

IN THE HIGH COURT OF KARNATAKA, DHARWAD BENCH

DATED THIS THE 22TH DAY OF JULY, 2024

BEFORE

THE HON'BLE MR. JUSTICE C.M. POONACHA

REGULAR SECOND APPEAL NO. 190 OF 2007

BETWEEN

1. SHRI JAMALUDDIN SHILEMAN MULLA
SINCE DECEASED BY HIS LRS

- 1(a). MOHABBAT W/O JAMALUDDIN MULLA
AGE: 65, OCC: HOUSEHOLD
R/O JATRA,
TALUK: HUKERI, DIST: BELGAUM.

- 1(b) HASINA W/O NASARUDDIN NAIKWADI
AGE: 52 , OCC: HOUSEHOLD,
R/O SOLAPUR,
TALUK: HUKERI, DIST: BELGAUM.

- 1(C) NASIMA GULAB JAMADAR
AGE: 45, OCC: HOUSEHOLD,
R/O SOLAPUR,
TALUK: HUKERI, DIST: BELGAUM.

- 1(D) SALIMA MAHBOOB SANADI,
AGE: 42, OCC: HOUSEHOLD,
R/O SOLAPUR,
TALUK: HUKERI, DIST: BELGAUM.

- 1(E) MAMUD JAMALUDDIN MULLA,
AGE: 40, OCC: AGRICULTURE,
R/O JATRAT,
TALUK: HUKERI, DIST: BELGAUM.

1(F) RESHMA RIYAZ MAKANDAR,
AGE: 35, OCC: AGRICULTURE,
R/O ALASA AKIWAT,
TALUK: CHIKODI, DIST: BELGAUM.

2. SHRI GAJABARSAB SHILEMAN MULLA,
AGE: 54 YEARS, OCC: AGRICULTURE,
R/O SOLAPUR-591309.
TALUK: HUKERI, DIST: BELGAUM.

3. SHRI HAMID MODIN SUTAR,
SINCE DECEASED BY HIS LRS

3(A) MAMTAZ SHIKUR SHAIK,
AGE: 60, OCC: HOUSEHOLD,
R/O : YARANAL ROAD NIPPAN,
TALUK: HUKERI, DIST: BELGAUM.

3(B) RASEED HAMID SUTAR
AGE: 58, OCC: AGRICULTURE,
R/O : SOLAPUR,
TALUK: HUKERI, DIST: BELGAUM.

3(C) KULSUMBI BASEET BADWALE,
AGE: 55, OCC: HOUSEHOLD,
R/O : SOLAPUR,
TALUK: HUKERI, DIST: BELGAUM.

3(D) SHENAJU SHIKANDAR NAIKWADI,
AGE: 58, OCC: AGRICULTURE,
R/O : SOLAPUR,
TALUK: HUKERI,
DIST: BELGAUM.

3(E) NAWASHAD HAMID SUTAR,
AGE: 48, OCC: SERVICE,
R/O : SOLAPUR,
TALUK: HUKERI, DIST: BELGAUM.

3(F) MAHAMMAD SHARIF HAMID SUTAR
AGE: 46, OCC: AGRICULTURE,
R/O : SOLAPUR,
TALUK: HUKERI, DIST: BELGAUM.

...APPELLANTS

(BY SRI B.S.KAMATE, ADVOCATE
SRI DINESH M. KULKARNI, ADVOCATE FOR R1 (A TO F))

AND

1 . SHRI BABASAHEB FAKRUDDIN MULLA
SINCE DECEASED BY HIS LRS

1(A) MUSTAQ BABASAHEB MULLA,
AGE: 42 YEARS, OCC: AGRICULTURE,
R/O : SOLAPUR,
TALUK: HUKERI, DIST: BELGAUM.

1(A) MUSTAQ BABASAHEB MULLA,
AGE: 42 YEARS, OCC: AGRICULTURE,
R/O : SOLAPUR, TALUK: HUKERI,
DIST: BELGAUM.

1(B) SHABEERA BASIEER PATHAN,
AGE: 39 YEARS, OCC: HOUSEHOLD WORK,
R/O : TAHASILDAR PLOT, NIPANI,
TALUK: NIPANI, DIST: BELAGAVI,

1(C) SHAKEERA YASEEN SANIDI,
AGE: 37 YEARS, OCC: HOUSEHOLD WORK,
R/O BAMBALAWAD,
TALUK: CHIKODI, DIST: BELAGAVI.

1(D) SADAM BABASAHEB MULLA,
AGE: 35 YEARS, OCC: AGRICULTURE,
1(A) MUSTAQ BABASAHEB MULLA,
R/O : SOLAPUR, TALUK: HUKERI,
DIST: BELAGAVI.

1(E) MEENAJ IRFAN MUJAWAR,
AGE: 32 YEARS,
OCC: HOUSEHOLD WORK,
BACKSIDE HANUMAN TALIM
R/O RANDAL,
TALUK" HATKANANGALA,
DIST: KOLHAPUR,

1(F) RUKKAYYA JAMEED KAMATE
AGE: 29 YEARS,
OCC: HOUSEHOLD WORK,
R/O PATTANKUDI, TQ. CHIKODI,
DIST: BELAGAVI.

2. SHRI NAZRUDDIN FAKRUDDIN MULLA,
AGE: 50 YEARS,
OCC: AGRICULTURE,
R/O SOLAPUR-591309.
TALUK: HUKKERI,
DIST: BELAGAVI.

...RESPONDENTS

(R-1 DECEASED;
NOTICE TO R2 SERVED BUT UNREPRESENTED)

THIS RSA IS FILED U/S. 100 OF CPC, PRAYING TO SET ASIDE THE JUDGMENT AND DECREE DATED 13.10.2006 PASSED BY THE FAST TRACK COURT-I (DIST. AND SESSIONS JUDGE) CHIKODI IN R.A.NO.460/2004 AND FURTHER THE JUDGMENT AND DECREE DATED 03.08.2004 PASSED BY THE LEARNED CIVIL JUDGE (SR.DN.) HUKERI IN O.S.NO.38/1998 MAY KINDLY BE CONFIRMED BY ALLOWING THIS RSA WITH COSTS.

THIS APPEAL HAVING BEEN HEARD AND RESERVED FOR ORDERS ON 22.06.2024 COMING ON FOR 'PRONOUNCEMENT OF ORDER' THIS DAY, THE COURT DELIVERED THE FOLLOWING:-

JUDGMENT

The present second appeal is filed under Section 100 of Code of Civil Procedure, 1908¹ by the defendants challenging the judgment and decree dated 13.10.2006 passed in RA No.460/2004 by the Fast Tract Court-I (District and Sessions Judge), Chikodi² and the judgment and decree dated 3.8.2004 passed in OS No.38/1998 by the Civil Judge (Sr.Dn), Hukkeri³, whereunder the suit for declaration of the preferential right and execution of the Sale Deed has been dismissed by the Trial Court and decreed by the first appellate Court.

2. The parties will be referred to as per their ranking before the Trial Court, for the sake of convenience.

3. It is the case of the plaintiffs that they are the sons of Fakruddin Mulla⁴ and defendant Nos.1 and 2 are the sons of Shileman Mulla⁵. That Fakruddin and Shileman are the brothers. That the suit properties belonged to the father of Fakruddin and Shileman namely, Modin Mulla. That after the death of Modin Mulla, the same was being enjoyed jointly by his sons, Fakruddin

¹ Hereinafter referred to as 'CPC'

² Hereinafter referred to as the 'first appellate Court'

³ Hereinafter referred to as the 'Trial Court'

⁴ Hereinafter referred to as 'Fakruddin'

and Shileman and after their death, the plaintiffs and defendant Nos.1 and 2 were in actual possession and enjoyment of the suit properties jointly. That as the father of the plaintiffs namely, Fakruddin became old and was unable to manage the suit properties, the names of the plaintiffs were entered in the revenue records of the suit properties. As also, the names of defendant Nos.1 and 2 have been entered in the revenue records of the suit properties. That though their names have been entered in the records of rights separately, there was no partition of the suit properties between the plaintiffs and defendant Nos.1 and 2.

4. It is the case of the plaintiffs that the financial position of defendant Nos.1 and 2 was not sound and hence, they were intending to sell their share in the suit properties. That the plaintiffs and defendant Nos.1 and 2 belong to the Muslim community and hence, the plaintiffs have preferential right to purchase the share of defendant Nos.1 and 2.

5. It is the further case of the plaintiffs that when they came to know the intention of defendant Nos.1 and 2 to sell their share, they approached defendant Nos.1 and 2 and expressed

⁵ Hereinafter referred to as 'Shileman'

their willingness to purchase their share. At that time, defendant Nos.1 and 2 informed the plaintiffs that they will intimate the plaintiffs when they sell their share in the suit properties. That the plaintiffs got issued a legal notice dated 27.12.1997 to defendant Nos.1 and 2 claiming their preferential rights and the same was served on defendant Nos.1 and 2 on 30.12.1997. That defendant Nos.1 and 2 have not replied to the same. However, behind the back of the plaintiffs, defendant Nos.1 and 2 in collusion with one another and without any intimation to the plaintiff executed Sale Deed dated 23.2.1998 in favour of defendant No.3 conveying their share in the suit properties for a total sale consideration of ₹68,000/-. That defendant No.3 has no right to purchase the share of defendant Nos.1 and 2 and therefore, the Sale Deed executed in favour of defendant No.3 is *void ab initio* and not binding on the rights of the plaintiffs. That the plaintiffs are ready to purchase the share of defendant Nos.1 and 2 at the prevailing market rate of ₹68,000/-. That defendant No.3 has filed an application before the revenue authorities to enter his name in the revenue records of the suit properties to the extent of the share of defendant Nos.1 and 2. Hence, the plaintiffs have filed the suit.

6. The defendant Nos.1 and 2 entered appearance in the suit through a counsel and defendant No.3 entered appearance in the suit through another counsel. In the written statement filed by defendant Nos.1 and 2, the case of the plaintiffs has been denied. They further contend that the partition has been effected of the family properties between the father of the plaintiffs and father of defendant Nos.1 and 2 after the death of Modin Mulla and after the death of Shileman, defendant Nos.1 and 2 have inherited the suit properties and they are in separate possession and enjoyment of their share to the exclusion of the plaintiffs. It is contended that the plaintiffs have expressed their intention not to purchase the share of defendant Nos.1 and 2 when they approached the plaintiffs along with the others after issuance of the notice. As such, defendant Nos.1 and 2 sold the suit properties in favour of defendant No.3.

7. Defendant No.3 filed a separate written statement denying the case of the plaintiffs and supported the case putforth by defendant Nos.1 and 2. It is further contended by defendant No.3 that he is a bonafide purchase for value vide registered Sale Deed dated 23.2.1998. Hence, he seeks for dismissal of the suit.

8. The Trial Court, consequent to the pleadings of the parties, framed the following issues and additional issues:

1. Whether the plaintiffs proves that themselves and defendant no.1 and 2 are the owners of the suit properties and they were in joint possession of the same on the date of suit?

2. Whether the plaintiffs proves that they have got preferential rights to purchase the share of defendants 1 and 2?

3. Whether the plaintiffs proves the cause of action to file the suit?

4. Whether the defendant no.3 proves that there was partition between Suleman and Faqrudin sons of Modin Mulla in the suit properties after the death of Modin Mulla?

5. Whether the deft no.3 proves that he is a bonafida purchaser of the share of the defendant no.1 and 2 for valuable consideration of Rs.68,000/- through registered sale deed dated 23/2/1998?

6. Whether the defendant no.3 is entitled for the compensatory costs of Rs.5,000/- from the plaintiffs.

7. Whether the plaintiffs are entitled for the reliefs as prayed for?

8. What order or decree?

Addl. Issues:-

1. Whether the D-1 and 2 proves that they have sold that shares in the suit property for Rs.68,000/- in favour of deft no.3 through registered sale deed dated 23/2/98 for their family necessity and delivered possession of the same to the deft no.3?

9. Plaintiff No.1 examined himself as PW.1. Two witnesses have been examined as PWs.2 and 3. Exs.P1 to P13 have been marked in evidence. Defendant No.1 examined himself as DW.1. The GPA holder of defendant No.3 has been examined as DW.3. Two witnesses have been examined as DWs.2 and 4. Exs.D1 to D54 have been marked in evidence. The Trial Court by its judgment and decree dated 3.8.2004 dismissed the suit.

10. Being aggrieved, the plaintiffs preferred RA No.460/2004. The defendants entered appearance before the first appellate Court and contested the same. The first appellate Court framed the following points for consideration:

- 1) *Whether the plaintiffs have acquired right of purchase under preferential right?*
- 2) *Whether the appellants have complied with all the requirements of law in order to claim the preferential right of purchase?*
- 3) *Whether the lower court has erred in appreciating the evidence available on record and same to wrong conclusion?*
- 4) *What order?*

11. The first appellate Court, by its judgment and decree dated 13.10.2006 allowed the appeal and passed the following order:

“In the result the appeal is allowed. The Judgment and Decree of the lower court is hereby set aside. The suit of the plaintiffs in O.S.No.38/98 on the file of civil judge (Sr.Dn.), Hukkeri is hereby decreed as prayed for with cost through out. The respondents are directed to execute the sale-deed within 90 days from the date of this order failing which the plaintiff is at liberty to get the sale-deed executed through the process of court.

12. Being aggrieved, the present second appeal is filed.

13. This Court, by order dated 3.1.2014 has framed the following substantial question of law:

“Whether the plaintiffs have complied with the provisions of Section 236 of Mohammadan Law for obtaining the relief fared on pre-emption.”

14. Learned Counsel for the appellants/defendant Nos.1 to 3 Sri B.S.Kamate assailing the judgment and decree passed by the first appellate Court, after taking this Court through the provisions of Sections (Clause/Note) 226, 231, 232 and 236 of the Mulla’s Mahomedan Law contends that there is no compliance of Section (Clause/Note) of 236 of the Mohammadan Law. He further contends that the Trial Court had properly appreciated the oral and documentary evidence on record and dismissed the suit and that the first appellate Court has erroneously set aside the

same and decreed the suit. Hence, he seeks for allowing of the above appeal and setting aside of the judgment of the first appellate Court and affirming the judgment of the Trial Court.

15. Per contra, learned Counsel for the respondents/plaintiffs Sri Dinesh M. Kulkarni submits that the finding of the Trial Court that there is no pleading in the plaint regarding the demand of enforcement of pre-emption right of the plaintiffs was erroneous and that the first appellate Court has rightly re-appreciated the oral and documentary evidence while allowing the appeal of the plaintiffs and decreeing the suit. He further submits that the judgment and decree passed by the Trial Court is a well considered one and the same is not required to be interfered with by this Court in the present second appeal. Hence, he seeks for dismissal of the above appeal.

16. The submissions of both the learned counsels have been considered and the material on record including the records of the Trial Court and the first appellate Court have been perused.

17. The relevant fact situation regarding the relationship between the parties as also the fact that the plaintiffs and defendant Nos.1 and 2 were the owners of the suit properties

having inherited the same upon the death of Fakruddin and Shileman are undisputed.

18. At this juncture, it is relevant to notice the findings recorded by the Trial Court and the first Appellate Court.

19. The Trial Court while recording its finding on issue Nos.1 and 4 has held that defendant Nos.1 and 2 have proved that there was a partition in the suit properties between Shileman and Fakruddin Mulla after the death of Modin Mulla. The Trial Court while considering issue No.5 and additional issue No.1, has held that defendant No.3 is a bonafide purchaser of the share of defendant Nos.1 and 2 for a valuable consideration of ₹8,000/- through registered Sale Deed dated 23.2.1998. The Trial Court while considering issue No.2 has recorded the following findings:

"i) The plaint is silent in respect of the willingness of plaintiff Nos.1 and 2 in respect of expressing their intention to purchase the suit property after having received information of the sale. So also they have not affirmed their intention in the presence of buyer or seller or on the premises which is the subject matter of the sale and in the presence of two witnesses. Section (Clause/Note) 232 of Mulla's Mahomedan Law contemplates that

sale alone gives rise pre-emption. When the provision is clear, issuance of notice by the plaintiff Nos.1 and 2 to defendant Nos.1 and 2 itself is premature. Hence, none of the ingredients of Section (Clause/Note) 236 of Mulla's Mahomedan law are complied with;

ii) More over the plaintiffs never expressed their willingness or affirmed their intention referring expressly to the fact that they are ready to purchase the suit property in the presence of two witnesses;

iii) Under the circumstances, the plaint is lacking in respect of the ingredients of Section (Clause/Note) 236 of Mulla's Mahomedan Law. When such being the fact, claim by the plaintiffs is not sustainable as they have not complied with the mandatory provisions of Clause/Note 236 Mulla's Mahomedan Law."

20. The First Appellate Court, while adjudicating upon the points framed by it for consideration has recorded the following findings:

i) The main defence of defendant Nos.1 and 2 is that the waiver of the right of the plaintiffs and also the plaintiffs have no preferential right to the property;

ii) As could be seen from the pleadings of the parties, they have admitted that they are co-owners of the suit survey number;

iii) There is no dispute with regard to possession of the property as also the extent the parties are entitled to in the survey number;

iv) The revenue records disclose that the extent of lands held by the plaintiffs and defendant Nos.1 and 2;

v) If we carefully apply Section (Clause/Note) 231 Mulla's Mahomedan Law, considering that there was a partition, then condition No.3 is fulfilled. If the parties were to consider that there was no partition and they are co-sharers, then condition No.1 is applicable.

vi) The right of pre-emption ripens only after the sale of the property. Section (Clause/Note) 232 Mulla's Mahomedan Law deals with this aspect. The right of pre-emption arises only out of valid, complete and bonafide sale. Here, there is valid, complete and bonafide sale of the property by defendant Nos.1 and 2 to defendant No.3. Therefore, the plaintiffs will get clear right of pre-emption against the defendants;

vii) In this case, the plaintiffs have expressed their willingness to purchase the property under registered notice dated 27.12.1997. The

defendant Nos.1 and 2 sold the property to defendant No.3 by registered Sale Deed dated 23.8.1998. Therefore, when the plaintiffs came to know about the sale of the property, immediately they expressed their intention to purchase the property. Therefore, there is a demand made by the parties immediately at the time of sale;

viii) According to Section (Clause/Note) 236 Mulla's Mahomedan Law, the demand must be made after the sale is completed. PW.1 has stated that after coming to know the execution of the Sale Deed they have approached defendant Nos.1 and 2 and asked them why they have not sold the suit lands in our favour, but defendant Nos.1 and 2 told that they are not going to sell the suit property to the plaintiffs. This part of evidence of PW.1 clearly goes to show that after execution of the Sale Deed they have made a demand of sale to defendant Nos.1 and 2 and they have completed the formal requirement of kalad-i-mowasibat;

ix) Further, it is not denied in the cross-examination of PW.1 that they have not demanded for execution of the Sale Deed after it was registered in favour of defendant No.3;

x) The panchas told about the sale of suit land by defendant Nos.1 and 2 and after coming to know of the sale, they approached defendant Nos.1 and 2. This clearly shows that after the sale of the

property, the plaintiffs have demanded for sale of the property and exercised their right under law;

xi) The defendants have not stated that after execution of the Sale Deed, they have approached the plaintiff requesting him to purchase the property;

xii) There can be no waiver unless the person against whom the waiver is claimed had full knowledge of his rights and of facts enabling him to take effective action for enforcement of such rights;

xiii) In this case, the plaintiffs have demanded their right in the legal notice and the defendants have pleaded that the plaintiffs have waived their right orally. If really the plaintiffs have waived their right as contended by defendant Nos.1 and 2, then why the plaintiffs have filed the suit. Therefore, the defendants have not established the waiver as required under law;

xiv) The plaintiffs had expressed their intention of purchasing the property for market value and in spite of it, defendant No.3 had purchased the property from defendant Nos.1 and 2 by depriving the right of the plaintiffs. Therefore, defendant No.3 cannot be called as a bona fide purchaser for value without notice and he cannot be protected under the above principle;

21. Before considering the contentions of the parties, it is relevant to notice the relevant legal provisions. In principles of Mahomedan Law by Mulla, Chapter XIII deals with pre-emption. The relevant provisions are extracted hereinbelow for ready reference:

i. Clause/Note 226 reads as follows:

226. Pre-emption.-*The right of shufaa or pre-emption is a right which the owner of an immovable property possesses to acquire by purchase another immovable property which had been sold to another person.*

ii. Clause/Note 231 reads as follows:

231. Who may claim pre-emption.- *The following three classes of persons and no others, are entitled to claim pre-emption, namely:-*

- 1) *A co-sharer in the property (shafi-i-sharik).
A Mukarraridar (lessee in perpetuity) holding under a co-sharer has no right to pre-empt as against another co-sharer.*
- 2) *A participator in immunities and appendages, such as a right of way or a right to discharge water (shafi-i-sharik);and*
- 3) *Owners of adjoining immovable property (shafi-i-sharik), but not their tenants(a), nor persons in possession of such property without any lawful title(b) (Baillie, 481). A wakif or mutawalli is not entitled to pre-empt, as the wakf property does not vest in him(c).*

The first class excludes the second, and the second excludes the third. But when there are two or more pre-emptors belonging to the same class,

they are entitled to equal share of the property in respect of which the right is claimed (Baillie, 500).

Exception- The right of pre-emption on the third ground, viz., that of vicinage does not extend to estates of large magnitude, such as villages and zamindaris, but is confined to houses, gardens, and small parcels of land(d). The right, however, may be claimed by a co-sharer(e).

iii. Clause/Note 232 reads as follows:

232. Sale alone gives rise to pre-emption- *The right of pre-emption arises only out of a valid (a), complete(b), and bonafide(c) sale. It does not arise out of gift(hiba), sadaqah (s.171), wakf, inheritance, bequest(d), or a lease even though in perpetuity(e). Nor does it arise out of a mortgage even though it may be by way of conditional sale(f); but the right will accrue, if the mortgage is foreclosed(g)."*

iv. Clause/Note 236 reads as follows:

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. This formality is called talab-i-ishhad (demand with invocation of witness)(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(j).

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), It is made only to some of them, the shares of those buyers only can be pre-empted(l). (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."

22. It is forthcoming from the relevant legal provisions that Clause/Note 232 of Mulla's Mahomedan Law specifically stipulates that the right of pre-emption arises only from a valid and complete sale. Clause/Note 236 of Mulla's Mahomedan Law requires a formal demand to be made either in the presence of the buyer or seller or on the premises which the subject sale and in the presence of two witnesses.

23. In the present case, it is the case of the plaintiffs that they approached defendant Nos.1 and 2 in March 1997 along with panchas and conveyed their intention to purchase the share of the defendant Nos.1 and 2 in the suit property and defendant Nos.1 and 2 have conveyed that the plaintiffs would be informed in the event of the sale. Consequent to the same, they got issued legal notice dated 27.12.1997. Thereafter, after coming to know of the execution of the registered Sale Deed dated 23.02.1998 executed by defendant Nos.1 and 2 in favour of defendant No.3, the plaintiff Nos.1 and 2 again approached defendant Nos.1 and 2 along with panchas.

24. It is forthcoming that the Trial Court, recording a finding that there is no plea that the plaintiffs expressed their

willingness to purchase the property and hence, the ingredients of Clause/Note 236 Mulla's Mahomedan Law have not been complied with dismissed the suit. In this context, as pointed by the learned counsel for the respondents, it is relevant to note that at para 8 of the plaint the plaintiffs have averred as follows:

“ಖರೀದಿ ಆದ ವಿಷಯ ವಾದಿಯರಿಗೆ ತಿಳಿದು ವಾದಿಉರಿ ಪ್ರತಿವಾದಿಉರಿಗೆ ಭೇಟಿ ಆಗಿ ನಮಗೆ ಕೋಡುತ್ತೇನೆ ಅಂತಾ ತಿಳಿಸಿ ಈಗ ಪ್ರತಿವಾದಿ ನಂ.3 ಈತನಿಗೆ ಏಕೆ ಖರೀದಿ ಕಟ್ಟಿರುವಿರಿ ಅಂತಾ ವಿಚಾರಿಸಲಾಗಿ ಪ್ರತಿವಾದಿ ನಂ.1 ಮತ್ತು 2 ಅವರು ನಾವು ನಮ್ಮ ಮನಸಿಗೆ ಬಂದಂತೆ ವರ್ತಿಸುತ್ತೇನೆ ನಿವೇನು ಮಾಡುತ್ತೀರಿ ನಾನು ನಿಮಗೆ ಸದರಿ ಜಮೀನು ಖರೀದಿ ಕೊಡುವುದಿಲ್ಲ.”

25. It is clear from the aforementioned that the plaintiffs have specifically averred in the plaint that after the sale by defendant Nos.1 and 2 to defendant No.3 they approached defendant Nos.1 and 2 for the purpose of requesting them to purchase the property.

26. PW.1 in his testimony has deposed that apart from the visit made by the plaintiffs along with PWs.2 and 3 to defendant Nos.1 and 2 in the year 1997 during the Deepavali festival and the issuance of the notice to defendant Nos.1 and 2 which was served

on 27.12.1997, after coming to know of the sale made on 23.02.1998 by defendant Nos.1 and 2, the plaintiffs have once again approached defendant Nos.1 and 2 to purchase the property sold by them. However, it is relevant to note that in the testimony of PW.1, it is not specifically stated as to when the plaintiffs have approached defendant Nos.1 and 2 after the said Sale Deed dated 23.02.1998 and it is also not specifically stated that the panchas i.e., PWs.2 and 3 had also accompanied the plaintiffs.

27. PW.2 in his testimony has stated that he has accompanied the plaintiffs when they went and met defendant Nos.1 and 2 in the year 1997 during Deepavali festival which was prior to the sale. That however, it is relevant to note that PW.2 has not stated that after the execution of the Sale Deed dated 23.02.1998 he has accompanied the plaintiffs to meet the defendants. In fact, in the cross examination of PW.2, he has specifically stated that after purchase of the suit land defendant No.3 he has not interacted with defendant No.3 or defendant Nos.1 and 2. He has further stated that he does not know whether the plaintiffs have enquired with defendant Nos.1 to 3.

28. PW.3 in his testimony has deposed that in the year 1997, he along with the plaintiffs and PW.2 has approached defendant Nos.1 and 2. That in the month of March 1998, they came to know that defendant No.3 has purchased the share of defendant Nos.1 and 2 and again he accompanied the plaintiffs along with PW.2 and approached defendant Nos.1 and 2 to enquire regarding the sale. In the cross examination, he has stated that he cannot say the date on which he has approached defendant Nos.1 to 3 for enquiry.

29. A co-ordinate Bench of this Court in the case of **Maheboob Buransab Maniyar and Others Vs. Mohadinsab Maheboosab Maniyar and Others**⁶ held as follows:

24. Therefore, now only two grounds remain. Therefore, in that context it was necessary for the plaintiffs to have pleaded specifically what is the nature of pre-emptive right which they have and they are enforcing in the suit. That apart, Section 236 as set out above, prescribes what are the conditions precedent which are to be satisfied before the claim for pre-emption would be up held by the Courts. The conditions are: firstly, the person claiming pre-emption right has to declare his intention to assert the right immediately on receiving the information of the same. That is formally called talab-i-mowasibat, Secondly, with the

⁶ ILR 2012 KAR 1192

least practicable delay affirmed intention and making formal demand either in the presence of buyer or seller or on the premises which are the subject of sale, in the presence of atleast two witnesses. The second formality is called as talab-i-ishhad (demand for invocation of witness). It is only thereafter he can resort to third step of filing a suit for enforcement of pre-emptive right, if the earlier two demands are not complied with.

26. Therefore it is clear that when a Muslim wants to enforce the pre-emptive right that is conferred on him by the custom, the requirement prescribed under the custom is to be strictly followed. The essence of this pre-emptive right is firstly he must express his intention to purchase the property immediately on receiving the information of the sale. Then he has to follow such communication by making a demand to the purchaser or seller in the presence of two witnesses. It is only if such a demand is not complied with, a cause of action arises for him to file a suit within a period of one year from the date of sale enforce the right of pre-emption. This is the requirement prescribed in the custom. Therefore when the customary right is sought to be enforced in a Court of law, all the prescriptions of the custom have to be meticulously followed.

(emphasis supplied)

30. It is clear from the aforementioned that while PW.1 has stated that plaintiff has enquired with defendant Nos.1 and 2 after the sale is made, he has not stated that PWs.2 and 3 have also accompanied the plaintiff. PW.2 has not stated that he has

accompanied the plaintiffs to meet the defendants after the sale. In fact in the cross examination, he has specifically stated that he has not accompanied the plaintiffs to meet the defendants after the sale. PW.3 has specifically stated regarding accompanying the plaintiffs and along with PW.2 to meet defendant Nos.1 and 2 after the sale.

31. It is clear from the aforementioned that although the demand has been made after the sale, in compliance of Clause/Note 232, the evidence adduced by the plaintiffs does not satisfy the criteria as stipulated under Clause/Note 236 of Mulla's Mahomedan Law.

32. In view of the aforementioned, the substantial question of law is required to be answered in the *Negative*. Hence, the following

ORDER

- i) The above appeal is allowed.
- ii) The judgment and decree dated 13.10.2006 passed in R.A.No.460/2004 by the Fast Track Court - I (District and Sessions Judge), Chikodi is set aside.

- iii) The judgment and decree dated 03.08.2004 passed in O.S. No.38/1998 by the Civil Judge (Sr.Dn.), Hukkeri is affirmed.

**Sd/-
JUDGE**

nd/- / BS