

before the Raja came in. It is, therefore, probable that the Raja's interest was of a temporary character. On the whole we think that the plaintiff established the existence of the custom of pre-emption he set up. This being so, the decree of the court below was correct. We, accordingly, dismiss the appeal with costs.

Appeal dismissed.

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GUPTESHWAR

RAM

v.

RATI

KRISHNA

RAM.

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May, 23.

Before Sir Henry Richards, Knight, Chief Justice, and Mr. Justice Tudball.

MUHAMMAD YASIN (PLAINTIFF) v. ILAHI BAKHSH and OTHERS (DEFENDANTS).*

Land-holder and tenant—Rights of tenants with respect to groves—Custom—Wajib-ul-arz—Construction of document—"Mālik."

The wajib-ul-arz of a village contained the following provision as to grove land:—"Persons who have planted a grove and who are in possession of a grove have the rights of an owner (*ikhtiyar malikana*). If any trees fall down, they can plant fresh trees without the permission of the zamindar. * * * When the land becomes denuded of all trees, the planter of the grove will have the first right to cultivate the land."

Held that these provisions implied a right of transfer in the possessor of grove land.

This was an appeal under section 10 of the Letters Patent from a judgement of BANERJI, J. The facts of the case sufficiently appear from the judgement under appeal, which was as follows:—

"This was a suit for possession of certain trees existing on plots of land Nos. 568 and 569, which are part of the waste land of the village. The parties to the suit are co-sharers in the zamindari. The plaintiff purchased the trees from one Jagaoli Lal under a sale-deed, dated the 20th of December, 1900. He alleged that the trees belonged to the predecessors in title of his vendor, that he was in possession by virtue of his purchase and that the defendants were wrongfully interfering with him and by virtue of an order of the criminal court had taken possession. The defendants stated that the trees belonged to the zamindars and had been planted by them, that the plaintiff's vendor or his predecessor was never in possession, and even if the trees were planted by Thakur Dayal, the ancestor of the plaintiff, he had left the village, and the trees had lapsed to the zamindars. It has been found by the lower appellate court that the trees in question were planted by Thakur Dayal, who was a member of a joint Hindu family; that Jagaoli Lal was the last male member of the joint family; that he was the owner of the trees; that Thakur Dayal or the plaintiff's vendor did not abandon the village, and that after the sale to the plaintiff the latter was in possession. The learned Subordinate Judge has also found that Thakur Dayal was not a tenant, by which he apparently means an agricultural tenant. But he holds that as it has not been shown that Thakur Dayal had no right to sell the trees, it must be presumed that he had such right. Accordingly the lower appellate court affirmed the decree of the court of first instance,

* Appeal No. 6 of 1912 under section 10 of the Letters Patent.

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decreasing the plaintiff's claim. It seems to me that for a proper determination of this suit it is necessary to ascertain certain facts which have not been found by either of the courts below. It should be found whether Thakur Dayal was in possession adversely to the zamindars. If he was not in adverse possession and planted the trees with the permission of the zamindars, it should be ascertained under what conditions he was allowed to plant the trees. If he planted the trees on the condition that he should have the right to enjoy the produce of the trees and should also be competent to sell them, the plaintiff has acquired a valid title to the trees. If, on the other hand, there was a restriction upon his right to transfer, the sale to the plaintiff can have no effect. There would still be the question whether by custom or otherwise a person planting trees with the permission of the zamindar has a right to sell the trees either to some of the zamindars or to strangers. I accordingly refer the following issues to the lower appellate court under order XLI, rule 25, of the Code of Civil Procedure: (1) By what right did Thakur Dayal plant the trees in question, and what was the nature of his possession of the trees? Was he in adverse possession of them? (2) Did Thakur Dayal plant the trees with the permission of the zamindars? (3) If he did so, what were the conditions, if any, under which he was permitted to plant the trees? (4) If no particular conditions were attached to his right of enjoying and selling them, had he by custom or otherwise a right to sell the trees in question? The court will take such evidence relevant to the above issues as may be adduced by the parties. On return of the findings ten days will be allowed for filing objections."

On receipt of the findings, BANERJI, J., held on a construction of the *wajib-ul-arz* that the plaintiff had failed to establish a custom giving the holder of a grove a right to sell the grove as such, though he might sell the timber, and accordingly allowed the appeal.

The plaintiff appealed.

Babu *Piari Lal Banerji*, for the appellant:—

The plaintiff as purchaser of the rights of the grove-holder was entitled to retain possession of the grove as such, as long as the grove retained its character. If the original grove-holder could not be dispossessed, there was no reason to hold that his transferee could be dispossessed. There is nothing in law to show that the right of a grove-holder is a mere personal right. The Tenancy Act which makes the interest of a non-occupancy tenant non-transferable does not apply to a grove-holder. This was decided in *Ismail Khan v. Mithu Lal* (1). Moreover, in the present case the *wajib-ul-arz* distinctly recorded the fact that grove-holders had rights of ownership with respect to their

grove. The word *malik* is most general and comprehensive, and, as observed by their Lordships of the Privy Council, implies absolute ownership unless there is anything in the surrounding circumstances to qualify such meaning; *Surajmani v. Rabi Nath Ojha* (1).

Mr. *Muhammad Ishaq Khan*, for the respondent.

It is quite clear that full rights of ownership were not given to a grove-holder. If such rights were given, the *wajib-ul-arz* would not record the fact that a grove-holder was not entitled to replant trees in case the trees fell down. The whole language of the *wajib-ul-arz* clearly controls the opening sentence.

Babu *Piari Lal Banerji*, was not heard in reply.

RICHARDS, C. J., and TUDBALL, J.—This appeal arises out of a suit in which the plaintiff claimed to recover possession of a grove. The court of first instance and the lower appellate court decreed the plaintiff's claim. On second appeal to this Court the decrees of the courts below were reversed and the plaintiff's suit dismissed. The facts are very simple and undisputed. The grove was planted by one Thakur Dayal with the consent of the zamindars. The plaintiff, who is also a zamindar, purchased it from Jagaoli Lal, the representative of Thakur Dayal, on the 20th of December, 1900. He has been ousted from possession by the other zamindars, who have been put into possession evidently under section 145 of the Code of Criminal Procedure. The *wajib-ul-arz* deals very fully with the rights of persons to plant groves. It is notorious that in some places it is considered by the zamindars themselves very desirable to encourage the planting of groves. The *wajib-ul-arz* in the present case shows that this was the case in the village in question. It provides that persons who plant with the consent of the zamindars, or are in possession of groves, are to have the rights of a *malik*. They can cut down and sell the trees on terms of paying one-fourth of the value of the timber to the zamindars. They are entitled to retain possession of the grove so long as it continues to have the characteristics of a grove. They are entitled when a tree is cut down, or falls down, to replace it with another without even asking the consent of the zamindar. Even after the trees have been cut down entirely, they are to have the first right to become tenants of the land at a

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rent payable to the zamindars. From the above recital of the wajib-ul-arz it would appear that the zamindars, on whose behalf the wajib-ul-arz was prepared, made provision not only for the actual planters of the groves but for persons who had become possessed of them. Furthermore, it is quite clear that long possession of the grove by persons other than zamindars was contemplated. Trees do not grow up in a day, and further the owner for the time being of the grove was entitled to renew it from time to time by planting fresh trees. It is, therefore, quite clear that the person who planted a grove with the consent of the zamindars acquired substantial right of a lasting and valuable nature. It is almost impossible to understand how in many cases the planter of a grove could enjoy to the full the benefits conferred upon him by the zamindars when he agreed to plant a grove unless he had a right to transfer it. The wajib-ul-arz contemplates enjoyment beyond an ordinary man's life. It almost seems to follow from the terms of the wajib-ul-arz itself that the planter of the grove had a right of transfer. *Prima facie* every man has a right to dispose of any property he possesses, whether it be a grove or anything else. Of course it frequently happens that the Legislature for reasons of policy places restrictions on rights of transfer; for example, in the case of certain tenancies, it is expressly provided by act of the Legislature that the tenant shall have no power to transfer, and if the grove in question was part of, or an appurtenance to, such a tenancy, it is clear that the tenant could not sell the trees. We know of no law which prohibits a person who has acquired rights similar to those of Jagaoli Lal from transferring such rights. Jagaoli Lal planted this grove and acquired all the rights and privileges mentioned in the wajib-ul-arz. There certainly is no legislative enactment prohibiting such a transfer. In the present case it is urged that there was a finding of the Court that there was no custom or evidence of a custom entitling a grove-holder to sell. In our opinion the wajib-ul-arz affords the strongest evidence that the grove-holder in the present case had an interest which he was entitled to transfer. Reliance is placed on an unreported case, Letters Patent Appeal No. 23 of 1909. In some respects the facts in that case were not altogether dissimilar to the facts in the present case, but it would appear from the judgement that there was this very

important distinction. The *wajib-ul-arz*, instead of stating that the planter of a grove was a *malik* of the grove, on the contrary, stated that the trees belonged to the zamindars. The only entry in favour of the defendant was a note to the effect that the tenants also claimed the trees. We think that this case is quite distinguishable from the case before us. In our opinion the decree of the lower appellate court on the facts of the present case was correct and ought to be restored. We, accordingly, allow the appeal, set aside the decree of this Court, and restore the decree of the lower appellate court with costs of both hearings in this Court.

Appeal allowed.

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FULL BENCH.

1912
March, 27.

Before Sir Henry Richards, Knight, Chief Justice, Mr. Justice Banerji, Mr. Justice Tudball and Mr. Justice Chamier.

HORI LAL AND ANOTHER (DEFENDANTS) v. MUNMAN KUNWAR AND OTHERS (PLAINTIFFS).*

Hindu law—Joint Hindu family—Mortgage—Purchase of mortgaged property by managing members—Suit for sale against managing members alone—Parties—Civil Procedure Code (1908), order XXXIV, rule 1.

Where in a suit for sale on a mortgage the defendants mortgagors were the managing members of a joint Hindu family, who in that capacity had purchased the mortgaged property, it was *held* that the family was sufficiently represented by the managing members and that the suit would not fail by reason of the non-joinder of the other members of the family.

The following cases were referred to in the judgements delivered by the various members of the Bench :—

Kishan Prasad v. Har Narain Singh (1), *Bhawani Prasad v. Kallu* (2), *Debi Singh v. Jia Ram* (3), *Ram Narain Lal v. Bhawani Prasad* (4), *Sheik Ibrahim Tharagan v. Rama Iyer* (5), *Kendall v. Hamilton* (6), *Daulat Ram v. Mehr Chand* (7), *Lala Surja Prasad v. Gulab Chand* (8), *Ramasamayyan v. Virasami Ayyar* (9), *Kunj Behari Lal v. Kandh Prashad Narain Singh* (10),

* Second Appeal No. 361 of 1911 from a decree of B. J. Dalal, District Judge of Shahjahanpur, dated the 31st of March, 1911, reversing a decree of Gokul Prasad, Subordinate Judge of Shahjahanpur, dated the 31st of January, 1911.

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| (1) (1911) I. L. R., 33 All., 272. | (6) (1879) L. R., 4 App. Cas., 504. |
| (2) (1895) I. L. R., 17 All., 537. | (7) (1887) I. L. R., 15 Calc., 70. |
| (3) (1908) I. L. R., 25 All., 214. | (8) (1900) I. L. R., 27 Calc., 724. |
| (4) (1881) I. L. R., 3 All., 443. | (9) (1890) I. L. R., 21 Mad., 222. |
| (5) (1911) 21 M. L. J., 508. | (10) (1907) 6 C. L. J., 362. |