1910

CHEPHUR v. ABDUL HAKIM.

consisted of two pattis, or mahals, the wajib-ul-arz recorded a custom of pre-emption to the effect that in the case of a sale or mortgage by a shareholder, a claim for pre-emption might be brought by persons mentioned in several categories and ultimately by shareholders in the village. The village was subsequently divided into more mahals but no new wajib-ul-arz was framed. It was held by one of us and by RICHARDS, J., that a co-sharer in the village had a right of pre-emption as against a stranger, even though he did not own a share in the mahal in which the property sold was situate.

For the foregoing reasons we hold that there is no force in the appeal and we dismiss it with costs.

Appeal dismissed.

Before Mr. Justice Richards and Mr. Justice Tudball.

1910

December 2.

LAKHAN SINGH AND ANOTHER (DEFENDANTS) *v.* BISHAN NATH (PLAINTIFF).*

Pre-emption—Wajib-ul-arz—Construction of document—"Apna shafi"—Muhammadan law.

A wajib-ul-arz provided that if any co-sharer of a patti in the *khalisa* wished to sell his share, he would do so paying due respect to his own pre-emptor (*apna shafi*), and if the latter refused and all the other pre-emptors of the village (*aur sab shafian deh*) refused then he might sell to a stranger. *Held* that the expression *apna shafi* connoted nearness in space and not a blood-relationship, and therefore where the vendor and pre-emptor were co-sharers in the same patti, the vendee being a co-sharer in a different patti, the co-sharer in the same patti had a preferential right.

THE facts of this case were as follows:—

Property situate in mauza Pingri-Pingra was sold to the appellants. The respondent, who was a co-sharer in the same patti in which the property sold was situate, sued for pre-emption. The vendees were share-holders in the village in the same mahal but in a different patti. The pre-emptive clause in the wajib-ul-arz ran as follows:—"*Agar koi hissedar kisi patti khalisa wah muafi bazyafita,*" etc., wishes to sell his property, he should do so, "*ba lehaz apna shafi ke*"; and "*dar surat inkar uske aur sab shafian deh*" he may transfer to a stranger. Both the courts below decreed the plaintiff's suit.

* Second Appeal No. 501 of 1910 from a decree of E. E. P. Rose, District Judge of Shahjahanpur, dated the 11th of March, 1910, confirming a decree of Jagmohan Narain Mushran, Munsif of Shahjahanpur, dated the 30th of September, 1909.

1910

LAKHAN SINGH v. BISHAN NATH.

The defendants appealed.

Babu *Sital Prasad Ghosh*, for the appellants :—

There are two classes of pre-emptors mentioned in the wajib-ul-arz: first, "*apna shafi*" and then, "*aur sab shafian deh*". The terms used are very vague; the word '*shafi*' is not at all defined. The only reasonable construction to be placed on the terms of the wajib-ul-arz is that the term "*apna shafi*" means pre-emptors who are near to the vendor by blood-relation; and the second category, that of "*aur shafian deh*," comprises pre-emptors who derive their title from nearness in space. But it is conceivable that the term "*apna shafi*" may be interpreted to mean pre-emptors who are near in space; both meanings are possible. If there is such a doubt, then it is the position of the plaintiff, and not of the defendant, that gets worse; for it is for the plaintiff, who seeks pre-emption, to establish his right to succeed, beyond a doubt. Unless and until he shows that the construction he wishes to put upon the terms of the wajib-ul-arz is the only reasonable construction, or at any rate, is a far more reasonable construction than that advanced by the defendant, he is not entitled to a decree.

Maulvi *Muhammad Ishaq*, for the respondent :—

As the wajib-ul-arz is silent as to the definition of the term "*apna shafi*," we have to look to the real meaning of the word '*shafi*' for our guidance. The meaning of the word '*shafa*' is conjunction and this signifies participation or contiguity in space. The word '*shafi*' therefore primarily signifies a person who is near in space, and not one who is near in blood; indeed, relationship is never a ground for pre-emption under the Muhammadan Law, which is the original law of pre-emption.

Again, the term "*apna shafi*" is to be interpreted in connection with the use of the words "*kisi patti*" immediately after the words "*agar koi hissedar*"; the addition of these words clearly indicates an intention that "*apna shafi*" should refer to a pre-emptor within the same patti; relationship was not contemplated at all.

Babu *Sital Prasad Ghosh*, in reply :—

The original etymological meaning of the word '*shafi*,' as understood in Muhammadan Law, is not a proper guide. The

question is, what was the meaning intended by the framers of the wajib-ul-arz? Presumably they were quite ignorant of the original meaning of the Arabic word '*shafi.*'

RICHARDS and TUDBALL, J. J.:—This appeal arises out of a suit brought to enforce a right of pre-emption in respect to a share in patti Munna Lal, mauza Pingri-Pingra, situated in the Shahjahanpur district. The vendor and pre-emptor were both co-sharers in the same patti. The vendee is a co-sharer in another patti, Bahadur Singh, of the same mahal. The sole question before us is whether on a true construction of the wajib-ul-arz the plaintiff respondent has or has not a preferential right over the defendant appellant. The court of first instance held that as the vendor and the pre-emptor were co-sharers in the same patti, the plaintiff had a right preferential to that of the defendant to purchase this property. On behalf of the vendee it was contended that the co-sharers in the village were divided into two classes, namely, those who were blood relations of the vendor, and those who were not. The court of first instance, however, held that the words *apna shafi* which occurred in the wajib-ul-arz, were equivalent to *hissedar qaribi* and that the plaintiff was entitled to pre-empt. The point was raised in the lower appellate court in grounds 3 and 4 of the memorandum of appeal. But as there is no mention whatsoever of the point in the lower court's judgement, it appears that it was not pressed to any extent in that court. The wajib-ul-arz runs as follows:—"If any co-sharer of a patti in the *khalisa* wishes to sell his share, he will do so paying due respect to his own pre-emptor (*apna shafi*), and if the latter refuse and all the other pre-emptors of the village (*aur sab shafian deh*) refuse, then he may sell to a stranger." The only other evidence in respect to the right of pre-emption is the judgement in a suit which was decided in 1902 which is of no use to us in construing the wajib-ul-arz as the point was not raised therein. On behalf of the appellant it is urged that it is for the plaintiff to clearly establish the custom upon which he relies, that the wajib-ul-arz now before the court is ambiguous in its meaning, and that it is impossible to say whether it gives a preferential right to one who is nearer in blood or to one who is nearer in space, and that the plaintiff has

1910

LAKHAN SINGH v. BISHAN NATH.

therefore failed to establish any custom under which he has a preferential right, and that therefore the suit should be dismissed. In so far as the original meaning of the word *shafi* is concerned, it is quite clear that it never contemplated the question of blood relationship. It means a conjunction, and under the Muhammadan Law there are three classes of pre-emptors: co-sharers in the subject-matter of sale: co-sharers in its appurtenances, and contiguous neighbours. If the original meaning be applied to the word *shafi* in the present case, it is clear that the interpretation placed by the court of first instance upon this document is a correct one. It is true that there are instances in these provinces of blood relations having a prior right of pre-emption under customs existing in certain villages. But these instances are comparatively rare as compared to those in which the prior right of pre-emption depends upon nearness of space. It seems to us that the interpretation placed by the court below is justified. In addition to this it seems to us that the wording of this wajib-ul-arz, wherein it speaks of a co-sharer of a patti in the *khalisa* selling his right, indicated that his co-sharers in that same patti would be his pre-emptors (*apna shafi*). We see no reason to differ from the interpretation placed by the court below. The appeal therefore fails and is dismissed with costs.

Appeal dismissed.

1910

December 21.

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

RAM SAHAI (DEFENDANT) v. AHMADI BEGAM AND OTHERS (PLAINTIFFS)*

Civil Procedure Code (1882), sections 13, 43—Res judicata—Dismissal of suit for redemption of a mortgage—Second suit for redemption of another mortgage of the same properties—Civil Procedure Code (1908), section 11; order II, rule 2.

Held that the dismissal of a previous suit for redemption of an alleged oral mortgage was no bar to the institution of another suit for redemption of a written mortgage in respect of the same properties of a different date. *Thrikaikat Madathil Raman* v. *Thiruthiyil Krishnen Nair* (1) followed.

THIS was an appeal under section 10 of the Letters Patent from a judgement of KARAMAT HUSAIN J. The facts of the

---

*Appeal No. 53 of 1910, under section 10 of the Letters Patent.

(1) (1906) I. L. R., 29 Mad., 153.