Before Sir John Edge, Kt., Chief Justice and Mr. Justice Tyrrell.

1891
June 25.

RUSTAM ALI KHAN (DEFENDANT), *v.* ABBASI BEGAM (PLAINTIFF)*.

Wajib-ul-arz, effect of as evidence of village custom—Wajib-ul-arz not signed by lambardár or co-sharers—Construction of wajib-ul-arz.

Where a *wajib-ul-arz* was not signed by the lambardár or by any of the co-sharers of the village for which it was framed, but was found to have been in existence without having been questioned by any of the parties whomight have been affected thereby for a period of some thirteen years: *Held* that the *wajib-ul-arz* might be taken as *primâ facie* evidence of the custom of the village for which it was framed.

The said *wajib-ul-arz* contained a clause relative to pre-emptive rights to the following effect:—"When any *muafidár* in the *patti* desires to transfer his share, then first a shareholder in the *patti* takes it, and if he does not take it, then another man who desires to take it takes it." *Held* that this clause was declaratory of the village custom and that it was not intended thereby to adopt the Muhammadan law of pre-emption.

The plaintiff-respondent sued (on the 9th November 1889) to enforce her right of pre-emption in respect of certain land sold by two of the defendants to the third, alleging that she was a sharer in the land sold and, as such, entitled to pre-empt under the terms of a certain *wajib-ul-arz* prepared in 1874, and that, immediately on hearing of the sale, she had tendered the price to the defendants. The defendant vendee alone appeared and pleaded that the plaintiff was not a co-sharer; that the land was *muáfi* and no *wajib ul-arz* was recorded in respect thereof; and he also traversed the plaintiff's allegation of tender of price. The *wajib-ul-arz* in question was not signed by any of the co-sharers but was prepared by the settlement officer and attested by the patwári. The Court of first instance (the Munsif of Farakhabad), holding the *wajib-ul-arz* on which the plaintiff's claim was based to have been prepared in accordance with law, decreed the claim. The defendant vendee appealed to the District Judge, who upheld the decision of the Munsif and dismissed the appeal. The defendant thereupon appealed to the High Court.

* Second appeal No. 1375 of 1888, from a decree of W. H. Hudson, Esq., District Judge of Farakhabad, dated the 26th May 1888, confirming a decree of Babu Madan Mohan Lal, Munsif of Farakhabad, dated the 12th December 1887.

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RUSTAM ALI KHAN. v. ABBASI BEGAM.

Mr. *C. H. Hill* and Pandit *Ajudhia Nath*, for the appellant.

The Hon'ble Mr. *Spankie*, for the respondent.

EDGE, C. J., and TYRRELL, J.—This is a second appeal arising out of a suit for pre-emption brought upon a *wajib-ul-arz*. The appellant before us is the defendant. The *wajib-ul-arz* in question was framed in May 1874. It was not executed by any *lambardár* or any of the co-sharers. It has not been shown that any person intrested in the *mahál* took any steps to challenge the correctness of the *wajib-ul-arz* before the settlement was confirmed by the Local Government, or indeed until the legality of the *wajib-ul-arz* was challenged by the defendant in this suit. Although, no doubt, it would have been better if the *wajib-ul-arz* had been attested by the *lambardár* or *lambardárs*, if any, and by the co-sharers, or some of them, we cannot, at this distance of time, and having regard to the fact that the correctness of the *wajib-ul-arz* remained all these years unchallenged, hold that it is not *primâ facie* evidence of the village rights and customs recorded in it.

The next question is, what is the meaning of the particular clause which relates to pre-emption? That clause is as follows:—"When any *muáfidár* in the *patti* desires to transfer his share, then first a shareholder in the *patti* takes it; and if he does not take it, then another man who desires to take it takes it." We cannot construe the clauses in a *wajib-ul-arz* as if they had been carefully prepared by a conveyancing counsel. We must try to find what was probably meant, so far as we can. Now, we think this clause shows that there was a local village custom of pre-emption, and that by that custom any shareholder in the *patti* was entitled to buy in preference to an outsider; and that the custom was not the custom of the Muhammadan law, pure and simple, but partook of the character ordinarily found in *wajib-ul-arzes*, and that it was the duty of the shareholder desiring to transfer to give a co-sharer an opportunity of purchasing. Every *wajib-ul-arz* has to be construed, so far as is possible, on its own wording. Few *wajib-ul-arzes*

which have come before us are worded precisely alike. This *wajib-ul-arz* in question was anterior to the issue of the rules to settlement officers of 1875. We accordingly, holding the views we do, dismiss this appeal with costs.

Appeal dismissed.

1891
May 15

Before Sir John Edge, Knight, Chief Justice, Mr. Justice Tyrrell, Mr. Justice Mahmood and Mr. Justice Knox.

ANGAN LAL (DEFENDANT), *v.* MUHAMMAD HUSAIN AND OTHERS (PLAINTIFFS.)*

Construction of document—Deed—Sale-deed or deed of gift.

A deed which purported on the face of it to be a deed of sale contained a recital that the consideration had been received by the vendor and returned as a gift to the vendee. The words used were—"Hath * * * nawasi apne ki bai katai karke zar-i-samaan tamâm wo kamâl wasul pakar bakhsh diya aur hiba kardiya."

The deed was stamped as a sale-deed and was duly registered, but no possession was given under it, and there was apparently no evidence external to the deed that any consideration had passed between the parties.

Held by EDGE, C. J., and TYRRELL and KNOX, J.J., that in the absence of any evidence external to the deed itself of the intention of the parties, the deed in question must be taken to be a deed of sale.

per MAHMOOD, J., *contra*.—The lower appellate Court having found that no consideration had passed, the deed must be considered as a deed of gift, though wearing the appearance of a sale-deed, and, possession not having been given, under Muhammadan Law the gift was invalid.

The facts of this case sufficiently appear from the judgments of of Edge, C. J., and Mahmood, J.

Mr. T. *Conlan* and the Hon'ble Mr. *Spankie*, for the appellant.

The respondents were not represented.

MAHMOOD, J.—This is an appeal preferred from the judgment of the late Mr. Justice Brodhurst as to the interpretation of a deed to which reference will be made by me presently.

The case out of which the appeal arises was a second appeal, and it came before my brother Straight and the late Mr. Justice Brodhurst, and they dissented in opinion and the decree passed by Mr. Justice Brodhurst was that the appeal should stand dismissed.

* Appeal No. 26 of 1889 under section 10 of the Letters Patent.