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June 1.

Before Mr. Justice Oldfield and Mr. Justice Tyrrell.

MUHAMMAD HASAN (PLAINTIFF) *v.* MUNNA LAL AND ANOTHER (DEFENDANTS)*

Pre-emption—Wajib-ul-arz—Evidence of contract and custom—Act XIX of 1873 (N.-W. P. Land Revenue Act), s. 91—Regulation VII of 1822, s. 9, cl. (i).

The *wajib-ul-arz* of a village is a document of a public character, prepared with all publicity, and must be considered as *primâ facie* evidence of the existence of any custom which it records. Its record of the existence of a custom of pre-emption is sufficiently strong evidence to cast on those denying the custom the burden of proof; and in the same manner, when it records a contract of pre-emption between the shareholders, there is a presumption that it is binding on the share-holders. Looking to the public character of the document, and the way it is prepared, and that all shareholders, whether signing it or not, must be presumed to have assented to its terms, the inferences to be deduced from it cannot be disregarded except when they are rebutted by evidence of an opposite character.

A suit to enforce the right of pre-emption, which was based on contract and custom as evidenced by the *wajib-ul-arz* of a village, was dismissed by the lower Courts on the ground that any contract which might be founded on the *wajib-ul-arz* was not binding on the vendor defendant, as that document did not bear his signature, and the lower appellate Court attached no weight to the *wajib-ul-arz* as proof of the custom of pre-emption, because it was drawn up when Regulation VII of 1822 was in force, and at that time there was no legal presumption of its accuracy. The claim was dismissed on the ground that the plaintiff's evidence did not prove the existence of a custom of pre-emption in the village.

Held that the lower appellate Court had erred in dealing with the evidence, and that although this particular *wajib-ul-arz* was made before Act XIX of 1873 came into force, yet the weight which should attach to it entries, both as proof of the contract as well of custom, was very strong. *Isri Singh* v. *Ganga* (1) referred to.

THE plaintiff in this case sued to enforce the right of pre-emption in respect of the sale of a piece of *muafi* land situate in Kasba Koil, zila Aligarh. The vendor defendant acquired the property by purchase at an execution-sale on the 24th August, 1871, and he sold it to the vendee-defendant by a deed dated the 24th June, 1883. The plaintiff was a co-sharer in the mahal, and he claimed on the basis of contract and custom, as evidenced by the following entry in the *wajib-ul-arz*:—"Every sharer may transfer his share as he pleases, but he must offer it to the sharers of his own family; then

* Second Appeal No. 1233 of 1885, from a decree of W. R. Barry, Esq., Additional Judge of Aligarh, dated the 31st July, 1885, confirming a decree of Babu Ganga Prasad, Munsif of Koil, dated the 18th September, 1884.

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to other sharers; and if these all refuse, he may transfer it to any one he pleases."

The defendants set up as a defence that the *wajib-ul-arz* was not binding on them, as it had not been attested by the vendor, and that the custom of pre-emption did not exist in Kasba Koil, the vendor denying its existence absolutely and the vendee as affecting *muafi* land. The Court of first instance dismissed the suit, holding that the entry in the *wajib-ul-arz* relating to the right of pre-emption did not apply to *muafi* land, and that even if it did, the entry was not binding on the vendor and vendee, as the vendor had not signed the *wajib-ul-arz*. On appeal by the plaintiff, the lower appellate Court held that the entry was not binding on the vendor and vendee as an agreement by the former, as it was not signed by the former, and that the custom of pre-emption in Kasba Koil had not been proved. It was of opinion that, as regards custom, there was no presumption as to the truth of the entry, such as s. 91 of Act XIX. of 1873 (N.-W. P. Land Revenue Act) created in respect of such entries, inasmuch as the *wajib-ul-arz* in question had been framed before that Act came into force. On this part of the case it observed as follows:—

"The entry in the *wajib-ul-arz* is no doubt a pretty strong piece of evidence in proving the existence of the custom; but it was drawn up and attested in 1872, before Act XIX. of 1873 came into force. Some witnesses have deposed in general terms that the custom of pre-emption exists in the mahal, but no specific instances have been given in which the custom has been acted on or asserted.

"The inevitable conclusion seems to be that the custom is not proved, unless it can derive assistance from s. 91, Act XIX. of 1873, or some corresponding clause in the corresponding enactment which was in force when the record-of-rights was drawn up. A reference to the official settlement report shows that the settlement of the Aligarh district which is now current began from 1868. The operations were begun shortly after that date and the enactment on the subject then in force was Regulation VII. of 1882. This enactment, by s. 9, cl. (i), directed the officer who was making the settlement to make a detailed investigation,

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and draw up a record of the landed tenures, rights, interests and privileges of the various classes of the agricultural community. The section goes on to specify the heads of information required, and then enacts that the information be so arranged as to admit of an immediate reference by Courts of Judicature, it being understood and declared that all decisions *on the demands of zamindars* shall be regulated by the rates of rent and modes of payment avowed and ascertained at the settlement, &c. This section seems not wide enough to cover the present claim. The object of the section is clearly to fix and determine the right of zamindars and *tenants*, and the record is not *per se* sufficient to make the entry in it conclusive proof of the existence of a custom of pre-emption.

"It remains to consider whether the entry can derive any confirmation from s. 91, Act XIX. of 1873. The record was drawn up and attested in 1872, and the officers which drew it up were acting under Regulation VII. of 1822. The settlement was not reported to the Board of Revenue for sanction till 1874, and was not confirmed by the Government till a later date. But when confirmed it took effect from 1868, the year in which the former settlement expired. This record must be taken to be prepared under Regulation VII. of 1822, and cannot derive force or validity from an enactment which came into force after it was drawn up."

The plaintiff appealed to the High Court on the ground (i) that the *wajib-ul-arz* was binding on all co-sharers, and among them on the vendor, and the fact that it was prepared before Act XIX. of 1873 was passed did not affect the question; (ii) that the indorsement on the *wajib-ul-arz* by the settlement officer showed that it was attested by all the co-sharers, and it was for the respondent to show that he had not attested it; and (iii) that the vendor had acquiesced in the terms of the *wajib-ul-arz* for fourteen years, and was thereby precluded from objecting to the term thereof.

Pandit *Ajudhia Nath* and Pandit *Sundar Lal*, for the appellant.

Babu *Jogindro Nath Chaudhri*, for the respondents.

OLDFIELD, J.—This suit has been brought to enforce a right of pre-emption in respect of certain property sold by the defendant Baldeo Das to the defendant Munna Lal. The suit has been dismissed in the Court of first instance, and that dismissal has been

affirmed by the lower appellate Court. The suit is based on contract and custom as evidenced by the *wajib-ul-arz*; and the only ground on which the lower Courts have dismissed the suit is, that any contract which may be founded on the *wajib-ul-arz* is not binding on the vendor-defendant, as it does not bear his signature; and so far as the *wajib-ul-arz* was relied on as proof of the custom of pre-emption, the Judge attached no weight to it, because it was drawn up when Regulation VII. of 1822 was in force, and at that time there was no legal presumption of its accuracy. He dismissed the plaintiff's claim on the ground that the evidence adduced by him did not prove that pre-emption existed in the village by custom. The Judge appears to me to have erred in dealing with the evidence. Although this particular *wajib-ul-arz* was made before Act XIX. of 1873 came into force, yet the weight which should attach to its entries, both as proof of the contract as well as the custom is very strong, and the observations made by this Court on this subject in the Full Bench case of *Isri Singh* v. *Ganga* (1) are as applicable here as in that case. The *wajib-ul-arz* is a document of a public character, prepared with all publicity, and must be considered as *primâ facie* evidence of the existence of any custom which it records. Its record of the existence of a custom of pre-emption is sufficiently strong evidence so as to cast on those denying the custom the burden of proof; and in the same manner, when it records a contract of pre-emption between the shareholders, there is a presumption that it is binding on the shareholders. Looking to the public character of this document and the way it is prepared, and that all shareholders, whether signing it or not, must be presumed to have assented to its terms, the inferences to be deduced from it cannot be disregarded except when they are rebutted by evidence of an opposite character. The grounds, therefore, on which the Judge disposed of the appeal before him are not valid. He must re-try the question of the binding effect of this *wajib-ul-arz*, both as to contract and custom as regards pre-emption, and also the other issues that arise.

The case is therefore remanded for re-trial. The costs of this appeal will abide the result.

TYRRELL, J.—I concur.

Case remanded.

(1) I. L. R., 2 All. 876.