

(1923) 11 AHC CK 0025
In the Allahabad High Court

Babban Pande

APPELLANT

Vs

Lachhman Chaudhri and Another

RESPONDENT

Date of Decision : 30-11-1923

Acts Referred:

Citation : (1924) ILR (All) 205

Hon'ble Judges : Sulaiman, J;Lindsay, J

Bench : Division Bench

Judgement

Lindsay and Sulaiman, JJ.—We cannot maintain the judgments of the courts below in this case. We think that the plaintiff was entitled to succeed and that it was established that a custom of pre-emption exists.

2. The plaintiff brought into court extracts from the wajib-ul-arzes of 1833, 1860 and 1885 and he also claimed to have in support of his case a decree in which the right of pre-emption had been recognized.

3. Clearly it lay heavily on the defendants to rebut this evidence led on behalf of the plaintiff.

4. We have had a number of these Basti cases before us recently and it seems to us that the position regarding these wajib-ul-arzes in Basti and Gorakhpur is not properly appreciated by the courts there.

5. It was brought to the notice of the learned judge of the court below in this case that the wajib-ul-arz prior to the year 1885 was a document of special importance.

6. We have in other cases found it necessary to draw attention to the fact that in the Gorakhpur and Basti settlement rules relating to the settlements which were made about the year 1885, the Board of Revenue issued special instructions regarding the preparation of a record of a custom of preemption

7. Settlement Officers were directed to record a custom of pre-emption when the

proprietors (being other than Muhammadan proprietors) expressly demanded that a note of the custom should be made and, further, proved conclusively that the custom exists. It seems to us, therefore, that when we find in a wajib-ul-arz prepared under these instructions a statement that a custom exists, it must be assumed that the necessary proof was forthcoming before the Settlement Officer before that record was made; in other words, that there was proof which conclusively satisfied the Settlement Officer of the existence of the custom.

8. It is, in our opinion, a mistake to treat these documents in the way in which the courts below seem to treat them. We ought, in dealing with the question of the existence of custom, to begin with the last record. In this instance, the record was prepared in 1885. If it is proved that records of custom are set out in the earlier wajib-ul-arzes of 1860 and 1833, that is corroborative evidence. It is not proper to start with the wajib-ul-arz of 1833 to consider whether it was possible that a custom could have grown up by that time and then to proceed to consider subsequent wajib-ul-arzes. The proper starting point is the last wajib-ul-arz.

9. We have it, therefore, that there is a very strong presumption here in favour of the existence of custom and it remains to be seen what evidence was forthcoming by way of rebuttal. We disagree entirely with the view of the evidence relating to the history of the village which has been taken by the court below. It seems to be clear on all hands that this was one of those numerous villages in which there was a superior proprietor and a number of inferior proprietors called birtyas. It would seem that in the earlier short term settlements which, were made before the first regular settlement came to be made under the Regulation of 1833, the revenue engagements were taken from the superior proprietor. A reference to the Gazetteer shows that in the earlier days of the British administration this was the policy of the Government. Later on, however, that policy was changed and the practice sprang up of taking the revenue engagement from the inferior proprietor or birtya and providing for the rights of the superior proprietor by declaring that a certain amount of malikana shall be payable to him.

10. This is what has happened in the present case. It appears that in the year 1837 a certain petition was put in by a member of a family residing in this village. He represented that he, himself and his co-sharers had been birtyas in this village and had been in possession, since the time of the Nawab Wazir of Oudh, that is to say, since before the year 1800.

11. The object of this petition was to obtain the revenue engagement, the birtyas apparently desiring that the settlement should be made with them and not, as heretofore, with the superior proprietor. There is nothing whatever in this petition to indicate that it was impossible in any way that a custom of pre-emption should have grown up by that time or subsequently. It is not correct to say that if it is shown that certain property in the course of time becomes the exclusive property of an entire family, any custom relating to pre-emption must necessarily lapse.

The true doctrine is that if the custom of pre-emption exists and if it so happens that the property to which it relates eventually comes into the hands of a single individual proprietor, the custom is there and then extinguished. That, however, is not the case here, for, as we have pointed out, in the application which was made in the year 1837, the applicant stated that there were other people who were co-sharers with himself.

12. On all hands, therefore, it is clear that the very strong presumption in favour of the existence of custom which is to be based upon the *wajib-ul-arz* prepared in the year 1885 has no in any way been overturned by the evidence of the history of the village. The case to our mind is a perfectly clear one, and, as we have said, we must hold that the existence of the custom, should on this evidence have been held to be established.

13. There remains the question of the consideration. It is stated in the sale-deed that the property was being sold for the-sum of Rs. 2,999. The allegation of the plaintiff was that the true consideration was only Rs. 1,100.

14. The court of first instance found on this issue that the-genuine consideration for the sale was a sum of Rs. 1,647 only.

13. When the plaintiff went in appeal, the question of consideration was raised again, but in view of the finding to which the learned Judge came regarding the existence of the custom, he did not consider it necessary to decide this issue. It will now be necessary for us to remit an issue to the learned District Judge asking him to find the true consideration for the sale now sought to be pre-empted. No further evidence will be taken. The finding of the learned Judge ought to be-returned to us with as little delay as possible, and ten days from the date of the receipt of the learned Judge's finding will be allowed to the parties to file objections.