suit from the plaintiffs. The appellant (Asafuddaula Khan) will get his costs from the respondents Nos. 1 to 3 (Abdul Ghaffar, Raghubar Dayal Singh and Munawwar Khan) in this Court in all events.

Appeal allowed.

1927

ASAFUDDAULA KHAN *v.* ABDUL GHAFFAR.

APPELLATE CIVIL.

Hasan and Raza, JJ.

Before Sir Louis Stuart, Knight, Chief Judge and Mr. Justice Gokaran Nath Misra.

MAHESH BAKHSH SINGH (PLAINTIFF-APPELLANT) v. BALA DIN (DEFENDANT-RESPONDENT).*

1927 *August*, 25.

*Pre-emption—Suit by a person not a co-sharer in the village but only related to the mortgagor, maintainability of—*Wajib-ul-arz *conferring a right of pre-emption on a mortgage or sale—Suit for pre-emption not on mortgage but on foreclosure, maintainability of.*

Held, that no right of pre-emption exists in Oudh, whether under a custom recorded in the *wajib-ul-arz* or under the Oudh Laws Act, in a person who has got no proprietary right in a village. Relationship alone is not sufficient to confer a right of pre-emption on any one; the claimant must be a co-sharer in the village also.

Where under the terms of a *wajib-ul-arz* a mortgage gives rise to a right of pre-emption and the person entitled to that right does not chose to enforce his right at that time, he cannot enforce the same right when the said mortgage is foreclosed under the terms of the same *wajib-ul-arz*.

Messrs. *Ram Bharose Lal* and *Raj Narain Shukla*, for the appellant.

Mr. *Radha Krishna*, for the respondent.

STUART, C. J., and MISRA, J. :—This is an appeal in a pre-emption suit. In the year 1917 one Lachman Singh, defendant-respondent No. 2, mortgaged a share

*First Civil Appeal No. 3 of 1927, against the decree of Pandit Damodar Rao Kelkar, Subordinate Judge of Rai Bareli, dated the 18th of October, 1926, dismissing the plaintiff's claim.

1927

MAHESH BAKHSH SINGH v. BALA DIN.

Stuart, C. J., and Misra, J.

of Mohal Fatch Singh, situate in village Ranmau, district Rai Bareli, to one Bala Din Sah, defendant-respondent No. 1. On the basis of the said mortgage, Bala Din Sah obtained a decree for foreclosure against Lachman Singh on the 4th of November, 1925, which was made absolute. The plaintiff-appellant Mahesh Bakhsh Singh, who claims to be a collateral of Lachman Singh, has brought the present suit for pre-emption, urging his claim on two grounds, firstly, that he is a co-sharer in the Mohal and has, therefore, a preferential right to purchase the property in comparison with Bala Din Sah, secondly, that even if his co-sharership be not proved, he is entitled to claim pre-emption on the basis of a custom recorded in the village *wajib-ul-arz*.

In defence it was contended on behalf of the mortgagee decree-holder, Bala Din Sah, that the plaintiff was not a co-sharer in Mohal Fatch Singh, in which the property in suit lay, and therefore he had no right to pre-empt. The custom set up by the plaintiff was also denied.

The learned Subordinate Judge of Rae Bareli, who tried the suit, held that the plaintiff's co-sharership was not established. He also held that the plaintiff had failed to establish the custom relied upon by him. On these findings he dismissed the plaintiff's suit.

In appeal the same points have been taken on behalf of the plaintiff in the grounds of appeal. Mr. *Ram Bharose Lal*, the learned Pleader for the plaintiff-appellant, did not press the point relating to the co-sharership of the plaintiff-appellant. He did not challenge the finding of the learned Subordinate Judge on that point. The only contention which was pressed by him was that his client's right to pre-empt the property in spite of the fact that he was not a co-sharer was proved, and in support of his contention paragraph 4 of the *wajib-ul-arz* of the village Ranmau was relied.

Paragraph 4 of the *wajib-ul-arz* of the said village states that the custom relating to transfer and inheritance mentioned in paragraph 4 of the *wajib-ul-arz* of village Malkha applies to this village also. Paragraph 4 of the *wajib-ul-arz* of village Malkha relating to transfer and inheritance runs as follows :—

> "Every co-sharer has power to transfer his share by sale and mortgage, but this custom obtains in our family and regarding it we have mutually arrived at a settlement, that so long as the line of Mohan Singh, our ancestor, subsists, sale and mortgage cannot be effected in favour of a stranger not belonging to that line."

It is contended that, according to the said *wajib-ul-arz*, it is not necessary that the plaintiff should be a co-sharer. It is quite sufficient for the success of his case if he can show that he belongs to the line of Mohan Singh. We regret we cannot accept this construction of the *wajib-ul-arz*. So far as we are aware no right to pre-empt has ever been held to exist in Oudh whether under a custom recorded in the *wajib-ul-arz* or under the Oudh Laws Act (XVIII of 1876) in a person, who has got no proprietary right in the village. Relationship alone is not considered to be sufficient to confer a right of pre-emption on any individual. In our opinion, therefore, the true construction to be placed upon the *wajib-ul-arz* is that the person having a right of pre-emption in this village Ranmau in accordance with the terms of the *wajib-ul-arz* must be a person belonging to the line of Mohan Singh, and must be a co-sharer in the village. The words of the *wajib-ul-arz* can be considered to apply only to a co-sharer in the village, who belongs to the line of Mohan Singh. In our opinion any other construction of the *wajib-ul-arz* would lead to absurd and impossible results. It is now admitted in appeal before us that the

1927

MAHESH BAKHSH SINGH v. BALA DIN.

plaintiff-appellant is not a co-sharer in Mohal Fateh Singh. He is not, therefore, entitled to pre-empt, though he may be considered to belong to the line of Mohan Singh. This point alone is sufficient to dispose of the plaintiff's appeal.

Stuart, C. J., and Misra, J.

We would, however, like to mention another point, as it struck us during the course of the arguments of this appeal. Even if we accept the interpretation attempted to be placed upon the *wajib-ul-arz* by the learned Pleader for the plaintiff-appellant, there is a further difficulty, it appears to us, in the way of the plaintiff-appellant. If the plaintiff-appellant be deemed to possess a right to pre-empt under the terms of the *wajib-ul-arz* it is clear that the said right must be deemed to have accrued to him, when the mortgage of 1917 was executed in favour of the defendant-respondent Bala Din Sah, on the basis of which he has obtained his foreclosure decree. The plaintiff-appellant brought no suit whatever to enforce his right to pre-empt at the time of the execution of the mortgage of 1917. If he did not chose to enforce his right of pre-emption at that time, it appears to us, he cannot enforce the same right, when the said mortgage has now been foreclosed. Under the terms of the *wajib-ul-arz*, apart from the provisions of the Oudh Laws Act (XVIII of 1876), the right to pre-empt accrues only either in the case of a mortgage or in the case of a sale. There is no provision for the exercise of the right of pre-emption in the case of a decree for foreclosure. Such a right can only be deemed to accrue to the plaintiff under the provisions of the Oudh Laws Act. He does not profess to have brought his suit under the provisions of the said Act, because his claim could not be entertained under the said Act, since he is not a co-sharer. It, therefore, appears to us that if the plaintiff takes his stand on the *wajib-ul-arz*, he must bring his case within the four corners of that *wajib-ul-arz*. The said document provides

1927

MAHESH BAKHSH SINGH v. BALA DIN.

for pre-emption only in the case of mortgage and sale. We are, therefore, of opinion that the plaintiff lost his right to pre-empt, when he did not bring the suit for pre-emption in respect of the mortgage of 1917. If he did not enforce the right of pre-emption in respect of that mortgage, he cannot obviously be allowed to pre-empt, when that right is lost to him and when the mortgage of 1917 has become free from the liability of being pre-empted.

Stuart, C. J., and Misra, J.

We are, therefore, of opinion that there is no force in this appeal and we, therefore, dismiss it with costs.

Appeal dismissed.

APPELLATE CIVIL.

Before Mr. Justice Muhammad Raza.

SARJU SINGH (PLAINTIFF-APPELLANT) *v.* DHANI RAM (DEFENDENT-RESPONDENT).*

1927 *August*, 25.

Civil Procedure Code (Act V of 1908) order XXXII, rule 4(3)—Guardian ad litem *for a suit, appointment of—Consent of a person to be appointed guardian for a suit, whether to be express—Implied consent of person to be appointed guardian* ad litem.

Held, that the consent of a proposed guardian *ad litem* required by sub-rule 3 of rule 4 of order XXXII of the Code of Civil Procedure need not be express, but it may be an implied one. *Vasireddi Sriramulu* v. *Putcha Lakshminarayana* (1), *Chhattar Singh* v. *Tej Singh* (2), *Thakur Tajeshwar Dutt* v. *Lakhan Prasad Singh* (3), and *Shiam Bahadur and others* v. *Brij Kishore and others* (4), relied upon.

Mr. *Hakimuddin*, for the appellant.

Mr. *D. K. Seth*, for the respondent.

*Second Civil Appeal No. 179 of 1927, against the decree of Pandit Sheonarain Tewari, First Additional Subordinate Judge, Lucknow, dated the 8th of February, 1927, reversing the decree dated the 30th of September, 1926, of M. Munir-ud-din Kirmani, Second Munsif, Lucknow District.

(1) (1924) I.L.R., 47 Mad., 783. (2) (1921) I.L.R., 43 All., 104.
(3) (1923) I.L.R., 2 Pat., 296. (4) (1927) 4 O.W.N., 356.