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suit clearly indicates that the suit is one of the description mentioned above. It is not a suit for the ejectment of the tenant on the ground of the commission of a breach of condition by a sub-lessee or on the ground of any act done or omission made by such lessee, as mentioned in section 64 (1) (*a*). Therefore the only section under which the suit in this case could be brought, and was brought, was section 31 (2). An appeal from the decree in the suit lay to the Commissioner.

We find that an appeal was preferred to the Commissioner but he returned the memorandum of appeal on the ground that a question of proprietary title was raised. On this point we are unable to agree with the learned Commissioner, inasmuch as the first defendant, the tenant, never denied his tenancy and never claimed proprietary right in the land within the meaning of section 199 of the Act. What he claimed was that under a custom prevailing in the locality he had a right to transfer his holding. This was not a question of proprietary title and section 199 did not therefore apply. In our judgment the appeal ought to have been heard by the Commissioner, and we accordingly direct that the petition of appeal be returned by the District Judge for presentation in the Court of the Commissioner.

APPELLATE CIVIL.

1908
December 14.

Before Mr. Justice Richards and Mr. Justice Griffin.

GOPAL PRASAD AND ANOTHER (DEFENDANTS) *v.* BADAL SINGH AND OTHERS (PLAINTIFFS).*

Pre-emption—Wajib-ul-arz—Contract for period of settlement—Effect of expiry of period of settlement pending suit for pre-emption.

Held that in the case of a suit for pre-emption based upon a contract embodied in the *wajib-ul-arz* the rights of the plaintiff remained unaffected by the fact that the period of the current settlement expired during the pendency of the suit. *Janki Prasad* v. *Ishar Das* (1) and *Ram Gopal* v. *Piari Lal* (2) distinguished.

THREE suits for pre-emption were filed by the plaintiff Badal Singh against the appellants in respect of three sales, dated 4th May 1906, 27th June 1906, and 27th August 1906, respectively.

* First Appeal No. 91 of 1908 from an order of H. David, Judge of the Court of Small Causes, Cawnpore, exercising powers of a Subordinate Judge, dated the 29th of May 1908.

(1) (1899) I. L. R., 21 All., 374. (2) (1899) I. L. R., 21 All., 441.

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The defence to all the suits was that the *wajib-ul-arz* on which the suits were based was the record of a contract and that the period of settlement for which it was prepared had expired. The Court of first instance (Munsif of Akbarpur) accepted the defence and dismissed all the suits. On appeal the Subordinate Judge held that the period of settlement had not expired at the dates of the sales nor at the date of the institution of the suits, although it had expired before the suits were decreed, and set aside the decrees of the Munsif and remanded the cases for trial on the merits.

The defendants vendees appealed.

Dr. *Tej Bahadur Sapru*, for the appellants, contended that the pre-emptor must have a subsisting right at the date of the decree and it was not enough that he had a right at the date of sale or the date of institution of suit. He referred to *Janki Prasad* v. *Ishar Das* (1) and *Ram Gopal* v. *Piari Lal* (2).

The plaintiff must show that the contract embodied in the *wajib-ul-arz* was still subsisting. Here the *wajb-ul-arz* had ceased to be operative.

Pre-emption was a restraint on alienation and should not be extended beyond the period for which there was a contract. The pre-emptor could not claim the sympathy of the Court or any equity in his favour.

Munshi *Govind Prasad*, for the respondent, was not called upon.

RICHARDS and GRIFFIN JJ.—This and the connected appeals arise out of pre emption suits. The plaintiff claims on foot of the *wajib-ul-arz*. It has been found by both the courts below that the *wajib-ul-arz* records a contract and not a custom. The court of first instance dismissed the suits upon the ground that the period of settlement for which the *wajib-ul-arz* was prepared had come to an end. The lower court found that the *wajib-ul-arz* was still in existence at the dates of the sales. In the present appeal it has been urged on behalf of the defendants vendees that inasmuch as the settlement, and therefore the contract, had come to end before the time at which a decree could be given, the plaintiff's right to pre-empt must fail. For

(1) (1899) I. L. R., 21 All., 874. (2) (1899) I. L. R., 21 All., 441.

the purpose of these appeals it is assumed that the plaintiff had, at the time of the institution of the suits, a right to pre-empt the property by virtue of the contract which is recorded in the *wajib-ul-arz*, and the only question argued here and which we have to decide is whether or not the mere fact that before the date of the decree the period of settlement had determined, prevents the plaintiff from enforcing the right of pre-emption and getting a decree in his favour. The point would be absolutely clear in the absence of authority. The contract was a contract which entitled the plaintiff to purchase if any co-sharer sold his share so long as the contract lasted. It is admitted for the purposes of these appeals that the contract was in full force and effect at the time of the sales. Dr. *Tej Bahadur* on behalf of the appellants, has cited the cases of *Janki Prasad* v. *Ishar Das* (1), and *Ram Gopal* v. *Piari Lal* (2). In both these cases the plaintiff had a right of pre-emption by virtue of the position of his property in the mahal. Before the sale was made partition proceedings had been commenced for the division of the mahal, and before the time for decree had arrived the plaintiff had ceased to be entitled to pre-emption by reason of the division of the mahal in consequence of the partition proceedings. He had ceased to be a co-sharer and the courts held that a decree ought not to be made in his favour, because the principle underlying the right of pre-emption was the keeping out of the stranger. It will be seen that in the cases cited, the plaintiff's position had quite changed during the pendency of the suit. If he had occupied the position at the time of the sale that he occupied at the time of the decree he would have had no right of pre-emption at all. In the present case the plaintiff's right at the time of the decree was exactly the same right as he had at the time of the institution of the suit. In our judgment, the cases cited do not apply and the decision of the court below was correct. We dismiss the appeal with costs.

Appeal dismissed.

(1) (1899) I. L. R., 21 All., 374. (2) (1899) I. L. R., 21 All., 441.