(1923) 07 AHC CK 0009

Allahabad High Court

Case No: None

Parbhu Lal and Others		APPELLANT
	Vs	
Sher Muhammad Khan and Chotan Lal and Others		RESPONDENT

Date of Decision: July 18, 1923

Citation: (1924) ILR (All) 47

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

Bench: Division Bench

Judgement

Lindsay and Kanhaiya Lal, JJ.
The dole question for decision in this appeal is whether the existence of a custom of pre-emption which was pleaded by the plaintiffs in the court below was established on the evidence submitted to the Subordinate Judge.

2. The property sought to be pre-empted is situated in a village in the Saharanpur district, known as Lakhnoti Kalan.

3. The evidence in support of the custom consisted of a wajib-ul-arz prepared at the settlement of 1867 A.D. Another wajib-ul-arz was prepared in 1296F corresponding with 1889 In addition to these two wajib-ul-arzes the plaintiffs produced a decree showing that a claim for pre-emption had been decreed in the court of the Munsif of Saharanpur in the year 1907. The judgment of the Munsif was based upon the provision of the wajib-ul-arz bf 1867 which is in evidence in this case.

4. There was no rebutting evidence put forward on the part of the defendants.

5. The full text of the wajib-ul-arz of 1867 is before us and it has been argued at great length that having regard to the language of the document and to certain of its provisions, it ought to be held in this particular case that the wajib-ul-arz is not a record of custom.

6. In support of his argument the learned advocate for the appellants has referred us to some of the earlier decisions of this Court in pre-emption cases. He has cited before us the cases of Dhian Kunwar v. Diwan Singh (1911) 8 A.L.J. 786, Budh Singh v. Gopal Rai ILR (1908) All. 544 and Tota v. Sheo Narain (1909) 6 A.L.J.R. 715.

7. While it might be conceded in favour of the appellants that on the earlier decisions of this Court it would be possible to construe the wajib-ul-arz before us in the present case as a record of contract rather than of custom, we are decidedly of opinion that it is not possible for us to follow the reasoning of these earlier cases in view of the pronouncement of their Lordships of the Privy Council in the case of Digambar Singh v. Ahmad Sayed Khan ILR (1914) All. 129. Since that judgment has been published, it has naturally been followed in this Court, and it must be taken that any principles which are laid down in it must be accepted in preference to any statement of law contained in previous decisions of the Court. It was clearly laid down in this case that a wajib-ul-arz by itself is good prima facie evidence of custom and that it is not necessary to corroborate a wajib-ul-arz by proof of instances in which preemption has been allowed. At the same time it was laid down that the evidence afforded by the wajib-ul-arz may be rebutted by other evidence.

8. Since that case was decided the pre-emption Bench of this Court has taken up the position thai the wajib-ul-arz is strong prima facie evidence of custom and that, in order to overturn the presumption in its favour, there must be convincing evidence to satisfy the court that in fact the wajib-ul-arz could not reasonably be treated as a record of custom.

9. The evidence which would rebut the presumption may of course be found in the language'' of the document itself or there may be external evidence. It has been laid down by the preemption Bench in the case reported in Fazal Husain v. Muhammad Sharif ILR (1914) All. 471, that in certain cases the language of the wajib-ul-arz will of itself afford sufficient evidence to overturn the presumption that it contains a record of custom. In that case certain observations were made with reference to the previous decision of this Court in Dhian Kunwar v. Diwan Singh (1911) 8 A.L.J.R. 786. It was pointed out that in that case the wajib-ul-arz was peculiar and that in the clause relating to pre-emption there were to be found "a number of other matters which could not possibly have been matters of custom." It was held accordingly that in such a case it might reasonably be held that the record in the wajib-ul-arz was not really a record of custom but a record of contract.

10. We have in recent cases endeavoured, as far as possible, to follow this principle laid down in the case just cited, and we may also refer in this connection to the case reported in Surajbali Singh v. Mohammad Nasir (1918) 16 A.L.J.R. 879.

11. We have, in the present case, as has been stated, the wajib-ul-arz prepared in the year 1867 and a subsequent wajib-ul-arz prepared in or about the year 1889. This latter wajib-ul-arz merely incorporates the provisions of the earlier document

and so it is only necessary to consider the language of the wajib-ul-arz of 1867.

12. The document begins with a recital that it is the wajib-ul-arz or dasturdehi of mauza Lakhnoti Kalan, Then there follows the declaration of the shareholders who attested the wajib-ul-arz, and following on this we have a number of provisions contained in twenty paragraphs setting out all the usages and arrangements prevailing in the village.

13. The particular paragraph with which we are concerned, that is to say, the paragraph which relates to pre-emption is paragraph No. 6, and that undoubtedly lays down in the clearest possible terms that there is a right of pre-emption in the village. In addition to the provisions relating to pre-emption the paragraph refers to a number of other matters concerning the devolution of property. Certain -rules are laid down, such, for example, as the exclusion of a daughter''s son or a sister''s son. Another rule which is laid down in the same paragraph relates to the custom which is known as istribant or chundabant. Obviously, therefore, the paragraph does refer to matters other than pre-emption. At the same time we think it is proper to observe that these other matters so referred to are matters which are capable of being the subject of a custom.

14. In this connection, however, the learned advocate for the appellants lays particular stress upon two rules which are laid down in the paragraph in question. One of these is that incases of dispute about the price of the property offered for sale the question is to be settled by the appointment of arbitrators or by a reference to the court. It is argued that this provision relates to a matter which cannot properly be said to be the subject of a custom. We do not, however, understand this provision in the sense contended for. It appears to us that the custom of pre-emption being recognized, all that the rule in question lays down is that a certain procedure is to be observed in cases where there is a dispute between the parties regarding the price of the property sold. We have to notice in this connection that in the wajib-ul-arzes which were before their Lordships of the Privy Council in Digambar Singh''s case, there were similar provisions recorded, and it is quite clear that the presence of those provisions in the wajib-ul-arzes in question did not prevent their Lordships of the Privy Council from holding that the wajib-ul-arzes in those cases were to be treated as records of custom.-

15. The only other argument we have to notice in this connection is one which is based upon the language of the concluding sentence of the paragraph in question which lays down that if there be no male issue or no relatives descended from a common ancestor, the shareholders of the patti will become the owners of the property in proportion to their shares. Dr. Sen has argued very earnestly that this provision contained in paragraph 6 cannot properly be treated as relating to any custom. He says that it is an endeavour on the part of the co-sharers of this village to prevent the application of the principle of escheat to the Crown in cases where a proprietor dies without leaving any heir. We do not say that this is an impossible

construction of the words in question but we are very doubtful whether that is the significance of them. It may be that they merely provide a rule or custom whereby other heirs who would take in preference to the Crown arc excluded. It is well-known that after the list of all relatives has been exhausted, succession to the property of a deceased Hindu may go to his spiritual preceptor or disciple or even to a Brahman, before the Crown can come and claim escheat. We have given this matter our best consideration and we think we ought to hold in the present case that there is no provision in paragraph 6 upon which, acting in accordance with principles laid down, we ought to come to the conclusion that the paragraph does not contain a record of custom. On the contrary, we are of opinion that it does contain such a record.

16. Something was said in the course of argument regarding the provisions in other paragraphs of the wajib-ul-arz and it is pointed out that many of these provisions relate obviously to matters of contract. That, however, is not a matter of any importance, because every wajib-ul-arz must of necessity contain matters which constitute arrangements between the co-sharers. The fact that such matters are to be found in a wajib-ul-arz does not prevent the wajib-ul-arz being treated also as a record of custom wherever a clear pronouncement regarding a custom is set out in the document itself.

17. We Have further to notice that the case of the plaintiff is supported by an actual instance in which pre-emption was decreed in the year 1907. To that fact due weight must be given, and we hold accordingly that the wajib-ul-arz, supported by the judgment in question which was passed in the year 1907, affords sufficient evidence upon which it was competent to the court below to find that the custom alleged in the plaint does exist. We have not in any way been convinced that the judgment of the first court is erroneous.

18. We notice that in the court below another plea by way of defence was that the plaintiffs could not maintain this suit as they had consented to the sale and had themselves refused to take the property offered to them. The learned Judge of the court below was of opinion that the evidence which was offered in support of this plea was not reliable and although the point is taken in the memorandum of appeal to this Court, it was not seriously argued here. We have no reason to differ from the learned Judge of the court below in his estimate of the evidence in question.

19. The result, therefore, is that the appeal fails and is dismissed with costs.