

(1899) 06 AHC CK 0002
In the Allahabad High Court

Tota	Vs	APPELLANT
Sheo Narain		RESPONDENT

Date of Decision : 15-06-1899

Acts Referred:

Citation : 3 Ind. Cas. 534

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

Bench : Division Bench

Judgement

Knox, J.—This first appeal arises out of an order of remand passed u/s 562 of the CPC in a suit for pre-emption. The pre-emption claim is based, so the plaintiff tells us, upon the Record-of-Rights which was drawn up at the Settlement of 1863 and also upon that which was prepared at the recent Settlement in 1890. Since the Settlement of 1890 the original mahal has come under partition and has been sub-divided into 34 mahals. The pre-emptor and vendor both own shares in one of these new mahals in which the property sold is situate. The Court of first instance finds that the Record-of-Rights which was prepared in the Settlement of 1890 contains no provisions regulating the subject of pre-emption and, holding that the Record-of-Rights of 1868 which did contain a provision regulating it had ceased to have effect between the contending parties, decided that the plaintiff could claim no pre-emptive right. The learned Subordinate Judge in appeal was of an opposite opinion. He appears to have entirely overlooked the plaintiff's allegation that the claim was based upon the Record-of-Rights prepared at the recent Settlement and his judgment reads as though he were under the impression that the Record-of-Rights of 1868 was the last Record-of-Rights that had been prepared for the village. He gave effect to the terms contained in the Record-of-Rights for 1863, set aside the decree of the Munsif, and remanded the suit for determination upon its merits. It is from this order of remand that the present appeal is brought. The memorandum of appeal equally ignores the existence of any Record of-Rights other than that of the year 1863. The plea relied upon is that as the village was partitioned into 34 mahals in the year 1866, the Record-of-Rights of 1868 ceased to have any effect. We have on the record

the Record-of-Rights prepared in the Settlement of 1890, and it is, of course, a document which cannot be ignored. In the Record-of-Rights for 1863 there are words which the plaintiff interprets, and we think rightly interprets, as being record of a covenant whereby the parties to it agreed that a right of pro-emption should obtain in the mahal, and which sets out conditions which were to govern the right. The Record-of-Rights of 1890 maintains absolute silence upon this point and totally ignores any covenant of pre-emption.

2. It was contended by the learned Vakil for the respondent that from certain words at the conclusion of the Record-of-Rights the Court; should infer that the parties intended to reproduce all customs which were recorded in the Record of-Rights prepared at the Settlement of 1863. Even if this was the intention of the parties there is all the difference between customs and covenants, and we have no right to infer that by the word customs" the word covenants was also intended. At partition no Record-of-Rights appears to have been framed for any mahal, and we had, therefore, to consider in the light of the recent Full Bench case Dalgan-jan Singh v. Kalka Singh (1899)AWN 111 : 22 A. 1 what effect, if any, should be given to the clause or clauses in the Record-of-Rights upon which the plaintiff based his claim. The absence of any mention of pre-emption in the Record-of-Rights prepared in 1890 is very significant. It stands in this case alone. By this, I mean, that there is no evidence of any kind to show that any conclusion other than that which would ordinarily be drawn from such silence can be drawn in the present case. There was the express covenant of 1863. In 1890 that covenant is distinctly ignored. The natural inference is that the parties in the village in 1890, from some cause or another, no longer considered themselves bound by the covenant of 1863. The latter Record-of-Rights is the Record-of-Rights by which the parties are governed, there being no Record-of-Rights prepared at the time of partition. The authority for this will be found in Section 191, Act XIX of 1873. The basis of the plaintiff's claim fails. In this view the appeal must be allowed, the order appealed from set aside, and the decree of the Munsif restored with costs.

Aikman, J.

3. I am of the same opinion: The plaintiff in the suit out of which this appeal arises came into Court seeking to assert a right of pre-emption. It is for any one who asserts such a right to prove that he possesses it. The plaintiff relies on what is contained in the village administration papers of 1863 and of the recent Settlement. Inasmuch as a new Record-of-Rights was" prepared at the last Settlement in 1890, the Record-of-Rights prepared at the previous Settlement no longer remained in force except in so far as its provisions were incorporated in the new Record-of-Rights. In the village administration paper prepared in 1863 there is this stipulation "For the future if any khewatdar wishes to sell or mortgage his property, he must transfer it for a reasonable price first to his own brother, if he refuses to take then to some other relation, and, lastly, if his relations refuse, then to the other khewatdars of the patti and village." The

opening words of this clause, viz., "for the future, "clearly show that here we have no record of a custom. What is recorded is an agreement come to by the co-sharers. In the village administration paper prepared in 1890 the arrangements for the distribution of profits, for the payment by each co-sharer of his share in the Government revenue, cesses and village-expenses, and for the manner, in which collections are to be made from cultivators are set forth. Then appears, this clause whatever customs exist in the village they are to be found entered in the wajib-ul-arz prepared at the last Settlement." As said above, the provision made at the last Settlement in regard to pre-emption is clearly not the record of a custom but the recital of a contract. I am, therefore, of opinion that the clause in the last wajib-ul-arz which is relied on by the plaintiff entirely fails to prove the continuance of the contract which had been entered into in 1863, and I infer from the significant silence of the new wajib-ul-arz in regard to any right of pre-emption that the co-sharers no longer wished to maintain the previous covenant. In the view I take of the meaning of the last wajib-ul-arz, it is unnecessary to consider the effect of the partition made in 1860. For the above" reasons, I concur in the order proposed by my brother Knox.