15. In the present case that was this Court. Further, we are of opinion that the Subordinate Judge was not entitled to take any action on the printed copy of the judgement of their Lordships of the Privy Council without proof that an order in Council had followed thereon; for what has to be enforced or executed is not the judgement or recommendation of their Lordships, but the order in Council. The result is that appeals Nos. 135, 363 and 264 are allowed and Birj Lal's applications are dismissed with costs in both courts. Appeals Nos. 246 and 359 are dismissed with costs.

We have been informed that, since the disposal of the applications referred to above by the Subordinate Judge, an application was made by Inda Kunwar to this Court under order XLV, rule 15, Civil Procedure Code, and on her application the order of His Majesty in Council has been transmitted to the court of the Subordinate Judge in order that it may be executed. We may point out that, as the order in Council has now reached the court of the Subordinate Judge, it is open to all parties to apply to the Subordinate Judge for such relief as they may be entitled to without making any further application to this Court under order XLV, rule 15, of the Code of Civil Procedure.

*Appeal decreed.*

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

KHAYALI RAM AND ANOTHER (DEFENDANTS) *v.* KALI CHARAN AND OTHERS (PLAINTIFFS.) *

1915 *May*, 28.

*Pre-emption—Wajib-u l-arz—Partition of village—Right of co-sharers in different mahals to pre-empt* inter se.

A certain village prior to 1873 consisted of one mahal which was sub-divided into two *pattis*. The wajib-ul-arz of that year recorded a custom of pre-emption first, with near relations, then with co-sharers in the *patti* and lastly with co-sharers in the village. Subsequently the village was divided into a number of different mahals, and at the last settlement a new wajib-ul-arz was drawn up for each of the new mahals in similar terms. The plaintiff, a proprietor in the village though not a co-sharer in the mahal, brought a suit for pre-emption. *Held* that the plaintiff was no longer a co-sharer with the vendor

* Second Appeal No. 1284 of 1914, from a decree of G.C. Badhwar, District Judge of Mainpuri, dated the 18th of July, 1914, confirming a decree of Ladli Prasad, Subordinate Judge of Mainpuri, dated the 15th of May, 1913.

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and therefore had no preferential right as against the vendor who was grove-holder in the village.

THE facts of this case were as follows :—

The plaintiff, not a co-sharer in the mahal in which the property sold was situate, but a proprietor in the village, brought this suit for pre-emption. In evidence he produced a wajib-ul-arz of 1873 which recorded a right of pre-emption in favour of (i) near relations (ii) co-sharers in the patti and (iii) co-sharers in the village. At that time the village was only divided into two pattis and consisted of one mahal. Later, the village was partitioned into separate mahals and each mahal had a wajib-ul-arz of its own which recorded that the old custom was to remain in force. The courts below decreed the claim. The defendants appealed to the High Court.

Babu *Girdhari Lal Agarwala*, 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. The plaintiff is not a co-sharer in the mahal, although he is a proprietor in the village. The vendees also are not co-sharers in the same mahal. They are stated to be grove-holders in another mahal. The plaintiff adduced in evidence an entry in the wajib-ul-arz of 1873. This records that there is a right of pre-emption, first, with own brothers and nephews, then with cousins who are co-sharers, then with co-sharers in the *patti* and then with co-sharers in the village. At that time the village consisted of one mahal, which was sub-divided into two *pattis*. We may point out here that the court below has made a very important mistake. It states that the village was then divided into two mahals. The other evidence in support of the existence of the custom consisted of the wajib-ul-arz which was framed at the last settlement. By this time the village had been divided into a number of different mahals and at the time of the settlement a new wajib-ul-arz was drawn up for each of the new mahals in similar terms. In each of these wajib-ul-arzes it is recorded that the old custom should remain in force. The question is whether the plaintiff has proved by these two entries the existence of a custom which gave him a right to pre-empt this property against

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the defendants, he not being a co-sharer in the same mahal. We agree that, whatever the custom was prior to the partition, it still continued. We have to see what that custom was. The only evidence being the entry in the wajib-ul-arz, we must look to this document in order to find out what the custom (if any) was. It is not contended in the present case that either parties are related to the vendor. Therefore that part of the wajib-ul-arz which refers to relationship may be left out of consideration. It is quite clear that the remaining part refers entirely to a custom existing between co-sharers because at that time all the proprietors in the village were *co-sharers with each other.* In the events which have happened *the plaintiff is no longer a co-sharer with the vendor.* He has ceased to have any community of interest with him. In this view it seems perfectly clear that there was no evidence of the existence of a custom *between persons who are not co-sharers.* After partition has taken place the owner in one mahal is no longer able to bring himself within the custom where the property sold is situate in the other mahal. We allow the appeal, set aside the decrees of both the courts below and dismiss the plaintiffs' suit with costs in all courts.

*Appeal decreed.*

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*Before Sir Henry Richards, Knight, Chief Justice, and Justice Sir Pramada Charan Banerji.*

1915
*June*, 29.

BISHESHAR DAS AND OTHERS (PLAINTIFFS) *v.* AMBIKA PRASAD (DEFENDANT).*

*Civil Procedure Code* (1908), *section 73, order XXXVIII, rules* 5, 8, 10; *order XXI, rules* 52 *and* 63—*Effect of attachment before judgement—Property deposited in court—Decree—Priority—Suit for a declaration that attachment before judgement did not confer any title on the attaching creditor.*

A got certain property belonging to B attached before judgement. The property being of a perishable nature it was sold and the proceeds were deposited in court. Subsequently one C obtained a decree against B and applied for the satisfaction of his decree out of the sum of money that was lying in court A filed an objection and it was allowed by the court. After A had obtained his decree, the sum deposited in court was distributed rateably between A and C. C brought the present suit for a declaration that he was entitled to get his

* Second Appeal No. 581 of 1914, from a decree of Gokul Prasad, Subordinate Judge of Allahabad, dated the 21st of February, 1914, reversing a decree of Sidheshwar Maitra, Munsif of Allahabad, dated the 29th of March, 1913.