

**Beni Madho Tewari and ors. Vs. Ram Sunder Tewari and ors.**

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**Court :** Allahabad

**Decided On :** May-23-1924

**Reported in :** AIR1924All859; 80Ind.Cas.902

**Judge :** Sulaiman and ;Kanhaiya Lal, JJ.

**Appellant :** Beni Madho Tewari and ors.

**Respondent :** Ram Sunder Tewari and ors.

**Judgement :**

1. This is a defendants' appeal arising out of a suit for pre-emption. The claim related to shares in four villages. With the fourth village we are not now concerned in appeal. Both the Courts below have decreed the claim in respect of the whole share sold in Hasanpur and half of the shares sold in Pauni and Walipur. They have, however, found that the consideration of Rs. 7,000 mentioned in the sale-deed, was not the true consideration and have fixed it at Rs. 3,000.

2. As regards the village Walipur, we are of opinion that the claim cannot be decreed. The plaintiffs, in order to prove that a custom of pre-emption exists in the village, relied upon a wajib-ul-arz of the year 1881 which contains a pre-emption clause similar to the clause in the wajib-ul-arz which was before the Full Bench, in the case of Randhir Singh v. Rajpal Missir 81 Ind. Cas. 25 : 22 A.L.J.R. 561 : 46 A. 478 : (1924) A.I.R (A.) 321, (F.A.F.O. No. 85 of 1923 decided on the 18th of December, 1923). It was held therein that such a clause furnished an internal evidence negating the existence of a custom. We must, therefore, hold that no custom of pre-emption has been proved to exist in Walipur. The claim as regards the share sold in Walipur must be dismissed.

3. As to Hasanpur and Pauni, the first point raised on behalf of the defendants-appellants is that the dakbandi shows that in the year 1201 Fasli, corresponding to 1796 A.D., the villages were owned by a single proprietor named Subsa Tewari. It has also been proved by the defendants' witnesses that at the present moment it is only the descendants of Subsa Tewari who are co-sharers in these villages. The plaintiffs relied on the wajib-ul-arz of 1381, which is still the wajib-ul-arz of the current settlement, the district of Jaunpur being permanently settled, and which wajib-ul-arz contains a clear entry of a record of custom. We are of opinion that the presumption raised by the entry in the said wajib ul-arz has not been rebutted by the circumstance that more than 100 years ago the villages were owned by a single proprietor. The Court below has pointed out that the two sales which are known to have taken place, are such that the first one had taken place in favour of a co-sharer and as to the second one, though it had taken place in favour of a stranger, ultimately a part of the property was returned to the vendors. It was of opinion that these two instances

furnished proof that the custom was at least being observed in the villages. Whether this is so or not, we are of opinion that the ordinary presumption which arises from the entry in the wajib-ul-arz has not been rebutted.

4. As regards the village Hasanpur, there can be no doubt that there is a clear preference given to co-sharers in the same patti as against the co-sharers in the other patti. Defendants Nos. 4 to 7 are co-sharers in the village but they are not co-sharers in the same patti in which the vendors and the plaintiffs own shares. Defendants Nos. 1 to 3 are perfect strangers. The plaintiffs have, therefore, a preference as against all the vendees.

5. In the village Pauni the wajib-ul-arz gives the right of pre-emption to two categories of pre-emptors. The first is an ekjaddi co-sharer and the other is a co-sharer in the village. The Courts below have found that the plaintiffs cannot bring themselves within the first category of the ekjaddi co-sharers. They are therefore, mere co-sharers in the village. Defendants Nos. 4 to 7 also are co-sharers in the same village while defendants Nos. 1 to 3 are not co-sharers at all. The plaintiffs' claim as against defendants Nos. 1 to 3 must, therefore, be decreed but should be dismissed as against defendants Nos. 4 to 7. We find it, however, that there is a clear specification in the sale-deed that each set of vendees has taken only one-half of the share sold. The plaintiffs' claim, therefore, with regard to Pauni must be decreed for half of the property sold as against defendants Nos. 1 to 3. It is necessary to clear the point as the decree which has been passed by the Court below is not very clear.

6. There was a dispute as to the price in the Courts below. The bulk of the sale consideration recited in the sale-deed was shown before the Sub-Registrar, but the Courts below were not satisfied that it represented the true consideration and were of opinion that the consideration had been immensely inflated. They then proceeded to work out the true value of the property sold. The Court of first instance thought that inasmuch as 11 bighas, 8 5/13 biswas of sir land had been sold, the price at the rate of Rs. 250 per bigha came to Rs. 2,955 It then added to this sum Rs. 45 as representing the value of the sir income. The total, in its opinion, came to Rs. 3,000 The lower Appellate Court has accepted that figure and said that this seems to be correct, if the area of sir land sold is taken to be about 12 bighas and the rental Rs. 8 per bigha. As we are now dismissing the claim with regard to a part of the property, it is apparent that the value of the portion decreed will have to be calculated afresh. We are not satisfied that the way in which the Courts below have arrived at the figure of Rs. 3,000 is necessarily correct. They appear to have ignored the areas of uncultivated land, about which only Rs. 45 had been allowed. We are not in a position to ascertain and apportion the sale consideration or the market value of that portion of the property, in regard to which the claim of the plaintiffs is to be decreed. It is, therefore, necessary that the market value of the shares in respect of Hasanpur and Pauni with regard to which the claim of the plaintiffs is being decreed, should be ascertained with due regard to the profits derivable from the same. We direct the lower Appellate Court accordingly to determine after taking such additional evidence as the parties may adduce

(1) What is the market value of the share sold in Hasanpur? And (2) What is the market value of half the share sold in Pauni?

7. Two months' time will be allowed for return of the findings and ten days will be allowed from the date of receipt of the findings to file objections.

