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reported cases where a gift by a Hindu widow consented to by the next reversioner has been called in question by that very reversioner, I think that the gift ought to be upheld as against the particular reversioner who has consented to the gift by the widow during her life time.

Decree reversed.

J. G. R.

APPELLATE CIVIL.

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

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ABDULLA AVJAL MOMIN (ORIGINAL DEFENDANT No. 1), APPELLANT *v.* ISMAIL MUGAL FODA AND OTHERS (ORIGINAL PLAINTIFF AND DEFENDANT No. 2), RESPONDENTS*.

Mahomedan law—Pre-emption—Payment of price and delivery of possession effected—No registered sale deed—Right of pre-emption arises—Transfer of Property Act (IV of 1882), section 54.

Where there has been an oral agreement to sell land followed by payment of price and delivery of possession to the purchaser, a right of pre-emption arises according to Mahomedan law even though there is no registered sale deed executed as required by section 54 of the Transfer of Property Act, 1882.

Begam v. *Muhammad Yakub*[1], followed.

Budhai Sardar v. *Sonaullah Mridha*[2], distinguished.

SECOND appeal against the decision of M. I. Kadri, Joint Judge of Ahmedabad, reversing the decree passed by N. N. Master, Subordinate Judge at Godhra.

Facts material for the purposes of this report are stated in the judgment of His Lordship the Chief Justice.

G. N. Thakor, for the appellant.

R. W. Desai and *M. H. Mehta*, for respondents Nos. 1 to 3.

* Second Appeal No. 46 of 1921.

(1) (1894) 16 All. 344.

(2) (1914) 41 Cal. 943.

MACLEOD, C. J. :—The plaintiffs sued to have their right of pre-emption enforced as regards the plaint house sold to the 1st defendant by the 2nd defendant on their paying the sale price to defendant No. 1. The only issue in the trial Court was, whether the plaintiffs had performed all the ceremonies required of *safildari*. That was found in the negative and the suit was dismissed.

In the first appeal the issues for decision were (1) whether the lower Court erred in holding that the two demands were not made in this case, and that the first demand was not expressly referred to at the time of making the second demand ; (2) whether it erred in holding that plaintiff No. 2 must have known of the sale during the absence of plaintiffs Nos. 1 and 3 and that he was in the town of Godhra then.

These are purely issues of fact and were both found in the affirmative, and the Court, reversing the decree of the trial Court, directed that on the plaintiffs paying to defendant No. 1 Rs. 1,900 together with the costs of the suit, defendant No. 1 should pass a sale-deed with respect to the plaint house, and that if he failed to do so, within a month after the service of a notice to him through the Court, the plaintiff should be at liberty to deposit the money in Court and ask for the execution of the sale-deed by the Court. The appellate Judge said : " The undisputed facts of the case are that an oral sale accompanied by delivery of possession and receipt of Rs 1,900 as purchase money was effected with regard to the plaint house sometime before the 15th February 1917, the date of the notices Exhibits 27 and 29, and that the sale was notified to the Municipality for the purpose of mutation of names on the 26th February 1917." The learned Judge finds that all the formalities required by Mahomedan law in the case of

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a person purporting to exercise the right of pre-emption had been observed.

Then the question arises, and that is really the question on this second appeal, whether, if the sale was valid according to Mahomedan law, but no registered deed had been passed so as to comply with the provisions of the Transfer of Property Act, the plaintiffs would be entitled to exercise their right of pre-emption. That question was decided in the affirmative by a Full Bench of the Allahabad High Court in *Begam* v. *Muhammad Yakub*[1]. Again in *Najm-un-nissa* v. *Ajaib Ali Khan*[2], it was held that no right of pre-emption arises upon a sale which, according to Mahomedan law, is invalid, as for instance, by reason of uncertainty in the price or the time for the delivery of the thing sold; but if such sale becomes complete, as by the purchaser getting possession of the thing sold, then the ownership of the purchaser becomes complete and a right of pre-emption arises.

The only case which we have been referred to in which this principle has been doubted is the case of *Budhai Sardar* v. *Sonaullah Mridha*[3]. In that case the agreement for sale had not been followed by delivery of possession, and therefore, the remarks of the learned Judges were confined to the facts of that case. Mr. Justice Carnduff did say (page 949): "I confess that the weight of principle and logic seems to me to be on the side of the contention that the general law, which is paramount and has superseded the Mahomedan law, should govern the incidents of sale in applying the law of pre-emption." But Mr. Justice Richardson did not go so far as that and confined himself to cases in which possession had not been delivered. He further

(1) (1894) 16 All. 344.
(2) (1900) 22 All. 343.
(3) (1914) 41 Cal. 943.

said (page 952): "There is no difficulty in applying the Mahomedan law, where possession is delivered, but if it is to be applied where possession is not delivered inconvenience may be caused by the rule, or supposed rule, of that law that a sale is constituted by offer and acceptance unconditionally expressed."

It seems to me, therefore, that there is no reason why we should differ from the decision of the Full Bench of the Allahabad High Court, that where there has been an oral agreement to sell followed by payment of the price and delivery of possession to the purchaser, the right of pre-emption arises. If the parties entitled to pre-empt were obliged to wait until a sale deed had been executed and registered they might very easily be deprived of their rights. I think, therefore, that the decision of the Court below was correct. The appeal must be dismissed with costs on defendant No. 1 only.

SHAH, J. :—I agree that this appeal should be dismissed with costs. On the facts found it is clear that in pursuance of the contract of sale there was a transfer of possession to the purchaser and payment of the purchase money to the vendor. There is nothing in the case to show that the parties to the contract had any intention other than that of effecting the sale of this property. In view of these facts it seems to me that the right of pre-emption did arise in favour of the plaintiffs in spite of the fact that there was no registered sale deed executed as required by section 54 of the Transfer of Property Act.

The point raised by Mr. Thakor is that the rules of Mahomedan law for completing a sale have really been superseded by the provisions of the Transfer of Property Act, and that in determining as to when the right of pre-emption arises according to the Mahomedan

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law, the question whether the sale has been completed or not must be answered with reference to the provisions of the Transfer of Property Act. There is really a difficulty in applying the rules of pre-emption strictly with reference to the rules of Mahomedan law applicable to sales, or even strictly with reference to the provisions of the Transfer of Property Act; and the difficulty has been sufficiently reflected in the divergence of judicial opinions in the reported cases on this point, as in *Janki* v. *Girjadat*[1]; *Begam* v. *Muhammad Yakub* [2]; *Jadu Lal Sahu* v. *Janki Koer*[3], *Budhai Sardar* v. *Sonaullah Mridha* [4] and *Sitaram Bhaurao* v. *Sayad Sirajul* [5]. Though the point has not been decided by this Court, it has expressed an opinion in *Sitaram Bhaurao* v. *Sayad Sirajul*[5], that perhaps the true solution of the question lies in looking to the intention of the parties. That may or may not be a strictly logical position, but that is a solution of the two extreme views on this point. Looking at the question from that point of view, I feel quite satisfied that the intention of defendant No. 2 was undoubtedly to convey the property to defendant No. 1, and the intention of defendant No. 1 was undoubtedly to purchase the property, as is evidenced by the fact that the purchase money was paid and there was a transfer of possession. There is nothing in their subsequent conduct to suggest that there was any change in their original intention at any later stage even up to this time. In going so far as to hold that the right of pre-emption does not arise until the title is completed by means of a registered conveyance, there is a difficulty. It is easy to conceive a case in which both the vendor and vendee may agree to postpone indefinitely

(1) (1885) 7 All. 482.
(2) (1894) 16 All. 344.
(3) (1908) 35 Cal. 575 at p. 599.
(4) (1914) 41 Cal. 943.
(5) (1917) 41 Bom. 636 at p. 651.

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the execution of a registered conveyance, and may defeat in that way the right of a neighbour to pre-empt. There is a good deal to be said in favour of the view which Mahmood J. accepts in *Janki* v. *Girjadat*[1] and which is concurred in by Banerji J. in *Begam* v. *Muhammad Yakub* [2]. But in the latter case Banerji J. agreed to allow the claim for pre-emption on grounds, which, as I read the judgment, would apply to a case like the present. After giving the best consideration to the question, I think that where there has been a transfer of possession accompanied by the payment of the price and the intention to convey the property is clear as in this case it cannot be said that the right of pre-emption according to the Mahomedan law has not arisen.

Decree confirmed.

J. G. R.

[1] (1885) 7 All. 482.

[2] (1894) 16 All. 344.

APPELLATE CIVIL.

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

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PARVATAVA KOM NEMAPA HAVILDAR (ORIGINAL PLAINTIFF), APPELLANT *v.* FAKIRNAIK BIN IRANAIK NAIKAR AND OTHERS (ORIGINAL DEFENDANTS NOS. 1, 3 AND 4), RESPONDENTS*.

Hindu law—Adoption—Minor widow 12½ years of age—Capacity to adopt.

Adoption by Hindu widow 12½ years of age held invalid.

Murgeppa v. *Kalawa*[1], followed.

PER SHAH, J.:—"Without attempting to lay down any general rule as to whether at that age a girl could ever make a valid adoption.....in the absence of any clear evidence as to the special capacity of this girl to exercise an independent judgment at that age, I am not prepared to hold that she could exercise such judgment as is required in the case of adoption."

*First Appeal No. 184 of 1919.

[1] (1919) 44 Bom. 327.