1912
March 22.

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

MAWASI (PLAINTIFF) *v.* MUL CHAND AND OTHERS (DEFENDANTS).*

Pre-emption—Custom—Wajib-ul-arz—Owner of isolated revenue-free plots—Evidence of custom.

The pre-emptive clause of a wajib-ul-arz contained the following provision:—"If the owner of a share wish to sell it, he shall do so first to his near relation who may be a co-sharer in the zamindari, and in case of his refusal to anyone he likes."

Held that this by itself was not sufficient evidence of a custom giving owners of isolated revenue-free plots of land in the village a right to pre-empt.

This was a suit for pre-emption based upon an alleged custom, which was thus described in the wajib-ul-arz of the mahal concerned:—"If the owner of a share wish to sell it, he shall do so, first, to his near relation who may be a co-sharer in the zamindari, and in case of his refusal to anyone he likes." The plaintiff was the owner of two revenue-free plots of land in the mahal, and it was held by the court of first instance that this qualification was not sufficient to give him a right to pre-empt within the meaning of the wajib-ul-arz. The court accordingly dismissed the suit. The plaintiff appealed to the High Court.

The Hon'ble Dr. *Sundar Lal* and Dr. *Satish Chandra Banerji*, for the appellant:—

Babu *Jogindro Nath Chaudhri* and Pandit *Baldeo Ram Dave*, for the respondents:—

RICHARDS, C. J., and TUDBALL J:—This appeal arises out of a suit for pre-emption. The plaintiff is the owner of two small plots of land which are not assessed for Government revenue. The plots held by the plaintiff appear in the same *khewat* as the land which goes to make up a 20 biswas mahal. To this extent and no further can it be said that the plaintiff is a proprietor in in the mahal in which the property sold is situate. The 20 bighas, 3 biswas and 7 biswansis do not go to make up the 20 biswas share set forth in the *khewat*. The only evidence adduced by the plaintiff in support of the existence of a custom of pre-emption is the wajib-ul-arz. The wajib-ul-arz for mahal Chhidu is as follows:—"In this mahal if the owner of a share wish to sell it, he shall do so first to his near relation, who may be a co-sharer in the zamindari, and in case of his refusal to anyone he likes."

*First Appeal No. 365 of 1910, from a decree of Kalka Singh, Additional Subordinate Judge of Agra, dated the 9th of August, 1910.

The wajib-ul-arz for mahal Roti Ram is in similar terms. Now the custom which the plaintiff attempts to set up is a custom giving a right of pre-emption to a person who is only a co-sharer in the very limited sense which we have already stated, namely, he merely holds two revenue-free plots entered in the same *khewat* as the property which is sold, is situated. The probability of such a custom existing is very slight. In the Full Bench case of *Dalganjan Singh* v. *Kalka Singh* (1), the learned Chief Justice said:—"The most essential feature of the co-parcenary 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 the customs of the co-sharers of the mahal. 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 co-parcenary body for which it is framed. It seems to us that in considering the question of the existence or non-existence of a custom of pre-emption the principle involved in the foregoing remarks fully apply to the present case. The plaintiff is in no way liable for the payment of Government revenue in conjunction with the vendor. He has no right to have any voice in the management of the mahal in which the vendor's property is situate. In all probability he would not be consulted or have any right to be heard when the wajib-ul-arz was being framed. It is in all probability a mere accident that the plots of land which he holds came to be put into the *khewat* in which they are found. There is in short no community of interest. These are all matters which the court in considering the question of the existence or non-existence of a custom of pre-emption is entitled and bound to take into consideration. The wajib-ul-arz is not the custom. It is merely a piece of evidence to be given due consideration to in the course of the inquiry. The question is, whether by

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

1912

MAWASI
v.
MUL CHAND.

production of the wajib-ul-arz in question, without the support of a single instance in which the right has been claimed or exercised, the plaintiff has discharged the onus of proving the existence of a custom of pre-emption giving him as a proprietor of an isolated plot a right to pre-empt.

In our opinion, the evidence falls altogether short of anything of the kind, and the decision of the court below was quite correct. We accordingly dismiss the appeal with costs.

Appeal dismissed.

1912.
March 26

Before Mr. Justice Sir George Knox and Mr. Justice Sir Henry Griffin.

GHULAM NASIR-UD-DIN AND ANOTHER (JUDGEMENT-DEBTOR) v. HARDEO PRASAD (PURCHASERS OF THE DECREE) *

Act No. XV of 1877 (Indian Limitation Act), schedule II, article 178—Act No. IX of 9108 (Indian Limitation Act), section 15—Execution of decree—Limitation—Execution stayed by injunction.

In execution of a decree certain property was attached by the decree-holder by means of an application made on the 8th of July 1904. Objection was taken to the attachment, which was disallowed on the 10th of March, 1908. This was followed up on the 5th of April, 1905, by a declaratory suit against the decree-holder. An injunction was also granted on the 6th of April, 1905, whereby the sale of the property in suit was stayed. The suit terminated on the 26th of June, 1907, but the injunction lasted until January, 1909. The next application for execution was made on the 14th of April, 1910.

Held that this last application was within time whether the Limitation Act of 1877 or that of 1908 applied. It was not relevant that the decree-holder might possibly have obtained execution of the decree against other property of his judgement-debtor. *Behari Lal Misir* v. *Jagannath Prasad* (1) followed.

The facts of this case were as follows :—

The North-Western Bank, Limited, of Meerut, obtained a decree against the appellants and others on the 24th of December 1897. This was confirmed in appeal by the High Court on the 7th of February, 1900.

On the 8th of July, 1904, the decree-holders made an application for execution against the judgement-debtors in the court of the Subordinate Judge at Delhi, and attached certain property. Two persons, Hafiz Khairati and Hafiz Ahmad Husain, objected to the attachment under order XXI, rule 58 (old section 278) of the Code of Civil Procedure, but their objections were disallowed.

---

* First Appeal No. 179 of 1911, from a decree of Soti Raghubans Lal, Subordinate Judge of Meerut, dated the 26th of January, 1911.

(1) (1906) I. L. R., 28 All., 651.