FULL BENCH.

1897
August 14.

Before Sir John Edge, Kt., Chief Justice, Mr. Justice Knox and Mr. Justice Blair.

GAYA BHARTHI (PLAINTIFF) *v.* LAKHNATH BAI (DEFENDANT.)*.

Pre-emption—Wajib-ul-arz—Construction of document.

By the clause in a *wajib-ul-arz* which related to pre-emption it was provided as follows:—

"When any co-sharer wishes to make a sale or mortgage of his share, it is incumbent on him to do so, first, in favour of a near co-sharer, next, in favour of a co-sharer of his *thok*, and, lastly, in favour of a co-sharer of another *thok*, at the rate of Rs. 20 per bigha of cultivated land and Rs. 5 per bigha of waste land. If none of these take it, then he may transfer it to an outsider. If any co-sharer (*i. e.*, any co-sharer who wishes to sell or mortgage) fail to act as above directed, another co-sharer has the right of enforcing pre-emption in respect of the property. If the term of the mortgaged share of any co-sharer is about to expire and notice of foreclosure has been issued, and the co-sharer mortgagor has not the means to redeem, then another co-sharer, after paying up the money, may take back the share, and when the original mortgagor has the means, he, after paying the money, may take possession of the share."

Held that, in the case of a conditional sale of property to which this *wajib-ul-arz* applied, there were only two stages contemplated by the *wajib-ul-arz*, and not three. The first stage was at or about the time of the execution of the deed of conditional sale, and at that time pre-emption might be had by a co-sharer at the rate indicated in the *wajib-ul-arz*. The second stage was when the conditional vendee had brought his suit for foreclosure, and at that time the pre-emptor would have to pay the amount found to be due under the deed of conditional sale. When once, however, the order for foreclosure had been made absolute, the co-sharer's right of pre-emption was gone and extinguished.

THE facts of this case are fully stated in the judgment of the Court.

Mr. *Abdul Majid*, (for whom Babu *Jivan Chandar Mukerji*) for the appellant.

Munshi *Ram Prasad*, for the respondent.

EDGE, C. J., KNOX and BLAIR, JJ. :—This appeal has arisen in a suit for pre-emption. The appellants are the plaintiffs, who claim to pre-empt under a condition in the *wajib-ul-arz* relating

*Second Appeal No. 780 of 1895, from a decree of Rai Sanwal Singh, Subordinate Judge of Azamgarh, dated the 26th March 1895, modifying a decree of Munshi Ganga Prasad, Munsif of Muhammadabad Gohna, dated the 27th June

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to the village. The condition is in that part of the *wajib-ul-arz* which bears the heading "*shafa.*" It is advisable to state what the whole provision for pre-emption is. It is as follows:—"When any co-sharer wishes to make a sale or mortgage of his share, it is incumbent on him to do so first in favour of a near co-sharer, next in favour of a co-sharer of his *thok*, and lastly in favour of a co-sharer of another *thok*, at the rate of Rs. 20 per bigha of cultivated land and Rs. 5 per bigha of waste land. If none of these take it, then he may transfer it to an outsider. If any co-sharer (*i. e.*, any co-sharer who wishes to sell or mortgage) fail to act as above directed, another co-sharer has the right of enforcing pre-emption in respect of the property. If the term of the mortgaged share of any co-sharer is about to expire, and notice of foreclosure has been issued, and the co-sharer mortgagor has not the means to redeem, then another co-sharer, after paying up the money, may take back the share, and when the original mortgagor has the means, he, after paying the money, may take possession of the share."

What happened in this case was this:—A co-sharer mortgaged a share in the village by a conditional sale deed. The mortgagee, conditional vendee, subsequently brought his suit for foreclosure under Act No. IV of 1882, and obtained a decree for foreclosure and an order was subsequently made making the foreclosure absolute. Thereupon the present plaintiff appeared on the scene and claimed to step into the shoes of the mortgagee vendee and to become in fact absolute owner, upon payment, not of the mortgage money for which the decree for foreclosure was passed, but of Rs. 20 per bigha for cultivated land, and Rs. 5 per bigha for waste land.

This *wajib-ul-arz* has been before another Bench of this Court in the case of *Loknath Singh* v. *Dhajju Singh*, Second Appeal No. 359 of 1895, in which the decision of the Bench was given on the 17th of July last. In that case the learned Judges differed, Mr. Justice Banerji holding that the pre-emptors in that case, who were claiming under exactly the same conditions as the pre-emptor

in this case, could not have pre-emption except upon payment of the full decretal amount of the foreclosure decree. On the other hand Mr. Justice Aikman held that, although the foreclosure decretal amount in that case was Rs. 2,226-8-0, the plaintiffs were entitled to pre-emption upon payment of Rs. 654-8-7, the latter being the amount calculated at Rs. 20 per bigha for cultivated land, and Rs. 5 per bigha for waste land.

We are bound to say that, if the plaintiffs, in the case to which we have referred, had, after the making of the decree for foreclosure, any right whatsoever of pre-emption under the *wajib-ul-arz*, the only construction possible in that event to put on the *wajib-ul-arz* was, in our opinion, that which was adopted by Mr. Justice Banerji. To illustrate by that case the position contended for on behalf of the pre-emptor appellant in this case, we may point to the following facts. There were three stages in the case. One was at the time when the co-sharer desired to mortgage his share, and mortgaged it. At that time, according to the *wajib-ul-arz*, the other co-sharers were entitled to pre-empt for Rs. 654-8-7. The next stage was after the suit for foreclosure had been brought, which would be equivalent to the service of notice of foreclosure under the Regulation which was in force when this *wajib-ul-arz* was made, and before the order absolute for foreclosure was made. At that time, if the plaintiffs in the former case had sought pre-emption, they could only have obtained the rights of the mortgagee on payment of the mortgage money due at the time, that is, on payment of a sum exceeding Rs. 2,000. The decree for foreclosure absolutely fixed the amount which must be paid in order to prevent the right to redeem being foreclosed for ever. The next stage was that subsequent to the making of the order absolute for foreclosure. At this last stage, according to Mr. Justice Aikman, the co-sharer seeking pre-emption was in a more fortunate position than he would have been at the intermediate stage, and was entitled to pre-empt by payment of Rs. 654-8-7, the amount calculated at Rs. 20 and Rs. 5 per bigha, as already mentioned; and, according to Mr. Justice Aikman, in

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that third stage, for that sum of money, a person claiming pre-emption was entitled to step into the shoes of the mortgagor who had obtained a decree and an order absolute for foreclosure, upon payment of the Rs. 20 and Rs. 5 per bigha, irrespective of what the principal mortgage money may have been and irrespective of the amount at which the interest on that principal may have arrived. Mr. Justice Aikman was quite right in saying that in construing this class of *wajib-ul-arzes* one should endeavour to ascertain what the intention of the parties was and to construe them as far as possible with regard to that intention. In our opinion the parties to this *wajib-ul-arz* never could have had any such intention as that which would have been consistent with the construction put upon the *wajib-ul-arz* by Mr. Justice Aikman.

But the real point and the real answer to the plaintiff's suit was not raised by the defendant-appellant in the appeal before those learned Judges. We are not referring to what the parties may have thought was the real answer: we are referring to what appears to us to be, upon the true construction of the *wajib-ul-arz*, the real answer to this suit and to the former suit. In our opinion this *wajib-ul-arz* contemplates only two stages, and not three. It contemplates a time when a contract of a sale or of mortgage is about to be entered into or has been entered into. The Indian Limitation Act, 1877, fixes a time within which a co-sharer desiring to claim pre-emption on a sale or on a mortgage must bring his suit. The second stage is when the conditional vendee has brought his suit for foreclosure, and before he has obtained his order absolute on the decree for foreclosure. Up to the time when that order is made absolute the co-sharer desiring to pre-empt may, under this *wajib-ul-arz*, obtain pre-emption upon payment of the amount decreed in the suit for foreclosure. When the order absolute for foreclosure is made the co-sharer's right to pre-empt under this *wajib-ul-arz* is in our opinion gone and extinguished. There is no provision as to what is to take place then, and a co-sharer not having availed himself of his right

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to pre-empt before the order absolute, the decree of the Civil Court must take effect and must fully vest in the vendee the rights which he obtains under his order absolute for foreclosure. At that time the matter has reached the stage when it is beyond the scope of this custom or contract in this *wajib-ul-arz*, and the right of the decree-holder under his Civil Court decree cannot be affected.

That is our view of the law to be applied to the case. If the defendant had filed a cross appeal, we could have given effect to it by dismissing the plaintiff's suit; but all we can do now is to dismiss the plaintiff's appeal, as he has not made out a case upon which we should alter in his favour the decree of the Court below.

We dismiss this appeal with costs.

Appeal dismissed.

APPELLATE CRIMINAL.

1897
September 22.

Before Mr. Justice Knox and Mr. Justice Burkitt.

QUEEN-EMPRESS v. YUSUF AND OTHERS.*

Practice—Appeal—Alteration of conviction in appeal.

Where, on appeal against a conviction for one offence, it became apparent that, although there was not sufficient evidence to support the conviction, there was evidence which might have led to the conviction of the appellants for an essentially different offence, with which they had not been charged, the Court declined to consider that evidence with a view to altering the conviction of the appellants. *Queen-Empress* v. *Parbati*, (Weekly Notes, 1887, p. 130) referred to.

IN this case four persons were tried by the Sessions Judge of Allahabad for an offence under section 302 of the Indian Penal Code, convicted and sentenced, three to death, the fourth to transportation for life. They appealed to the High Court. At the hearing of this appeal the Court, on consideration of the evidence, came to the conclusion that the case under section 302 was not

* Criminal Appeal No. 1059 of 1897.