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akin to that of the Court of the King's Bench. It has its power of superintendence over all inferior civil and criminal courts, and it has power to protect its subordinate courts from improper interference in the administration of justice. In my opinion it will be absurd to think that this Court, which is the custodian and protector of public justice throughout the province, has no power to deal with the contempt of subordinate courts. It is absolutely necessary that this Court should have such power and authority and exercise it.

Thomas, C. J.

I entirely agree with the view taken by my learned brother Justice YORKE. I, therefore, answer the reference in the affirmative.

FULL BENCH: *By Court*—(THOMAS, C.J., ZIAUL HASAN and YORKE, JJ.,): We answer the question referred to the Full Bench in the affirmative

F. B.

APPELLATE CIVIL

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Before Mr. Justice A. H. deB. Hamilton

RAM DIN AND ANOTHER (PLAINTIFFS-APPELLANTS) *v.* THAKUR BALBHADDAR SINGH AND ANOTHER (DEFENDANTS-RESPONDENTS)*

Customs—Grove-holders' right of transfer—Wajib-ul-arz recording custom that grove-holders cannot transfer—No evidence that grove-holders had agreed to the terms of Wajib-ul-arz—Evidentiary value of wajibularz—Wajibularz recording custom applicable to whole taluqa—No proof of number of villages and groves in the taluqa—Instances of a few transfers, value of—Appeal—Finding as to existence of custom based upon wrong conclusions drawn from certain instances—Second appeal against decision, if lies.

Where the wajib-ul-arz of a village records a custom that grove-holders could not transfer their groves, the fact that there was no evidence that the terms of the wajib-ul-arz were not agreed to by the grove-holders of the village or that they were

*Second Civil Appeals Nos. 467 and 468 of 1936, against the order of Pundit Pearey Lal Bhargava, Civil Judge of Partabgarh, dated the 10th October, 1936.

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since acted upon, is not valid ground in law to reject the evidence afforded by the wajib-ul-arz. *Parmeshur Din* v. *Bishambhar Singh* (1), and *Krishna Pal Singh* v. *Chhabraja* (2), followed. *Jagdamba Bakhsh Singh* v. *Badri Partab Singh* (3), *Anant Singh* v. *Durga Singh* (4), *Krishna Kumar* v. *Manzoor Ali* (5), *Narpat* v. *Mohammad Rafi* (6), *Ali Mohammad Khan* v. *Madari Shah* (7), *Bindeshuri Devi* v. *Sardar Khan* (8), *and Shyam Kumar Singh* v. *Sat Narain* (9), referred to.

Where a wajibularz recorded a custom that grove-holders could not transfer their groves and the wajibularz applied to a whole taluqa and there was nothing to show how many villages there were in this taluqa nor how many groves there were in each of these villages, no valid inference could be drawn against the correctness of the wajib-ul-arz from instances of transfers as it is impossible to say that the proportion of transfers to the number of groves is such that one can hold the contents of the wajibularz to be incorrect. *Krishna Pal Singh* v. *Chhabraja* (2), *Krishna Kumar* v. *Manzoor Ali* (5), and *Shyama Kumar Singh* v. *Sat Narain* (9), referred to.

Where the court in giving its finding relating to the existence of a custom has drawn conclusions from the instances of transfers which in law could not be drawn, a second civil appeal can lie against the decision. *Palaniappa Chetty* v. *Deivasikamony Pandara* (10), referred to.

Messrs. *Hydar Husain* and *H. H. Zaidi,* for the Appellants.

Mr. *Radha Krishna,* for the Respondent No. 1.

Mr. *S. N. Srivastava,* for the Respondent No. 2.

HAMILTON, J.—These are appeals by plaintiffs against an appellate decision of the Civil Judge of Partabgarh.

The plaintiffs' case is that in the village of Aichaka grove-holders were not allowed to transfer their groves but the respondents had done this and possession should, therefore, be given to the plaintiffs.

The learned Civil Judge held that the Wajib-ul-arz was dictated by the taluqdar himself and it did not

(1) (1930) 7 O.W.N., 503.
(2) (1930) 7 O.W.N., 967.
(3) (1932) I.L.R., 8 Luck., 586.
(4) (1910) I.L.R., 32 All., 363.
(5) (1933) 7 O.W.N., 333
(6) (1928) I.L.R., 3 Luck., 478.
(7) (1927) 102 I.C., 626
(8) (1935) 11 O.W.N., 1365.
(9) (1936) I.L.R., 11 Luck., 397.
(10) (1917) L.R., 44 I.A., 147

record any well established custom. He referred to *Jagdamba Bakhsh Singh* v. *Badri Partab Singh* (1) as regards this part of his argument, and he then pointed out that there were a number of sale-deeds as well as a decision of a court where it was held that the alleged custom was not proved.

It was held in *Ali Mohammad Khan* v. *Madari Shah* (2) that the general law in Oudh is that the interest of a grove-holder is transferable and there is no general custom to the contrary as distinguished from a village custom proved by a wajib-ul-arz or otherwise. This was repeated in *Bindeshuri Devi* v. *Sardar Khan* (3) and in both those cases the wajib-ul-arz contained no village custom but a custom which applied only to certain specific groves which did not include the groves which formed the subject-matter of those suits.

Jagadamba Bakhsh Singh v. *Badri Partap Singh* (1) referred to the custom of exclusion of widows in the wajib-ul-arz was quite inconsistent with the entries in wajib-ul-arz was quite inconsistent with the entries in two exhibits and that there was no reliable evidence to prove any instance in which the custom pleaded was recognized. The part of this decision quoted by the learned Civil Judge runs as follows:

> "There is no class of evidence which is morel likely to vary in value according to circumstances than that of the wajib-ul-araiz. Where 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, it is proper to attach weight to the fact that no evidence at all was forthcoming of any instance in which the alleged custom had been observed."

This part of the decision in *Jagdamba Bakhsh Singh* v. *Badri Partab Singh* (1), was itself a quotation from *Anant Singh* v. *Durga Singh* (4) a decision of

(1) (1932) I.L.R., 8 Luck., 386.
(2) (1927) 102 I.C., 626.
(3) (1935) 11 O.W.N., 1365.
(4) (1910) I.L.R., 32 All., 363.

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their Lordships of the Privy Council in a case where family custom was pleaded as superseding the Mitakshara law: it had nothing to do with groves.

The learned Civil Judge has referred to *Krishna Kumar* v. *Manzoor Ali* (1) a decision of a single Judge of this Court as regards the evidentiary value of an entry in a wajib-ul-arz recording a custom restraining a tenant cultivator from selling or removing manure and rubbish. The learned Judge there referred to *Narpat* v. *Mohammad Rafi* (2) a decision of a Bench of this Court, as to the evidentiary value of a wajib-ul-arz where it was stated that it was the duty of certain tenants to give the services of a pair of bullocks for two days in the year and a bundle of fodder and one of *bhusa* yearly. It was stated that when, as was the case there, it was distinctly to the interest of the zamindars to record the existence of cultivators' liabilities and where the cultivators had no opportunity of stating their experience, the value of such an entry was necessarily not so great in a case where the zamindars were recording the existence of customs from which they themselves may suffer. The liabilities of the tenants according to the wajib-ul-arz were, I think, somewhat unusual, while the custom preventing transfer of groves is to be found recorded in a very large number of wajb-ul-araiz in Oudh.

That principle was followed in *Krishna Kumar* v. *Manzoor Ali* (1), as regards the limitation of rights of tenants as regards manure and rubbish; and the same learned Judge of this Court in *Shyama Kumar Singh* v. *Sat Narain* (3) referred to his earlier decision. This was a case in which it was alleged that there was a custom making houses of residents in a bazar non-transferable. The wajib-ul-arz was silent about the right to transfer houses or the absence of such a right, so the question of the evidentiary value of the contents of the wajib-ul-arz did not really arise.

(1) (1930) 7 O.W.N., 353. (2) (1928) I.L.R., 3 Luck., 478.
(3) (1936) I.L.R., 11 Luck., 337.

On the other hand, there are two decisions *Parmeshur Din* v. *Bishambhar Singh* (1) and *Krishna Pal Singh* v. *Chhabraja* (2), which, in the opinion of the learned Civil Judge, have no application to the facts of the present case.

Parmeshur Din v. *Bishambhar Singh* (1), was a Bench case where it was held that where a wajib-ul-arz of a particular village records a custom to the effect that the tenants of the village resident therein cannot remove manure therefrom, the custom is not so unreasonable as cannot be enforced in law. The Bench added that it appeared to them that the plaintiff's case did not rest on the existence of custom alone but could also be supported on the broad ground that tenants who acquired agricultural holdings in the zamindar's village and who also acquired lands on which they built their houses for residence must be deemed to have acquired those rights with all the incidents appertaining to such rights and one of the incidents was their disability to remove the manure from one village to another. In this view of the case it was wholly immaterial whether they signed the wajib-ul-arz in which the entry relating to the custom was made or not. It should be noticed that though earlier decision were not referred to specifically in this decision, those earlier decisions appear to have been quoted because there evidently had been an argument to the effect that the wajib-ul-arz had not been signed by the tenants.

Krishna Pal Singh v. *Chabbraja* (2) is a case where the wajib-ul-arz of a particular village conferred no right on the grove-holder to plant new trees without permission of the owner of the soil. It would appear that no evidence other than the wajib-ul-arz was produced by the plaintiff. The courts below had refused to give effect to the terms of the wajib-ul-arz on the ground that there was no evidence that those terms were agreed to by the grove-holders of the village or that they

(1) (1930) 7 O.W.N., 503 (2) (1930) 7 O.W.N., 967.

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were since acted upon, and the Bench held that neither of those two grounds were valid in law. The effect of the entry in the wajib-ul-arz was to fix the terms entered therein as incident of the tenure of a grove-holder in the village and as such it applied to all grove-holders who accepted or maintained such tenures in the soil belonging to the owner of the village. It was further held that the argument that the condition in the wajib-ul-arz was not shown to have been acted upon was vague. The real question was whether it had been departed from with the consent or acquiescence of the landlord. There was no evidence of such consent of acquiescence, but that view of the case, in the opinion of the learned Judges, did not affect the merits of the plaintiff's claim for he might choose to object in one instance and may elect not to in another. Reference was made to *Parmeshur Din* v. *Bishambhar Singh* (1), as being the correct view in cases of this nature.

The learned Civil Judge was of opinion that these two rulings had no application to the facts of the present case because the question whether a wajib-ul-arz recording a custom prejudicial to the interest of the persons who were no parties to it could carry the same weight as other wajib-ul-araiz was not considered.

It is true that prior cases were not specifically referred to, but as I have shown in quoting from these judgments the point of tenants signing or not signing the wajib-ul-arz was considered. This last case was a case about a grove though the custom was not the same, and I find it impossible to agree with the learned Civil Judge that these two cases have not at least as much application to the facts of the present case as the others he has quoted. These two cases are the latest Bench cases and they should, therefore, be followed in preference to earlier Bench cases or to cases decided by a single Judge of this Court.

(1) (1930) 7 O.W.N., 503.

The next point is the instance referred to by the learned Civil Judge as disproving the correctness of the contents of the wajib-ul-arz. The wajib-ul-arz applied to the whole of taluqa Tarwal in which this village is situated which taluqa is the property of the Raja of Partabgarh who is a big landholder. Presumably, therefore, the taluqa is a large one, but no evidence has been pointed out to me to show how many villages were in this taluqa which is a very material point when the number of instances of transfer is considered.

The relevant portions of the wajib-ul-arz are that the groves granted by the taluqdar confer on the grantee the right to take fruit so long as the grantee or his heir live in the village. *Mahwa* and *kathal* fruits are divided equally between the taluqdar and the grove-holder. A tree fallen owing to wind or old age goes to the taluqdar but with his permission can be used by a *riaya*. In groves in the possession of tenants they have the right to cut wood for house repairs or for house building so long as they live in the village, but they are not allowed to transfer the groves, and shifting from one village in the taluqa to another does not maintain any right in the grove in the original village and it goes to the taluqdar. Without the permission of the taluqdar new trees cannot be planted. This last condition is exactly the same condition as was the subject of *Krishna Pal Singh* v. *Chhabraja* (1).

A taluqdar dictating a wajib-ul-arz about his taluqa may be correctly stating that a certain custom extends over the whole taluqa or it may exist in no part of the taluqa or it may exist in some part of the taluqa but not in other parts and it is not, therefore, sufficient to consider merely the occurrence instances of transfers, especially when it is not known of how many villages the taluqa consists.

In this particular village there are only three instances of transfers, Exs. A4 and A5—the first dated

(1) (1930) 7 O.W.N., 967.

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the 1st December, 1933, and the second dated the 15th December, 1933. The transferors were of the same caste and sub-caste, being Chattri Raikwars, and for all we know they may have been close relations. This wajib-ul-arz was drawn up in about 1862 so that for 70 years there had been no transfer and these two recent transfers would rather appear to be an attempt to make an end of an existing custom rather than prove that the custom never existed. There had been another transfer which gave rise to a suit by the Court of Wards as representing the Partabgarh estate in 1935 which was decided against the Court of Wards as the courts relied on *Krishna Kumar* v. *Manzoor Ali* (1) and *Shyama Kumar Singh* v. *Sat Narain* (2), those single Judge cases to which I have referred above.

In village Dhima there had been about half a dozen transfers, the earliest of them being in 1918 and the latest in 1928. If they established that the custom has never existed in Dhima or has been given up, this is no reason for holding that the custom never existed or has been given up in Aichaka.

There are then transfers in three more villages. In village Parasrampur two dated the 19th October, 1895, and one dated the 11th February, 1897, all by Brahman Tewaris; in village Sarai Balu there were two, one dated the 22nd September, 1898, and the other 26th January, 1915, and finally there was one in village Pura Basawan, dated the 26th April, 1926. It will be noticed that the earliest of these transfers is at least 50 years after the wajib-ul-arz was drawn up, and if these transfers show anything they show rather that the custom is being disregarded now, but there are no instances of transfers very soon after the wajib-ul-arz was prepared which can enable one to hold that the entry in the wajib-ul-arz was incorrect. I must again repeat that these transfers, including this village and village Dhima where about half the total number of

(1) (1930) 7 O.W.N., 333. (2) (1936) I.L.R., 11 Luck., 337.

transfers occurred, occurred in five villages, and there is nothing to show how many villages there were in this taluqa nor how many groves there were in each of these villages so that it is impossible to say that the proportion of these transfers to the number of groves is such that one can hold the contents of the wajibul-arz to be incorrect. The learned Civil Judge has not found that there once was a custom which has been given up, but that there was no custom at all. In my opinion, his decision is incorrect.

Hamilton, J.

It has been argued that this decision as to the absence of custom is one of fact which cannot be agitated in this second appeal. In *Palaniappa Chetty* v. *Deivasikamony Pandara* (1), their Lordships of the Privy Council have stated that "questions of the existence of an ancient custom are generally questions of mixed law and fact, the judge first finding what were the things actually done in alleged pursuance of custom and then determining whether these facts so found satisfy the requirements of the law. This latter is a quesion of law—not fact." What has to be seen is not merely whether the decision arrived at by a court is one of fact but whether in arriving at that decision the court has committed an error in law or not; for instance, if the decision of a court that a certain custom existed was based on the acceptance of evidence which was inadmissible there can be no doubt that that decision could be questioned in second appeal. On the other hand, if the decision was based because the Judge believed the statements of three witnesses for one side and disbelieved the evidence of three witnesses on the other, his decision could not be questioned in second appeal. In the present case he has really failed to apply the decisions of this Court reported in *Parmeshur Din* v. *Bishambhar Singh* (2). and *Krishna Pal Singh* v. *Chhabraja* (3) and has drawn

(1) (1917) L.R., 44 I.A., 147 at 158 (2) (1930) 7 O.W.N., 503.
(3) (1930) 7 O.W.N., 967.

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conclusions from the instances of transfers which, in my opinion, in law could not be drawn.

I, therefore, find that in the present case a second appeal lay, and I have found that this decision was wrong in law.

I, therefore, allow these appeals Nos. 467 and 468 of 1936, with costs throughout.

Appeal allowed.

APPELLATE CIVIL.

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January 3

Before Mr. Justice A. H. deB. Hamilton, and Mr. Justice R. L. Yorke

PT. RAMSAGAR PRASAD (APPELLANT) *v.* MST. SHYAMA AND OTHERS (RESPONDENTS)*

United Provinces Encumbered Estates Act (XXV of 1934), sections 14(4)(a) and 15—Decreed debt—Amount due under decree—Section 14(4)(a), applicability of—Interest on loan plus pendente lite *and future interest, exceeding unpaid principal—Amount, if can be reduced.*

Where there has been a decree the Special Judge must under section 15 accept the findings of the Court which passed the decree except in so far as they are inconsistent with the provisions of section 14. This means that he has to see whether the civil court that passed the decree could have passed the decree which it did pass if that court had had to comply with the provisions of section 14. If the civil court at the time that it passes a decree had been bound by section 14 it could have given a decree for the unpaid principal, for interest directly due on the bond or mortgage-deed, that is to say, on contract, not exceeding the principal and in addition it could have given interest *pendente lite* and future interest. Therefore the fact that interest on the loan itself plus *pendente lite* and future interest exceeds the unpaid principal is no reason for reducing it.

Messrs. *Ghulam Husain* and *Iftikhar Husain*, for the Appellant.

Mr. *Ali Zaheer*, for Respondent No. 1.

*First Civil Appeal No. 126 of 1936, against the judgment and decree of P. Kaul, Esq., Special Judge of Bara Banki, dated the 14th August, 1936.