

(1895) 01 AHC CK 0009
In the Allahabad High Court

Man Singh and Another

APPELLANT

Vs

Ghure and Another

RESPONDENT

Date of Decision : 20-01-1895

Acts Referred:

Citation : (1895) ILR (All) 226

Hon'ble Judges : Knox, J;Aikman, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

Knox, J.—This is an appeal from an order passed by the District Judge of Agra in an appeal before him, whereby he set aside a decree passed by the Subordinate Judge of Agra and remanded the case u/s 562 of the Code of Civil Procedure, for determination of certain issues which were raised before the Subordinate judge, and which issues the Subordinate Judge, in consequence of his finding upon the first issue raised, had not determined. In order to understand the case it will be necessary to briefly set out the contentions between the parties. The respondents before us were plaintiffs in the Court of First Instance. Their claim was to enforce a right of pre-emption over certain land which had been sold by one Umrao Beg to one Ghure. The respondents before us and Umrao Beg were none of them residents in the village of Chanderbhanpore. Chanderbhanpore originally consisted of one mahal. In 1881 this mahal was divided by perfect partition into three perfect mahals, respectively termed mahal Umrao Beg, mahal Mogal Beg and mahal. Chair Khwahindagan. The share of land in dispute is situate in mahal Umrao Beg, and it is admitted that since the perfect partition took place the plaintiffs-respondents are not shareholders in that mahal Umrao Beg, they are sharers in the mahal termed Ghair Khwahindagan. They base their claim to enforce the right of pre-emption over the property situate in mahal Umrao Beg, not upon any record of village customs prepared after partition, but upon a record of village customs, which forms part of the record of rights drawn up at the Settlement which was completed in the days when the village of

Chanderbhanpore still consisted of one single mahal. The vendees of the share in dispute, who were defendants in the Court of First Instance, and are appellants before us, resisted the claim of preemption on the ground that a record of village custom, which they say was prepared after perfect partition, conferred no rights of pre-emption in favor of the share holders over the land situate in their mahal. The Court of First Instance considered the record of village custom which was prepared at the time of partition to be a good and valid document, and as it conferred no preemptive rights in favour of the shareholders of the other mahal, dismissed the claim brought by the respondents. The Lower Appellate Court treated the document prepared after partition, as being no valid record of village custom; held that it could not supersede the record of village custom which had been prepared at the village settlement, and hence issued an order of remand, in order that the rights of the parties might be determined by the provisions contained in that document. It is contended before us that this was an illegal order, inasmuch as the learned Judge was wrong in holding that the record of village custom prepared in 1881 was not a good document. It is contended that the document is a genuine record of village custom and has been in existence for years without being questioned by any of the parties and that record being a good document, and conferring no claim upon the respondents, the respondents were in no way entitled to pre-empt, and their claim should have been dismissed. The issue thus clearly raised before us is, whether the record of village custom prepared at the time of partition is, or is not, a good and valid document. It has been admitted, and very properly admitted, by the learned pleader for the respondents, that if it is a good and valid document, and if it be held to govern the rights of parties in the present case, the respondents' claim must fail.

2. A good many questions of considerable difficulty were raised in the course of the hearing, and we have had the benefit of arguments which on both sides have been prepared with great care and thoroughness. Had it been necessary to decide some of the points so raised, the case would have been one for the consideration of a Full Bench of this Court. I am of opinion that the matters directly and substantially raised in this appeal can be determined apart from those questions. The record of village custom in this case has been prepared in accordance with the rules which were issued by the Board of Revenue on the 13th of November 1875, and under the powers given them by Clause (f), Section 257 of Act No. XIX of 1873. The preface to those rules shows that the rules had received the sanction of Government. It was not prepared under the rules which issued in 1885 and superseded the rules of 1875. In the present case moreover we are not dealing with a record of village custom which has simply been blindly taken from the record which was prepared at "Settlement and repeated totidem Verbis without any consideration whether the rules prepared at settlement did apply to the state of things which ensued upon the great revolution which must take place in every village which was. office undivided but has come to be divided into two or more separate and perfect mahals. The record of village

custom is part of a larger document which is known as the record of village rights and the existence of which is necessary to every mahal. There can be no such thing in law as a mahal for which a separate record of rights has not been framed. This is evident from the way in which the term "mahal" has been defined in Section 3, Sub-section (1) of Act No. XIX of 1878. The record of rights in every mahal is no ordinary document; it is a document which by law is entitled to so much weight that by one of the provisions (i.e. Section 91) of Act No. XIX of 1873, all entries in it when properly made and attested are presumed to be true until the contrary is proved. The authority for the preparation of the document is contained in Rule 23 of the rules above quoted of the 13th of November 1875. Under that rule, when a perfect partition is approaching completion,--"The map and rough schedule shall then be returned to the amin who shall forthwith make out records of the new mahals or pattis in the same form as the records of settlement prescribed under the rules of settlement under XIX of 1873." This rule, it will be seen, refers us back to certain rules issued by the Board, under the powers given them in Section 257, (e) and (f) of Act No. XIX of 1873, on the 28th of September" 1875. The important rules for the purposes of this appeal are rules Nos. 30, 49 and 51. Rule No. 23 of the Circular of the 13th of November 1875 lays down no provision concerning any attestation. All that it requires is that the records of the new mahal be made out in the same form as the records of settlement. It must not be forgotten that no partition record, which includes the record of rights made for the partition of mahals, is complete until it has been sanctioned by the Collector of the district. Even if the partition has been made by an Assistant Collector, the law still requires that it be reported to the Collector of the district for sanction and confirmation. That sanction and confirmation can never take place without formal attestation by the Collector of the district signed by his signature to the records prepared at partition. A still further safeguard is provided by the appeal which Section 132 of Act No. XIX of 1873 gives to the Commissioner of the division from the confirming order of the Collector of the district up to one year from the date from which the partition took effect. It may be that in view of the safeguard thus provided by law the Board of Revenue did not consider it necessary to lay down a rule prescribing that the entries made in the record of rights prepared at partition should be attested in the particular manner provided by Rule 49 of the rules of the 28th of September 1875, when the record of rights is prepared for the first time at settlement. Be that as it may, the highest weight that can attach to an objection that the record or a portion of it has not been attested or that the attestation of them has not been required by any rule, is that the record is not one to which the provision of Section 91 of Act No. XIX of 1873 does apply. Now in this case the respondents do not ask us to presume anything upon the strength of the document prepared at the time of partition; they rely on the document prepared at the time of settlement. Upon that document they stand or fall, and their claim will not prevail, even if it be, which we do not think is the case, that the document prepared after partition is not a document to which the provisions of Section 91 apply. Recognising the importance of the record of village custom

prepared at the settlement so far as the interests of his clients were concerned, the learned pleader for the respondents laboured at great length and with much persistency to the effects, that the record still held good and governed the present case. He laid great stress upon the fact that it was a record of custom prevalent in the village and governing all within the local area of the village. His foundation rests upon the somewhat slender fact that the record of village custom contain in one place the word "riwaj," The word occurs at the introduction to that portion of the record of village custom which deals with the subject of pre-emption. He also laid great stress upon the fact that in dealing with pre-emption the record gives a preference to those who are shareholders in the "deh." His argument was that, however much the village of Chanderbhanpore might have been split up into separate mahals, there still remained one "deh," and that his clients were shareholders in that "deh." Assuming for the present that the record of village custom does set out that pre-emption in Chanderbhanpore at the time when the settlement record was prepared rested upon custom, and not upon contract then prepared among the share holders it is necessary to examine with great care and minuteness the exact nature of the custom, the extent to which it prevailed and the persons who were governed by it. We are dealing with a village which bears a Hindu name, the parties before Us are Hindus, and the custom, if there be one, of pre-emption, in so far as it extends, is a custom superseding general law. In examining the terms in which it is recorded we cannot forget that it was recorded at a time when the village bore its natural and, from a Hindu standpoint, proper form of an undivided village and an undivided mahal. The term "hissadar deh" as then used would apply to all who could claim to hold a share in land within a well-defined ring-fence in which all were. shareholders, and at a time when there existed no intention of the village brother hood being separated or the land being broken up into distinct parcels in which some only and not all the village brotherhood would hold a share. It is more than difficult to say that those who then made the record would have recorded that the custom was one which should prevail when the relations of persons and property then subsisting had undergone such a radical change as necessarily ensues when perfect partition takes place. Even where the existence of custom has been proved, it must not be forgotten that it is not custom but the general law which regulates all beyond the custom. Custom moreover is held to be discontinued owing to accidental circumstances. The fact of a perfect partition evidences not a mere accident, but an intention to break Up, and to completely break up, the existing state of things. It would require therefore strong proof to establish that a custom which regulated and provided for one set of circumstances still regulates and provides when those circumstances have been wholly altered. We were referred to several cases in support of the doctrine that a record of village custom prepared at the time of settlement still prevails and governs when and after perfect partition has taken place. The first case which we were referred to was that of Gokal Singh v. Mannu Lal ILR 7 All. 772. In that case, however, there was apparently no record of village custom prepared after partition had taken place, and the only record of village custom which was in

existence was that prepared at the time of settlement. It was moreover a case in which the contention was that the record of village custom contained covenants made between the parties, and not, as in the present case, a privilege and liberty created by the running of custom. The next, case was that of *Matadin v. Mahesh Prasad* Weekly Notes, 1892, p, 100. This was one of those cases in which the village record of custom, prepared after partition was a verbatim copy from the record of village customs prepared at the time of settlement. In that, case, whether from accident or of design, the record of village custom prepared after partition conferred in express terms a right of pre-emption upon the co-sharers of themauza. In that case the Word "mauza" was. deliberately used after partition had not only been intended but had been completed, and not used as "deh" has been in the present case when partition was not yet within the horizon. The next case cited was that of *Knar Dat Pratad Singh v. Nahar Singh* ILR 11 All 257. That was a case in which Mr. Justice Straight, who delivered judgment, was careful to point out that he was at the time dealing with a particular *wajib-ul-arz* and not with cases where, one record of village custom having existed for the purpose of a common village area, and that village area having been divided into separate revenue areas, no record of village custom had been drawn up for the new area. The record of village custom which was under consideration in that case was one which in express terms conferred a right of pre-emption upon shareholders in a *patti* other than that in which the land sought to be pre-empted was situate, and, in the event of refusal by them, conferred the right in equally well-defined terms upon the sharers of the village, and this too after partition had taken place. There remains one case further which need be mentioned, and which was cited by the learned pleader for the respondents. *Shiam Sundar v. Amanant Begam* ILR 9 All 234. The record of village custom which had to be interpreted in that case was a record prepared at a time when three villages formed a single *mahal*, a state of things widely different from the case now under consideration. It was a special case decided under special circumstances, as the judgment shows.

3. The result then is that the document upon which the respondents base their right and which was the only evidence which they produced in support of that right, is a document prepared at a time when circumstances wholly different from those now in existence prevailed and which never contemplated the existing state of things. We are not prepared to hold that it is sufficient to establish that the custom which did prevail, if there be such a custom, can be held to be a custom governing and ruling the parties in the new and altered state of things. The finding of the learned Judge was erroneous, the order of remand was unnecessary, as the memorandum of appeal filed before him shows. There remains no further matter for decision, and I would, setting aside the order made by the learned Judge, restore that of the Court of First Instance and dismiss the respondents' claim.

Aikman, J.

4. This is an appeal by the vendees who were defendants in a pre-emption suit

brought by the plaintiffs, who are respondents here. The plaintiffs and the vendor, who is not before us, were co-sharers in a village which at one time formed an undivided mahal. In 1881 the village was divided into three mahals, which it will be sufficient to describe as mahals Nos. I, II and III. The property sold lies within mahal No. I. The plaintiffs own a share in mahal No. III, but own no property in mahal No. I. They came into Court asserting their pre-emptive right in virtue of a wajib-ul-arz which was prepared at a time when the village formed but one mahal. The defendants resisted their claim on the ground that a new wajib-ul-arz had been prepared at the time of partition by which, if a valid document, it is admitted the plaintiffs have no right to pre-empt. The validity of this document is disputed by the plaintiffs. In my opinion it is valid and furnishes an answer to the plaintiffs' claim. At the time when the partition was carried out, it was under the then existing rules as much a part of the duty of the officer executing the partition to prepare a new wajib-ul-arz for each mahal, as it was to prepare a new jamabandi. The Board of Revenue, in the rules they have framed for carrying out partitions, prescribed that the officer executing partition is to make out the records of the new mahals in the same form as the records of settlement prescribed under the rules of settlement in Act No. XIX of 1873. Section 90 of that Act lays down that the Board shall from time to time prescribe the form in which the record is to be made, and the manner in which it is to be attested. In the rules relating to partition nothing is said as to the manner in which the new records are to be attested. It was contended on behalf of the plaintiffs, that as the co-sharers had not signed this new wajib-ul-arz, it was of no force. It is the custom at settlement that this wajib-ul-arz is signed by the co-sharers; but this is not required by the rules framed by the Board (vide Rule 49, Book Circular No. 15, 28th of September 1875); consequently the mere absence of the signatures of the co-sharers would not be sufficient to invalidate the document. It is signed by the officer who executed the partition. As pointed out by my brother KNOX, the law gives ample opportunity to the co-sharers to raise any objection, either before the Collector at the time of confirmation or by way of appeal to the Commissioner of the Division, in regard to anything which may have been done at the time of partition. But from 1881 up to May 1893 no objection is shown to have been raised by any co-sharer to the proceedings of the partition amin. I therefore hold that this document would supply a sufficient answer to the plaintiffs' suit. This would be enough to decide the case, but as an important question has been raised as to whether after a partition an owner of land in one mahal can assert a right of pre-emption when a sale is made of property situated in another mahal, I think it necessary to give my opinion in regard to this also.

5. Partitions are of two kinds--perfect and imperfect. In the case of an "imperfect" partition it has never been held that a right of pre-emption disappears with the partition. In the case of *Ram Pershad v. Buljeet Singh* N.W.P.H.C.R. 867 it was remarked: "It is true that there has been a partition, but it was an imperfect one. The lands were divided, but the joint liability of all to the

Government revenue remains. Therefore the property is still one mahal, the whole of the lands of which are liable for the Government revenue. In this state of imperfect partition it is decided by various cases that the condition as to pre-emption in the old wajib-ul-arz remains in force." It is different in the case of "perfect" partition. In the case of *Motet Sah v. Musammat Goklee* 1861 S.D.A.N.W.P. 506 the Judges say, with regard to such a partition: "An essential condition of the existence of a right of pre-emption is that the parties claiming such a right shall be co-parceners in the same estate as those against whom the claim is made, a relation between the parties which is extinguished by the very operation of partition and the separate proprietorship thereby established." In the case of *Jai Ram v. Mahabir Rai* ILR 7 All 720 Mr. Justice Oldfield said: "The condition as to pre-emption only affected the shareholders of the mahal as long as they remained shareholders, and ceased to have effect upon those shareholders and their property who separated themselves and their property by forming a separate mahal. The plaintiff could after separation exercise no right of pre-emption against and in respect of shareholders and property as so separated, nor could the separated shareholders exercise any right of pre-emption against the plaintiff and his property remaining in the mahal from which they had separated." And in the same case *Mahmood, J.*, held that the terms of an old wajib-ul-arz were superseded by a partition at which a new wajib-ul-arz was framed which created rights of pre-emption amongst the co-sharers of the new mahals.

6. The case principally relied on by the respondents, and a case which is undoubtedly in their favor, is that of *Gokal Singh v. Mannu Lal* ILR 7 All 772 quoted by my brother KNOX. With every respect to the learned Judges who were parties to that decision I am unable to concur with them. It was there held that there may still be some community of interest and also a considerable community of things held and used in common by all the inhabitants, such for instance as roads, drains and other things which are necessary to all. Hence even after partition something is still left in common, and with reference to the merits of this case there remained enough community of interest to justify the preference given by the wajib-ul-arz to partners in the village" over strangers in respect of the right of pre-emption. With reference to the reason here assigned I would quote a passage from a recent decision of this Court, *Nazirud-din v. Kadir Bakhsh*, Weekly Notes, 1894, p. 193. "In the present case, although the pre-emption according to the wajib-ul-arz is to be according to the Muhammadan law, still it is to be a pre-emption for co-sharers in the mahal and not for persons other than co-sharers, even if such persons may have some right or interest in the shumilat lands of the mahal." I am of opinion that unless at the time of partition a right of pre-emption is specifically reserved by the co-sharers in respect of lands lying in the other mahals, such right of pre-emption is not to be presumed from the mere fact that when the village-formed but one mahal the co-sharers had pre-emptive rights against each other. In the case of *Mata Din v. Mahesh Prasad*, Weekly Notes, 1892, p. 100, *Mahmood, J.*, said: "Partition,

whether perfect or imperfect, is a matter which relates to the province of the recovery of revenue." But in my view partition relates to much more than the revenue, though it is provided by law that it must be conducted in such a manner that the revenue does not suffer. It is my experience that what gives rise to an application for partition is not so frequently a dispute as to revenue as the presence in the village of some quarrelsome-or litigious co-sharer who seeks to take more than the others consider him entitled to. If it were held that notwithstanding partition such a co-sharer could, whenever a sale took place, assert his right of pre-emption in the mahal which had been divided off, this manner of avoiding quarrels would not be put an end to. In the result I have no hesitation in concurring with my brother Knox in holding that this appeal should be decreed.

7. The order of the Court therefore will be that the order of the lower Court be set aside, the claim of the plaintiffs be dismissed, and the appeal be decreed with special costs in all Courts.