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30 C. 631=7 C. W. N. 565.

saying that under no circumstances will the Court order a husband to give security for his wife's costs, expressed an opinion that it should be done under special circumstances only, and there being no special circumstances shown, these learned Judges refused the application that the husband should be ordered to deposit the estimated costs of his wife, the petitioner. From the evidence in the case before me, it appears that the petitioner has no money of her own, and it was admitted that if an application had been made before the hearing for the respondent to give security or to deposit the amount of the estimated costs of the petitioner there would have been no answer. Had an order for the respondent to make a deposit or give security for costs been made, I should have allowed the petitioner her costs; and if these costs had exceeded the estimated costs, I should not have limited the order to the amount estimated. In a case where it is shown that the wife has no money of her own, I do not think the mere fact that no deposit has been made or security given should be an obstacle to the making of an order against her husband to pay her costs. I therefore direct the respondent to pay his wife's costs as between party and party on scale No. 2. The order does not, however, cover the costs of the Commissioner sent down to Midnapore, as those costs have been separately dealt with.

Attorneys for the petitioner: *Leslie* and *Hinds*.

Attorneys for the respondent: *Orr*, *Robertson* and *Burton*.

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[635] PRIVY COUNCIL.

RAHIMUDDIN *v.* REWAL.* [17th February and 25th March, 1903.]

[*On appeal from the Chief Court of the Punjab.*]

Pre-emption—Punjab Laws Act (XII of 1878) *ss.* 10, 12—"*Village Community*"—*Act XIV of* 1872, *s.* 14—*Occupancy tenants in zemindari village.*

The expression "village community" in the Punjab Laws Act (XII of 1878) is not used to denote a village community of the typical sort consisting of members of one family or one clan holding the village lands in common, and dividing between them the agricultural lands according to the custom of the village; but is used to denote a body of persons bound together by the tie of residence in one and the same village, amenable to the village customs, and subject to the administrative control of the village officers.

A "village community" is not confined to the land-owners in the village. Occupancy tenants are members within the meaning of the Punjab Laws Act, and so are all persons in an inferior position who belong to the village, though they may be unconnected with the land and not entitled to any right of pre-emption under the Act.

[**Ref.** 7 O. C. 275; 21 P. R. 1906=110 P. L. R. 1906; 12 O. C. 1.]

APPEAL from a decision (12th April 1897) of the Chief Court of the Punjab, which reversed a decision (31st March 1894) of the Subordinate Judge of Hissar who had dismissed the suit of the respondents with costs.

The representatives of the second defendant, Sheik Allah Dia, appealed to His Majesty in Council.

The suit was brought for possession of a village called Manda Khera, of which the plaintiffs claimed the right of pre-emption as occupancy

* *Present*: Lords Macnaghten, Davey, Robertson and Lindley, Sir Andrew Scoble and Sir Arthur Wilson.

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tenants,—a status which they or their predecessors had occupied since 1863.

The village originally belonged to a single proprietor, one Daulat Ram, a Thakur by caste. He was succeeded by his widow, Rani Anandi, who transferred it to her daughter's son, Bukhtawar Singh. Subsequently, one Hena Mall, a [636] mahajun, caused it to be sold in execution of a decree, and at that sale, in or about 1854, it was purchased by Alexander Skinner who established the *abadi* or village site, and induced cultivators to reside on it. On his death his son became the sole proprietor, and he died on 19th January 1892.

The *wajib-ul-arz* of the village expressly recorded that "as the estate absolutely belongs to my principal, and as none of the present co-sharers of the Skinner estate, or the present heirs of Colonel Skinner, or those appointed as such in future has or will have any connection or concern with the estate, except my principal, the estate being self-acquired property, he shall have in his lifetime every power to alienate for his personal necessity or for payment of arrears of Government revenue to whomsoever he may like."

On 7th January 1893, Mr. Kirkpatrick, the first defendant in the suit, acting under the authority of a declaration of trust dated 8th February 1879, made by Alexander Skinner, sold the village of Manda Khera to the second defendant, Allah Dia, and this sale the plaintiffs in their plaint, filed on the 17th November 1893, alleged to be their cause of action. Clause 3 of the plaint stated that "the plaintiffs are occupancy tenants in Manda Khera, and the defendant No. 2, vendee, has no right whatever in the said village: hence according to law and the custom obtaining in the Punjab, the plaintiffs' right of pre-emption is superior to that of the vendee." They stated the price of the village to be Rs. 11,320-6-6 and claimed pre-emption on payment of that sum.

The defendants filed written statements in answer to the claim, in which they alleged that the plaintiffs had by law no right of pre-emption on the sale of an entire village belonging to a single proprietor, the right only accruing when the share of a member in a joint community was sold, that is to say, when the property sold was situated within, or was a share of, a village if (*i*) it belongs to one or more of a greater number of joint and undivided sharers; (*ii*) it is part of a village held in ancestral shares by several proprietors; and (*iii*) it is part of a *patti* or other subdivision of a village. The defendants also denied that there was any custom which gave the plaintiffs [637] the right of pre-emption, there being no necessity for any custom to provide for the exclusion of strangers owing to the fact that the proprietors of the village had for some time past been of a different race and religion from those of the tenants. The second defendant further pleaded that the claim to pre-emption could not succeed, as the plaintiffs were suing also on behalf of others who were not occupancy tenants; that the plaintiffs were occupancy tenants of only a small area of the village; and that the price of the village fixed by them was not correct.

Issues were raised on these pleadings, of which the first only is now material:—

"Have the plaintiffs by law or custom a preferential right to purchase the property in suit to that of Sheik Allah Dia, the vendee?

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On this issue the judgment of the Subordinate Judge was as follows :—

"On the first issue I have no doubt, from the wording of ss. 10 and 12 of the Punjab Laws Act, as also from the case reported in Punjab Record No. 103 of 1889, that the law applies to the case of a sale of an entire village belonging to a single proprietor, but as a zemindari village is not shown under s. 12 of the Act, I fail to see how the plaintiffs can exercise the right of pre-emption in such property. I may add here that I do not agree in the defendant's contention, that occupancy tenants are not members of a 'village community,' as the term 'community of landholders' does not appear in the present law. As the plaintiffs cannot exercise the right they claim by law, it has now to be seen whether they can succeed by custom. I find that they have failed to prove by a single instance that occupancy tenants have successfully exercised the right before in a case like the present one, and as the plaintiffs or their predecessors got occupancy rights only at the settlement of 1863-64, and no sales beyond the one now in dispute took place in their village since then, it is obvious that no such custom can exist in their village. I find against the plaintiffs on the first issue."

When the case came on appeal before the Chief Court the same question had arisen in another appeal (No. 1365 of 1893) then before them, in which the opinion of a Division Bench of the Court was given as follows :—

"The real contention is that the right of pre-emption cannot be presumed to exist in Faridpur under s. 10 of the Punjab Laws Act because that section applies only to village communities, and Faridpur was not a village community at the time of the sale, as it belonged to a single proprietor. It is admitted that the custom of pre-emption may be proved to exist in Faridpur, but it is contended that such custom has not been established. It is further contended that s. 12 of the Punjab Laws Act has no application [638] because the property to be sold was not situate within, or a share of, a village but was a whole village. This latter contention may be at once overruled. The sale deed shows that the whole village was not sold, but only that portion of it which had not been acquired by Government. Even if the property to be sold was the whole of Faridpur, it was none the less situate in a village in the sense that it was situate within its own circumscribing limits. The wording of s. 12 would have been more clear and explicit if the words 'is a village or' had been introduced between the words 'foreclosed' and 'is' in the first clause, but we feel no doubt that the Legislature intended s. 12 to apply to whole villages as well as to parts of them, and we do not consider that we are stretching language in holding that a village is situate within itself. The word 'village' in s. 12 is used in contradistinction to the words 'town' and 'city' in s. 11, and the object of s. 12 is to declare the precedence of pre-emptors *inter se* and not in any way to restrict their rights to the pre-emption of sales of parts of, and shares in, villages. Faridpur originally belonged to Colonel Skinner, who died in December 1841. On his death it devolved on his heirs, and was certainly a village community at that time. On partition in 1888 it was assigned to Mrs. Victoria Ingram, who is said to have been sole proprietor at the time of the sale to defendants 2, 3 and 4 and who alleged herself to be such. According to Ram Sarup Patwari 16 bighas 10 biswas belong to one Allah Bakhsh, and if this is the case, Mrs. Ingram never was sole proprietor; but even if Ram Sarup's statement is not true, we are still of opinion that Faridpur was a village community at the time of the sale. One of appellant's chief points is that the wording of s. 14 of Act IV of 1872 shows that the Legislature drew a distinction between occupancy tenants and members of the village community, and evidently did not include the former among the latter.

"S. 14 declares that if the property to be sold is situated within, or is a share of, a village, the right to accept the offer referred to in s. 13 belongs in the absence of custom to the contrary, thirdly, to any member of the village community: fourthly, to tenants with rights of occupancy in the village, if any. The above wording tends to support appellants' contention, but the wording of s. 12, Act XII of 1878, which superseded s. 14, Act IV of 1872, does not support it any way. There is nothing in it to show that the Legislature did not consider that occupancy tenants are not members of the village community, and the fact that the words 'to any landholder of the village' were substituted by Act XII of 1878 for the words 'to any member of the village community' in Act IV of 1872 tends to show that it was considered that occupancy tenants are members of the village community, and

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that it was necessary to distinguish them from members who are landholders, and to postpone their pre-emptive rights to those of such landholders. The village of Faridpur is situated in the Karnal district, and we may note that Mr. Ibbetson in the chapter on the village community in his settlement report speaks of the proprietary body proper as forming the nucleus round which the subsidiary parts of the community are grouped. We see no reason why the words 'village community' in s. 10 of the Punjab Laws Act should not be construed as including not only the members of the proprietary body, but also all those individuals who dwell within the village boundaries and whose rights and duties are as clearly defined as [639] those of proprietors themselves. Whether as proprietors or tenants, or menials, or shopkeepers, or village officers, they are all members of a community or body associated together for the purpose of maintaining themselves and others, and none of them can be said to be wholly independent of the others. Wherever there is such a community, the right of pre-emption must be presumed to exist, though it would not be exerciseable by any members of the community other than those referred to in s. 12. If there are no such members, it cannot be exercised, though there is no reason why it should not exist. It may remain dormant for a time, and then again become exerciseable. We must hold that plaintiffs, as occupancy tenants, have a right of pre-emption."

The judgment now under appeal was given by a Division Bench (CHATTERJI and STOGDON, JJ.) of the Chief Court of the Punjab a few days later, and the material portion of it was as follows :—

"As regards the plaintiffs' right to sue, the question has been fully considered and all the arguments raised by the respondents disposed of in No. 1365 of 1899. Exactly the same points arise in the present appeal, and we consider it unnecessary therefore to discuss them afresh in this judgment Following the decision in the other case, we hold that plaintiffs as occupancy tenants in the village are entitled to acquire it in preference to the purchaser, who is an entire stranger."

The appeal was therefore allowed, the decree of the Subordinate Judge was reversed, and the suit decreed with costs.

On this appeal, which was heard *ex-parte* :

Sir *W. Rattigan*, *K. C.* and *C. W. Arathoon*, for the appellants, contended that the respondents were not entitled to any right of pre-emption of the village in suit. No custom of pre-emption had been proved. The village was, and had been for many years as the *wajib-ul-arz* showed, the self-acquired property of a single owner, who had the absolute power of disposing of it, and the members of whose family had no connection or concern with it whatever, which facts are quite inconsistent with the existence of the right of pre-emption claimed. The Punjab Laws Act (XII of 1878) gave the respondents no such right. It could not be presumed to exist under that Act. S. 12 did not confer the right of pre-emption : it must be proved unless it could, from the circumstances, be presumed under s. 10 to exist. If this were not so, cl. (*a*) of s. 10 would be unnecessary. For any presumption to arise in this case the respondents must show that they form a "village community" within the meaning of s. 10. But that expression meant, it was submitted, a community [640] of landholders. A member of a village community could, under the Act, be synonymous with no one but a landholder. This was the inference to be drawn from the alteration of the former Act (IV of 1872) by the Act of 1878 : s. 14 of the Act of 1872, corresponding with s. 12 of the Act of 1878, and Baden-Powell on Village Communities, Edition of 1896, page 26, were referred to. A "village community" would not include any one except a village proprietor, and here the whole village belonged to a single proprietor. Occupancy tenants or mere cultivators did not come within that expression. Reference was made to the Punjab Record No. 74 of 1897. The Punjab Laws Act did not apply to the case of a zemindari village like the one in suit, nor to the case of the sale of a whole village.

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The judgment of their Lordships was delivered by—

LORD MACNAGHTEN. This is an appeal *ex-parte* against a decree of the Chief Court of the Punjab pronounced in favour of the respondents who were plaintiffs in the suit.

The respondents are occupancy tenants in the village of Manda Khera, a zemindari village owned by a single proprietor. On the death of the owner in 1892 the village was sold under the authority of a declaration of trust, and sold to a stranger. Thereupon the respondents, taking their stand on Act XII of 1878, an Act passed for the purpose of amending the Punjab Laws Act, 1872, claimed pre-emption of the whole village. There was no preferential claim.

It was not disputed at their Lordships' bar that there would be no answer to the claim of the respondents if the provisions of the Act of 1878 apply to the case. It was, however, contended on behalf of the purchaser, who was a defendant in the suit and is now represented by the appellants, that the respondents cannot claim the benefit of the Act because, although Manda Khera is a village, no village community is to be found in it.

The argument was mainly founded on section 10 of the Act of 1878. The provisions with regard to pre-emption begin with section 9. Section 9 declares that "the right of pre-emption is a right of the persons hereinafter mentioned or referred to to acquire in the cases hereinafter specified immoveable property in preference to all other persons." The section goes on to explain [641] that the right arises in respect of sales and foreclosures. Section 12 declares that "if the property to be sold . . . is situate within . . . a village, the right to buy . . . belongs, in the absence of a custom to the contrary," to certain classes of persons therein described in succession one after the other. Among them, in the sixth place, come "the tenants (if any) with rights of occupancy in the property," and, seventhly, "the tenants (if any) with rights of occupancy in the village."

Those two sections, 9 and 12, taken together seem to be complete in themselves and plain enough. But between them are sections 10 and 11. It is section 10 which creates, or is supposed to create, the difficulty. It declares that "unless the existence of any custom or contract to the contrary is proved, such right," that is, the right of pre-emption, "shall, whether recorded in the settlement record or not, be presumed—

"(*a*) To exist in all village communities, however constituted."

Section 11 declares that the right "shall not be presumed to exist in any town or city, or any subdivision thereof, but may be shown to exist therein."

The argument, as their Lordships understood it, was to this effect. Before the benefit of the provisions of section 12 can be invoked, the existence of a right of pre-emption must be either presumed or proved. In villages the right is presumed to exist if there be a village community, but if that condition is wanting there must be proof of custom. In the present case there is no evidence of custom at all. There can be no village community because the whole village was in the hands of a single proprietor. Two persons at least are required to make a community, and they must be landowners. The result of this argument would be that the rights of occupancy tenants would be made to depend on the question whether the village belonged to one or more than one landowner—a matter which does not of itself seem to affect or concern that position

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of the tenant in relation to strangers, whose exclusion is aimed at by the law of pre-emption. There is certainly ground for contending that the generality of sections 9 and 12 is not cut down by sections 10 and 11. These sections apply a different rule in the case of villages from that which is applicable in the case of [642] towns and cities. And it may well be that they were not intended to do more, though no doubt the introduction of the expression "village communities" where the expression " villages " would suffice does introduce an element of obscurity. It is not, however, necessary to pursue this subject further or to determine the point, because their Lordships agree with the Chief Court in thinking that the expression "village communities" in the Act of 1878 is not used to denote a village community of the typical sort consisting of members of one family or one clan holding the village lands in common and dividing between them the agricultural lands according to the custom of the village. It seems rather to be used in a popular sense to denote a body of persons bound together by the tie of residence in one and the same village, amenable to the village customs, and subject to the administrative control of the village officers. There seems to be no reason why a village community should be confined to the landowners in the village. In their Lordships' opinion occupancy tenants are members of a village community within the meaning of the Act, and so are all persons in an inferior position who belong to the village, though they may be unconnected with the land and not entitled to any right of pre-emption under the Act of 1878. That was the view of the learned Judges in the Chief Court, and their Lordships see no reason to differ from them.

Their Lordships will therefore humbly advise His Majesty that the appeal ought to be dismissed.

Appeal dismissed.

Solicitors for the appellants : *T. L. Wilson & Co.*

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30 C. 643 (=7 C. W. N. 637.)

[643] CRIMINAL REVISION.

MOTI LAL PAL *v.* THE CORPORATION OF CALCUTTA.*

[19th May, 1903.]

Adulteration—Mustard oil (as commercially known)—Sale " to the prejudice of purchaser "—Manufacture for sale—Calcutta Municipal Act (Bengal Act III of 1899) *s.* 495.

Where a Food Inspector purchased samples of mustard oil from the manufactory of the accused, which on analysis were found to be adulterated with *til* oil, and the accused were convicted under s. 495 of Bengal Act III of 1899:—

Held, that such adulterated oil not being what is commercially known as mustard oil, and the adulteration being to the prejudice of the purchaser, the accused had been rightly convicted.

Baishtab Charan Das v. *Upendra Nath Mitra* (1) distinguished.

[**Ref.** 46 C. 60]

RULE granted to the petitioner, Moti Lal Pal.

This was a Rule calling upon the District Magistrate of the 24-Perganas to show cause why the conviction and sentence passed on the

* Criminal Revision No. 346 of 1903, against the order of P. N. Mookerjee, Municipal Magistrate of Calcutta, dated Dec. 18, 1902.

(1) (1898) 3 C. W. N. 66.