

Dori and ors. Vs. Jiwan Ram

Dori and ors. Vs. Jiwan Ram

SooperKanoon Citation : sooperkanoon.com/463289

Court : Allahabad

Decided On : Jan-27-1910

Reported in : 6Ind.Cas.17

Judge : John Stanley, C.J. and ;Banerji, J.

Appellant : Dori and ors.

Respondent : Jiwan Ram

Judgement :

John Stanley, C.J.

1. In this appeal is involved one of the vexed questions in regard to the right of pre-emption which frequently come before the Court. In the suit out of which it has arisen, the plaintiff-appellants claimed a right to pre-empt a sale to Jiwan Ram of a 5 biswas share in a certain village relying upon the provisions of the wajib-ul-arz of 1272 Fasli, which gave a right of pre-emption, first to a near sharer (hissadar karibi) and secondly to another sharer in the village (dusre hissadar deh). The purchaser is a stranger to the village. The village was recently partitioned but no new wajib-ul-arz was framed on the occasion of the partition. The plaintiff is a co-sharer in one of the mahals into which the village is now divided but has no share in the mahal in which the property purchased by Jiwan Ram is situate. Outside the wajib-ul-arz neither side produced any evidence. The wajib-ul-arz is prima facie evidence of the existence of the custom which it records and the only question is

as to the true construction to be placed upon it. The learned Judge of this Court, from whose decision this appeal has been preferred, held overruling the two lower Courts that the case was 'on all fours with' the case of Dalganjan Singh v. Kalka Singh 22 A. 1 and that the decision of the Full Bench in that case governs it. If that ruling is applicable, it is binding upon us and must be loyally followed, but let us see what was decided in it. The facts of it were these: The sale which was sought to be pre-empted was a sale of 7 bighas of land in the village of Serai Sitam and the claim for preemption was based on the wajib-ul-arz framed at the last settlement in 1880-1881. The portion of the wajib-ul-arz relating to preemption is contained in Chapter II which is headed 'as to the rights of co-sharers among themselves based on custom or agreement.' Section 13 of the Chapter (sic) 'as to the custom of right of pre-emption,' and the clause embodying the right runs as follows: If any hissadar wishes to transfer his share (apna hissa) first, he will transfer it to his own brother, then to his near relatives, thirdly, to owners in the village who are partners in the same khata (malikan sharik khata), fourthly, to sharers in the village (hissadaran deh). If none of these purchase, then he is competent to transfer it to any one he likes.'

2. It was decided that in every case the question whether or how far a contract or a custom of pre-emption recorded in the wajib-ul-arz of an undivided mahal was still in force or who is entitled to claim the benefit of it, was not capable of any absolute or invariable answer; that it depended in each case upon the proper construction of the terms of the particular contract or the proper interpretation of the particular custom re-corded, assuming that there was no evidence of any intention on the part of the co-sharers at the time of partition to put an end to the contract or the custom ; but that there is a strong presumption against such claims for pre-emption when made after perfect partition by persons who are no longer co-sharers of the vendor.'

3. No hard and fast rule, it will be observed, was laid down and the judgment is of importance more from the lucid review of the. authorities by the learned Chief Justice, Sir Arthur Strachey, and the guidance to be found in his judgment in dealing with questions of pre-emption, than as a ruling which would govern individual cases. As my brother Banerji said in his judgment in it, the question in

each case is that of the construction of the nature of the particular custom or contract on which the claim for pre-emption is based, and whether the custom or contract can apply to the altered state of things which has come into existence since a perfect partition has been effected.'

4. Now let us look more closely into the facts of that case. In the first place, it will be observed that Chapter II of the wajib-ul-arz deals with the rights of co-sharers among themselves. Similar words were held by my brother Banerji and myself in the case of Sahib Ali v. Fatirna Bibi 6 A.L.J. 958 : 32 A. 63 : 4 Ind. Cas. 138 to limit the meaning of the expression malikan deh' to co-sharers between whom and the vendor there was the common bond of being co-sharers and that as the plaintiff was not a co-sharer with the vendor, she had no right of pre-emption. The facts of that case were similar in fact to those in Dalganjan Singh v. Kalka. Singh 22 A. 1 and we disposed of the case accordingly.

5. In the wajib-ul-arz before us no similar words appear. The heading of the clause in the wajib-ul arz dealing with pre-emption is 'relating to the rightof pre-emption.' There is no heading to Chapter II in which is embraced the words dealing with pre-emption. Nothing is to be found in it to qualify the plain and simple meaning of the words hissadar deh namely, a sharer in the village or person holding a share in the village area. But let us see what was the view expressed by the learned Chief Justice in his judgment and what was actually decided in Dalganjan Singh's case 22 A. 1. He refers to the heading in the wajib-ul-arz in the Chapter on the view expressed by Mr. Justice Blair, that upon the partition of a village into mahals, the old wajib-ul-arz disappeared with a legal entity to which it applied. He observes : It appears to me to be incorrect to say that upon a perfect partition of a mahal, the wajib-ul-arz necessarily disappears or ceases to exist. There is no such general rule of law.' Later on he observes, 'in the absence of any such new wajib-ul-arz, the old wajib-ul-arz remains in force except so far as its provisions are inconsistent with the state of things which the partition has created.' That, he observes, was expressly held to be 'clear law' by Mr. Justice Blair in Mithu Lal v. Muhammad Ahamd Said Khan A.W.N. (1899) 19. Thon he proceeds: 'If the wajib-ul-arz as a whole is not necessarily abrogated by a perfect partition, is there any more ground for holding that the pre-emption clause of it is so abrogated?' Then referripg to

some of the decisions which appear to lay down a general rule of law that after a perfect partition no claim for pre-emption can be successfully made on the basis of the old wajib-ul-arz, he observes: 'Others going to the (sic), appear to regard partition as a purely fiscal arrangement concerned exclusively with the collection of the Government revenue, and having no possible bearing upon any contract or custom of pre-emption.' Then he remarks: 'Both views appear to me equally open to the objection that they treat as an abstract question of law what is really a question of the construction of a particular contract or the interpretation and application of a particular custom.' 'Again,' later on he observes, 'where the clause does not constitute a contract but records a custom, the question is still one of its true meaning, though in this case, considering that the wording of the clause is often the composition of some ignorant subordinate whose accuracy cannot be assumed, the only safe course is to look to the substance of the thing, and not to attach undue weight to the particular expressions used. The question is whether the custom is one which necessarily pre-supposes the continuance of the co-parcenary body existing at the time when the clause was framed. If the custom recorded is one by which the right of pre-emption is confined to co-sharers of the then existing mahal, then it appears to me that it can no more exist in favour of others after the mahal and that particular co-parcenary body have been destroyed by perfect partition, than any other custom can continue after the class among which it has always prevailed has perished. On the other hand, it is possible to imagine a custom of pre-emption which does not depend upon the continued existence of the undivided mahal and its co-parcenary body. A custom in favour of the brothers or other near relatives of the vendor, might be an instance.' He proceeds: 'Again when a Settlement Officer records a custom of pre-emption in the wajib-ul-arz of a new mahal created by perfect partition of an old one, what is that custom? It cannot be something absolutely new or the word custom would be a misnomer. It must, therefore, be something which existed before the new mahal and before the partition, something, therefore, which existed in the time of the old mahal which has survived the partition, and which is recognised as still applicable within the new mahal.' From this language we gather that the view of the learned Chief Justice was that in each particular case the Court is to see whether the custom recorded is one which necessarily pre-supposes the continuance of the old

co-parcenary body and that if it does pre-suppose the continuance of that body the custom can no longer prevail, but must perish upon perfect partition. Later on after referring to the decision in *Abdul Hai v. Nain Singh* 20 A. 94 to the effect that it would require very strong evidence to satisfy the Court that after share-holders in a mahal had applied for and obtained partition and consequent separation of their interest from other shareholders in the mahal, they intended that the other co-sharers from whom they had separated their interest should be entitled to come in and pre-empt in the new mahal and become again their co-sharers, the learned Chief Justice observes: 'Some of these considerations obviously do not apply where the right is claimed after partition by persons who having been co-sharers in the undivided mahal are still co-sharers with the vendor in one of the separate mahals. Partition has not as regards them made so radical a change, they are as closely united as before, though by a new bond; there is still the distinction between them and strangers which it is the object of pre-emption to preserve.' If by the passage last quoted, the learned Chief Justice intended to convey that a custom whereby a sharer in a village is entitled to pre-empt a sale to a stranger only prevails upon partition of the village into several mahals so far as to allow of a right of pre-emption in the case of a sale of part of a mahal in which the pre-emptor is a co-sharer with the vendor, the proposition is, in my opinion, open to objection. The effect of it would be to break up the custom into as many customs as there are mahals. This cannot be. A custom must prevail in its entirety or not at all. Then he states: 'The inference which I drew is that while it depends in every case on the particular circumstances and especially upon the terms of the particular *wajib-ul-arz*, whether or how far pre-emption can be claimed under it after a perfect partition, there is a strong presumption against such a claim when made by persons who are no longer co-sharers of the vendors.'

6. Now it must be borne in mind that in the *wajib-ul-arz* with which the learned Chief Justice was dealing the right of pre-emption was a right of co-sharers 'among themselves.' These words 'among themselves' indicate that to enjoy a right of pre-emption the claimant must not merely be a sharer in the village which has been partitioned but there must be between him and the vendor this common bond, namely, that they 'each own a fractional share of an integer made up of all the shares held by each.' As to the presumption which, in the view of the learned

Chief Justice, existed against a claim for pre-emption made by persons who are no longer co-sharers of the vendors, any such presumption, whatever its strength be, must, as it seems to me, yield to evidence; it has no place for consideration when there is clear evidence to rebut it.

7. Referring to the passage in the judgment in the case of *Motee Sah v. Musammat Goklee* 1 S.D.A.N.W.P. 506, namely, that an essential condition of the existence of a right of pre-emption is that the parties claiming such a right shall be co-parceners in the same estate as those against whom the claim is made, a relation between the parties which is extinguished by the very operation of proprietorship thereby established, the learned Chief Justice observed: "I infer that the *wajib-ul-arz* in that case confined the right of pre-emption to co-parceners of the vendor and that after the partition, the plaintiff was not such a co-parcener in one of the new mahals. Upon that assumption the decision was no doubt right. If, however, the passage means that whatever the terms of the *wajib-ul-arz*, no one can in any case successfully claim pre-emption who is not a co-parcener of the vendor, it is in my opinion too widely expressed.' It is clear from this that the Chief Justice did not consider that in every case the claimant for preemption after partition must be a co-sharer with the vendor in the mahal in which the vendor has a share.

8. Referring to the case of *Gokal Singh v. Mannu Lal* 7 A. 772, which was a case of pre-emption arising out of a contract, which gave the right of pre-emption to persons described in the report as 'share-holders' or 'partners' in the village, he observed: 'It appears to me that the whole question was whether the plaintiffs when they brought their suit were co-sharers of the village within the meaning of the contract. That depended on whether the pre-emption clause meant by co-sharers of the village all persons owning shares within any part of the village area, or all whose shares were co-extensive with the whole of that area, or all who whether in the whole or in part of the village were co-sharers of the vendor. If it had the first meaning, then the plaintiffs, being co-sharers of one of the mahals into which the village was divided, were entitled to pre-emption.

9. It will be observed that the Chief Justice here recognizes that the expression *hissadaran deh* was susceptible of the meaning that it embraced 'all persons owning shares within any part of the village area.' Subsequently in his judgment the learned Chief Justice quoted without disapproval the case of *Abbas Ali v. Ghulam Nabi* A.W.N. (1891) 137, in which Knox, J., held that the partition of a village consisting of a single mahal into two separate mahals, in one of which the plaintiff and the vendor were co-sharers and in the other the vendee was a co-sharer did not render the previously framed *wajib-ul-arz* inapplicable and that under it the vendee was equally, entitled with the plaintiff as a co-sharer of the vendor.

10. He also cited the case of *Mata Din v. Mahesh Prasad* A.W.N. (1892) 100. In that case there was a village originally forming a single mahal and the *wajib-ul-arz* of which gave a right of pre-emption to *hissadaran* not of the mahal but of the *mauzah*. There was a perfect partition of the village into three mahals for each of which a new *wajib-ul-arz* was framed and in each the pre-emption clause was copied verbatim from the old *wajib-ul-arz*. At that time one of the new mahals belonged to a single owner. Upon the sale of property in that mahal a suit for pre-emption was brought by a person who was a co-sharer in another of the new mahals. Mahmood, J., held that the plaintiff was entitled to pre-empt as a co-sharer of the *mauzah* notwithstanding the partition and the fact that he was not a co-sharer of the vendor in the mahal in which the property sold was situate. The comment of the learned Chief Justice upon this decision is: 'whether Mr. Justice Mahmood's conclusions in that particular case were correct or not. I cannot doubt that his method of deciding it up on the construction of the contract contained in the *wajib-ul-arz* was the right one.' This, it is to be observed, was the case of a right of pre-emption existing by contract and not by custom, but it is useful as a guide in the case of a claim for preemption existing by custom.

11. Then later on he commented upon the case of *Mithu Lal v. Muhammad Ahmad Said Khan* A.W.N. (1899) 19, which was decided by Blair and Aikman, JJ. The suit in that case was based on a pre-emption clause recording a custom of pre-emption in favour of co-sharers in the village. The village was, at the time when the *wajib-ul-arz* was framed, an undivided mahal. It was afterwards divided by

perfect partition into two separate mahals and no new wajib-ul-arz was framed. The plaintiffs and the vendors were co-sharers in the mahal in which the property sought to be pre-empted was situate. The vendee was sole proprietor of the other mahal, his only connection with the other being that he owned in it certain rent-free land'. The Court held in substance that the old wajib-ul-arz and the old custom still remained in force in so far as they were not inconsistent with the state of things created by the partition. The Chief Justice says as to this that the Judges took for granted that 'co-sharers in one of the separate mahals were co-sharers in the village within the meaning of the wajib-ul-arz' but did not discuss the question. Then he observes: 'All depends on what the wajib-ul-arz meant by co-sharers in the village.' If it included all persons who might thereafter be co-sharers in any part of the village, the decision was right. If it meant all persons who were co-sharers in the entire undivided village for which the wajib-ul-arz was framed, the decision was wrong, for the plaintiffs after the partition were no more co-sharers of the village in that sense than the defendant vendee. As a matter of fact the only co-sharers in the village at the time when the wajib-ul-arz was framed were co-sharers of the undivided village.'

12. Then he refers to the question before the Full Bench, namely, whether the plaintiff was a hissadar deh within the fourth category of pre-emptors, and dealing with the contention that 'hissadar' did not in the wajib-ul-arz in question mean a co-sharer of a mahal in the sense in which that term is used in the Land Revenue Act, but merely the holder of a share, he observes: 'According to this argument a hissadar deh merely means one who owns or holds a share within the area of the village. If that is the meaning, then notwithstanding the partition the plaintiff is entitled to pre-emption, for the deh or village still remains and he is still a hissadar, or owner of a share, within its area.' On the other hand, he observed, if hissadar means not merely the owner of a share but a co-sharer, and hissadar deh means a co-sharer of the entire village for which the wajib-ul-arz was framed, then as the effect of the perfect partition was to destroy the class of hissardaran deh altogether, neither the plaintiff nor any one else can now claim pre-emption as a member of it.' Then he explains that the word hissadar used in the wajib-ul-arz under consideration by the Court 'ought to be construed in the same sense as the same word in the opening words of the clause,' namely, 'if any hissadar wishes to

transfer his share, apna hissa.' In view of the fact that the word hissadar is there used without the word deh, he was of opinion that hissadar meant a co-sharer and not merely a sharer in the village. No such qualifying words are to be found in the waiib-ul-arz before us. Mr. Justice Aikman, in his judgment in Dalganjan Singh's case 22 A. 1, pointed out that the claim of the plaintiff was based on the clause in the wajib-ul-arz which occurs in a Chapter dealing with the rights of co-sharers among themselves. I now gather from the language of the learned Chief Justice that his view was that in the case of a right of pre-emption existing by custom, the right must, after perfect partition, continue to prevail in its entirety, or else be treated as having fallen into abeyance, or as having been extinguished. I find in it no support for the proposition that a custom of pre-emption can be treated as liable to modification by perfect partition, that is, that it 'must be held to be subject to such modifications as were rendered necessary by the partition.' It is further clear from the language of the Chief Justice that his view, in which the other members of the Court concurred, was that the question how far a custom of pre-emption recorded in the waiib-ul-arz of an undivided mahal was still in force or who was entitled to claim the benefit of it, depended in each case upon the proper interpretation of the particular custom recorded. He attempted to lay down no rigid rule on the subject but on the contrary carefully abstained from doing so. In Dalganjan Singh's case 22 A. 1, a key to the meaning of the wajib-ul-arz was found in the heading to the portion of it relating to pre-emption, namely, 'as to the rights of co-sharers among themselves based on custom or agreement.' The words 'co-sharers among themselves' indicate that not sharers in the village merely, but co-sharers in the village between whom the common bond exists, namely, that each owns a share of an integer made up of the shares held by all, was intended. In the case of Sahib Ali v. Fatima Bibi 6 A.L.J. 958 : 32 A. 63 : 4 Ind. Cas. 138, to which I have already referred, for similar reasons the ruling in Dalganjan Singh's case 22 A. 1 was applicable and was followed by myself and my brother Banerji.

13. In the case of Ram Din v. Pokhar Singh 27 A. 553 : A.W.N. (1905) 97 : 2 A.L.J. 253, the custom of pre-emption relied upon ran as follows: If a co-sharer is desirous of transferring his share, he shall transfer it first to his near relative and next to sharers in the village (hissadar deh), and then on their refusal, he may mortgage or sell it to any one he likes.' It was held by my brother Banerji, and I

think rightly, that upon a true construction of the wajib-ul-arz coupled with a clause in a later wajib-ul-arz to the effect that the parties accepted the right of pre-emption, the two documents amounted to a record of a custom of preemption prevailing in the village and that a near relative need not also be a co-sharer. It was contended before him that a near relative could not pre-empt unless he was also a co-sharer. My brother Banerji repelled this contention observing that such a construction could only be justified by reading into the wajib-ul-arz words which did not appear in it. 'Under that document,' he observed, 'pre-emptors of the first class are near relatives without any qualification, and preemptors of the second class are co-sharers in the village. If the intention had been that pre-emptors of the first class must also be co-sharers, nothing could have been easier than to insert appropriate words to indicate that intention. As the wajib-ul-arz is worded it is only near relatives, whether they are co-sharers or not, who come under the category of preemptors of the first class.' This case is an illustration of a custom whereby a party enjoys a right to pre-empt who is not a co-sharer with the vendor or a sharer at all in a village. Why should not the same consideration apply to the case of a hissadar karibi, that is, a relative who is a sharer in the village? If a common bond is found in the one case in relationship, why, I ask, should not in the other a common bond be found in membership of the village community coupled with relationship? Why should the additional condition be imposed, namely, that the pre-emptor must be a co-sharer with the vendor

14. In the case of Auseri Lal v. Ram Bhajan Lal 27 A. 602 : A.W.N. (1905) 115 : 2 A.L.J. 313, in which on partition of a village into two separate mahals the provisions of the former wajib-ul-arz which recorded a custom of pre-emption as existing in favour of, amongst others, sharers in the village (hissadar deh), were copied verbatim into the wajib-ul-arz of each of the new mahals, it was held by Justice Sir, William Burkitt and myself that a co-sharer in the village was entitled to pre-empt a sale of property situate in one of the new mahals in which he had no share. Sir William Burkitt was a member of the Bench which decided Dalganjan Singh's case 22 A. 1.

15. Now let us see what is the language in which the custom in the case before us is set forth in the wajib-ul-arz. The custom is that if a sharer (hissadar) wishes

to sell his hakiat, then he shall do so first to a near sharer (hissadar karib) and if he shall refuse then to another sharer in the village (dusre hissadar deh). There is nothing whatever to be found in the wajib-ul-arz, so far as I have been able to discover, to qualify the meaning of the expression hissadar deh, and as I have said, there is no evidence outside the wajib-ul-arz to furnish us with any guidance. Deh means a definite area of land with houses upon it. Its equivalent 'mouza' is defined in Wilson's Glossary as 'one or more clusters of habitations and all the land belonging to their proprietary inhabitants.' Every one who owns a portion of that area has a share in the village and is a Jiissadar. Hissadar primarily means one who owns a share, hissa.' In the pre-emptive paragraph a preferential right of preemption is given to hissadar karib and in case of his refusal, to another (dusre hissadar deh). The word 'another' furnishes a key to the meaning of hissadar as used in the earlier part of the paragraph. That meaning is 'sharer in the village.' The paragraph amplified would run thus: 'If any sharer in the village (hissadar) wishes to sell or mortgage his hakiat, he must do so first to a sharer in the village who is a relation (hissadar Jcarib) and in case of his refusal to another sharer in the village (hissadar deh).' In this wajib-ul-arz, there is no such context to be found as in Dalganjan Singh's case 22 A. 1 rendered the meaning of co-sharer' appropriate to the word Jiissadar. The custom in this case sprung up at a time when presumably it was not in the contemplation of the sharers in the village that the village would be broken up into distinct parcels by partition. The meaning of the expression hissadar deh meant in the eyes of the villagers a sharer in the village.

16. What then is the effect of perfect partition upon a custom under which the sharers in a village are entitled to pre-empt? The old custom cannot be treated as capable of modification to meet the altered circumstances. A custom must not merely be ancient but it must be continuous, uninterrupted, uniform, certain and definite. Unless the effect of partition is to extinguish the custom, it must prevail in its entirety. If we qualify the expression hissadar deh as used in the wajib-ul-arz by a condition that a hissadar who claims a right of pre-emption must be a co-sharer in the mahal in which the property sought to be pre-empted is situate, we shall be altering and modifying the custom. It appears to me, therefore, that the custom; must prevail in its entirety or not at all. Now the custom in this case is not one in

my opinion which necessarily pre-supposes the continuance of the village as an undivided village--no more than did the custom which was the subject of consideration in the case of *Ram Din v. Pokhar Singh* 27 A. 553 : A.W.N. (1905) 97 : 2 A.L.J. 253. The object of a custom of preemption is to exclude strangers from participation in the ownership of a village or other area. There is no reason why a custom, such as that which is recorded in the *wajib-ul-arz* in the present case, should be treated as extinguished upon partition of the village into separate mahals. The sharers in each of the new mahals continue to be sharers in the village and there is still the common bond between them that they are sharers in the village.

17. The learned Judge from whose decision this appeal has been preferred, in overruling the decision of both the lower Courts, stated that the case was exactly on all fours with the case of *Dalghanjan Singh v. Kalha Singh* 22 A. 1. I think that I have shown that this is not so in view of the fact that there is to be found in the *wajib-ul-arz* in that case language which qualified the meaning of the expression *Jiissadaran deh*. The question before us nearly resembles that which was decided by my brother, the late Sir William Burkitt and myself in *Auseri Lal v. Ram Bhajan Lal* 27 A. 602 : A.W.N. (1905) 115 : 2 A.L.J. 313. The learned Judge does not allude to that decision but he quotes the following passage from a judgment which I delivered in *Gobind Bam v. Masiah-Ullah Khan* 29 A. 295 : 4 A.L.J. 137 : A.W.N. (1907) 39: 'As was remarked,' he observed, 'in that case the custom which prevailed in this case was one which gave a right of pre-emption to persons between whom there was the common bond that they each owned a share of an undivided village, and when this common bond was severed by partition the custom ceased to be applicable.' This is not a complete quotation. The important words which introduced the words quoted by the learned Judge are omitted by him. These words are 'It may be said that' and the passage coupled with the succeeding passage in the judgment was intended to show that the plaintiff was on the horns of a dilemma, namely, that if he contended that the custom which he relied on was one which gave a right of pre-emption to persons between whom there was the common bond that they each owned a share of an undivided village, then his suit failed inasmuch as in that case the custom had ceased to be applicable; but that if on the other hand, the custom still prevailed, then the

vendees respondents stood on the same level as regards pre-emption as the plaintiff, and in either view the plaintiff's suit failed. A. perusal of the entire passage shows what was intended to be conveyed. It appears to me that the learned Judge imposes a heavier burden on the decision in Dalganjan Singh's case 22 A. 1, than it was intended to bear. In it, the particular wajib ul-arz before the Court was construed and stress was laid upon language used in it which was held to support the decision arrived at. No such language is to be found in the wajib-ul-arz before us. We have not got there the words 'apna hissa' unaccompanied by the word 'deh.' We have no such heading to the Chapter in which the clause, as to pre-emption is included as was found in Dalganjan Singh's case (1), namely, 'rights of co-sharers inter se.' We have simply to interpret the words hissadar deh as they appear in the wajib-ul-arz without qualification. The terms 'hissadar deh' are clear and unambiguous, and mean a sharer in the village. Partition as regards such sharers has not made a radical change; they are as closely united as before; and there is still the distinction between them and strangers which it is the object of pre-emption to preserve. The common bond of membership in the village community still subsists. Whatever presumption there may be against a claim for pre-emption when advanced by a person who is no longer a co-sharer of the vendor, no such presumption ought, in my opinion, to be allowed to prejudice or affect clear, unambiguous and unqualified words such as are to be found in the wajib-ul-arz before us. In my opinion the learned Judge of this Court was wrong in overruling the decisions of the lower Courts.

18. In coming to this conclusion I am guided by the language of the judgments in Dalganjan Singh's case 22 A. 1 and am in no way questioning the authority and binding nature of that decision. In the wajib-ul-arz, then before the Court, language was found which led the Court to hold that hissadar meant a co-sharer. In the wajib-ul-arz before us there is no such qualifying language and we have, therefore, only to interpret the words hissadar deh according to their strict, plain, common meaning. This meaning I take to be a sharer in the village.

19. I would, therefore, allow the appeal, set aside the decree of the learned Judge of this Court and restore the decree of the lower appellate Court.

20. I agree with Mr. Justice Aikman that this case cannot be distinguished in principle from the Full Bench decision in *Dalganjan Singh v. Kalka Singh* 22 A. 1. in that case the following propositions were laid down:

(1) Where on the partition of a mahal, no new wajib ul-arz has been framed for any of the new mahals, a custom or contract of pre-emption recorded in the wajib ul-arz before partition does not necessarily come to an end and cease to have effect and operation.

(2) The question whether or how far a contract or a custom of pre-emption recorded in the wajib-ul-arz of the undivided mahal is still in force, or who is entitled to claim the benefit of it depends in each case upon the proper construction of the particular contract or custom. For example, if a contract of preemption contained an express covenant to the effect that persons entitled to pre-emption would not be deprived of their right by a perfect partition of the mahal, the right would not be affected by partition- Again, if a brother or other relative, who is not a co-sharer, has the right of pre-emption, a partition of the mahal would not affect his right. Another instance may be a case similar to that of *Janki v. Ram Partab Singh* 28 A. 286 : 2 A.L.J. 833 : W.N. (1906) 2, where before partition a share-holder in one mahal had the right to preempt property situate in another mahal.

(3) There is a strong presumption against a claim for pre-emption when it is made after perfect partition by persons who are no longer co-sharers of the vendor, and where the language of the wajib-ul-arz is ambiguous this presumption may be conclusive. This view was also held by Knox and Aikman, JJ., in *Abdul Hai v. Nain Singh* 20 A. 94.

21. The learned Judges constituting the Full Bench then proceeded to consider whether the custom recorded in the wajib-ul-arz relied upon in that case was applicable to the altered state of things which arose after partition and answered that question in the negative upon a true construction of the terms of the wajib-ul-arz. The provisions of the wajib-ul-arz of 1272 Fasli on which reliance is placed in

the case before us are, in my opinion, substantially the same as those of the wajib-ul-arz in the Full Bench case and must be construed in the same way. The wajib-ul-qarz of 1272 'Fasli provides as follows: 'If any hissadar wishes to sell or mortgage his hakiat (right), he should first inform his near share-holder and on their refusal, his other co-sharers in the village (dusre hissadaran deh) and sell or mortgage for proper price'. In the case of Dalganjan Singh v. Kalha Singh 22 A. 1, the terms of the wajib-ul-arz, as set forth in the judgment of the learned Chief Justice, were these: ' If any hissadar wishes to transfer his share (hissa), first he will transfer it to his own brother,...fourthly, to the hissadar deh.' The question in that case, as in this, was whether a person, holding a share in the village but not in the same mahal as the vendor, had a right of pre-emption after the partition of the village. The learned Chief Justice, Sir Arthur Strachey, who delivered the principal judgment in the case, held that the word hissadar deh in that wajib-ul-arz meant a co-sharer of the undivided village for which the wajib-ul-arz was framed'. And he came to this conclusion upon, as he says, two main considerations.' The first was that 'the word hissadar as used in the fourth category of pre-emptors (hissodaran deh) must be construed in the same sense as the same word in the opening words of the clause 'if any hissadar wishes to transfer his share.'" He then held that the opening words of the clause meant if any co-sharer in this mahal wishes to transfer his share therein' and that 'the subsequent words hissadaran deh' mean 'co-sharers of the undivided village' not 'owners of shares in any sub-division of the village.'" The second consideration which led him to come to the above conclusion is thus stated in the judgment: We are interpreting and applying a particular custom of which the plaintiff claims the benefit. In considering who is entitled to the benefit of a custom, it is essential to see who are the persons among whom it has in fact habitually prevailed. It cannot be claimed by any one who is not a member of the class thus determined. Now there can be no doubt as to what was the class of persons who at the time when the wajib-ul-arz was framed, habitually exercised the right of pre-emption by virtue of the custom. They were the co-sharers of the undivided mahal which the village Serai Sitam then formed and no others. There was no distinction between share-holders in the village and co-sharers of the entire village; there was only a single class of co-sharers. That is the only class among whom the custom actually prevailed, and to whom, therefore, the right

belonged. It is now sought to apply the custom for the benefit of the plaintiff, who stands in a totally different relation to the village, to the vendor, and to the property sold. He is not a co-sharer of the entire village. He is not a member of the class who exercised the right of pre-emption at the time when the custom was recorded. He is a member of a class which only came into existence through the partition of persons who have shares in a particular sub-division of the village. He is not even a co-sharer of the vendor. To allow him to pre-empt under the old wajib-ul arz would be, in my opinion, to change the custom while professing to apply it.' It is thus clear that the basis of the learned Chief Justice's decision was not the fact that the custom of pre-emption recorded in the wajib-ul-arz appeared in a Chapter which was headed 'Rights of co-sharers among themselves.' The other Judges agreed with the learned Chief Justice. In my judgment in that case I said: 'In my opinion the true construction of the custom as recorded in the wajib ul-arz is that it is only such a share-holder as is also a co-sharer who has the right of pre-emption as a pre-emptor of the fourth class. At the time when the wajib-ul- arz was prepared all the share-holders were also co-sharers. The custom which was embodied in the wajib-ul-arz evidently had reference to that description of Share-holders. Therefore, by virtue of such a custom the plaintiff, who is the holder of a share in the village, but not a co-sharer of the vendor, has no right of pre-emption.' I see no reason to alter the opinion there expressed, and, as I have said above, I cannot distinguish the case before us from the Full Bench case of Dalganjan Singh v. Kalka Singh 22 A. 1. I feel myself bound to follow the interpretation of the words hissadaran deh adopted by five learned Judges in that case. I would, therefore, dismiss the appeal.

22. In view of the provisions of the Letters Patent, the order of the Court is that the decree of the learned Judge of this Court be set aside and the decree of the lower appellate Court be restored. The parties will abide their own costs in the High Court.