APPELLATE CIVIL.

1911
July, 24.

Before the Hon'ble Mr. H. G. Richards, Chief Justice, and Mr. Justice Tudball.

GANGA SINGH AND OTHERS (DEFENDANTS) *v.* CHEDI LAL AND OTHERS (PLAINTIFFS.)*

Pre-emption—Wajib-ul-arz—Custom—Evidence—Nature of evidence required to establish a custom of pre-emption.

The plaintiffs claimed a right, based upon contract or custom, to pre-empt a sale of zamindari property. The property was situate in one of the three mahals of a village named Suram. The plaintiffs were not co-sharers with the vendors in that mahal; the vendees were strangers.

In 1873 the village Suram consisted of a single mahal, and the village wajib-ul-arz of that date contained the following reference to pre-emption:—"In future if any *pattidar* wishes to transfer his share by sale * * * to a stranger * * * first, the sharers in the *patti khas*, then *pattidars* in the *thok*, and then *digar pattidaran deh* shall have a right to purchase."

In 1883 perfect partition took place, and the village was divided into three separate mahals.

A fresh wajib-ul-arz was drawn up for each of the new mahals, but in each the provisions regarding pre-emption were copied *verbatim* from the wajib-ul-arz of 1873.

Held (1) that the plaintiffs had failed to establish any right of pre-emption based on contract; (2) that the oral evidence was worthless as supporting the custom set up by the plaintiffs, and (3) that the evidence afforded by the wajib-ul-arzes of 1873 and 1883 was quite insufficient to establish the right claimed by the plaintiffs, if such right was to be regarded as one based on an alleged custom. *Dalganjan Singh* v. *Kalka Singh* (1) referred to. *Auseri Lal* v. *Ram Bhajan Lal* (2) and *Sardar Singh* v. *Ijaz Husain Khan* (3) discussed.

Observations by RICHARDS, C. J., on the proper method for a court to approach the consideration of pre-emption suits based upon custom.

THIS was a suit for pre-emption of certain zamindari property situate in one of the mahals of the village of Suram, pargana Ouraiya. In 1873 this village consisted of a single mahal and the wajib-ul-arz of that date contained the following reference to pre-emption:—"In future if any *pattidar* wishes to transfer his share by sale * * * to a stranger * * * first, the sharers in the *patti khas*, then the *pattidars* in the *thok*, and then *digar pattidaran deh* shall have a right to purchase" In 1883 perfect

* First Appeal No. 296 of 1910 from a decree of Banke Bihari Lal, Subordinate Judge of Mainpuri, dated the 15th of September, 1910.

(1) (1899) I. L. R., 22 All., 1. (2) (1905) I. L. R., 27 All., 602.
(3) (1906) I. L. R., 28 All., 614.

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partition took place and the village was divided into three mahals. Fresh wajib-ul-arzes were framed, but in each the provisions as to pre-emption were copied *verbatim* from the wajib-ul-arz of 1873. The plaintiffs were not co-sharers in the mahal in which the property sold was situated. The vendees were strangers. There was no reliable evidence outside the wajib-ul-arzes above referred to as to the existence of a right of pre-emption based either on contract or custom. The court of first instance (Subordinate Judge of Mainpuri), however, decreed the plaintiffs' claim on the basis of the wajib-ul-arzes. The defendants thereupon appealed to the High Court.

Babu *Sarat Chandra Chaudhri* (for Dr. *Satish Chandra Banerji*), for the appellants.

Mr. *M. L. Agarwala* (with him the Hon'ble Pandit *Sundar Lal*), for the respondents.

RICHARDS, C. J.—This is an appeal in a suit for pre-emption. The admitted facts are as follows:—This property in question is situate in mauza Suram, pargana Ouraiya. In 1873, mauza Suram constituted a single mahal. The wajib-ul-arz of that date is produced and contains the following reference to pre-emption:—

"In future if any *pattidar* wishes to transfer his share by sale . . . to a stranger . . . . first the sharers in the *patti khas*, then *pattidars* in *thok*, and then *diga pattidaran deh* shall have the right to purchase."

In the year 1883 perfect partition took place and mauza Suram was divided into three separate mahals. A copy of the wajib-ul-arz on partition was copied out as the wajib-ul-arz for each of the new mahals.

In the events which have happened, the plaintiffs are not now co-sharers of the vendor, that is to say, they are not co-sharers in the same mahal, while the defendants are strangers. This view is, I think, supported by abundant authority, and if it is correct, it follows in the present case that the custom of pre-emption which existed in 1873, is the same custom which existed when this suit was instituted.

Now what was the custom which existed in 1873? It was a custom (leaving out immaterial preferential rights) for sharers in

the village to pre-empt as against strangers. But in 1873 every sharer in the village must have been also a co-sharer with the vendor, because the village was the one single mahal. It follows that there could never have been a custom of pre-emption in favour of persons who were not co-sharers with the vendor. This is sufficient to dispose of the case, unless it can be contended that co-ownership was a matter of no importance. I think it could hardly be contended for a moment that mere residence in the village would confer a right to pre-empt, or, that it was likely that such a custom would have grown up. It is absolutely clear that possession of a share in the village was an essential condition The wajib-ul-arz itself so provides. I cannot see why the possession of a share in the village was essential unless co-partnership with each other was also essential. Under the Muhammadan law from which customs of pre-emption are said to have been borrowed, partnership is *the* most important fact. The importance of the existence of partnership between the pre-emptor and the vendor in pre-emption cases of zamindari property was considered at great length and I think fully recognized by the five Judges who decided the case of *Dalganjan* v. *Kalka Singh* (1). I propose to quote at some length from the judgement in this case, because, if the existence of co-ownership is essential or important in pre-emption, it should be borne in mind when considering the probability or improbability of the existence of the custom claimed by the plaintiff in the present case and the weight to be attached to the wajib-ul-arz as evidence of it. At page 10, the Chief Justice says :—"The most essential feature of the coparcenary body is the joint and several responsibility of the co-sharers for the payment of the Government revenue assessed on the mahal, coupled, in cases of zamindari tenure, with the holding and management of the whole of the lands of the mahal by all the co-sharers in common. It is for the mahal for 'the local area held under a separate engagement for the payment of the land revenue,' not for a village or other local area not being a mahal, that the settlement officer frames the wajib-ul-arz. It is meant as a record of the contracts or customs of the co-sharers of the mahal.

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

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This being its object, it is *primâ facie* unlikely to include any contract or custom which is absolutely independent of the continuance of the mahal as a fiscal and proprietary unit or of the coparcenary body for which it is framed. Next, what is pre-emption? It is a right very closely connected with the objects of the coparcenary system. Its essential purpose is the exclusion of strangers from the co-parcenary body and the maintenance of the existing proprietary body throughout all changes of ownership. It thus *primâ facie* implies that the coparceners desire to preserve and not to destroy their mutual connection, and is *primâ facie* inapplicable after that connection has been severed by a perfect partition."

Again at page 12 the Chief Justice quotes from the case of *Motee Sah* v. *Mussumat Goklee* (1):—"Now, an essential condition of the existence of a right of pre-emption is that the parties claiming such a right shall be coparceners in the same estate as those against whom the claim is made, a relation between the parties which is extinguished by the very operation of partition and the separate proprietorship thereby established." The learned Chief Justice adds:—"I infer that the wajib-ul-arz in that case confined the right of pre-emption to coparceners of the vendor," and it may be urged that the very question we have in this case to decide is whether or not the wajib-ul-arz in the present case confines the right of pre-emption to coparceners of the vendor.

Practically speaking, the two wajib-ul-arzes of 1873 and 1883 are the only evidence of the existence of rights of pre-emption in the village or mahal.

The oral evidence is quite worthless as supporting the particular custom claimed by the plaintiffs. The learned Subordinate Judge decided in favour of the plaintiffs and decreed the suit. The defendants appeal.

The question is, have the plaintiffs a right of pre-emption based either on contract or on custom? It seems to me absolutely clear that the plaintiffs have no right based on contract. If any right of pre-emption existed other than a right based on custom, such right must exist by virtue of a contract, the evidence of which is the partition wajib-ul-arz of 1883, but the plaintiffs

(1) S. D. A., N.-W. P., 1861, Vol. I, p. 506.

cannot rely upon this wajib-ul-arz as a contract. They were no parties to it. The wajib-ul-arz of 1883 in question is the wajib-ul-arz for mahal Bihari Lal, in which the plaintiffs are not co-sharers and have no concern. If the entry in the wajib-ul-arz of 1883 is a record of contract, the contract was between the co-sharers in mahal Bihari Lal.

In my judgement the case of the plaintiffs must fail unless they can establish the existence of a custom giving them a right of pre-emption notwithstanding that they are not co-sharers of the vendors.

I wish to say a few words as to what I consider as a general rule is the proper method for the court to approach the consideration of pre-emption suits based on custom, because I think that the neglect of such method has led to much confusion and supposed conflict of judicial decisions. I think the same cause also has led the courts into attempting to draw, what, with great respect, I must call almost ridiculous distinctions between different wajib-ul-arzes, particularly when regard is had to the circumstances under which such documents were prepared and the class of persons who prepared them.

In pre-emption cases based on custom the proper issue ought to be "does the custom alleged by the plaintiff pre-emptor exist." The onus lies on the plaintiff, and he must establish his case by the production of sufficient evidence. The proper issue is not what is the true construction of this or that wajib-ul-arz. No doubt it is quite true that the court will have to consider, amongst other things, the language of the wajib-ul-arz when that document is adduced in evidence. But the fact that the court has to consider the language of the wajib-ul-arz does not make the construction of the wajib-ul-arz the real issue, or the equivalent of the real issue in the case. This is not a mere verbal distinction. It is a real distinction, which, I think, ought to be carefully borne in mind. I am speaking, be it remembered, of cases of pre-emption based on custom. In cases based on contract the considerations may be quite different.

To continue. After considering the evidence, (whether such evidence consist solely of the wajib-ul-arz, or partly of the wajib-ul-arz and partly of other evidence), it is the duty of the

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court to come to a conclusion whether the fact of the existence of the custom is "proved," "disproved" or "not proved." I am using these expressions with the meaning given to them by section 3 of the Evidence Act. If the fact is proved, the plaintiff is of course entitled to a decree. If it is disproved, or not proved, the plaintiff's case fails.

During the argument numerous decisions were referred to, and the case has been presented to us as of considerable difficulty. It seems to me, however, that if we are at liberty to apply the simple and elementary rules which I have mentioned above, all difficulty quickly disappears. As I said before, the evidence in the present case must be treated as consisting of the two wajib-ul-arzes, which are *verbatim* copies of each other. I am clearly of opinion that partition does not abrogate or cause an existing custom of pre-emption to cease to exist. The custom continues after partition, unless the co-sharers in each new mahal enter into a new arrangement between themselves. It might perhaps be open to the co-sharers in one mahal to make a contract with the co-sharers in the other mahals. But this would be an unusual contract, and it would require clear evidence to prove it. This, with all respect, I think, is not the question. The question is, are we reasonably satisfied upon the evidence that the custom claimed by the plaintiffs exists? The wajib-ul-arz is not the custom. It is evidence of the custom, and in considering the wajib-ul-arz we are entitled to consider the condition of the village at the time the record was made, the possibility, or impossibility, the probability, or improbability of such a custom then existing, and whether or not the officer who prepared the wajib-ul-arz was really recording the custom claimed. Again, at page 28 the Chief Justice says:— "We are interpreting and applying a particular custom of which the plaintiff claims the benefit. In considering who is entitled to the benefit of a custom it is essential to see who are the persons among whom it has in fact habitually prevailed. It cannot be claimed by anyone who is not a member of the class thus determined. Now there can be no doubt as to what was the class of persons who at the time when the wajib-ul-arz was framed, habitually exercised the right of pre-emption by virtue of the custom. They were the co-sharers of the undivided mahal which

the village Sarai Sitan then formed and no others. There was no distinction between shareholders in the village and co-sharers of the entire village, there was only a single class of co-sharers. That is the only class among whom the custom actually prevailed, and to whom therefore the right belonged. It is now sought to apply the custom for the benefit of the plaintiff, who stands in a totally different relation to the village, to the vendor, and to the property sold. He is not a co-sharer of the entire village. He is not a member of the class who exercised the right of pre-emption at the time when the custom was recorded. He is a member of a class which only came into existence through the partition, persons who have shares in a particular sub-division of the village. He is not even a co-sharer of the vendor. To allow him to pre-empt under the old wajib-ul-arz would be, in my opinion, to change the custom while professing to apply it." The other Judges appear to have agreed with the learned Chief Justice. KNOX, J., says:—"I concur in all that the learned Chief Justice has written."

It seems to me that, the more unusual a custom or usage is, the stricter ought to be the proof of its existence, and that this applies to customs or usages of pre-emption just as much as to any other custom or usage. If the custom claimed is of a common or usual nature, the wajib-ul-arz may be sufficient proof and justify the court in coming to the conclusion that the custom exists. If the particular right of pre-emption claimed is of an unusual nature, the wajib-ul-arz may be almost worthless as evidence or quite insufficient to prove the existence of the custom. In the present case, I think that the custom claimed by the plaintiffs is of an unusual nature, and in support of this view I refer to the passages which I have quoted above and adopt what the learned Chief Justice has said on the importance of co-ownership in pre-emption. If this vexed question of pre-emption in the province of Agra is to be settled by legislation (and I hope it may be). I doubt very much whether any authority who would be likely to be consulted would suggest the propriety of giving a right of pre-emption to persons who were not co-sharers in the mahal. The expression *pattidar deh* in the wajib-ul-arz of 1873 clearly applied to co-owners, but,

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even assuming for the purposes of argument that the expression strictly construed means simply "sharer in the village" and not "co-sharer in the village", nevertheless, after taking into consideration the time and circumstances under which the wajib-ul-arz was prepared and the constitution of the village, so far from believing that the custom claimed by the plaintiff existed, I believe that it did not exist. I am certainly quite unable to say that the existence of the custom has been proved.

The only evidence produced, viz. the wajib-ul-arz, does not convince me. The learned counsel for the respondents has referred to a number of authorities, and amongst them the case of *Auseri Lal* v. *Lal Ram Bhagan Lal* (1) and the case of *Sardar Singh* v. *Ijaz Husain Khan* (2).

The first of these cases was a first appeal and the court had to find on the question of fact. The terms of the record in the wajib-ul-arz were very similar to the present case. STANLEY, C. J., held that the sharer in the village who was not a co-sharer with the vendor, had a right of pre-emption. At page 610, BURKITT, J., says:—"Having had an opportunity of perusing the judgement of the learned Chief Justice, I have come (though not without some hesitation) to the conclusion that his decision as to the meaning to be given to the words *mauza* or *deh* when used in a wajib-ul-arz is correct." Later on he says:—"I have no doubt that in a large number of cases the word *deh*, or mauza or *gaon* crept into the new wajib-ul-arz through the ignorance or carelessness of the settlement officer's muharrir when copying the wajib-ul-arz of the parent mauza." STANLEY, C. J., at page 609 says:—"Finding then no ambiguity whatever in the terms of the new wajib-ul-arz, it appears to me that the court is bound to construe them according to the plain sense of the words used, and that we ought not to put a construction contrary to the plain sense in view of anything *dehors* the documents." It seems to me, with all respect, that this was not the correct way of considering the question. Does it not appear as if BURKITT, J., was finding in favour of the existence of the custom (a question of fact) on evidence which he considered of no weight or value whatever. If the view taken by STANLEY, C. J., be

(1) (1905) I. L. R., 27 All., 602. (2) (1906) I. L. R., 28 All., 684.

correct, the result might be that the Court, tying itself down to particular words used by an ignorant or careless muharrir, would find in favour of the existence of an unusual and unnatural custom which it was perfectly certain never existed at all, unless it shut its eyes to all other considerations save the actual words in the wajib-ul-arz.

In my opinion both the cases relied on are contrary to the view taken by the entire Bench which decided the case of *Dalganjan Singh* v. *Kalka Singh*. In the present case, I think that the learned Subordinate Judge was wrong under the circumstances in thinking that there could be a new custom or any variation of the custom after the partition, and that he ought to have applied his mind to considering what was the custom recorded in the year 1873, and whether or not the custom that was then recorded was a custom which entitled a person who was not a co-sharer with the vendor to pre-empt in the case of a sale by one of the co-sharers in the village. Had he done so, and considered the great improbability, if not impossibility, of such a custom ever having existed; if he had taken into consideration that the record in the wajib-ul-arz must have been the result of instructions given by the co-sharers to the officer on matters concerning their coparcenary rights, I think it very improbable that he would have come to the conclusion that the plaintiff had proved the existence of the custom he claimed.

The learned Subordinate Judge might fairly have come to the conclusion that a custom of pre-emption existed among the co-sharers, but not *the* custom claimed by the plaintiffs, that is to say, a custom giving a right to a person who was neither a co-sharer with the vendor nor in the mahal. I have already given my reasons for holding that the plaintiff cannot succeed on the basis of contract. I would allow the appeal.

TUDBALL, J.—I fully agree with the learned Chief Justice. The plaintiffs claim the right to pre-empt, though at the date of the sale in question they had no share in the mahal, and were therefore not co-sharers with the vendor therein. If the claim be based on contract, then their suit fails for the reasons given by my learned colleague. If their claim be based on custom, then the custom put forward is one under which a person owning a share in a

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separate mahal, (that is, a separate and distinct portion of a village which consists of several mahals), and who is not a member of the co-parcenary body to which the vendor belongs and is therefore not a cosharer with the latter, has a right to pre-empt because the vendor has transferred his share to one who previously owned no share in any of the mahals in the village. In other words, the plaintiffs say:—"Though we are not co-owners with the vendor, still we own a share in one of the mahals in the village and the custom gives us a right to pre-empt." To establish his custom they produce the wajib-ul-arz of 1873, a document drawn up prior to partition and which for the purposes of this judgement I assume to contain the relation of an existing custom. That custom was one under which a member of an undivided coparcenary body could pre-empt if any member of that body sold his share to a stranger. The object of the custom was clearly to prevent the introduction of an outsider into the coparcenary body. Such a stranger might be very unwelcome to the other members. But this is not the custom which the present plaintiffs now put forward. The original coparcenary body has split up into several distinct and separate such bodies, no one of which has any further connection or concern, in any way, with any of the others. The words "*pattidar dek*" were used in the wajib-ul-arz of 1873 at a time when there was only one mahal. It does not follow that the courts must on the bare meaning of those words throw on one side and entirely leave out of consideration that *co-ownership* which was at the root of the custom itself. The custom, as recorded in 1873, did not and could not refer to the state of affairs as they now are, when there are *pattidars* in the village who are not co-owners in a great part of the village with each other. The record of the custom in 1873 must be read in the light of the then existing state of affairs in order that its true meaning may be grasped. The object of the custom, the cause of its growth and existence must also be kept in view. Paying regard to all these points it is clear to my mind that the document in question does not prove the custom which is now put forward by the plaintiffs.

Turning now to the wajib-ul-arz of 1883, drawn up at partition for this mahal, we find that it is merely a *verbatim* copy

of the old one of 1873. If it is not a record of an agreement between the co-sharers of this mahal, it must be the record of a custom existing among the co-sharers of the mahal which had only just come into existence and in which no new custom could possibly have sprung up. The wajib-ul-arz, it must be noted, is drawn up, not for a village, but for a mahal, and is supposed to set forth custom obtaining among the co-sharers therein. If it be taken that it related to the old custom which had previously existed, and which was not necessarily destroyed by the partition, we are again met with the difficulty that the old custom contemplated the existence of co-ownership between the vendor and the pre-emptor. In the present circumstances that co-ownership does not exist. Muhammadan law gives the right of pre-emption, first of all, to *shafi-i-sharik*, then to *shafi-i-khalit* and, lastly, to *shafi-i-jar*. It originally applied to small plots of land and houses. In this country it has been extended to zamindari estates, but never on the ground of vicinage alone. Where two co-sharers of such an estate have perfectly partitioned their shares so as to entirely put an end to co-ownership in every way, it has been distinctly ruled more than once that under the Muhammadan law the right of pre-emption is lost; because after such a partition neither can be a *shafi-i-sharik* or a *shafi-i-khalit*; and vicinage alone in such cases gives no right of pre emption. It is worthy of note that co-ownership in Muhammadan law gives a prior right of pre-emption, and the customs which have sprung up among Hindus as well, in the case of such estates, have always had as their basis the existence of co-ownership among those persons to whom the custom applies. Of course it is conceivable that a custom of pre-emption might possibly spring up among the separate owners of separate mahals or separate villages for some special reason. It would be an unusual and extraordinary custom, and the person alleging it would have to prove it by clear, cogent and convincing evidence. A wajib-ul-arz is not conclusive evidence of any custom, and where a plaintiff puts forward such an unusual custom and cannot point to a single instance of its exercise within the memory or knowledge of man, the court will be justified in holding that the plaintiff has not proved the custom. In the case of an unusual and extraordinary

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custom (other than that of pre-emption) in which no instances are proved of the exercise thereof, the courts have hesitated to hold that a custom is proved by the bare production of one or more wajib-ul-arzes; and I can see no reason why the same rule should not apply to the very unusual and extraordinary custom which is now put forward in this case, under which a plaintiff who is not a co-sharer in the mahal and is not a co-owner with the vendor in anything, claims a right to prevent a man selling his property to whomsoever he pleases. The clear issue is the existence or non-existence of this unusual custom. Can the plaintiff be said to have proved it by a wajib-ul-arz drawn up when the state of the village was very different to what it now is, and when co-ownership in one unit, namely, the mahal, existed and all *pattidaran deh* were co-owners with each other which they now are not. In my opinion such evidence is not only insufficient but does not in the least go to establish the custom which is now put forward. I would, therefore, allow the appeal.

BY THE COURT:—The order of the Court is that we allow the appeal, set aside the decree of the court below, and dismiss the plaintiffs' claim with costs.

Appeal allowed.

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May, 2.

Before the Hon'ble Mr. H. G. Richards, Chief Justice, and Mr. Justice Tudball.

MUHAMMAD SADIQ (DEFENDANT) *v.* ABDUL MAJID (PLAINTIFF) AND MUSAMMAT HAKIMAN (DEFENDANT.)*

Act No. IX of 1908 (Indian Limitation Act), section 3—Limitation—Amendment of plaint after expiry of limitation—Suit for pre-emption—Zamindari property—Incorrect statement of extent of share claimed.

In a suit for pre-emption under the Muhammadan law of a zamindari share it was found that the necessary conditions of the Muhammadan law had been fulfilled; but, there being some doubt as to the exact share sold, the plaintiff had specified it in his plaint as 15 biswansis, when in fact it amounted to 17 biswansis. *Held* that it was within the competence of the court to allow the plaintiff to amend his plaint so as to claim the larger share, even after the period of limitation for the suit had expired.

THE facts of this case were as follows: —

One Musammat Hakiman sold certain zamindari property to Muhammad Sadiq on the 16th of December, 1907. The price

* Second Appeal No. 605 of 1910 from decree of A. W. R. Cole, District Judge of Moradabad, dated the 17th of April, 1910, confirming a decree of Muhammad Shamsuddin, Munsif of Nagina, dated the 14th of April, 1909.