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MULCHAND v. BHIKARI DAS.

Munshi *Kashi Prasad*, for the appellant.

Mr. *A. S. T. Reid*, for the repondent.

STRAIGHT, J.—I think the Courts below have rightly held that the suit is not barred by the provisions of s. 43 of Act XIV of 1882. It appears that the plaintiff formerly sued the defendant for his share of the profits of 1286 fasli. At the time of the institution of that suit the profits now claimed were due. This suit was struck off on account of the non-appearance of the parties, under s. 140 of Act XII of 1881, and leave was specially reserved for the plaintiff to bring a fresh suit. I do not see anything in the law to prevent the plaintiff from bringing the present suit. At any rate, before the case was struck off he could have so amended his plaint as to have included the present claim. If he could do so, *à fortiori* I do not see any reason why he should not do the same in a fresh suit. As it is, the claim for 1286 fasli is barred by limitation, and the plaintiff can now proceed with his claim in respect of 1287 and 1288 fasli.

I also concur with the Judge in that portion of his judgment in which he disposes of the plea about *sir* expenses. As to the third plea, the judgment of the Judge fully disposes of all the pleas. The appeal is dismissed with costs.

BRODHURST, J.—I concur.

Appeal dismissed.

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March 7.

FULL BENCH.

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

NIAMAT ALI (PLAINTIFF) *v.* ASMAT BIBI AND ANOTHER (DEFENDANTS)*.

Pre-emption—Wajib-ul-arz—"Rights and interests"—"Qimat"—"Sale"—Exchange.

The *wajib-ul-arz* of a village gave a right of pre-emption by a clause providing that in case of transfer by any co-sharer of his rights and interests (*haqiyat*), his partners should have a right to purchase at the same price (*qimat*) as the vendee had given. One of the co-sharers transferred to a stranger one biswa and six dhurs of a grove or garden in exchange for another piece of land.

Held by the Full Bench that this transaction was a transfer of *haqiyat* within the terms of the *wajib-ul-arz*.

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* Second Appeal No. 1655 of 1883, from a decree of Babu Ram Kali Chaudhri Subordinate Judge of Allahabad, dated the 31st August, 1883, reversing a decree of Pandit Indar Narain, Munsif of Allahabad, dated the 2nd February, 1883.

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Held also that the plot of land which was given in exchange for the one biswas and six dhurs must be considered as a price (*qimat*), within the terms of the *wajib-ul-arz*.

Per MAHMOOD, J., that the word "*qimat*" must be interpreted in the sense given to it by the Muhammadan Law, including not only money but other kinds of property capable of being valued at a definite sum of money, and covering the consideration of "sale" as well of exchange as defined in ss. 54 and 118 of the Transfer of Property Act (IV of 1882) respectively. *Sahib Ram* v. *Kishen Singh* (1) referred to. *Hazari Lal* v. *Ugrah Rai* (2) dissented from.

THE plaintiff in this case sued to enforce the right of premption, in respect of one biswa and six dhurs of a grove or garden consisting of three bighas and two biswas of land, which the defendant Farukh Ali had transferred to the defendant Minhajuddin in exchange for another piece of land. The suit was based on the *wajib-ul-arz* of the mahal in which the land in suit was situated, and the plaintiff claimed on the ground that he and Farukh Ali were sharers in the same thoke, and the defendant Minhajuddin was not a sharer in that thoke. The plaintiff valued the land at Rs. 5, and claimed possession on payment of that sum, or any sum which the Court might determine the value of the land to be. The defendant Minhajuddin defended the suit on the grounds, amongst others, that the provisions of the *wajib-ul-arz*, in respect of the right of pre-emption, applied only to revenue-paying interests in the mahal, and not to "an isolated piece of garden land, not assessed to Government revenue," and that, the land not having been sold, but having been exchanged, the transfer gave the plaintiff no cause of action.

The provision in the *wajib-ul-arz* relating to the right of pre-emption was as follows:—"*Ba surat intiqal haqiyat kisi patidar ki us qimat par jo shakhs ghair dawe istehqaq kharidari awal shurkai karib, etc.*"

"If any sharer transfer his rights and interests (*haqiyat*), near partners, *etc.*, have a right to purchase at the same price (*qimat*) which the stranger gives."

The Court of first instance gave the plaintiff a decree for possession of the land in suit on payment of Rs. 13 as "compensation" to the defendant Minhajuddin within one week.

On appeal by the legal representatives of the defendant Minhajuddin, who had in the meantime died, the lower appellate

(1) Weekly Notes, 1882, p. 192. (2) Weekly Notes, 1884, p. 103.

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Court held that the suit was not maintainable and dismissed it. It observed as follows:—

"The first question that the grounds of appeal raise is, whether the land in dispute is subject to the pre-emptive clause of the *wajib-ul-arz*. The word '*haqiyat*' is used in it as being subject to pre-emption on its being transferred by its owner. This word is ordinarily understood in the sense of a zamindari right in a village expressed in annas or biswas in undivided estates, and in bighas and biswas when an estate is divided. This sense the word '*haqiyat*' bears when it is not accompanied by qualifying terms. When in common parlance we say such a body's *haqiyat* is sold, we mean that his zamindari right in a village, the extent of which is expressed in the manner above observed, is sold, and not that any specific thing, such as a particular plot of land, cultivated or uncultivated, a particular grove, orchard or garden, or a particular part of the habitation site that is comprised within zamin-right rights, is sold. Court people have frequently in their mouths the word '*haqiyat* cases.' These cases are understood to be those in which shares of zamindari rights are concerned, and not any house, site, garden (*bagh*), land of a *bagh*, tank, trees, or a particular parcel of cultivated or uncultivated land, though these may be things appertaining to a share of zamindari rights. Such being the ordinary meaning of the word *haqiyat*, it must be held to have the same meaning when used in the pre-emptive clause of the *wajib-ul-arz* of mauza Manauri, where the land in dispute is situated. Consequently the condition of pre-emption as inserted in it cannot be taken to apply to the particular piece of land that is the subject of dispute in this case. I may also observe that the ruling of the Full Bench of the Allahabad High Court in the case of *Sahib Ram* v. *Kishen Singh* (1) applies in this case, inasmuch as the particular piece of garden-land in dispute in this case bears a character similar to that of the *abadi* land in dispute in that case. The question raised on this head is therefore found in favour of the appellants. The second ground of appeal raises the question whether the pre-emption condition of the *wajib-ul-arz* applies to exchange of lands. In my opinion it does not. That condition is to the effect that in case of transfer (*intiqal*) of the

(1) Weekly Notes, 1882, p. 192.

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haqiyat (share of zamindari right) of any pattidar or co-sharer, the right to purchase of the co-sharer (as mentioned in the said record) at the price (*qimat*) offered by a stranger would be preferable. The words '*qimat*' (price) and '*kharidari*' (purchase) used in the clause show that the transfer mentioned in the condition means a sale for a price (*qimat*). Now the word *qimat* in the ordinary acceptance of it means a money-price, and not any other benefit that is received in exchange for a thing. If I am right in this interpretation, the parties to the agreement involved in the said condition of pre-emption had it in their contemplation that when a zamindari share is sold for a money price by a pattidar to a stranger, the co-sharers (as mentioned in the clause) would have the right of pre-emption in respect of it. This Court therefore cannot hold the said pre-emptive clause to apply to a case of exchange of lands, such as is the subject of dispute in this case."

On second appeal by the plaintiff, the Divisional Bench (BRODHURST and DUTHOIT, JJ.), hearing the appeal, referred the following questions to the Full Bench:—

"(1) Was the transfer of the one biswas and six dhurs of land made by Farukh Ali, on the 13th August, 1881, or was it not, a transfer of *haqiyat* within the terms of the *wajib-ul-arz*? (2) Can the plot of land which was given in exchange by Minhajuddin, or can it not, be considered as a price (*qimat*) within the terms of the *wajib-ul-arz*?"

Mr. *C. H. Hill* and Pandit *Sundar Lal*, for the appellant.

Mr. *G. E. A. Ross* and Babu *Ram Das Chakarbati*, for the respondents.

The following judgments were delivered by the Full Bench:—

PETHERAM, C. J.—I think that the first question referred to us in this case must be answered in the affirmative. It is—"Was the transfer of the one biswa and six dhurs of land made by Farukh Ali, on the 13th August, 1881, or was it not, a transfer of *haqiyat* within the terms of the *wajib-ul-arz*? The only question here is, whether a transfer of a part of a man's land in a village can be considered a "transfer of his rights and interests" within the meaning of the *waji-bul-arz*. Now documents like the *wajib-ul-arz* must be read as a whole and in the light of common sense, and,

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so read, it is evident that the object of the *wajib-ul-arz* is the exclusion of strangers from the village. If it is so read that although a man may not sell the whole, he may sell a *part*, of his land in the village, without letting in the right of pre-emption, the whole object of the *wajib-ul-arz* would be defeated, because the result might be the admission of a great number of strangers. That appears to me to amount to a *reductio ad absurdum*, and I am therefore of opinion that when any co-sharer sells any part of his land, the right of pre-emption belonging to his partners arises. My answer to the first question is therefore in the affirmative.

My answer to the second question is in the affirmative also. As I understand the matter, this right of pre-emption has arisen out of a very old custom, under which land was originally occupied by families or communities, and the rule originally was that if any individual went away or failed, his share became divisible among the rest. But afterwards there grew up a right based upon custom, by which the owner, before going away, might sell his share to his neighbours. And later still, he became entitled to sell the share, not only to them but to a stranger, unless his co-sharers chose to buy him out. In that case, the right to sell to the stranger arose upon the refusal of the co-sharers to make the purchase.

It is to this custom that the terms of the *wajib-ul-arz* appear to me to give expression, and the matter therefore comes to this, that before any sharer is competent to transfer his rights and interests, he must offer to transfer them to his co-sharers. It is true that the *wajib-ul-arz* shows that before the co-sharers can fix the price, the owner is entitled to get what he can from an outsider, so that he can insist upon their giving the same. Under these circumstances, the word "*qimat*" is used, and it seems to be generally agreed that the meaning of this word is not "money," but "equivalent" or "value."

If, therefore, the co-sharers want to get the land, they must give the vendor the equivalent or value of the thing for which he desires to exchange his property. Now, in all countries sufficiently advanced in civilization to possess coinage, money is the accepted standard of value, and therefore, because in this case the co-sharers cannot give the thing for which the vendor agreed to exchange his

land—it being another piece of land which does not belong to them—they have a right to obtain his land for an equivalent in money. My answer to the second question therefore is in the affirmative.

STRAIGHT, J.—I cannot concur in the contention that the pre-emptive clause of the *wajib-ul-arz* is only intended to apply to cases in which a sharer parts with the whole or considerable portion of his *haqiyat*. If this argument were to be admitted, it would, in my opinion, be open to any sharer to defeat such right by disposing of his *haqiyat* piece-meal. I then come to the question whether there was such a transfer of the vendor's *haqiyat* in the present case as gave birth to the plaintiff's right of pre-emption. I think that the exchange was an undoubted transfer of the one biswa and six dhurs to the vendee. The remaining point to be determined is whether the field given in exchange by the vendee to the vendor can be regarded as the price given, for the purpose of supplying a basis upon which the plaintiff must compensate the vendor. I think that it can, and that the plaintiff, before getting the one biswa and six dhurs must pay whatever may be found to be the value of the field given by the vendee.

OLDFIELD, J.—My answer to both the questions referred to us is in the affirmative. I wish, however, to express no opinion as to whether the pre-emptor can force the vendor or the vendee to take the value of the property exchanged, that not having been the object of the contract under which the exchange of land for land was intended. Nor do I express any opinion as to whether the proper remedy of the pre-emptor was not rather to have the contract rescinded, and the vendor and vendee put back into their original position, in regard to the land which was exchanged.

BRODHURST, J.—I concur with the learned Chief Justice in answering both of the questions referred to us in the affirmative.

MAHMOOD, J.—I have arrived at the same conclusions. Upon the first question, as to the interpretation to be placed on the word "*haqiyat*," I have nothing to add to the observations which I made upon a cognate question in the case of *Sahib Ram* v. *Kishen Singh* (1), which was a case decided by a Full Bench, of

(1) Weekly Notes, 1882, p. 192.

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which I was a member, but had the misfortune of differing with the majority of the Court. The case has unfortunately not been reported in the Indian Law Reports, but I have adhered to the view which I then expressed as to the nature of the proprietary rights of a co-sharer in a mahal to which, under the *wajib-ul-arz*, the right of pre-emption applies. That case related to the question whether the *abadi* area or habitable site of a village came within the meaning of the term "*haqiyat*;" and in the present case the property appears to be a grove. The *ratio decidendi* of my judgment in that case is, *mutatis mutandis*, entirely applicable here, and therefore my answer to the first question must be in the affirmative. I may add, in reference to this question, that in the case of *Hazari Lal* v. *Ugrah Rai* (1), the Full Bench ruling to which I have referred was relied on in connection with *sir*-land. With all due deference, I dissent from the decision, and must express myself unable to accept the rule of the law therein laid down.

Upon the second question, I have nothing to add to what the learned Chief Justice has said from the Bench on several occasions. The rule of pre-emption was originally introduced into India as a part of the Muhammadan law, and must, by equitable analogy, be administered in the spirit of that law. This view was adopted by Sir Barnes Peacock, C. J., a good many years ago. It therefore appears to me that the word "*qimat*," which is of Arabic origin, must be interpreted in the sense given to it by the Muhammadan law, and that is undoubtedly not the technical meaning of the English word "price." In the law of pre-emption "*qimat*" includes not only money, but other kinds of property capable of being valued at a definite sum of money. This is borne out by the passage in Hedaya, which has been cited at the Bar :— "If a man sell a piece of ground for another piece of ground, in this case, as each piece of ground is the price for which the other is sold, the *shafee* of each piece is entitled to take it for the value of the other, land being of the class of *zosat-al-keem*, or things compensable by an equivalent in money," (Grady's edition of Hedaya, p. 555), and in this sense the word may be taken to cover the consideration of "sale" as well as of exchange as defined in ss. 54 and 118 of the Transfer of Property Act (IV of 1882) res-

(1) Weekly Notes, 1884, p. 103.

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pectively. Any other view of the law of pre-emption would simply render the object of the right easily defeasible—the object being the exclusion of strangers from the co-parcenary of the property to which the right applies.

My answer to the second question also is therefore in the affirmative.

1885 *March* 14.

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

SITAL PRASAD AND ANOTHER (DEFENDANTS) *v.* AMTUL BIBI AND ANOTHER (PLAINTIFFS)*.

Sir-land—Sale of sir-land by co-sharer—Validity of transfer—Act XII of 1881 *(N.-W. P. Rent Act), ss.* 7, 9*—Ex-proprietary tenant—Right of occupancy.*

Held by PETHERAM, C. J., and STRAIGHT, OLDFIELD, and BRODHURST, JJ. that the question whether the proprietary rights of a co-sharer in the *sir* of a mahal are distinct and separate from the proprietary rights in the mahal itself, so as to enable the owner of one share to sell and give possession of his *sir* alone as against his co-sharers, must be determined with reference to the tenure and conditions under which land is held in the mahal by the coparceners, to be ascertained in each case.

Per PETHERAM, C. J., and STRAIGHT, and OLDFIELD, JJ.—In zamindari tenures, in which the whole land is held and managed in common, a co-sharer cannot convey his right of occupancy in the *sir* as something distinct from his proprietary rights in the mahal. In pattidari tenures, in which the lands are divided and held in severalty, each proprietor managing his own lands, there may be lands which come within the classification of *sir* given in the Rent Act, but they would not seem to be on a different footing from any other land held in severalty by a proprietor.

Per BRODHURST, J.—So long as a person is the sole proprietor of a mahal, he is not restrained by any law from effecting a sale of his proprietary rights in his *sir* land, even though he retains possession of the whole of the other lands of the mahal.

Per MAHMOOD, J.—That the proprietary rights of a joint co-sharer in his *sir* land form an essential part of his rights in the mahal, that such proprietary rights in the *sir* land may be sold, but that the purchaser under such a sale could not obtain any such possession as would operate in defeasance of the ex-proprietary right in such *sir* land conferred by s. 7, and secured by s. 9 of the Rent Act. *Sahib Ram* v. *Kishen Singh* (1), *Hazari Lal* v. *Ugrah Rai* (2), *Gulab Rai* v. *Indar Singh* (3), and *Tirmal Singh* v. *Bhola Singh* (4), referred to.

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* Second Appeal No. 130 of 1884, from a decree of Babu Mrittonjoy Mukerji, Subordinate Judge of Ghāzipur, dated the 22nd December, 1883, affirming a decree of Babu Nil Madhab Rai, Munsif of Ghāzipur, dated the 27th June, 1883.

(1) Weekly Notes, 1882, p. 192.
(2) Weekly Notes, 1884, p. 103.
(3) I. L. R., 6 All. 54.
(4) Weekly Notes, 1884, p. 169.