

(1917) 01 AHC CK 0005
In the Allahabad High Court

Bhagwan Singh

APPELLANT

Vs

Musammat Rajwanta Kunwar and Others

RESPONDENT

Date of Decision : 30-01-1917

Acts Referred:

Citation : AIR 1917 All 302(2) : 38 Ind. Cas. 157

Hon'ble Judges : Henry Richards, C.J;Tudball, J

Bench : Division Bench

Judgement

1. This appeal arises under the following circumstances:--Musammat Rajwanta Kunwar and others were the owners of shares in certain villages. Gajadhar Singh and others were the owners of shares in certain other villages, Musammat Rajwanta and her party agreed with Gajadhar and his party to exchange the shares which they owned for the shares which Gajadhar and his party owned in the other villages. The deed of exchange contained a provision that if either party Should lose the property which they were getting under the exchange, then they would get back the property which they were giving in exchange. The plaintiff instituted two suits, one against Musammat Rajwanta and her property, and the other against Gajadhar and his property, claiming possession by right of pre-emption over portions of the property in each case. As soon as the suit was instituted, a further deed was executed between the parties cancelling the deed of exchange. The lower Appellate Court has held that as a result the parties have been relegated to their previous rights and that the plaintiff is not entitled to get either property. Both suits were accordingly dismissed. The plaintiff has appealed in both suits. It seems to us that in the present suits, like all other suits for pre-emption, it is necessary for the plaintiff to prove the existence of a custom which entitles him to get the property. In the present cases the property was neither being sold nor mortgaged, it was necessary, therefore, to prove the existence of a custom that when property was being exchanged, the plaintiff was entitled to get the property exchanged in consideration of paying the value of the property in cash. The evidence in support of the existence of such a custom is the wajib-ul-arz, which provides that whenever a co-sharer wishes to make an absolute sale

of his share, or mortgage by conditional sale, he must first offer it to the other co-sharers. We think that this evidence is altogether insufficient to establish such a custom. There is no mention whatever of exchange. On behalf of the appellant reliance is placed on the case of Niamat Ali v. Asmat Bibi 7. A. 626 : A.W.N. (1885) 183 : 4 Ind. Dec. 740 and also on the case of Bhagwan Singh v. Kharag Singh A.W.N. (1907) 280 : 4 A.L.J. 756. In the first of these cases the waiib-ul are contained the following entry:--"If any sharer transfer his rights and interests, near partners, etc., have a right to purchase at the same price which the stranger gives." It was held that the words were sufficiently wide to cover the case of an exchange. The vernacular words are "Ba surat intiqal haqiyat kisi pattidar ki us qimat par jo shakhs ghair dewe istehqaq haridari awal shurkai karib", etc. The arguments in the case proceeded largely on the meaning of actual words. The language is different from the language in the wajib-ul-arz in the present case. In the present case the right of pre-emption as evidenced by the entry in the wajib-ul-arz only arose on the case of the absolute sale, or a mortgage by conditional sale. In the second case the words used much more nearly approach the words in the present case, but the judgment really proceeds upon the basis that the first case referred to had laid down the principle for all cases. It seems to us that the case cannot be taken as laying down any such general principle. As we have had occasion to point out more than once, these cases of pre-emption where the issue is the existence or nonexistence of a custom must be decided on their own facts and circumstances. It is necessary for the plaintiff to prove not merely that some custom prevails, he must prove a custom under which he is entitled. We think the evidence in the present case was insufficient to establish the existence of the particular custom which it was necessary for the plaintiff to prove. In this view the decree of the Court below is correct. We dismiss the appeal with costs.