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this appeal, and we give the plaintiffs appellants a decree for possession of the property in suit unrestricted by the burden of paying Rs. 6,000 to Musammat Jawitri Kunwar, and we give mesne profits from the date of the institution of the suit. The appellants are entitled to their full costs in both Courts.

We may mention that several objections were filed in this Court after the presentation of the appeal under the provisions of section 561 of the Code of Civil Procedure. According to law, those objections should have been filed within one month from the date of the service of summons on the respondent. Now here it has been shown that the summonses were served on the 5th of December 1904, and these objections were not filed until the 9th of January 1905, that is to say, they were four days late. They should have been filed on the 5th of January at the latest. An attempt has been made to explain this delay by saying that the respondent was away from the village when the summons was served. An affidavit has been put in to support this excuse for the delay. To that affidavit we give very little credit. We cannot understand how the person who swore to its truthfulness, who is the agent of Musammat Jawitri, did not, if his story be true, at once inform her of the service. Further we have before us the affidavit of the process-server who swears that Musammat Jawitri was at the time in her house, that he could not obtain access to her, and he was obliged to affix the summons on the door of the house. We refuse to entertain the objections and reject them with costs.

Appeal decreed.

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

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January 22.

GOBIND RAM (PLAINTIFF) *v.* MASIH-ULLAH KHAN AND OTHERS (DEFENDANTS.) *

Pre-emption—Wajib-ul-arz—Custom—Effect of perfect partition, no new wajib-ul-arzes for the new mahals being framed.

Where a village, in which, according to the wajib-ul-arz, a custom of pre-emption existed amongst the co-sharers, was divided by perfect partition into three mahals, but no fresh wajib-ul-arzes were framed for the new mahals, it was *held* that the custom was either abrogated in its entirety, or remained

* First Appeal No. 72 of 1905 from a decree of Maulvi Maula Bakhsh, Additional Subordinate Judge of Aligarh, dated the 20th of December 1904.

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applicable in its entirety to the co-sharers in the various new mahals *inter se*. *Badri Prasad* v. *Hasmat Ali* (1) discussed. *Dalganjan Singh* v. *Kalka Singh* (2) referred to.

THIS was a suit for pre emption based upon custom as recorded in the wajib-ul-arz of a village named Kiyampur Bheria in the Etah District. The terms of the wajib-ul-arz were as follows :—"If any co-sharer wishes to transfer his share by mortgage or sale, he shall do so first to the co-sharers of the village, and if any stranger causes the price of the share to be entered in the document in excess of the real price in order to deprive the co-sharers of the village of their right, the proper price shall be determined by arbitration or by the officer for the time being." After the framing of this wajib-ul-arz, the village, originally one, was divided by perfect partition into three mahals of 10, 5 and 5 biswas, but no fresh wajib-ul-arzes were framed for the new mahals. Then the owner of a share in the 10 biswa mahal sold his share to the owners of one of the 5 biswas mahals, and the owner of another share in the 10 biswa mahal brought the present suit for pre-emption. The Court of first instance (Subordinate Judge of Aligarh) dismissed the suit, being of opinion that the village had been divided into four mahals, and not three, and that the pre-emptor was not therefore a co-sharer in the mahal to which the property sold belonged, and was in no better position than the vendee as regards the right of pre-emption. The plaintiff appealed to the High Court, contending that, inasmuch as he was a co-sharer in the mahal in which the property sold was situated, he had a claim to pre-empt superior to that of the vendee whose property was in a different mahal.

Babu *Kedar Nath* and Babu *Lakhshmi Narain*, for the appellant.

Pandit *Moti Lal Nehru* and Qazi *Muhammad Zahur*, for the respondents.

STANLEY, C.J., and BURKITT, J.—The question involved in this appeal is concerned with the effect upon a custom of pre-emption prevailing in a village of a perfect partition of the village. In the village of Kiyampur Bheria, situate in the district of Etah, the following right of pre-emption arising by custom prevailed was recorded in the wajib-ul-arz, namely :—"If any share-holder

(1) Infra, p. 299. (2) (1899) I. L. R., 22 All., 1.

wishes to transfer his share by mortgage or sale, he shall do so first to the co-sharers of the village, and if any stranger causes the price of the share to be entered in the document in excess of the real price in order to deprive the co-sharers of the village of their right, the proper price shall be determined by arbitration, or by the officer for the time being." The village at the time of this wajib-ul-arz consisted of one undivided mahal, but it was, before the sale which has given rise to this litigation, divided by perfect partition into three mahals. The plaintiff Gobind Ram is the owner of 5 biswas of one of these mahals, and the share which is the subject matter of the suit is the remaining 5 biswas of that mahal, which belonged to the defendant Lachmi Narain. The vendees are Masi-ullah Khan and Zamir-ul-Hasan Khan, who purchased his share from Lachmi Narain. No new wajib-ul-arzes were framed at the time of partition. The learned Subordinate Judge, wrongly, we think, held that the village was divided into four mahals, and that neither the plaintiff nor the vendees were co-sharers in the mahal which was the subject matter of the sale, and that therefore the plaintiff and the defendant vendees stood on the same footing as regards pre-emption, and on this ground he dismissed the plaintiff's suit.

It appears to us clear from the khewat that the village was divided into three mahals only, namely, mahal Rafat Khan, consisting of 5 biswas, mahal Masih-ullah Khan, consisting of 5 biswas, and mahal Chainsukh of 10 biswas. This appears from the closing khewats for the years 1302 and 1305 fasli which have been proved. The mistake of the learned Subordinate Judge arose from the fact that in the khewat of the 10 biswas mahal Hafiz Muhammad Rafat Khan is described as the mortgagee of the share consisting of 5 biswas of Lachmi Narain, while Musammat Ratan Kunwar is described as the owner of the remaining 5 biswas. This fact by no means establishes that the mahal of 10 biswas formed two mahals. The learned advocate for the respondents admitted this, and was not able to support the view of the Court below. On the ground therefore on which the Court below dismissed the plaintiff's claim the decree cannot be supported. But the learned advocate for the respondent contended that as the vendees were co-sharers in the village before the partition, they

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have the same pre-emptive rights in respect of every part of the village as the plaintiffs.

This raises the important question what is the effect of the perfect partition of a village upon a right existing by custom under which *each co-sharer in the village* was entitled to pre-empt the sale to a stranger of any portion of the village. Mr. *Kedar Nath* on behalf of the appellant contended that in a case such as the present, upon perfect partition of a village into mahals, only the co-sharers in the mahal, portion of which is sold to a stranger, can pre-empt the sale, and that co-sharers in other mahals have no right of pre-emption whatever.

If this view be correct, the effect of perfect partition is undoubtedly to modify the custom of pre-emption as it previously existed. The custom is no longer a custom whereby any co-sharer in the village is entitled to pre-empt the sale of any portion of the village area, but is split up into customs which restrict the right of pre-emption to the co-sharers in the limited area of the village portion whereof has been sold to a stranger. It appears to us that this cannot be; we think that the custom which previously prevailed must be treated either as subsisting in its entirety or else as having been abrogated by perfect partition; that if the custom exist at all after partition it must be the old custom and not modifications of the old custom. If the effect of partition is to abrogate the custom entirely, then *cadit quæstio*. If on the other hand it continues to exist after partition, it cannot, we think, do so in a modified form. A custom must be not merely ancient, but it must be continuous, uninterrupted, uniform, certain and definite. As Sir Arthur Strachey, C.J., in the case of *Dalganjan Singh* v. *Kalka Singh* (1) said in dealing with the record of a custom of pre-emption in the wajib-ul-arz of a new mahal created by perfect partition:—"It cannot be something absolutely new, or the word custom would be a misnomer. It must therefore be something which existed before the new mahal and before the partition, something therefore which existed in the time of the old mahal, which has survived the partition, and which is recognised as still applicable within the new mahal."

(1) (1899) I. L. R., 22 All., 1.

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We are unable to accept the view expressed by the learned Judges who decided the case of *Badri Prasad* v. *Hasmat Ali* * as far at least as it applies to a right of pre-emption existing by custom. In that case upon the perfect partition of a village fresh wajib-ul-arzes were prepared for each mahal, recording that each mahal was to maintain a right of pre-emption as set forth in the wajib-ul-arz applicable to the whole village. The learned Judges held that such custom or contract, whichever it might be, must be held to be subject to such modifications as are rendered necessary by the partition. Blair, J., in delivering the judgment of the Court says :—" Now such custom or contract, whichever it may be, must be held to be subject to such modifications as are rendered

* The judgment in this case was as follows :—

BLAIR and BANERJI, JJ.—The suit out of which this second appeal arises is a suit brought by the respondent for pre-emption under the following circumstances :—The village in which the property sold is situated was subject to a wajib-ul-arz in which the custom or contract, in our opinion it matters not which, was set forth. A partition took place, and the village was formed into two mahals, one containing two-thirds of the whole undivided village, and the other one-third. The property sold was in a patti which may be briefly described as the two-thirds mahal. The vendee is a share-holder in the one-third mahal. The pre-emptor claims as being a co-sharer in the other mahal, namely, the two-thirds mahal. What happened on partition in relation to the rights of pre-emption is this. A wajib-ul-arz was prepared for each mahal, in which provision was made as to the right of pre-emption in words which it is needless to quote. Each mahal proposed to maintain and keep up the custom of pre-emption as set forth in the settlement wajib-ul-arz applicable to the whole village. Now such custom or contract, whichever it may be, must be held to be subject to such modifications as were rendered necessary by the partition. It seems to us that the substantial and central modification effected by that partition was that persons in each of the two mahals had ceased to be co-sharers in an unbroken village and had not become and never were co-sharers in the mahals created by the partition.

Therefore it happens that the pre-emptor is a co-sharer with the vendor and that the vendee is not a co-sharer of the vendor. Having regard to the judgment on the Full Bench case of *Dalganjan Singh* v. *Kalka Singh* (1) it seems to us that there is no escape from the conclusion that the pre-emptor's right is established. The case seems to fall within the ruling in *Dalganjan Singh's* case, and any amount of ingenuity to draw any substantial distinction between the two cases must fail. Following that case therefore, as we are bound to do, we hold that the plaintiff in this suit was entitled to pre-empt, and we dismiss the appeal with costs.

(1) (1899) I. L. R., 22 All., 1.

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necessary by the partition. It seems to us that the substantial and central modification effected by that partition was that persons in each of the two mahals had ceased to be co-sharers in an unbroken village and had not become and never were co-sharers in the mahals created by the partition." If the learned judges intended by this to convey that a custom of pre-emption prevailing in a village can be regarded as liable to modification otherwise than by contract in the event of the village being partitioned, so as not any longer to prevail in its *entirety, but in a modified form,* we *cannot* agree with them. A custom is not, we think, capable of such an abrupt and automatic change as is implied in this language. We think that the old custom must be treated as prevailing in its entirety or else as abrogated.

It may be said that the custom which prevailed in this case was one which gave a right of pre-emption to persons between whom there was the common bond that they each owned a share of an undivided village and that when this common bond was severed by partition the custom ceased to be applicable. If this be so, then in the case before us the custom has ceased to be applicable and no longer can prvail, and there having been no agreement entered into on partition between the owners of the divided mahals as to pre-emption the *right* of pre-emption no longer exists. If on the other hand the custom still prevails, then the vendees respondents stand on the same level as regards pre-emption as the plaintiff. In either view the plaintiff's suit fails.

For these reasons we dismiss the appeal with costs.

Appeal dismissed.