1913
July, 1.

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

JANKI MISIR AND ANOTHER (DEFENDANTS) *v.* RANNO SINGH (PLAINTIFF) AND MAHADEO SINGH AND ANOTHER (DEFENDANTS.)*

Pre-emption—Custom—Evidence—Sales to strangers unchallenged, as evidence negativing custom—Mode in which such sales should be proved.

Where the court is trying the issue of the existence or non-existence of a custom of pre-emption, every instance of a sale to a stranger is material evidence which the court ought to take into consideration and weigh when coming to a conclusion on the issue. But a mere vague statement that there had been sales to strangers without the production of the sale-deeds or certified copies thereof and without some further details of the sale is not sufficient to prove sales to strangers. *Sewak Singh* v. *Girja Pande* (1) discussed.

THIS was a suit for pre-emption based upon an alleged custom as to the existence of which the principal evidence was an entry in the village wajib-ul-arz. The defendants disputed the construction of the entry in the wajib-ul-arz relied upon by the plaintiffs, and they also pleaded that there had been several cases in the village of sales to strangers in respect of which no claim for pre-emption had been made, and put forward these instances as evidence that the custom alleged did not exist. The court of first instance, however, decreed the claim and this decree was confirmed on appeal. The defendants vendees appealed to the High Court.

Mr. *A. P. Dube* and Dr. *S. M. Suleman*, for the appellants.

Dr. *Satish Chandra Banerji*, for the respondents.

RICHARDS, C. J. and TUDBALL, J.—This appeal arises out of a suit for pre-emption. Both the courts below decreed the claim. The defendant vendee appeals. He argues first that the extract from the wajib-ul-arz is ambiguous and not sufficient to prove the existence of the custom. He also argues that there was other evidence as to the non-existence of the custom which the court below has failed to appreciate; and lastly, it is argued that the court was not competent to set aside the lease mentioned in the plaint. We can see no ambiguity in the clause in the wajib-ul-arz. We, therefore, think that the courts below were right in holding that it was good *prima facie* evidence of the existence of a custom of pre-emption in this village, and that it was an incident of that custom that a relation *ek-jaddi* had preference over a co-sharer who was not

*Second Appeal No. 445 of 1913 from a decree of L. Marshall, District Judge of Jaunpur, dated 15th of January, 1913, confirming a decree of Gopal Das Mukerji, Munsif of Jaunpur, dated 10th of June, 1912.

(1) (1904) 2 A. L. J., 6.

ek-jaddi. The court below has found that the lease was not *bond fide* and was merely part of a scheme to avoid pre-emption. We are bound by this finding in second appeal, and therefore we cannot differ from the court below on this question. One of the witnesses for the defendant vendee deposed that there had been several sales to strangers. The court of first instance refers to the decision in *Sewak Singh* v. *Girja Pande* (1). STANLEY C. J., at page 9 of the report, says :—"The mere fact that evidence was given that sales and mortgages had taken place in the villages as to which no pre-emptive claim had been made does not negative the existence of the custom." With great respect, we think that this remark goes too far. In our opinion, where the court is trying the issue of the existence or non-existence of a custom every instance of a sale to a stranger is material evidence which the court ought to take into consideration and weigh when coming to a conclusion on the issue. In the present case having regard to the remarks of the court of first instance, which have been more or less accepted by the lower appellate court, we have gone into and considered the evidence that was given by the vendee on the subject of sales to strangers. The only evidence there was was that of a witness who was undoubtedly somewhat hostile to the plaintiff, in which he stated in vague terms that during his recollection these 5—7 sales were to strangers. In not a single one of these alleged cases was the sale-deed produced, nor were even the names of the majority of the vendees mentioned. Except for the vague statement that the sales were to strangers, the court was not informed who the vendees were. In our opinion, this was not the proper way to prove instances of sales to strangers. The sale-deeds should have been produced, or certified copies of them. It should be clearly and distinctly proved to the court who the vendees were and any other circumstances connected with the sales. Under these circumstances, we see no sufficient reason to set aside the decree of the court below. We, therefore, dismiss the appeal with costs.

Appeal dismissed.

(1) (1904) 2 A.L.J., 6.