(1914) 05 AHC CK 0039

Allahabad High Court

Case No: None

Fazal Husain		APPELLANT
	Vs	
Muhammad Sharif and Another		RESPONDENT

Date of Decision: May 13, 1914

Citation: (1914) ILR (All) 471

Hon'ble Judges: Henry Richards, C.J; Tudball, J

Bench: Division Bench

Final Decision: Dismissed

Judgement

Richards, C.J. and Tudball, J.

This appeal arises out of a suit for pre-emption. The plaintiff adduced in evidence, in support of the existence of this custom, an extract from the wajib-ul-arz of 1861. He also produced a judgment of 1866 which shows that the right of pre-emption was at least asserted and that the pre-emptor got possession, though possibly on a compromise decree. Both the courts below have dismissed the plaintiff''s claim. The question for us to decide is whether or not the evidence which the plaintiff adduced was sufficient, in the absence of all evidence to the contrary, to establish the custom under which he claimed. In the full Bench case of Returaji Dubain v. Palwan Bhagat I. L. R. (1911) All. 196 it was decided that the entry in the wajib-ul-arz of a right of preemption was to be taken prima facie as a record of a custom rather than of a contract, and that the mere fact that at the beginning of the wajib-ul-arz, or at the end, a word such as "ikrarnama" appears is not sufficient to make the entry, an entry of a contract and not of a custom. Almost every wajib-ul-arz does contain certain matters which are arrangements between the co-sharers. Nor is the mere fact that there are entries of arrangements in the wajib-ul-arz sufficient to prevent the entry of pre-emption from being read as a record of custom. In the courts below and in this Court the case of Dhian Kunwar v. Diwan Singh (1911) 8 A. L. J. 786 was quoted and relied upon on behalf of the defendants. In that case the only evidence adduced on behalf of the plaintiff was an extract from one wajib-ul-arz.

2. The lower appellate court bad dismissed the plaintiffs claim and this Court affirmed its decree. If the case is carefully looked into, it will be seen that the case was entirely decided upon its own facts and circumstances. The wajib-ul-arz was of an unusual nature, and in the very same clause in which reference to pre-emption was made, reference was made to a number of other matters which could not possibly have been matters of custom. Furthermore, the plaintiff in his plaint had referred to an earlier wajib-ul-arz but had not filed it. The ease was decided, as we have said, on its own facts and circumstances. In the present case the record is quite clear and free from ambiguity, nevertheless the ease might have been quite different if the defendants had gone into evidence and had shown, from the history of the village or other circumstances, that it was very improbable or impossible that a custom of pre-emption had grown up in the village. They might have shown (if such was the case) that there had been a number of sales to strangers, or that the entry of the right of pre-emption in different wajib-ul-arzes were necessarily inconsistent. If the defendants had gone into any such evidence the court might very well have come to the conclusion that the entry in one wajib-ul-arz standing alone was insufficient to support the allegation of the existence of the custom, but where there is an entry in the wajib-ul-arz which is clear and distinct, and there is no evidence w the contrary, we think the court ought, having regard to the prevailing practice, to hold that the custom of pre-emption exists. The result is that we must allow the appeal, set aside the decrees of the courts below and remand the suit to the court of first instance, through the lower appellate court, with directions to re-admit it under its original number and to proceed to hear and determine the case according to law. Costs here and heretofore will be costs in the cause.