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(1911) 02 AHC CK 0023

Allahabad High Court

Case No: None

Sarju Prashad Rai and Others	APPELLANT
Vs	
Gauri Rai and Others	RESPONDENT

Date of Decision: Feb. 6, 1911

Citation: 9 Ind. Cas. 485

Hon'ble Judges: Tudball, J; Richards, J

Bench: Division Bench

Final Decision: Dismissed

Judgement

1. This appeal arises out of a suit for pre-emption. The Court below has dismissed the plaintiffs'' claim and the plaintiffs come here in appeal. The plaintiffs alleged that a custom of pre-emption prevailed in the village. The only evidence they thought fit to produce in support of this allegation of the existence of the custom was the wajib-ul-arz of 1860. Paragraph 1 of the wajib-ul-arz is as follows: "This is a zemindari village which was purchased by us. It was settled with us, as a zemindari village consisting of one thok with specification of shares and after completion of all the particulars. Hence, after full consideration and due deliberation, we reduce to writing the following conditions, and we shall act according to the same." Paragraph 5 refers to preemption and is as follows: Bach co-sharer is competent to transfer his own shares but at the time of transfer it shall be necessary for him to make the transfer first to a near co-sharer and on his refusal he (the transferor) shall inform other co-sharers in the village and then sell or mortgage the same for a proper price, if such a co-sharer does not take the property and pay the proper price, he (vendor) shall be at liberty to transfer the same to whom-so ever he likes and then no claim of pre-emption brought by anyone shall be entertained." Paragraph 21 refers to leases. It says,--"Up to this time lands were not given to the tenants for cultivation under leases and qabuliats; they simply cultivate it on oral agreements. In future we shall let land on obtaining qabuliats from and giving leases to the tenants. If any tenant cultivates land without filing a qabuliat or taking a lease, he

shall be dealt with according to law and we shall not deviate therefrom." Paragraph 24 is about the absence of a bund in the village and an agreement is entered into in the event of a bund becoming necessary. We only refer to these last two paragraphs in order to show that the wajib-ul-arz did in fact deal with matters which were to consolidate arrangements for the future between the co-sharers and which could not possibly be matters of custom. The defendants gave in evidence another part of the Settlement Record of 1860. This document is to be found at pages 5 and 6 of the appellants'' book. It gives what appears to be the history of the whole village. It shows the different Settlements that were made. It shows that up to the year 1818 the land was jungle, uncultivated, with no Settlement. The column of remark is as follows: It appears from the former Mohtwar''s report that up to 1225 this village was uncultivated. Afterwards it was settled along with the Baredhi jungle with Sarwan for five years with the direction that the jama of the first 3 years should be remitted and for the (fourth) 4th year be fixed at the rate of Rs. 4 per kura (share) and for the fifth year at the rate of Rs. 8 per kura (share) in respect of the cultivated land after deduction of the Makaddam''s 1/3rd dues, in favour of Wasiullah. Afterwards, under an order of the 29th January 1819, the village was settled with. Shanker Pande on a varying jama and from that time Shanker aforesaid after bringing the land under cultivation paid the revenue. Afterwards, under order dated the 17th of April 1823, Kishan Chand''s name also was recorded. Afterwards, upon an application of Shanker Pande, the name of Bhagirathi was entered who has been in possession ever since." Then follows a list of transfers up to the year 1860. Only two transfers appear to have been made. One transfer of the 24th of September 1851 was a transfer when one Gajraj Rai had obtained a decree against Mala Rai. The cause of the transfer is partition. This may either mean that Gajraj obtained a decree against Mala Rai and had the property sold and after that instituted a partition suit or it may mean that Gajraj Rai instituted a partition suit against Mala Rai who was a co-sharer. The only other transfer is a transfer which was made on the death of Bhagirathi Rai, whose name according to the column of remark was recorded on the application of Shanker Pande. We may mention that the Wajib-ul-arz was signed by Pirthi Rai, Bhairo Prasad Rai, Gajraj Rai, Shiva Din Rai, Darbans Rai, Surajmal Rai, Ram Autar Rai and Gumani Rai as zemindars. There is a mistake in the translation and Trebeni Rai ought to be Pirthi Rai. It will also be seen that Pirthi Rai and Bhairo Prasad Rai were heirs of Bhagirathi Rai. The question for decision is whether or not upon this evidence it can be said that the plaintiffs established a custom of pre-emption prevailing in the village. It must be borne in mind that the onus of proving such custom lay on the plaintiffs. Have they discharged this by merely producing the Wajib-ul-arz we have quoted above? Great reliance is placed on the Full Bench ruling in Returaji Dubain v. Pahalwan Bhagat VII L.L.J. 1040 : 7 Ind. Cas. 680. We understand that decision to have laid down the following proposition. That where a Wajib-ul-arz is given in evidence which refers to a right of pre emption as existing in a village, prima facie it must be presumed that the reference to pre-emption is a reference to a custom of pre-emption rather than

to a contract and this notwithstanding that there are words which in their ordinary interpretation seem more to apply to a contract or agreement between the co-sharers, than to an existing custom, the reason being that it was the duty of the Settlement officers to record customs but not contracts. We are, of course, bound by this authority. We cannot, however, altogether shut our eyes to the fact that whether it was their duty to do so or not, the Settlement officers did, as a matter of fact, record arrangements between co-sharers as well as matters of custom. In the present case we have referred to two paragraphs in which arrangements for the future are recorded which could not possibly be matters of custom. In fact the paragraph which refers to qabuliats and leases is a complete departure from the usage that up to that time had prevailed in the village. Assuming that we are bound, notwithstanding the language of the Wajib-ul-arz, in the present case to presume prima facie that it refers to a custom and not to a contract, we think that presumption cannot, under the circumstances of the present case, be said to be a strong presumption and we think that the rest of the Settlement record in conjunction with the language of the Wajib-ul-arz itself is amply sufficient to rebut any presumption which has arisen. We think that great difficulty has arisen in these pre-emption cases by reason of the'' fact that it has become the practice in some Courts for the parties to rely entirely on extracts from the Wajib-ul-arz and to pay no attention whatever to other evidence which might and in some cases must be obtainable to prove the existence or non-existence of the custom alleged. Great confusion has been the result, The Wajib-ul-arz, more often than not, was drawn up by an office drawing small salary and possessing little or no legal knowledge. The Courts have Spent their time trying to construe document of this nature as if they were Acts of the Legislature or at least solumn records drawn up by skilled lawyer. In the present, case the plaintiffs have merely produced extracts of the Wajib-ul-arz of 186. No other Wajib ul-arz is produced either prior or subsequent. There is no evidence of a single case in which a right of pre-emption has been claimed or allowed. On the contrary another portion of the Settlement record produced by the defendants goes to show from the history of the village that there was hardly any transfer and, generally, that it was very improbable if not impossible that any custom of pre-emption could have grown up in the village. We think the plaintiffs have entirely failed to discharge the onus of establishing a custom of pre-emption and the decision of the Court below is correct. We dismiss the appeal with costs including in this Court fees on the higher scale.