Privy Council Appeal No. 102 of 1913.
Allahabad Appeal No. 30 of 1912.

Kunwar Digambar Singh - - - *Appellant,*

v.

Kunwar Ahmad Sayeed Khan - - - *Respondent,*

FROM

THE HIGH COURT OF JUDICATURE FOR THE NORTH-WESTERN PROVINCES, ALLAHABAD.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 25TH NOVEMBER 1914.

Present at the Hearing.

LORD DUNEDIN. LORD SHAW.
SIR JOHN EDGE. MR. AMEER ALI.

[*Delivered by* SIR JOHN EDGE.]

The suit in which this Appeal has arisen was brought on the 6th August 1910 in the Court of the Subordinate Judge of Aligarh by Kunwar Digambar Singh, who is the Appellant here, against Kunwar Ahmad Said Khan, who is the Respondent to this Appeal, and one Bhawani Das, to enforce a right of preemption to which Kunwar Digambar Singh claimed to be entitled, under a custom which he alleged to be prevailing in Mauza Pala Kher in the District of Bulandshahr.

The Respondent here, Kunwar Ahmad Said Khan, who was the vendee of the property in dispute, by his written statement denied that

[96] E J 390 125—11/1914 E & S A

there was any custom of preemption in Mauza Pala Kher and alleged that

> "Mauza Pala Kher was divided by perfect par-
> " tition and entirely separate mahals were formed . . .
> "After the said partition no connection of any kind
> " was left among the co-sharers of the different
> " mahals, nor did any joint right, based on the
> " terms of any *wajib-ul-arz*, subsist among them."

The date of the sale in respect of which preemption is claimed was the 12th July 1909. In 1905, Mauza Pala Kher, otherwise known as Mauza Pala Kaser, and as Mauza Bilaksir, was, on the applications of certain of the then sharers in the mauza, partitioned into five mahals, of which two were named respectively Salig Ram and Bhawani Das. On the partition each of the five newly formed mahals became separately responsible for the revenue assessed upon it, but did not become responsible for the revenue assessed upon any other of the five mahals. No separate record of rights was before this suit framed for any of the five new mahals.

The property sought to be preempted is in Mahal Bhawani Das, in which mahal the Appellant had not a share at the date of the sale; he was, however, at that date a sharer in Mahal Salig Ram, in which mahal neither the Respondent nor his vendor, Bhawani Das, was a sharer. The Respondent was not at the date of the sale a sharer in any of the five new mahals; he was, however, the mortgagee in possession of part of the share of Bhawani Das, the vendor, in Mahal Bhawani Das. The Appellant and Bhawani Das are not related to each other. The Respondent, who is a Muhammadan, is not related to the Appellant or to Bhawani Das. Prior to the partition of 1905 Mauza Pala Kher was an unpartitioned mauza in which the Appellant and Bhawani

Das were sharers. Of the history of Mauza Pala Kher prior to 1863 their Lordships are unaware, but in 1863 all the sharers in the mauza were apparently Muhammadans.

The evidence to prove the custom of preemption upon which the Appellant's claim is based consisted of extracts from a *wajib-ul-arz* of Mauza Pala Kher, of 1863, upon extracts from a *wajib-ul-arz* of the same Mauza of 1870, and of a judgment of the Subordinate Judge of Merut in 1875 in a suit for preemption which was confirmed by the High Court at Allahabad in 1876. The cause of action in that case arose of course long anterior to the partition of Mauza Pala Kher, but the judgments do afford evidence that there existed in Mauza Pala Kher a custom of preemption under which a relation of a vendor—sharer in the mauza was entitled to preempt on a sale to a stranger to the mauza, but that is not the custom upon which the Appellant must rely in this suit.

The extract from the *wajib-ul-arz* of Mauza Pala Kher, which was prepared on the 16th June 1863, as translated and so far as it is material is as follows:—

> "In future every co-sharer mortgagor or mortgagee "shall as such be at liberty to make transfers. But "he shall make transfers first in favour of his own "and *ckjaddi* brothers and after them in favour of "co-sharers in the *khata* and *patti* as well as in "favour of the proprietors of the village. If none "of them take he shall be competent to make "transfers in favour of strangers. If there is a "dispute regarding difference in consideration it shall "be decided by arbitration."

The *wajib-ul-arz* of 1863 was signed by all the sharers and by some, if not all, of the mortgagees.

The corresponding clause in the *wajib-ul-arz* of 1870, as translated in the record, is as follows:—

"In future co-sharer mortgagor or mortgagee has
"as such power. He shall have power to make
"transfers first to his own and *ekjaddi* brothers and
"next to co-sharers in the *khata* and *patti* as well
"as to proprietors. If none of the aforesaid persons
"takes he shall have power to transfer it to a
"stranger. If there arises any dispute as regards
"the price being more or less it shall be decided by
"arbitration."

In paragraph 14 of the *wajib-ul-arz* of 1870 it is expressly stated, "Custom as to preemption—Preemption is allowed." There can be no possible doubt that the clauses to which their Lordships have referred set out what the sharers in Mauza Pala Kher had in 1863 and in 1870 agreed to be the custom of preemption in the mauza. It is to be presumed, as the contrary has not been shown, that the *wajib-ul-arz* of 1863 and the *waib-ul-arz* of 1870 had been properly prepared in accordance with the law then in force, and with the "Directions for Revenue Officers in the North-"Western Provinces of the Bengal Presi-"dency," which had been promulgated under the authority of the Lieutenant-Governor of those provinces.

The references in the clauses above mentioned to mortgagors and mortgagees are obscure. The sharers in Mauza Pala Kher may have intended that if a mortgagor should assign his interest as a mortgagor he should offer it in the first instance to his own or his *ekjaddi* brother and then to a sharer in the *khata* and *patti*, or to a proprietor in the mauza, and if they should refuse to purchase it he might assign it to a stranger, and in the same way if a mortgagee should wish to assign his mortgagee's interest his right to assign it should be similarly limited. In their Lordships' opinion it was not meant by the clauses to which they have referred to treat

mortgagees as such as sharers in the mauza and to confer on them a right to preempt.

Having regard to some of the decisions of the High Court of Allahabad, which have been referred to in the arguments in this appeal, it is unfortunate that the record which is before this Board does not show what was the vernacular word in the *wajib-ul-arzes* of 1863 and 1870, which has been translated as "co-sharer," or what was the vernacular word in the *wajib-ul-arz* of 1863 which has been translated as "village."

The *wajib-ul-arz* of 1863 contained a clause as to partition which, as translated in the record, was as follows:—

7. Partition, separate and compact.

"Every one can get his property partitioned to "the extent of his share. And, if the area be "compact, he can also get a separate *mahal* formed. "If at the time of partition the grove of one person "comes to be included in the lot of another, the "planter of the grove shall remain in possession as "before, but the planter shall (have to) give land "of the same quality in exchange. As to a well, "the costs of construction shall be given to the "person who constructed it. If the *khudkasht* land "of one person comes into the possession of another, "then he (the person in possession) shall relinquish "it of his own accord or shall pay rent as a "tenant."

It appears to their Lordships that it may reasonably be inferred from this clause that the sharers of 1863 in Mauza Pala Kher not only contemplated that the mauza might subsequently be partitioned into separate mahals, but also intended that on a partition off from the mauza of a separate mahal, the sharers in the other mahals or in the unpartitioned portion of mauza Pala Kher should as such have no share or other proprietary interest in the separated mahal. It does not appear from the extracts from the *wajib-ul-arz* of 1870,

which are printed in the record whether the *wajib-ul-arz* of 1870 contained a similar clause, but it probably did.

It appears from the *rubkar* of the 5th December 1902 which was drawn up for the carrying out by the *Amin* of the partition of Mauza Pala Kher that the partition should be a perfect partition; that a grove should be allotted to the mahal of the person who had planted it; and that a Muhammadan tomb, which stood in the *abadi*, should be allotted to the share of the Muhammadans.

The Subordinate Judge of Aligarh found that a custom of preemption prevails in Mauza Pala Kher; that the partition of the mauza and the separation of the plaintiff's Mahal Salig Ram from that of the vendor did not affect the custom of preemption; and that the plaintiff, the Appellant here, had a right to preempt as against the vendee, the Respondent here; and on the 28th March 1911 he gave the Appellant a decree for preemption. From that decree Kunwar Ahmad Said Khan, the Respondent here, appealed to the High Court of Judicature at Allahabad.

The Chief Justice and Mr. Justice Tudball, before whom the appeal came for hearing, allowed the appeal and dismissed the suit. From the decree of the High Court this Appeal has been brought.

Preemption in village communities in British India had its origin in the Muhammadan law as to preemption, and was apparently unknown in India before the time of the Moghul rulers. In the course of time customs of preemption grew up or were adopted among village communities. In some cases the sharers in a village adopted or followed the rules of the Muhammadan law of preemption, and in such

cases the custom of the village follows the rules of the Muhammadan law of preemption. In other cases, where a custom of preemption exists, each village community has a custom of preemption which varies from the Muhammadan law of preemption and is peculiar to the village in its provisions and its incidents. A custom of preemption was doubtless in all cases the result of agreement amongst the shareholders of the particular village, and may have been adopted in modern times and in villages which were first constituted in modern times. Rights of preemption have in some provinces been given by Acts of the Indian Legislature. Rights of preemption have also been created by contract between the sharers in a village. But in all cases the object is as far as is possible to prevent strangers to a village from becoming sharers in the village. Rights of preemption when they exist are valuable rights, and when they depend upon a custom or upon a contract, the custom or the contract, as the case may be, must, if disputed, be proved.

The only evidence in this case to prove that the custom, which is relied upon by the Appellant, existed in Mauza Pala Kher, is afforded by the clauses relating to preemption which are contained in the *wajib-ul-arzes* of 1863 and 1870. These clauses do, in the opinion of their Lordships, prove that prior to the partition of Mauza Pala Kher the custom of preemption, which is set out in the second paragraph of clause 2 of the plaint, existed and was in force in Mauza Pala Kher, but that would not be sufficient to entitle the Appellant to a decree. It would be necessary for him to show, either on the construction of the *wajib-ul-arzes* or by other evidence, that

the custom of preemption which obtained in the unpartitioned Mauza Pala Kher would survive a partition of that mauza into separate mahals so as to give a sharer in one of the new mahals a right to preempt property in another of those mahals in which he was not a sharer at the date of the sale.

This question was very carefully considered by a Full Bench of the Allahabad High Court in Dalganjan Singh *versus* Kalka Singh and others (I.L.R. 22 Allahabad 1), in which Sir Arthur Strachey, C.J., and Mr. Justice Banerji, considered that the question in each case is that of the construction of the nature of the particular custom on which the claim for preemption is based, and whether the custom can apply to the altered state of things which comes into existence when a perfect partition has been effected. In that case as in this no new *wajib-ul-arz* was framed on the partition. Their Lordships are not prepared to dissent from the view of Mr. Justice Banerji in the case which has been referred to, that " where " a fresh *wajib-ul-arz* has not been prepared " at partition, it does not follow, as a matter " of law or principle, that the custom or " contract in force before partition is no " longer to have effect or operation." The question must depend upon the circumstances of each case and the inferences which may legitimately be drawn from the evidence. In the present case their Lordships cannot overlook the fact that in 1863 all the sharers in Mauza Pala Kher were Muhammadans; that Hindus were obtaining interests in the mauza as mortgagees; and that the sharers in 1863 were contemplating that the mauza might be partitioned. The right to obtain perfect partition, of course, existed. Nor can their

Lordships overlook the fact that in 1905, when perfect partition was applied for, Hindus had become sharers in Mauza Pala Kher, and that nothing was done on partition to provide that sharers in one mahal should have a right of preemption in respect of a sale in another mahal in which they were not sharers. Their Lordships are unable to draw the inference from the *wajib-ul-arzes* and the circumstances in this case that it was intended that, in case of a perfect partition of Mauza Pala Kher, a sharer in one mahal should have a right of preemption in another mahal in which he was not a sharer.

The learned judges who decided the appeal in this case in the High Court apparently considered that the evidence afforded by the *wajib-ul-arzes* of 1863 and 1870 did not prove any custom of preemption, and each of them also relied upon the fact that no evidence that the right of preemption has been exercised was given. The learned Chief Justice also apparently suggested doubts as to the value of a *wajib-ul-arz* as evidence of a custom of preemption when unsupported by evidence that the custom had been enforced. As their Lordships have already intimated, they have no doubt that the clauses relating to transfers of shares in the *wajib-ul-arzes* of 1863 and 1870 stated what the sharers in 1863 and the sharers in 1870 had agreed was the custom of preemption in Mauza Pala Kher. These clauses were inartistically drafted. The Kanungo or other official who collected information from the sharers in the mauza may have been a person who was as ignorant as they were of legal forms and legal phraseology, but

before the *wajib-ul-arzes* were signed by the sharers or sanctioned by the settlement officer the sharers had an opportunity of objecting to any statements contained in them which they did not understand or did not consider to be correct. Preemption was a matter in which all the sharers were interested; it was a matter as to which they could agree as to what the custom in their mauza was. Preemption, with various incidents, limitations, and restrictions, prevails by custom or by special agreement amongst shareholders in very many, if not in most or all, of the village communities in the province in which Mauza Pala Kher is situate.

In agreeing as to the custom of preemption which should be inserted in the *wajib-ul-arzes* the sharers were not trying to establish any rule of inheritance in the mauza inconsistent with the Muhammadan or the Hindu law of inheritance, and their Lordships fail to see on what principle statements in a *wajib-ul-arz* as to rights of preemption, which are not in contravention of Muhammadan, Hindu, or other law, should not be considered as reliable evidence of a custom of preemption. To hold that a *wajib-ul-arz* is not by itself good *primâ facie* evidence of a custom of preemption which is stated in it and that the *wajib-ul-arz* requires to be corroborated by evidence of instances in which the custom has been enforced would be to increase the costs of litigation in preemption cases, and in many cases might practically deprive a sharer of his right. Of course the evidence as to a custom of preemption afforded by a *wajib-ul-arz* may be rebutted by other evidence.

The Appellant has failed to prove that he is entitled to a decree. Their Lordships will humbly advise His Majesty that the Appeal should be dismissed. The Appellant must pay the costs of the Appeal.

In the Privy Council.

KUNWAR DIGAMBAR SINGH

v.

KUNWAR AHMAD SAYEED KHAN.

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