

Shah Ram Chand and anr. Vs. Shah Lal Chand and anr.

Shah Ram Chand and anr. Vs. Shah Lal Chand and anr.

SooperKanoon Citation : sooperkanoon.com/475370

Court : Allahabad

Decided On : Apr-28-1924

Reported in : (1924)ILR46All674

Judge : Sulaiman and ;Kanhaiya Lal, JJ.

Appellant : Shah Ram Chand and anr.

Respondent : Shah Lal Chand and anr.

Judgement :

Kanhaiya Lal, J

1. This appeal and the cross-objection arise out of a suit for pre-emption, and the main question for consideration is whether the plaintiffs respondents are entitled to a preferential right of purchase as against the defendants vendees. The sale in question was effected by the defendants Nos. 3 to 13 in favour of the defendant No. 1 and the father of defendant No. 2, for a consideration of Rs. 22,000 on the 27th of May, 1919; and the property sold comprised a 3 biswa share in patti No. 14, with the rights appertaining thereto in shamilat pattis Nos. 17 and 18, in the thoh known by the name of thok 12 biswas in the village Kadipur. The allegation of the plaintiffs was that they were co-sharers in that thoh and that the defendants vendees were strangers. - The court below found that the village Kadipur comprised 2 thohs, that the plaintiffs were co-sharers in the thoh in which the property in suit was situated and that the defendants vendees were co-sharers in

the other thoh. It further found that the plaintiffs were entitled to a preferential right as against the defendants vendees and that the sale consideration actually paid was Rs. 22,000. It accordingly decreed the claim of the plaintiffs subject to the payment of the above amount.

2. Paragraph 14 of the wajib-ul-arz of the village Kadipur, dealing with the right of pre-emption, states that in the case of a transfer of property by a sale or mortgage, but not by a gift, the claim to the right of pre-emption (dawa haq shafa) shall belong first to an own brother and nephew, then to a paternal cousin, a partner in the property, then to the co-sharers in the thok and then to the co-sharers of the village. The contention here is that the right to claim pre-emption arises only when a sale or mortgage is effected in favour of a person outside these categories and that no right of preference is given by the wajib-ul-arz between the co-sharers of the different categories inter se. In other words, it is argued that the right of pre-emption is at best recognized only where a sale or mortgage is effected in favour of a stranger and not where it is effected in favour of a member of one or other of the categories above-mentioned. It is further urged that the clause itself does not establish any custom of pre-emption in the village, because it mentions what could hardly be the subject of a custom, namely, that no gift could be made by a co-sharer except in favour of an own brother and nephew or a daughter's son or except for a charitable purpose. The last condition is clearly extraneous to the scope of the paragraph, which purports to deal with the right of pre-emption. But it is contended that if that entry could not be the record of a custom, the previous entry could hardly be treated as a record of a custom of pre-emption.

3. The questions raised present features of some difficulty. As pointed out in *Digambar Singh v. Ahmad Sayed Khan* (1914) I.L.R. 87 All. 129, and *Sher Muhammad Khan v. Parbhu Lal* (1923) I.L.R. 46 All. 47, a wajib-ul-arz is, in the absence of intrinsic or extrinsic evidence to the contrary, prima facie evidence of the custom it records. It may, however, record a custom about certain matters and a contract as regards others. If it records a custom, the incidents of that custom and the occasion which would give an opportunity for its enforcement may be proved by its production, or by external evidence, or by both.

4. The wajib-ul-arz here produced does not say that the right of pre-emption or a claim to enforce that right would only accrue where a co-sharer has transferred his share to a stranger or a person outside the coparcenary body. It mentions the different classes of persons who can enforce that right, in their due order, whenever a transfer is effected. Such a transfer may, however, be effected in favour of a stranger or in favour of a person belonging to a remoter category, to the prejudice of a person belonging to a nearer category. In the absence of any terms of limitation, the right of pre-emption can be enforced, as far as it may be, between the persons belonging to the different categories inter se. Each wajib-ul-arz requires to be interpreted according to its own terms. While in some cases it has been held, on the interpretation of the particular wajib-ul-arzes produced, that the co-sharers belonging to the different categories have preferential rights inter se, in other cases it has been held that such preferential rights only exist where a sale is effected in favour of a stranger.

5. The court below, relying on the decisions in *Ram Lal v. Niadar* (1907) 4 A.L.J. 352, and *Gurdial v. Mathura Singh* (1910) 7 A.L.J. 610, has found that such a right of preference exists even where a co-sharer of one thok sells to a co-sharer of another thok. In the former case, the wajib-ul-arz provided that in the event of a sale a co-sharer should sell his property to his own brother or ek jaddi and after him to co-sharers in the patti or thok and after them to other co-sharers, and further said that the person falling within the first category would have to give the same price as was offered by a stranger. The view taken by this Court was that a right of pre-emption was given to the successive categories of the pre-emptors inter se, that is one against the other, and that such right did not arise only in the event of a sale to a stranger. In the latter case the custom recorded in the wajib-ul-arz gave a right of pre-emption in the case of a sale or mortgage to a co-sharer in a patti, then to the pattidars of the mahal, then to the owners of the other mahals, and in case of their refusal to an outsider, at the same price as a stranger would be willing to give. The view taken by this Court was that a right of pre-emption between the persons mentioned in the wajib-ul-arz was enforceable inter se.

6. The learned Counsel for the defendants appellants has referred to the decisions in *Khatun Bibi v. Saiyida Bibi* (1905) I.L.R. 27 All. 457 and *Mathura*

Singh v. Ram Lal Singh (1921) 19 A.L.J. 903, where under circumstances said to be similar to the present case, no right of pre-emption as between the co-sharers of different categories inter se was allowed.

7. Personally speaking, it appears to me questionable how, far we can import into the terms of a wajib-ul-arz a limitation or restriction which does not there exist. The wajib-ul-arz does not in terms say that the right of pre-emption would be available only where there is a sale to a stranger. It is wide enough in its terms to govern all cases where a sale is effected in favour of a person whether he is a stranger or belongs to one or other of the categories mentioned. It merely declares the order in which the right of preference is to be exercised as between the different classes of co-sharers or as against a stranger. For the purpose of enforcing the right of pre-emption, the village is practically divided into different concentric circles. One of those concentric circles is the thok and the other is the village unit. A person who belongs to an inner concentric circle is entitled to claim pre-emption as against a person who belongs to an outer concentric circle, because, so far as the former is concerned, the latter is virtually a stranger. A claim to a right of pre-emption does not necessarily connote a suit. It may be enforced either by private treaty or by suit. It implies an assertion of a right which may be asserted before a transfer is effected or after it is effected. It may be asserted out of court or, if the vendee refuses to reconvey the property, by a suit. The right arises from a sale if the order of preference laid down by the wajib-ul-arz is disregarded by the vendor. If it had been intended to limit the exercise of the right to an occasion when a sale was made to a stranger, the wajib-ul-arz would have said so.

8. In Sukhdeo Singh v. Bahadur Singh (1904) I.L.R. 26 All. 544, where a wajib-ul-arz provided that if a co-sharer wanted to sell his property he should do so for whatever price was obtained from others, first to a near co-sharer in the same patti, secondly to any other co-sharer in the same patti, thirdly to a near co-sharer in another patti, fourthly to a co-sharer in the mahal and fifthly to an outsider, it was held that the right conferred was a right enforceable between the different classes of persons mentioned inter se.

9. In *Dhanraj Misr v. Rameshwar Misr* (1923) I.L.R. 40 All. 170, no such restriction was read into the forms of the *wajib-ul-arz* as is now contended for.

10. It is urged in differentiation of those cases that where the pre-emptive clause of the *wajib-ul-arz* imposes no duty on a co-sharer to offer the property in the first instance to a person of the class first named and then to the persons mentioned in the other classes in their order, no cause of action can accrue to the co-sharers of the different classes inter se, by a sale to a member of one of those classes. But there is no difference in principle between a clause which casts a duty on a co-sharer to sell the property to the different classes of persons mentioned in their order, and a clause which defines the classes of persons among whom the right of pre-emption would be enforceable whenever a sale was effected by a co-sharer in respect of his share. Obviously, if a pre-emptive clause contains no restriction limiting its operation to a sale or transfer in favour of a stranger, it will be doing violence to the spirit and intention of the framers of the *wajib-ul-arz* to import that limitation and preclude a person belonging to a superior category from enforcing it as against a person who, so far as his *thoh* is concerned, is as much a stranger as a complete outsider.

11. Where all the lands belonging to the parent *khatas* are held in severalty, the mere existence of a common *khata* containing certain barren, uncultivated or *abadi* lands, which usually remain the property of all the co-sharers of the village till a partition is formally effected, cannot make a person who belongs in other respects to one class or category a joint co-sharer with another who belongs to another class or category, as regards any separate interest the latter may sell. No account is taken of the appurtenances in the *shamlat khatas* for the determination of his right of pre-emption.

12. Interpreted, however, in the light of the Pull Bench decision in *Randhir Singh v. Rajpal Misir* (1923) I.L.R. 46 All. 478, which follows a previous decision in *Balwant Singh v. Mare Singh* (1923) 21 A.L.J. 542 and is binding on us, the inclusion of extraneous matters in the same clause which could not possibly be the subject of a custom precludes the possibility of the clause being treated as a record of custom in regard to any of the matters of which that clause forms a part. It has

been there pointed out that where a wajib-ul-arz contained matters which could not properly or possibly be the subject of a custom, there the ordinary presumption that the wajib-ul-arz was prima facie record of a custom was overturned by the internal evidence afforded by the oilier terms embodied therein, though they, might be separable from the rest.

13. The claim of the plaintiffs must in these circumstances fail and it is hereby dismissed with costs The cross-objection is not pressed and is also dismissed with costs.

Sulaiman, J

14. It is notorious that before the year 1911 there were numerous cases on pre-emption which were more or less irreconcilable. In that year a special Pre-emption Bench was therefore constituted with the professed object of laying down certain principles which should, as far as possible, be consistently followed. Ever since that year the principle of stare decisis has been rigorously attempted to be followed.

15. Now in these provinces two kinds of custom of pre-emption generally prevail. The first is of a kind where it is the duty of every co-sharer before he sells his property to offer it to the other co-sharers in a certain prescribed order. The other kind of custom is that when a property has gone out of the hands of the coparcenary body by a sale to a stranger, certain classes of pre-emptors have a right to pre-empt the sale in a certain order of priority. Under the second kind there is no right inter se, that is to say, no right of pre-emption when a sale takes place in favour of any of the co-sharers, but there is a priority of claim when rival suits of pre-emption are instituted against a stranger transferee. That both these kinds of custom do exist in these provinces cannot for a moment be disputed.

16. Instances of the second kind of custom are to be found in cases like Sheobalak Singh v. Lachmidhar (1901) I.L.R. 23 All. 427, Khatun Bibi v. Saiyida Bibi (1905) I.L.R. 27 All. 457 and Narain Saran Singh v. Sidh Narain Singh (1908) 5 A.L.J. 655, as well as in a number of other cases, to some of which I shall refer later on.

17. It has been well established that the burden of proving the custom lies on the plaintiff. The plaintiff pre-emptor cannot succeed by merely proving that a custom of pre-emption exists in the village. He has to show that that particular custom exists which would entitle him to a decree against the defendant vendee. The pre-emption Bench has always held that if the only evidence which the plaintiff can produce is ambiguous, that is to say, is capable of two interpretations, and if on one of such interpretations the suit cannot succeed, then the suit must fail, and it is not the duty of the court to give it necessarily the other interpretation which would entitle the plaintiff to a decree : vide the cases of Bechu Singh v. Lachmi Narain Singh (1912) 15 Indian Cases 54, Jahangira v. Amir Singh (1913) 1.2 A.L.J. 19, Din Dayal v. Ramdhan (1915) 28 Indian Cases 306, and Nageshar Prasad v. Ram Hardkh Pande (1924) I.L.R. 46 All. 370.

18. In the present case the wajlb-ul-arz contains a clause which when literally translated runs as follows: 'The claim to (or suit for) a right of pre-emption in case of transfer of property by sale and mortgage, except a gift, shall be, first to own brother and nephew and then a paternal uncle's son, a partner in the property, then co-sharers in the thoh and then co-sharers in the village.' ('Dawa haqq shufa dar sural intiqal haqiat ba zaria bai wa rehan sewai hiba awwal bhai bhatija haqiqi phir bhai chachazad sharik haqiat phir hissadaran thok phir hissadaran gaon ko hoga.') With the other portion of the clause I am not concerned at this stage.

19. It is clear that the clause is not like the clauses which are found in many wajib-ul-arzes and which say that in case a co-sharer wishes to transfer his property he should offer it first to one class of co-sharers and then to another class. Obviously, in such latter cases, if no offer is made to the first class of co-sharers, the condition is broken, which gives a co-sharer of the first class a right of pre-emption even if a sale takes place in favour of a co-sharer of the second class. In the present case the right comes in after the transfer has taken place. If the word 'transfer' in the clause were given its wide meaning so as to include even a transfer to any of the classes of pre-emptors mentioned therein, the clause as it stands cannot in its entirety be operative. For instance, let us substitute the words 'transfer to own brother' in place of the word 'transfer,' the clause would then read 'In case of transfer to own brother of property by sale and mortgage except a gift,

first own brother and nephew and then a paternal uncle's son, a partner in the property, and then co-sharers in the thok and then co-sharers in the village shall claim right of pre-emption.' Such a provision is of course absurd. Similarly if for the word 'transfer,' we substitute 'transfer to any of the other classes of pre-emptors mentioned,' part of the clause would be meaningless, as no right of preemption can exist in favour of persons of that class or an inferior class.

20. The learned Counsel for the respondents is accordingly forced to admit that in such cases either the whole or a portion of the clause must be omitted as being inapplicable. It follows that if we give the word 'transfer' its general meaning, so as to include transfers to persons mentioned in the various categories, then the whole clause as it stands may not be applicable. On the other hand, if no portion of this clause is to be omitted in any possible case, then the only meaning which can consistently be given to the word 'transfer' would be 'a transfer to a person not coming within the categories mentioned.'

21. No case has been brought to our notice which contains a clause similar to the one before us and where it has been held that there is necessarily a right of preference inter se. The cases referred to by the court below as well as the cases cited in argument on behalf of the respondents are all cases where the clause expressly provided that the vendor should offer or transfer his property first to one class of co-sharers and then to another class. In such cases if the transfer or the offer is not made to the first class of pre-emptors then the custom has not been complied with and the members of that class have a right to claim pre-emption even though the sale has been made to co-sharers in other categories. On the other hand, there are at least three cases which support the view that a wajib-ul-arz of this kind is at least capable of an interpretation that the right was intended to be given only when a sale had taken place in favour of a person other than those coming within the categories mentioned therein. This would imply that at least one meaning of the wajib-ul-arz may be that when a transfer of property has taken place by sale or mortgage other than a gift, then among the persons who will have the right to institute a suit would be, first own brothers and nephews, then paternal uncle's sons, then co-sharers in the property, then co-sharers in the thok and lastly co-sharers in the village. The last mentioned co-sharers would not have been

mentioned unless the transfer under contemplation was one in favour of a stranger.

22. This was the view clearly expressed in the case of Mathura Singh v. Ram Lal Singh (1921) 19 A.L.J. 903. Tudball, J., who had been a member of the pre-emption Bench from the very beginning of its constitution, joined in coming to the conclusion that a wajib-ul-arz of that kind was ambiguous and capable of two interpretations and that therefore the plaintiff pre-emptor could not succeed. This case was referred to subsequently by Lindsay, J. and myself in the case of Dhanraj Misr v. Rameshwar Misr (1923) I.L.R. 46 All. 170, which, though different on facts, is certainly a case where the distinction sought to be drawn by the pre-emption Bench was very prominently brought out and the earlier case of Mathura Singh v. Ram Lal Singh (1921) 19 A.L.J. 903, distinguished. I may note that the wajib-ul-arz in the case last mentioned was Very similar to the one before us. We have sent for the record of that case and the words of the wajib-ul-arz were as follows:--'In the case of transfer of property, the claim to (or suit for) preemption shall be first to heirs descended from a near common ancestor, then to co-sharers in the patti, and after them to co-sharers in the village.' ('Bahalat intiqal haqiyat kisi hissadar he, dawa shafa pahle warisan ekjaddi qaribi zan bad hissadaran patti pas az shurkayan mauza ko paunchhega.')

23. In the case of Ganpat Rai v. Jamna Prasad (S.A. No. 78 of 1924, decided on the 31st of January, 1924) the pre-emption Bench (LINDSAY, J. and myself) had before it a wajib-ul-arz which was almost identical in its terms with the one in the present case. The words of the wajib-ul-arz in that case were as follows: 'The claim to (or suit for) a right of preemption in the case of transfer of property by sale and mortgage, except a gift, shall be, first, to own brother and nephew, a paternal uncle's son, a partner in the property, then, co-sharers in the thok and then co-sharers in the village.' ('Dawa haq shafa ka dar sural intiqal haqiyat bazaria bai wa rehan sewai heba he awal bhai bhatija haqiqi, aur phir bhai chachazad shank haqiyat aur phir shurkayan patti zan bad hissedaran deh ko hoga.')

24. It is apparent that with the exception of two or three synonymous words all the words were exactly identical with the words in the wajib-ul-arz before us. That

case also came from the same district, Mainpuri. It was held therein that the terms were ambiguous and capable of two interpretations, and that the plaintiffs' suit must therefore fail.

25. I find it impossible therefore to distinguish the present case from the case of Mathura Singh v. Ram Lal Singh (1921) 19 A.L.J. 903, and Ganpat Rai v. Jamna Prasad S.A. No. 78 of 1924, decided on the 31st of January, 1924. It is also noteworthy that in all these three wajib-ul-arzes the word 'dawa' is used, which in ordinary parlance means 'suit,' and that word does not occur in any of the cases cited on behalf of the respondents.

26. Now that the Pre-emption Act has been passed and all subsequent cases would be governed by it, cases of the present kind have lost much of their importance. But as regards cases which are not yet governed by the now Act, I would consider it lamentable if this High Court is to accept two different interpretations of wajib-ul-arzes of exactly the same language and prepared at the same settlement in the same district. And therefore even if I had entertained any doubt as to the correctness of the interpretation which was adopted in the cases referred to by me, I would not have felt inclined to deviate from that interpretation. My conclusion is that the documentary evidence adduced by the plaintiffs in this case was capable of two interpretations, according to one of which the plaintiffs' claim cannot be decreed. The evidence was therefore wholly insufficient to establish the claim against the defendants.

27. The suit also fails on another ground. After reciting the right of pre-emption, the same clause goes on to add, 'gift will be made in favour of an own brother and nephew or daughter's son or for a charitable purpose and not otherwise.' This is a part of the same clause which records a right of pre-emption. It is intended to lay down that gifts to persons other than those mentioned therein or for the purposes mentioned therein are altogether invalid. It is obvious that such a rule cannot be the result of the growth of a custom. It has been held in a number of cases (vide Fazal Husain v. Muhammad Sharif (1914) I.L.R. 36 All. 471, Suraj Bali Singh v. Mohammad Nasir (1918) 16 A.L.J. 879, and Balwant Singh v. Mare Singh (1923) 21 A.L.J. 542, as well as the recent Full Bench case of Randhir Singh v. Rajpal

Misir (1923) I.L.R. 46 All. 478, that; if the clause of pre-emption contains matters which cannot possibly be a record of custom, then the ordinary presumption which arises that the entry is one of custom is negated. Here we have a part of the clause which cannot possibly be the result of the growth of a custom. It follows, therefore, that there is internal evidence to show that the entry in paragraph 14 cannot be a record of custom. It is also noteworthy that the word 'custom' itself is not mentioned in paragraph 14. The exact year when this wajib-ul-arz was prepared is not given in the copy, but it is noted therein that this is a record of the former settlement. The entry, therefore, if it was a record of contract, cannot now be in force as that settlement has come to an end.

28. In my opinion, therefore, on both these grounds the appeal should be allowed and the plaintiffs' suit dismissed.

29. The respondents have filed certain cross-objections, but they are not pressed. In the view which I have taken they also could not have been allowed.

30. The appeal is allowed and the claim of the plaintiffs respondents dismissed with costs here and hitherto. The cross-objection is dismissed with costs.