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been struck off should be restored to the file, and that the petition under section 258, Civil Procedure Code, be "placed on the record". The *ratio decidendi* of this case is in favour of the present appellant. It is pointed out that "the effect of the certificate is to satisfy the decree so far as the sum certified is concerned." It must be remembered that without such payment being certified, on the application of one or other of the parties, it could not be recognized as a payment by any court subsequently executing the decree. An application by the decree-holder under section 258 of Act XIV of 1882 therefore calls upon the court to do a certain act which *ipso facto* satisfies the decree to the extent of the payment certified, and without which the decree would not be satisfied to any extent whatever. We hold that such an application satisfies the requirements of article 179(4) of the second schedule to the Indian Limitation Act (XV of 1877), and that no sound distinction can be drawn between the present case and that reported in I. L. R., 12 All., 399.

We therefore set aside the orders of both the courts below and direct the court of first instance to readmit this application for execution and to proceed with it according to law. The decree-holder will get his costs in this and in the lower appellate court.

Appeal decreed.

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January 23

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Piggott.

PRAN SUKH (PLAINTIFF) *v.* SALIG RAM AND OTHERS (DEFENDANTS) *

Pre-emption—Wajib-ul-arz—Custom or contract—Partition of village—Separate wajib-ul- arzes—Change in the language.

A village, originally undivided was first partitioned into several mahals with a separate settlement wajib-ul-arz for each. Subsequently one of these mahals was subdivided into two and fresh wajib-ul-arzes were framed for these two mahals One of these new mahals was in turn divided into two, but no fresh wajib-ul-arzes were then framed. The wajib-ul-arzes framed at the first and second partitions differed *inter se* as to their conditions relative to pre-emption. *Held* that there was evidence only of a contract for pre-emption, which, so far as the two last formed mahals were concerned, had ceased to exist even before the expiry of the term of the settlement.

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* Second Appeal No. 827 of 1908, from a decree of B. J. Dalal, District Judge of Agra, dated the 12th of May, 1908, modifying a decree of Sheo Prasad, Subordinate Judge of Agra dated the 25th of November, 1907.

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THE facts of this case were as follows:—

The plaintiff brought his suit on the basis of a custom of pre-emption prevailing in a village on the allegation that he was a co-sharer with the vendor and that the vendee was a stranger. The defendants pleaded, among other things, that the plaintiff had no right of pre-emption. The property in dispute was situated in three different mahals: (1) Mahal Piyari Kuar *az* mahal Ganeshi Lal, (2) Mahal Piyari Kuar *az* mahal Kaheri, (3) mahal Piyari Kuar *az* mahal Dilsukh. The Subordinate Judge decreed the plaintiff's suit. The defendants appealed. Before the lower appellate court the defendants conceded that the plaintiff had a right of pre-emption in respect of the property situated in mahals Piyari Kuar *az* mahal Kaheri and Piyari Kunwar *az* mahal Dilsukh, but denied his right in respect of that situated in mahal Piyari Kuar *az* mahal Ganeshi Lal. The District Judge decided it in favour of the defendants and reversed the decree of the court of first instance so far as it related to mahal Piyari Kuar *az* mahal Ganeshi Lal. The judgment of the lower appellate court dealing with the point was as follows:—

"I am of opinion that the appellants must succeed on this ground. At first it appears that there was one village Kolara. At the time of the last settlement, several mahals existed, Kaheri, Dilsukh, Ganeshi Lal and others. At the time of settlement a separate wajib-ul-arz was prepared for each mahal; the pre-emptive clause of the wajib-ul-arz of this particular mahal ran as follows:—

'*Jo koi hissadar haqiat apni bai ya rehan karna chahe to awal hissadaran ekjaddi ke hath, badahu badast hissadaran digar wa zanbad badast hissadaran-i-mahal*' and finally to strangers:—'If a co-sharer should desire to sell or mortgage his property he shall first transfer it to *ek jaddi* co-sharers, then to other co-sharers and after that to the co-sharers of the mahal,' and finally to strangers.

"It will be observed that there is some mistake in the transcript. As it stands, the second and third categories are the same. The third category should be co-sharers of other mahals.

"Subsequently mahal Ganeshi Lal was partitioned into two mahals Ganeshi Lal and mahals Piyari Kuar *az* Ganeshi Lal.

"A separate wajib-ul-arz was prepared for each. The terms of the pre-emption clause were :—

'The property should be sold or mortgaged first to near relatives, if they are co sharers of the zamindari as well : on their refusal to other owners of the mahal, and if they do not take, then to the owners of other mahals, and finally to strangers.'

"Prior to the sale in suit mahal Piyari Kuar *az* Ganeshi Lal was partitioned into two mahals :—

(1) Mahal Piyari Kuar *az* Ganeshi Lal.

(2) Mahal Nagpal.

"No wajib-ul-arz was prepared at the time. The property in suit is situated in mahal Piyari Kuar of the second partition. It cannot possibly be urged that a custom of pre-emption existed in the village which has come down to the present from time immemorial, because we find different rules set up at different periods of time. When originally there was a joint mauza Kolara, the co-sharers who were relatives had the first right of pre-emption and then all the other co-sharers of Kolara in an equal degree. Then the devolution of the right altered ; first came the relatives in the same mahal, for instance, Dilsukh, then co-sharers of mahal Dilsukh and then the rest of the co-sharers of the former mauza Kolara. Relatives who went to other mahals were put in the third category while non-relatives of the same mahal were entered in the same category. Hence the pre-emptive rule was not the same as it was before. When mahal Ganeshi Lal was partitioned there was a further change in the rule. Thus the right of pre-emption was one entirely based on contract. When mahal Piyari Kuar *az* Ganeshi Lal was partitioned, no fresh contract was entered into by the co-sharers of the two mahals, and so the right of pre-emption, based on a former contract, lapsed. The ruling quoted by the lower court, *Gobind Ram* v. *Masih-ul-lah Khan* (1), does not apply to this case, because no custom of pre-emption is proved. At every partition a fresh contract was entered into, and the right of pre-emption existed as modified by the last contract. But at the last partition no contract was entered into at all, so no pre-emptive right accrued to the co-sharers of the mahals formed at the last partition out of mahal Ram Piyari. I hold that no right of pre-emption exists with respect to the property in suit

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

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which is included in mahal Piyari Kuar *az* Ganeshi Lal (of the last partition).

"I set aside the decree of the lower court and in its place decree to the plaintiff possession of the property in mahal Piyari Kuar *az* Kaheri."

The plaintiff appealed.

The Hon'ble Pandit *Sundar Lal*, for the appellant: The wajib-ul-arz at the settlement as well as that at first partition recorded a custom of pre-emption. The heading of the pre-emptive clause of the wajib-ul-arz is '*rawaj haq shafa* &c.' The word "*rawaj*" is a clear expression, it cannot mean anything other than custom. There is only a slight change in the language of the two documents, which is not of much material consequence. The custom nevertheless remained unabrogated. It is clear from the language of the wajib-ul-arz prepared at the first partition that it recorded a custom of pre-emption. The further partition of mahal Piyari *az* Ganeshi Lal into sub-divisions had not the effect of putting an end to the custom. He next contended that, even assuming that the wajib-ul-arz prepared at the settlement was a record of contract, it must continue to operate as such up till the expiration of the settlement. The mere partition during the subsistence of the settlement would not render the contract abortive. If the parties intended to abrogate the contract they would have prepared a separate wajib-ul-arz.

The Hon'ble Pandit *Moti Lal Nehru*, for the respondents:—

There was a variation in the terms of the wajib-ul-arzes prepared at the settlement and the partition respectively. These could not be records of custom. If it was a contract, then there is nothing to show that the parties intended to let it continue for the rest of the settlement. With reference to the words *rawaj* and *haq*, he cited *Dhanpal* v. *Nand Kishore* (1).

STANLEY, C. J. and PIGGOTT J:—We are of opinion that the decision of the learned District Judge is correct. He has given reasons for the conclusion at which he arrived, and we think that those reasons are sound. He is supported in his judgment by the decision of a Bench of this Court, of which one of us was a

(1) L. P. A., No. 22 of 1909, decided on 7th January, 1910.

member, in appeal No. 22 of 1909 under the Letters Patent, *Dhanpal* v. *Nand Kishore*. The facts in that case were somewhat similar to those in the present case and the learned Judge of this Court, from whom the appeal under the Letters Patent was preferred, concurred with the lower appellate court, giving reasons for the conclusion at which he arrived and which commend themselves to us. We, therefore, dismiss this appeal with costs.

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Appeal dismissed.

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

1910 *January*, 27.

DORI AND OTHERS (PLAINTIFFS) v. JIWAN RAM (DEFENDANT). *

Pre-emption—Wajib-ul-arz—Custom or contract—Construction of document.

The wajib-ul-arz of an undivided village gave a right of pre-emption, first, to a near co-sharer (*hissadar karib*) and then to a co-sharer in the village (*hissadar deh*). Subsequently the village was divided by perfect partition. No new wajib-ul-arz was framed. Property situated in one of the new mahals was sold to a stranger, and a suit for pre-emption was brought by sharers in one of the other mahals, claiming as *hissadaran deh*.

Held by STANLEY, C. J.—That the plaintiff was entitled to pre-empt notwithstanding the partition, and that the words *hissadar deh*, as used in this wajib-ul-arz, meant a sharer in the village.

Dalganjan Singh v. *Kalka Singh* (1) distinguished. *Sahib Ali* v. *Fatima Bibi* (2), *Mithu Lal* v. *Muhammad Ahmad Said Khan* (3), *Abdul Hai* v. *Nain Singh* (4), *Motee Sah* v. *Mussumat Goklee* (5), *Gokal Singh* v. *Manna Lal* (6), *Abbas Ali* v. *Ghulam Nabi* (7), *Mata Din* v. *Mahesh Prasad* (8), *Ram Din* v. *Pohkar Singh* (9), *Auseri Lal* v. *Ram Bhajan Lal* (10) and *Gobind Ram* v. *Masih-ul-lah Khan* (11) referred to.

Held, by BANERJI, J.—That the plaintiff pre-emptor could not pre-empt after the partition of the village, as, although he was a sharer in the village, he was not a co-sharer of the vendor, and that the words *hissadar deh* as used in the wajib-ul-arz meant a co-sharer of the undivided village for which the wajib-ul-arz had been prepared. *Dalganjan Singh* v. *Kalka Singh* (1) followed. *Janki* v. *Ram Partap* (12) and *Abdul Hai* v. *Nain Singh* (4) referred to.

THIS was an appeal under section 10 of the Letters Patent against the decision of Aikman, J. The facts of the case appear from the judgement under appeal, which was as follows:—

"This appeal arises out of a suit brought by the respondents to enforce a right of pre-emption. The suit was based on the terms of the wajib-ul-arz of

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* Appeal No. 63 of 1909, under section 10 of the Letters Patent.

(1) (1899) I. L. R., 22 All., 1.
(2) (1909) I. L. R., 32 All., 63.
(3) Weekly Notes, 1899, p. 19.
(4) (1897) I. L. R., 20 All., 92.
(5) (1861) S. D. A., N.-W. P., Vol. 1, 506.
(6) (1885) I. L. R., 7 All., 772.
(7) Weekly Notes, 1891, p. 187.
(8) Weekly Notes, 1892, p. 100.
(9) (1905) I. L. R., 27 All., 553.
(10) (1905) I. L. R., 27 All., 602.
(11) (1907) I. L. R., 29 All., 295.
(12) (1905) I. L. R., 28 All., 268.