
(1910) 03 AHC CK 0021
In the Allahabad High Court

Hub Lal Tewari

APPELLANT

Vs

Ganga Sahai and Others

RESPONDENT

Date of Decision : 15-03-1910

Acts Referred:

Citation : 6 Ind. Cas. 151

Hon'ble Judges : Karamat Husain, J; George Knox, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

1. This second appeal arises out of a suit brought by Hub Lal, appellant before us, for pre-emption of certain property which has been transferred to Ganga Sahai and others, defendants first-party, on the basis of a custom recorded in wajib-ul-arz. The Court of first instance held that the custom was proved by the record contained in the wajib-ul-arzes of 1833 and 1860. No rebutting evidence was given to that Court. The lower appellate Court held that the custom of pre-emption was not proved from the wajib-ul-arz of 1860. The reasons given by it for holding this view are as follows:

2. Firstly.--That the preamble to the wajib-ul-arz of 1860 contains words to this effect "accordingly we willingly and with full understanding subscribe to what follows and will remain bound accordingly". Secondly: That the case before it was on all fours with two unreported rulings of this Court, namely Babu Dharam Rai v. Tahal Rai, L.P. No. 64 of 1905, decided, on the 27th of April 1906 and Phalloo Ram v. Sheo Harak, S.A. No. 810 of 1903, decided on the 7th of April 1905; the learned Judge says that it has not been shown to him that the clauses of the 1860 wajib-ul-arz undoubtedly record custom. He accordingly decreed the appeal and dismissed the suit. In appeal before us, it is contended that the lower Court has erred in its interpretation of the terms of the wajib-ul-arz, and that the evidence on the record fully establishes the custom of pre-emption in the village. We called upon the learned Vakil for the respondents to support the judgment of the lower appellate Court. He argued the case before us very fully and contends

that he relies first upon the preamble of the wajib-ul-arz, and next upon the fact that the terms contained in the wajib-ul-arz of 1860 differ from the terms contained in the wajib-ul-arz of 1833. Now it is quite true and has been frequently held by this Court that in dealing with the words contained in a wajib-ul-arz, specially those relating to pre-emption, it is by no means safe to rely upon the language used, and that we have to judge whether the custom alleged exists or does not exist from the circumstances which surround the case and not from a too particular scrutiny of the words contained in the wuiib-ul-arz. In the case before us, the wajib-ul-arz of 1860 undoubtedly began with a preamble which was as follows "we" so and so "pattidars of the village. This village is our ancestral zamindari and its settlement has been made with us. Hence willingly and having understood, we write down the following clauses and we shall act according to them." This preamble is, however, a preamble based more or less upon a sample preamble which the Board of Revenue thought fit to enjoin as suitable for wajib-ul-arzes in general. The wajib-ul-arz, it must be remembered, was not confined to being a mere record of the custom of preemption but other facts and customs alleged to exist in the village are contained in the record, e.g., the constitution of the Mahal and tenure, payment of Government Revenue, rights of sharers and subordinate holders and of tenants and so forth. It was in fact a record of facts existing in the village, some of which might be based upon custom and other facts which referred to the relations between landlord and tenants. The wajib-ul-arz was a declaration on the part of the zamindars that they recognised the existence of these facts and customs. The opening words contained in the preamble seldom, if ever, are any sure guide as to whether this or that, that follows in the paper, is a fact or a custom prevalent in the village. Sometimes, however, but very seldom, it will be found that the signatures to a wajib-ul-arz do distinguish between what are existing facts and what are customs. In such cases, it will be found that the divergence in the language used is marked and shows that the signatures recognised the difference. In such cases, the language used may and probably will be a safe guide to show what the signatures regarded as facts and what they regarded as customs. In the present case, however, we have only the preamble and nothing more.

3. When we come to the particular clause relating to pre-emption the [wajib-ul-arz of 1833 runs as follows:

Whoever from among us wishes to transfer either the whole or part of his share by means of sale or mortgage, it is proper (lazim) that he should give information to the shareholders of the village (deh), the sale or mortgage to be at the price appointed (moiana). In the event of a proper (wajib) price not being taken or given, it is in his power to transfer to whom he likes". The terms contained in the wajib-ul-arz of 1860 run as follows: "Mention of transfer of right. Every share-holder is empowered to transfer his share, and at the time of transfer it would be proper that first he should give information to his near (qaribi) share-holders and in the event of their refusing to other share-holders of the village, and sell or mort gage at the proper price". It is upon the change in

the words used that the learned Vakil for the respondent takes his stand; but upon looking carefully into the two wajib-ul-arzes, we are of opinion that there is no real or substantial difference between them. The wajib-ul-arz of 1833 was recorded at a time when the recording of pre-emptive provisions was new to share-holders. That of 1860 was written after a lapse of some 30 years, when probably more attention was, paid to details. The record of 1833 records the custom in brief and general terms; the record of 1860 sets out the custom in greater detail. We have sent for the two cases upon which the learned Judge relied which he held he was bound to follow in preference to Baldeo Sahai v. Nagai Sahai A.W.N. (1907) 17 : 3 A.L.J. 850 and Maratib Husain v. Alain Ali A.W.N. (1907) 285. In the case of Dharam Rai v. Tahal Rai, the wajib-ul-arz of 1833, upon which the defendant relied to prove the existence of the custom of pre-emption, there was a very material difference between the record as contained in the wajib-ul-arz of 1833 and in the wajib-ul-arz of 1868; and the learned Judge who decided the case decided it upon this material difference in the two documents. In Phalloo Ram v. Sheo Harak, the decision turned upon the words contained in the preamble to the wajib-ul-arz. The words used were certainly somewhat different from those which are contained in what we have called the sample attestation clause of the wajib-ul-arz. They ran as follows: "Therefore, having well-understood we have recorded the following matters, and according to them we shall remain bound". In the case before us, we have come to the conclusion that the clause relating to pre-emption records a custom and not a contract, first, because there is nothing in it which in any way leads us to infer that a contract was contemplated, and also because the rules prevailing at the time directed the settlement officer to record customs which he found existing in the village. If we had found in the clauses relating to pre-emption any special language or had our attention been called by the evidence on the record to any particular circumstance evidencing the exist once of a contract, it would be different. We find no evidence of a contract, and following the rulings in Majidan Bibi v. Hayatan Bibi A.W.N. (1897) 3, Ali Nasir Khan v. Manik Chand 25 A. 90, Baldeo Sahai v. Nagaisahai A.W.N. (1907) 17 : 3 A.L.J. 850, we hold that the custom of pre-emption has been proved to exist. We decree the appeal, set aside the decree of the Court below and restore that of the Court of first instance with costs in all Courts including in this Court fees on the higher scale.