PRIVY COUNCIL

Kumar Digambar Singh

Vs.

Ahmad Sayeed Khan
P.C.A No. 102 of 1913

(Lord Dunedin,CJ, Lord Shaw, Sir John Edge and Ameer Ali. JJ)

25.11.1914

JUDGMENT

Sir John Edge J.

1. The suit in which this appeal has arisen was brought on the 6th August, 1910, in the Court of the Subordinate Judge of Aligarh by Kunwar Digamber Singh, who is the appellant here, against Kunwar Ahmed Sayeed Khan, who is the respondent to this appeal, and one Bhawani Das, to enforce a right of pre-emption to which Kunwar Digamber Singh claimed to be entitled under a custom which he alleged to be prevailing in *mouza Pala Kher* in the District of Bulandshahr.

2. The respondent here, Kunwar Ahmad Sayeed Khan, who was the vendee of the property in dispute by his written statement denied that there was any custom of pre-emption in *mouza Pala Kher* and alleged that :-

> "*Mouza Pala Kher* was divided by perfect partition and entirely separate *mahals* were formed.....After the said partition no connection of any kind was left among the co-sharers of the different *mahals*, nor did any joint right, based on the terms of any *wajib-ul-arz*, subsist among them."

3. The date of the sale in respect of which pre-emption is claimed was the 12th July, 1909. In 1905, *mouza Pala Kher*, otherwise known as *mouza Pala Kaser*, and as *mouza* Bilaksir, was, on the applications of certain of the then sharers in the *mouza* partitioned into five *mahals*, of which two were named respectively Saligram and Bhawani Das. On the partition, each of the five newly formed *mahals* became separately responsible for the revenue assessed upon it, but did not become responsible for the revenue assessed upon any other of the five *mahals*. No separate record-of-rights was before this suit framed for any of the five new *mahals*.

4. The property sought to be pre-empted is in *mahal* Bhawani Das, in which *mahal* the applicant had not a share at the date of the sale; he was, however, at the date a sharer in *mahal* Salig Ram, in which *mahal* neither the respondent nor his vendor, Bhawani Das was a sharer. The respondent was not at the date of the sale a sharer in any of the five new *mahals*; he was, however, the mortgagee in possession of part of the share of Bhawani Das, the vendor, in *mahal* Bhawani Das.

5. The appellant and Bhawani Das are not related to each other. The respondent, who is a Muhammadan, is not related to the appellant or to Bhawani Das. Prior to the partition of 1905 *mouza, Pala Kher* was an unpartitioned *mouza* in which the appellant and Bhawani Das were sharers of the history of *mouza Pala Kher* prior to 1863 their Lordships are unaware, but in 1863 all the sharers in the *mouza* were apparently Muhammadans.

6. The evidence to prove the custom of pre-emption upon which the appellant's claim is based consisted of extracts from a wajib-ul-arz of the *mouza* of the Pala Kher of 1863, upon extracts from a *wajib-ul-arz* of the same *mouza* of 1870, and of a judgment of the Subordinate Judge of Meerut in 1875 in a suit for pre-emption which was confirmed by the High Court at Allahabad in 1876. The cause of action in that case arose of course long anterior to the partition of *mouza Pala Kher*, but the judgments do afford evidence that there existed in *mouza Pala Kher* a custom of pre-emption under which a relation of a vendor-sharer in the *mouza* was entitled to pre-empt on a sale to a stranger to the *mouza*, but that is not the custom upon which the appellant must rely in this suit.

7. The extract from the *wajib-ul-arz* of *mouza Pala Kher*, which was prepared on the 16th June, 1863, as translated and so far as it is material, is as follows :-

> "In future every co-sharer, mortgagor or mortgagee shall as such be at liberty to make transfers. But he shall make transfers first in favour of his own and *ekjaddi* brothers and after them in favour of co-sharers in the *khata* and *patti* as well as in favour of the proprietors of the village. If none of them take he shall be competent to make transfers in favour of strangers. If there is a dispute regarding difference in consideration it shall be decided by arbitration."

8. The *wajib-ul-arz* of 1863 was signed by all the sharers and by some, if not all of the mortgagees.

9. The corresponding clause in the *wajib-ul-arz* of 1870 as translated in the record is as follows:-

"In future co-sharer, mortgagor or mortgagee has as such power. He shall have power to make transfers first to his own and *ekjaddi* brothers and next to co-sharers in the *khata* and *patti* as well as to proprietors. If none of the aforesaid persons takes he shall have power to transfer it to a stranger. If there arises any dispute as regards the price being more or less it shall be decided by arbitration."

10. In paragraph 14 of the *wajib-ul-arz* of 1870 it expressly stated "Custom as to Preemption is allowed." There can be no possible doubt that the clauses to which their Lordships have referred set out what the sharers in *mouza* Pala Kher had in 1863 and in 1870 agreed to be the custom of pre-emption in the mouza. It is to be presumed, as the contrary has not been shown, that the *wajib-ul-arz* of 1863 and the *wajib-ul-arz* of 1870 had been properly prepared in accordance with the law then in force, and with the "Directions of Revenue Officers in North-West Provinces of the Bengal Presidency," which had been promulgated under the authority of the Lieutenant-Governor of those Provinces.

11. The references in the clauses above mentioned to mortgagors and mortgagees are obscure. The shares in *mouza* Pala Kher may have intended that if a mortgagor should assign his interest as a mortgagor he should offer it in the first instance to his own or his *ekjaddi* brother and then to a sharer in the *khata* and *patti* or to a proprietor in the *mouza,* and if they should refuse to purchase it he might assign it to a stranger, and in the same if a mortgagee should wish to assign his mortgagee's interest his right to assign it should be similarly limited. In their Lordships' opinion it was not meant by the clauses to which they have referred to treat mortgagees as such, as sharers in the *mouza* and to confer on them a right to pre-empt.

12. Having regard to some of the decisions of the High Court of Allahabad, which have been referred to in the arguments in this appeal, it is unfortunate that the record which is before this Board does not show what was the vernacular word in the *wajib-ul-arz* of 1863 and 1870, which has been translated as "co sharer,' or what was the vernacular word in the *wajib-ul-arz* of 1863 which has been translated as "village."

13. The *wajib-ul-arz* of 1863 contained a clause as to partition which, as translated in the record, was as follows:-

"7. Partition, separate and compact.

"Every one can get his property partitioned to the extent of share and if the area be compact he can also get a separate *mahal* formed. If at the time of partition

the grove of one person comes to be included in the lot of another, the planter of the grove shall remain in possession as before, but the planter shall (have to) be given land of the same quality in exchange. As to a well, the costs of construction shall be given to the person who constructed it. If the *khudkasht* land of one person comes into the possession of another, then he (the person in possession) shall relinquish it of his own accord or shall pay rent as a tenant."

14. It appears to their Lordships that it may reasonably be inferred from this clause that the sharers of 1863 in *mouza Pala Kher* not only contemplated that the *mouza* might subsequently be partitioned into separate mahals, but also intended that on a partition off from the *mouza* of a separate *mahal*, the sharers in the other *mahals* or in the unpartitioned portion of *mouza Pala Kher* should as such have no share or other proprietary interest in the separated mahal. It does not appear from the extracts from the *wajib-ul-arz* of 1870 which are printed in the record whether the *wajib-ul-arz* of 1870 contained a similar clause, but it probably did.

15. It appears from the *rubkar* of the 5th December, 1902, which was drawn up for the carrying out by the *Amin* of the partition of *mouza Pala Kher* that the partition should be a perfect partition; that a grove should be allotted to the *mahal* of the person who had planted it and that a Muhammadan tomb, which stood in the *abadi*, should be allotted to the share of the Muhammadans.

16. The Subordinate Judge of Aligarh found that a custom of pre-emption prevails in *mouza Pala Kher*; that the partition of the *mouza* and the separation of the plaintiffs Mahal Salig Ram from that of the vendor did not affect the custom of pre-emption; and that the plaintiff, the appellant here, had a right to pre-empt as against the vendee, the respondent here; and on the 28th March, 1911, he gave the appellant a decree for the pre-emption. From that decree Kunwar Ahmad Sayeed Khan, the respondent here, appealed to the High Court of Judicature at Allahabad.

17. The Chief Justice and Mr. Justice Tudball, before whom the appeal came for hearing, allowed the appeal and dismissed the suit. From the decree of the High Court this appeal has been brought.

18. Pre-emption in village communities in British India had its origin in the Muhammadan law as to pre-emption, and was apparently unknown in India before the time of the Moghul rulers. In the course of time customs of pre-emption grew up or were adopted among village communities. In some cases the sharers in a village adopted or followed the rules of the Muhammadan law of preemption, and in such

cases the custom of the village follows the rules of the Muhammadan law of pre-emption. In other cases, where a custom of pre-emption exists, each village community has a custom of pre-emption which varies from the Muhammadan law of pre-emption and is peculiar to the village in its provisions and its incidents. A custom of pre-emption was doubtless in all cases the result of agreement amongst the shareholders of the particular village, and may have been adopted in modern times, and in villages which were first constituted in modern times. Rights of pre-emption have in some provinces been given by Acts of the Indian Legislature. Rights of pre-emption have also been created by contract between the sharers in a village. But in all cases the object is, as far as possible, to prevent strangers to a village from becoming sharers in the village. Rights of pre-emption, when they exist, are valuable rights, and when they depend upon a custom or upon a contract, the custom or the contract, as the case may be, must, if disputed, be proved.

19. The only evidence in this case to prove that the custom, which is relied upon by the appellant existed in *mouza Pala Kher*, is afforded by the clauses relating to pre-emption which are contained in the *wajib-ul-arz* of 1863 and 1870. These clauses do, in the opinion of their Lordships, prove that prior to the partition of *mouza Pala Kher* the custom of pre-emption, which is set out in the second paragraph of Clause 2 of the plaint existed and was in force in *mouza Pala Kher*, but that would not be sufficient to entitle the appellant to a decree. It would be necessary for him to show, either on the construction of the *wajib-ul-arz* or by other evidence, that the custom of pre-emption which obtained in the unpartitioned *mouza Pala Kher* would survive a partition of that *mouza* into separate *mahals* so as to give a share in one of the new *mahals* a right to preempt property in another of those *mahals* in which he was not a sharer at the date of the sale.

20. This question was very carefully considered by a Full Bench of the Allahabad High Court in *Dalganjan Singh v. Kalka Singh*[1] in which Sir Arthur Strachey, J., and Mr. Justice Banerji, considered that the question in each case is that of the construction of the nature of the particular custom on which the claim for pre-emption is based, and whether the custom can apply to the altered state of things which comes into existence when a perfect partition has been effected. In that case, as in this, no new *wajib ul-arz* was framed on the partition. Their Lordships are not prepared to dissent from the view of Mr. Justice Banerji in the case which has been referred to that:-

> "Where a fresh *wajib ul-arz* has not been prepared at partition, it does not

follow, as a matter of law or principle, that the custom or contract in force before partition is no longer to have effect or operation."

21. The question must depend upon the circumstances of each case and the inferences which may legitimately be drawn from the evidence. In the present case their Lordships cannot overlook the fact that in 1863 all the shares in *mouza Pala Kher* were Muhammadans; that Hindus were obtaining interests in the *mouza* as mortgagees; and that the sharers in 1863 were contemplating that the *mouza* might be partitioned. The right to obtain perfect partition, of course, existed. Nor can their Lordships overlook the fact that in 1905, when perfect partition was applied for, Hindus had become sharers in *mouza Pala Kher*, and that nothing was done on partition to provide that sharers in one *mahal* should have a right of pre-emption in respect of a sale in another *mahal* in which they were not sharers. Their Lordships are unable to draw the inference from the *wajib ul-arz* and the circumstances in this case that it was intended that, in case of perfect partition of *mouza Pala Kher*, a sharer in one *mahal* should have a right of pre-emption in another *mahal* in which he was not a sharer.

22. The learned Judges who decided the appeal in this case in the High Court apparently considered that the evidence afforded by the *wajib-ul-arzes* of 1863 and 1870 did not prove any custom of pre-emption, and each of them also relied upon the fact that no evidence that the right of pre-emption has been exercised was given. The learned Chief Justice also apparently suggested doubts as to the value of a *wajib-ul-arzes* as evidence of custom of pre-emption when unsupported by evidence that the custom had been enforced. As their Lordships have already intimated, they have no doubt that the clauses relating to transfers of shares in the *wajib-ul-arzes* of 1863 and 1870 stated what the sharers in 1863 and the sharers in 1870 had agreed was the custom of pre-emption in *mouza Pala Kher*. These clauses were inartistically drafted. The Kanungo or other official who collected information from the sharers in the *mouza* may have been a person who was as ignorant as they were of legal forms and legal phraseology, but before the *wajib-ul-arz* were signed by the sharers or sanctioned by the settlement officer, the sharers had an opportunity of objecting to any statements contained in them which they did not understand or did not consider to be correct. Pre-emption was a matter in which all the sharers were interested; it was a matter as to which they could agree as to what the custom in their *mouza*, was Pre-emption, with various incidents, limitations, and restrictions, prevails by custom or by special agreement amongst share-holders in very many, if not in most or all, of the village communities in the province in which *mouza Pala Kher* is situate.

23. In agreeing as to the custom of pre-emption which should be inserted in the *wajib-ul-arz* the sharers were not trying to establish any rule of inheritance in the *mouza* inconsistent with the Muhammadan or the Hindu Law of Inheritance, and their Lordships fail to see on what principle statements in a *wajib-ul-arz* as to rights of pre-emption, which are not in contravention of Muhammadan, Hindu or other law, should not be considered as reliable evidence of a custom of pre-emption. To hold that a *wajib-ul-arz* is not by itself good prima facie evidence of a custom of pre-emption which is stated in it and that the *wajib-ul-arz* requires to be corroborated by evidence of instances in which the custom has been enforced would be to increase the costs of litigation in pre-emption cases, and in many cases might practically deprive a sharer of his right. of course the evidence as to a custom of pre-emption afforded by a *wajib-ul-arz* may be rebutted by other evidence.

24. The appellant has failed to prove that he is entitled to a decree. Their Lordships will humbly advise His Majesty that the appeal should be dismissed. The appellant must pay the costs of the appeal.

Appeal dismissed.

Cases Referred

1. [1899] 22 All. 1: 1899 A.W. N.111 (F.B.)