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which was not cited before the Subordinate Judge in this case, is clearly an authority for the appellant, with which I agree. The decision in *Guru Das* v. *Secretary of State for India* (1), does not touch this case, though, if I may say so, I entirely agree with it. It dealt with land retained by the claimant, which would be injuriously affected by the proximity of the sewage dépôt, amounting ordinarily to an actionable nuisance, and also with compensation for severance. I think the appellant is right and that this head of claim is excluded by section 24, clause (3).

[On receipt of the answer to the reference, the original Bench held that the respondent was not entitled to any sum over and above the market value of the land awarded to him.]

Appeal allowed.

PRIVY COUNCIL.

J. C.*
1927
March, 4.

SHEOBARAN SINGH (PLAINTIFF) v. KULSUM-UN-NISSA AND OTHERS (DEFENDANTS).*

[On appeal from the High Court at Allahabad.]

Pre-emption—Insolvency—Custom of Pre-emption—Wajib-ul-arz—Sale by Official Assignee—Provincial Insolvency Act (III of 1907), section 16, sub-section 2(a).

When a share in a village in which a custom of pre-emption exists has vested in the Official Assignee under the Provincial Insolvency Act, 1907, section 16, a sale by him is subject to the custom. An Official Assignee takes the property of an insolvent exactly as it stood in his person, with all its advantages and all its burdens.

The record in a wajib-ul-arz of a custom of pre-emption is sufficient to establish the custom without oral evidence in confirmation. *Digambar Singh* v. *Ahmad Sayed Khan* (1), followed.

* *Present*:—Viscount DUNEDIN, Sir JOHN WALLIS and Sir LANCELOT SANDERSON.

(1) (1900) 18 C.L.J., 244.
(2) (1914) I.L.R., 37 All., 129; L.R., 42 I.A., 10.

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A right of pre-emption recorded in a wajib-ul-arz is to be presumed to be recorded as a customary right, not as arising out of a contract between the co-sharers, or as being merely their wish or intention, unless the language clearly shows the contrary. It is only a right by custom which should be recorded. *Keturaji Dubain* v. *Pahlwan Bhagat* (1), approved.

Whether a person *entitled to pre-empt* loses or does not lose his right if he attends an auction sale of the property and does not bid, he does not lose his right if the auction is of the property together with arrears of rent, all in one lot.

Decree of the High Court (I. L. R., 42 All., 402), reversed.

APPEAL (No. 149 of 1924) from a decree of the High Court (March 13, 1920) reversing a decree of the Additional Subordinate Judge of Aligarh.

The suit was brought by the appellant who claimed that by custom he had a right of pre-emption in respect of a 15 biswas share in a mauza. The share in question had belonged to a co-sharer with the appellant in the mauza, but the owner had been declared an insolvent under the Provincial Insolvency Act, 1907, upon a creditor's application. His property had vested under the Act in the Official Assignee who had sold the share to the first defendant, now represented by the respondents.

The first defendant by his written statement denied the existence of the custom alleged, and pleaded that if there was a custom it was not applicable in the circumstances of the case.

The facts appear from the judgement of the Judicial Committee.

The trial Judge decreed the suit, but an appeal to the High Court was allowed, and the suit was dismissed. The learned Judges (TUDBALL and RAFIQUE,

(1) (1911) I.L.R., 33 All., 196.

JJ.), held that assuming that a custom of pre-emption existed in the village, it did not apply to the sale by the Official Assignee, as the sale was involuntary and was not a sale by a co-sharer. Also they were of opinion that the plaintiff's failure to bid at the auction, of which he had notice, amounted to a refusal to purchase. The appeal is reported at I. L. R., 42 All., 402.

1927. February 1, 15. *De Gruyther, K. C.*, and *Dube*, for the appellant:—The appellant was entitled to pre-empt. There can be no effectual relinquishment of the right to pre-empt until a sale has been completed, and the right operates in the case of a sale in an insolvency: *Kanhai Lal* v. *Kalka Prasad* (1). That case was rightly decided, since the principle of pre-emption rests upon a right to be substituted for a purchaser who is not a co-sharer: *Gobind Dayal* v. *Inayatullah* (2), *Kamta Prasad* v. *Mohan Bhagat* (3), *Budhai Sardar* v. *Sonaullah Mridha* (4), *Subhagi* v. *Muhammad Ishak* (5), *Janki* v. *Girjadat* (6). The decision in *Indraj v. Brother Clement*, Missionary (7), was erroneous. The effect of the vesting in the Official Assignee is that he is placed in relation to the property in the same position as the insolvent. The statement in the wajib-ul-arz established the custom: *Digambar Singh* v. *Ahmad Sayed Khan* (8), *Balgobind* v. *Badri Prasad* (9).

Dunne, K. C., and *Wallach*, for the respondents. The appellant's failure to bid at the auction was a renunciation of any right which he had to pre-empt:

(1) (1905) I.L.R., 27 All., 670.
(2) (1885) I.L.R., 7 All., 775.
(3) (1909) I.L.R., 32 All., 45.
(4) (1914) I.L.R., 41 Calc., 943.
(5) (1884) I.L.R., 6 All., 463.
(6) (1885) I.L.R., 7 All., 492.
(7) (1915) I.L.R., 37 All., 262.
(8) (1914) I.L.R., 37 All., 129; L.R., 42 I.A., 10.
(9) (1923) I.L.R., 45 All., 413; L.R., 50, I.A., 196.

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Naunihal Singh v. *Ram Ratan* (1), *Shamsher Singh* v. *Piari Dat* (2), *Nathi Lal* v. *Dhani Ram* (3). In any case the custom did not apply, as the sale was not by a co-sharer and was involuntary. Further, no custom of pre-emption was proved. The wajib-ul-arz did not use the word "custom"; it really recorded merely an arrangement between the co-sharers, or the views of the co-sharers, as in *Anant Singh* v. *Durga Singh* (4).

DeGruyther, K. C., in reply. In *Digambar Singh* v. *Ahmad Sayed Khan* (5), the wajib-ul-arz did not specifically state the right as a custom. Having regard to the duty of the revenue officers to record only customs, a statement in a wajib-ul-arz should be presumed to refer to a custom unless the contrary clearly appears: *Returaji Dubain* v. *Pahlwan Bhagat* (6). The auction sale was not merely of the share but also of the accrued rent.

March 4. The judgement of their Lordships was delivered by Viscount DUNEDIN:—

In this case, pre-emption in a share in a village is claimed by a co-sharer as against the buyer from the assignee in bankruptcy of another co-sharer. The claim was decreed by the Subordinate Judge, but his judgement was reversed and the case dismissed by the High Court of Allahabad on appeal.

There was another like suit by another co-sharer.

The circumstances are these. Rai Bahadur Shri Kishan Das was a co-sharer of the plaintiff and others in the village of Peotha Gokalpur. On the 26th of September, 1913, he was declared insolvent by the Bombay High Court, and all his property, including the share in question, was vested in the Official

(1) (1916) I.L.R., 39 All., 127.
(2) (1918) I.L.R., 40 All., 690.
(3) (1917) 15 A.L.J., 315.
(4) (1910) I.L.R., 32 All., 363; L.R., 37 I.A., 196.
(5) (1914) I.L.R., 37 All., 123; L.R., 42 I.A., 10.
(6) (1911) I.L.R., 33 All., 196 (216).

Assignee of Bombay. The Official Assignee put up the property for sale at Aligarh by public auction on the 8th of November, 1914. A bid was made but was not accepted by the Official Assignee, and the sale was re-advertised for the 6th of December, 1914. A bid of Rs. 40,000 was made by one Sheoraj Singh, and he was declared purchaser, subject to confirmation by the Official Assignee. On the next day the auctioneer received a private offer of a greater amount. The result of the private offer was that the property was sold privately for Rs. 41,000 to a purchaser, since dead, who is represented by the respondents. The plaintiff and appellant alleges that there was in this village a customary right of pre-emption among the co-sharers, and that he is entitled to have that right made good. It was objected by the respondents that the appellant ought to have exercised his right of pre-emption by bidding at the sale. There was a good deal of discussion as to whether the right of pre-emption was always open until a concluded sale, or whether the person in right of pre-emption, if he finds the property is going to be exposed to public sale, is bound to go there and bid. It is unnecessary to consider this matter for this reason, that it appears that what was put up at the auction was not the property pure and simple, but the property plus arrears of rent all in one lot, so that the only sale of the property pure and simple was the private sale, of which, admittedly, the appellant had no notice.

The further defence was twofold and consists of two parts: (1) A denial of the custom of pre-emption in the village; (2) an argument that if such pre-emption is assumed or proved, it does not operate against the purchaser at a sale from an Official Assignee in bankruptcy.

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As to the custom of pre-emption, the Subordinate Judge held this proved. The High Court did not inquire as to whether this was so or not; they decided in favour of the respondents on the second point on the assumption that the custom was proved. Before this Board, however, the respondents strongly urged that no custom had been proved.

Admittedly, the proof in favour of the custom is provided only (for oral testimony may be disregarded) by an entry in the wajib-ul-arz of the village, which is as follows :—

" 'Wajib-ul-arz' of mauza Piplot Gokulpur, pargana Koil, district Aligarh, prepared in 1280 Fasli.

" Paragraph 18.—As to the transfer of property and the right of pre-emption :—Each co-sharer is entitled to transfer his property, but he should transfer it first to a co-sharer, the descendant of a common ancestor, and in case of refusal on his part to other co-sharers in the village, and if they also do not take it, then to any one he may like. If there be any dispute between the transferor and the person having a right of pre-emption as to the amount of price, then it will be decided with reference to the rate at which property is sold in the neighbouring villages."

The respondents argued that a wajib-ul-arz alone is not sufficient, and that the present entry does not actually mention custom, and may, therefore, refer to contract and not to custom.

The weight to be given to entries in wajib-ul-arz has been considered on more than one occasion by this Board.

In the case of *Digambar Singh* v. *Ahmad Sayed Khan* (1), the custom of pre-emption was held good, and it was laid down that a statement in the wajib-ul-arz of a village that there is a custom of pre-emption, which is not in contravention of law, is good *prima facie* evidence of the custom, without corroborative evidence of instances in which it has been

(1) (1914) I.L.R., 37 All., 129; L.R., 42 I.A., 10.

exercised. And upon the entry in the wajib-ul-arz alone, the custom was held proved.

In the case of *Balgobind* v. *Badri Prasad* (1), though it was a case where it was sought actually to alter the law of inheritance, nevertheless, their Lordships said this :—

"When it is not shown by reliable evidence that the settlement officer neglected to perform his duty or was misled in recording a custom, and it does not appear that the statement of the custom is ambiguous, the record in a wajib-ul-arz of a custom is most valuable evidence of the custom, much more reliable evidence than subsequent oral evidence given after a dispute as to the custom has arisen."

They found the custom proved.

The respondents appealed to the case of *Anant Singh* v. *Durga Singh* (2), where an alteration of the law of inheritance was held not proved, but the *ratio decidendi* is clearly given in the judgement of the Board, where it is said :

"Where, as here, from internal evidence it seems probable that the entries recorded connote the views of individuals as to the practice that they would wish to see prevailing, rather than the ascertained fact of a well-established custom, the learned Judicial Commissioners properly attached weight to the fact that no evidence at all was forthcoming of any instance in which the alleged custom had been observed."

The respondents sought to say that the entry here was ambiguous and to criticize it on the ground that it did not use the word "custom" and, therefore, might be a record of either a contract or mere wish and intention. On this point their Lordships wish to refer to a very valuable judgement by CHAMIER, J., in a Full Bench judgement in the case of *Returaji Dubain* v. *Pahlwan Bhagat* (3). He points out that the terms of the circulars show that the revenue authorities meant customs of pre-emption to be recorded

(1) (1923) I L.R., 45 All., 413; L.R., 50 I.A., 196.
(2) (1910) I.L.R., 32 All., 363; L.R., 37 I.A., 196.
(3) (1911) I.L.R., 33 All., 196.

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in brief and general terms, and he sums up the situation thus :—

"We have all of us seen wajib-ul-arzes which contain provisions which ought not to be in them. In some, no doubt, language may be found which shows clearly an attempt to create a right of pre-emption. In others, there is an obvious contract between the co-parceners for a right of pre-emption. But where the contrary is not shown, a provision in a wajib-ul-arz relating to pre-emption should be presumed to be the record of a custom, and this rule has been affirmed repeatedly by this Court."

It is also to be kept in view that it is easier to hold established a custom, which, as here, only proves a well-recognized adjunct to the ordinary law, than it is where the law is said to be actually altered, as, e.g., in the case of a change in the rule of succession. In the present case their Lordships have no doubt that the entry in the wajib-ul-arz is a record of a custom, and they hold the custom proved.

Turning now to the second point, which affords the ground of judgement in the High Court. Their *ratio decidendi* is really contained in a single sentence :—

"Now, in the circumstances of the present case, this being the custom, it is clear that no co-sharer has sold his share at all."

And again :—

"We find it impossible to hold the view that a village custom which refers only to a voluntary sale by one co-sharer of his property can in any way apply to the case of an involuntary sale carried out against his wishes by a court through a Collector or an Official Assignee, or anybody else."

With deference to the learned Judges, it seems to their Lordships that this overlooks one of the fundamental principles of all arrangements for the realization and distribution of a bankrupt's property. In every system of law the form may vary, but in all

there is an official, be he called an assignee or trustee or any other name, and that official is by force of the statute invested in the bankrupt's property. But the property he takes is the property of the bankrupt exactly as it stood in his person, with all its advantages and all its burdens. The working out of the view taken by the learned Judges would lead to curious results. After all, in a custom of pre-emption there is, so to speak, a debtor and creditor side: the debtor side is the obligation of the holder of the share to offer it to a co-sharer; the creditor side is the right of the co-sharer to buy. The property, if fettered, would be presumably somewhat less valuable than if it were free. But if the view of the learned Judges were right, the bankruptcy of *A* would have the double effect of forfeiting something belonging to *B* and of rendering the property of *A* more valuable in the hands of his Official Assignee than it was in his own.

It was pointed out that a sale in execution of a decree transferred the property free from a claim of pre-emption. The reason is simple. The Code of Civil Procedure arranging for sale under a decree mentions and deals with rights of pre-emption and gives those who hold them certain rights. Now whenever a statute deals with certain rights it is easy to conclude that it deals with the total ambit of those rights and leaves nothing standing outside the provisions of the statute. An illustration of this doctrine may be found in the case of *Attorney-General* v. *De Keyser's Royal Hotel* (1). As an illustration of how there is no privilege of person may be taken the case of *Collector of Futtehpore* v. *Syud Yad Ali* (2), where the Government as standing in right of a convict had to submit to the right of pre-emption. Just, therefore,

(1) (1920) A.C., 508. (2) (1866) 1 N.-W. P. H. C. R., 83.

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as if the conveyance had been made to an individual, that individual would have had at once the disadvantage and the privilege of the custom of pre-emption, so the Official Assignee was in the same position and could only sell what he got.

Their Lordships will, therefore, humbly recommend His Majesty that the appeal should be allowed and the judgement of the Subordinate Judge restored, the appellant to have his costs before this Board and in the court below.

Solicitors for appellant: *Douglas Grant* and *Dold*.

Solicitor for respondent: *H. S. L. Polak*.

MISCELLANEOUS CIVIL.

Before Mr. Justice Mukerji.

1926 *November*, 18.

ALLAHABAD UNION BANK, LTD. *v.* JAGESHAR PRASAD SHUKUL.*

Company—Liquidation—Banker and customer—Question whether in certain circumstances a customer should rank as a secured or an unsecured creditor.

One *JP* left some money with a bank and received a pass-book in which it was stated that the money was left on deposit. As a matter of fact, however, the practice was this: *JP* used to secure borrowers who would agree to pledge ornaments by way of security. The borrower was taken by *JP* to the manager of the bank or he would go to the manager with a note from *JP*. The ornaments were kept by the bank by way of security and money was advanced on interest at the rate of 12 per cent. per annum. Out of this interest *JP* used to get 9 per cent. and the bank 3 per cent. No money belonging to *JP* used to be lent by the bank except on security of ornaments. Similarly, when a man came to redeem his ornaments, he would either take *JP*

* Miscellaneous Case No. 340 of 1924.