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the amount of the court fee payable which is final. The Legislature has not thought fit to allow any appeal from such an order, and it seems to me that once such an order has been passed, I cannot go behind it to examine the method which the Taxing Officer adopted to arrive at his decision. I have, therefore, no jurisdiction in this matter to set aside the order of the Taxing Officer. Let the papers be laid before the Judge taking applications. As Mr. *Agarwala* wishes to obtain time to make good the deficiency, I would further point out that in my opinion I have no jurisdiction in the matter, as it has not been referred to me as Taxing Judge by the Taxing Officer.

APPELLATE CIVIL.

1909
November 9.

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

SAHIB ALI AND OTHERS (DEFENDANTS) *v.* FATIMA BIBI (PLAINTIFF).*

Pre-emption—Wajib-ul-arz—Interpretation—Perfect partition—No new wajib-ul-arz framed—"Malikan deh."

The determination of an alleged right of pre-emption must depend upon the particular circumstances of each case and the evidence adduced in support of the pre-emptive right.

A village was divided by perfect partition into several mahals, but no new wajib-ul-arz was prepared. The wajib-ul-arz framed before partition was headed "*Hakuk hissadaran bakhudha*: rights of co-sharers *inter se*" and gave the right of pre-emption (1) to co-sharers in the *khata* (2) to the proprietors of the *patti* and (3) to the proprietors of the village (*malikan deh*). Plaintiff was a co-sharer in a different mahal from that in which the vendor was a co-sharer. *Held* that the heading of the wajib-ul-arz limited the meaning of the expression "*malikan deh*" to proprietors who were co-sharers with a vendor, between whom and the vendor a common bond subsisted, and as the plaintiff was not a co-sharer in the same mahal with the vendor, she had no right of pre-emption.

Janki v. *Ram Partap Singh* (1), *Sardar Singh* v. *Ijaz Husain Khan*, (2) *and Gobind Ram* v. *Masih-ullah Khan*, (3) distinguished. *Dalganjan Singh* v. *Kalka Singh* (4) followed.

THE facts of this case were as follows:—

In 1888 the village of Arand, which had previously consisted of a single mahal, divided into *thoks* and *pattis*, was partitioned and split up into several mahals. The owners of one of these

* First Appeal No. 327 of 1907, from a decree of Saiyid Tajammul Husain, Subordinate Judge of Jaunpur, dated the 8th of October 1907.

(1) (1905) I. L. R., 28 All., 286.
(2) (1906) I. L. R., 28 All., 614.
(3) (1907) I. L. R., 29 All., 295.
(4) (1899) I. L. R., 22 All., 1.

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mahals, known by the name of Mahal Muhammad Makki, sold the same to the defendants. The plaintiff thereupon brought the present suit for pre-emption. The plaintiff had no interest in the mahal sold, but was the owner of one of the other mahals into which the village had been divided. At the time of partition no fresh wajib-ul-arz was framed. The existing wajib-ul-arz contained a chapter on pre-emption headed "Rights of co-sharers amongst themselves," and gave a right of pre-emption, first to co-sharers in the *khata*, next to proprietors of the *patti* and finally to proprietors of the village (*malikan deh*). The Court of first instance (Subordinate Judge of Jaunpur) held that the plaintiff was entitled to pre-empt as "*malik deh*," and gave her a decree accordingly. The defendants appealed to the High Court.

The Hon'ble Pandit *Sundar Lal* (with him Maulvi *Muhammad Ishaq*), for the appellants.

Mr. *B. E. O'Conor* (with him Babu *Jogindro Nath Chaudhri*), for the respondent.

STANLEY, C. J.—This appeal arises out of a pre-emption suit. The village of Arand prior to 1888 consisted of one mahal which was divided into *thoks* and *pattis*. On the 17th of April 1888, partition proceedings were filed and the village was partitioned. A number of mahals were formed, one of which, namely, Mahal Muhammad Makki, is the subject matter of this litigation. The plaintiff is not a co-sharer in this mahal, but is a co-sharer in another mahal. The owners of Mahal Muhammad Makki sold the entire mahal to the defendants and therefore the suit was instituted. No new wajib-ul-arz was framed at the time of partition, but the plaintiff relies upon the wajib-ul-arz which was prepared in the year 1883, which contains the following provision as to pre-emption, namely, "if any co-sharer in any *patti* wishes to transfer his property, then he shall do so first of all to his co-sharer in the *khata*, next to the proprietors of the *patti*, after that to the proprietors of the village (*malikan deh*)." The contention on behalf of the plaintiff is that no new wajib-ul-arz having been framed upon the recent partition, the provisions of the old wajib-ul-arz must prevail and that the plaintiff being proprietor (*malik*) of part of the village is entitled to pre-empt.

The Court below acceded to this contention, holding that the case was governed by the ruling in *Janki* v. *Ram Partap Singh* (1).

As has been often laid down, the determination of an alleged right to pre-emption must depend upon the particular circumstances of each case and the evidence adduced in support of the pre-emptive right. In the present case the plaintiff relies upon the words in the wajib-ul-arz "*malikan deh*" as strongly supporting her claim. We have therefore to ascertain what meaning is to be attributed to this expression in the wajib-ul-arz in question. I think that the key to its meaning is to be found in the language used in the heading to Chapter II, in which chapter is to be found the provision as to pre-emption. The heading of this chapter is "Rights of co-sharers, ('*hissadaran deh*'), as among themselves, based on custom or agreement." The words "co-sharers as among themselves" seem to limit the meaning of the words *malikan deh* to proprietors who are co-sharers with a vendor between whom and the vendor is a common bond. The plaintiff in this case is not such a co-sharer, and therefore, I think, cannot claim the benefit of the custom. The case is unlike that which was relied on by the Court below. Its facts also do not resemble those in the case of *Sardar Singh* v. *Ijaz Husain Khan* (2), in which upon partition a new wajib-ul-arz was prepared which was a verbatim copy of the old wajib-ul-arz. I would therefore allow the appeal and dismiss the plaintiff's suit. The view which I take does not conflict with that expressed in *Gobind Ram* v. *Masih-ul-lah Khan* (3), inasmuch as in that case there was nothing in the wajib-ul-arz relied upon to qualify the meaning of the expression *hissadaran deh* as used in it.

BANERJI, J.—I am of the same opinion. The plaintiff claims under a custom recorded in the wajib-ul-arz prepared in 1883-1884, when the village was an undivided village and consisted of only one mahal. Chapter II of the wajib-ul-arz, containing the clause relating to pre-emption, is headed "*Hakuk hissadaran bakhudha* (rights of co-sharers *inter se*)." It is clear from this heading that the persons referred to in the clause were persons among whom existed the common bond of being co-sharers.

(1) (1905) I. L. R., 28 All., 286. (2) (1906) I. L. R., 28 All., 614.
(3) (1907) I. L. R., 29 All., 295.

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The words *mālikan deh* which appear in that clause bear, in my opinion, the same meaning as the words *hissadaran deh* in the wajib-ul-arz which formed the subject of consideration by a Full Bench in *Dalganjan Singh* v. *Kalka Singh* (1). I am unable to distinguish this case from the case above mentioned. As held in that and other cases, the decision of each case depends on the nature of the particular custom or contract on which it is founded. The ruling in *Janki* v. *Ram Partap Singh* (2), to which I was a party, has been relied on by the Court below, apparently under the impression that it was held in that case that in every instance the owner of a share in one mahal is entitled to pre-empt a share in another mahal. No such general rule was laid down in that case, which was decided with reference to its own peculiar circumstances. The wajib-ul-arz relied on in that case was prepared after the village had been divided into two mahals. Having regard to that circumstance it was held that when the wajib-ul-arz conferred on a share-holder in the village the right of pre-emption, it was clearly intended that the right would attach to such a share-holder, even though he was not a co-sharer in the same mahal. Those circumstances are absent in the present case. The custom recorded in the wajib-ul-arz relied on in this case cannot after partition apply to the altered state of things which has now come into existence. I agree in the order proposed.

BY THE COURT.—The order of the Court is that the appeal is allowed, the decree of the Court below is set aside and the plaintiff's suit is dismissed with costs in both Courts.

Appeal decreed.

(1) (1899) I. L. R., 22 All., 1. (2) (1905) I. L. R., 28 All., 286