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advised, I think, that it would be unduly restricting the scope of the section to say that it does not apply at all, when the previous unregistered transaction has taken effect by delivery of possession. Of course, delivery of possession may amount to notice of the previous title and the subsequent alienee may fail owing to such notice as already pointed out; but that would depend upon the nature and circumstances of the possession under the prior title.

On the above findings, I dismiss the appeal, but in view of all circumstances I leave the parties to bear their costs.

A. K. C.

Appeal dismissed.

APPELLATE CIVIL.

Before Bhide J.

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Oct. 8.

RATI RAM AND OTHERS (DEFENDANTS) Appellants,

versus

SHERA RAM AND OTHERS (PLAINTIFFS)
SIRI RAM (DEFENDANT) } Respondents.

Regular Second Appeal No. 1346 of 1937.

Custom — Alienation — Non-proprietor of village Chotala, Tahsil Sirsa, District Hissar — Whether entitled to alienate the houses occupied by them — Wajib-ul-arz — *Value of.*

Held, that non-proprietors of the village Chotala, Tahsil Sirsa, District Hissar, are not entitled by custom to alienate the houses occupied by them.

Held further, that an entry in the *Wajib-ul-arz* even when it is not corroborated by instances is a strong piece of evidence and is sufficient to shift the *onus* to the other side and is of even greater authority than an entry in the *Riwaj-i-am* as a *Wajib-ul-arz* is a part of the revenue record and is drawn up with special reference to each village.

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Balgobind v. *Badri Prasad* (1), *Digambar Singh* v. *Ahmad Sayed Khan* (2), and *Gurbakhsh Singh* v. *Mst. Partapo* (3), followed.

Other case-law discussed.

Second appeal from the decree of Chaudhri *Kanwar Singh, Senior Subordinate Judge, Hissar, with enhanced appellate powers, dated 5th July, 1937, reversing that of* R. S. Lala *Atma Ram, Honorary Subordinate Judge, 3rd Class, Sirsa, dated 15th October, 1936, and awarding the plaintiffs joint possession of the house in dispute, etc., etc.*

NANAK CHAND *Pandit*, PREM CHAND *Pandit* and L. M. DUTTA, for Appellants.

SHAMAIR CHAND, for (Plaintiffs) Respondents.

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BHIDE J.—Regular Second Appeals Nos. 1287 and 1346 of 1927 are connected and will be disposed of together. They arise out of two suits in which the main point for decision was the same, viz. whether according to the custom prevailing in the village Chotala in the Sirsa Tahsil of the Hissar District, non-proprietors are entitled to alienate the houses occupied by them. The trial Court found the issue against the plaintiff-proprietors and dismissed their suits while the learned Senior Subordinate Judge has on appeal found in their favour and decreed the same. Defendants have come up in second appeal.

In both the suits the plaintiffs relied mainly on the provisions of the village *wajib-ul-arz* of 1882, which are admittedly in their favour. These provisions carry a presumption of correctness under section 44 of the Punjab Land Revenue Act and this fact was not disputed by the learned counsel for the appellants. He however urged that the document was an expression

(1) I. L. R. (1923) 45 All. 413 (P. C.). (2) I. L. R. (1915) 37 All. 129 (P.C.).
(3) I. L. R. (1921) 2 Lah. 346.

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of the interested opinions of a few proprietors of the village, that some of the provisions were on the face of them absurd and that being unsupported by any instances, the document should not be relied on. As regards the first point, there is nothing on the record to show that only a few of the proprietors were consulted and that the non-proprietors whose interests were affected were not consulted when the *wajib-ul-arz* was prepared. The presumption on the other hand is that the Settlement Officer who made the entries in the *wajib-ul-arz* did so after due inquiry. The second argument that some of the provisions are absurd also does not seem to have much force. The only thing on which the learned counsel laid stress in this connection was the recital in the *wajib-ul-arz* that even the persons who built on land purchased from the proprietors were not competent to sell or mortgage it. This custom may not be reasonable in the light of the law now in force but it may not have been unreasonable according to the notions of the old village community. In any case we are not concerned in this case with this particular recital. The custom with which we are concerned here is admittedly one which is generally found to prevail in the villages in this province and there is nothing unusual in the recitals of the *wajib-ul-arz* as to that custom. There is no evidence forthcoming in this case to show that the entry was dictated by interested persons and was false as was shown to be the case in *Roshan Ali Khan* v. *Chaudhri Asghar Ali* (1) and *Uman Parshad* v. *Gandharp Singh* (2). Lastly the mere fact that no instances are given in support of the *wajib-ul-arz* is not material. I believe it was not the practice to give any instances in the *wajib-ul-arz* and in any case it has been held by their Lordships of the

(1) I. L. R. (1930) 5 Luck. 70 (P. C.). (2) I. L. (1888) 15 Cal. 20 (P. C.).

Privy Council that an entry in the village *wajib-ul-arz* even when it is not corroborated by instances is a strong piece of evidence and is sufficient to shift the onus to the opposite side (see *Balgobind* v. *Badri Parshad* (1), *Digambar Singh* v. *Ahmad Sayed Khan* (2), *Sheobaran Singh* v. *Mst. Kulsum-un-Nissa* (3), etc.). In *Gurbakhsh Singh* v. *Mst. Partapo* (4) it was held that an entry in the *wajib-ul-arz* is of even greater authority than that in a *Riwaj-i-am*, as the *wajib-ul-arz* is a part of the revenue record and is drawn up with special reference to each village. It must therefore be held that the *wajib-ul-arz* produced in this case is a strong piece of evidence in support of the custom relied upon by the plaintiffs. The *wajib-ul-arz* shows clearly that the custom relied on prevailed in 1882. It is alleged that the entry in the *wajib-ul-arz* was not repeated in the records of the later settlements. This is not clear, for no later *wajib-ul-arz* was produced. But even if this is correct, this fact will not be of any significance as entries relating to custom in the village *abadi* are, apparently no longer made in the *wajib-ul-arz* (*cf. Gujar* v. *Sham Das* (5) and *Dhuman Khan* v. *Gurmukh Singh* (6)).

The appellants appear to have tried to prove that 'Chautala' is a town and not a village, by showing that it has a population of 6 or 7 thousand, that it contains a large number of shops, a school, a post office and so forth. It seems unnecessary to go into this evidence in view of the fact that in 1882 the custom in dispute prevailed in Chautala according to the *wajib-ul-arz* prepared in that year. Even if Chautala has expanded since then and shows some features of a

(1) I. L. R. (1923) 45 All. 413 (P. C.).
(2) I. L. R. (1915) 37 All. 129 (P. C.).
(3) (1927) 101 I. C. 368 (P. C.).
(4) I. L. R. (1921) 2 Lah. 346.
(5) 107 P. R. 1887, P. 244.
(6) I. L. R. (1936) 17 Lah. 403.

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town that fact by itself cannot be held to be enough to show that the custom in dispute has been abrogated (*cf.* remarks of Chatterjee J. in *Sobha Singh* v. *Natha Shah*—Case No. 991 of 1897 and *Aman Singh* v. *Kallu* (1)).

It must therefore be held that in view of the provisions of the *wajib-ul-arz* of 1882 the custom relied on by the plaintiffs existed in 1882. The sole remaining point for decision is whether the evidence produced by the defendants is sufficient to show that the custom has since been abrogated.

It was remarked by the Full Bench in *Bahadur* v. *Mst. Nihal Kaur* (2) that a custom to be legal must be proved to have been in existence for a time preceding the memory of man—or at any rate 'as far as living testimony can establish it.' If this test is to be applied to the present case, it is obvious that no change of custom could possibly be established by instances of alienations during the period of last 50 years or so which has elapsed since the *wajib-ul-arz* of 1882 was prepared. But even if it is held that the custom in the Punjab is in a fluid state and can change gradually as has been held in several other cases (*cf. Fazl-i-Hussain* v. *Tafazil Hussain* (3), *Kesar Singh* v. *Achhar Singh* (4), etc.), the change must be proved by testimony, which would leave no doubt on the point. We have therefore to see whether any such evidence is forthcoming in this case.

Before proceeding to discuss the evidence, I may note that the trial Court was in error in treating the evidence in both the cases now under appeal together, although the parties had apparently never agreed to the evidence in one case being treated as evidence in the other and the suits had not been consolidated. The learned Senior Subordinate Judge appears to have

(1) 119 P. R. 1884.
(2) I. L. R. [1937] Lah. 594 (F. B.).
(3) I. L. R. (1932) 13 Lah. 410.
(4) I. L. R. (1936) 17 Lah. 101, 104.

realised that the procedure was erroneous but has held that even if this irregularity was ignored and the evidence in both the cases on the question of custom was considered together, the cumulative evidence is not enough to discharge the onus which lay on the defendants. After carefully considering the evidence on the record I am in agreement with this view. The defendants have produced documents relating to 29 alienations in all in both the cases. Eight out of these documents have not been exhibited and have not been properly proved. Thirteen out of the transactions were still liable to be challenged at the date of the suit as the period of limitation had not expired. The learned Senior Subordinate Judge has further held that eleven sale-deeds which were executed by '*Jats*' were not relevant, as *Jats* are presumably proprietors. This presumption, however, does not seem to be justified as there is evidence on the record which goes to show that all the *Jats* in the village do not belong to the proprietary body and that some of the 'Jat' vendors at any rate whose sales were relied on were non-proprietors (see evidence of Lekh Ram, D. W. 1, D. W. 4, D. W. 8, etc.). However even if these sales are not excluded, the number of sales relied on, which have become final owing to their not being challenged by the *Biswadars* within limitation, comes to only about 16 during a period of about 50 years commencing from the year 1882. This number is obviously not large, giving as it does, an average of about one sale in three years. The defendants' case will be still weaker if the alienations in each of the two cases are taken separately—as I think they should be according to strict legal procedure. As pointed out in *Kharak Singh* v. *Alla Ditta* (1), proof of particular sales

(1) 85 P. R. 1882.

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having taken place without objection would ordinarily be very good evidence only of the title of the purchaser to the land sold and while such sales would give title to the individuals in particular portions of the village site, they would not prove that the rights of the proprietary body over the remainder of the site had been extinguished. No inference as to any change of custom could, I think, reasonably be drawn, unless the number of alienations were so overwhelmingly large as to be incompatible with the existence of a custom restraining alienations by non-proprietors.

The learned counsel for the appellants has further laid stress on the facts that (*i*) there is not a single instance on the record of any sale by a non-proprietor having been ever challenged in Court, (*ii*) that some of the sales have been attested by proprietors and (*iii*) in some the purchasers are themselves proprietors. As regards these points, the number of unchallenged sales is comparatively very small, the proprietors may not have cared to challenge them or may have consented to them for special reasons. Plaintiff Shera has also attested one sale-deed. It was urged that he has not explained why he did so; but he was apparently not questioned on the point. It may be noted that several of the sales were of small sites and were effected for a small consideration and hence the proprietors may not have cared about them. Instances of purchases by proprietors are perhaps the most strong piece of evidence in favour of the defendants. There are 14 sales in favour of *Jats*. It is not clear whether all of these were proprietors in the village; for as pointed out already there is evidence on the record that some of the *Jats* in the village are not proprietors (*Biswadars*). But even if a few proprietors have shown themselves ignorant of their rights, that would not, I think, be

sufficient to prove that the custom stated in the *wajib-ul-arz* of 1882 has been abrogated. In my opinion a change of custom in such circumstances could not be established except by overwhelming testimony consisting of a very large number of instances spreading over a long period which could not be compatible with any other conclusion except that the custom had since changed.

I have not referred above the oral evidence relating to a few more instances unsupported by any documents which was given by defendants' witnesses. It seems to me unsafe to rely upon such evidence. But in any case these few instances will not make any difference to the conclusion arrived at above.

The learned counsel for the appellants referred to a large number of authorities but I consider it unnecessary to discuss all of them, as in most of them there was no *wajib-ul-arz* available and hence a certain number of instances—large or small according to their value—were held to be sufficient to establish custom. In *Tajammul Hussain* v. *Banwari Lal* (1), in which a custom contrary to the entry in the *wajib-ul-arz* of 1872 was held to be established, there was a large number of alienations (125 sales in all) relied on and there was besides a judgment of the year 1865, which showed that a large number of sales had taken place even prior to that year. In *Kallu Mal* v. *Ganeshi Lal* (2) also a large number of alienations (about 90) extending over 52 years was proved. Besides, the entry in the *wajib-ul-arz* was found to have been attested only by the *Zamindars* and not by the tenants. The entry was not repeated in the later *wajib-ul-arz* and no explanation was given of its omission. It is not known what the

(1) 1926 A. I. R. (All.) 43. (2) 1936 A. I. R. (All.) 119.

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present practice in United Provinces is as regards the record of customs in *wajib-ul-arzes*.

The circumstances in *Ahmad Yar* v. *Jesa Ram* (1) in which a certain entry to the *wajib-ul-arz* of 1866 was held to be rebutted were peculiar. The entries in the later *wajib-ul-arz* differed and it was therefore held that not much weight could be attached to the *wajib-ul-arz*. There was besides a large number of instances of alienations including about 51 sales of village-sites only. In *Mangal Sain* v. *Punjab Singh* (2) also in which *wajib-ul-arz* had been relied on, a large number of instances of alienations was proved. It was found further that the majority of persons who resided in the village were non-proprietors and the number of alienations was almost half of the total number of houses in the villages.

The respondents' counsel on the other hand has strongly relied on *Sewa Singh* v. *Ghulam* (3) in which even a large number of instances (about 250) was not considered to be enough to establish custom, as most of the instances were of comparatively recent dates.

It is true that the evidence produced by the plaintiffs apart from the *wajib-ul-arz*, is meagre and the defendants would have had a strong case if the *wajib-ul-arz* were not in favour of the plaintiffs. But it is possible that the plaintiffs did not think it necessary to produce more evidence because the *wajib-ul-arz* supported them.

In conclusion, I may note an attempt was made to argue before me that Rati Ram defendant had become a full proprietor, as the house purchased by him had been previously sold by non-proprietors on more than one occasion and a period of more than 12 years had

(1) 1932 A. I. R. (Lah.) 90. (2) 1932 A. I. R. (Lah.) 130.
(3) 1923 A. I. R. (Lah.) 467.

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elapsed since the first alienation. No such issue had been, however, raised in the trial Court and as the point involved questions of fact, which the plaintiffs had no opportunity to meet, I did not consider it fair to allow it to be argued.

I agree with the learned Senior Sub-Judge's conclusion that the defendants-appellants have failed to discharge the onus cast upon them by the *wajib-ul-arz* entry of 1882 and dismiss the appeals. In view of all the circumstances I leave the parties to bear their costs in this Court.

A. K. C.

Appeal dismissed.

REVISIONAL CIVIL.

Before Bhide J.

LAL DIN (PLAINTIFF) Petitioner,

versus

THE OFFICIAL RECEIVER, LYALLPUR (DEFENDANT) Respondent.

1938

Oct. 24.

Civil Revision No. 863 of 1933.

Provincial Insolvency Act (V of 1920), SS. 37, 43 — Insolvent failing to apply for discharge — adjudication annulled — vesting order under S. 37 — Order by Court that Official Receiver would sell the leasehold rights of the insolvent for the benefit of creditors — whether legal.

The appellant, who had been adjudicated insolvent, failed to apply for his discharge within time and his adjudication was annulled by the Insolvency Court under s. 43 of the Provincial Insolvency Act with the reservation that any money in the hands of the Official Receiver and any money which he would recover by the lease of the land of the insolvent shall be available for distribution among creditors. On the Receiver proceeding to sell the leasehold right of the insolvent he objected that the Receiver had no right to sell the aforesaid rights.

Held, that on the annulment of adjudication the property could not be sold by the Insolvency Court and therefore no