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that the appellant has made out a case which falls outside those terms. This being so, he is not entitled to bring the property to sale otherwise than by instituting a suit under section 67 upon his decree.

The appeal is dismissed with costs.

Appeal dismissed.

[See also *Madho Prasad Singh v. Baij Nath*, Weekly Notes, 1905, p. 152.—Ed.]

1905
May 26.

Before Mr. Justice Banerji and Mr. Justice Richards.

JAGDAM SAHAI (DEFENDANT) v. MAHABIR PRASAD AND OTHERS
(PLAINTIFFS) AND BIHARI RAI AND ANOTHER (DEFENDANTS).*

Pre-emption—Wajib-ul-arz—Construction of document—Muhammadan law—“Intiqal.”

Where in a wajib-ul-arz it was recorded merely that “the custom of pre-emption prevails,” it was held that in the absence of any special custom different from or not co-extensive with the Muhammadan law of pre-emption, the Muhammadan law must be applied. *Ram Prasad v. Abdul Karim* (1) followed.

The term “*intiqal*” occurring in the pre-emptive clause of a wajib-ul-arz covers all kinds of transfers, mortgages as well as sales.

BIHARI RAI and Rajkumar Rai executed a usufructuary mortgage of three shares in their villages, Ahrauli, Chak Rukn-ud-din and Chak Latif, in favour of Mahabir Prasad and others. Jagdam Sahai brought a suit claiming a right under the village wajib-ul-arz to have himself substituted for Mahabir Prasad and others as mortgagee. The wajib-ul-arz of the villages Chak Rukn-ud-din and Chak Latif provided merely that “the custom of pre-emption prevails,” in these villages. The plaintiff asserted that he had performed the necessary demands preliminary to a claim for pre-emption. The defence traversed this allegation and pleaded that the custom of pre-emption provided for in the wajib-ul-arz meant the Muhammadan law of pre-emption, and that, inasmuch as that law did not provide for any such right as pre-emption in the case of a

* Second Appeal No. 243 of 1903 from a decree of Maulvi Muhammad Shafi, Additional Subordinate Judge of Ghazipur, dated the 12th of December 1902, confirming a decree of Babu Ramchandra Saksoni, Officiating Munsif of Muhammadabad, dated the 18th of July 1902.

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mortgage, the plaintiff had no cause of action so far as the shares in Chak Rukn-ud-din and Chak Latif were concerned. The Court of first instance (Munsif of Muhammadabad) gave a decree in favour of the plaintiff. The defendant vendee, Jagdam Sahai, appealed. The lower appellate Court. (Additional Subordinate Judge of Ghazipur) affirmed the decree of the Munsif and dismissed the appeal. The defendant vendee appealed to the High Court.

Munshi *Gobind Prasad* and *Maulvi Ghulam Mujtaba*, for the appellants.

Messrs. *Abdul Raof* and *M. L. Agarwala*, and *Munshi Haribans Sahai*, for the respondents.

BANERJI and RICHARDS, JJ.—This appeal arises in a suit for pre-emption in respect of the mortgage of three villages, namely, Ahrauli, Chak Rukn-ud-din and Chak Latif. The Court of first instance decreed the claim, and the decree has been affirmed by the lower appellate Court. The mortgagee has preferred this appeal. The learned vakil who appears for him does not press the appeal as regards the share in Ahrauli. As regards the other two villages, he contends that the custom referred to in the *wajib-ul-arz* upon which the claim is based can only be regarded as the custom of pre-emption according to Muhammadan law. The *wajib-ul-arz* of the two villages Chak Rukn-ud-din and Chak Latif recites that “the custom of pre-emption prevails” and that “every co-sharer has the right to transfer his property subject to the right of pre-emption.” It does not set forth what the custom is, and the plaintiffs also in their plaint do not allege any particular custom as prevailing in the villages in question. Consequently, having regard to the ruling in *Ram Prasad v. Abdul Karim* (1), “in the absence of any special custom different from or not co-extensive with the Muhammadan law of pre-emption,” that law must be applied to the case. According to that law, no claim for pre-emption arises in respect of a mortgage. It is true that in the *wajib-ul-arz* the word used is *intiqal*, which covers all kinds of transfers. Placing a reasonable construction upon the *wajib-ul-arz*, we must hold it to mean that the right of pre-emption will

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apply to those transfers only in respect of which pre-emption can be claimed. As we have already said, the plaintiffs do not assert any particular custom of pre-emption. They only refer to the *wajib-ul-arz*, which does not set forth any special rule of pre-emption. Consequently, the only rule of pre-emption that can apply is the rule of Muhammadan law, and under that law the claim cannot be sustained, first, because the transaction is a mortgage, and, secondly, because the conditions of the law as to "demands" were not fulfilled. That being so, the claim in regard to the two villages Chak Rukn-ud-din and Chak Latif fails. As, however, it is admitted that the plaintiffs have a right of pre-emption in regard to Ahrauli, it is necessary that we should have a finding from the Court below as to the portion of the mortgage money which is assignable to the share in Ahrauli comprised in the mortgage. We accordingly refer that issue to the Court below under the provisions of section 566 of the Code of Civil Procedure. The Court will take such additional evidence as may be necessary. On receipt of the finding ten days will be allowed for filing objections.

Issue referred.

APPELLATE CRIMINAL.

1905
June 5.

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

EMPEROR v. DENI AND ANOTHER.*

*Act No. XLV of 1860 (Indian Penal Code, sections 230, 235, and 243—
Definition—Queen's coin—Murshidabad rupees—Practice—Duty of
subordinate courts to follow decision of superior courts—Maxim—Stare
decisis.*

Murshidabad rupees stand on the same footing as Farrukhabad rupees and fall within illustration (e) to section 230 of the Indian Penal Code, these rupees having been stamped and issued by the authority of the Government of India, or at least of the Government of a Presidency, and issued as money under the authority of the Government of India, as were Farrukhabad rupees. They are therefore "Queen's coin" within the meaning of the section. *Emperor v. Gopal* (1) followed.

* Criminal Appeal No. 255 of 1905.

-(1) Weekly Notes, 1903, p. 115.