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appeal, distinguishes the case decided by Mr. Justice Burkitt on the 20th of December, 1898, on the ground that the tenancy there was an occupancy tenancy. I cannot draw any such distinction. If the defendants were not occupancy tenants when they entered into the mortgage they were at all events agricultural tenants, who had certain rights including the right to retain possession of their holding until ousted in due course of law. For the reasons set forth above, I concur in the order proposed.

By THE COURT.—The order of the Court is that the appeal is allowed with costs; the decision of this Court and of the lower appellate Court set aside with costs, and that of the Court of first instance is restored. We extend the time for payment of the mortgage money up to the 10th of September next.

Appeal decreed.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Banerji.

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RAN BAHADUR RAI AND ANOTHER (PLAINTIFFS). *v.* PARMESHAR BHARTHI (DEFENDANT).*

Pre-emption—Mortgage by conditional sale—Accrual of right of pre-emption when sale becomes absolute — Wajib-ul-arz — Partition of mahal.

The wajib-ul-arz, framed in 1883, of an undivided mahal consisting of several villages contained the following provision as to pre-emption:—"Should a sharer of any patti sell his share, he will sell it first to subordinate sharers; if they refuse to take it, then to sharers in the patti; and if they also do not take it, then to proprietors of the mahal; and in case of refusal by all the sharers before mentioned, he shall have power to transfer it to a stranger."

While this wajib-ul-arz was in force, namely, in 1890, certain property, to which its provisions applied, was mortgaged by a deed of conditional sale. In 1894, after partition of the mahal, a new wajib-ul-arz was framed for the mahal in which the mortgaged property was situated, which also contained a similar record of the custom of pre-emption in the following terms:—"Should a sharer sell his share, he will sell it first to his subordinate sharers, afterwards to a sharer in the mahal, and in case of refusal by the sharer in the mahal, to a sharer in the old mahal."

Held that the record as to the right of pre-emption being in both cases the record of a custom, and the provisions of the latter wajib-ul-arz being capable of application to the circumstances of the case, a right of pre-emption

* Second Appeal No. 339 of 1900 from a decree of R. Greeven, Esq., District Judge of Ghazipur, dated the 17th January 1900, reversing a decree of Maulvi Syed Zain-ul-Abdin, Subordinate Judge of Ghazipur, dated the 22nd February 1897.

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accrued to the share-holders in one of the other mahals into which the original mahal had been divided, upon the mortgage by conditional sale becoming an absolute sale in favour of a stranger.

Alu Prasad v. *Sukhan* (1) followed. *Bechan Rai* v. *Nand Kishore Rai* (2), and *Gaya Bharthi* v. *Lakhnath Rai* (3) distinguished.

THE suit out of which this appeal arose was a suit for pre-emption brought under the following circumstances:—On the 24th of July 1890 several co-sharers in a mahal called Kheri Rai executed a mortgage by conditional sale in favour of one Parmeshar Bharthi. At that time the subsisting wajib-ul-arz of the mahal was one framed at the settlement of 1883-1884, which contained the following provision as to the custom of pre-emption:—"Should a sharer of any patti sell his share, he will sell it first to subordinate sharers: if they refuse to take it, then to the sharers in the patti: and if they also do not take it, then to the proprietors of the mahal; and in case of refusal by all the sharers before mentioned, he shall have power to transfer it to a stranger." In 1894 there was a perfect partition into 13 mahals, for each of which a new wajib-ul-arz was prepared containing the following observations on the subject of pre-emption:—"Should a sharer sell his share, he will sell it first to his subordinate sharers, afterwards to a sharer in the mahal, and in case of refusal by the sharer in the mahal, to a sharer in the old mahal." On the 12th of February 1895 the mortgagee sued for foreclosure, and on the 5th of March following obtained a decree in the terms of section 86 of the Transfer of Property Act, 1882. This decree became absolute on the 13th of February 1896, and possession was delivered through the Court on the 10th of May. On the 4th of July 1896 the present suit was filed. The plaintiffs, who were co-sharers in the new mahal, Ran Bahadur, alleged that they were entitled on a construction of both the wajib-ul-arzes above referred to, to pre-empt the property mortgaged in 1890 to Parmeshar Bharthi, which was situated in mahal Nihal Rai, the conditional sale having become absolute on the 13th of February 1896. The Court of first instance (Subordinate Judge of Ghazipur) gave the plaintiffs a decree; but on appeal by the defendant the District Judge

(1) (1881) I. L. R., 3 All., 610. (2) (1892) I. L. R., 14 All., 341.
(3) (1897) I. L. R., 20 All., 103.

reversed that decree, holding, on an interpretation of the ruling in *Bechan Rai* v. *Nand Kishore Rai* (1), that the plaintiffs had no right of pre-emption. The plaintiffs thereupon appealed to the High Court.

Mr. *Abdul Majid* and Munshi *Gobind Prasad*, for the appellants.

Munshi *Haribans Sahai* and Babu *Sital Prasad Ghosh*, for the respondent.

STANLEY, C. J., and BANERJI, J.—The suit out of which this appeal has arisen was a suit instituted by the plaintiffs to pre-empt certain villages. It appears that the defendant second party mortgaged the villages in dispute to the defendant first party on the 24th of July, 1890, by a deed of conditional sale. On the 12th of February, 1895, the defendant first party instituted a suit for foreclosure against the second party of defendants, and a primary decree was passed on the 25th of March, 1895. The order absolute for foreclosure was made on the 13th of February, 1896, and possession was obtained on the 10th of May, 1896. On the 4th of July, 1896, following, the present suit for pre-emption was instituted by the plaintiffs, who are co-sharers in the villages. They based their claim upon the terms of the wajib-ul-arz, to which we shall presently refer. The Court of first instance decreed the plaintiffs' claim; and thereupon an appeal was taken to the lower appellate Court, with the result that the lower appellate Court reversed the decree of the Court of first instance and dismissed the plaintiffs' suit. The grounds upon which the lower appellate Court dismissed the suit were, that the wajib-ul-arz of 1883 and that of 1894 expressly limited the right of pre-emption to the case of a sale, and did not contemplate its accrual in the case of a mortgage; that it was manifest, therefore, that "no right could possibly have accrued until the decree absolute had taken effect on the 13th of February, 1896. Even then, however, no right of pre-emption could arise, because the change of transaction from one of mortgage to one of absolute sale merely followed as the legal result of events contemplated by the contract of conditional sale." For this proposition the learned Judge quotes as his authority the case of

(1) (1892) I. L. R., 14 All., 341.

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Bechan Rai v. *Nand Kishore Rai* (1). The wajib-ul-arz prepared at the settlement of 1883 contains the following provisions as to the right of pre-emption :—"Should a sharer of any *patti* sell his share, he will sell it first to subordinate sharers; if they refuse to take it, then to the sharers in the *patti;* and if they also do not take it, then to the proprietors of the *mahal;* and in case of refusal by all the sharers before mentioned, he shall have power to transfer it to a stranger." In the wajib-ul-arz as framed on partition in 1894 substantially the same provision is contained in clause 13 as to the right of pre-emption. The words are as follows :—"Should a sharer sell his share, he will sell it first to his subordinate sharers, afterwards to a sharer in the mahal, and in case of refusal by the sharer in the mahal, to a sharer in the old mahal." It is to be observed that these provisions as to pre-emption are founded, as appears by the wajib-ul-arz, on custom, and not on contract, and it is perfectly clear that the custom which prevailed in 1883 was not superseded when the partition was effected in 1894, but that that custom was carried on, and recognized by the sharers of the property in 1894. If there had been any real conflict in the nature of the custom as stated in the wajib-ul-arzes of these two years, different considerations might arise; or if it had been the case that the wajib-ul-arz which was framed on the partition in 1894 had been the outcome of a contract of the parties then entered into, also different considerations would arise. But here the provisions as to pre-emption are provisions which have arisen from custom, and which have been carried on from a time anterior to 1883 down to the present time. Now the District Judge appears to us to have entirely misconceived and misinterpreted the case on which he relies, namely, the case of *Bechan Rai* v. *Nand Kishore Rai*. In that case a share-holder in a village executed two deeds of conditional sale of his share. Subsequently to the execution of the deeds and to the making of the contracts embodied in them, a wajib-ul-arz was prepared, agreed to and sanctioned in the village. After the making of the wajib-ul-arz a suit was brought by the mortgagee on foot of his mortgages, and the conditional sale made to him by the mortgages became an absolute sale.

(1) (1892) I. L. R., 14 All., 341: S. C., Weekly Notes, 1892, p. 18.

Thereupon a pre-emption suit was brought by some of the co-sharers in the village, claiming by right of the wajib-ul-arz to pre-empt the sale. The plaintiff did not rely upon any custom of pre-emption existing in the village at the time of the execution of the deeds of conditional sale. He simply relied upon the agreement contained in the wajib-ul-arz, which was subsequent in date to the mortgages, and was not based on custom. The learned Chief Justice, Sir John Edge, in his judgment, says :—"It appears to me that no subsequent village contract, to which the parties to the conditional sale deeds were not agreeing parties, could alter the rights of the conditional vendee under his deeds. Those rights came into existence on the making of the deeds of conditional sale. The change of the transaction from one of mortgage to one of absolute sale merely followed as the legal result of events contemplated by the contract of conditional sale." The learned District Judge misconstruing this judgment says, in the course of his judgment, that "no right of pre-emption could arise because the change of transaction from one of mortgage to one of absolute sale merely followed as the legal result of events contemplated by the contract of conditional sale; and whether the wajib-ul-arz evidences a custom or contract, it is unnecessary to decide, for in either case a mortgage is not contemplated as a transaction giving a right of pre-emption." The Court in the case to which we have referred laid down no such proposition. The District Judge overlooks the fact, too, that in that case the claim was based upon contract, and not upon custom, as in the present case. All that was decided by the Court was, that a wajib-ul-arz, which was the creature of a contract entered into after the date of a mortgage, can in no way be allowed to prejudice the rights of the mortgagee, he being no party to the wajib-ul-arz, and that consequently, having had a right to convert his conditional sale into an absolute sale, unfettered by any right of pre-emption before the wajib-ul-arz was agreed to, he was not precluded from exercising that right absolutely, regardless altogether of the provisions of the wajib-ul-arz subsequently entered into. Then it is said by the District Judge that the wajib-ul-arz in this case did not contemplate the accrual of the right of pre-emption in the case of a mortgage.

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That is so; but when a conditional sale has been made absolute, it becomes an absolute sale of property, and upon so becoming absolute the right of pre-emption at once springs up under the provisions of the wajib-ul-arz. This was so decided in the Full Bench case in this Court of *Alu Prasad* v. *Sukhan* (1). In that case a party mortgaged by way of conditional sale a share of a village to a stranger. The mortgage was foreclosed. Whereupon the mortgagee sued the mortgagor for possession, and obtained a decree, in execution of which he obtained possession of the share in 1878. On the 1st of September, 1879, a co-sharer sued both the mortgagor and mortgagee to enforce his right of pre-emption in respect of the share, and founded his suit upon the following clause in the administration paper of the village, namely:—"When a share-holder desires to transfer his share, a near relative shall have the first right; next, the share-holders of other *pattis*; if all these refuse to take, the vendor shall have power to sell and mortgage, etc., to whomsoever he likes." The facts of this case seem to be on all fours with the case before us. It was there held by the members of the Court (Mr. Justice Pearson alone dissenting), that, having regard to the terms of the wajib-ul-arz, the co-sharer in the village was entitled to pre-empt when the mortgage by conditional sale was foreclosed. This case seems to us to govern the present case. We have been referred, however, to a case as deciding the contrary, and that is the case of *Gaya Bhurthi* v. *Lakhnath Rai* (2). In that case, it is sufficient to say that the judgment of the Court was based upon the language of the wajib-ul-arz. It was held that the wajib-ul-arz only contemplated a right of pre-emption in two cases, namely, when a co-sharer made a mortgage of his share; and, secondly, when the term of the mortgage was about to expire, and notice of foreclosure had been issued. It did not provide for pre-emption when the right to redeem had already been foreclosed, and it was on these special terms of the wajib-ul-arz that the Court held that, once the equity of redemption had been foreclosed, the co-sharer was late in seeking his remedy by pre-emption. For these reasons we are of opinion that the decision of the learned District Judge was wrong, and

(1) (1881) I. L. R., 3 All., 610. (2) (1897) I. L. R., 20 All., 103.

that the judgment of the Court of first instance was correct. We therefore allow the appeal, set aside the decree of the District Judge, and restore that of the Court of first instance. The appellants will have their costs of this appeal, and also their costs in the lower appellate Court.

Appeal decreed.

Before Mr. Justice Blair.

BEHARI LAL AND OTHERS (PLAINTIFFS) *v.* GHISA LAL AND OTHERS (DEFENDANTS).*

Injunction—Maxim—Cujus est solum ejus est usque ad cœlum—Question whether common law rights of owner can be limited by religious prejudices of neighbours.

Certain plaintiffs sued for an injunction restraining defendants from obstructing them in cutting certain branches of a pipal tree overhanging their property. The pipal tree grew in the inclosure of a temple, and the resistance was based on the ground that the tree was an object of veneration to Hindus, and that the lopping of its branches would be offensive to the religious feelings of the Hindu community.

Held that the plaintiffs were entitled to the injunction prayed for, and that the fact that the plaintiffs' action might cause annoyance to a large number of Hindus, was not a sufficient ground for cutting down the well recognized common law rights of an owner of property.

THE facts of this case sufficiently appear from the order of the Court.

Pandit *Moti Lal Nehru* (for whom Pandit *Tej Bahadur Sapru*), for the appellants.

Pandit *Madan Mohan Malaviya*, for the respondents.

BLAIR, J.—This appeal impugns the propriety of a decision of the Subordinate Judge of Moradabad dismissing the plaintiffs' suit under the following circumstances. The plaintiffs are the owners of a house adjacent to the site of a Hindu temple. Near their house stands in the temple inclosure a pipal tree, the branches of which extend over their house, and which has, of course, been growing there for many years. The plaintiffs, alleging that the branches of the tree afforded facilities for a thief to obtain entrance into their house, and endangered life and property, desired to cut those branches. They were prevented

* Second Appeal No. 374 of 1901 from a decree of Rai Mata Prasad, Subordinate Judge of Moradabad, dated the 31st January 1901, confirming a decree of Maulvi Muhammad Abdul Latif, Munsif of Moradabad, dated the 30th of November 1900.