Privy Council Appeal No. 4 *of* 1932.
Allahabad Appeals Nos. 30 *and* 31 *of* 1930.

Sahu Ramjimal - - - - - - *Appellant*

v.

Riaz-ud-din and Others - - - - - *Respondents*

Musammat Phula Devi - - - - - *Appellant*

v.

Riaz-ud-din and Others - - - - - *Respondents*

(Consolidated Appeals.)

FROM

THE HIGH COURT OF JUDICATURE AT ALLAHABAD.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 5TH JULY, 1935.

Present at the Hearing:

LORD ATKIN.
SIR JOHN WALLIS.
SIR SHADI LAL.

[*Delivered by* SIR SHADI LAL.]

This consolidated appeal arises out of two suits for pre-emption in respect of the sales of two agricultural holdings situate in Mahal Zard of the Village Babaina in the Agra Province of India. The trial Judge dismissed both the suits, but the High Court on appeal granted decrees for pre-emption, on payment of certain sums of money which are no longer in dispute. The vendees have each preferred an appeal to His Majesty in Council, and their appeals, involving, as they do, the same points for determination, have been consolidated into one appeal.

During the pendency of the appeal the successful pre-emptor sold, on the 27th May, 1932, the lands, in respect of which he had obtained decrees, to one Shyam Lal who, as alleged by the vendees in the trial Court, had instigated the plaintiff to bring the suits and financed the litigation, in order to get the property ultimately from him.

After making the transfer to Shyam Lal, the pre-emptor entered into a compromise with the vendees, by which he abandoned his alleged right of pre-emption, and agreed to

the restoration of the decrees of the Court of first instance, which had dismissed his suits. This compromise cannot, however, affect the title which had already vested in Shyam Lal.

The contesting parties before their Lordships are, therefore, the vendees who are the appellants, and the sons of Shyam Lal, who, after the death of their father, have been impleaded as respondents.

Before discussing the questions arising in the appeal, their Lordships consider it necessary to give a brief history of the Mahal Zard which comprises the lands in dispute. The village Babaina in 1874 consisted of four Mahals called Mahal Nadir Khan, Mahal Niaz-ullah Khan, Mahal Bibi Begum and Mahal Bhikari Das. In respect of each of these mahals a *wajib-ul-arz* was prepared during the period, 1874 to 1877. While the *wajib-ul-arz* of Mahal Nadir Khan recorded that there was no right of pre-emption in that mahal, the *wajib-ul-arz* of Mahal Bibi Begum contained an entry in favour of pre-emption, and so did the *wajib-ul-arz* of Mahal Bhikari Das. In respect of Mahal Niaz-ullah Khan, the *wajib-ul-arz* prepared in 1874 contained a declaration in favour of pre-emption, but the later *wajib-ul-arz* prepared in 1877 recorded that there was no right of pre-emption. It is, however, common ground that the former *wajib-ul-arz* must prevail, *vide*, Explanation to sub-section 2 of section 5 of the Agra Pre-emption Act, XI of 1922, which section will be discussed hereinafter.

In 1898 one Qadir Khan became the owner of two mahals, viz.: Mahal Nadir Khan and Mahal Niaz-ullah Khan, and also of a new mahal called Mahal Surkh Bibi Begum, which was one of the two mahals which were formed on the partition of the original Mahal Bibi Begum. He, thereupon, applied for the consolidation of these three mahals into one mahal, and his application was granted and the consolidated mahal was called Mahal Qadir Khan Surkh. After the death of Qadir Khan, his mahal was divided in 1924 into three mahals, viz.: (1) Mahal Asmani, consisting of the land which two brothers, Rafi-ud-din and Nizam-ud-din, had purchased from Qadir Khan in 1920; (2) Mahal Sabz, which became the property of Qadir Khan's widow; and (3) Mahal Zard, which was owned by his nephews Mustajib-ud-din and Zahur Husain.

On the 20th March, 1925, Mustajib-ud-din sold his one-half share in Mahal Zard to Sahu Ramji Mal. Subsequently, the other co-sharer, Zahur Husain, executed in July, 1925, a deed of sale in respect of his moiety in favour of Phula Devi. On the 5th January, 1926, Riaz-ud-din brought two suits for the pre-emption of these lands, and based his right of pre-emption on the ground that he was a co-sharer in Mahal Zard. His claim was rejected by the trial Judge, but has been allowed by the High Court.

The questions raised on this appeal are :—(1) Whether the plaintiff has proved the existence of the right of pre-emption in the Mahal Zard in which the lands are situate; and (2) Whether he is a co-sharer in the mahal, and as such is entitled to exercise the right of pre-emption.

The determination of these questions depends upon certain provisions of the Agra Pre-emption Act, XI of 1922, which consolidates the law relating to pre-emption in the Province of Agra. For the purpose of establishing the existence of the right of pre-emption, the plaintiff invoked, not only section 5 of the statute, but also the Mahomedan law, the provisions of which are not affected by that section in so far as the present case is concerned. Under the Mahomedan law the pre-emptor must make certain demands for pre-emption, which are a pre-requisite to the exercise by him of the right of pre-emption. The trial Judge felt no hesitation in holding that the condition prescribed by that law had not been fulfilled; and his finding, which depended upon an appreciation of the evidence, was not challenged before the High Court, and cannot be seriously contested.

The question then arises whether the requirements of the statute as to the existence of the right of pre-emption have been satisfied. Section 5 (1), as amended by Act VIII of 1923, which contains the law on the subject, provides that a right of pre-emption shall be deemed to exist only in mahals or villages in respect of which any *wajib-ul-arz* prepared prior to the commencement of the Act records a custom, contract, or declaration, as specified in clauses (*a*), (*b*) and (*c*) of that sub-section.

Now, it is beyond dispute that in respect of Mahal Zard, no *wajib-ul-arz* was, or could be, prepared before the commencement of the statute; and there is, therefore, no entry in favour of the existence of the right of pre-emption in that mahal. The history of the Mahal Zard, as sketched above, shows that it came into existence in 1924 on the partition of Mahal Qadir Khan Surkh into three separate mahals; but there was no such *wajib-ul-arz* even in respect of that parent mahal. There was, however, a *wajib-ul-arz* relating to each of the three mahals, which were amalgamated into Mahal Qadir Khan Surkh, and, while the existence of the right of pre-emption was recorded in respect of two of these mahals, there was no pre-emption in the third mahal.

The learned trial Judge finds that of 1,158 bighas of land, which were sold to the two vendees, only about 82 bighas of land originally formed part of Mahal Bibi Begum, in respect of which the existence of the right of pre-emption was recorded in the *wajib-ul-arz*. But the rest of the property sold, viz.: about 1,076 bighas, belonged to Mahal Nadir Khan, in which there was no right of pre-emption. What is exactly the position of a new mahal, for which no

wajib-ul-arz had been prepared prior to the commencement of the Act, but which consisted of two parcels of land which came out of two mahals, one recognising the existence of the right of pre-emption, and the other negativing it? Does each of these plots continue to be governed by the law which was applicable to the mahal from which it had emanated, or does the law originally governing one of the plots regulate both the plots when they are united into a new mahal? In the latter event, which of these two conflicting laws prevails?

The Court of first instance held that the right of pre-emption should be confined to that plot which was pre-emptible, when it formed part of the mahal which recognised the right of pre-emption. That view has not been accepted by the High Court, who find that the entry in the *wajib-ul-arz* of the mahal favouring the right of pre-emption should govern the entire land of the composite mahal.

Their Lordships find it difficult to follow the reasoning of the learned Judges. They do not see any valid ground for preferring one entry to the rival entry about the existence or non-existence of the right of pre-emption. Suppose, there is a mahal consisting of 1,000 acres, in respect of which the *wajib-ul-arz* contains an entry against the existence of the right of pre-emption. It would, according to the High Court, be open to the proprietors of that mahal to create the right of pre-emption in respect of the entire area by adding to it one acre taken out of an adjoining mahal recognising the right of pre-emption, and thereby making a new mahal of the two plots. There would then be a right of pre-emption in respect of, not only one acre, but also one thousand acres, which constituted the original mahal and enjoyed, at that time, immunity from the restrictions imposed by the law of pre-emption.

It is to be observed that the Legislature has preserved the *status quo* in respect of the existence of the right of pre-emption by providing in sub-section 3 of section 5 that when a mahal recognising the right of pre-emption has been partitioned, that right shall be deemed to apply to all the parts into which it has been divided. Presumably, if before partition a mahal was not governed by the law of pre-emption, there would be no right of pre-emption in respect of any of the parts resulting from its partition. There is, however, no statutory provision for a composite mahal formed by the union of two plots, one coming out of a mahal favouring the right of pre-emption, and the other taken out of a mahal negativing that right. The matter appears to be one which lies peculiarly within the province of the Legislature.

Their Lordships do not consider it necessary to make any pronouncement on the subject, as they have no hesitation in holding that, even if the right of pre-emption is assumed to exist in respect of the whole of Mahal Zard, the plaintiff

has not succeeded in proving that he possessed the qualification claimed by him for exercising the right of pre-emption, viz. : that he was a co-sharer in the mahal. He is certainly the proprietor of a plot of land, which he had purchased on the 10th August, 1920, from Rafi-ud-din and Nizam-ud-din, who had acquired it from Qadir Khan a few months earlier. At the time of the purchase, that plot formed part of Qadir Khan's Mahal Surkh, but on the partition of that mahal in 1924 into three mahals, it was allotted to Mahal Zard. The sale deed in favour of the plaintiff makes it clear that he acquired only certain specified fields, the total area of which amounts to 38 bighas and 14 biswas; and the Courts in India are agreed that he had no interest in the joint lands of the mahal. The trial Court also found that he did not take part in the administration of the affairs of the mahal, but the learned Judges of the High Court observe that " there is no evidence to show that he has not any right to take part in the administration of the affairs of the mahal ". They themselves, however, point out that " the burden of proving that he is a co-sharer and that he has a right to take part in the administration of the mahal undoubtedly lies on the plaintiff who comes to Court ". There is not a scrap of evidence to discharge that onus, and the decision of the Court of first instance on this point must, therefore, be affirmed.

The word " co-sharer ", as defined in section 4 (1) of the Agra Pre-emption Act means " any person other than a petty proprietor entitled as proprietor to any share or part in a mahal or village whether his name is or is not recorded in the register of proprietors ". It is clear that, if a person is a petty proprietor, he cannot be a co-sharer. The definition of " petty proprietor " is contained in section 4 (7) of the Act, and that expression means " the proprietor of a specific plot of land in a mahal, who as such is not entitled to any interest in the joint lands of the mahal, or to take part in the administration of its affairs ".

Now, the plaintiff is the proprietor of a specific plot of land, and as such he is not entitled to any interest in the joint lands of the mahal. Nor is he entitled to take part in the administration of its affairs. All the ingredients of the definition have been fulfilled, and he must be held to be a petty proprietor, and is consequently excluded from the definition of a co-sharer. The learned Judges of the High Court think that he is jointly liable with the other proprietors of the mahal for the payment of the whole of the land revenue assessed on the mahal, but it appears that he is liable to pay only Rs.16-1-0 which is entered in the revenue record as the revenue imposed upon the land owned by him. He has neither alleged nor proved that his liability extends beyond the payment of the revenue which is assessed upon his holding.

The result of the above discussion is that the suits for pre-emption must fail on the ground that the plaintiff has not established that he had the status of a co-sharer, which alone was the foundation of his claim.

The appeal should, therefore, be allowed, the decrees of the High Court should be set aside, and the decrees of the trial Judge dismissing the suits should be restored. The respondents, other than the vendors, must pay the costs incurred by the appellants throughout the litigation. Their Lordships will humbly advise His Majesty accordingly.

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In the Privy Council.

SAHU RAMJIMAL

v.

RIAZ-UD-DIN AND OTHERS

MUSAMMAT PHULA DEVI

v.

RIAZ-UD-DIN AND OTHERS

(*Consolidated Appeals.*)

DELIVERED BY SIR SHADI LAL.

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