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degrees of nearness in the same class of pre-emptors. For instance, all who come within the definition of *shafi shariq* stand on the same footing. In this view the plaintiff and the vendee are both *shafi shariq* and are entitled to share the property which has been sold.

The result is that S. A. No. 696 of 1920 will stand decreed. The decree of the court below will be set aside and that of the court of first instance re-instated. S. A. No. 697 of 1920 will stand dismissed. We think that in view of the circumstances the parties should pay their own costs in this Court and in the lower appellate court. The actual result of the two appeals is that the decree of the court of first instance is restored in its entirety.

Appeal No. 696 *decreed.*
Appeal No. 697 *dismissed.*

Before Mr Justice Tudball and Mr. Justice Sulaiman.

PARBHU DAYAL (PLAINTIFF) *v.* JAMIL AHMAD AND ANOTHER (DEFENDANTS)*

1921
August, 4.

Act No. X of 1873 (*Indian Oaths Act*), *section* 11—*Pre-emption—Custom—Offer by guardian of minor defendant to be bound by oath of plaintiff—Extent to which minor is bound thereby—Wajib-ul-arz—Perfect partition—Survival of custom of pre-emption.*

In a suit for pre-emption the guardian *ad litem* of one of the defendants, who was a minor, agreed that if the plaintiff, holding Ganges water in his hands, took an oath that he had not refused to take the property in suit before the sale-deed was executed, then his suit should be decreed. The plaintiff took the oath and swore that no offer had ever been made to him and that had not refused to purchase the property. *Held* that so far as the statement of fact—that the plaintiff had not refused to purchase the property—was concerned the minor defendant was bound; but not with regard to the agreement that the suit should be decreed. *Chengal Reddi* v. *Venkata Reddi* (1) and *Sheo Nath Saran* v. *Sukh Lal Singh* (2) referred to.

A *wajib-ul-arz* of 1875 mentioned the existence of a custom of pre-emption relating to two categories of pre-emptors, viz., *shariq patti qaribi* and *shariq patti digar*. In 1894 there was a perfect partition and in the *wajib-ul-arz* then framed a third class of pre-emptors was added, namely,

* Second Appeal No. 1434 of 1919, from a decree of Shibendra Nath Banerji, Officiating Subordinate Judge of Allahabad, dated the 27th of August, 1919, reversing a decree of Sidheshwar Maitra, Munsif of Allahabad, dated the 15th of March, 1919.

(1) 1889) I. L. R., 12 Mad., 483. (2) (1899) I. L. R., 27 Calc., 229.

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co-sharers in other mahals. *Held* that the effect of the *wajib-ul-arz* of 1894 was not to abrogate the previous custom of pre-emption, but merely to add by agreement a third class of pre-emptors which would be preferred to strangers.

THE facts of this case are fully stated in the judgment of the Court

Mr. *A. P. Dube*, for the appellant.

Maulvi *Haidar Mehdi* (for whom the Hon'ble *Saiyid Raza Ali*), for the respondents.

TUDBALL and SULAIMAN, JJ.:—This is a plaintiff's appeal arising out of a suit for pre-emption. The plaintiff alleged that the amount of Rs. 1,300 entered in the sale-deed was fictitious. On behalf of the defendants the custom of pre-emption was denied and it was further pleaded that an offer had been made to the plaintiff and he had refused to purchase, and that the true consideration had been entered in the sale-deed. So far as the amount of consideration was concerned the parties agreed in the court of first instance that it should be fixed at Rs. 1,150. After this the guardian *ad litem* of the defendant, minor, made a statement that if the plaintiff, holding Ganges water in his hands, took an oath that he had not refused to take this property before the sale-deed, then his suit should be decreed. This was duly recorded by the court. The plaintiff agreed to take the oath which was administered to him. The plaintiff swore that no offer had ever been made to him and that he had not refused to purchase it.

On behalf of the defendant no evidence was produced to prove that any offer had been made to him at all, nor was any further rebutting evidence to disprove the existence of the custom adduced. The court of first instance decreed the suit, holding that the custom of pre-emption had been fully established by the entries in two successive *wajib-ul-arzes*, and in addition to that, it was of opinion that the defendant was bound by the oath of the plaintiff. The suit was decreed on payment of Rs. 1,150. On appeal the learned Officiating Subordinate Judge has dismissed the suit. In his opinion the defendant minor was not bound by the statement of his guardian *ad litem* that the suit should be decreed. He was also of opinion that the subsequent *wajib-ul-arz* of 1894 introduced a variation in the custom, under which

the plaintiff was no longer entitled to succeed. In this view of the matter he has dismissed the suit *in toto*. The plaintiff has come up in appeal to this Court and on his behalf the findings of the learned Officiating Subordinate Judge are challenged. As to the question whether the defendant minor was bound by the statement of his guardian *ad litem*, we are of opinion that the admission can bind him only partially. Accepting the offer made on behalf of the defendant's guardian *ad litem*, the plaintiff took the oath and swore that he had not made any refusal. The minor was, therefore, bound by the statement made by the plaintiff. This is clear from a perusal of section 11 of the Oaths Act of 1873. The case of *Chengal Reddi* v. *Venkata Reddi* (1) and the case of *Sheo Nath Saran* v. *Sukh Lal Singh* (2) are clear authorities on this point. At the same time we think that the statement of the defendant's guardian that the suit should be decreed cannot absolutely bind the minor, because that part of the statement would amount to a compromise or agreement by the guardian which had not been sanctioned by the court, nor had the court considered whether it was for the benefit of the minor. As a compromise it required the sanction of the court, which had not been obtained.

In these circumstances all that we can say is that the defendant is bound by the statement of the plaintiff that there had been no refusal on his part.

Going into the question, however, we are of opinion that the conclusion arrived at by the learned Officiating Subordinate Judge that the *wajib-ul-arz* introduced a variation in the custom is not correct. The first *wajib-ul-arz* of 1875 mentioned only two categories of pre-emptors, namely, *sharik patti qaribi* and *sharik patti digar*, and persons coming under either of these categories had clearly a preferential right as against a stranger. In 1894 there was a partition and the old village was divided into a number of mahals. Ordinarily, if there was no express agreement between the co-sharers, a co-sharer in one mahal not being a co-sharer with owners of other mahal, would have no right to pre-empt a share sold in that other mahal. We find, however, that in 1894 a special provision was entered in the *wajib-ul-arz*

(1) (1889) I. L. R., 12 Mad., 483. (2) (1899) I. L. R., 27 Calc., 229.

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that after *sharik patti qaribi* and *sharik mahal qaribi*, co-sharers in other mahals will have a right of pre-emption as against a person who is an entire stranger to the village. The addition of the third category of pre-emptors in our opinion cannot be said to bring about an alteration in the original custom. The original custom existed among the entire community who owned the village and in spite of the partition they clearly seem to have agreed that the old right of pre-emption *inter se* should continue. This is simply a keeping alive of the old custom and not in any way abrogating or extinguishing it. In fact, all that it can amount to would be an addition or a fresh agreement under which a right of pre-emption was agreed to subsist even after the partition. The *wajib-ul-arz* of the year 1894 is a *primâ facie* evidence of custom and that evidence is strengthened by the subsequent entry in the partition papers of 1894. There is absolutely no rebutting evidence on behalf of the defendant and we are of opinion that the view taken by the first court was correct.

No other question remains undisposed of. We accordingly set aside the decree of the lower appellate court and restore that of the court of first instance with costs in all courts. We extend the time for deposit of the purchase money to two months from this date.

Appeal allowed.