1909
January 16.

Before Sir John Stanley, Knight, Chief Justice and Mr. Justice Banerji,
DARIA (DEFENDANT) v. HARKHIAL AND ANOTHER (PLAINTIFFS.)*

Pre-emption—Village divided into several mahals—Rights of pre-emption given to co-sharers in the village—Right among co-sharers of thoks.

The *wajib-ul-arz* of a village gave a right of pre-emption to share-holders in a *patti*, then to those in a *mahal* and lastly, to those in the village. The village was divided into several *thoks*. One of the *thoks*, viz. Jaroli was subsequently sub-divided into several *mahals* and under the new arrangement the *thoks* were done away with. A share was sold in the *thok* so sub-divided and was purchased by a co-sharer in one of the old *thoks*. A co-sharer in one of the *mahals* of *thok* Jaroli sued for pre-emption. *Held* that the vendee being a co-sharer in the village the plaintiff had no preferential right of pre-emption inasmuch as the old *pattis* and *thoks* had been done away with. *Dalganjan Singh* v. *Kalka Singh* (1), distinguished.

THE facts of this case are as follows:—

Mauza Basawar consisted of several *thoks*, one of which was *thok* Jaroli. *Thok* Jaroli had several *pattis*. The plaintiff, the vendor, and the vendee were all co-sharers in *thok* Jaroli, but not in the same *patti*. The *wajib-ul-arz* of village as it stood in 1283 fasli, contained the following provisions as to pre-emption:—

"*Dawa haq shaffa ka dar surat intiqal haqiat kisi hissedar ke bazarie bai wa rehn: awal Bhai Bhatija haqiqi aur doem phir Bhai Bhatija chachazad shurkayan haqiat aur seom phir hissedar patti aur chaharam phir hissedar thok aur panchwen phir malikan deh ka hoga; aur jo malikan deh se koi na lewe to usko akhtiar hoga jiske hath chahey rehn wa bai kari.*"

In 1305 *thok* Jaroli was perfectly partitioned into several *mahals*, one of which was *mahal Harkhial* and *Dalipa*. By this new arrangement the pre-empted property and the property of the plaintiff fell in *mahal Harkhial* and *Dalipa* and that of the vendee in another *mahal*, known as *mahal Chandarsen*. The new system did away with the *pattis*. No new *wajib-ul-arz* was prepared after the partition. The plaintiff brought this suit of pre-emption on the plea that he was a co-sharer with the vendor in the same mahal, whereas the vendee was a stranger to it. The defence was that the plaintiff had no preferential right to pre-empt. Both the lower courts

* Appeal No. 64 of 1908, under section 10 of the Letters Patent.

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

allowed this contention relying on *Gobind Ram* v. *Masih-ul-lah Khan* (1) and dismissed the plaintiff's suit. On appeal to the High Court, GRIFFIN, J., reversed the decree of the courts below holding that the principle enunciated in *Dulganjan Singh* and *Kalka Singh* (2) applied to the present case.

The defendant appealed.

Babu *Jogindra Nath Mukerji*, for the appellant.

Babu *Benode Behari*, for the respondent.

STANLEY, C. J., and BANERJI, J.—This appeal arises out of a suit for pre-emption. The village in question formerly consisted of several *thoks*, one of which was *thok* Jaroli. *Thok* Jaroli consisted of several *pattis*. The property in dispute was situate in *patti* Khera of *thok* Jaroli. In this *thok* the plaintiff was a co-sharer. The *wajib-ul-arz* of the village gave a right of pre-emption to five classes of pre-emptors. With the first two classes we are not concerned. The third class consists of share-holders in a *patti*, the fourth, sharers in a *thok*, and the fifth share-holders in the village. In the year 1305 Fasli *thok* Jaroli was by perfect partition divided into several *mahals* one of which is *mahal* Harkhial and Dalipa. By the new arrangement the property sought to be pre-empted and the property of the plaintiff fell in *mahal* Harkhial and Dalipa. The defendant appellant is not a co-sharer in *mahal* Harkhial and Dalipa but is the owner of *mahal* Chandersen, one of the *mahals* of the old *thok* Jaroli. It thus appears that by the new arrangement *pattis* and *thoks* have been done away with and the old *thok* Jaroli has been divided into several new *mahals*. Both the lower Courts held that in view of the new arrangement the plaintiff had no preferential right of pre-emption over the defendant appellant. On appeal the learned Judge of this Court, before whom the appeal was heard, came to the conclusion that the case was governed by the ruling in the case of *Dulganjan* v. *Kalka Singh* (2). We are unable to agree in the view taken by the learned Judge. It appears to us that when the *pattis* and *thoks* into which the village was divided were done away with, the plaintiff could only claim pre-emption by virtue of his being a shareholder in the village. The defendant vendee is also a share-holder in the

(1) (1899) I. L. R., 22 All., 1. (2) (1907) I. L. R. 29 All., 295

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village and the plaintiff has no preferential right over the defendant. If there had been a new *wajib-ul-arz* provision might have been made whereby preference would under the circumstances be given to the plaintiff, but in this case no new *wajib-ul-arz* was prepared. Therefore the rights of the parties are governed by the old *wajib-ul-arz* and in view of the fact that the old *pattis* and *thoks* have been done away with, we fail to see how the plaintiff has any preferential right of pre-emption over the defendant vendee. For these reasons we allow the appeal, set aside the decree of the learned Judge of this Court and restore the decree of the lower appellate Court. We give the defendant appellant the costs of this appeal.

Appeal decreed.

FULL BENCH.

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January 20.

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

SHEO KARAN SINGH AND ANOTHER (DEFENDANTS), *v.* MAHARAJA PARBHU NARAIN SINGH (PLAINTIFF.)*

Landlord and tenant—Possession without a lease—Kabuliat—Suit for rent—Liability for compensation for use and occupation—Denial of liability—Estoppel.

When certain persons entered into possession of property executing a registered *kabuliat* and paid rent for sometime but in a suit for rent pleaded that in the absence of a lease there was no contract of tenancy and rent could not be recovered by suit, *held* that the suit might be treated as one for use and occupation and in view of the fact that the defendants entered into, and continued in possession they could not be heard to say that they were not liable for use and occupation.

THIS was a suit for arrears of rent on the basis of a registered *kabuliat* executed by the defendants. By the *kabuliat*, an annual rent of Rs. 4,701 was reserved for the landlord and the term of the lease was nine years. The defendants were let into possession of the property. No lease was executed by the plaintiff. In the written statement which the defendants filed they admitted that rent had been paid for some time, but they raised the question that a mere *kabuliat* without a lease did not constitute a contract. The court below decreed the suit. The defendants appealed to the High Court.

* First Appeal No. 5 of 1906 from a decree of Shah Wahid Alam, Assistant Collector 1st class of Benares, dated the 30th September 1905.