1914

MATA PRASAD v. BARAN BARHAI.

of the Indian Penal Code was made in the court of the Munsif of Gorakhpur city and was dismissed by him. The party applying for sanction carried the matter to the court of the District Judge, as he was entitled to do, under clause (6), section 195, of the Code of Criminal Procedure, with the result that the District Judge passed an order granting the sanction. The parties against whom the sanction was granted have filed these three connected appeals in this Court. A preliminary objection is taken that under the provisions of section 195 of the Code of Criminal Procedure aforesaid it was not intended that the question of granting or withholding a sanction should be carried to a third court. There is clear authority of a bench of this Court in support of this objection in the case of *Kanhai Lal* v. *Chhadammi Lal* (1), where the facts were precisely similar to those of the case now before us. We have been asked to reconsider this ruling both with reference to the decision of a Full Bench of the Madras High Court in *Muthuswami Mudali* v. *Veeni Chetti* (2), and to other cases referred to in the abovementioned ruling of this Court. So far as we are aware the reported decision of this Court has never been dissented from and has been accepted in this Court for the last five or six years. On the principle of *stare decisis* we do not think it expedient to reconsider that decision, or the arguments on which it was based. We hold accordingly that no appeal lies to this Court against the orders complained of and we dismiss each of the three appeals now before us with costs.

Appeal dismissed.

1914
May, 13.

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

FAZAL HUSAIN (PLAINTIFF) *v.* MUHAMMAD SHARIF AND ANOTHER (DEFENDANTS).*

Pre-emption—Wajib-ul-arz—Custom—Evidence—Entry in wajib-ul-arz clear and unrebutted.

Where there is an entry in the wajib-ul-arz as to the right of pre-emption which is clear and distinct and there is no evidence to the contrary, the court

* Second Appeal No. 608 of 1913 from a decree of Durga Datt Joshi, District Judge of Azamgarh, dated the 4th of March, 1913, confirming a decree of Udit Narain Sinha, Subordinate Judge of Azamgarh, dated the 18th of November, 1912.

(1) (1908) I.L.R., 31 All., 48. (2) (1907) I. L. R., 30 Mad., 382.

1914

FAZAL HUSAIN v. MUHAMMAD SHARIF.

ought, having regard to the prevailing practice, to hold that the custom of pre-emption exists. *Returaji Dubain* v. *Pahlwan Bhagat* (1) referred to. *Dhian Kunwar* v. *Diwan Singh* (2) distinguished.

THIS was a suit for pre-emption based on village custom, in proof of which the plaintiff relied on an entry in the wajib-ul-arz of 1861, supported by a judgement of the year 1866. There was no evidence to displace the effect of the entry in the wajib-ul-arz. The court of first instance, however, did not consider the evidence adduced by the plaintiff to be sufficient, and dismissed the suit, and on appeal this decree was upheld. The plaintiff thereupon appealed to the High Court.

Maulvi *Muhammad Ishaq*, for the appellant.

Dr. *Surendra Nath Sen*, for the respondents.

RICHARDS, C. J., and TUDBALL, J.—This appeal arises out of a suit for pre-emption. The plaintiff adduced in evidence, in support of the existence of this custom, an extract from the wajib-ul-arz of 1861. He also produced a judgement of 1866 which shows that the right of pre-emption was at least asserted and that the pre-emptor got possession, though possibly on a compromise decree. Both the courts below have dismissed the plaintiff's claim. The question for us to decide is whether or not the evidence which the plaintiff adduced was sufficient, in the absence of all evidence to the contrary, to establish the custom under which he claimed. In the full Bench case of *Returaji Dubain* v. *Pahlwan Bhagat* (1) it was decided that the entry in the wajib-ul-arz of a right of pre-emption was to be taken *primâ facie* as a record of a custom rather than of a contract, and that the mere fact that at the beginning of the wajib-ul-arz, or at the end, a word such as "*ikrarnama*" appears is not sufficient to make the entry, an entry of a contract and not of a custom. Almost every wajib-ul-arz does contain certain matters which are arrangements between the co-sharers. Nor is the mere fact that there are entries of arrangements in the wajib-ul-arz sufficient to prevent the entry of pre-emption from being read as a record of custom. In the courts below and in this Court the case of *Dhian Kunwar* v. *Diwan Singh* (2) was quoted and relied upon on behalf of the defendants. In that case the only evidence adduced on behalf of the plaintiff was an extract from one wajib-ul-arz,

(1) (1911) I. L. R., 33 All., 196. (2) (1911) 8 A. L. J., 786.

The lower appellate court had dismissed the plaintiff's claim and this court affirmed its decree. If the case is carefully looked into, it will be seen that the case was entirely decided upon its own facts and circumstances. The wajib-ul-arz was of an unusual nature, and in the very same clause in which reference to pre-emption was made, reference was made to a number of other matters which could not possibly have been matters of custom. Furthermore, the plaintiff in his plaint had referred to an earlier wajib-ul-arz but had not filed it. The case was decided, as we have said, on its own facts and circumstances. In the present case the record is quite clear and free from ambiguity, nevertheless the case might have been quite different if the defendants had gone into evidence and had shown, from the history of the village or other circumstances, that it was very improbable or impossible that a custom of pre-emption had grown up in the village. They might have shown (if such was the case) that there had been a number of sales to strangers, or that the entry of the right of pre-emption in different wajib-ul-arzes were necessarily inconsistent. If the defendants had gone into any such evidence the court might very well have come to the conclusion that the entry in one wajib-ul-arz standing alone was insufficient to support the allegation of the existence of the custom, but where there is an entry in the wajib-ul-arz which is clear and distinct, and there is no evidence to the contrary, we think the court ought, having regard to the prevailing practice, to hold that the custom of pre-emption exists. The result is that we must allow the appeal, set aside the decrees of the courts below and remand the suit to the court of first instance, through the lower appellate court, with directions to re-admit it under its original number and to proceed to hear and determine the case according to law. Costs here and heretofore will be costs in the cause.

Appeal allowed.