1909

HARNAND v. KALLU.

The village with which we are concerned is situate in parganas Jhinjhana, tahsil Kairana. The silence therefore in the record of rights of 1890 is not a silence from which any inference opposed to the existence of the right of pre-emption can be drawn. The probability is that if the Circulars were before myself and my brother AIKMAN when we decided F. A. F. O. No. 135 of 1898, our decision would have been different. Certainly mine would have been. This appeal is dismissed with costs.

GRIFFIN, J.—I agree.

Appeal dismissed.

1909, *June* 30.

Before Sir George Knox, Knight, Acting Chief Justice and Mr. Justice Griffin.

DARYAO SINGH (DEFENDANT) *v.* JAHAN SINGH AND OTHERS (PLAINTIFFS)*

Wajib-ul-arz—Pre-emption—Custom or contract—Interpretation of document—Exchange—Variation to terms of wajib-ul-arz.

An exchange gives rise to a right of pre-emption when such right arises on a sale. Where there has been a variation in the terms of the *wajib-ul-arzes* prepared respectively at two settlements, and the previous *wajib-ul-arz* recorded a custom, *held* that the variation in the terms of the later *wajib-ul-arz* did not necessarily affect the custom. *Gulab Singh* v. *Jag Ram*, [1906] 3 A. L. J. R. 646 distinguished.

THE facts of this case are fully set forth in the judgment.

Dr. *Tej Bahadur Sapru*, for the appellant.

Babu *Jogindra Nath Chaudhri* (for whom Babu *Sarat Chandra Chaudhri*), for the respondents.

KNOX, A. C. J. and GRIFFIN, J.—The facts which gave rise to the suit out of which this appeal has sprung are briefly as follows:—One Mukhtar Singh who held a share in village Hisanda on the 28th November 1905, exchanged that share for a share of property held by Daryao Singh the present appellant in village Billochpura. Jahan Singh and Sarup Singh minor under the guardianship of his brother Jahan Singh, claimed that in consequence of this exchange, a right of pre-emption arose in their favour. They base their right of pre-emption upon the *wajib-ul-arz* of 1860 in which they maintain that in every case of transfer by a co-sharer, a preferential right of pre-emption exists in favour of own brothers or other "*ekjaddi*" relatives. Jahan

* First Appeal No. 77 of 1908, from a decree of B. J. Dalal, Additional District Judge of Meerut, dated the 4th of January 1908.

1909

DARYAO SINGH v. JAHAN SINGH.

Singh and Sarup Singh are admittedly the own brothers of Mukhtar Singh. In defence it was contended that the provision in the *wajib-ul-arz* relating to pre-emption was the record of a contract not of custom and that it came to an end when the settlement of 1870 determined. It was further contended that if the court was not prepared to hold that it was the record of a contract, the provision in the *wajib-ul-arz* in question did not really give a preference in favour of "own brothers", that the proper construction to put upon it was that "own brothers" stood upon an equal footing with *Bhai ekajaddi*. It was further contended that the plaintiffs had consented to the exchange. There was also a plea to the effect that the *wajib-ul-arz* gave no right of pre-emption in case of an exchange. The court below has held that the provision in the *wajib-ul-arz* was a record of custom and not of contract, that it gave preference to "own brothers" over all others, that there was no reliable evidence to prove that plaintiffs consented to the exchange. It followed a ruling of this Court to the effect that an exchange does give rise to a right of pre-emption when such right arises on a sale. It therefore decreed the suit in plaintiffs' favour. The defendant comes here in appeal and repeats the pleas to which we have already referred. The learned advocate who appeared for the appellant has argued the case with great care and has advanced all that could possibly be said on behalf of his client. We also feel that this is a case in which we should have been glad to hold that there was no right of pre-emption particularly in view of the consequences that must arise on our decision, but we find ourselves constrained to hold otherwise. The exchange effected the settlement of a dispute in a suit brought by the appellant against Mukhtar Singh in a matter of profits and the exchange was decided upon by a *punchayat* and does seem, for the time, to have put an end satisfactorily to the dispute between the parties. But after a careful consideration of the *wajib-ul-arz* we are satisfied that it is a record of custom, not of contract. Great stress was laid upon the case reported in 3 A. L. J. R., 646. In that case however there was satisfactory evidence that there had been no custom of pre-emption existing in the village in the year 1836 and there was apparently strong evidence to the effect that even afterwards

1909

DARYAO SINGH v. JAHAN SINGH.

there was no instance of pre-emption being claimed in the village. In the case before us there is no evidence as to what were the circumstances prior to the *wajib-ul-arz* of 1860. That *wajib-ul-arz* has also been placed before us, and it is in our opinion as clear a record of custom as is the *wajib-ul-arz* of 1870. There is some difference in the terms in which the two *wajib-ul-arzes* of 1860 and 1870 record the custom, but as regards the preference to own brothers there is really no difference and it is after all with that with which we are concerned in this appeal, and that is all that we find, *viz.*, that in the village there was a custom by which on a transfer, a right of pre-emption arose in favour of the own brother of the transferor. We have also been taken through the evidence and we agree with the view expressed by the court below that it has not been proved that the plaintiffs respondents consented to the exchange. Nothing was said to us on the fourth plea taken in the memorandum of appeal and we see no reason to differ from the rulings cited. The result is that all the pleas taken in the memorandum of appeal fail. We dismiss the appeal, but under the circumstances we direct that each party bear his own costs.

Appeal dismissed.

1909

July 5.

Before Mr. Justice Banerji and Mr. Justice Tudball.

DEBI SARAN PANDE (PLAINTIFF) *v.* RAMJAS AND OTHERS (DEFENDANTS).*

Act (local) No. III of 1901, *(Land Revenue Act), Section* 233 *(k)—Mode of partition—Suit in Civil Court—Maintainability of.*

In an application for partition of revenue paying property the defence was that there had been an imperfect partition in which *khata* No. 28 was left joint and *kuras* Nos. 1 and 3 were given to defendants and *kura* 2 to plaintiff and certain defendants. The plaintiff was referred to a civil suit. He brought a suit for declaration of his right to *kura* 2 but did not claim any relief in respect of *khata* No. 28. A decree was passed in his favour. Thereupon the Revenue Court ordered that any deficiency in the defendants' share should be made good from *khata* No. 28. Plaintiff brought this suit for a declaration that the defendant could not get any land out of *khata* No. 28. *Held* that the suit was one relating to partition or union of mahals and could not be regarded as a suit under section 111 or 112 of the Revenue Act. The dispute related to the mode of

*Appeal No. 11 of 1909 under section 10 of the Letters Patent from a decree of Knox, J., affirming a decree of F. D. Simpson, District Judge of Gorakhpur, dated the 31st of July 1907, who reversed the decree of Jogindra Nath Chaudhri, Munsif of Basti, dated the 21st of January 1907.

L. P. A. No. 11 of 1909.