

1885
January 7.

APPELLATE CIVIL.

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

GOKAL SINGH AND ANOTHER (PLAINTIFFS) v. MANNU LAL AND ANOTHER
(DEFENDANT.)*

Pre-emption—Wajib-ul-arz—Co-sharers—“Village”—Effect of perfect partition on covenants contained in the wajib-ul-arz.

The *wajib-ul-arz* of a village contained a covenant among the co-sharers that, in the event of any one of them selling his share, a right of pre-emption should be enforceable, first by a “near share-holder,” next, by a partner in the *thoke*, and thirdly by a partner in the village. The village was subsequently divided into three separate mahals by means of a perfect partition, under the N.-W. P. Land Revenue Act (XIX of 1873).

Held that the agreement regarding pre-emption remained in force after the partition.

The term “village,” as used in the *wajib-ul-arz* means a definite area of land with houses upon it, and does not necessarily imply a joint ownership of such land, inasmuch as after partition there may remain some community of interest, and things held and used in common by all the inhabitants. Every one who lives in that area has a share in it, and may therefore be regarded as a “share-holder” within the meaning of the *wajib-ul-arz*.

THIS was a suit to enforce a right of pre-emption based on the *wajib-ul-arz* of a village called Maharajpur. The plaintiffs and defendant No. 2 were co-sharers in the village, and in 1875 they entered into an agreement that, in the event of any one of them selling his share, a near share-holder in the first instance, next, a partner in the *thoke*, and thirdly, a partner in the village, should be entitled to purchase it in preference to a stranger. This agreement was entered in the *wajib-ul-arz*. Subsequently the village was divided into three separate mahals by means of a perfect partition under the N.-W. P. Land Revenue Act (XIX of 1873). After this had been done, defendant No. 2 sold his share to defendant No. 1, a stranger, and thereupon the plaintiffs brought the present suit for the enforcement of their right of pre-emption.

The first issue framed by the Court of first instance (Subordinate Judge of Cawnpore) was—“Whether or not the settlement *wajib-ul-arz*, which was prepared prior to the partition, can be acted upon after the taking place of a complete partition?” The

* First Appeal No. 27 of 1884, from a decree of Saiyid Farid-ud-din Ahmad Subordinate Judge of Cawnpore, dated the 15th December, 1883.

second issue need not be stated. The third was—"Has the sale in dispute taken place with the consent of the plaintiffs, and after their refusal to purchase?" The fourth—"Is the amount of the sale-consideration mentioned in the sale-deed in question correct or not?"

Upon the first issue, the Subordinate Judge made the following observations:—"As to the first point, the Court holds that the *wajib-ul-arz*, which was prepared at the time of settlement, when the disputed village Maharajpur was jointly held, can have no force or effect after the time when the said village was divided into three separate mahals by means of a complete division. The *wajib-ul-arz* is a document comprising the conditions and engagements entered into by the co-sharers and co-parceners, and it can remain in force only as long as the parties executing it continue to retain the same character, and the nature of the co-parcenership and partnership is not altered. It cannot affect the persons who do not fall under the definition of co-parceners or co-sharers. By a complete division, each divided share becomes a separate mahal and a separate village, without any connection with the other co-sharers. Although those shares are parts of a village which was once jointly held by the co-sharers, yet after division they become altogether separate mahals and villages, and all co-parcenership among the former co-sharers ceases to exist." In consequence of the first issue being decided against the plaintiffs, the Court did not try the other issues above set out.

The plaintiffs appealed to the High Court. It was contended on their behalf that the partition of a village by a Revenue Court could not exempt the co-sharers from their liabilities under the covenants entered in the *wajib-ul-arz*, and that, no new contract having been made at the time of partition, the former contract must be regarded as still subsisting.

Mr. C. H. Hill and Munshi Kashi Prasad, for the appellants.

Messrs. T. Conlan and W. M. Colvin, and Pandit Bishambar Nath, for the respondents.

PETHERAM, C. J.—In this case, an arrangement was made among three owners of shares in a village, who held those shares *jointly*, in the sense that there had been no division between them,

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that if any co-sharer should sell his share, a right of pre-emption should belong first to a near shareholder, next to a partner in the *thoke*, and thirdly, to a partner in the village. This agreement was entered in the *wajib-ul-arz*. After it had been made, what is called a "perfect partition" among the co-sharers was effected. In other words, the whole inhabitable and cultivable area of the village was absolutely divided, and the joint ownership of the shares was determined. This having been done, Mr. Conlan argues that there ceased to be any entire thing which can be called a "village" in the sense in which the term is used in the *wajib-ul-arz*, for the reason that each of the original co-sharers thenceforth was the owner of a separate property. If that argument were good, every "village" would cease to exist where there was no joint ownership. But although there may be no joint ownership in a village, there may still be some community of interest, and also a considerable community of things held and used in common by all the inhabitants, such, for instance, as roads, drains, and other things which are necessary to all. Hence, even after partition, something is still left in common; and, with reference to the merits of this case, there remained enough community of interest to justify the preference given by the *wajib-ul-arz* to partners in the village over strangers in respect of the right of pre-emption. The meaning of the word "village" as used in the *wajib-ul-arz* is well understood. It means a definite area of land with houses upon it. Every one living in that area has a share in it, and may therefore be regarded as a "shareholder" within the meaning of the document in question. Here one of these share-holders wishes to sell his share. The person who desires to purchase it is also a share-holder. The case therefore falls within the terms of the *wajib-ul-arz* specifying the conditions under which the right of pre-emption may be enforced. The agreement appears to me to have been in force as well after the partition as before it. I am of opinion that the appeal should be allowed, and that the case should be sent back for a new trial upon the issues numbered (3) and (4) in the Subordinate Judge's judgment.

MAHMOOD, J., concurred.

Issues remitted.