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

MUHAMMAD MAHBUB ALI KHAN (PLAINTIFF) *v.* RAGHUBAR DAYAL AND OTHERS (DEFENDANTS).*

1915 *July*, 28.

Pre-emption—Wajib-ul-arz—Custom—Effect of perfect partition.

The wajib-ul-arz of an undivided village supported a finding that there existed a custom of pre-emption amongst the co-sharers in the village. Subsequently to the framing of this wajib-ul-arz a perfect partition of the village took place.

Held that the basis of such a custom was the coparcenary relation, and that after partition a co-sharer in one mahal could not claim pre-emption in respect of property sold in another mahal in which the pre-emptor was not a co-sharer. *Dalganjan Singh* v. *Kalika Singh* (1) and *Ganga Singh* v. *Chedi Lal* (2) referred to.

THIS was a suit for pre-emption based upon custom, in support of which reliance was placed on a wajib-ul-arz of the village in which the property sold was situate of the year 1865. At that time the village consisted of a single mahal ; but since then had been the subject of a perfect partition. The land sold was in a different mahal from that in which the pre-emptor was a co-sharer. The court of first instance dismissed the suit, holding that, although the wajib-ul-arz of 1865 was evidence of a custom then in existence, it did not apply to the altered circumstances of the village at the date of the suit so as to afford the plaintiff a basis for his claim. The plaintiff appealed to the High Court.

The Hon'ble Dr. *Tej Bahadur Sapru* and Mr. *Ibn Ahmad*, for the appellant.

The Hon'ble Dr. *Sundar Lal*, for the respondents.

RICHARDS, C.J., and TUDBALL, J. :—This appeal arises out of a suit for pre-emption. The court below has dismissed the claim. The plaintiff adduced, as evidence of the existence of the custom, an extract from the wajib-ul-arz of 1865. The court below has considered the history of the village. It has also considered the the terms of wajib-ul-arz. The language used in the wajib-ul-arz coupled with the history of the village strongly suggests that what was recorded in the wajib-ul-arz of 1865 was not an existing custom but an arrangement between the co-sharers. We are not prepared to dissent from the view taken by the court below that a custom of pre-emption has not been proved in the present case.

* First Appeal No. 435 of 1913, from a decree of Khirod Gopal Banerji, Officiating Subordinate Judge of Budaun, dated the 2nd of September, 1913.

(1) (1899) I. L. R., 22 All., 1. (2) (1911) I. L. R., 33 All., 605.

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There is, however, another matter which we think is fatal to the plaintiff's claim. Since the wajib-ul-arz of 1865 perfect partition has taken place in the village and the plaintiff was not at the time of the sale a co-sharer *with the vendor*. His property was situate in a separate mahal. There was no joint and several responsibility between the plaintiff and the vendors for the payment of the Government revenue assessed upon their respective properties. Neither had any voice in the management or share in the enjoyment of the other's zamindari. It lay upon the plaintiff in the present case not merely to prove the existence of *some* custom of pre-emption, he had to prove the existence of a custom under which he himself had a right, that is to say, he had to prove the existence of a custom which gave a right to a person who was not a co-sharer with the vendor. The great importance in pre-emption cases of the co-parcenary relationship has been pointed out in the case of *Dalganjan Singh* v. *Kalika Singh* (1), and also in the case of *Ganga Singh* v. *Chedi Lal* (2). The only evidence of the existence of a custom in the present case was the extract from the wajib-ul-arz to which we have referred. But that record clearly relates *to a right between co-sharers*, because at that date partition had not taken place and all the proprietors in the village were co-sharers with each other. We are not deciding that the custom (assuming that there was one) ceased as the result of partition. The custom continues, but the plaintiff not being a co-sharer with the vendor is no longer within the custom. We think that the plaintiff gave no evidence of the existence of a custom which gave a person who was not a co-sharer with the vendor a right of pre-emption. We dismiss the appeal with costs.

Appeal dismissed.

(1) (1899) I. L. R., 22 All., 1. (2) (1911) I. L. R., 33 All., 605.