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BEG PARTAB ARAIN SINGH v. BEG GHOLAM SINGH.

appeal to the lower appellate Court. The lower appellate Court rejected it on the ground that the time prescribed by law for the appeal had expired.

The defendant appealed to the High Court.

Pandit *Ajudhia Nath* and Munshi *Sukh Ram*, for the appellant.

Munshi *Ganaman Prasad* and Lala *Lalta Prasad*, for the respondent.

The portion of the judgment of the Court (PEARSON, J., and STRAIGHT, J.,) material to the purposes of this report was as follows:—

PEARSON, J.—The memorandum of appeal to the lower appellate Court was presented on the 23rd June, 1879, admittedly within time. The lower appellate Court was therefore wrong in declaring on the 18th July following that the appeal was not within time. The orders passed by the lower appellate Court on the 23rd June and 5th July in the matter of the deficiency of the court-fee were not in accordance with the provisions of s. 54 (*b*), Act X of 1877. The Judge should have fixed a time within which the deficiency was to be paid up, and on the expiry of that period, in the event of its not being paid up, should have rejected the appeal.

Having regard to the irregularity of the lower appellate Court's procedure, we must allow the appeal, and, reversing the Judge's order, direct him to place the appeal on his file and proceed to dispose of it according to law. We make no order as to costs.

Appeal allowed.

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May 5.

FULL BENCH.

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

ISRI SINGH (DEFENDANT) *v.* GANGA AND ANOTHER (PLAINTIFFS).*

Wajib-ul-arz—Pre-emption—Act XIX of 1873 (N.-W. P. Land-Revenue Act), ss. 61, 65, 91, 257—Record-of-Rights.

A *wajib-ul-arz* prepared and attested according to law is *primâ facie* evidence of the existence of any custom of pre-emption which it records, such evidence

* Second Appeal, No. 720 of 1879, from a decree of G. E. Knox, Esq., Subordinate Judge of Allahabad, dated the 28th March, 1879, reversing a decree of Babu Mritonjoy Mukarji, Munsif of Allahabad, dated the 20th November, 1878.

being open to be rebutted by any one disputing such custom. When such a *wajib-ul-arz* records a right of pre-emption by contract between the share-holders, it is evidence of a contract binding on all the parties to it and their representatives, and there will be a presumption that all the share-holders assented to the making of the record and in consequence were consenting parties to the contract of which it is evidence, and it will be for those shareholders repudiating such contract to rebut such presumption.

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THIS was a reference to the Full Bench by a Division Bench (STUART, C. J., and STRAIGHT, J.) The facts giving rise to the reference and the points of law referred will be found stated in the order of reference, which was as follows:

STUART, C. J.—This is a second appeal from the judgment of Mr. G. E. Knox, acting with powers as a Subordinate Judge in the district of Allahabad, in a suit in which the plaintiffs claim a right of pre-emption in preference to the vendee, Babu Isri Singh, defendant No. 5, who is a stranger. The clause in the *wajib-ul-arz* is paragraph twelve, and is in these terms.—"A sharer in the patti shall have a right to purchase at the time of sale and mortgage at the price offered by a stranger in preference to a sharer in another patti." This is certainly not very clear, and it is difficult to know what is meant by it unless we hold that "stranger" and "a sharer in another patti" are synonymous, which was probably intended, indeed, must have been intended, for otherwise the paragraph has no meaning. We may take it, then, that the paragraph means that a sharer in a patti shall have a right of pre-emption over a stranger vendee.

The Munsif found that the *wajib-ul-arz* had not been signed by the vendors, and that there was no evidence to show that they consented to be bound by its terms, and he, therefore, held that the *wajib-ul-arz* was not binding upon them or the defendant-vendee. In appeal to Mr. Knox, he found that the *wajib-ul-arz* in the case had been prepared in accordance with the rules prescribed by the Board of Revenue for the guidance of Settlement Officers under Act XIX of 1873, s. 257, and the conclusion he arrived at was, that although the *wajib-ul-arz* had not been signed by the vendors, the right of pre-emption had been "recognized" by the share-holders, and was binding on each one of the brotherhood. He therefore held that the vendors were bound to offer the share to the plaintiff

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before disposing of it to a stranger. The Subordinate Judge therefore decreed the appeal to him, reversed the decree of the Munsif, and granted the plaintiff the right of pre-emption claimed.

In second appeal to this Court it is contended, as had been found by the Munsif, that the *wajib-ul-arz*, having not only not been signed, but not having been assented to by the vendors, the paragraph respecting the right of pre-emption was not binding on them.

The word "recognized" used by the Subordinate Judge is rather a loose term in a judicial finding, but taken in connection with the Subordinate Judge's decretal order, it must mean that the *wajib-ul-arz*, though not actually signed, had been assented to and accepted by the share-holders, and the question before us is whether such assent, without actual signature, is sufficient to hold all the sharers bound by the *wajib-ul-arz* generally, and in particular by the proviso respecting the right of pre-emption. It is also to be observed that the record-of-rights in the case appears to have been prepared under s. 62 of the Revenue Act, which provides, among other things, that the record shall contain a list of all the co-sharers; and by s. 90 of the same chapter of the Act it is provided that the Board shall, from time to time, prescribe the form in which the record is to be made up. The Board have, in fact, issued rules for the formation of the record-of-rights which is to consist of three statements, the third being the *wajib-ul-arz*, which is defined to be a record of village-customs. Such being the character of the record-of-rights in the case before us, it must be presumed that the condition of pre-emption in the *wajib-ul-arz* was known to the vendors, and it was not enough to contend that it was not binding on them and their vendee simply because the *wajib-ul-arz* was not signed by them, and that there was no other evidence to show that they had expressly consented to its terms.

I have carefully examined the rulings of this Court in pre-emption suits, and the following appear to be the principle of these:— In *Chowdhree Brij Lall* v. *Goor Suhai* (1) it was held that the *wajib-ul-arz* is to be regarded rather as an official record of usages or agreements than as a contract. In *Sheoumber Sahoo* v. *Bhowanee*

(1) H. C. R., F. B., N.-W. P., 1866-67, p. 128.

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Deen (1) it was ruled that claims of pre-emption might be made both on contract and custom. In *Dabee Dut* v. *Enait Ali* (2) it was laid down that a *wajib-ul-arz* is not a mere contract, but a record of rights made by a public officer, and it would, therefore, follow that without attestation or signature by the sharers the *wajib-ul-arz* was entitled to weight as evidence of custom. In *Chahami Lal* v. *Muhammad Baldeh* (3), it appears to have been decided that the *wajib-ul-arz* is a special agreement, and that it excludes evidence of custom. This perhaps, as a general proposition, is a doubtful ruling, especially in regard to another definition which has been given of the *wajib-ul-arz*, that it is a record of custom, and it is so called in the Revenue Act XIX of 1873. In *Maratib Ali* v. *Abdal Hakim* (4), it also appears to have been ruled, although not very clearly, that the *wajib-ul-arz* must be held to exclude evidence of custom, but that depends on the terms of the *wajib-ul-arz*, and the nature and scope of the custom: the two might not be inconsistent. And there are numerous cases not reported, in which the decisions appear to have been hastily written on the paper-books, to the effect that the *wajib-ul-arz* was *primâ facie* evidence of custom, and that to be binding on sharers it was not absolutely necessary to be signed by them, but by their silence showing acquiescence, they must be understood to have accepted or acquiesced in its terms.

No exception can be taken to the record-of-rights in the present case, seeing that it has been prepared according to the provisions of the Revenue Act XIX of 1873, and the rule I deduce from the the Revenue Act and the rulings I have referred to is, that the *wajib-ul-arz* is a public record-of-rights, *primâ facie* binding on all the co-sharers; that it is not binding on any sharer in the patti who has expressly repudiated it, but that it becomes a contract binding on all who may have signed it, or who may be taken by their acquiescence, express or implied, to have accepted its provisions.

Such is my understanding of the law on the subject, but I desire to refer the matter to the Full Bench of the Court with the following

(1) H. C. R., N.-W. P., 1870, p. 223. (3) I. L. R., 1 All., 563.
(2) H. C. R., N.-W. P., 1870, p 395. (4) I. L. R., 1 All., 567.

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questions:—(i) Is the *wajib-ul-arz* to be regarded as a public record-of-rights, *prima facie* binding on all the co-sharers, but which may be repudiated by any of the sharers on coming into the patti? (ii) Does the *wajib-ul-arz* become a contract when it is either expressly or by necessary implication or acquiescence assented to by the co-sharers?

STRAIGHT, J.—I fully concur in the reference to the Full Bench of the two questions propounded by the learned Chief Justice.

Mr. *Conlan*, Mr. *Colvin*, and Munshi *Hanuman Prasad*, for the appellant.

Pandit *Ajudhia Nath*, Babu *Oprokash Chandar Mukarji*, and Lala *Ram Prasad*, for the respondents.

The following judgments were delivered by the Full Bench:—

STUART, C. J.—After hearing the argument addressed to us in Full Bench, I remain substantially of the opinion expressed in my referring order; but I desire now to add one or two observations. In the first place I have to express my regret that my statement of the case of *Chaiani Lal* v. *Muhammad Bakhsh* (1) is not quite accurate and scarcely does justice to my colleagues, Pearson, J., and Oldfield, J., who decided it. I state that by their judgment "it appears to have been decided that the *wajib-ul-arz* is a special agreement and that it excludes evidence of custom," adding that "this perhaps, as a general proposition, is a doubtful ruling," and so it undoubtedly would be as a general proposition. But again looking into the report of the case I find that the suit was for pre-emption founded on a special agreement which the *wajib-ul-arz* in that case was considered to be, "and not," as the judgment states, "on any well-established custom apart from the contract made under the administration-paper." So that the case really lays down no general principle of law excepting perhaps this, that a *wajib-ul-arz* may be a contract or agreement complete in itself under which evidence of any contradictory custom would be excluded.

I have next to remark that, as s. 91 of the Revenue Act XIX of 1873 was suggested at the hearing as supplying an answer to the

(1) I. L. R., 1 All., 563.

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first question in the order of reference, that section has not in my opinion such effect. It simply provides that "all entries in the record so made and attested shall be presumed to be true until the contrary is proved." But it does not necessarily follow that such entries are *primâ facie* binding on the co-sharers. On the contrary, I believe that, according to the practice recognized by the Revenue Department of these Provinces, entries in the record-of-rights are not binding on those who have attested and signed it, but they may be contested and the parties allowed to prove that the record is wrong, unless the entries have been made by order of the settlement officer when they would appear to be considered *primâ facie* binding.

In regard to the second question in the order of reference, I have been struck by a remark made by my colleague Mr. Justice Spankie that, if the *wajib-ul-arz* is to be looked upon as a contract, it might be required to be stamped, and he would prefer that entries of such a nature should rather be regarded as evidence of the agreement. I gladly adopt this view which, besides stating the law in very appropriate terms, has the merit of avoiding any infringement of the Stamp Act. With these modifications, I would answer both questions put to the Full Bench in the referring order in the affirmative, leaving any further expression of my views till the case which gave rise to the reference comes back to my colleague Straight, J., and myself as the referring Division Bench.

OLDFIELD, J.—The *wajib-ul-arz* or administration-paper forms part of the record-of-rights of a mahál which is prepared under the provisions of s. 61 and following sections of the Land-Revenue Act, and with reference to the provisions of s. 65 and the rules framed under s. 257, it is a public record, *inter alia*, of customs and rights affecting the share-holders of the mahál and including such as relate to pre-emption. The right of pre-emption may be founded on the Muhammadan law, or, as is more generally the case, where it affects Hindus, on long established custom having the force of law, or on special contract between the share-holders, and the *wajib-ul-arz* may record the practice of pre-emption as based on any of these grounds, and the entry may be either evidence of custom or of the contract. The law (s. 90, Land-Revenue Act, prescribes that the record-of-rights shall be drawn up in a form and attested in a manner to be

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prescribed by the Board of Revenue, and s. 91 of the Act directs that "all entries in the record so made and attested shall be presumed to be true till the contrary is proved." Such being the legal presumption in favor of the truth of the entries in the record-of-rights, and considering the public character of the document and the publicity with which it is prepared, there can be no doubt, when it has been prepared and attested in the form and manner prescribed by the Board of Revenue, that the *wajib-ul-arz* becomes *primâ facie* evidence of the existence of any custom of pre-emption which it records, open to be rebutted by any one disputing the custom; and when it records a right of pre-emption by contract between the share-holders, it is evidence of a contract binding all the parties to it and their representatives, and there will be a presumption that all the share-holders assented to the making of the entry, and in consequence were assenting parties to the contract of which it is evidence, and it will be for those repudiating the contract to rebut this presumption.

A case,—*Chadami Lal* v. *Muhammad Bakhsh* (1),—which was decided by Mr. Justice Pearson and me, has been noticed in the order of reference of the learned Chief Justice, and I wish to add, with reference to some remarks on the judgment in that case, that I do not find that we ruled "that the *wajib-ul-arz* is a special agreement and that it excludes evidence of custom." All we said was that the plaintiff in the case before us had brought his claim on the contract in the recent administration-paper and not on any well established custom, and we refused to allow him to shift the ground of his action, but we expressly observed that an entry of the right of pre-emption in a former administration-paper might be evidence towards proving a custom though it does not necessarily establish it.

PEARSON, J.—I concur in the remarks of my learned colleague Mr. Justice Oldfield on the questions referred to the Full Bench.

SPANKIE, J.—In reply to the first question I would say that s. 90 of Act XIX of 1873 authorises the Board of Revenue from time to time to prescribe the form in which the record to be made under the provisions of Chapter III of the Act shall be drawn up

(1) I. L. R., 1 All. 563.

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and the manner in which it shall be attested. Accordingly, orders have been drawn out by the Board, and the *khewat* and the *wajib-ul-arz*, which form a portion of the record-of-rights, are to be attested by the Settlement or Assistant Settlement Officer in the presence of all the lambardárs of each mahál or their authorised agents, and as far as possible of all other persons whom they may concern, and shall be signed by the Settlement Officer or Assistant Settlement Officer and by all the lambardárs and the patwári. When a document has been so attested, all the entries in the record shall be presumed to be true until the contrary is proved, as provided by s. 91. Such a record is *primâ facie* binding on all the co-sharers, and cannot be repudiated by any one succeeding to or acquiring a share except as permitted by s. 91.

As to the second question, I would say that the *wajib-ul-arz* is a record of those arrangements made by the Settlement Officer in accordance with the provisions of s. 65, cl. (*e*) of which includes in the record so formed any other matters which the Settlement Officer may be directed to record under rules framed under s. 257 of the Act, and the document must be attested and drawn up as provided by s. 90: amongst other matters the Settlement Officer is required to record the custom relating to pre-emption in the village. The *wajib-ul-arz* then is a record of village-customs. But when it relates to pre-emption, it may record the custom existing in the mahál or the agreement which the share-holders have already made amongst themselves. I do not look upon it as the contract itself, for as such it might require to be stamped, but when it recites the fact of the existence of any agreement amongst the share-holders as to the condition under which pre-emption might be claimed, I would regard the entry as evidence of that agreement. In either case, the custom, if it exists, is binding upon the share-holders, or they are bound by an agreement which can be proved, and the nature of which has been recorded in the administration-paper for the guidance and information of all the share-holders, a document in which the truth of the entries is to be presumed until the contrary be shown.

STRAIGHT, J.—I agree with my honorable colleague Mr. Justice Spankie.