1908

EMPEROR v. KHEORAJ.

of witnesses in addition to the informer Girdhari. Dinanath, Dallu, Chhutan, Fajji and Jiwaram son of Kewal, all identified him. We think that the case was fully proved against Ilahi Bakhsh. We allow the appeals of Thanwa and Kheoraj and setting aside the convictions and sentences in their case, we acquit them of the charge on which they were tried and direct that they be released. We dismiss the appeal of Ilahi Bakhsh and we direct that a copy of our judgment be sent to the learned Additional Judge of Moradabad.

1908
July 13.

APPELLATE CIVIL.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Karamat Husain.

BUDH SINGH (PLAINTIFF) v. GOPAL RAI AND OTHERS (DEFENDANTS).*

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

The wajib-ul-arz of a village in the Saharanpur district of the year 1867 contained the following agreement on the part of the "khewatdars" of the village that "up to the term of the settlement and in future to the termination of the next settlement they will abide by the following terms and act upon them." Amongst the subsequent provisions were certain relating to the right of pre-emption. In a later wajib-ul-arz of 1890 no mention was made of any custom of pre-emption, but it contained these words:—"For the remaining village customs see the wajib-ul-arz prepared in 1867."

Held that the wajib-ul-arz of 1867 recorded a contract and not a custom, and that the rights conferred by it would not be perpetuated by the incorporation in the later wajib-ul-arz of the customs existing in the village.

THIS was a suit to pre-empt a sale of property situate in a mahal of the village of Gumti in the Sultanpur pargana of the district of Saharanpur. The plaintiff relied upon a wajib-ul-arz of the year 1867, the provisions of which he alleged to have been adopted in a subsequent wajib-ul-arz of 1890. In the earlier wajib-ul-arz the names of the zamindars of the village, who were styled "khewatdars" were recited and it was recorded that they agreed that up to the term of the settlement and in future to the termination of the next settlement they would abide by and act upon certain terms. Amongst these was the following provision as to pre-emption:—"If any co-sharer wishes to transfer his share he can do so, first, to his own brother; and in case of refusal by him, all his co-sharers descended from a common ancestor have a

* First Appeal No. 296 of 1906 from a decree of Girdhari Lal, Subordinate Judge of Saharanpur, dated the 18th of June 1906.

right to it." In the later wajib-ul-arz of 1890 a number of matters were referred to but no mention was made of any custom of pre-emption, but there was an entry—"For the remaining village customs see the wajib-ul-arz prepared in 1867." The Court of first instance (Subordinate Judge of Saharanpur) dismissed the plaintiff's suit. The plaintiff accordingly appealed to the High Court.

Mr. *Abdul Raoof*, for the appellant.

Dr. *Satish Chandra Banerji*, for the respondents.

STANLEY, C.J., and KARAMAT HUSAIN, J.—This appeal arises out of a suit to enforce a claim for pre-emption. The property which is the subject of a sale lies in a *mahal* of the village Gumti in pargana Sultanpur, in the Saharanpur district, which village was partitioned in the year 1905. The plaintiff relies upon the wajib-ul-arz of the village prepared in the year 1867 and upon an alleged adoption of the provisions of that wajib-ul-arz in the later wajib-ul-arz of 1890. The question before us appears to depend upon the fact whether or not the wajib-ul-arz of 1867 is the record of a right of pre-emption existing by custom. If it be such a record, we are disposed to think upon the authorities that that right still continues to exist in the village. If, on the other hand, it is the record of a right existing by contract, then that right came to an end at the expiration of the settlement, and if it did come to an end at the expiration of the settlement, the language of the later wajib-ul-arz of 1890 would not perpetuate it. In the wajib-ul-arz of 1867 the names of the residents of the village, who are described as the khewatdars, are mentioned, and they purport to declare that "they agree that up to the term of the settlement and in future to the termination of the next settlement they will abide by the following terms and act upon them." Then follows a number of provisions, and amongst others the following provisions as to pre-emption:—"If any co-sharer wishes to transfer his share, he can do so, first to his own brother; and in case of refusal by him, all his co-sharers, descended from a common ancestor, have a right to it." Now the pre-emptor Budh Singh is a paternal uncle of the vendor, and is also a co-sharer in the village, but he is not a co-sharer in the *mahal* portion of which is the subject of the sale,

1908

BUDH SINGH v. GOPAL RAI.

If, however, the right to pre-empt, recorded in this wajib-ul-arz is a right existing by custom, then it would appear to us that the pre-emptor plaintiff appellant is entitled to pre-empt notwithstanding the fact that he has no share in the *mahal* portion of which is the subject of the sale. In the later wajib-ul-arz of 1890, a number of matters are referred to but no mention is made of any custom of pre-emption whatever, but the following words are to be found in it:—"For the remaining village customs see the wajib-ul-arz prepared in 1867." The plaintiff relies upon this language, and asks us to hold that it imports into this wajib-ul-arz the provision as regards pre-emption set forth in the wajib-ul-arz of 1867. It would not be unreasonable to hold that the parties intended by this language to incorporate the provisions of the earlier wajib-ul-arz as regards the custom set forth in that document. But if the right of pre-emption created by it was one arising from contract and not existing by custom, it is obvious that that right would not be perpetuated by the incorporation in the later wajib-ul-arz of the *customs* existing in the village. The right was not a right existing by custom, but a right arising from contract. Now the question as to whether or not the wajib-ul-arz of 1867 is a record of a custom or the record of a contract is one of very great difficulty. A strong argument may be based upon the language used in support of the view that it is a record of custom. We are, however, not disposed to set aside the decree of the Court below unless we are clearly satisfied that it is erroneous. We do not agree with the learned Subordinate Judge in the reasons given by him for his decision, but after giving the best consideration we can to the language of the wajib-ul-arz of 1867, we are unable to hold that it is a record of custom. This being so, the appeal fails and is dismissed with costs.

Appeal dismissed.

(See also *Muradib Husain* v. *Alam Ali*, Weekly Notes, 1907, p. 285).