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plaintiff's favour would have been made, but for the error of the court, and not the date on which, the error having been corrected, the case came back to the court to be dealt with on the merits. Under the circumstances of the case we think it unnecessary to express an opinion as to what would have been the result if the plaintiff had lost his right of pre-emption by not fulfilling the conditions after the institution of the suit and before the case came back to the court for disposal in the ordinary course. We allow the appeal, set aside the decrees of both the courts below, and remand the case to the first court through the lower appellate court with directions to re-admit it to its original number in the register and to dispose of it on the merits. The appellant will have his costs in this court. Other costs will abide the result.

Appeal allowed.

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

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HARNAND AND OTHERS (DEFENDANTS) *v.* KALLU (PLAINTIFF) AND SHEO SINGH (DEFENDANT).*

Pre-emption—Wajib-ul-arz—Construction—Custom—or Contract—Silence as to right of pre-emption in wajib-ul-arz of last settlement—Duties of Settlement Officers when preparing record of rights.

Where, in a suit for pre-emption, the *wajib-ul-arz* of 1833 made no mention of the right and the subsequent *wajib-ul-arz* of 1863 referred to the right of pre-emption in the following terms: "In future every one would be entitled to transfer etc.", and the *wajib-ul-arz* prepared at the settlement of 1890 was silent as to any right of pre-emption existing in the village, *held* that the record of 1863 was one of custom and that the silence of the record of rights of the latest settlement in respect to pre-emption was not a silence from which any inference opposed to the existence of the right of pre-emption could be drawn, inasmuch as the rules framed for the settlement of the district under section 257 of Act No. XIX of 1873 did not require the settlement officer to put on record any custom of pre-emption. *Tota* v. *Sheo Narain*, F. A. F. O. No. 135 of 1898, decided on June 15, 1899, dissented from.

THIS was a suit for pre-emption on custom recorded in the village *wajib-ul-arz* prepared at the settlement of 1863. The clause in the *wajib-ul-arz*, was as follows :—"In future every one would be entitled to transfer his *haquiat* in whole or in part, by

* Appeal No. 19 of 1908 under section 10 of the Letters Patent from a judgment of Banerji J., dated the 7th of May 1908 reversing a decree of A. Kendall, District Judge of Meerut, dated the 19th December 1906 who reversed a decree of Bhola Nath Seth, Munsif of Kairana, dated the 27th of July 1906.

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sale or mortgage, but first to *shikmi* co-sharers and on their refusal the transfer can be made to other co-sharers in the *patti* or *deh* and if nobody from the village be willing to take the *haquiat*, then the vendor or the mortgagor shall be entitled to transfer the same to a stranger." The court of first instance held that the *wajib-ul-arz* was *prima facie* good evidence of custom and decreed the suit. The defendants appealed to the District Judge and filed in that court a copy of the *wajib-ul-arz* of the village prepared in 1833. In that *wajib-ul-arz* there was no reference to any right of pre-emption. The lower appellate court also found that after 1863 a perfect partition of the village was effected and no new *wajib-ul-arz* was prepared, that there was no reference to pre-emption in the *wajib-ul-arz* of the recent settlement of 1890 and that no cases of pre-emption took place in the village up to the year 1863, though the occurrence of transfers could not be denied; neither were any cases proved since that time. It accordingly held that the entry in the *wajib-ul-arz* of 1863 referred to a contract as was "held in the High Court in the case of *Tota Ram* v. *Sheo Narain*, unreported, which had reference to this part of the district," and dismissed the suit.

The plaintiff appealed to the High Court. The case was put up for hearing before Banerji, J., who delivered the following judgment:—

"This was a suit for pre-emption based upon custom. As evidence of custom the plaintiff relied upon the *wajib-ul-arz* of 1863. The learned Additional Judge says in regard to that document: 'It may refer to a custom or to a new contract.' If that is so, then according to the Full Bench ruling in *Musammat Majidan Bibi* v. *Sheikh Hayatan* (1), which has been followed in many cases the record should be regarded as the record of a custom. In the *wajib-ul-arz* now in question the entry as to pre-emption comes under the heading of transfers. It does not clearly show that it records a contract which the co-sharers agreed to abide by in future. Referring to what may take place in future it says that co-sharers may in future mortgage or sell, but subject to the rule of pre-emption therein recorded. It may be that the rule so recorded is the rule of pre-emption prevailing as a custom at the time of the preparation of the *wajib-ul-arz*. Lower down the document says that for other customs, the *wajib-ul-arz* of the previous settlement should be referred to. The inference from this is that what precedes is also the record of a custom. However, as it is not clear that the entry in the *wajib-ul-arz* is the record of a contract, it must according to the ruling referred to above be deemed to be the record of a custom. The circumstance of there being no mention of pre-emption in the *wajib-ul-arz*

(1) Weekly Notes, 1897, p. 3.

of 1833 is inconclusive. The ground on which the court below has dismissed the claim cannot therefore be supported. The appeal is allowed with costs, and the case is remanded to the court below under section 562 of the Code of Civil Procedure with directions to readmit it under its original number in the register and dispose of it according to law."

From the above judgment and order of BANERJI, J., an appeal under section 10 of the Letters Patent was preferred by the defendants-respondents.

Dr. Satish Chandra Banerji (for whom Babu *Jagabandhu Phani*) for the appellants, submitted that the entry in the *wajib-ul-arz* was the record of a contract. In the *wajib-ul arz* of 1833, although there were definite references to mortgages, to the manner of their redemption and to several other matters, there was absolutely nothing which could be construed into a reference to any right of pre-emption. It was evident that the rule of pre-emption had not been adopted in 1833. The opening words of the clause in the *wajib-ul-arz* of 1863 upon which the plaintiff had based his claim were "in future &c." This showed that at the time of settlement the co-sharers were agreeing as to some future arrangement. They never purported to record a pre-existing custom as no such custom ever in fact existed. The court of first appeal found that no cases of pre-emption occurred in the village up to 1863, and although transfers took place, there was no case of pre-emption proved since 1863. This finding, coupled with the fact that the *wajib ul-arz* prepared at the settlement of 1890 made no mention of any right of pre-emption, shows that the entry made in 1863 was based upon a covenant which expired with the settlement.

In a previous case from the same part of the district under similar conditions a similar *wajib-ul-arz* was construed by a Division Bench of the High Court as the record of a contract. *Tota* v. *Sheo Narain* (1).

Mr. *M. L. Agarwala*, for the respondent, was not called upon.

The following judgments were delivered :-

KNOX, A. C. J.—It will be sufficient for the decision of this Letters Patent Appeal to say that after hearing all that could be said on behalf of the appellants, I fully agree with the

(1) 6 A. L. J. R., 715.

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decision arrived at by my learned brother and with the reasons which he has given for that decision. In the course of the arguments my attention was drawn to an unreported decision of this Court, *Tota* v. *Sheo Narain*. (1) I was one of the Judges who decided that case and I wish clearly to state that on a more careful consideration of the question at issue in that case which was the same as the question at issue in this case, I am not prepared to adhere to what I then said and held. The reason for my decision in that case was mainly that in the record of rights prepared in 1890 no mention was made of the right of pre-emption while there had been mention of the right in the record of rights prepared at the settlement of 1863. From the silence in the record of rights of 1890 mainly, and for other reasons I inferred that the entry in the record of rights was a covenant recorded in the year 1863 and that being the case the covenant could not be considered binding beyond the settlement in the course of which it was made.

In that case the attention of the Bench was not drawn to the provisions of the law in force when the record of rights was prepared in 1863 (*viz.*, Regulation VII of 1822) or to the orders of the Board of Revenue under which the record of rights of the 1863 settlement was prepared, to the law and to the further orders in force when the settlement of 1890 was made. Regulation VII of 1822, section 9, enacted that "it shall be the duty of collectors" on the occasion of making or revising settlements of the land revenue to "unite with the adjustment of the assessment the object of ascertaining and recording the fullest possible information in regard to landed tenures, the rights, interests and privileges of the various classes of the agricultural community. For this purpose their proceedings shall embrace the formation of as accurate a record as possible of all local usages connected with landed tenures etc." The Board of Revenue in their Circular No. 24 of 1868 recalled the attention of settlement officers to these rules and laid down that in the first clause of the *wajib-ul-arz* there should be recorded the custom relating to pre-emption in the village together with several other customs, and settlement officers were directed "to confine themselves in the

(1) F. A. F. O. No. 135 of 1898 decided 15th June 1899.

wajib-ul-arz to a record of such usages and customs which they found to be actually in existence." It was further ordered that particular care should always be paid " to the attestation of the *wajib-ul-arz*, that the presence of all the parties interested should be secured, and the provisions carefully explained and read over to them, when possible, by an English officer." As nothing to the contrary has been shown to us it is only right that we should presume that the record of rights, which is before us in this appeal, was prepared in accordance with the law and these instructions especially (seeing that it can bear such a construction without any violence done to it), and that it is a record of the custom of pre-emption found by the settlement officer existing when he prepared the record.

It need hardly be said that if the language of the *wajib-ul-arz* prevented our forming such an inference, neither the Regulation nor the Circulars could convert what was not a custom into a custom, but as I have pointed out above, this difficulty does not exist in the present case. When the settlement of 1890 was under preparation, Regulation VII of 1822 had given way to and had been repealed by Act No. XIX of 1873. Section 62 and following sections of Act No. XIX of 1873 deal with the formation of the record of rights (*wajib-ul-arz*). The section that alone bears upon the immediate point is section 65. That section runs as follows :—

" The Settlement Officer shall also record the arrangement made by himself or agreed to by the co-sharers,

(a) For the distribution of the profits derived from sources common to the proprietary body.

(b) For fixing the share, which each co-sharer is to contribute of the Government revenue and of the cesses levied under any law for the time being in force, and of the village expenses.

(c) As to the manner in which lambardars or co sharers are to collect from the cultivators.

(d) As to any other matters which he may be directed to record under rules framed under section 257.

The Settlement Officer may, subject to rules to be made from time to time by the Board, with the previous sanction of the Local Government, fix, and shall record

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(e) The amount of instalments of rent and the respective dates for their payment;

(f) The dates for the payment of any amounts payable by inferior to superior proprietors under section 54, clause (I); and

(g) The dates on which profits shall be divisible by lambardars.

The custom of pre-emption then would no longer be recorded unless it was a matter which the settlement officer was directed to record under any rule framed under section 257 of Act No. XIX of 1873 as amended by section 7 of Act No. VIII of 1879.

The rules for the Muzaffarnagar Settlement framed under section 257 are to be found in the Board's Circular No. 9 of Department I, edition of 1890. Paragraph 9 runs as follows:—

"A memorandum of the village customs will be appended to each *khewat* by the Assistant Settlement Officer when he verified the *jumabandi*, and will take the place of the document hitherto known as the *wajib-ul-arz*." It will contain those particulars only which the settlement officer is required to record under section 65 of the Revenue Act, as amended by section 7 of Act VIII of 1879. It should be verified at the same time and in the same manner as the *khewat* is verified.

There is nothing here which requires the settlement officer to put on record any custom of pre emption. I have examined the rules and find that nowhere else do they allude to this subject. On referring to the final report on the settlement of the Muzaffarnagar district, 1892, I find the following:—

Paragraph 128.—No new *wajib-ul-arz* has been prepared for the settlement. A statement called the memorandum of village customs takes its place, the contents of which have in tahsils Muzaffarnagar and Kairana been strictly limited to the matters required to be entered by section 65 of the Revenue Act, all of which, it may be noted, are recorded as matters not of custom, but of arrangement or agreement. In tahsils Jansath and Budhana the memorandum was framed so as to include any special village customs; but it does not even there supplant the old *wajib-ul-arz*, which still remains in force for all matters not now provided for.

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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.