

them was opened out by the pleadings, and properly fell to be decided in that case, and cannot be raised again.

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We decree the appeal with all costs and reverse the decrees of the lower Courts and dismiss the suit.

Appeal allowed.

 APPELLATE CIVIL.

1878

January 21.

Before Mr. Justice Pearson and Mr. Justice Oldfield.

CHADAMI LAL (PLAINTIFF) v. MUHAMMAD BAKHSH AND ANOTHER
(DEFENDANTS).*

Pre-emption—Contract—Wajiluarz—Custom—Appeal.

The plaintiff in a suit to enforce a right of pre-emption in respect of certain shares in certain villages founded his claim on a special agreement contained in the village administration-papers, and such claim was tried and determined in the lower Court as so founded. *Held* that the plaintiff could not in appeal set up a claim to enforce such right founded on custom (1).

THIS was a suit for pre-emption founded on special agreement. The facts of the case and the manner in which the Court of first instance dealt with the suit are sufficiently stated for the purposes of this report in the judgment of the High Court, to which the plaintiff appealed from the decree of the Court of first instance dismissing his suit.

The *Junior Government Pleader* (Babu Dwarka Nath Banarji) and Munshi *Hanuman Prasad*, for the appellant.

Pandits *Bishambhar Nath*, *Ajudhia Nath*, and *Nand Lal*, for the respondents.

The judgment of the Court was delivered by

OLDFIELD, J.—This suit has been brought to recover certain shares in mauza Saran Top and Mahal Bagh, pargana Kanauj, by right of pre-emption based on the village administration-papers of the current settlement. It was urged in defence by the purchaser

* Regular Appeal, No. 86 of 1877, from a decree of Pandit Har Sahai, Subordinate Judge of Farukhabad, dated the 28th April, 1877.

(1) See also *Koonj Behari Lal v. Girihari Lal*, 1 B. L. R. S. N. 12, S. C. 10 W. R. 189, and *Shiu Suhai v. Hari Suhai* 3 B. L. R. Ap 14^o, in which cases it was held that, where a plaintiff seeks to

enforce a right of pre-emption upon the ground of partnership, he cannot obtain a decree upon the ground of vicinage.

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BANNO.

that the village administration-papers are not binding on his vendor, who was no party to them, and that, as a matter of fact, the plaintiff refused the offer of the estates when made to him. The lower Court has dismissed the claim finding in favour of the answering defendant. The objections now taken in appeal by the plaintiff appear to us to fail. The *wajibulanz* of Mahal Bagh was not signed by the vendor or any one he represents, and though in that of the zamindari mahal there is an endorsement to the effect that Gajadhar Lal attested it, there is nothing to show that, if he did so, he had any authority to do so. He was the lessee of the owner Musammat Banno, but this position did not give him authority to act for her at the settlement. In his evidence he states that he cannot remember about the attestation of the *wajibulanz*, and he never had any power of attorney to act as her agent.

We concur with the lower Court in considering that it is not satisfactorily proved that the vendor or any one he represents was a party to the execution of the village administration-papers, or knowingly accepted their conditions. Whether or not any similar condition of pre-emption was entered in the previous administration paper cannot affect this claim, which is brought on the contract under the recent settlement-paper, and not on any well established custom apart from the contract made under the administration-paper, nor would the entry of the right of pre-emption in a former administration-paper necessarily establish, though it might be evidence towards proving, such a custom.

1878

FRONT, 22.

FULL BENCH.

Before Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Pearson, Mr. Justice Turner, Mr. Justice Spankie, and Mr. Justice Oldfield.

DWARIKA DAS AND ANOTHER (DEFENDANTS) v. HUSAIN BAKISHI (PLAINTIFF).^{*}
Pre-emption—Hindu Vendor—Muhammadan Law—Act VI of 1871 (Bengal Civil Courts' Act), s. 24.

Held (STUART, C. J., and PEARSON, J., dissenting) that where the vendor is a Hindu a suit to enforce a right of pre-emption founded upon Muhammadan law is not maintainable. *Chundo v. Alim-ul-din* (1) overruled. *Poorno Singh v. Hurrychurn Surnah* (2) followed.

^{*} Special Appeal, No. 1358 of 1876, from a decree of H. W. Dashwood, Esq., Judge of Meerut, dated the 1st September, 1876, reversing a decree of Babu Kashi Nath Biswas, Subordinate Judge of Meerut, dated the 21st April, 1876.

(1) H. C. R., N-W. P., 1874, p. 28.

(2) 10 B. L. R., 117.