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mortgage repudiate the mortgagee's title, and they have held adversely to them for about 30 years. Both on the ground, therefore, that the contract upon which the plaintiff comes into Court had been departed from by mutual agreement, and a new contract substituted, and also on the ground that the plaintiff's suit is barred by limitation, we hold that the appeal fails. On the grounds set forth above we dismiss the appeal with costs. In arriving at this decision we have this satisfaction, that it defeats an exorbitant claim and is in accord with the equity of the case.

Appeal dismissed.

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

LACHMAN SINGH AND ANOTHER (PLAINTIFFS) *v.* RAM LAGAN SINGH AND OTHERS (DEFENDANTS).*

Pre-emption—Wajib-ul-arz—Construction of document—Letters Patent, sections 10 *and* 27*—Difference of opinion between members of Bench hearing an appeal from a single Judge of the Court—Civil Procedure Code, section* 575.

Where the words of the pre-emptive clause of a wajib-ul-arz ran in the form:—"If any co-sharer desires to sell or mortgage, &c., *let him* sell first to so and so, and then to so and so." It was *held* by STANLEY, C.J., that the use of the imperative mood did not indicate a fresh contract between the co-sharers, but was consistent with the clause being a record of pre-existing custom. Where there is nothing to show clearly that such a clause embodies a new contract as to pre-emption, the rule of construction is that it is a record of a custom. *Majidan Bibi* v. *Hayatan* (1) and *Ali Nasir Khan* v. *Manik Chand* (2), followed.

Per BURKITT, J. *contra.*—The language of the wajib-ul-arz indicates that what is recorded is a new contract between the co-sharers.

Held also that where an appeal under section 10 of the Letters Patent is heard by a Bench consisting of two Judges, and such Judges are divided in opinion as to the decision to be given on such appeal, the appeal will be decided according to the opinion of the senior Judge; that is, section 575 of the Code of Civil Procedure does not, in respect of appeals under section 10 of the Letters Patent, override section 27 of the Letters Patent.

THE suit out of which this appeal arose was brought by the plaintiffs to enforce a right of pre-emption, or rather pre-mortgage, based upon a custom recorded in the village wajib-ul-arz. The Court of first instance (Munsif of Deoria) found the

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* Appeal No. 35 of 1902 under section 10 of the Letters Patent.

(1) (1896) Weekly Notes, 1897, p. 3. (2) (1902) I. L. R., 25 All., 90.

custom set up by the plaintiffs proved and passed a decree in their favour. On appeal the lower appellate Court (Additional Subordinate Judge of Gorakhpur) held that the two old wajib-ul-arzes produced by the plaintiffs did not support their case, but indicated a contract rather than a custom of pre-emption; and the wajib-ul-arz of the current settlement was not produced by the plaintiffs. In absence of any reliable evidence outside these wajib-ul-arzes, the lower appellate Court reversed the decree of the Munsif and dismissed the suit. The plantiffs appealed to the High Court. There they rested their case on the wajib-ul-arz of the former settlement, contending that no wajib-ul-arz was in fact prepared at the recent settlement, and its absence could not be construed against them. The appeal came on for hearing before Banerji, J., who held that the wajib-ul-arz relied upon by the appellants indicated a contract and not a custom, and, there being no other evidence of custom, accordingly dismissed the appeal. Against this judgment the plaintiffs preferred an appeal under section 10 of the Letters Patent of the Court.

Munshi *Haribans Sahai*, for the appellants.

Munshi *Gobind Prasad* (for whom Mr. *M. L. Agarwala*), for the respondents.

STANLEY, C. J.—This case appears to me to be governed by the decision of a Full Bench of this Court in the case of *Majidan Bibi* v. *Sheikh Hayatan* (1). That case came before a bench consisting of Edge, C. J., and Banerji and Aikman, JJ. In it the principle upon which questions arising upon a wajib-ul-arz as to the existence of a right of a pre-emption should be determined by custom or contract was laid down in these terms, at page 4 of the report :—"If the wajib-ul-arz clearly showed that the clause as to pre-emption embodied a new contract as to pre-emption entered into by the co-sharers at the time when the wajib-ul-arz was made, it would have been necessary for the plaintiff to prove that he or some one through whom he claimed was an assenting party to the contract. On the other hand, if the wajib-ul-arz did not itself show, or if it was not otherwise proved, that the pre-emption clause was merely the embodiment

(1) (1896) Weekly Notes, 1897, p. 3.

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of a new contract as to pre-emption, the reasonable and proper construction of such a document would be that the pre-emption clause was merely the recital of a pre-emptive custom in force in the village ; and in such a case it would be for the defendant in a suit for pre-emption to prove by clear evidence that no such custom had existed in the village, and that the vendor and the plaintiff had not agreed to be bound by that recital." In the wajib-ul-arz before us, which was tendered in evidence in proof of the existence of the right by custom, there is nothing from which I can gather that the wajib-ul-arz embodied a new contract between the co-sharers as to pre-emption. The heading of section 14 which deals with pre-emption is as follows:—" Mention of right," and then follow the words which state the right of pre-emption. If any co-sharer desires to sell or mortgage, &c., " let him " sell first to so and so, and then to so and so, the imperative mood being used. It is suggested that the use of the imperative mood indicates that the creation of the right was by contract, and that the record is not a record of a right existing by custom. I am unable to take that view of the language. It appears to me that the words fitly record a right existing by custom. The bodies of customs which largely go to make up Indian law are very frequently expressed by the ancient law-givers in the imperative mood. The rule which was laid down by a Full Bench in the case of *Majidan Bibi* v. *Sheikh Hayatan* was accepted by another Full Bench of this Court consisting of my brothers Knox and Blair and myself in the case of *Ali Nasir Khan* v. *Manik Chand* (1), and ought, in my opinion, to prevail in this appeal. The wajib-ul-arz does not, in my opinion, anywhere show, and it has not been otherwise proved, that the pre-emption clause was merely the embodiment of a new contract as to pre-emption, and therefore the construction put upon it by the Court of first instance was the correct construction and ought to have been accepted. It appears to me highly inexpedient to fritter away a rule of construction laid down by a Full Bench by drawing nice distinctions in the language used. I am unable in this case to regard the use of the imperative mood in the recording of

(1) (1902) I. L. R., 25 All., 90.

the right as sufficient to justify me in holding that the clause embodied a new contract as to pre-emption. I would therefore allow the appeal, set aside the decree of this Court, and also the decree of the first appellate Court, and, inasmuch as there are several issues which have not been tried by the lower appellate Court, remand the case to that Court, under the provisions of section 562 of the Code of Civil Procedure for the determination of those issues. The costs in this Court should abide the event.

BURKITT, J.—I regret I am unable to concur in the judgment which has been delivered by the learned Chief Justice on the question raised in this appeal. In my opinion the decision of my brother Banerji under appeal is correct. I concur with him in holding that the language used in the wajib-ul-arz does not indicate a custom, but, on the contrary, strongly indicates an agreement or contract between the parties thenceforth to adopt a pre-emption rule. In this view of the case it seems to me that this appeal is not governed by the cases cited by the learned Chief Justice. Holding, therefore, that the wajib-ul-arz in this case indicates a contract between the co-sharers of the village, I would confirm the decree below and dismiss this appeal.

[After the judgments in this case had been delivered the contention was raised on behalf of the respondents that they were entitled to have the appeal dismissed under section 575 of the Code of Civil Procedure, as one of the Judges agreed with the learned Judge of this Court from whose decision the appeal lay.]

BY THE COURT.—As this is an appeal under section 10 of the Letters Patent, it is governed by the provisions of section 27 of the Letters Patent, which provide that when two Judges hearing an appeal are equally divided, the opinion of the Senior Judge should prevail. It has been contended before us that the case is governed by section 575 of the Code; that in this case that section has superseded the section of the Letters Patent to which we have referred. We are of opinion that there is no substance in this contention. The two cases to which we have been referred, so far from supporting the contention of the

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learned counsel for the respondents, go to show that in this case section 575 of the Code of Civil Procedure is not applicable. The order of the Court, therefore, is that the appeal be allowed, the decree of this Court, and also the decree of the first appellate Court, be set aside, and the case remanded to the lower appellate Court under the provisions of section 562 of the Code of Civil Procedure for the determination of the issues which have as yet not been decided. The costs of this appeal will abide the event.

Appeal decreed and cause remanded.

1903
May 21.

Before Mr. Justice Blair and Mr. Justice Banerji.

BHAGWAN DAS (PLAINTIFF) *v.* BHAWANI AND ANOTHER (DEFENDANTS).*

Act No. IV of 1882 *(Transfer of Property Act), sections* 96 *and* 97*—Civil Procedure Code, section* 295*—Mortgage—Suit for sale of entire property by holder of usufructuary and simple mortgages over the same property.*

A mortgagee held several simple mortgages over properties *A* and *B*, and also a usufructuary mortgage of prior date over property *B*. *Held* that the mortgagee was not entitled to bring to sale the property covered by his simple mortgages, subject to the usufructuary mortgage held by him, nor could he bring to sale the whole property for the aggregate amount of his mortgages, simple and usufructuary.

THE facts of this case are as follows:—

One Tara Singh owned certain property which was entered in the khewat as No. 8, and also other property described in the khewat as No. 4. On the 9th of November 1885 he made a usufructuary mortgage of the first-mentioned property to one Bhagwan Das, and subsequently five simple mortgages including both properties to the same mortgagee. Prior to all these mortgages Tara Singh had in 1880 made a mortgage of the same property in favour of Ganga Ram and others, who obtained a decree upon that mortgage and assigned the decree to Narain Prasad. The suit out of which this appeal arose was brought for sale upon the five simple mortgages mentioned above. The plaintiff alleged that he was the mortgagee in possession of the property entered in khewat as No. 8, and was not entitled to bring

* Second Appeal No. 537 of 1901 from a decree of H. D. Griffin, Esq., District Judge of Aligarh, dated the 21st of February 1901, modifying a decree of Maulvi Ahmad Ali, Subordinate Judge of Aligarh, dated the 27th of June 1900.