

Judgment of the Lords of the Judicial Committee of the Privy Council on the two consolidated Appeals of Mathura Prasad and others v. Sheikh Muhammad, from the High Court of Judicature for the North-Western Provinces, Allahabad (P.C. Appeal No. 113 of 1911; Allahabad Appeals Nos. 19 and 20 of 1910); delivered the 5th December 1912.

PRESENT AT THE HEARING :

LORD MACNAGHTEN.

LORD MOULTON.

SIR JOHN EDGE.

MR. AMEER ALI.

[DELIVERED BY MR. AMEER ALI.]

These Appeals, consolidated by an Order in Council, dated the 22nd March 1911, arise out of two suits brought by the Plaintiff Haji Muhammad Salim, since deceased, to establish a right of pre-emption in respect of certain lands situated in the District of Azamgarh in the United Provinces. The properties in question consist of shares in a *patti* called Shah Rajab Ali lying in two *mahals* Hirapatti and Azampur; and belonged respectively to one Sadruddin Beg and Shah Ahsanullah who conveyed to the Defendant-Appellants their shares by two separate deeds of sale. Sadruddin Beg's conveyance purports to be the earlier of the two in date, the allegation being that it was executed on the 11th of March 1906; whilst the sale-deed of Ahsanullah bears date the 31st of May following.

The suit in respect of Absanullah's share was instituted in the Court of the Subordinate Judge of Azamgarh; the other regarding Sadruddin's sale-deed, in consequence of the value of the claim, was brought in the Court of the Munsiff whence it was subsequently transferred to the Subordinate Judge and both cases were tried together by that officer.

The Plaintiff's claim in both actions is based on the *Wajib-ul-Arz* of the *mahals* within which the lands in suit are situated. The material part of the document is to be found in paragraph 14, chapter II., which is headed thus:—
 “Mutual rights of the co-sharers, based on
 “ custom or particular contracts.” Paragraph 14 is headed “Custom relating to the right of pre-emption,” and under this heading is to be found the following statement:—

“If any of the co-sharers in a village wishes, under
 “ necessity, to transfer his share in any particular village
 “ or in all the villages, under an absolute or a conditional
 “ sale or mortgage or *zar-i-peshgi* lease, or if he wishes to
 “ hypothecate the property, it will be incumbent on him to
 “ offer it at first to his near co-sharer, after that to a co-
 “ sharer in the *patti*, then to a co-sharer in the *thok*, and then
 “ to a co-sharer in the *mahal*, and if, notwithstanding the
 “ publication of the transfer and intimation being given, the
 “ aforesaid co-sharers are not prepared to purchase the
 “ property and to pay a reasonable price for the same with
 “ reference to the quality of the property which other
 “ persons are prepared to pay or to advance as a loan on the
 “ mortgage, &c., then in that case the transferor shall be at
 “ liberty to transfer the property to someone else.”

The rest of the paragraph is immaterial for the purposes of the present case.

The Plaintiff alleged that as a co-sharer in the *patti*, he was entitled to a right of pre-emption against the Defendant-Appellants who were only co-sharers in the *thok* or *mahal*, and had no interest in the *patti* itself; and he charged that the conveyance of Sadruddin Beg was fabricated

with the object of proving that the Defendants held a share in the *patti* when they took a conveyance of Ahsanullah's interest. The Defendant-Appellants attempted to defeat the Plaintiff's claim mainly on two grounds, both based, as the claim was, on the terms of the *Wajib-ul-Arz*, viz., first, that they themselves were co-sharers in the *patti* and therefore the conveyance to them was not open to question; and secondly, that the shares sold to them had been offered before to the Plaintiff and refused by him. It will be noticed that the first defence put forward by the Appellants proceeded on the assumption that the sale deed executed by Sadruddin Beg was, in fact, prior in date to the sale by Ahsanullah.

The words "particular contracts" in the heading of chapter II. of the *Wajib-ul-Arz* seem to have suggested to the Defendants' advisors the ingenious plea that paragraph 14 gave expression to a "contract" between the co-sharers, which came to an end with the last settlement. The Subordinate Judge held in favour of the Defendants' contention, but the High Court overruled it, and the objection has not been seriously pressed before this Board. In their Lordships' judgment the terms of the *Wajib-ul-Arz* are absolutely clear regarding the existence of the custom of pre-emption in the *mahals* to which it relates.

As already stated the main dispute between the parties turned on the questions of fact, (1) whether the conveyance by Sadruddin Beg represents a real transaction; and (2) whether the Plaintiff refused to take the properties when offered to him by the Defendants' vendors.

The Subordinate Judge found on both points in favour of the Defendants, and accordingly dismissed the Plaintiff's suits. The High Court

of Allahabad have reversed the Decree of the First Court, and decreed the Plaintiff's claim. The learned Judges after a careful examination of Sadruddin Beg's document and of the evidence relating to its execution on the date it purports to bear, came to the conclusion that it did not represent a genuine transaction, and that it "was fabricated with a view to defeat the claim for pre-emption which the Plaintiff was about to bring." The reasons which they have given for arriving at that conclusion appear to their Lordships cogent and decisive.

But it has been contended before this Board that the Defendants had adduced evidence to prove the offer to the Plaintiff in the presence of some of his relatives, and that neither he nor the persons who were alleged to have been present on the occasion had come forward to contradict the story of the Appellants' witnesses; and it is urged that the High Court erred in overlooking this fact. The learned Judges appear to have carefully considered also this part of the Defendants' case. They say in effect that he has attempted to prove the allegation of offer by the same witnesses who spoke to the sale-deed of March 1906 which they found to be fabricated, and that they saw no reason for believing the testimony of witnesses, one part of whose evidence was found to be distinctly false. It is said, however, that there is one witness who did not depose to the deed. In their Lordships' opinion the learned Judges were perfectly justified, upon a consideration of the whole evidence, in arriving at their conclusion; that it was open to them to take the view they have expressed, and that it would not be right to treat their judgment in the piecemeal manner suggested by learned Counsel for the Appellants.

On the whole their Lordships are of opinion that these Appeals should be dismissed, the Respondent will have such costs as he may be entitled to.

And they will humbly advise His Majesty accordingly.

In the Privy Council.

MATHURA PRASAD AND OTHERS

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SHEIKH MUHAMMAD.

DELIVERED BY MR. AMEER ALI.

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