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JHINGURI TEWARI v. DURGA.

The following judgment was delivered by the Full Bench :—

PETHERAM, C. J., STRAIGHT, BRODHURST, and TYRRELL, JJ.—The order we propose to pass in this case is that proposed by Mr. Justice Mahmood, namely, "that the decree of the lower appellate Court should be upheld so far as it declares the sale-deed to be void, and that the suit should be dismissed so far as the claim for ejectment is concerned, leaving the plaintiff to his proper remedy in the Revenue Court."

The reasons for this order have been so fully explained in the judgment of Mr. Justice Mahmood, that is unnecessary for us to say more than that we agree with him.

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July 6.

Before Sir W. Comer Petheram, Kt., Chief Justice, Mr. Justice Straight, Mr. Justice Brodhurst, and Mr. Justice Terrell.

SHEOBARAN (DEFENDANT) *v.* BHAIRO PRASAD AND OTHERS (PLAINTIFFS)*

Landholder and tenant—Suit by landholder for declaration of right to take land from occupancy-tenant for cultivation of indigo—Wajib-ul-arz—Act I of 1877, (*Specific Relief Act*), *s.* 42.

THE zamíndárs of a village sued an occupancy-tenant for a declaration of their right to maintain a custom which was thus recorded in the *wajib-ul-arz*:—"when necessary, one or two bighas out of the tenants' lands are taken with their consent (*ba khushi*) for sowing indigo." Upon the basis of this entry, they claimed to be entitled to take a portion of the occupancy-holding at a certain period of the year, for the purpose of cultivating indigo.

Held by the Full Bench that the word "*khushi*" used in the *wajib-ul arz* indicated that the land was only to be taken with the occupancy-tenant's consent, and the document created no right of the nature alleged, namely to take the land despite the tenant.

Per TYRRELL, J.—That the suit was not maintainable under the special provisions of the Specific Relief Act (I of 1877).

THE plaintiffs in this case, Bhairo Prasad Singh and Bageshar Singh, the zamíndárs of a village named Pipri, claimed a declaration of their right to take a portion of the cultivatory holdings of the tenants of the village for sowing indigo. The claim was based on custom. The defendant, by caste a *Lunia*, was an occupancy-tenant of land in the village. It appeared that the plaintiffs had

* Second Appeal No. 1141 of 1884, from a decree of G. J. Nicholls, Esq., Offg. District Judge of Azamgarh, dated the 12th June, 1884, affirming a decree of Kazi Muhammad Wais, Munsif of Azamgarh, dated the 20th March, 1884.

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sown a part of his land with indigo seed, whereupon he had instituted proceedings against them in the Revenue Court, alleging illegal ejectment, and claiming to recover possession of the land; and that he had, on the 17th September, 1883, obtained a decree for possession.

The plaintiffs produced in evidence of the custom the sixth clause of the fourth chapter of the *wajib-ul-arz* of the village, framed in or about the year 1870. The chapter was entitled "Rights of the tenants in general," and the clause was headed "Dues received by the proprietors of the village from the cultivating and non-cultivating tenants." It was in the following terms:—

"In this mahál, all the cultivating and non-cultivating tenants render services to us (zamíndárs) according to the custom of the country. Excepting Brahman and Chhatri tenants, all the cultivating tenants of low castes, Chamars and others, give one ploughman with a plough and bullocks in Asarh, and one in Kartik, and each tenant gives one basket of chaff. Those tenants who have sugarcane mills, give daily one pitcher of sugarcane. *When necessary, one or two bighas out of the tenants' lands are taken with their consent* (ba khushi) *for sowing indigo.*"

When the *wajib ul-arz* was attested, the tenants were not present, and this gave rise to a case for the correction of the *wajib-ul-arz* between the zamíndárs and some of the tenants. This was decided by the Settlement Officer, by an order, dated the 23rd May, 1872, which maintained the wording of the *wajib-ul-arz* (sixth clause) in respect to the ploughing of the land and cultivation of indigo.

The Court of first instance decreed the claim. On appeal by the defendant, the lower appellate Court affirmed the decree. In reference to the sixth clause of the *wajib-ul-arz*, above set out, the Court made the following observations:—

"It is argued that the meaning of this passage is that, in this village (or pargana) it frequently, very generally, happens that, with the permission of the tenant, a zamíndár takes up a small portion of an occupancy as well as of a non-occupancy ryot's land to sow indigo, &c. From this it is argued that the tenant can, when he likes, refuse permission, that, if the ryot pleases, he can stop

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the zamíndár and upset all his plans, prospects, and arrangements, and that the latter has no right to take the land. This custom is entered solemnly in the *wajib-ul-arz*, in the official record of village rights and customs. Such a meaning has never before been attached to the passage, and if this had been the true state of affairs, it was ridiculous to enter anything whatever about indigo cultivation, based on contract between the parties, in the *wajib-ul-arz*. It would have no more practical meaning than if the Settlement Officer had entered :—'In this village, the zamíndárs blow their noses if they have pocket-handkerchiefs.' The words '*ba khushi*' in this place are surplusage, except in as far as they record a pleasant historical fact that, up to 1872 A.D., the ryots had not objected to the custom, and the zamíndárs had not given them cause to object to it."

The defendant appealed to the High Court, upon the following grounds :—

"(1). The decision is bad in law, as the Civil Court had no jurisdiction to set aside the decree passed by the Revenue Court, whereby the appellant recovered possession of his holding.

(2). The decision is bad in law, as the alleged custom is neither proved, nor such as would be recognized and enforced by the Civil Court.

(3). The entry in the *wajib-ul-arz* is not binding on the appellant, who had successfully objected thereto when that document was prepared ; moreover, the lower Courts have placed a wrong construction on its terms."

The Divisional Bench (Petheram, C. J., and Straight, J.), before which the appeal came for hearing, referred it to the Full Bench.

Lala *Juala Prasad*, for the appellant.

Munshi *Kashi Prasad*, for the respondents.

The following judgments were delivered by the Full Bench :—

STRAIGHT, J.—The plaintiffs in this case, who are zamíndárs, sue the defendant, who is an occupancy-tenant, for a declaration of their right to maintain a custom contained in the sixth clause, fourth head, of the *wajib-ul-arz*. The material portion of that document is as follows :—"When necessary, one or two bighas

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out of the tenants' lands are taken with their consent for sowing indigo." Upon the basis of this, the plaintiffs claim to be entitled to take 16 biswas and 9 dhurs out of the occupancy-holding at a certain period of the year for the purpose of cultivating indigo. In other words, they claim that, notwithstanding the occupancy-tenancy, they may go upon the holding when they please, and plant and grow indigo there, and may oust the tenant for the time being.

If I were asked whether I, sitting here as a Judge, should countenance a custom of this kind, I should reply that I regard such a custom as preposterous, and such as no Court of law should recognize. It is unnecessary, however, to deal with the case upon this ground, because the term "*khushi*" used in the *wajib-ul-arz*, indicates that the land is only to be taken with the occupancy-tenant's consent, and the document creates no such right as that alleged, which is to take the land despite the tenant. It has been suggested that, under the further order of the Settlement Officer in reference to this claim, the position of the parties was altered. I do not concur in this view. The order must be taken in connection with the earlier clause of the *wajib-ul-arz*, and the words which show the necessity of the tenant's consent being obtained must take effect. I will only add that I am unable to follow the reasoning of the District Judge, much of which appears to be irrelevant in presence of the word *khushi* in the *wajib-ul-arz*; while the analogy which he employs to illustrate his observations in reference to this word is somewhat out of place in the judgment of a Court of justice.

I am therefore of opinion that the alleged custom has not been established, and that it is not contemplated by the *wajib-ul-arz*. The appeal must be decreed with costs, and the suit dismissed with costs.

BRODHURST, J.—I am of the same opinion.

TYRRELL, J.—I am of the same opinion. It appears to me that the suit is open to objection on the further ground that it is not maintainable under the special provisions of the Specific Relief Act. Its object is to obtain a declaration that a custom prevails in this village which enables the landlord to take land for the purpose of cultivating indigo. No other relief is expressly

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sought, but the real object aimed at is the temporary ejectment of the occupancy-tenant. The suit is one which, professing to be based on custom, and on the good-will and consent of all concerned, seeks to force the custom upon a most unwilling tenant, who has successfully resisted the landlord in the Revenue Court.

PETHERAM, C. J.—I am of the same opinion.

APPELLATE CIVIL.

1885
July 8.

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

RAM SARUP AND ANOTHER (PLAINTIFFS) *v.* RUKMIN KUAR AND OTHERS (DEFENDANTS)*

Suit to set aside a decree on the ground of fraud—Act I of 1877 (*Specific Relief Act*), *s.* 42.

Subsequent to a decree for partition of an ancestral estate, the creditors of one of the parties thereto who, from the time of the suit, had borrowed money from them on the security of his rights and interests in the estate, brought a suit against their debtor, and obtained a decree for the monies due to them. They then sued all the parties to the partition for a declaration that the decree then passed was, so far as it affected their (the plaintiffs') interests, fraudulent and collusive, and of no effect.

Held, that the suit was not maintainable.

THE facts of this case were as follows:—One Jai Singh had two wives. By his first wife he had a son called Beni Singh, and by his second, two sons called Dammar Singh and Shib Sahai. Beni Singh sued his father for partition of a moiety of the ancestral estate of the family, and obtained a decree.

This decree was followed by a partition of the estate between him and his father. Subsequently Rukmin Kuar, the wife of Beni Singh, sued her husband and her minor sons, for a one-third share of the estate, on the ground that she was entitled to such share on partition. On the 27th July, 1883, she obtained a decree for a one-fifth share of the estate, that is to say, to an equal share with her husband and his three sons.

From the time Beni Singh sued his father for partition, he commenced to borrow money from the plaintiffs in the present suit,

* Second Appeal No. 1263 of 1884, from a decree of A. F. Millett, Esq., District Judge of Shahjahánpur, dated the 12th May, 1884, reversing a decree of Mirza Abid Ali Beg, Subordinate Judge of Shábjahánpur, dated the 25th January, 1884.