1910
November 30.

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

CHEPHUR AND OTHERS (DEFENDANTS) *v.* ABDUL HAKIM (PLAINTIFF) AND ABDUL WAHID AND OTHERS (DEFENDANTS).*

Pre-emption—Wajib-ul-arz—Construction of document—Partition of village—New wajib-ul-arzes prepared after partition.

The wajib-ul-arz of a village before partition provided for pre-emption in the following way:—"Rights of co-sharers as among themselves on the basis of custom or agreement. The custom of pre-emption obtains. In case of sale of property by a co-sharer, another co-sharer in the mauza can bring a suit for pre-emption. If he offers a low price, then the vendor can sell the property to a stranger." The village was divided by perfect partition into three mahals. New wajib-ul-arzes were drawn up after partition, and the condition as to pre-emption in each ran as follows:—"Rights of co-sharers *inter se* based on custom or agreement. The custom of pre-emption prevails. In case one co-sharer sells his share (*hakiat*), another co-sharer in the village (*hissedar sharik mauza*) can claim pre-emption. If he offers a smaller price the seller can sell it to a stranger." The plaintiff pre-emptor was a co-sharer in a different mahal from that in which the property sold was situate. The vendee was a stranger to the village. The entire body of co-sharers in the village were Muhammadans of the same stock, and continued so up to the time of partition.

Held, upon a construction of the language of the wajib-ul-arz and the circumstances of the case that the pre-emptor must succeed as against the stranger vendee, notwithstanding that a partition had taken place. *Janki* v. *Ram Partab Singh* (1) referred to.

THE facts of this case were as follows:—

A village was partitioned into three mahals in 1888. The wajib-ul-arzes prepared subsequently to the partition were exactly the same as the earlier wajib-ul-arz of the village. In that wajib-ul-arz a right of pre-emption was given to co-sharers "among themselves."

On a case of sale arising in one f the mahals a co-sharer in another mahal sought to pre-empt it and his claim was allowed by the court below. The defendant vendee appealed to the High Court on the ground that being a co-sharer in a different mahal, the pre-emptor was precluded from bringing the suit by the provision in the wajib-ul-arz that the right was to be confined to co-sharers "among themselves."

Munshi *Gobind Prasad*, for the appellants:—

* First Appeal No. 372 of 1909 from a decree of Hari Mohan Banerji, Additional Subordinate Judge of Cawnpore, dated the 8th of September 1909.

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

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The words of the wajib-ul-arz limited the right to co-sharers in the mahal; *Sahib Ali* v. *Fatima Bibi* (1), *Auseri Lal* v. *Ram Bhajan Lal* (2), *Dori* v. *Jiwan Ram* (3), *Badri Prasad* v. *Hashmat Ali* (4) and (5) *Mathra Prasad* v. *Nem Chand*.

Mr. *B. E. O'Conor* (with him Mr. *M. L. Agarwala*), for the respondent:—

No gradation in class of persons seeking to pre-empt was specified. The only idea was to keep strangers out, and the vendor was selling to a stranger. The actual word used was "*mauza*," which would include all the three mahals into which the village had been partitioned.

STANLEY, C. J. and BANERJI, J.—This appeal arises out of a suit for pre-emption of a share in the village of Mendla Patti in the district of Fatehpur. The vendee is a stranger to the village, while the pre-emptor is a share-holder in a mahal of the village, but not in the mahal in which the property which has been sold is situate. A partition of the village was effected in the year 1888, but prior to that partition, the wajib-ul-arz of the village had a provision in regard to pre-emption. The chapter in it dealing with pre-emption is headed "Rights of co-sharers as among themselves on the basis of custom or of agreement," and the custom is set forth as follows:—"The custom of pre-emption obtains. In case of sale of property by a co-sharer, another co-sharer in the mauza can bring a suit for pre-emption. If he offers a low price, then the vendor can sell the property to a stranger." Upon partition of the village three mahals were formed, and in one of these mahals the plaintiff is a co-sharer. This mahal, however, is not, as we have said, the mahal in which the property sold is situate. Upon partition a new wajib-ul-arz was framed, and it is largely upon the language of this wajib-ul-arz that the arguments before us have been based. It is practically in identical terms with the older wajib-ul-arz of 1876, so far as regards the custom set forth therein as to the right of pre-emption. The chapter is headed "Rights of co-sharers *inter se* based on custom or agreement," and the material portion of the paragraph dealing with pre-emption runs as follows:—"The

(1) (1909) I. L. R., 32 All., 63.
(2) (1905) I. L. R., 27 All., 602.
(3) (1910) I. L. R., 32 All., 265.
(4) (1904) 1 A. L. J., 33.
(5) (1905) 2 A. L. J., 261.

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custom of pre-emption prevails. In case one co-sharer sells his share (*hakiat*) another co-sharer in the village (*hissadar sharik mauza*) can claim pre-emption. If he offers a smaller (*sic*) price, the seller can sell it to a stranger." Now it has been repeatedly held that 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. We apply that rule to the case before us. It is clear that under the older wajib-ul-arz of 1876, upon the sale of a share in the village any co-sharer in the village had a right to pre-empt. There was, as it has been said, no gradation of parties to exercise the right. In the later wajib-ul-arz of 1888 the same right is maintained by the co-sharers in the mahal in respect of which the wajib-ul-arz was prepared. The language of the wajib-ul-arz is clear and explicit. It gives the right of pre-emption, in case of a sale to a stranger, to a sharer who is a sharer in the village, and to no other party. From its language we gather that it was the intention of the parties that the rule of pre-emption, as it had existed, should continue to prevail. In the column for observations are to be found the words "as before," which indicate that the old custom was to prevail. It has been stated by the learned counsel for the respondents, and not contradicted, that the co-sharers in the village in 1876 were Muhammadans, belonging to the same family, and that in 1888 the representatives of the same family were the sole proprietors of the village. If this be the case, then it seems to us to throw some light upon the wajib-ul-arz which is before us. As the entire body of co-sharers in the village were Muhammadans of the same stock and continued so up to the time of partition, it seems very probable that their intention in adopting the custom to be found in the earlier wajib-ul-arz was to exclude strangers, and to confine the right of pre-emption to the sharers in the village, whether they belonged to the same mahal or not. In view of the language of the wajib-ul-arz and of the circumstances, we think that the court below rightly interpreted it.

It is very difficult to distinguish the case from that of *Janki* v. *Ram Partap Singh* (1). In that case in a village which

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

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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.

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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.