore, the best course would be to have the case re-argued before a Bench of three Judges.

The appeal was accordingly reheard by a Full Bench consisting of Macleod, C. J., Heaton and Kajiji, JJ.

Mirza, with *G. N. Thakor*, for the appellant :—It has been found by both the lower Courts that the plaintiff and defendant No. 1 belong to the same class of pre-emptors and are thus equally entitled to pre-empt the property sold. We submit defendant No. 1 is not entitled to pre-empt a moiety of the property: *Lalla Nowbut Lall* v. *Lalla Jewan Lall*[1], *Gokaldas* v. *Partab*[2], *Karim Bakhsh* v. *Khuda Bakhsh*[3], *Baldeo* v. *Badri Nath*[4]. The cases of *Amir Hasan* v. *Rahim Bakhsh*[5] and *Abdullah* v. *Amanat Ullah*[6] have laid down a contrary principle. *Amir Hasan's case*[5] is not referred to in *Baldeo* v. *Badri Nath*[4]. The parties here hail from the town of Bulsar in the Surat District where the Sunnee Hanafee law of pre-emption applies to Hindus on the ground of custom. A custom before it could be legally enforced must be shown to be reasonable and in conformity with justice, equity and good conscience. Generally speaking the law of pre-emption is a special and exceptional branch of Mahomedan law. The custom which enforces it is unreasonable and contrary to justice, equity and good conscience: see the remarks of Holloway C. J. in *Ibrahim Saib* v. *Muni Mir Udin Saib*[7]. The Hanafee law recognizes subterfuges to defeat the right of pre-emption. The devices to defeat the right are simple in their character. Further, the very exercise of the right is made to depend on the strict observance

(1) (1878) 4 Cal. 831.
(2) (1916) 18 Bom. L. R. 693.
(3) (1894) 16 All. 247.
(4) (1909) 31 All. 519.
(5) (1897) 19 All. 466.
(6) (1899) 21 All. 292.
(7) (1870) 6 Mad. H. C. R. 26.

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of certain formalities. Even a slight non-observance of these formalities is fatal to the right. The Sunnee Hanafee School is the only school which recognizes the three classes of pre-emptors, viz., (1) to sharers, (2) participators in appendages, and (3) neighbours. The Sunnee Shafi School recognizes only clause 1 and has no place for clauses 2 and 3. Imam Shafi has laid down that the right of pre-emption is repugnant to analogy and must not be extended beyond what the law strictly enjoins: see Minhaj-i-Talibin, p. 205, Hedaya, Hamilton's Translation, p. 548. The Shia School recognizes only the first class and confines it only to the case where the number of co-sharers does not exceed two: *Abbas Ali* v. *Maya Ram*[1]. The divergence of opinion in the various schools indicates that the law of pre-emption is not based upon any fundamental principles of the Mahomedan law. It restricts the freedom of contract and is against public policy. If pre-emptors can pre-empt in fractions it must lead to a highly inconvenient and unjust result. Such a right should not be given effect to although the original texts cited in *Amir Hasan* v. *Rahim Bakhsh*[2] give countenance to it.

Faiz Tyabji, with *H. V. Divatia*, for respondent No. 1, was not called upon.

MACLEOD, C. J.:—In this case there were four houses in one court-yard, and of these two belonged to the 1st defendant in the suit, and one to the plaintiff. The 4th house was sold by the 2nd defendant in the suit to the 1st defendant, and thereupon the plaintiff filed this suit to obtain a deed of conveyance of the suit house from the 2nd defendant by right of pre-emption. The suit was dismissed in the first Court on the ground that the plaintiff had not established that he had proved that he had performed the necessary ceremonies.

(1) (1888) 12 All. 229. (2) (1897) 19 All. 466.

without undue delay. In first appeal the decree was reversed. The learned Judge held that the plaintiff was entitled to get half the property from the 1st defendant. When the case was argued before us on second appeal, we were prepared to accept the decision of the first appellate Court, following the decision in *Amir Hasan* v. *Rahim Bakhsh*[1]. But before the judgment was signed, we were referred to the case of *Gokaldas* v. *Partab*[2], where the opposite view had been taken, and it was, therefore, necessary that the case should be argued before a Full Bench. We see no reason why the decision which we had come to on the first occasion should not be confirmed. In *Gokaldas* v. *Partab*[2] the learned Judges considered the conflict between the case of *Lalla Nowbut Lall* v. *Lalla Jewan Lall*[3] and *Amir Hasan* v. *Rahim Bakhsh*[4] and they considered that it was safer to follow the ruling which commended itself to the Calcutta Full Bench. Although they mention that the authorities showed that in this Presidency it has not been the custom to enforce the doctrine of pre-emption to the extent allowed in Allahabad, no cases were referred to. The decision of the learned Judges seem to proceed on the basis that it would cause serious practical inconvenience, and in many cases even injustice, if the right of pre-emption were to be exercised in fractions. Now it is admitted that the parties in this case come from the District of Bulsar where the Hanafi School of Mahomedan law prevails, and it must further be admitted that according to Hanafi law neighbours have equal right to pre-empt. It must follow from that, that the plaintiff in this case must succeed unless we are prepared to decide the case, not according to Hanafi law, but according to some other principle.

(1) (1897) 19 All. 466.
(2) (1916) 18 Bom. L. R. 693.
(3) (1878) 4 Cal. 831.
(4) (1897) 19 All. 466.

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It has been suggested that we must only apply Mahomedan law where it is in accordance with the principles of justice, equity and good conscience. Admitting that, for myself I see nothing which is contrary to the principles of justice, equity and good conscience in allowing two neighbours who have equal rights of pre-emption to exercise them.

If A and B are neighbours with equal rights to pre-empt in the case of the sale of a neighbouring house, I do not see why if B happens to be the first purchaser A should be deprived entirely of his right to pre-empt. In fact, the only ground on which we can decide not to follow the principle of the Hanafi law, would be on the ground of inconvenience. It may be said that it is not desirable that property should be held in fractions. That may be so on general principles, but certainly in this country it is a most common occurrence. But apart from that, I should not myself say that mere inconvenience resulting from the application of the Hanafi law, is a reason why we should not apply it. In my opinion, therefore, the appeal must be dismissed with costs. The cross-objections are dismissed with costs.

HEATON, J.:—I agree that the appeal should be dismissed with costs. We have here the simplest possible case of competitors claiming pre-emption. The original owner of the house, defendant No. 2, sold it to defendant No. 1. The defendant No. 1 and the plaintiff are the only competitors for pre-emption, and it is found that under the law they are equally entitled to pre-empt. A very natural, and on the whole a very just, decision in a competition of this kind is that each should take half. Their claims are equal in the eye of the law. Therefore says the law let them be equally treated, and that is a sufficient and a satisfactory disposal of this case, because defendant No. 2,

the vendor, apparently has nothing to say against it, and defendant No. 1, the original purchaser, is apparently prepared to take half rather than get nothing. If he had said: "Oh! very well if I can only buy half the property I would not buy any at all, I cancel my purchase;" then the affairs would have to be differently viewed. I do not wish to express any opinion as to what in that event my decision would be.

KAJIJI, J.:—I agree.

Decree confirmed.

J. G. R.

APPELLATE CIVIL.

Before Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Heaton.

ANNA LATICIA DeSILVA (ORIGINAL PLAINTIFF), APPELLANT *v.* GOVIND BALVANT PARASHARE, RECEIVER UNDER THE PROVINCIAL INSOLVENCY ACT, THANA FIRST CLASS SUBORDINATE JUDGE'S COURT (ORIGINAL DEFENDANT), RESPONDENTS.*

1920. *January* 27.

Civil Procedure Code (Act V of 1908), section 2, sub-section (17) and section 80—Receiver—Suit against a receiver—Receiver, public officer—Notice necessary—Provincial Insolvency Act (III of 1907) sections 19–20.

The plaintiff brought a suit against the defendant who had been appointed a receiver in an insolvency application to get it declared that the property in suit belonged to her. The suit was dismissed by the lower appellate Court on the ground that no notice under section 80, Civil Procedure Code, was given. On appeal to the High Court,

Held, confirming the decision, that as soon as the receiver was appointed under the Provincial Insolvency Act, he became a public officer within the meaning of section 2, sub-section 17, Civil Procedure Code, 1908, and he was protected by section 80 of the Civil Procedure Code against any plaintiff who filed a suit against him with regard to any act done by him as such receiver without giving the requisite notice.

* Second Appeal No. 962 of 1918.