

(1924) 06 AHC CK 0006
In the Allahabad High Court

Chaudhri Khazan Singh and Another	Vs	APPELLANT
Chaudhri Umrao Singh and Others		RESPONDENT

Date of Decision : 10-06-1924

Acts Referred:

Citation : 92 Ind. Cas. 335

Hon'ble Judges : Sulaiman, J;Kanhaiya Lal, J

Bench : Division Bench

Judgement

1. This is a plaintiffs' appeal arising out of a suit for pre-emption. The defendants Nos. 1 and 2 by a sale-deed, dated the 15th of July 1920, transferred their shares in village Badnauli in Tahsil Hapur, District Meerut, in favour of two sets of defendants. Half of the property was transferred to defendants Nos. 3 to 7 and the other half to defendants Nos. 8 to 12. There is a clear specification of this in the sale-deed. The plaintiffs alleged in the plaint that under a custom of preemption existing in the village they were entitled to pre-empt as against the defendants who were strangers to the mahal. As to the sale consideration it was alleged that out of the sum shown before the Sub-Registrar a sum of Rs. 2,000 was actually returned afterwards and was a fictitious item. It was further asserted that the property sold covered standing sugar-cane crop of the value of Rs. 1,500 which had since been appropriated by the vendees.

2. The defendants vendees denied the existence of any custom of pre-emption and also asserted that the sale consideration mentioned in the sale-deed was true.

3. We may note that a considerable portion of the sale consideration mentioned in the sale-deed was left in the hands of the vendees for payment to certain specified creditors.

4. The learned Subordinate Judge has held that the evidence produced by the plaintiffs is insufficient to establish that a custom of pre-emption existed in this village. On this finding the suit has been dismissed in toto. He has, however,

gone on to record findings on the other issues which arose in the case and has come to the conclusion that it is not established by the plaintiffs that a sum of Rs. 2,000 was returned by the vendors after registration. He has also come to the conclusion that the value of sugar-cane crop was only Rs. 1,000 and not Rs. 1,500 and, therefore, Rs. 1,000 would have to be deducted from the sale consideration. There was also an allegation by the plaintiffs that the defendants vendees had cut away certain trees of wild growth worth Rs. 150, but this was not substantiated by any evidence.

5. The plaintiffs have come up in appeal before us and two main points arise for consideration, (1) The existence or non-existence of the alleged custom of pre-emption and (2) the amount of sale consideration.

6. In support of the alleged custom of preemption the plaintiffs relied on the wajib-ul-arz of 1870 prepared by Mr. Nasir Ali, a Settlement Deputy Collector. They also relied on two suits for pre-emption instituted in 1886 and in 1892 respectively. The defendants, on the other hand, produced what purports to be a wajib-ul-arz prepared by Mr. Mohar Singh another Settlement Deputy Collector, and of which the learned Subordinate Judge says the year is 1860. The document which is produced, however, bears no such date. The defendants also produced a rubkar of 1836 drawn up by Sir Henry Elliot and the dastur dehi prepared by Mr. Gillan for 1303 Fasli. The last two documents do not contain any mention of the right of pre-emption.

7. The learned Subordinate Judge has made a great point against the plaintiffs by pointing out that there are some variations in the entries regarding the right of preemption as contained in the wajib-ul-arzes prepared by Mr. Mohar Singh and Mr. Nasir Ali respectively. It is necessary for us to consider as to the exact nature of the wajib-ul-arz prepared by Mr. Mohar Singh. In this document, it is shown that the entire village had been settled with Girwar Singh, lambardar, from the year 1242 Fasli to the year 1262 Fasli (corresponding to 1835-1855 A.D.). It goes on to say that subsequently as sanctioned by the Board of Revenue the term of the Settlement was extended by a further period of 10 years and the aforesaid revenue was maintained. It is clear, therefore, that the Settlement which was made by Sir Henry Elliot in 1835 continued till 1865. The wajib-ul-arz prepared by Mr. Mohar Singh is said to have been prepared in the year 1860. A reference to the Gazetteer of the District of Meerut shows that after the Settlement of Sir Henry Elliot the next regular Settlement was made by Mr. Forbes and Mr. Porter between the years 1865 and 1870. It is quite clear that, there was no Settlement, in the strict sense of the word, in the year 1860. It is, therefore, impossible to regard the wajib-ul-arz prepared by Mr. Mohar Singh as the final Record of Rights prepared at the Settlement. There are no materials on the record to show when the Settlement which was completed in 1870 actually commenced. It is possible that some preliminary operations may have been started in 1860 in course of which the wajib-ul-arz drawn up by Mr. Mohar Singh might have been prepared. The clause containing the verification is not filed and

it is difficult to say whether that wajib-ul-arz represents a final record of a custom or contract enforceable in the village. It is possible that the wajib-ul-arz of 1870 may be the revised and corrected record.

8. In this view of the nature of the document it cannot be seriously urged that the presumption arising from the entry in the wajib-ul-arz of 1870 which was admittedly a Settlement period, has been negated by a different entry contained in Mr. Mohar Singh's document.

9. The defendants have also produced a rubkar issued by Sir Henry (then Mr. Henry) Elliot, dated the 25th of February 1836, which contains no reference to any right of pre-emption. That, however, is not the complete wajib-ul-arz. The defendants further relied on the absence of any entry of a right of pre-emption in the dastur dehi prepared by Mr. Gillan in the subsequent Settlement. As to this we may point out that Mr. Gillan's Settlement was completed in the year 1901 and the settlement of Tahsil Hapur came into effect in 1898 (vide page 132 of the Gazetteer). On the 19th of November, 1897, however, a fresh set of Settlement Rules had been issued by the Board of Revenue under which directions were given to Settlement Officers to make certain entries in the Record of Rights. A comparison of the directions then issued with the previous directions makes it clear that no specific authority was given to Settlement Officers to make an entry of custom like pre-emption, prevailing in the village other than those covered by certain specified clauses. Accordingly under the new rules no entry was ordinarily to be made by the Settlement Officers as regards a custom of pre-emption and it is on this account that in wajib-ul-arzes prepared subsequent to 1897 there is no mention of any such rights either way. The omission, therefore is not so conclusive.

10. We are, therefore, left with the entry in the wajib-ul-arz of the year 1870, which was of the second regular Settlement, and which contains a clear recital of a right of pre-emption. Paragraph 1.7 states that if any share-holder wishes to sell his share he can do so first to his bhai hakiki (own brothers), then to qaribi (near) and then to shareholders in the thok. If the share-holders in the thok refuse to purchase it the vendor is at liberty to transfer it to any share-holder of the village. Then follows a clause regarding the settlement of price by arbitration in case of a dispute. This entry raises a prima facie presumption of the existence of a custom of pre-emption. This wajib-ul-arz was prepared at the time when the Board's Circular No. 24 of 1868 had come into effect, under which the Settlement Officers were expressly authorised to make entries as regards customs prevailing in the village. We are, therefore, entitled to presume that this entry is a record of custom. There is nothing in the previous or subsequent history of the village which necessarily negatives the existence of such a custom. All that is shown is that the village was settled with Girwar Singh, lambardar. There may have been many other co-sharers besides Girwar Singh and in any case he may have represented a joint Hindu family. There is, therefore, no ground for holding that during this period the entire village was owned by a

single proprietor. As to the circumstances that various other proprietors became co-sharers between 1860 and 1870 we may point out that the Gazetteer at page 130 mentions that in Hapur old proprietors were replaced to the extent of 20 per cent. mainly by moneylenders, that no less than 69 estates were confiscated owing to the action of proprietors during the Mutiny, and of these 49 were sold by auction and 16 were given away in reward while 4 were held for a time under the direct management. Therefore, it might well have been that some of these strangers became co-sharers by purchases at auction.

11. The learned Subordinate Judge has been influenced by two main points. The first is that the preamble of the wajib-ul-arz indicates that it was a record of an agreement. The inference is not quite correct because all wajib-ul-arzes are in stereotyped forms and contain similar preambles: vide *Re-turaji Dubain v. Pahalwan Bhagat Ind.* Cas. 680 : 33 A. 196 : 7 A.L.J. 1040. They are primarily records of engagements of co-sharers with the Government for payment of Government revenue. The second circumstance relied on is a supposed variation between the wajib-ul-arzes of 1860 and 1870. As to this we have already stated that the wajib-ul-arz of 1860 cannot be regarded as a complete and final record of any regular Settlement. In any case the variation does not make the two wajib-ul-arzes necessarily contradictory. In the wajib-ul-arz of Mr. Mohar Singh the right of preemption was given first to the true brother, then to a near brother, but not specifically to a co-sharer. It is, however, to be noted that in that year there might have been no other co-sharers but the three brothers Baldeo Singh, Jagdish Singh and Gurdayal Singh, sons of Girwar Singh, whose names are entered in the opening portion of the wajib-ul-arz. This circumstance might explain the omission of a reference to co-sharers. The other discrepancy relied upon is that under the first wajib-ul-arz a right was given in the case of transfer by mortgages as well as sales, whereas in the wajib-ul-arz of 1870 the right was confined to sales and it was expressly stated that there was no right of pre-emption as regards mortgages. We may say that even if a custom of pre-emption as regards mortgages had existed in 1860 there was nothing to prevent the co-sharers in 1870 from abrogating that part of the custom.

13. The plaintiffs relied on two pre-emption suits in order to show that claims of preemption had been asserted. In 1886 a suit was instituted for pre-emption and in para. 3 of the plaint it was expressly alleged that according to the terms of the wajib-ul-arz and the custom of the village the plaintiffs were entitled to claim pre-emption. In the written statement which was filed the substantial plea taken was that the plaintiffs were not proprietors at all and there was no express denial of the existence of a custom of pre-emption. This suit is said to have been ultimately withdrawn and is, therefore, not of very great importance. The second suit was instituted in the year 1892 where the plaintiff merely asserted that he had a right of pre-emption not expressly mentioning that there was a custom under which this right existed. That suit also was ultimately dismissed on the ground that the plaintiff was not the absolute proprietor by virtue of which she was claiming pre-emption. As the Settlement of 1870 was then in force no

conclusive inference can be drawn from this litigation also. Having regard, however, to the entry in the wajib-ul-arz of 1870 which, in our opinion, stands unrebutted, we must hold that the custom of pre-emption exists in this village.

8. As regards the sale consideration, the finding of the learned Subordinate Judge that there is no satisfactory evidence that Rs. 2,000 were returned after registration, cannot be seriously challenged. We are satisfied that that finding must be accepted.

9. The learned Vakil for the plaintiffs has not challenged the finding that there is no satisfactory evidence to prove that dhak and other kind of timber worth Rs. 150 had been removed by the defendants vendees. Therefore this finding must also stand.

10. On behalf of the defendants there is no cross-objection with regard to the finding that out of the sale consideration, sugarcane crops worth Rs. 1,000 had been appropriated by the vendees. So this finding of the learned Subordinate Judge also must stand.

11. There is, however, some dispute between the parties as to the exact amount which has been paid by the vendees to the creditors named in the sale-deed, for whom money had been left in the hands of the vendees. The vendees are entitled to claim from the plaintiffs pre-emptors only that much of the amount which they have actually paid to the vendors or to the prior creditors named in the deed. If there is any sum still left in their hands for payment the plaintiffs will make this payment as they have stepped into the shoes of the vendees.

12. We, accordingly, allow this appeal and setting aside the decree of the Court below, decree the plaintiffs' claim for pre-emption subject to the payment of Rs. 21,000 to be deposited in the Court below within two months from this date. Out of this sum Rs. 1,000 will be paid to the vendees, and out of the balance of Rs. 20,000 the vendees will be entitled to get as much as they have actually paid to the prior creditors mentioned in the sale-deed. The balance will be paid to the creditors themselves directly. In case of default of payment by the plaintiffs within the time specified the suit shall stand dismissed with costs in all Courts. In case of payment within the time allowed the plaintiffs will get their costs in both the Courts. The fees in this Court will include fees on the higher scale.