1917
April, 11.

APPELLATE CIVIL.

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

KAMR-UN-NISSA BIBI (DEFENDANT) *v.* SUGHRA BIBI (PLAINTIFF) AND MUHAMMAD ISMAIL AND ANOTHER (DEFENDANTS).*

Pre-emption—Custom—Effect on pre-existing custom of village coming to be owned by a single individual.

When a mahal in respect of which there exists a custom of pre-emption comes into the ownership of a single individual, the effect is to put an end to the custom, and not merely that the custom falls into abeyance.

THE facts material for the purposes of this report are as follows:—

Sheikh Muhammad Ismail and Musammat Zamina Bibi, defendants second party and respondents in this appeal, sold a 4 annas share in mauza Dhelwa to Musammat Kamr-un-nisa Bibi on the 16th of May, 1913. There were two other deeds of transfer between the same parties. Musammat Sughra Bibi, a co-sharer in the village, claimed to pre-empt the properties transferred, and brought three separate suits, one in regard to each of the properties, basing her claim on custom and contract as entered in the wajib-ul-arzes of 1840 and 1881, and in the alternative on Muhammadan law. For the purposes of this report it may be assumed that both the wajib-ul-arzes recorded custom. It appeared, however, that in 1881 there was a single proprietor in the village. The court of first instance dismissed the plaintiff's suit on the ground that there could exist no custom when there was but a single proprietor. It also held that the demands required by Muhammadan law had not been made and that there was no contract. The plaintiff appealed to the District Judge, who allowed the appeal on the ground that the custom had been proved and held that the fact that in 1881 there was only one proprietor did not go to show that the right of pre-emption was discontinued, but it only put an end to the exercise of that right. The defendant, first party, thereupon appealed to the High Court.

The Hon'ble Sir *Sundar Lal* (Mr. *Abdul Raoof*, Maulvi *Mukhtar Ahmad* and Munshi *Kamla Kant Varma* with him),

* Second Appeal No. 139 of 1916, from a decree of Ram Prasad, District Judge of Ghazipur, dated the 14th of September, 1915, reversing a decree of Muhammad Husain, Subordinate Judge of Ghazipur, dated the 20th of February, 1915.

submitted that as soon as a single person became the owner of the property the custom came to an end For the existence of a custom it was necessary that there should be at least two persons. The view of the learned District Judge was incorrect.

Dr. *S. M. Suleman* (for Maulvi *Iqbal Ahmad*), submitted that the custom of pre-emption should not be held to have disappeared. It was only in abeyance during the time the village was in the hands of a single proprietor. Now that there were more proprietors than one the custom was again enforceable.

The Hon'ble Sir *Sundar Lal* was not called upon to reply.

RICHARDS, C. J., and TUDBALL, J. :—This appeal is connected with S. A. No. 140 and No. 141 of 1916. They were all disposed of by one judgement. All three appeals arise out of pre-emption suits. The plaintiff in each case came into court seeking to pre-empt certain property and relying both upon alleged village custom and Muhammadan law. The court of first instance in each case dismissed the suit. The lower appellate court reversed the decree of the court of first instance. That court has held that there is an existing custom of pre-emption under which the plaintiff is entitled to get possession of the property upon payment of the price found to have been paid by the defendant vendee. The court below, having decided that the custom of pre-emption existed, felt it unnecessary to consider whether the formalities required by Muhammadan law had been complied with. We may assume for the purposes of the present appeal that some time prior to the year 1881, there was a custom of pre-emption prevailing, which was recorded in the wajib-ul-arz of 1840. We find, however, that some time prior to 1881 and in the year 1887, the mahal was the property of a single proprietor. It seems to us quite impossible that there could be a custom of pre-emption in existence when the property belonged to a single individual. The lower appellate court seems to have thought that it was merely the right to exercise the power that was in abeyance. We do not think that this view can be accepted. "Custom" means a practice prevailing amongst a certain community. If that community has been reduced to a single individual, it is impossible that the practice can any longer exist. It seems to us equally clear that once the property had come into the ownership

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of a single individual, that individual was entitled to dispose of his property to any one he pleased without it being subject to any right of pre-emption (unless the sale was made expressly subject to such right). We have already decided this same question in another case. See F. A. No. 302 of 1910, decided on the 22nd of March, 1912 (*Powell* v. *Powell*). In our opinion the court below was wrong in holding that a custom of pre-emption existed at the time of the sale in question. No doubt a custom might grow up again in the course of time, but there is no evidence to justify any such finding in the present case and this is not the finding of the court below. Nor can it be said that a contract between the co-sharers has been proved. In 1881 (when the latest record of pre-emption was made) the property was, as already stated, in the hands of a single proprietor. The fact that there is such a record appearing in the wajib-ul-arz of a mahal in the hands of a single proprietor is another instance that the entry in the wajib-ul-arz is not always trustworthy. Before finally deciding the appeal, we must refer the second issue to the court below, namely, whether the formalities required by the Muhammadan law were performed by the plaintiff, pre-emptor. This issue will be deemed to be taken in all three cases and the court will decide the issue upon the evidence already on the record.

Issue remitted.

APPELLATE CRIMINAL.

1917
April, 12.

Before Justice Sir Pramada Charan Banerji and Mr. Justice Piggott.

EMPEROR *v.* HASHIM ALI.*

Act (Local) No. II of 1916 *(United Provinces Municipalities Act), sections* 185, 186—*Erection of building without sanction of municipal board—Prosecution—Notice for demolition of building not necessary before prosecution.*

Where it is found that a building for which the sanction of a municipal board is required has been erected either without such sanction or in contravention thereof, it is not necessary for the board to direct the demolition of the building before it can prosecute the person who has erected it.

* Criminal Appeal No. 193 of 1917, by the Local Government, from an order of F. Rustamji, Special Magistrate, second class, of Lalitpur, dated the 14th December, 1916.