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course the Collector of the district. According to section 2 of the Regulation it is only the Collector or other officer acting in that capacity that can impose a fine under that section. Section 4 provides for the levying of fine by the Collector as if it were arrears of public revenue, and section 5 of the Regulation gives a right of appeal to the Board of Revenue. It seems to be quite clear that proceedings cannot be taken under the Regulation by a Magistrate as such. The Joint Magistrate was not a Collector or other officer acting in that capacity within the meaning of the Regulation, and therefore had no jurisdiction under that section. But as he dealt with the case as a Magistrate, the Sessions Judge was entitled to deal with the case under section 435 of the Code of Criminal Procedure and this Court has power to set aside the order of the Joint Magistrate. The order of the Joint Magistrate is therefore set aside as having been passed without jurisdiction. The fine, if realized, will be refunded.

Order se aside.

FULL BENCH.

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July 19

BHIM SEN AND OTHERS (PLAINTIFFS) *v.* MOTI RAM AND ANOTHER (DEFENDANTS).*

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

Pre-emption—Wajib-ul-arz—Construction of document—Contract or custom—Presumption in absence of evidence that the record is one of custom.

Where it is not apparent, either from the language of the wajib-ul-arz itself or from other evidence, that the pre-emption clause of a wajib-ul-arz is merely the record of a new contract between the co-sharers, the presumption is that it is the record of a pre-existing custom. *Majidan Bibi* v. *Sheikh Hayatan* (1) followed.

The pre-emptive clause of a wajib-ul-arz was headed "Relating to the right of pre-emption" and ran as follows:—"If a co-sharer has to sell and mortgage his *haqiat*—then at the time of transfer it will be incumbent that he should, after giving information, sell and mortgage for a proper price, &c., &c." *Held* that this, in the absence of evidence to the contrary, indicated a pre-existing custom of pre-emption rather than a contract.

* Second Appeal No. 900 of 1909 from a decree of B. J. Dalal, District Judge of Shahjahanpur, dated the 16th of April, 1909, confirming a decree of Muhammad Mubarak Husain, Subordinate Judge of Shahjahanpur, dated the 24th of November, 1908.

(1) Weekly Notes, 1897, p. 3.

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THIS was a suit for pre-emption based on the wajib-ul-arz. The question was whether the record in the wajib-ul-arz was one of custom or contract. The clause of the wajib-ul-arz relating to pre-emption was worded as follows:—

Dafa chahardahum—dar-bab haq shafa :—Agar kisi hissedar-ko haqiat apni bai wa rahn aur murtahin (ko) haq murtahni rahn dar rahn karni ho to barwaqt intiqal-ke lazim hoga ke pahle apne hissedar qarib-ko aur darsurat inkar uske dusre hissedar deh-ko khabar dekar ba-qimat wajib bai wa rahn kare ; agar woh na lewe ya qimat wajib na de to usko ikhtiar hoga ke jiske hath chahe mutaqqil kare :—Section fourteenth—relating to the right of pre-emption. If a co-sharer has to sell and mortgage his *haqiat* and a mortgagee (has to) sub-mortgage, then at the time of transfer (it) will be incumbent that (he) should after giving information sell and mortgage for proper price (*qimat*) first to his near co-sharer and in case of his refusal, to another co-sharer of the village (*deh*) ; should he not take it or not give the proper price then he (the vendor) will have the power to transfer (it) to whomsoever he likes."

Both the courts below construed this as the record of a contract for pre-emption and accordingly dismissed the suit. The plaintiff appealed to the High Court.

Munshi *Govind Prasad*, for the appellant, contended that the wajib-ul-arz recorded a custom and cited *Majidan Bibi* v. *Sheikh Hayatan* (1), *Faizullah Khan* v. *Lok Nath* (2), *Manu Singh* v. *Hira Lal* (3), *Moti Ram* v. *Balwant Singh* (4) and *Ali Nasir Khan* v. *Manik Chand* (5).

Babu *Durga Charan Banerji* (for Dr. *Tej Bahadur Sapru*), for the respondent:—There was nothing to show that a right of pre-emption had existed before. On the contrary there was an indication of the record being that of a contract. In the heading the words are "relating to the right of pre-emption," which indicate a contract rather than a custom. Then if the record in the wajib-ul-arz were looked to, it would show that throughout the future tense was used, which again indicated that the practice was being introduced for the first time.

STANLEY, C. J.—This appeal arises out of a pre-emption suit. The court of first instance dismissed the plaintiffs' claim on the ground that the right set up by them was a right existing by

(1) Weekly Notes, 1897, p. 3.

(2) S. A. No. 641 of 1906; decided on the 15th of August, 1908.

(3) S. A. No. 822 of 1908, decided on the 25th of May, 1909.

(4) F. A. F. O. No. 113 of 1908, decided on the 27th of May, 1909.

(5) (1902) I. L. R., 25 All., 90.

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contract and not by custom, and that the period for which the contract was entered into having expired, the right came to an end. The same view was taken by the learned District Judge upon appeal to him. Hence this appeal to the High Court.

In consequence of a conflict in the decisions of the Court in regard to the construction of wajib-ul-arzes in the district of Shahjahanpur, corresponding to the wajib-ul-arz before us in this case, the appeal was sent to a larger Bench, so that there might be a binding decision of the Court upon the true meaning of the pre-emption clause in the wajib-ul-arz before us and similar clauses in other wajib-ul-arzes in regard to the right of pre-emption. The wajib-ulrarz runs thus:—"If a co-sharer has to sell and mortgage his *haqiat* and a mortgagee has to sub-mortgage, then at the time of transfer it will be incumbent that he should, after giving information, sell and mortgage for a proper price, first, to a near co-sharer, and in case of his refusal to another co-sharer in the village: should he not take it, or not give a proper price, then he (the vendor) will have power to transfer it to whomsoever he likes." This translation is admitted by the parties to be an accurate translation of the wajib-ul-arz in regard to pre-emption. The paragraph in which this right is set forth is headed "Relating to the right of pre-emption" (*dar-bab haq shafa*). It has been suggested that this heading indicates that the right was not one existing by custom, but arising out of contract, as the word "custom" is not used in the heading. I am not disposed to attach any importance to the omission of the word "custom" in the heading of paragraph 14. It appears to me that the words "relating to the right of pre-emption" would apply equally well to a right of pre-emption existing by custom as to a right of pre-emption arising out of contract. In the Full Bench case of *Majidan Bibi* v. *Sheikh Hayatan* (1) it was laid down that "if a wajib-ul-arz did not itself show, or if it was not otherwise proved that the pre-emption clause was merely the embodiment of a new contract as to pre-emption, the reasonable and proper construction of such a document would be that the pre-emption clause was merely the recital of a pre-existing custom in force in the village; and in such a case it would be for the

(1) Weekly Notes, 1897, p. 3.

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defendant in a suit for pre-emption to prove by clear evidence that no such custom had existed in the village, and that the vendor and the plaintiff had not agreed to be bound by the recital."

This rule I fully approve of. It has been followed in a number of cases [see *Baldeo Sahai* v. *Nagai Ahir* (1), also *Sewak Singh* v. *Girja Pande* (2)].

From the language of the wajib-ul-arz before us there is nothing to indicate that the pre-emption clause is merely the embodiment of a new contract. On the contrary, the language in which the paragraph is couched is equally applicable to a right of pre-emption existing by custom as it is to a right of pre-emption existing by contract. Applying, therefore, the rule that the presumption is in favour of custom, as there is nothing in the wajib-ul-arz to indicate that the right recorded therein is one arising from the contract of the parties, the words used in this wajib-ul-arz should be interpreted as recording a right existing by custom.

As regards the decisions of this Court, we find that in *Faizullah Khan* v. *Lok Nath* (3) (not reported), it was held that the right of pre-emption embodied in a wajib-ul-arz, of property in the Shahjahanpur district, similar to the record before us, was a right arising from contract. We have examined the judgement in that case, and we find in it that reliance was placed on the fact that nowhere in the plaint was custom set up. The learned Judges seem to have based their decision to some extent at all events upon this omission in the plaint.

In the case of *Manu Singh* v. *Hira Lal* (4) (not reported), the question before us was not raised. The learned Judges in their judgement point to the fact that it was not disputed by the parties that the right recorded in the wajib-ul-arz then before the Court, was a right existing by contract. This therefore may be treated as a decision of no account.

In three later unreported cases, namely, *Moti Ram* v. *Balwant Singh* (5), *Mohan Lal* v. *Bhola Nath* (6) and *Gopal Singh* v. *Dwarka Prasad* (7), it was held that language in the wajib-ul-arzes

(1) (1906) 3 A. L. J., 650.

(2) (1904) 2 A. L. J., 6.

(3) S. A. No. 641 of 1906, decided on the 15th of August, 1908.

(4) S. A. No. 822 of 1908, decided on the 25th of May, 1909.

(5) F. A. f. O. No. 118 of 1908, decided on the 27th of May, 1909.

(6) S. A. No. 1148 of 1908, decided on the 23rd of February, 1910.

(7) F. A. f. O. No. 96 of 1909, decided on the 16th of January, 1910.

in those cases similar to the language in the wajib-ul-arz before us should be interpreted as the record of a custom and not the record of a contract. I think these three last mentioned cases were rightly decided, and in the present case I would hold that the right recorded in the wajib-ul-arz is a right existing by custom.

I would therefore set aside the decrees of both the lower courts and remand the case to the court of first instance through the lower appellate court for decision upon the merits.

BANERJI, J.—I am of the same opinion. The rule as to the construction of documents of this nature was laid down in the case of *Majidan Bibi* v. *Sheikh Hayatan* (1). According to that rule a record in the wajib-ul-arz must be deemed to be the record of a custom unless the document itself indicates, or it is otherwise proved, that the pre-emption clause was the embodiment of a new contract. This rule has been adopted and followed in many subsequent cases. The wajib-ul-arz in the present case does not clearly show that it is the record of a contract relating to pre-emption. It must therefore be deemed to be the record of an existing custom.

As to the rulings in which a contrary view was held in regard to wajib-ul-arzes the terms of which are similar to those of the wajib-ul-arz in this case, I was a party to one of them, namely, Second Appeal No. 822 of 1908. As pointed out by the learned Chief Justice, it was not disputed in that case that the right recorded in the wajib-ul-arz was a right arising by contract. The lower court held that the wajib-ul-arz contained the record of a contract and this view of the lower court was not questioned in second appeal. Therefore it was not necessary in that appeal to consider whether the wajib-ul-arz contained the record of a contract or of a custom. That case is therefore no authority as to the interpretation to be put on the wajib-ul-arz in question. I agree in the order proposed by the learned Chief Justice.

CHAMIER, J.—There is nothing in the extract from the wajib-ul-arz before us which indicates that it was intended to record a contract. It is therefore presumably the record of a custom. I agree in the order proposed by the learned Chief Justice.

(1) Weekly Notes, 1897, p. 3.

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BY THE COURT:—The order of the Court is that the appeal be allowed, the decision of the lower court set aside, and the case remanded to the court of first instance through the lower appellate court, with directions that it be reinstated in the file of pending suits in its proper number and be disposed of on the merits, regard being had to the observations made by us in our judgements this day delivered. Costs here and hitherto will abide the event.

Appeal decreed: Cause remanded.

APPELLATE CIVIL.

1910
July 20.

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

AMIN BEG (PLAINTIFF) *v.* SAMAN (DEFENDANT).*

Marriage—Muhammadan law—Conversion of wife to Christianity—Dissolution of marriage—Suit for restitution of conjugal rights.

Under the Muhammadan Law a wife's conversion from Islam to Christianity effects a complete dissolution of marriage with her Muhammadan husband. The fact of such a conversion is therefore a bar to a suit by the husband for restitution of conjugal rights. *Zuburdust Khan* v. *His wife* (1) and *Imamdin* v. *Hasan Bibi* (2) followed.

THE plaintiff and defendant in this case had been Muhammadans married to each other according to the Muhammadan law. The wife became a convert to Christianity and left her husband. Thereafter the husband brought a suit for restitution of conjugal rights. Both the courts below dismissed the suit as unmaintainable.

The plaintiff appealed to the High Court.

Mr. *Ishaq Khan*, for the appellant, contended that under the Muhammadan law a wife who abandoned Islam should be forced to embrace it. This was, however, not possible now. If she was converted to Christianity, the previous relation did not come to an end, since there was no bar to a Muhammadan marrying a Christian lady. He relied on Ameer Ali's *Mahomedan Law*, 3rd edn., p. 432.

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* Second Appeal No. 1260 of 1909 from a decree of Banke Behari Lal, Additional Subordinate Judge of Aligarh, dated the 9th of October, 1909, confirming a decree of Kunwar Sen, Munsif of Bulandshahr, dated the 9th of August, 1909.

(1) (1870) 2 N-W. P., H. C. Rep., 370. (2) (1906) Punj. Rec., 309.