

ment in the case now. The appeal is allowed with costs, and the plaintiffs declared entitled to judgment, that this mortgage be realised as a first charge against the mortgaged property.

TYRRELL, J.—I am of the same opinion, and, having given careful consideration to the terms of s. 50 of the Registration Act of 1877, I accept the interpretation placed on the words “not being a decree or order” by the learned Chief Justice.

*Appeal allowed.*

*Before Sir W. Comer Petheram, Kt., Chief Justice, and Mr. Justice Tyrrell.\**

NIHAL SINGH AND OTHERS (PLAINTIFFS) v. KOKALE SINGH AND OTHERS  
(DEFENDANTS) \*

*Pre-emption—Wajib-ul-arz—Right of pre-emptor to stand in the position  
of the purchaser.*

A co-sharer of a village sold part of his share to a stranger. This sale was subject to a right of pre-emption created by the *wajib-ul-arz* in favour of the partners of the vendor. Only a part of the purchase-money was paid in cash, it being agreed that the balance should remain on credit, and be secured by two deeds in which the property was hypothecated by the purchaser to the vendor.

*Held*, that it could not be said that the partners of the vendor had not only the right of pre-emption but also the right to be put in the same position with reference to all the peculiar incidents of the payment of the purchase-money as that arranged between the vendor and the purchaser.

THIS was a suit for pre-emption based on the *wajib-ul-arz* of a village named Pachnan. The clause of the *wajib-ul-arz* relating to pre-emption was in the following terms:—“Up to this time, no case of pre-emption has ever occurred. The practice, however, in the neighbourhood has been that when any co-sharer desires to sell his property, he sells first to the nearest partner, after him to the partner in the *thoke*, then to the partner in the village; failing all these, to a stranger. We also accept this practice.” The plaintiffs, Nihal Singh and five other persons, alleged that they were co-sharers in the village with the defendant Girind Singh; that, on the 3rd February, 1883, Girind Singh sold a five annas share out of his ten annas share in the village to the defendants Kokale Singh and Muhabbat Singh, who were “total strangers and inhabitants of a different mauza,” for a sum of Rs. 10,000, of

\* First Appeal No. 45 of 1885, from a decree of Maulvi Farid-ud-din Ahmad, Subordinate Judge of Cawnpore, dated the 15th September, 1884.

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**SINGH.**

which Rs. 6,000 were paid in cash, and, in respect of the balance, a two annas six pies share of the property was mortgaged to the vendor by the vendees; that the sum of Rs. 15,000 was falsely entered in the sale-deed as the consideration for the sale; and that in order to defraud the plaintiffs, the defendants executed and registered a false and collusive mortgage deed in respect of the remaining two annas six pies share, for Rs. 5,000. The defendants pleaded in reply that the ten annas share of Girind Singh constituted a mahal distinct and separate from that constituted by the plaintiffs' share in the village, and that the plaintiffs were therefore not entitled to pre-emption under the terms of the *wajib-ul-arz*; that the plaintiffs had refused to purchase the property in dispute; and that the consideration for the sale was correctly stated in the sale-deed as Rs. 15,000, out of which Rs. 6,000 had been paid in cash and the balance secured by two mortgage-deeds for Rs. 4,000 and Rs. 5,000 respectively.

The Court of first instance (Subordinate Judge of Cawnpore) decreed the claim for pre-emption, but found that the true consideration for the sale was Rs. 15,000 as stated in the sale-deed, and that the plaintiffs' allegation that the mortgage-deed for Rs. 5,000 was false and collusive had not been substantiated by the evidence. The Court therefore passed the following decree:—"It is ordered that the plaintiffs' claim for possession of the property in dispute be decreed. The plaintiffs should deposit in this Court Rs. 15,000, full sale-consideration, within twenty days from the date this decision becomes final. As the plaintiffs denied the correctness of the sale-consideration, and the defendants denied the plaintiffs' right of pre-emption, each party will bear its own costs. If the plaintiffs fail to pay the sale-consideration within the appointed time, their suit shall stand dismissed, and the costs of the defendants, with interest thereon at eight annas per cent per mensem, will be charged to them."

From this decree the plaintiffs appealed to the High Court. It was contended on their behalf (i) that the Court of first instance was wrong in holding that the consideration for the sale was the amount stated in the sale-deed, and (ii) that "the appellants, pre-emptors, are entitled to be placed exactly in the same position

as the vendees. The lower Court's decree, directing possession to be given to the appellants on payment of full consideration, is erroneous."

Pandit *Nand Lal*, for the appellants.

Mr. T. Coulan and Munshi *Kashi Prasad*, for the respondents.

PETHERAM, C. J.—I think that this appeal must be dismissed and the decision of the Court below affirmed. The suit is to enforce a right of pre-emption. The plaintiffs and the vendor are co-sharers. The co-sharers who are defendants in the suit sold to the other defendants, who are strangers, the amount of consideration being Rs. 15,000. They made a bargain with the defendants-vendors that a portion of the purchase-money should remain on credit. The plaintiffs obtained a decree. They are the appellants before the Court, and they urge that they must have the same credit in respect of payment of the purchase-money as that arranged between the vendors and the vendees-defendants. I do not think that is the meaning of the *wajib-ul-arz*. The stranger and the vendors made some particular bargain regarding the payment of the purchase-money, with which the pre-empting plaintiffs had nothing to do. I do not think it possible to say that the plaintiffs have not only the right of pre-emption, but also the right to be put in the same position, with reference to all the peculiar incidents of the payment of the purchase-money, as that arranged by the vendors and the vendees. The decision of the lower Court is affirmed, and this appeal is dismissed with costs, except that the plaintiffs are to be allowed twenty-one days to deposit the purchase-money, reckoning from the day on which the decree of this Court reaches the lower Court.

TYRRELL, J.—I concur.

*Appeal dismissed.*

Before Sir W. Comer Petheram, Kt., Chief Justice, and Mr. Justice Oldfield.

WAJID ALI SHAH (DEFENDANT) v. DIANAT-UL-LAH BEG (PLAINTIFF)\*

Suit for declaration that property is *wakf*—Act XX of 1863, ss. 14, 15, 18—Civil Procedure Code, s. 539—Act I of 1877 (Specific Relief Act) s. 42.

A Muhammadan brought a suit against a person in possession of certain property, for a declaration that the property was *wakf*. He did not allege him-

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\* First Appeal No. 48 of 1885, from a decree of Rai Baghu Nath Sahai, Subordinate Judge of Gorakhpur, dated the 13th January, 1885.

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