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*May* 8.

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

RAM LAL (DEFENDANT) *v.* BAHADUR ALI (PLAINTIFF) AND ISMAIL KHAN, (DEFENDANT).*

*Pre-emption—Wajib-ul-arz—Construction of documents—Muhammadan law.*

The pre-emptive clauses of a wajib-ul-arz contained the following provision:—"The zamindar of the *khalsa* is one person; hence there is no custom of pre-emption in the *khalsa*; but among the owners of the *khalsa* and *milks* the following custom of pre-emption obtains." The *khalsa* subsequently came to have more owners than one. *Held* that no right of pre-emption was given by this wajib-ul-arz to the owners of the *khalsa inter se*, but that a sale of a share in the *khalsa* was subject to the Muhammadan law of pre-emption, and this irrespective of the fact that the vendee was a Hindu. *Gobind Dayal* v. *Inayatullah* (1), *Qurban Husain* v. *Chote* (2) and *Amir Hasan* v. *Rahim Bakhsh* (3) referred to.

THE facts of this case are as follows:—

ONE Ismail Khan on the 9th of December 1900, sold a share in the *khalsa* land of Bazidpur to Ram Lal. Bahadur Ali Khan brought a suit for pre-emption under the Muhammadan law, presumably under the Hanafi school. The vendee raised various defences. The Court of first instance (Subordinate Judge of Moradabad), finding that the vendee Ram Lal was entitled to pre-empt under the wajib-ul-arz and that Bahadur Ali was entitled to pre-empt under the Muhammadan law, gave the latter a decree for half the property in suit on payment of half the price for which it had been sold. Both parties appealed. The District Judge, coming to the conclusion that the custom of pre-emption recorded in the wajib-ul-arz superseded the rules of the Muhammadan law, and finding that Bahadur Ali was a near relation of the vendor, gave Bahadur Ali a decree for all the property in suit and dismissed the appeal of Ram Lal. The vendee Ram Lal thereupon appealed to the High Court.

Mr. *G. W. Dillon*, for the appellant.

Mr. *Abdul Raoof*, for the respondent.

KARAMAT HUSAIN, J.—The facts out of which this second appeal has arisen are as follows:—

One Ismail Khan on the 9th of December 1900, sold a share in the *khalsa* land of Bazidpur to Ram Lal. Bahadur Ali Khan

* Second Appeal No. 1260 of 1906, from a decree of D. R. Lyle, District Judge of Moradabad, dated the 6th of August 1906, modifying a decree of Mohan Lal, Subordinate Judge of Moradabad, dated the 23rd of September 1905.

(1) (1885) I. L. R., 7 All., 775. (2) (1899) I. L. R., 22 All., 102.
(3) (1897) I. L. R., 19 All., 466.

brought a suit for pre-emption under the Muhammadan law, presumably under the Hanafi school. The vendee raised various defences. The Court of first instance, finding that the vendee Ram Lal was entitled to pre-empt under the wajib-ul-arz and that Bahadur Ali was entitled to pre-empt under the Muhammadan law, gave the latter a decree for half the property in suit on payment of half the price for which it had been sold. Both parties appealed. The learned District Judge coming to the conclusion that the custom of pre-emption recorded in the wajib-ul-arz superseded the rules of the Muhammadan law, and finding that Bahadur Ali was a near relation of the vendor, gave Bahadur Ali a decree for all the property in suit and dismissed the appeal of Ram Lal. Ram Lal has preferred this second appeal. The grounds of appeal are :—

(1) The interpretation put upon the wajib-ul-arz is wrong.

(2) The words in the wajib-ul-arz relate to propinquity in space and not propinquity of relationship.

(3) The claim being based on the Muhammadan law, a decree under the wajib-ul-arz could not be passed.

The following facts have been found by the lower appellate Court :—(1) Bahadur Ali is a co-sharer in the *khalsa*; (2) Ram Lal is also a co-sharer in the *khalsa*. The point on which the decision of this appeal turns is the interpretation of the wajib-ul-arz. The material portion of it may be rendered as follows :—

"The zamindar of the *khalsa* is one person; hence there is no custom of pre-emption in the *khalsa*; but among the owners (lit. owner) of the *khalsa* and *milks* the following custom of pre-emption obtains."

On the basis of the above extract from the wajib-ul-arz it is urged for the appellant that the wajib-ul-arz gives no right of pre-emption to the co-sharers in the *khalsa inter se*, but that there is a right of pre-emption between the owners of the *khalsa* and the owners of the *milks* in the sense that if a share in the *khalsa* is sold the owner of the *milk* is entitled to pre-empt. Whatever may be the correct meaning of the last portion of this peculiarly worded clause in the wajib-ul-arz, I can safely say that according to the plain meaning of the first part of the clause, the *khalsa* land is not subject to a claim for pre-emption under the

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wajib-ul-arz. Such being the case, the wajib-ul-arz has no application to the sale of the *khalsa* land, and a suit to pre-empt it can only be instituted under the Muhammadan law.

This leads me to determine the right of the pre-emptor and the vendee under the Hanafi school of Muhammadan law. The property sold belonged to a Muhammadan, and was therefore subject to pre-emption by those who were entitled to pre-empt under that law. The fact that it was purchased by a Hindu makes no difference. He purchased it subject to the right of pre-emption by the plaintiff. See *Gobind Dyal* v. *Inayat ul-lah* (1).

It might, however, be contended that Ram Lal being a Hindu has not a right to pre-empt, although he is a co-sharer in the *khalsa*, but there is no force in this contention. "The principle of reciprocity," as remarked by Aikman, J., in *Qurban Husain* v. *Chote*, (2) "lies at the root of the law of pre-emption" and "according to the Hanafi law it is not necessary that the pre-emptor should be of the same religion as the vendor."

The conclusions at which I thus arrive are that :—

(1) The *khalsa* land in Bazidpur is not subject to the right of pre-emption under the wajib-ul-arz.

(2) The case before us is to be governed by Hanafi law.

(3) Bahadur Ali and Ram Lal both have equal rights of pre-emption in respect of the *khalsa* land.

Following, therefore, *Amir Hasan* v. *Rahim Bakhsh* (3), I set aside the decree of the lower appellate Court and give Bahadur Ali a decree for possession of half of the property in dispute on condition that the plaintiff shall deposit in Court within two months hence the sum of Rs. 734 which is half the purchase money. Ram Lal defendant will pay the costs incurred by the plaintiff in all Courts : on default his suit shall stand dismissed with costs in all Courts.

STANLEY, C.J.—I concur in the views expressed by my learned brother. The wajib-ul-arz which we have to interpret has a most novel provision as to pre-emption, and it is difficult to say what was in the minds of the parties when they agreed to be bound by it. But upon the whole I am disposed to think that the view

(1) (1885) I. L. R., 7 All., 775 (2) (1899) I. L. R. 22 All., 102 ; at p. 104.
(3) (1897) I. L. R., 19 All., 466.

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which has been adopted by my learned colleague is correct. I therefore concur in the proposed order.

BY THE COURT.—The order of the Court is that the decree of the lower appellate Court be set aside and that a decree for possession of half of the property in dispute be passed in favour of Bahadur Ali, on the condition that he deposit in Court within two months from this date a sum of Rs. 734. We give Bahadur Ali the costs of this appeal in all Courts in the event of the payment of the said sum within the time aforesaid. In default of payment his suit will stand dismissed with costs in all Courts.

*Appeal decreed.*

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

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*May* 14.

JAGARDEO SINGH (PLAINTIFF) *v.* PHULJHARI AND ANOTHER (DEFENDANTS).*

*Act No. XV of* 1877 (*Indian Limitation Act*), *schedule II, article* 91—*Limitation—Suit for cancellation of a deed—Suit for a declaration that het transaction evidenced by the deed was fictitious.*

A suit for a declaration that a transaction embodied in a particular deed was from its very inception a sham transaction is to be distinguished from a suit for cancellation of the deed. The former kind of suit does not fall within the purview of article 91 of the second schedule to the Indian Limitation Act. *Sham Lall Mitra* v. *Amarendro Nath Bose* (1) and *Petherpermal Chetty* v. *Muniandy Servay* (2) referred to.

THE facts of this case are as follows :—

The plaintiff came into Court alleging that he and his nephew Ramdeo had executed a sale-deed of certain zamindari property in favour of the defendant Musammat Phuljhari on the 27th of June 1899 ; that the sale was a fictitious transaction and was never given effect to; that it was agreed that Musammat Phuljhari should execute a deed of relinquishment ; that a deed was drawn up and signed by her, but she refused to have it registered, and that an application for the registration of the deed made by the plaintiff to the District Registrar was refused. The plaintiff accordingly prayed for a decree directing the registration of the deed of relinquishment. This part of the

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*Second Appeal No. 859 of 1907, from a decree of W. R. G. Moir, District Judge of Jaunpur, dated the 10th of April 1907, reversing a decree of Zain-ul-abdin, Subordinate Judge of Jaunpur, dated the 6th of September 1905.

(1) (1895) I. L. R., 23 Calc., 460. (2) (1908) 12 C. W. N., 562.