APPELLATE CIVIL.

1910
January 8.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Karamat Husain.

KANCHAN SINGH AND ANOTHER (PLAINTIFFS) v. MANI RAM (DEFENDANT).*

Pre-emption—Wajib-ul-arz—Construction of document—Contract or custom.

The pre-emptive clause of a wajib-ul-arz ran as follows:—"*Koi muqadma haq shafa ka dair nahin hua: aiyanda ho jari rakhna haq shafa ka ham ko manzur hai.*" *Held* on a construction of the wajib-ul-arz that these words did not denote a record of a custom but merely of a contract to take effect in the future.

Tasadduq Husain Khan v. *Ali Husain Khan* (1) followed. *Hazari Lal* v. *Durga Prasad* (2) distinguished.

THIS was a suit for pre-emption, based on the wajib-ul-arz prepared at a previous settlement, alleging that the wajib-ul-arz recorded a custom of pre-emption entitling him to pre-empt the property, which had been sold to a stranger. The defendant vendee pleaded, among other things, that the wajib-ul-arz in question recorded a contract which terminated at the expiration of the settlement at which it was prepared. The terms of the wajib-ul-arz were as follows:—"*Zikar intiqal haqiat baruye bai wo rehan wo hiba wo warasat worawaj haq shafa wo dastur izdawaj sani.*

Kuchh haqiat rehan nahin hai, aiyanda har hissadar ko apne juz wa kul haqiat ke intiqal ka ikhtiar hai, ab tak koi muqadma haq shafa ka dair nahin hua, aiyanda ko jari rakhna haq shafa ka ham ko manzur hai; jo hissadar apna haqiat farokht karna chahega to awal badast biradar haqiqi jo shamil zamindari ho, badahu pas hissadar jaddi, jo woh na len to pas hissadar patti, bahalat inkar unke, pas hissadar digar patti, agar woh na len to jiske hath chahega farokht karega."

The court of first instance held that the document recorded a custom and decreed the plaintiff's suit. The lower appellate court, however, held that it recorded a contract and not a custom. The plaintiff appealed to the High Court.

Babu *Sital Prasad Ghose*, for the appellants, contended that the wajib-ul-arz was *prima facie* evidence of the existence of

* Second Appeal No. 772 of 1908 from a decree of Girraj Kishor Datt, Subordinate Judge of Bareilly, dated the 12th of June 1908, reversing a decree of Abdul Halim, Munsif of Aonla Faridpur, dated the 29th of November 1907.

(1) Weekly Notes, 1908, p. 121. (2) *Supra* p. 187.

1910

KANCHAN SINGH v. MANT RAM.

a custom of pre-emption and the lower appellate court had erred in holding it to be that of a contract. The heading of the pre-emption clause of the wajib-ul-arz "*rawaj haq shafa wa dastur izdawaj sani*" clearly showed that the document recorded a custom of pre-emption. He distinguished *Tasadduq Husain Khan* v. *Ali Husain Khan* (1) and relied on an unreported decision in *Hazari Lal* v. *Durga Prasad* (2).

The respondent was not represented.

STANLEY, C. J., and KARAMAT HUSAIN, J.—This case appears to us to be undistinguishable from the case of *Tasadduq Husain Khan* v. *Ali Husain Khan* (1), which was decided by this Bench. The learned pleader for the appellants endeavours to distinguish the two cases, and he also relies upon a recent decision in an appeal under the Letters Patent, namely, Appeal No. 45 of 1909, decided by a Bench of which one of us was a member (2). In that case it was argued that the case of *Tasadduq Husain Khan* v. *Ali Husain Khan* was not distinguishable from the case before the court, but it was pointed out in the judgment that the language used in the wajib-ul-arz in the two cases was different in an important respect. In the wajib-ul-arz then before the court the clause as to pre-emption ran in the following terms, "*aiyanda ko jari rakhna rawaj shafa ka ham ko manzur hai.*" In the wajib-ul-arz in the case of *Tasadduq Husain Khan* v. *Ali Husain Khan*, the words are "*aiyanda ko jari rakhna rawaj haq shafa ka manzur hai.*" In the judgment the importance of the introduction of the word "*haq*" between "*rawaj*" and "*shafa*" is pointed out. We find the following comment in the judgment:—"Now the wajib-ul-arz referred to in the case of *Tasadduq Husain Khan* v. *Ali Husain Khan* does differ in one material respect from the wajib-ul-arz before us. Between the words '*rawaj*' and '*shafa*' there comes in the important word '*haq*.' In the case now before us reliance is placed upon the language of the heading of the clause dealing with pre-emption, which runs as follows:—"*Rawaj haq shafa wo dastur izdawaj sani.*' It is contended that '*rawaj*' properly translated is 'custom' and that therefore we should treat the subsequent language of the wajib-ul-arz, in which the parties express their

(1) Weekly Notes, 1903, p. 121. (2) *Supra* p. 187.

desire to continue the right of pre-emption, as showing that a pre-existing custom existed. We do not so interpret these words. The proper translation, we think, is "currency, or practice, of the right of pre-emption and custom as to remarriage." We are unable to distinguish the language of the wajib-ul-arz in this case from that in the earlier case decided by us and must dismiss this appeal. We accordingly dismiss it, but without costs as no one appears to represent the respondent.

Appeal dismissed.

FULL BENCH.

1910
January 15.

Before Sir John Stanley, Knight, Chief Justice, Mr. Justice Richards and Mr. Justice Tudball.

ARTHUR FLOWERS (PETITIONER) *v.* MINNIE FLOWERS (RESPONDENT) AND THOMAS JOHN MOORE (CO-RESPONDENT).*

Act No. IV of 1869 (*Indian Divorce Act*), *section* 3—*Divorce—Jurisdiction—"Reside."*

Held that a mere temporary sojourn in a place, there being no intention of remaining there, will not amount to residence in that place within the meaning of section 3 of the Indian Divorce Act, 1869, so as to give jurisdiction under the Act to the court within the local limits of whose jurisdiction such place is situated.

THIS was a petition for dissolution of marriage. The petitioner and the co-respondent had at one time been stationed together at Meerut, and, being both free-masons, were on terms of the greatest intimacy. Subsequently the petitioner was transferred to Hyderabad (Scinde), the co-respondent remaining in Meerut. Whilst the petitioner was stationed at Hyderabad he had occasion to pay a short visit to Meerut. The petitioner took his wife with him, and they stayed with the co-respondent. On this occasion the petitioner accidentally found a letter which led him to believe that the respondent had committed adultery with the co-respondent. The petition was filed in the court of the District Judge of Meerut, who heard the case and granted the petitioner a decree for dissolution of marriage. The decree then came up to the High Court for confirmation. The rest of the facts of the case are stated in the judgement.

Mr. *E. A. Howard*, for the petitioner.

* Matrimonial Reference No. 5 of 1909.