Before Mr. Justice Knox and Mr. Justice Aikman.

1895
March 18.

KALLIAN MAL (DEFENDANT) v. MADAN MOHAN (PLAINTIFF)*

Pre-emption—Wajib-ul-arz—Construction of document—Co-sharer—Holder of resumed muáfi—Act No. XIX of 1873 (*N.-W. P. Land Revenue Act*) *s.* 62—*Rules of the Board of Revenue*, 1870, *Department I, Rules* 30 *and* 51.

The plaintiff, a co-sharer in the village of Deobarampur, sued for pre-emption of certain land, being 'resumed revenue-free land' in the village, which had been sold to a stranger. The clause of the *wajib-ul-arz* under which pre-emption was claimed was as follows:—"When any co-sharer (*hissadar*) is bent upon selling or mortgaging his right (*haqqiyat*), then first that co-sharer who is nearest to the sharer bent on transfer can take it; after that any other person who is interested (*sharik*) in the village rank by rank can take it. If no person interested in the village takes it then a stranger may take it.

Held that under the circumstances of the case the plaintiff had no right of pre emption in respect of the land claimed by him, the vendor not being, within the meaning of the *wajib-ul-arz*, a co-sharer in the village by virtue of his possession of a portion of the resumed *muáfi*.

THE facts of this case sufficiently appear from the judgment of KNOX, J.

Munshi *Ram Prasad* for the appellant.

Pandit *Sundar Lal* for the respondent.

KNOX, J.—The ground taken in the memorandum of appeal is that the record of rights has been misconstrued by the lower appellate Court, and that on a true construction of the record the respondent has no right to pre-empt and his suit should have been dismissed. The respondent was plaintiff in the Court of first instance. The suit he brought was to enforce a right of pre-emption under this same record of rights in respect of a portion of land known and styled in the village papers as "*resumed revenue-free land* of mauza Deobarampur." The respondent was one of those persons commonly known as *co-sharers* in the village of Deobarampur. In this village, besides the ordinary co-sharers, there were persons who were proprietors of land which had once been recorded as revenue-free, but had, before the present suit had been brought, been assessed to

* First Appeal No. 142 of 1894 from an order of Maulvi Muhammad Anwar Husen, Subordinate Judge of Farakhabad, dated the 4th September 1894.

1895

KALLIAN MAL v. MADAN MOHAN.

Knox J.

Government revenue. There were in the village also other persons who possessed proprietary interests of other kinds, but with them we are not concerned. The portion of land which forms the subject matter of this suit was a portion of the land formerly rent-free, but now assessed to Government revenue. The respondent in his plaint distinctly bases his right of pre-emption upon the clause relating to pre-emption as recorded in the village record of rights. That clause runs as follows :—"When any co-sharer (*hissadar*) is bent on selling or mortgaging his right (*huqqiyat*), then first that co-sharer who is nearest to the sharer bent on transfer can take it : after that any other person who is interested (*sharíq*) in the village, rank by rank, can take it. If no person interested in the village takes it then a stranger may take it." The lower appellate Court inclining to the view that the respondent and the vendor were sharers in one and the same *mahál* of the village, and that respondent was entitled to pre-empt and had a preferential right of purchase as against the appellant, who is admittedly a stranger, remanded the case to the Court of first instance for trial of the remaining issues. The Court of first instance had held a contrary view, and without determining the other questions in issue had dismissed the suit on this preliminary point. Hence the question which we have to determine in the present appeal is, whether the clause above quoted from the village record of rights does or does not confer on the respondent the right of pre-emption over that portion of the revenue-free grant subsequently assessed to revenue which is the subject-matter of this litigation. The case for both the appellant and the respondent was argued with great ability, and it was contended with much force on behalf of the respondent that, although the vendor was proprietor of a plot only of the resumed revenue-free land, he was still one of those persons termed in the record of rights a sharer (*hissadar*). In support of this contention our notice was directed to s. 62 of Act No. XIX of 1873; to the rules of the Board of Revenue, edition 1876, Department I, page 10, and especially to rules 30 and 51. We were also referred to the precedent of *Inayat Husain* v. *Amin-ud-din Ahmad* (1), *Safdar Ali* v. *Dost Muhammad* (2) and the Full

(1) Weekly Notes, 1888, p. 182. (2) Weekly Notes, 1890, p. 117.

Bench ruling of *Niamat Ali* v. *Asmat Bibi* (1). The last of these rulings deals with the case of a person who was admittedly a co-sharer in the ordinary sense of the term. In *Safdar Ali* v. *Dost Muhammad* the case again was that of a co-sharer in the *mahál*. In both cases the dispute did not turn, as in the present case, upon whether a person who is only a proprietor of a portion of land and not one of the general proprietary body of a *mahál* can be rightly termed a shareholder in the *mahál*. The case of *Inayat Husain* v. *Amin-ud-din Ahmad* turned upon the interpretation to be given to the word *sharik*. On the other side we were referred to a passage in the petition for partition which had been put in by the predecessor in interest of the present respondent, and to a second passage in the partition proceedings. In both of these the predecessor in interest of the respondent distinctly sets out that neither she, styling herself *hissadar* (or sharer), nor any of the other sharers had any concern with the plot in which the subject-matter of this suit is situate. It was also pointed out to us that both in s. 62 of Act No. XIX of 1873 and in rule 51 of the rules of the Board of Revenue a separate place is assigned in the record of rights to the co-sharers distinct from that assigned to all persons occupying portions of the land in the village or in possession of any heritable or transferable interest in such land.

The particular portion of the record of rights which recites the custom regarding pre-emption finds place only in the chapter relating to the rights of sharers amongst themselves founded on custom or agreement. It is not to be found in that portion which relates to other persons. It is true that the rules contained in the circular of the Board of Revenue to which our notice was directed are rules for the guidance of Settlement Officers prescribed under Act. No. XIX of 1873, and that the village record of rights with which we are concerned bears date 1870, but the exact similarity in the heading to Chapter II of the document with that contained in the circular of the Board of Revenue shows that there must have been in existence some similar circular upon which this record of rights

(1) I. L. R., 7 All. 626.

1895

KALLIAN MAL v. MADAN MOHAN.

was framed. Looking therefore to the place in this record of rights in which the rule regarding pre-emption is to be found, I, with considerable hesitation, come to the conclusion that the persons only to whom it is intended to apply are those who are known and were known in the village as co-sharers in the ordinary language of the day, and that it was understood in the village that those who held any portion of the once revenue-free and subsequently assessed lands were in no way concerned with it, and that the rule or custom of pre-emption was not a rule or custom relating to them. The right of pre-emption not being an ordinary right, but one for which express provision must be found, I come to the conclusion that in this case and under the special circumstances the respondent has not made out his claim to pre-empt and that the Court of first instance was right in dismissing his suit.

AIKMAN, J.—I concur with my brother Knox in thinking that this appeal must succeed. The plaintiff came into Court asserting a right to pre-empt, based on a clause in the *wajib-ul-arz* of the village, and the only question we have to decide in this appeal is whether the *wajib-ul-arz* gives the plaintiff the right he claims or not. The *wajib-ul-arz* is drawn up in four chapters. We have only to consider the second and third of those chapters. The second deals with the rights of sharers among themselves; the third deals with the rights of subordinate holders. It is in Chapter II that the clause on which the plaintiff relies is to be found. The sale which gave rise to this suit was one by which a subordinate holder, who comes under Chapter III, conveyed his property to the respondent before us. I think it is clear that the meaning of the framers of the *wajib-ul-arz* was to distinguish subordinate holders from co-sharers proper. No right of pre-emption is expressly given when a sale is made by such subordinate holders. It is only in the case of a sale by a sharer that this right arises. In Chapter III there is a clause by which the zamíndárs of the village (and by zamíndárs, I understand the co-sharers) expressly disavow any right of interference with property such as that which formed the subject of this sale. I think for the plaintiff to endeavour to assert a right of pre-emp-

1895

KALLIAN MAL v. MADAN MOHAN.

tion in respect of such property is to go in the teeth of the arrangement which was come to at the time the *wajib-ul-arz* was framed, to which the co-sharers and the subordinate holders had been signatories. Further, as has been pointed out by my brother KNOX, the predecessor in title of the present plaintiff, when a partition was being carried out in 1889, repeated this disavowal of all concern with the resumed revenue-free land. For these reasons I think that the view taken by the Court of first instance was the correct one.

Per Curiam.

This appeal is decreed, the order of the lower appellate Court is set aside, and that of the Court of first instance restored with costs in all Courts.

Appeal decreed.

APPELLATE CIVIL.

1895.
March 15.

Before Mr. Justice Burkitt.

RAM DIN AND OTHERS (DEFENDANTS) *v.* RANG LAL SINGH (PLAINTIFF.)*

Pre-emption—Limitation—Sale, with subsequent agreement for re-purchase—Mortgage by conditional sale.

On the 6th of June 1887, one R. K. sold a certain zamíndári share to S. On the 18th of May 1888, B. brought a suit for pre-emption of that share. Pending the suit, on the 6th of July 1888, the vendor, the vendee and the pre-emptor entered into an agreement by which the vendee, recognizing the pre-emptive right of the plaintiff, agreed to re-transfer the property to the vendor or the pre-emptor on payment by either of them on the full moon of Jeth in any year of the price paid by him. On the 20th of June, 1891, the vendor, affecting to treat the transaction of the 6th of June 1887, as a mortgage, made an application purporting to be under s. 83 of the Transfer of Property Act accompanied by payment of the price of the property into Court and prayed for redemption. The vendee refused to take out the money deposited by the vendor; and subsequently, on the 13th of November, 1891, R. K. applied for repayment to him of the said money, stating that he wished the vendee to remain in possession and asking that the agreement of the 6th of July, 1888, might be considered null and void. On the 1st of September 1892, one R. S. filed a suit for pre-emption of the said property.

* Second Appeal No. 793 of 1894, from a decree of Kunwar Jwala Prasad, District Judge of Azamgarh, dated the 26th June 1894, reversing a decree of Munshi Kishan Lal, Additional Subordinate Judge of Azamgarh, dated the 20th of March 1893.