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CHAUDHRI MEHDI HASAN v. MUHAMMAD HASAN.

course, but ordered the appellants to pay, in any event, the respondent's costs of that application, and of the case orders, which the respondent had been compelled to take out. The respondent must pay the costs of this appeal, but must be allowed to set off against them the costs mentioned above.

Appeal allowed.

Solicitors for the appellants—*Barrow, Rogers and Nevill.*

Solicitors for the respondents—*T. L. Wilson & Co.*

J. V. W.

1906
January 30.

APPELLATE CIVIL.

Before Mr. Justice Sir George Knox and Mr. Justice Aikman.

HULAS RAI AND OTHERS (DEFENDANTS), *v.* RAM PRASAD (PLAINTIFF) AND MOHAN LAL (DEFENDANT).*

Pre-emption—Wajib-ul-arz—*Construction of document*—"Qimat."

Held that the word '*qimat*' as used in the pre-emptive clause of a *wajib-ul-arz* is wide enough to include the consideration given for a usufructuary mortgage with possession as well as for a sale.

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

Munshi *Gokul Prasad* and Pandit *Tej Bahadur Sapru*, for the appellants.

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

KNOX and AIKMAN, JJ.—This appeal arises out of a suit for pre-emption. The circumstances are somewhat peculiar. On the 13th of July, 1902, a document was executed by one Mohan Lal, Brahman, in favour of the appellants, Bansi Dhar and Jagan Lal, as security for a loan of Rs. 5,000. As the deed was originally drafted, it was a usufructuary mortgage for a term of seven years and the interest entered in the deed was eight annas per cent. On the 14th of July this deed, however, was altered by striking out the term of seven years and enhancing the rate of interest to 10 annas per cent. At the same time on the 14th of July a lease was executed in favour of the brother and nephew of the mortgagees abovenamed for a term of seven

* First Appeal No. 42 of 1904, from a decree of Lala Mata Prasad, Subordinate Judge, Moradabad, dated the 6th November, 1903.

years for a consideration of Rs. 300, which, it will be noted, is equivalent to the amount of the interest at eight annas per cent. secured by the mortgage. Both the deeds were executed on the same date and were written by the same scribe. The witnesses were the same and the registration of both was effected on the same day. The lower Court has found that the two documents represent one and the same transaction of usufructuary mortgage; that this mortgage was the real intention of the parties, and that the transaction assumed the form it did, in order to defeat the right of pre-emption given by the *wajib-ul-arz* to co-sharers in the village. We have been taken through the whole of the evidence, and we see no reason to differ from the conclusions arrived at by the lower Court. The evidence of Kanhaiya Lal, a pleader, shows that he was consulted by the parties to the deed, and that he advised them that according to the *wajib-ul-arz* pre-emption could be claimed if the transaction was a usufructuary mortgage. He states that nothing was said to him about a simple mortgage. When we consider this evidence in the light of the very significant alterations in the mortgage deed and of the evidence of Gumani Lal, one of the marginal witnesses, and of Kedar Nath, the scribe of the documents, we have no hesitation in finding that the real transaction between the parties was one of usufructuary mortgage, and that in order to conceal the true character of the transaction a lease was executed in favour of the relations of the mortgagees, who are really *benamidars* of the mortgagees. This finding relieves us from the necessity of considering whether in this village a deed of simple mortgage would give rise to a right of pre-emption. The learned vakil for the appellants contended that the use of the word '*qimat*' in the *wajib-ul-arz* indicated that this provision related only to the case of an out-and-out sale. Having regard to the object which underlies the provisions as to pre-emption in a village administration paper, namely, the prevention thereby of intrusion of strangers into the village community, we cannot put so narrow an interpretation on the word '*qimat.*' We consider that it is wide enough to include the consideration given for a usufructuary mortgage with possession as well as for a sale. This disposes of the pleas raised in appeal.

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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.