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May 2.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Sir George Knox.

POHKAR SINGH (PLAINTIFF) *v.* MUHAMMAD HUSAIN KHAN AND OTHERS (DEFENDANTS).*

Pre-emption—Wajib-ul-arz—Inference from entry in previous wajib-ul-arz—Muhammadan Law.

A village wajib-ul-arz, prepared in the year 1883, contained only the following entry with reference to pre-emption :—"Custom of pre-emption :—No pre-emption suit has been instituted, but the custom of pre-emption is accepted." But the wajib-ul-arz of the same village, prepared in 1864, was more explicit. It ran as follows :—"Mention of the right of pre-emption :—When it is desired to transfer a share, the heirs and near brethren have the right first. On their refusal to take, the transferor is competent to sell, mortgage or assign to anyone he likes."

Held that in the wajib-ul-arz of 1883 the villagers intended to reproduce—and understood they were in fact reproducing—the custom of pre-emption that prevailed in 1864: that therefore the provisions of the Muhammadan Law were not applicable.

THE plaintiff, suing for pre-emption, based his claim on the conditions of the records-of-right prepared at the settlements of 1864 and 1883. The record-of-rights of 1864 contained the following entry :—

"Mention of the right of pre-emption :—When it is desired to transfer a share, the heirs and near brethren have the right first. On their refusal to take, the transferor is competent to sell, mortgage or assign to any one he likes."

In that of 1883 the corresponding entry was :—"Custom of pre-emption :—No pre-emption suit has been instituted, but the custom of pre-emption is accepted."

The learned District Judge held that the rules of Muhammadan Law applied and that, since there had been no valid demand under that law, the plaintiff's suit must fail.

Babu *Durga Charan Banerji*, for the appellant.

The respondents were not represented.

STANLEY, C.J. and KNOX, J.—This appeal arises out of a suit for pre-emption instituted by the plaintiff. He asked for a decree declaring his right of pre-emption over an eleven-anna share of Sherpura and a six-anna share in Rudarpura. The defence

* Second Appeal No. 1109 of 1904, from a decree of A. Sabonadiere, Esq., District Judge of Jhansi, dated the 6th of September, 1904, confirming a decree of Munshi Ganga Prasad, Munsif of Orai, dated the 31st of May, 1904.

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was to the effect that the plaintiff had no title to pre-empt; further, that he could not pre-empt, inasmuch as he was claiming only a portion of the property sold and not the whole of that property. There was a further plea as to limitation, but with that we are not concerned in this appeal. The Court of first instance found that under the conditions of the wajib-ul-arz relied on in the plaint, the plaintiff was entitled to pre-empt, in respect both of the property in Sherpura and of that in Rudarpura, and went on to hold that, as the plaintiff laid no claim to the other property which had been sold, he was not entitled to a decree for pre-emption. The lower appellate Court rightly held that, as the plaintiff had no pre-emptive rights in respect of that portion of the property sold to which he made no claim, and as his claim included all property over which he had a right of pre-emption, he was entitled to pre-empt. It, however, refused to grant him a decree for pre-emption, because it held that, under the terms of the wajib-ul-arz, the right of pre-emption current in the villages was one in accordance with Muhammadan Law, and, as the plaintiff had not shown that he had made the demands required by the Muhammadan Law, it confirmed the decree of the lower Court and dismissed the appeal. Here it is urged that the lower appellate Court was wrong in holding that the Muhammadan Law applied to the case. The claim, as has been already stated, was based upon the wajib-ul-arz. The terms of the wajib-ul-arz are set out on page 9 of the paper-book. In the case of both Sherpura and Rudarpura the original wajib-ul-arz drawn up at the settlement of 1864, laid down the terms upon which the right of pre-emption could be claimed. In the case of both the villages in 1883, all that was entered in the wajib-ul-arz about the custom of pre-emption was "no pre-emption suit has been instituted, but the custom of pre-emption is accepted." We are of opinion that the words contained in the wajib-ul-arz of 1883 must be interpreted with reference to what was contained in the wajib-ul-arz of 1864. When the wajib-ul-arz of 1883 was drawn up, the villagers no doubt had in mind what had been the custom of pre-emption from the year 1864 onwards and intended to reproduce, and understood that they were reproducing in the wajib-ul-arz of 1883 the custom of pre-emption which has been hitherto found prevailing. The

respondents are not represented here; but there is a finding that the price that the appellant must pay is Rs. 325, for the property of which he seeks pre-emption. We decree this appeal, set aside the decrees of the Courts below and grant the appellant a decree declaring his right to pre-empt upon payment of Rs. 325, on or before the 2nd of August next. If that amount is paid within the time, he will get his costs in all Courts, and will get possession. If the amount be not paid within such time the suit will stand dismissed with costs in all Courts.

Appeal decreed.

Before Mr. Justice Banerji and Mr. Justice Aikman.

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May 4.

GAYA PRASAD MISR AND ANOTHER (OPPOSITE PARTY) *v.* RANDHIR SINGH (JUDGMENT-DEBTOR) AND ANOTHER (DECREE-HOLDER).*

Civil Procedure Code, section 244(c)—Application to set aside sale on the ground of fraud—Previous suit with same object—Procedure—Estoppel.

Section 244(c) of the Civil Procedure Code governs a case in which a person seeks to set aside an auction sale on the ground of fraud and on the ground that the decree-holder himself held a mortgage on the property brought to sale.

This plea had been urged sucessfully by the appellant in a regular suit brought by the present respondent, but the former now pleaded that the remedy should be by suit and not by execution proceedings.

Per AIKMAN, J.—The appellant cannot be allowed to go behind the issue decided in the course of the previous litigation.

THE facts of this case are thus stated in the judgment of the lower appellate Court:—

Lachman Singh, father of Randhir Singh, usufructuarily mortgaged 68 bighas 3 biswas out of his three-anna share in mauza Garwan to Gajadhar Singh, but did not give possession. The mortgagee brought a suit for possession, and obtained a decree for possession as also for mesne profits and costs. In execution of the decree for mesne profits and costs he caused the three-anna share to be sold, and it was purchased on the 20th of June, 1889, by one Sita Ram. Randhir Singh filed a regular suit

* Second Appeal No. 753 of 1905, from a decree of Syed Muhammad Ali, District Judge of Mirzapur, dated the 31st of March, 1905, confirming the decree of Babu Jotindro Mohan Bose, Munsif of Mirzapur, dated the 3rd December, 1904.