1906

HULAS RAI v. RAM PRASAD.

There remain the objections filed by the respondents which relate to that portion of the lower Court's decree which deals with interest. The amount of the interest, *viz.* Rs. 354-2-8, is not disputed, but it is contended by the learned vakil, and we think with reason, that the lower Court was in error in giving this amount to the mortgagees, Bansi Dhar and Jagan Lal. Out of the Rs. 5,000 all that they were entitled to was Rs. 1,500. The balance was due to a prior mortgagee, Bansi Dhar (not the appellant). The usufruct of the property was a sufficient return to the mortgagees for what they were out of pocket. Without altering the total amount to be paid by the plaintiff, we vary the decree of the Court below by directing that out of the amount paid into Court, Rs. 1,500 be payable to the appellants, Bansi Dhar and Jagan Lal, and the balance, *viz.* Rs. 3,854-2-8 to the prior mortgagee, Bansi Dhar of Moradabad. We dismiss the appeal with costs. The objection is allowed With costs.

Appeal dismissed.

1906
February 3.

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

DAULAT (PLAINTIFF) v. MATHURA AND OTHERS (DEFENDANTS).*

Pre-emption—Wajib-ul-arz—*Construction of document*—*Custom or contract.*

In a suit for pre-emption two *wajib-ul-arzes* were relied upon. The earlier *wajib-ul-arz* of the year 1864, provided that "if a sharer desires to transfer his share, the first right of pre-emption is possessed by his near brother, next by the sharers in the patti and next by the sharers in other pattis, and when all these have declined to take a transfer the sharer may sell to any one he likes." The later *wajib-ul-arz* of the year 1884, under the head "custom as to pre-emption" provided that "no such case has as yet occurred; but we acknowledge the right of pre-emption." *Held* that the *wajib-ul-arz* of 1864 was evidence of the existence of a right existing by custom and the provision in the latter was a recognition by the parties of the custom prevailing under the earlier *wajib-ul-arz*. *Ram Din* v. *Pokhar Singh* (1) followed.

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

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* Second Appeal No. 612 of 1904, from a decree of A. Sahonadiere, Esq., District Judge of Jhansi, dated the 6th of June, 1904, reversing a decree of Munshi Ganga Prasad, Munsif of Orai, dated the 30th of March, 1904.

(1) (1905) I. L. R., 27 All., 553.

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DAULAT v. MATHURA.

Babu *Jogindro Nath Chaudhri* and Hon'ble Pandit *Sundar Lal*, for the appellant.

Babu *Durga Charan Banerji* and Dr. *Satish Chandra Banerji*, for the respondents.

STANLEY, C.J. and BURKITT, J.—We are at a loss to understand how the learned District Judge came to hold that the *wajib-ul-arz* of 1884 recorded a custom, the incidents of which were not specified, so that the Muhammadan Law must be taken to apply to it. It was proved that in the earlier *wajib-ul-arz* of 1864 there was the following provision as to pre-emption, namely, that if a sharer desires to transfer his share, the first right of pre-emption is possessed by his near brother, next by the sharers in the patti, and next by the sharers in other pattis, and that when all these have declined to take a transfer the sharer may sell to anyone he likes. In the later *wajib-ul-arz* it is stated under the head "custom as to pre-emption" that no case or suit had as yet taken place, but the right of pre-emption was acknowledged. The *wajib-ul-arz* of 1864, according to the rulings of this Court, is clearly evidence of a right existing by custom, and the provision in the later *wajib-ul-arz* is a recognition by the parties of the custom prevailing under the earlier *wajib-ul-arz*. The question has nothing whatever to do with Muhammadan Law, as was determined by our learned brother Banerji in the recent case of *Ram Din* v. *Pokhar Singh* (1). The facts of that case are on all fours with those in the present, and in it our learned brother has in a lucid judgment shown that the contention that the rules of the Muhammadan Law governed the case was without foundation. We entirely agree with him in the view which he took and also in the reasons which he has assigned for his decision. We must therefore allow the appeal. The Court of first instance decreed the plaintiff's claim, but found that the price of the property was only Rs. 525. On appeal the learned District Judge found that the price agreed upon was Rs. 800. We therefore allow the appeal, set aside the decree of the lower appellate Court and restore the decree of the Court of first instance, with this modification, namely, that the sum payable will be Rs. 800 and not Rs. 525.

(1) (1905) I. L. R., 27 All., 553.

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DAULAT v. MATHURA.

We also extend the time for payment for three months from this date. The defendants-respondents must pay the costs of this appeal and also the costs in the lower appellate Court.

Appeal decreed.

1906 *February* 24.

Before Mr. Justice Sir William Burkitt and Mr. Justice Aikman.

PADAM KUMARI (PLAINTIFF) *v.* SURAJ KUMARI AND ANOTHER (DEFENDANTS).*

Hindu law—Marriage—Succession—Marriage between a Brahman and a Chhattri illegal.

Held that whatever may have been the case in ancient times, and whatever may be the law in other parts of India, at the present day a marriage between a Brahman and a Chhattri is not a lawful marriage in these Provinces and the issue of such a marriage is not legitimate.

The defendant pleaded that the parties were governed by a Nepalese custom by which a Brahman could lawfully marry the daughter of a Chhattri. *Semble*, that the custom set up, not being an ancient family custom, but merely a territorial custom, would, if it in fact existed, be applicable only to indigenous Nepalese subjects and perhaps to others permanently domiciled in Nepal. *Soorendro Nath Roy* v. *Mussamut Heeramonee Burmoneah* (1) referred to.

THE facts of this case are fully set forth in both the judgments.

Hon'ble Pandit *Sundar Lal*, for the appellant.

Munshi *Kalindi Prasad*, for the respondents.

BURKITT, J.—This is an appeal from a decree of the Subordinate Judge of Gorakhpur of July 7th, 1902, dismissing the plaintiff's suit with costs.

This appeal was at hearing before us on a former occasion, when, for the reasons stated in our order of December 13th, 1904, finding that most of the evidence on the record was inadmissible, we were obliged to send down the record to the Subordinate Judge, with directions to submit to us findings on certain issues after giving the parties an opportunity of producing evidence. That has been done, and the appeal is now before us for disposal.

The plaintiff sues for possession of the property of one Bhikhraj Upadhya, who died in the month of April, 1900, possessed of considerable properties in the Gorakhpur and Basti districts.

* First Appeal No. 253 of 1902, from a decree of Maulvi Muhammad Shafi Subordinate Judge, Gorakhpur, dated the 7th July, 1902.

(1) (1868) 12 Moo., I. A., 81.