1954

Chhote Khan v. *Mal Khan and Others.*

Ghulam Hasan J.

for no issue was framed, nor any finding recorded by the trial Court. This point is not taken even in the grounds of appeal to this Court. The plea has no substance and was rightly rejected by the High Court on the ground that possession was under an arrangement between the co-sharers and no question of adverse possession could arise under the circumstances.

We hold that there is no force in this appeal and dismiss it with costs.

Appeal dismissed.

1954

April 23.

SHRI AUDH BEHARI SINGH

v.

GAJADHAR JAIPURIA AND OTHERS.

[MEHR CHAND MAHAJAN C.J., BIJAN KUMAR MUKHERJEA, VIVIAN BOSE, N. H. BHAGWATI and T. L. VENKATARAMA AYYAR JJ.]

Custom—Pre-emption—City of Banaras—Local Custom of Pre-emption—Such right—Incident of property and attaching to land.

Held, that a local custom of pre-emption exists in the city of Banaras and the right attaches at least to all house properties situated within it and no such incident of custom is proved which would make the right available only between persons who are either natives of Banaras or are domiciled therein.

When a right of pre-emption rests upon custom it becomes the *lex loci* or the law of the place and affects all lands situated in that place irrespective of the religion or nationality or domicile of the owners of the lands except where such incidents are proved to be a part of the custom itself.

The right of pre-emption is an incident of property and attaches to the land itself.

Byjnath v. *Kapilmon* (24 W.R. 95) and *Parsashth Nath* v. *Dhanai* (32 Cal. 988) disapproved.

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 15 of 1951.

Appeal from the Judgment and Decree, dated the 29th August, 1944, of the High Court of Judicature at Allahabad (Mulla and Yorke JJ.) in First Appeal

No. 157 of 1942, arising out of the Judgment and Decree, dated the 19th November, 1941, of the Court of the Civil Judge at Banaras in Original Suit No. 79 of 1941.

Achhru Ram, (*N. C. Sen* and *R. C. Prasad,* with him) for the appellant.

C. K. Daphtary, Solicitor-General for India and *S. P. Sinha,* (*J. C. Mukherji, Shaukat Husain,* and *S. P. Varma,* with them) for respondent No. 1.

1954. April 23. The Judgment of the Court was delivered by

MUKHERJEA J.—The plaintiff, who is the appellant before us, commenced the suit, out of which this appeal arises, in the Court of the Civil Judge at Banaras (being Original Suit No. 79 of 1941) for enforcement of his right of pre-emption in respect of an enclosed plot of land with certain structures upon it, situated within Mohalla Baradeo in the city of Banaras and bearing Municipal No. D 37/48. The premises in suit admittedly belonged to defendants Nos. 2 to 5, who are residents of Calcutta and they sold it by a conveyance executed on the 29th March, 1941, and registered on the 3rd of April following, to defendant No. 1, also a resident of Calcutta, for the price of Rs. 7,000. The plaintiff is the owner of the two premises *to wit,* premises Nos. D 37/85 and D 37/44, within the same Mohalla of the city of Banaras, which are in close proximity to the property in dispute and adjoin it on the northern and eastern sides respectively. It is averred by the plaintiff that there is from very early time a custom prevalent in the city of Banaras according to which the plaintiff was entitled to claim pre-emption of the property in dispute on the ground of vicinage. It is said that as soon as the plaintiff received news of the sale, he made an immediate assertion or demand of his rights and repeated the same in the presence of the witnesses as required by Muhammadan Law and he further sent a registered notice to defendant No. 1 on the 21st May, 1941, asking the latter to transfer the property to the plaintiff on receipt of the price which he had actually paid to the vendors. As the defendant No. 1 did not comply with this demand the present suit was brought.

1954

Shri Audh Behari Singh
v.
Gajadhar Jaipuria and Others.

Mukherjea J.

The defendant No. 1 alone contested the suit and the pleas taken by him in his written statement can be classified under four heads. In the first place, he denied that there was any custom of pre-emption amongst non-Muslims in the city of Banaras as alleged by the plaintiff. The second plea taken was that even if there was any custom of pre-emption it could not be availed of in a case like this where neither the vendors nor the vendee were natives of or domiciled in Banaras but were residents of a different province. The third contention raised was that the plaintiff had not made the two demands in the proper manner as required by Muhammadan Law and by reason of non-compliance with the essential pre-requisites to a claim for pre-emption, the suit was bound to fail. Lastly, it was contended that as the plaintiff himself was the landlord of the property in suit and the vendors were his tenants, he could not, under any law or custom, eject his own tenants by exercise of the right of pre-emption.

The Civil Judge who tried the suit held, on the evidence adduced in the case, that there was in fact a custom of pre-emption in the city of Banaras, the incidents of which were the same as in Muhammadan Law. He held however that the custom being a local custom it could not be enforced against either the vendors or the vendee in the present case, as none of them were natives of or domiciled in Banaras. The trial judge also found that the plaintiff did not make the requisite demands which are mandatory under Muhammadan Law. The result was that the plaintiff's suit was dismissed and in view of the findings arrived at by him, the Civil Judge did not consider it necessary to decide the question as to whether the plaintiff being himself a landlord could assert any claim for pre-emption against his tenants on the basis of a custom.

Against this decision the plaintiff took an appeal to the High Court of Allahabad which was heard by a Division Bench consisting of Mulla and Yorke JJ. The learned Judges agreed with the trial Court in holding that although there was a custom of pre-emption in the city of Banaras, yet the necessary condition for enforcing the custom in that locality was that the vendor

and the vendee must be natives of or domiciled in the city. As this condition was not fulfilled in this case the plaintiff's claim could not succeed. In the result the High Court affirmed the decision of the trial judge and dismissed the appeal. The other questions as to whether the plaintiff had made the demands in strict compliance with the rules of Muhammadan Law and whether he could claim pre-emption against his own tenants on the basis of a right by custom were left undecided. The judgment of the High Court is dated the 29th August, 1944. After this, the plaintiff applied for leave to appeal to the Judicial Committee. This application was refused by the High Court but he got special leave under an order of the Judicial Committee, dated the 11th December, 1945. After the abolition of the jurisdiction of the Judicial Committee the appeal stood transferred to this Court for disposal.

The contentions that have been raised before us by the parties to this appeal practically centre round one point. It is not disputed by either side that there is a custom of pre-emption in the entire city of Banaras; but whereas the respondents contend that the custom obtains exclusively amongst persons who are inhabitants of the city or are domiciled therein, the case of the appellant is that the custom admits of no such restriction or limitation and all those who own property in the city are governed by the custom, it being immaterial whether or not they are the natives of the place or are or are not resident owners. Various contentions have been raised by the learned counsel on both sides in support of their respective cases and we have been treated to an elaborate discussion regarding the nature of the right of pre-emption as is recognised in the Muhammadan Law and the incidents that attach to it, when it is not regulated by law but is founded on custom said to be obtaining in a particular locality.

Before we examine the arguments that have been placed before us by the learned counsel appearing for the parties, it may be necessary to make a few general observations regarding the law or laws which govern the exercise of the right of pre-emption in India at the present day.

1954

Shri Audh Behari Singh v. *Gajadhar Jaipuria and Others.*

Mukherjea J.

The Privy Council has said in more cases than one (1), that the law of pre-emption was introduced in this country by the Muhammadans. There is no indication of any such conception in the Hindu Law and the subject has not been noticed or discussed either in the writings of the Smriti writers or in those of later commentators. Sir William Macnaghten in his Principles and Precedents of Mahomedan Law(2) has referred to a passage in the *Mahanirvana Tantra* which, according to the learned author, implies that pre-emption was recognised as a legal provision according to the notions of the Hindus. But the treatise itself is one on mythology, not on law and is admittedly a recent production. No value can be attached to a stray passage of this character the authenticity of which is not beyond doubt.

During the period of the Mughal emperors the law of pre-emption was administered as a rule of common law of the land in those parts of the country which came under the domination of the Muhammadan rulers, and it was applied alike to Muhammadans and Zimmees (within which Christians and Hindus were included), no distinction being made in this respect between persons of different races and creeds(3). In course of time the Hindus came to adopt pre-emption as a custom for reasons of convenience and the custom is largely to be found in provinces like Bihar and Gujerat which had once been integral parts of the Muhammadan empire.

Opinions differ as to whether the custom of pre-emption amongst village communities in Punjab and other parts of India was borrowed from the Muhammadans or arose independently of the Muhammadan Law, having its origin in the doctrine of "limited right" which has always been the characteristic feature of village communities(4). Possibly much could be said in support of either view and there is reason to think that even where the Muhammadan Law was borrowed

(1) Vide *Jadulal* v. *Janki Koer*, 39 I.A. 101, 106; *Digambar Singh* v. *Ahmad* 42 I.A. 10, 18.

(2) *Vide* page 14.

(3) Vide *Hamilton's Hedaya*, Vol. III. p. 592.

(4) *Vide* P.R. 98 of 1894.

it was not always borrowed in its entirety. It would be useful to refer in this connection to the following observations of the Judicial Committee in *Digambar* v. *Ahmad*(1) :

"In some cases the sharers in a village adopted or followed the rules of the Mahomedan Law of pre-emption, and in such cases the custom of the village follows the rules of the Mahomedan Law of pre-emption. In other cases, where a custom of pre-emption exists, each village community has a custom of pre-emption which varies from the Mahomedan Law of pre-emption and is peculiar to the village in its provisions and its incidents. A custom of pre-emption was doubtless in all cases the result of agreement amongst the shareholders of the particular village, and may have been adopted in modern times and in villages which were first constituted in modern times."

It is not necessary for our present purpose to pursue this discussion any further.

Since the establishment of British rule in India the Muhammadan Law ceased to be the general law of the land and as pre-emption is not one of the matters respecting which Muhammadan Law is expressly declared to be the rule of decision where the parties to a suit are Muhammadans, the Courts in British India administered the Muhammadan Law of pre-emption as between Muhammadans entirely on grounds of justice, equity and good conscience. Here again there was no uniformity of views expressed by the different High Courts in India and the High Court of Madras definitely held that the law of pre-emption, by reason of its placing restrictions upon the liberty of transfer of property, could not be regarded to be in consonance with the principles of justice, equity and good conscience(2). Hence the right of pre-emption is not recognised in the Madras Presidency at all even amongst Muhammadans except on the footing of a custom. Rights of pre-emption have in some provinces like Punjab, Agra and Oudh been embodied in statutes passed by the Indian Legislature and where the law has been thus codified

(1) 42 I.A. 10, 18

(2) Vide *Krishna menon* v. *Keshavan*, 20 Mad. 305.

1954

Shri Audh Behari Singh
v.
Gajadhar Jaipuria and Others.

Mukherjea J.

it undoubtedly becomes the territorial law of the place and is applicable to persons other than Muhammadans by reason of their property being situated therein. In other parts of India its operation depends upon custom and when the law is customary the right is enforceable irrespective of the religious persuasion of the parties concerned. Where the law is neither territorial nor customary, it is applicable only between Muhammadans as part of their personal law provided the judiciary of the place where the property is situated does not consider such law to be opposed to the principles of justice, equity and good conscience. Apart from these a right of pre-emption can be created by contract and as has been observed by the Judicial Committee in the case referred to above, such contracts are usually found amongst sharers in a village. It is against this background that we propose to examine the contentions that have been raised in the present case.

The first question that has been mooted before us is, whether the burden and benefit of a right of pre-emption are incidents annexed to the lands belonging respectively to the vendor and the pre-emptor or is the right merely one of re-purchase. which a neighbour or co-sharer enjoys under Muhammadan Law, and which he can enforce personally against the vendee in whom the title to the property has already vested by sale. The learned counsel for the appellant has pressed for acceptance of the first view while the Solicitor-General appearing for the respondents has contended, that by no accepted principles of jurisprudence can the pre-emptor be said to have an interest in the property of the vendor. It is pointed out that the right of pre-emption arises for the first time when there is a completed sale and the title of the purchaser is perfected and if the right was one attached to the property, it must have existed prior to the sale and should have been available not merely in case of sale but in all other kinds of transfer like gift and lease.

This latter line of reasoning found favour with the majority of a Full Bench of the Calcutta High Court in the case of *Sheikh Kudratulla* v. *Mahini Mohan*(1),

(1) 4 Beng. L.R. (Full Bench Rulings) page 134.

where the question arose whether, when a Muhammadan sold his property to a Hindu purchaser the co-sharer of the former could enforce a right of pre-emption against the Hindu vendee under the Muhammadan Law. The question was answered in the negative by the majority of the Full Bench and Mitter J. who delivered the leading judgment, while discussing the nature of the right of pre-emption observed as follows :

"If that right is founded on an antecedent defect in the title of the vendor, that is to say on a legal disability on his part to sell his property to a stranger, without giving an opportunity to his co-parceners and neighbours to purchase it in the first instance, those co-parceners and neighbours are fully entitled to ask the Hindu purchaser to surrender the property, for although as a Hindu, he is not necessarily bound by the Mahomedan Law, he was at any rate bound by the rule of justice, equity and good conscience to inquire into the title of his vendor; and that very rule also requires that we should not permit him to retain a property which his vendor had no power to sell. If, on the contrary, it can be shown, that there was no such defect in the title of the vendor, or in other words that he was under no such disability, even under the Mahomedan Law itself, it would follow as a matter of course, that there was no defect in the title of the purchaser, at the time of its creation ..... Now, so far as I can judge of the Mahomedan Law of pre-emption from the materials within my reach, it appears to me to be perfectly clear that a right of pre-emption is nothing more than a mere right of re-purchase, not from the vendor but from the vendee, who is treated, for all intents and purposes, as the full legal owner of the property which is the subject-matter of that right."

The minority judges consisting of Norman and Macpherson JJ. took a different view and held that the law of pre-emption was to be treated as a real law, that is a law affecting and attaching to the property itself. The liability to the claim of pre-emption is a quality impressed upon and inherent in the property which is subjected to it; or in other words an incident of that property.

1954

Shri Audh Behari Singh v. *Gajadhar Jaipuria and Others.*

Mukherjea J.

The identical point came up for consideration before a Full Bench of the Allahabad High Court(1), where also the question for decision was whether a Muhammadan pre-emptor could enforce his right against a Hindu vendee from a Muhammadan vendor. The learned Judges took a view contrary to that taken by the majority of the Calcutta Full Bench and answered the question in the affirmative. It was held that the right of pre-emption was not one of re-purchase from the vendee. It was a right inherent in the property and hence could be followed in the hands of the purchaser whoever he might be. Mr. Justice Mahmood elaborately reviewed all the original authorities of Muhammadan Law on the point and expressed the opinion that the right of pre-emption under Muhammadan Law partakes strongly of the nature of an easement right, the "dominant tenement" and the "servant tenement" of the law of easement being analogous to what the learned Judge described respectively as the "pre-emptive tenement" and "pre-emptional tenement." In other words the right of pre-emption is a sort of legal servitude running with the land. The right exists, as the learned Judge said, in the owner of the pre-emptive tenement for the time being which entitles him to have an offer of sale made to him, whenever the owner of the pre-emptional property desires to sell it. But the right could not be a right of re-purchase either from the vendor or the vendee involving a new contract of sale. "It is simply a right of substitution entitling the pre-emptor, by reason of a legal incident to which the sale itself was subject, to stand in the shoes of the vendee in respect of all the rights and obligations arising from the sale under which he has derived his title. It is in effect, as if in a sale deed the vendee's name was rubbed out and the pre-emptor's name was substituted in its place." The learned Judge pointed out that the decision of the Calcutta Full Bench was based upon a mis-translation of the Arabic word "Tajibo" in Hamilton's Hedaya. Hamilton translated the word as meaning "established" but it really means "becomes obligatory, necessary or

(1) Vide *Govinda Dayal* v. *Inayatulla*, 7 All. 775.

enforceable." The right has not got to be established at all. It is attached and continues to be attached to the tenement concerned and can under certain circumstances be enforced forthwith against the adjoining tenements sold.

This decision was followed by the Patna High Court in *Achyatananda* v. *Biki*(1). A Division Bench of the Bombay High Court in a case decided in 1928(2) accepted the view taken by the majority of the Calcutta Full Bench but the reasons given in that decision were held to be unsupportable by a later Full Bench(3) of the same High Court which held the right of pre-emption to be an incident of property and agreed substantially with the view taken by Mahmood J. in the Allahabad Full Bench.

In our opinion it would not be correct to say that the right of pre-emption under Muhammadan Law is a personal right on the part of the pre-emptor to get a re-transfer of the property from the vendee who has already become owner of the same. We prefer to accept the meaning of the word "Tajibo" used in the Hedaya in the sense in which Mr. Justice Mahmood construes it to mean and it was really a mis-translation of that word by Hamilton that accounted to a great extent for the view taken by the Calcutta High Court. It is true that the right becomes enforceable only when there is a sale but the right exists antecedently to the sale, the foundation of the right being the avoidance of he inconveniences and disturbances which would arise from the introduction of a stranger into the land. We agree with Mr. Justice Mahmood that the sale is a condition precedent not to the existence of the right but to its enforceability. We do not however desire to express any opinion on the view taken by the learned Judge that the right of pre-emption partakes strongly of the character of an easement in law. Analogies are not always helpful and even if there is resemblance between the two rights, the differences between them are no less material. The correct legal position seems

(1) 1 Pat. 578.

(2) Vide *Hamed Miya* v. *Benjamin*, 53 Bom. 525.

(3) Vide *Desharathilal* v. *Bai, Dhondu Bai*, I.L.R. 1941 Bom. 460.

1954

Shri Audh Behari Singh v. *Gajadhar Jaipuria and Others.*

Mukherjea J.

to be that the law of pre-emption imposes a limitation or disability upon the ownership of a property to the extent that it restricts the owner's unfettered right of sale and compels him to sell the property to his co-sharer or neighbour as the case may be. The person who is a co-sharer in the land or owns lands in the vicinity consequently gets an advantage or benefit corresponding to the burden with which the owner or the property is saddled; even though it does not amount to an actual interest in the property sold. The crux of the whole thing is that the benefit as well as the burden of the right of pre-emption run with the land and can be enforced by or against the owner of the land for the time being although the right of the pre-emptor does not amount to an interest in the land itself. It may be stated here that if the right of pre-emption had been only a personal right enforceable against the vendee and there was no infirmity in the title of the owner restricting his right of sale in a certain manner, a *bona fide* purchaser without notice would certainly obtain an absolute title to the property, unhampered by any right of the pre-emptor and in such circumstances there could be no justification for enforcing the right of pre-emption against the purchaser on grounds of justice, equity and good conscience on which grounds alone the right could be enforced at the present day. In our opinion the law of pre-emption creates a right which attaches to the property and on that footing only it can be enforced against the purchaser.

The question now arises as to what is the legal position when the right is claimed not under Muhammadan Law but on the footing of a custom. It cannot be and is not disputed that if the right of pre-emption is set up by non-Muslims on the basis of a custom, the existence of the custom is a matter to be established by proper evidence. But as has been laid down by the Judicial Committee(1) following the decision of the Calcutta High Court in *Fakir Rawat* v. *Emman*(2), that when the existence of a custom under which the Hindus

(1) Vide *Jadulal* v. *Janki Koer*, 39. I.A. 101.

(2) 1863 B.L.R. Sup. Vol. 35.

claim to have the same rights of pre-emption as Muhammadans, in any district, is generally known and judicially recognised, it is not necessary to prove it by further evidence. A long course of decisions has established the existence of such custom in Bihar, Sylhet and certain parts of Gujerat.

So far as the present case is concerned, a large number of judgments have been put in evidence by the plaintiff in proof of the existence of a custom of pre-emption in the entire city of Banaras. There are at least three reported cases(1) in which the High Court of Allahabad has affirmed the existence of such rights in Banaras. The defendants in the present case do not dispute the existence of the custom and the whole dispute is as regards the incidents of the same, the defendants' case being that the custom is available as between persons who are natives of or domiciled in the place and cannot be extended to an outsider even though he owns property in the city which is the subject-matter of the claim.

The Privy Council in *Jadhulal* v. *Janki Koer*(2) expressly laid down that when a custom of pre-emption is established by evidence to prevail amongst non-Muslims in a particular locality "it must be presumed to be founded on and co-extensive with the Muhammadan Law on that subject unless the contrary is shown; that the Court may as between Hindus administer a modification of the law as to the circumstances under which the right may be claimed when it is shown that the custom in that respect does not go to the whole length of the Muhammadan Law of pre-emption, but that the assertion of right by suit must always be preceded by an observance of the preliminary forms prescribed in the Muhammadan Law which forms appear to have been invariably observed and insisted on through the whole of the cases from the earliest times of which we have record."

In the case before us no attempt was made by the defendants to show that the custom of pre-emption set up

(1) Vide *Chakauri Devi* v. *Sundari Devi*, 28 All. 590; *Ram Chandra* v. *Goswami Ram Puri*, 45 All. 501; *Gouri Sankar* v. *Sitaram*, 54 All. 76.

(2) 39 I.A. 101.

1954

Shri Audh Behari Singh v. *Gajadhar Jaipuria and Others.*

Mukherjea J.

and proved by the plaintiff was of a character different from that which is contemplated by Muhammadan Law. The only difference that is noticed in one of the decided authorities(1) is that the custom of pre-emption prevalent in the city of Banaras is confined to house properties only and does not extend to vacant lands; but this view again has been modified in a subsequent decision(2) which held that building sites and small parcels of land even though vacant are not excluded from the ambit of the custom. The various judgments which have been made exhibits in this case do not give any indication whatsoever that under the custom, as it prevails in the city of Banaras, pre-emption could be claimed only against persons who are the inhabitants of the place or are domiciled therein and that it could not be enforced in respect of a property situated in the city, the owner of which is not a native of that place. In fact no such question was raised or discussed in any of these cases. The ambit or extent of a custom is a matter of proof and the defendants were certainly competent to adduce evidence to show that the custom of pre-emption prevailing in the city of Banaras was available not against all persons who held lands within it but only against a particular class of persons. But this they did not attempt to do at any stage of the litigation. Their contention, which has been accepted by both the Courts below is, that, as a matter of law, a local custom of pre-emption does not affect or bind persons who are not the natives of or domiciled in that area. In support of this proposition the Courts below have relied primarily upon the statement of law made by Roland Wilson and other text book writers on Muhammadan Law which purport to be based upon certain decided authorities.

At page 391 of his book on Anglo-Muhammadan Law(3) Roland Wilson states the law in the following manner:

"Where the custom is judicially noticed as prevailing amongst non-Muhammadans in a certain local area,

(1) Vide *Ram Chandra* v. *Goswami*, 45 All. 501.
(2) Vide *Gouri Sankar* v. *Sitaram*, 54 All. 76.
(3) *Vide* 6th edition, paragraph 352.

it does not govern non-Muhammadans, who, though holding land therein for the time being, are neither natives of, nor domiciled in, the district."

Two cases have been referred to in support of this proposition, one of which is *Byjnath Pershad* v. *Kapilmon Singh*(1) and the other *Parsashth Nath Tewari* v. *Dhanai*(2). Mulla repeats the law almost in the same terms in his Muhammadan Law. In Tyabji the rule is thus laid down(3):

"The law of pre-emption is personal. It is not territorial, nor an incident of property. A person who is not a native of or domiciled within a locality where pre-emption is enforced by law or custom but who owns lands within the same locality will not necessarily be subject to the law of pre-emption."

This statement clearly indicates the foundation of the whole doctrine. The law of pre-emption is stated to be a purely personal law even when it rests on custom. It is no incident of property and the right which it creates is enforceable only against persons who belong to a particular religious community or fulfil the description of being natives of a particular district. In the case of *Byjnath Pershad* v. *Kapilmon Singh*(1), which can be said to be the leading pronouncement on the subject, the vendor of a house situated in the town of Arah, in the province of Bihar, was one Rajani Kanta Banerjee who was a native of lower Bengal but resided at Arah where he carried on the profession of a lawyer. Rajani Kanta sold the property to the defendant and the plaintiff brought a suit claiming pre-emption on the ground of vicinage. It was admitted that the custom of pre-emption did prevail amongst non-Muslims in Bihar, but still the suit was dismissed on the ground that the vendor, who was not a native of the district, was not bound by it. The right of pre-emption, it was held, arises from a rule of law by which the owner of the land is bound and it no longer exists if he ceases to be an owner, who is bound by the law either as a Muhammadan or by custom.

(1) 24 W.R. 95.
(2) 32 Col. 988.
(3) Tyabji's Muhammadan Law, page 670, paragraph 523(c).

1954

Shri Audh Behari Singh
v.
Gajadhar Jaipuria and Others.

Mukherjea J.

In our opinion the decision proceeds upon a wrong assumption. The right of pre-emption, as we have already stated, is an incident of property and attaches to the land itself. As between Muhammadans the right undoubtedly arises out of their personal law; but that is because the law of pre-emption is no part of the general law in India. Muhammadans live scattered all over our country and unless the right of pre-emption is regarded as part of their personal law they would lose the benefit of it altogether. Hence if a Muhammadan owns land in any local area and has co-sharers or neighbouring proprietors who are also Muhammadans, a right of pre-emption would accrue to the latter under the personal law of the Muhammadans, which is enforced in this country since the British days on grounds of equity, justice and good conscience. But though arising out of personal law the right of pre-emption is not a personal right; it is a real right attaching to the land itself. When the right is created by custom it would be, as the Privy Council has said, co-extensive with the right under Muhammadan Law unless the contrary is proved. This means that the nature and incidents of the right are the same in both cases. In both it creates a right in the property and not a mere personal claim against the vendor or the vendee and the essential pre-requisites to the exercise of the right and the terms of enforcement are identical in both. But this does not mean that the customary right must be personal to the inhabitants of a particular locality. It may be so, if that is the incident of the custom itself as established by evidence, but not otherwise. Under Muhammadan Law the right is confined to persons of a particular religious persuasion because it has its origin in the Muhammadan Law which is no longer a law of the land. But when it is the creature of a custom the religious persuasion of the parties or the community to which they belong are altogether immaterial. All that is necessary to prove in such cases is that the right of pre-emption is recognised in a particular locality and once this is established, the land belonging to every person in the locality would be subject to the custom, irrespective of his being a member of a particular

community or group. The whole doctrine, as enunciated above, is based upon the fallacious assumption that the right of pre-emption is a personal right arising out of certain personal conditions of the parties like religion, nationality or domicile and this fallacy crept into our law simply because the right of pre-emption as between Muhammadans is administered as a part of their personal law in our country.

The correct legal position must be that when a right of pre-emption rests upon custom it becomes the *lex loci* or the law of the place and affects all lands situated in that place irrespective of the religion or nationality or domicile of the owners of the lands except where such incidents are proved to be a part of the custom itself.

It appears that the decision in *Byjnath* v. *Kapilmon*(1), which was quite in accordance with the view then taken by the High Court of Calcutta about the nature of the right of pre-emption, was the basis of the statement of law in the form set out above in an earlier edition of Roland Wilson's book. The decision in *Parsashth Nath* v. *Dhanai*(2), which is the other authority referred to, is based entirely upon the statement of law in that earlier edition, and does not carry the matter any further. In our opinion these decisions cannot be held to be correct and the contention of the learned counsel for the appellant should be given effect to. We accordingly hold that a local custom of pre-emption exists in the city of Banaras and the right attaches at least to all house properties situated within it and no incident of such custom is proved which would make the right available only between persons who are either natives of Banaras or are domiciled therein. The result is that the appeal is allowed and the judgments of both the Courts below are set aside. The case shall go back to the High Court for consideration of the two questions left undecided by it, namely, whether the plaintiff has made the demands in due compliance with the forms prescribed by the Muhammadan Law and secondly whether the plaintiff, being a landlord,

(1) 24 W.R. 95.
(2) 32 Cal. 988.

1955

Shri Audh Behari Singh v. Gajadhar Jaipuria and Others.

could eject his own tenants in exercise of the right of pre-emption. The appellant will have the costs of this appeal from respondent No. 1. Further costs will abide the result.

Appeal allowed.

1954

April 2

GOPAL SINGH AND OTHERS

v.

UJAGAR SINGH AND OTHERS.

[B. K. MUKHERJEA, VIVIAN BOSE, GHULAM HASAN and VENKATARAMA AYYAR JJ.]

Custom—Succession—Agricultural Jats of village Ralla, Tahsil Mansa, District Barnala, State Pepsu—Non-ancestral property—Daughter's sons v. collaterals—Gift by daughter of non-ancestral property in favour of her sons—Whether amounts to acceleration—Omission to include a small portion of the whole property in the gift—Surrender—Validity of.

Held, that among agricultural Jats of Village Ralla, in the District of Barnala, State of Pepsu, daughter's sons will inherit, to the exclusion of collaterals, the non-ancestral lands which had devolved by inheritance on their mother.

A gift by the daughter to her sons would amount to acceleration of succession. Omission to include a small portion of the whole property due to ignorance or oversight does not affect the validity of the surrender when it is otherwise bona fide.

Lehna v. *Mst. Thakri* (32 Punjab Record 1892 F.B.); *Lal Singh* v. *Roor Singh* (55 P.L.R. 168 at 172); *Mulla's Hindu Law, 11th Edition, page 217; Rattigan's Digest of Customary Law Para. 23(2)* referred to.

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 174 of 1952.

Appeal from the Judgment and Decree dated the 27th June, 1950, of the High Court of Judicature of Patiala and East Punjab States Union in Second Appeal No. 219 of 1949-50 against the Judgment and Decree dated the 21st September, 1949, of the Court of the Additional District Judge, Bhatinda, in Appeal No. 61 of 1948, arising from the Judgment and Decree dated the 10th August, 1948, of the Court of the Sub-Judge II Class, Mansa, in Case No. 134 of 1947.