

Ganesh Singh Vs Jai Mangal Singh and Another

None

Court: Allahabad High Court

Date of Decision: Nov. 21, 1923

Citation: AIR 1924 All 723 : 84 Ind. Cas. 1017

Hon'ble Judges: Sulaiman, J; Lindsay, J

Bench: Division Bench

Judgement

1. These two appeals have been heard and argued together and are to be decided on one common ground. The question in both cases is whether

the existence of the custom of pre-emption was established. The lower Appellate Court has held that the custom was established and it has given a

decree for pre-emption accordingly.

2. It is now argued before us that the evidence upon which the learned Judge relied in his finding was not adequate to establish the existence of the

custom alleged.

3. We may say at once that the case in many respects resembled a case which was reported in *Sarju Rai v. Bhuinlot Misir* 11 Ind. Cas. 258 : 8

A.L.J. 947.

4. The principal piece of evidence upon which the plaintiffs took their stand was a *wajib-ul-arz* prepared in the year 1860. It is admitted before us

that no *wajib-ul-arz* for the Settlement of 1833 was before the Court.

5. We start, however, with this *wajib-ul-arz* of 1860 and on the principles which govern all the decisions in matters of this kind it must be

presumed that the record set forth in this *wajib-ul-arz* is a record of custom, and there can be no doubt that a custom of pre-emption is set out in

the *wajib-ul-arz*. The presumption, however, maybe overturned by other evidence and we have, therefore, to see what was the nature of the

attempt made in the Courts below, to overthrow this presumption. Dr. Sen has taken his stand upon the entries in the document known as the

kaifiat sherista nizamat. That document and the other kaifiat, namely,, the kaifiat mahtavi are on the record.

6. Now, it is undoubtedly stated in the kaifiat sherista nizamat that up till the year 1833 the settlement of this village was made with a single person

who was apparently a Raja. After that time we find that the settlement is made with a numerous body of proprietors, all Thakurs, and the Raja is

treated as excluded from the settlement. He is allowed a certain malikana allowance as the excluded superior proprietor. From what we can

gather, this arrangement has continued down to the latest date regarding which we have any evidence in this case.

7. It cannot, however, be properly argued from this material that no custom could possibly have come into existence prior to the year 1833 on the

ground that the village was the property of a single owner. The fallacy in our opinion is the assumption that there was a single owner. Having regard

to what took place at the Settlement of 1833 when numerous body of co-sharers were admitted to engage for the Government revenue, it seems

to us highly probable, that the constitution of this village had been the same for a long period. At any rate it is more reasonable to assume this than

to assume the contrary. It is stated in the Gazetteer of the Gorakhpur District that in a great many of these Rajas there were large numbers of

birtyas who were treated as inferior proprietors. It seems to have been the policy in the earlier""years of the British Administration to deal with the

superior proprietor and to take the revenue, engagement from him but this policy was reversed and from the year 1838 settlement began to be

made with the birtyas who were in fact, the real owners of the villages.

8. The co-existence of these superior and under-proprietors ought, we think in the circumstances, to be assumed and we do not think it would be

safe to argue in the present case that there was only a single proprietor up to the year 1833 and that for that reason no custom could have then

come into existence. The Judge of the Court below we think dealt with this part of the case on these lines.

9. Then there remains the further argument that it has not been shown by the plaintiff in this case that the custom could have grown up inasmuch as

it is said that no evidence of transfers is forthcoming, that is to say, transfers to which the custom would attach. The same argument, however, was

raised in the case which we have already cited from the 8th Volume of the A.L.J.R. Sarju Rai v. Bhuinlot Missir 11 Ind. Cas. 258 : 8 A.L.J. 947

and so far as we can see it was considered of no avail for the purpose of over-turning the presumption which was raised by the wajib-ul-arz (in

that case too the wajib-ul-arz was of 1860). Having regard to all the facts which have been brought before us in connection with the documentary

evidence we think that the judgment of the Court below ought to be affirmed and we, therefore, dismiss these appeals with costs including in this

Court fees on the higher scale. The order staying execution is discharged.