

(2012) 05 CAL CK 0075

In the Calcutta High Court

Case No : S.A. NO. 36 of 1984 and S.A. NO. 37 of 1984

Sk. Shabajan Molla

APPELLANT

Vs

Akbar Hossain and Others

RESPONDENT

Date of Decision : 17-05-2012

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 3 Rule 1, Order 3 Rule 2, 100
Evidence Act, 1872 — Section 92, 94

Citation : (2012) 4 CHN 240

Hon'ble Judges : Tapan Kumar Dutt, J

Bench : Single Bench

Advocate : Saptangshu Basu, Mr. Debasis Roy and Mr. Suprabhat Bhattacharya, for the Appellant; Bidyut Kumar Banerjee, Sr. Advocate. Mrs. Shila Sarkar, Ms. Usha Maity and Mr. Syed Shafi Ahmed, for the Respondent

Judgement

Tapan Kumar Dutt, J.—The two second appeals being S.A. No. 36 of 1984 and S.A. No. 37 of 1984 have been heard together. The facts of the case, briefly, are as follows:

The respondent No.1 in S.A. No.36 of 1984 (Akbar Hossain) as plaintiff filed title suit No.18 of 1975 which was subsequently re-numbered as title suit No. 71 of 1981 before the learned Trial Court concerned against the appellant in both the second appeals and against one Abdul Aziz. In such suit the respondent No.1 prayed for a decree for pre-emption of the 17 gondas, 3 karas and 1 kranti share of the appellant in both the second appeals, that is, Sk. Shabajan Molla in respect of the premises No. 7A, Tiljala Lane (Eastern Portion), now numbered as 7C, Tiljala Lane, P.S. Karaya, District 24-paraganas which was sold by the said Abdul Aziz to the said Sk. Shabajan Molla. The case of the said Akbar Hossain was that the said Akbar Hossain and Abdul Aziz were co-shares in premises No. 7A, Tiljala Lane in which the said Abdul Aziz had only 17 gondas, 3 karas and 1 kranti and the said Akbar Hossain was the owner of the remaining lion's share in the suit premises but the said Abdul Aziz sold his aforesaid undivided share to the Sk. Shabajan Molla by a registered deed of sale in which the said Akbar

Hossain had no consent and on receiving information of completion of the said sale on 9.1.1975 from one Md. Anis the said Akbar Hossain had at once declared his intention to assert his right of pre-emption by uttering, "I do claim my shuffa" and with the least practicable delay the said Akbar Hossain affirmed his intention, referring expressly to the fact that "talab-in-mowasibat" had already been made, made a formal demand on the premises which were subject of sale, in presence of two witnesses, who were very close neighbours of Akbar Hossain. The plaintiff in the said suit, that is, Akbar Hossain pleaded that the said Akbar Hossain duly performed both the demands, "talab-in-mowasibat" and "talab-in-ishhad" as prescribed by Mohammedan Law. The said Akbar Hossain's case was that he had declared his readiness and intention to pay to the buyer (Sk. Shabajan Molla) such sum as the Court determines. The said Sk. Shabajan Molla contested the said suit by filing a written statement contending, inter alia, that the said Akbar Hossain had no locus standi to file the present suit and it was the case of the said Sk. Shabajan Molla that the said Akbar Hossain has already transferred his right, title and interest in the disputed property and, thus, he has lost his right to file any suit for pre-emption. The said Sk. Shabajan Molla's further case was that the plaintiff in the said suit, that is, Akbar Hossain knew about the sale when Letters of attornment were issued to the tenants.

2. The said Sk. Shabajan Molla prayed for dismissal of the suit filed by the said Akbar Hossain. It may be noted that in such suit Rabia Begum was added as a co-plaintiff.

3. The said Sk. Shabajan filed title suit No.128 of 1975 against one Rabia Begum and one Sk. Manjur Ali praying, inter alia, for a decree for pre-emption of the undivided 15 annas 2 gondas and 2 kranties share of the disputed property against the defendant No.1 in the said suit (i.e., Rabia Begum) and his case was that his co-sharer Akbar Hossain sold away his 17/18th undivided share in favour of Rabia Begum who in turn, after purchase, sold away half of it to Sk. Monjur Ali. According to Sk. Shabajan, he being a co-sharer, he intended to pre-empt after performing all formalities as provided in Mohammedan Law. The defence of Rabia Begum was that her vendor Akbar Hossain did not sell his entire share but retained for himself a fraction of the land while disposing of the major portion in favour of Rabia Begum.

4. It appears that the said suit was contested by Rabia Begum who filed a written statement in the said suit.

5. The two suits were heard together and by a common judgment and decree dated 30th November, 1981 the learned Trial Court decreed the said T.S. No. 71 of 1981 and the said Akbar Hossain was directed to deposit in Court or to pay the said Sk. Shabajan directly the purchase money for the premises No. 7C Tiljala Lane containing by ad-measurement an area of 17 gondas, 3 karas and 1 kranti share as described in the schedule of the plaint of T.S. No. 71 of 1981 within 21 days and "on payment of such purchase money on or before the day referred to above the defendant shall deliver possession of such property to the plaintiff

No.1 whose title thereto shall be deemed to have accrued from the date of such payment. If the purchase money is not paid within 21 days from the date hereof the suit shall be dismissed with costs payable to defendant No.1 alone. The said learned Trial Court was further pleased to order that the said judgment in the said T.S. 71 of 1981 will also govern T.S. 128 of 1975."

6. That challenging the said judgment and decrees passed in the aforesaid two suits the appellant herein filed two appeals being title appeal No. 36 of 1982 (arising from the title suit No. 71 of 1981) and title appeal No. 110 of 1982 (arising out of title suit No. 128 of 1975). The said two title appeals were heard together analogously and the learned Lower Appellate Court by judgment and decree dated 8th June, 1983 affirmed the judgment and decrees passed by the learned Trial Court. The learned Lower Appellate Court held that Akbar Hossain was entitled to a decree of pre-emption and the suit filed by Sk. Shabajan, i.e, the appellant in the present appeals, must be dismissed.

7. That challenging the aforesaid judgment and decrees passed in the title appeals, as aforesaid, the appellant has filed the present two second appeals in this Court. S.A. No. 36 of 1984 arises out of the said title appeal No. 36 of 1982 and S.A. No. 37 of 1984 arises out of title appeal No. 110 of 1982. It appears that the instant two second appeals were initially heard by a learned Single Judge of this Court and His Lordship by judgment and decree dated 16.5.1997 was pleased to allow the aforesaid two second appeals on contest against Rabia Begum who is the respondent No.2 in S.A. No. 36 of 1984 and respondent No.1 in S.A. No.37 of 1984 and ex parte against the rest. The judgment and decree passed by the learned First Appellate Court were set aside, the said title suit No. 71 of 1981 was dismissed and the said title suit No.128 of 1975 was remanded to the learned Trial Court for disposal according to law in the light of the observations made in the body of the said judgment and on the basis of the evidence already on record within a certain period of time. The said learned Single Judge was further pleased to observe that the learned Trial Court shall not allow any of the parties to adduce any additional evidence in support of their respective cases. It appears that the said Rabia Begum challenged the said judgment and decree passed by the said learned Single Judge of this Court in the aforesaid two appeals in the Hon''ble Supreme Court of India and the Hon''ble Supreme Court by order dated 28.7.2004 was pleased to allow the appeals before the said Hon''ble Court by setting aside the judgment and decrees passed by the said learned Single Judge of this Court on the ground that substantial questions of law were not formulated by the High Court before disposal of the second appeals, and remit back the second appeals to this Court for disposal in accordance with law after considering and formulating substantial questions of law if such questions arise for consideration between the parties, as required u/s 100 of the C.P.C.

8. That by order dated 5.8.2011 this Court formulated the following substantial questions of law on which the appeals were heard:

(1) Whether the learned Lower Appellate Court erred in not holding that after Akbar Hossain had transferred his 17/18th share in the suit property in favour of Rabia Begum the said Akbar Hossain had lost his right to maintain the suit for pre-emption (T.S. No. 71 of 1981).

(2) Whether or not the learned Lower Appellate Court erred in not holding that in order to succeed in a suit for pre-emption, the right of pre-emption must subsist till the final adjudication of the suit and in the present case such right did not subsist in the name of said Akbar Hossain at the time when the suit (in which Akbar Hossain was plaintiff no.1 i.e. Title Suit No.71 of 1981) came up for final hearing?

(3) Whether or not the learned Lower Appellate Court erred in coming to a finding that Akbar Hossain had a subsisting right in the disputed property even after the sale in favour of Rabia Begum?

(4) Whether or not, the learned Lower Appellate Court was justified in holding that Sovajan Molla had acquiesced in the sale made by Akbar Hossain in favour of Rabia Hossain on the basis of the materials on record?

(5) Where or not the learned Lower Appellate Court should have drawn an adverse inference from the fact that the said Akbar Hossain after executing the deed of sale in favour of Rabia Begum did not come forward to adduce evidence?

(6) Where or not the learned Courts below failed to consider the effect of Section 92 of the Indian Evidence Act while considering Exbt. 4?

(7) Where or not the learned Lower Appellate Court erred in dismissing Sovajan Molla's Suit (Title Suit No. 128 of 1975) without considering the same independently on its own merits?

9. The learned Advocate appearing on behalf of the appellant in both the appeals submitted that Rabia Begum who is the respondent in both the appeals cannot claim pre-emption under the Mohammedan Law without complying with the necessary formalities under the law. In this connection, he has referred to the judgment of the learned Lower Appellate Court where the learned Lower Appellate Court has held that Rabia Begum is not entitled to pre-emption but the said Akbar Hossain has not lost his right of pre-emption and, therefore, the said Akbar Hossain has a right to claim pre-emption. The said learned Advocate submitted that Akbar sold his entire 17/18th share in the property concerned vide sale deed dated 27th June, 1975 (Ext.4) and thus Akbar Hossain also lost his right of pre-emption. He submitted that Akbar Hossain himself did not adduce any evidence in both the suits but his power-of-attorney-holder, namely, one Md. Hossain, gave evidence on the basis of the power of attorney executed by Akbar Hossain on 18.1.1977. The said learned Advocate questioned the value of the evidence of the said power-of -attorney-holder particularly when the deed of power-of-attorney was executed sometime in the year 1977 and such witness has adduced evidence in respect of the deed of 1975. According to the said

learned Advocate, the power-of-attorney-holder was not competent to depose in respect of the "talab-i-mowasibat". According to the said learned Advocate, even Rabia Begum cannot succeed in the title suit No. 71 of 1981 even though the said Akbar Hossain had purportedly transferred his 17/18th share to the said Rabia Begum in view of the fact that the said Rabia Begum did not comply with the necessary formalities for claiming pre-emption under the Mohammedan Law and this aspect of the matter has not been considered by both the learned Courts below. It may be noted here that the appellant in both the appeals, that is, Sk. Shabajan had purchased the share of Abdul Aziz in the property concerned on 4.10.1974.

10. The said learned Advocate referred to Sections 236 of Mulla's Principle of Mohammedan Law which is quoted below:

236. Demands for pre-emption:- No person is entitled to the right of pre-emption unless -

(1) he has declared his intention to assert the right immediately on receiving information of the sale. This formality is called talab-i-mowasibat (literally, demand of jumping, that is, immediate demand): and unless

(2) he has with the least practicable delay affirmed the intention, referring expressly to the fact that the talab-i-mowasibat had already been made (a), and has made a formal demand -

(a) either in the presence of the buyer, or the seller, or on the premises which are the subject of sale (b), and

(b) in the presence at least of two witnesses (c). This formality is called talab-i-ishhad (demand with invocation of witnesses) (d)

Explanation I. - The talab-i-mowasibat should be made after the sale is completed. It is of no effect if it is made before the completion of the sale.(s.232)

Explanation II.- it is not necessary that the talab-i-mowasibat or talab-i-ishhad should be made by the pre-emptor in person. It is sufficient if it is made by a manager or a person previously authorized by the pre-emptor to make the demand (e). When the pre-emptor is a minor, his de facto guardian may make a demand on his behalf (f). A demand made by the father or brother of the pre-emptor is not sufficient, even if he has a right to pre-empt, unless he has been previously authorized to make the demand (g). When the pre-emptor is at a distance, the demand may be made by means of a letter (h).

Explanation III. - If the talab-i-ishhad is made in the presence of the buyer it is not necessary that the buyer should then be actually in possession of the property in respect of which pre-emption is claimed (i).

Explanation IV.- When two or more persons claim to pre-empt, each one of them should make the demands, unless one of them has also been authorized by the other to do so, and he makes the demands on their behalf also. If a suit is

brought by several persons claiming to pre-empt, and only one of them has made the demand on his own behalf the suit will proceed as regards him, but it must be dismissed as to the rest.

Where there are two or more buyers, and the talab-i-ishhad is not made in the presence of the vendor or on the property sought to be pre-empted, the demand must be made to all the buyers (k). If it is made only to some of them the sharers of those buyers only can be pre-empted (I) (s.244).

Explanation V.- No particular formula is necessary either for the performance of talab-i-mowasibat or talab-i-ishhad so long as the claim is unequivocally asserted.

11. According to the said learned Advocate, no person is entitled to the right of pre-emption unless he has declared his intention. According to the said learned Advocate, the power of attorney holder could not have deposed with regard to the Akbar Hossain's alleged declaration of intention to pre-empt and the said Rabia Begum has never claimed to have made such declaration of intention to pre-empt. The said learned Advocate submitted that since the said Akbar Hossain has not come forward to depose in the suits particularly in the facts and circumstances of the instant case, the performance of Talab-I-Mowasibat or Talab-i-Ishhad remained unproved.

12. The said learned Advocate also referred to Section 241 of the aforesaid Mulla's Principle of Mohammedan Law which is quoted below:

241. Right lost by joinder of plaintiffs not entitled to pre-empt.- If a plaintiff who has a right of pre-emption joins with himself as co-plaintiff a person who has no such right he is not entitled to claim pre-emption, and the suit must be dismissed. But the right is not lost if he joins with himself as co-plaintiff a person who, but for his failure to make the necessary demands (sec.236), would have been entitled to pre-empt.

13. According to the said learned Advocate, the provisions of the said Paragraph 241 will indicate that Rabia Begum also did not have any right to claim pre-emption. According to the said learned Advocate, the learned Courts below omitted to consider the question whether the said Rabia Begum had a right of pre-emption or not. The said learned Advocate referred to Ext.4 and submitted that the said document would clearly indicate that Akbar Hossain intended to sell his entire 17/18th share, more or less, to the said Rabia Begum. He submitted that Section 92 of the Evidence Act would show that oral evidence of the witnesses cannot override the written terms of the document and the plan which has been annexed to the said Ext.4 is in consonance with the recitals in the said deed. The said learned Advocate further submitted that in the facts and circumstances of the present case it is not necessary to remand the said title suit No.128 of 1975 as the same should be decreed on the basis of the evidence on record.

14. The learned Advocate appearing on behalf of the appellant has cited a

decision reported a Roy and Co. and Another Vs. Sm. Nani Bala Dey and Others, and referred to Paragraph 6 of the said reports wherein it has been observed by the Hon''ble Court that in the case of conflict between the area and the boundary, the description of the boundary will prevail however, since in the present case it has been submitted by the said learned Advocate that the plan annexed to the Ext.4 is in consonance with the recitals made in the Ext.4 it is not necessary to dilate on this question any further.

15. The said learned Advocate submitted that the intention of the parties is of paramount importance in the event there is any conflict in the terms of the deed but, in the present case, there is no conflict at all and the intention is absolutely clear from the recitals of the said Ext.4.

16. He cited a decision reported at 10CLJ 570 (Raja Durga Prosad Singh -V- Rajendra Narain Bagchi & Others) in support of his contention that where the boundaries and the quantity, are equally certain and exactly defined, or the boundaries are as precise and definite as the quantity is specific and exact, and there is gross divergency between the quantity specified and the quantity found to be included within the defined boundaries, preference should be given to that element of the description of the subject-matter which is more consistent with the intention of the parties to be collected from the other parts of the deed, illuminated, if necessary, by the surrounding circumstances and the subsequent conduct of the parties.

17. The said learned Advocate cited another decision reported at AIR 1944 Privy Council 80 (Andiappan Ambalam & Others -V- V.E. Meyyappan Servai & Others) and referred to Paragraph 10 of the said reports wherein it has been observed that in order to ascertain the document's true construction, the whole document must be considered, and not merely the so-called "description of property" at the end thereof.

18. The said learned Advocate cited another decision reported at Smt. Kamala Devi Vs. Seth Takhatmal and Another, and referred to Paragraph 8 of the said reports wherein it has been observed by the Hon''ble Court that "when a Court is asked to interpret a document, it looks at its language. If the language is clear and unambiguous and applies accurately to existing facts it shall accept the ordinary meaning for the duty of the court is not to delve deep into the intricacies of the human mind to ascertain one's undisclosed intention, but only to take the meaning of the words used by him, that is to say his expressed intentions. Sometimes when it is said that a Court should look into all the circumstances to find an author's intention, it is only for the purpose of finding out whether the words apply accurately to existing facts."

19. The said learned Advocate cited another decision reported at Golam Kibria Molla Vs. Abdur Rouf Molla and Others, and referred to Paragraph 5 of the said reports wherein it has been observed that "in order to get a decree for pre-emption under the Mohammedan Law where an outside party has purchased a

share of a co-sharer, it is necessary, according to the Mohammedan Law, that two formalities are to be observed. The first formality is known as talab-in-mowasibat. This formality requires that as soon as a co-sharer comes to know about a sale of a property by a co-sharer to an outsider, he must immediately on getting such information of sale declare his intention that he is ready and willing to assert the right of pre-emption. The next formality to be observed by the intending purchaser is known as talab-i-ishhad. According to this step, the intending co-sharer-purchaser must without any unreasonable delay affirm, as soon as practicably possible after the demand under talab-i-mowasibat, his intention to exercise the right of pre-emption and make a formal demand for the same either in the presence of the buyer or the seller or upon the subject-matter of sale in presence of at least two persons whom he has to invoke as witnesses and in this demand he is to reassert his right of pre-emption with reference to his first demand, known as talab-i-mowasibat."

20. The said learned Advocate cited another decision reported at Bishan Singh and Others Vs. Khazan Singh and Another, and referred to Paragraph 11 of the said reports in support of his contention that the right of pre-emption is a very weak right and the Court should be fully satisfied with regard to the claim of pre-emption by a party before granting a decree of preemption.

21. The learned Advocate for the appellant cited a decision reported at Janki Vashdeo Bhojwani and Another Vs. Indusind Bank Ltd. and Others, wherein it has been observed, inter alia, that Order 3 Rules 1 and 2 of the CPC empowers the holder of power of attorney to "act" on behalf of the principal and the word "acts" employed in Order 3 Rules 1 & 2 C.P.C. confines only in respect of "acts" done by the power-of-attorney holder in exercise of the power granted by the instrument concerned but the said term "acts" would not include deposing in place and stead of the principal. The Hon"ble Court was pleased to clarify that if the power-of-attorney-holder has rendered some "acts" in pursuance to power of attorney he may depose for the principal in respect of such "acts" but he cannot depose for the principal for the acts done by the principal and not by him. The Hon"ble Court was further pleased to observe that such power-of-attorney-holder cannot depose for the principal in respect of the matter which only the principal could have a personal knowledge and in respect of which the principal is entitled to be cross-examined.

22. The said learned Advocate cited another decision reported at Dr. Deepak Sharma Vs. Smt. Vineeta Sharma (nee Dubey), It appears from paragraph 28 of the said reports that the Hon"ble Court was of the view that a power-of-attorney-holder is incapable of giving evidence in respect of "acts" which are not the acts of the power -of-attorney-holder and, since the acts which were involved in the said reports were exclusively within the personal knowledge of the parties concerned it is none but the parties concerned who can prove those ingredients by giving evidence before the Court.

23. The said learned Advocate disputed the submission made by the learned

Advocate appearing on behalf of the said Rabia Begum that the signature of Sk. Shabajan appears on Ext.4. The said learned Advocate for the appellant submitted that since Akbar Hossain had sold his entire 17/18th share in the property concerned the said Akbar Hossain had lost his right of pre-emption.

24. The learned Advocate for the appellant referred to some parts of the evidence P.W.6 in respect of his contention that Akbar Hossain had clearly sold his 17/18th share in the property concerned to the said Rabia Begum and nothing was retained by Akbar Hossain.

25. The learned Advocate appearing on behalf of the respondent Rabia Begum submitted that Sk. Shabajan Molla was an attesting witness in the deed dated 27.6.1975 by which Akbar Hossain sold 17/18th share to Rabia Begum but the said Sk. Shabajan Molla subsequently filed title suit No.128 of 1975 in August 1975 suppressing such fact. The said learned Senior Advocate submitted that Akbar Hossain had more than 4 cottahs 2 chittaks of land and even after the sale made by Akbar Hossain in favour of Rabia Begum, Akbar Hossain had retained some land. The said learned Senior Advocate submitted that the recitals in the sale deed (Ext.4) regarding the share of Akbar Hossain was only a rough calculation made by the learned Lawyer concerned. According to the said learned Senior Advocate since Akbar had retained some portion of the land, Akbar had the right of pre-emption available to him. The said learned Senior Advocate submitted that if a neutral stand is taken then there is nothing on record to show that either the sale made in favour of Sk. Shabajan or the sale made in favour of Rabia Begum was completed before the demand was made as per the Mohammedan Law and no witness has stated that after the sale transaction has been entered into the Volume Book the demand as per Mohammedan Law was made, and the date of entry into the Volume Book should be treated as the date of completion of sale.

26. The said learned Senior Advocate for the respondent submitted that Akbar Hossain had 15 annas 2 gondas and 2 kranti share which in terms of measurement would be more or less 4 cottahs and 8 chittaks but the said Akbar Hossain sold about 4 cottahs and 2 chittaks in favour of Rabia Begum and, therefore, Akbar Hossain did not sell his entire share in favour of Rabia Begum but he retained about 6 chittaks of land with him. The said learned Senior Advocate submitted that Akbar thus remained to be a co-sharer and did not lose his right of pre-emption. The said learned Advocate submitted that it could be that Akbar Hossain had sold 17/18th share of his share in the property to the said Rabia Begum.

27. The said learned Advocate submitted that the said Rabia Begum was added as a co-plaintiff in the title suit No. 71 of 1981 by Court's order dated 4.4.1977 on the said Rabia Begum's application and not at the instance of Akbar Hossain. Therefore, according to the said learned Advocate, Section 241 of the Principles of Mohammedan Law is not applicable in the instant case as according to the said learned Advocate, to make Section 241 applicable a person must be joined as a

co-plaintiff at the instance of the plaintiff. According to the said learned Senior Advocate, the said Akbar Hossain must have voluntarily acted to add the said Rabia Begum as a co-plaintiff in order to make Section 241 applicable but that was not done in the instant case. The said learned Advocate submitted that if Akbar Hossain's suit succeeds then the said Sk. Shabajan's suit for pre-emption has to fail.

28. The said learned Advocate further submitted that the power-of -attorney-holder of the said Akbar Hossain is the brother-in-law of the said Akbar Hossain and, therefore, a relative, and being a relative and having adjacent residence the said power-of-attorney-holder had personal knowledge with regard to the affairs of the said Akbar Hossain.

29. The said learned Senior Advocate submitted that the decision reported at 2005 SC 439 cannot apply in the instant case as the power-of-attorney-holder of the said Akbar Hossain deposed not only on the basis of the power-of-attorney but also on the basis of his personal knowledge being a close relative of the said Akbar Hossain and having an adjacent residence. The said learned Senior Advocate submitted that the act of the principal, that is, the said Akbar Hossain in making the demand as per Section 236 of the Principles of the Mohammedan Law need not be proved by the power- of-attorney-holder as it was proved by other witnesses and the evidence of such other witness in this regard not having been questioned in cross-examination. The said learned Advocate submitted that the learned Lower Appellate Court has found that Akbar Hossain's presence is not necessary. The said learned Advocate further submitted that P.W.6 proved Sk. Shabajan's signature on Ext.4.

30. The said learned Advocate submitted that in the cause title of plaint of T.S. 128 of 1975 the said Sk. Shabajan has also described himself as Sk. Subajan and that Sk. Shabajan and Sk. Subajan is really the same person and, therefore, there can be no confusion in this regard with regard to Ext.4. The said learned Advocate submitted that the said Sk. Shabajan acquiesced in the sale made by Akbar Hossain in favour of the said Rabia Begum as the said Sk Shabajan signed as an attesting witness in the sale deed concerned.

31. In this connection the said learned Advocate referred to Section 240 of the Mohammedan Law. The said learned Senior Advocate cited a decision reported at AIR 1950 Madhya Bharat 85 (Narayandas Nandkishore V. Jagan Nath and others) in support of his submission that since the said Sk. Shabajan had consented to and/or acquiesced in the sale made by Akbar Hossain in favour of Rabia Begum, the said Sk. Shabajan cannot assert his claim of pre-emption subsequently. The said learned Senior Advocate submitted that the language of the said Ext.4 is very clear and the decision cited by the learned Advocate for the appellant are not applicable in the facts and circumstances of the present case. The said learned Advocate cited a decision reported a Sheikh Mohammad Rafiq Vs. Khalilul Rehman and Another, by his legal representatives, -V- Khalilul Rahman and another) and referred to Paragraph 7 of the said reports in support of his

contention that it is settled law that the necessary demands in a pre-emption suit had to be made after a sale had been completed not by execution or registration of the sale deed but by the sale deed having been copied out in the Volume Books and it would be the date entered in such book which has to be considered as the date of sale. The said learned Advocate also submitted that as per the provisions of Order 3 Rule 2 of the CPC a recognised agent has conducted the suit on behalf of the principal.

32. Having heard the learned Advocates for the respective parties and having considered the materials on record this Court finds that the crucial point to be decided in this appeal is as to whether or not the said Akbar Hossain had retained any land for himself after selling out the property concerned vide the sale deed dated 27.6.1975 (Ext.4) to the said Rabia Begum. The learned Advocate for the respondent laid much emphasis in his submission that the said Akbar Hossain had more than four cottahs two chittacks of land and even after the sale made by Akbar Hossain in favour of Rabia Begum, Akbar Hossain had retained some land and that the recitals in the said sale deed (Ext.4) regarding the share of Akbar Hossain was only a rough calculation made by the learned Lawyer concerned. The said learned Advocate for the respondent submitted that since the said Akbar Hossain had retained some portion of the land, he had the right of pre-emption available to him. On perusal of the said sale deed dated 27.6.1975 it appears that it has been stated in the said sale deed that the said Akbar Hossain had undivided 17/18th share and the said Abdul Aziz had undivided 1/18th share in premises No. 7C, Tiljala Lane, Calcutta. It further appears from the said sale deed dated 27.6.1975 that " the Vendor (Akbar Hossain) hath agreed with the Purchaser (Rabia Begum) for the absolute sale to her of his said undivided share in the said land hereditaments and premises and the inheritance thereof in fee simple in possession free from all encumbrances at or for the price of Rs. 25,000/- (Rupees Twenty-five thousand) only." It has been recorded in the aforesaid sale deed that "the Vendor (Akbar Hossain) doth hereby convey grant and transfer unto the Purchaser (Rabia Begum) his said undivided 17/18th share in ALL THAT piece or parcel of land together with all structures thereon containing by measurement an area of four cottahs two chittacks and forty-two square feet more or less situate lying at and being the premises No. 7C, Tiljala Lane within the municipal limits of the town of Calcutta more fully described in the schedule hereunder and delineated in the map or plan hereto annexed and shown within red borders". The schedule in the said sale deed has been described as follows:

THE SCHEDULE ABOVE REFERRED TO:-

An undivided 17/18th share of and in ALL THAT piece or parcel of land together with all structures standing thereon containing by measurement an area of four cottahs two chittacks and forty-two square feet be the same a little more or less situate lying at and being the premises No. 7C (formerly the Eastern portion of 7A), Tiljala Lane within the municipal limits of the town of Calcutta in Thana

Karaya, Sub-Registration Office Sealdah in the district of 24-parganas and butted and bounded as follows:-

on the North - Surface drain and beyond that Tiljala Lane

on the East - 4/2, Rifle Range Road

on the South - Boundary wall of the premises and beyond that common surface drain.

on the West - 7/A, Tiljala Lane.

33. In the map annexed to the said sale deed the area of four cottahs two chittacks and forty-two square feet has also been described as more or less. Reading the said sale deed and perusing the map annexed to the said sale deed this Court is of the view that the area described in the said document which is supposed to have been sold by the said Akbar Hossain to Rabia Begum is more or less subject to actual measurement but there cannot be any dispute with regard to the fact that the said Akbar Hossain had sold his entire undivided 17/18th share in the said premises No. 7C, Tiljala Lane and nothing was retained by the said Akbar Hossain for himself. The intention of the parties will be absolutely clear on perusal of the said sale deed. The decisions cited by the learned Advocate for the appellant, namely, the decision reported at 10CLJ 570 that if there is gross divergency between the quantity specified and the quantity found to be included within the defined boundaries, preference should be given to that element of the description of the subject-matter which is more consistent with the intention of the parties to be collected from the other parts of the deed, illuminated if necessary, by the surrounding circumstances and the subsequent conduct of the parties. In the present case Akbar Hossain has clearly recorded in the said sale deed that he had intended to transfer his entire 17/18th share in the premises concerned and there is no question of any land being retained by the said Akbar Hossain. It does not appear that any of the parties have claimed that there was an actual measurement of the land sold by the said Akbar Hossain to Rabia Begum but the fact remains that whatever share the said Akbar Hossain had in the premises concerned, namely, undivided 17/18th share the said Akbar Hossain sold his entire share in the said premises to Rabia Begum. The decision reported in AIR 1944 Privy Council 80 indicates that in order to ascertain the document's true construction, the whole document must be considered, and not merely the so-called "description of property" at the end thereof. According to the decision reported at Smt. Kamala Devi Vs. Seth Takhatmal and Another, if the language of a document is clear and unambiguous and applies accurately to existing facts a Court should accept the ordinary meaning of such language in the document. A plain reading of the said Ext.4 would clearly show that Akbar Hossain had sold his entire 17/18th share in the premises concerned to Rabia Begum. The intention of the parties is quite clear from a perusal of the said document. The learned Advocate appearing on behalf of the appellant had rightly submitted that the provisions of Section 92 of the Evidence Act would show that

oral evidence of the witnesses cannot override the written terms of the document being Ext.4. The learned Courts below were not right in coming to the conclusion that the said Akbar Hossain had retained some portion of the land for himself after making a sale in favour of said Rabia Begum vide Ext.4. The learned Advocate appearing on behalf of the respondent made an attempt to calculate the area of land which should have comprised the share of the said Akbar Hossain considering the total area of the premises concerned and the area of land which was sold by Akbar Hossain to the said Rabia Begum. But, it appears to this Court that such calculations cannot be of any assistance to the said Rabia Begum since the intention of the parties is absolutely clear from a perusal of the said sale deed and it does not appear that any actual measurement was done at the time of sale of the undivided 17/18th share of Akbar Hossain to the said Rabia Begum. The area of land sold by Akbar Hossain to the said Rabia Begum has been described to be more or less. That apart, according to Section 92 of the Indian Evidence Act, 1872 no evidence can be admitted for the purpose of contradicting the terms of the written document. According to Section 94 of the said Evidence Act when language used in a document is plain in itself, and when it applies accurately to existing facts, evidence may not be given to show that it was not meant to apply to such facts. As already noted above, the language of the said Ext.4 is absolutely clear. The finding of the learned Lower Appellate Court that the RTS room has been excluded from the subject-matter of the sale is quite contrary to the recitals in the sale deed concerned. The stand taken by the said Rabia Begum, as noted by the learned Trial Court in its judgment, that the said Akbar Hossain did not sell his entire share but retained for himself a fraction of the land is unacceptable and no evidence of Rabia Begum in support of such claim is admissible as provided u/s 92 of the said Evidence Act. The language in the sale deed concerned is quite clear that the said Akbar Hossain had sold his entire 17/18th share in the said premises in favour of Rabia Begum. Thus, this Court finds that the said Akbar Hossain had lost his right of preemption when he had sold his undivided 17/18th share in favour of Rabia Begum. It may be noted here, the said Akbar Hossain did not come to the witness box to state that he had not sold his entire 17/18th share in the premises concerned.

34. The learned Advocate appearing on behalf of the said Rabia Begum contended that Sk. Shabajan Molla was an attesting witness in the said deed dated 27.6.1975 and as such the said learned Advocate raised the point of acquiescence and submitted that the said Sk. Shabajan cannot claim pre-emption. The said learned Advocate referred to the cause title of the plaint of T.S. 128 of 1975 and submitted that the said Sk. Shabajan has also described himself as Sk. Subajan and that Sk. Subujan and Sk. Shabajan is really the same person and, therefore, there can be no confusion in this regard with regard to Ext.4. The said learned Advocate cited a decision reported at AIR 1950 Madhya Bharat 85 on such point of acquiescence as already noted above.

35. It appears that the learned Lower Appellate Court relied upon the evidence of

P.W. 4 and P.W.5 who are interested witnesses. The purported signature of Sk. Shabajan in Ext.4 has been disputed by Sk. Shabajan and there is no expert opinion on record. It appears to this Court that the learned Lower Appellate Court relying upon the evidence of interested witnesses wrongly came to the conclusion that the said Sk. Shabajan actively participated in the sale transaction (Ext.4) on the basis of the purported finding that "In all probability therefore the signature Ext.4 (b) appears to be that of Shabajan". Such conclusion arrived at by the learned Lower Appellate Court, in the absence of any expert opinion in this regard, is based on surmises and conjectures. The finding of the learned Lower Appellate Court in this regard, that is, with regard to the purported signature of the said Sk. Shabajan in Ext.4 is not a certain one. In such circumstances the decision reported at AIR 1950 Madhya Bharat 85 cannot be of any assistance to the said respondent Rabia Begum.

36. The submission made by the learned Advocate for the appellant that Rabia Begum cannot claim pre-emption under the Mohammedan Law without complying with the necessary formalities under the law is quite justified. The learned Lower Appellate Court has held that Rabia Begum is not entitled to pre-emption but the learned Lower Appellate Court proceeded to pass the impugned judgment on the basis that Akbar Hossain has not lost his right of pre-emption and, therefore, Akbar Hossain has a right to claim pre-emption. This Court is of the view that Akbar had lost his right of pre-emption. Section 236 of the principles of Mohammedan Law stipulates certain conditions on the performance of which the right of pre-emption can be exercised. There is nothing on record to show that the said Rabia Begum had complied with the necessary formalities for claiming pre-emption as rightly submitted in this regard by the learned Advocate for the appellant.

37. The arguments made by the learned Advocate for the said Rabia Begum that the said Rabia Begum was added as a co-plaintiff in title suit No. 71 of 1981 on the basis of an application made by Rabia Begum and on the basis of Court's order in this regard, and not at the instance of Akbar Hossain, and, therefore, Section 241 of the principles of Mohammedan Law is not applicable in the instant case. Such submissions cannot be of any benefit to the said Rabia Begum as this Court has already found that Akbar Hossain had lost his right of pre-emption and the said Rabia Begum has failed to prove that she had complied with the necessary formalities under the Mohammedan law for the purpose of claiming pre-emption. In the instant case, since Akbar Hossain himself had lost his right of pre-emption the question of the said Akbar Hossain joining with himself a co-plaintiff (Rabia Begum) did not arise.

38. The learned Advocate for the appellant has questioned the value of the evidence of the power-of-attorney-holder (Md. Hossain) particularly when the deed of power-of-attorney was executed sometime in the year 1977 and such witness has adduced evidence in respect of the deed of the year 1975. According to the said learned Advocate, the power-of-attorney-holder was not competent to

depose in respect of the "talab-i-mowasibat". Reference was made by the said learned Advocate to the decision reported at Janki Vashdeo Bhojwani and Another Vs. Indusind Bank Ltd. and Others, as already noted above. The learned Advocate appearing on behalf of the respondent Rabia Begum submitted that the said power-of-attorney-holder of Akbar Hossain is the brother-in-law of the said Akbar Hossain and, therefore, a relative, and being a relative and having adjacent residence the said power-of-attorney-holder had personal knowledge with regard to the affairs of the said Akbar Hossain. The said learned Advocate submitted that the said decision reported at Janki Vashdeo Bhojwani and Another Vs. Indusind Bank Ltd. and Others, cannot apply in the facts of the instant case as the said Md. Hossain deposed not only on the basis of the power of attorney but also on the basis of his personal knowledge. It will appear that the deed of power-of-attorney concerned came into existence long after the execution of the sale deed. It is important to note here that the Hon'ble Supreme Court in the said reports Janki Vashdeo Bhojwani and Another Vs. Indusind Bank Ltd. and Others, has clarified that if the power-of-attorney-holder has rendered some "acts" in pursuance of power-of-attorney he may depose for the principal in respect of such "acts" but he cannot depose for the principal for the acts done by the principal and not by him. Thus, this Court finds that the evidence of the said Md. Hossain in respect of the alleged compliance of formalities under the Mohammedan Law by the said Akbar Hossain cannot form the basis of granting any decree of pre-emption in favor of the said Akbar Hossain. In the instant case, Akbar Hossain did not come to the witness box at all and it cannot be held that the power-of-attorney-holder has adduced evidence on behalf of the said Akbar Hossain on the basis of his personal knowledge. A perusal of the evidence of the said Md. Hossain would show that he gave evidence on the basis of a power-of-attorney. In cross-examination the said Md. Hossain stated that the said Akbar Hossain is living somewhere in Bihar and he does not know his present address. He further stated in cross-examination that he does not know the exact date of sale of land by Akbar Hossain to Rabia Begum and he even does not know the date when the said power-of-attorney was executed by Akbar Hossain. The said witness also stated that he cannot say the exact extent of share the said Akbar Hossain had in the suit property. In such circumstances, it is difficult to accept the submission made by the learned Advocate for the respondent Rabia Begum that the said Md. Hossain had deposed on the basis of his personal knowledge. It is also difficult to appreciate the submission made by the learned Advocate for the said Rabia Begum that the act of Akbar Hossain in making a demand as per Section 236 of the principles of Mohammedan Law need not be proved by the power-of-attorney-holder as it was proved by other witnesses. It appears that the learned Advocate appearing on behalf of the appellant has rightly submitted that the said power-of-attorney-holder was not competent to depose in respect of the acts allegedly done by the said Akbar Hossain. In the facts and circumstances of the present case this Court is of the view that the learned Lower Appellate Court was not correct in coming to the conclusion that the presence of Akbar Hossain was not absolutely necessary in

the facts and circumstances of the instant case.

39. In view of the discussions made above, this Court is of the view that the suit filed by Akbar Hossain in which Rabia Begum was added as a co-plaintiff is liable to be dismissed as the said Akbar Hossain had lost his right of pre-emption and the said Rabia Begum has failed to prove that she is entitled to any decree of pre-emption. She has failed to prove that she can claim any such right of pre-emption under law. With regard to the suit filed by the Sk. Shabajan it appears that the learned Trial Court came to the conclusion that since Akbar Hossain has become entitled to a decree of pre-emption of the suit property purchased by Sk. Shabajan, the said Sk. Shabajan "cannot have any ownership of the suit property of any longer." The learned Trial Court held that since Sk. Shabajan himself " can not have ownership of suit property as co-sharer he has no remedy in filing a subsequent suit for pre-emption". The learned Trial Court further held that had the case of Akbar Hossain failed, the said Sk. Shabajan could have claimed relief in his own suit (T.S. 128 of 1975). The learned Lower Appellate Court came to the conclusion that the said Akbar Hossain was entitled to pre-empt and, therefore, Sk. Shabajan's suit must be dismissed. Thus, it is found that both the learned Courts below had dismissed the suit filed by said Sk. Shabajan being said T.S. 128 of 1975 simply on the basis that the said Akbar Hossain's suit was entitled to be decreed. Both the learned Courts below did not go into the merits of the suit filed by Sk. Shabajan. It has not been decided by any of the Courts below as to whether or not the said Sk. Shabajan is entitled to pre-emption in accordance with the provisions of the Mohammedan Law. This is required to be adjudicated by the learned Trial Court and this Court is of the view that the said T.S. 128 of 1975 should be remanded to the Trial Court for an adjudication of the said suit by the Trial Court. This Court is unable to accept the submission of the learned Advocate for the appellant that it is not necessary to remand the said title suit No. 128 of 1975 as the same can be decreed on the basis of evidence on record.

40. In view of the discussions made above, both the instant second appeals are allowed on contest against the said Rabia Begum respondent No.2 in S.A. 36 of 1984 and respondent No.1 in S.A. 37 of 1984 and ex parte against the rest of the respondents. The impugned judgment and decrees passed by the learned Lower Appellate Court are set aside. The said title suit No. 71 of 1981 brought by the said Akbar Hossain is dismissed. The said title suit No. 128 of 1975 brought by the said Sk. Shabajan is remanded back to the learned Trial Court concerned for disposal in accordance with the law in the light of the observations made in this judgment and on the basis of the evidence already on record and further evidence that the parties may adduce in connection with the said T.S. 128 of 1975. The learned Trial Court shall allow the parties, if they so intend, to adduce further evidence in respect of the aforesaid title suit No. 128 of 1975. It is also directed that the learned Trial Court shall consider the point raised by the learned advocate appearing on behalf of the said Rabia Begum in the instant appeal that the necessary demand, as per the Mohammedan Law in a pre-emption suit, has

to be made after a sale is completed not merely by execution or registration of the sale deed but by the sale deed having been copied out in the Volume Books and it would be the date entered in such book which has to be considered as the date of sale. In view of the fact that the suit filed by the said Sk. Shabajan Molla is of the year 1975 the learned Trial Court shall make an endeavour for disposal of the said suit as early as possible without granting any unnecessary adjournment to any of the parties.

41. There will, however, be no order as to costs.

42. Lower Court records be sent down to the learned Court concerned immediately. Urgent certified xerox copy of this judgment, if applied for, be given to the parties on compliance of all necessary formalities.

Later:

After the aforesaid judgment was delivered in open Court, the learned Advocate for the appellant prayed that the lower Court records may be sent back to the learned Court concerned by special messenger and the appellant shall put in the special messenger cost for such purpose.

In such circumstances, let the lower Court records be sent down to the learned Court concerned by special messenger and the special messenger cost for such purpose shall be put in by the appellant by tomorrow.

The learned Advocate for the respondent, Rabia Begum, submits that the operation of the above judgment should be stayed for eight weeks.

The learned Advocate for the appellant has opposed such prayer.

However, the operation of the aforesaid judgment shall remain stayed for eight weeks from this date.